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Title [redacted]

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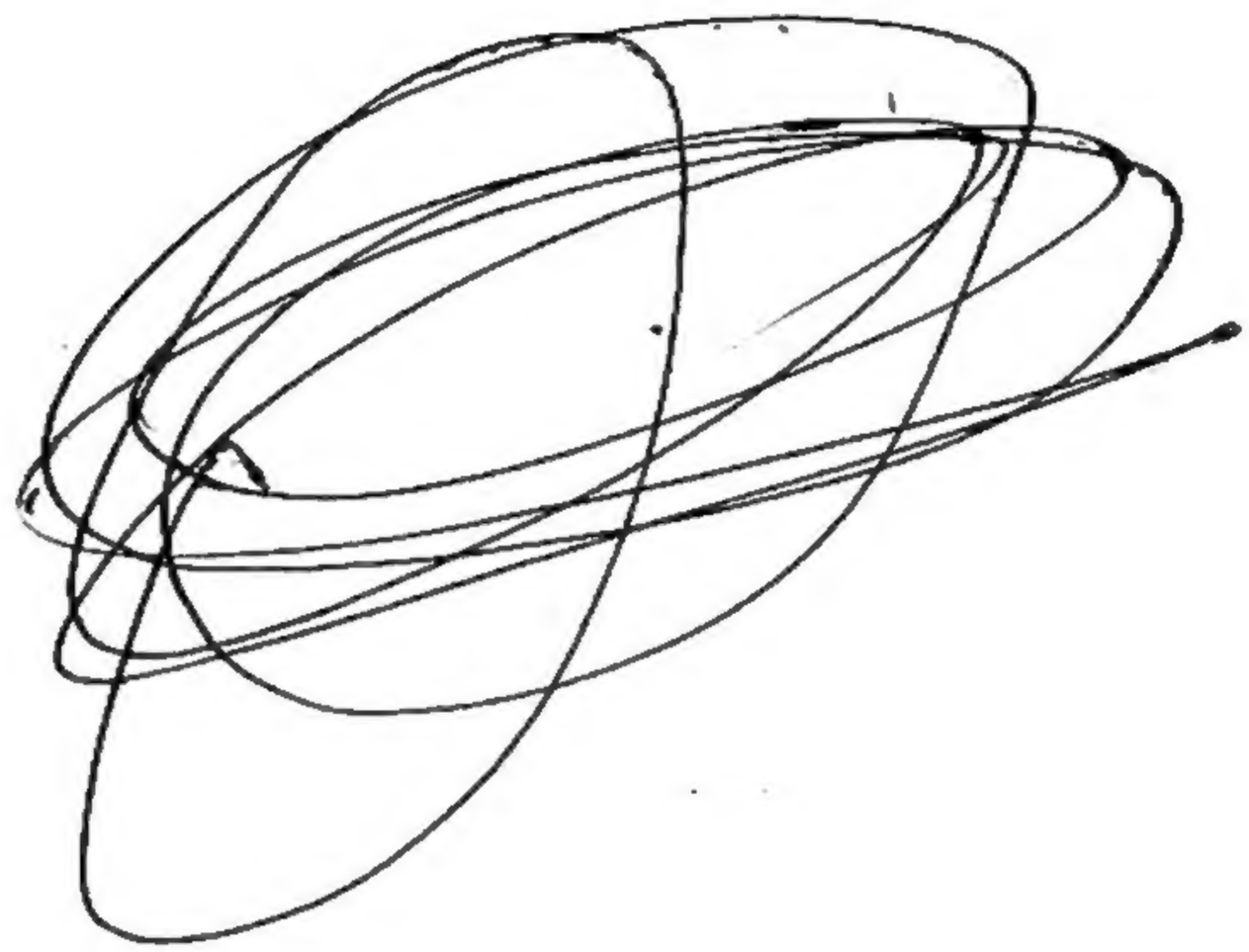
THE CODE OF CIVIL PROCEDURE

(V of 1908)



TO THE LEGAL PROFESSION
IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT

A. I. R. Commentaries

The Code of
CIVIL PROCEDURE
(V OF 1908)

WITH EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

4th (1944) Edition

VOLUME I

SECTIONS 1—158

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PREFACE TO THE FOURTH EDITION

It is now nearly four years since the previous edition of this Work was published, and it is hardly necessary to emphasize the fact that the usefulness of a Commentary on this branch of the law depends very largely on its being brought up to date from time to time. Encouraged by the appreciation of the work shown by the Bench and the Bar, the authors have decided to bring out this fresh edition, notwithstanding the stringency of the paper market and the prohibitive cost of publication. The edition is, however, not one which has been merely brought up to date. It has been subjected to a thorough revision and various improvements have also been introduced. To mention only a few, the following new features may be drawn attention to :

1. Decisions of outstanding importance have been specially indicated in the foot-notes by appropriate marks.

2. A Table of Cases cited in the book has been added.

3. Notifications issued under the various sections of the Code have been given in an Appendix.

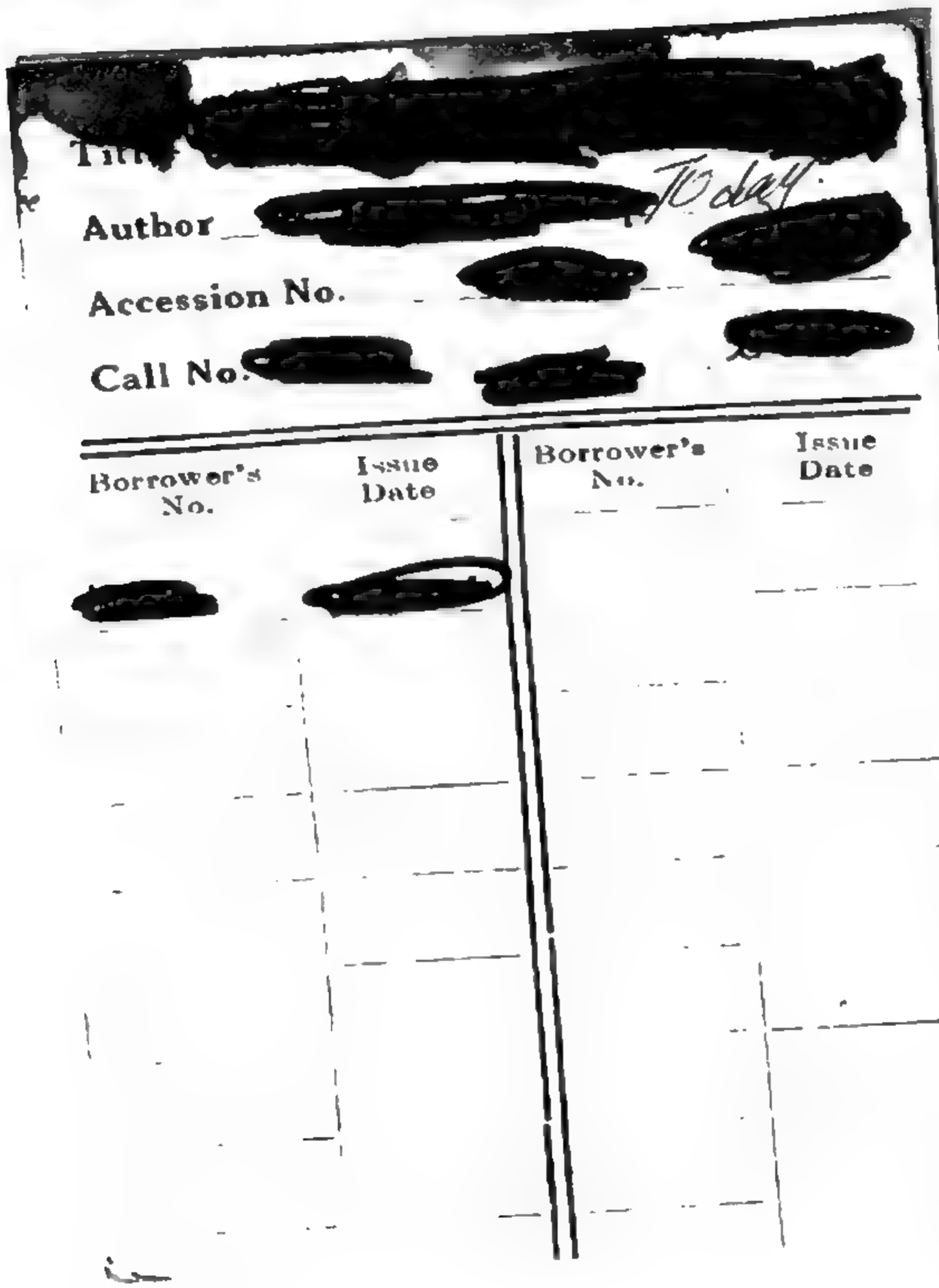
4. The Privy Council Rules of 1920 have been included in an Appendix.

As in the previous editions, references to official reports have been invariably given wherever available.

Although the provisions of Schedule II have been repealed by the Arbitration Act of 1940, the text of the Schedule has been given for purposes of reference.

The Authors wish to thank the following gentlemen for their valuable help in bringing out this edition : Rao Bahadur D. D. Datar, B.Sc., LL.B., Advocate, Editor, All India Reporter; Mr. S. Appu Rao, B.A., B.L., Advocate, Asstt. Editor, A. I. R.; Mr. V. S. Balkundi, B.A., LL.B., Mr. B. P. Ingle, B.A., LL.B., Mr. N. S. Deshpande, High Court Pleader (Bom.), and Mr. G. B. Shidhaye, B.A., LL.B., Pleader, Nagpur.

V. V. C.
K. N. A.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PREFACE TO THE THIRD EDITION

It is necessary for a lawyer always to know the law as it is today. And this is specially so in respect of the Law of Procedure. It is now five years since the last edition of this work was published, and during this period several changes have been introduced into the provisions of the Code by legislation. Further, the case-law has enormously increased, sometimes settling conflicts of judicial opinion which existed before, and sometimes giving rise to new conflicts of opinion. Under the circumstances, no apology is needed for bringing out this edition.

In the preparation of this edition the authors have not confined themselves to merely incorporating the subsequent case-law, but have examined all the old cases once again with a view to remove any defects that might have crept in. The legislative changes in the provisions of the Code and recent case-law have rendered it necessary to re-write many portions of the work, abridging the discussion where the point has been settled by authority, and fully discussing points about which a conflict of opinion has arisen. Beyond this, however, the method of treatment of the subject has not been departed from.

The case-law has been brought up-to-date. References to Official Reports are invariably given in all cases found in the Official Reports.

The authors feel it their duty to express their gratefulness to the Bench and the Bar for their very cordial reception of the previous editions of their work.

Their thanks are also due to Messrs. S. Appu Rao, B.A., B.L., Advocate, Coimbatore, N. Krishna Iyer, M.A., B.L., Coimbatore, G. B. Shidhaye, B.A., LL.B., and V. S. Balkundi, B.A., LL.B., of Nagpur, for the very valuable help rendered by them in revising and bringing the work up-to-date.

V. V. C.
K. N. A.

January 1st, 1940.

PREFACE TO THE SECOND EDITION

The cordial reception accorded by the members of the Bench and the Bar to the first edition of this work, which was almost exhausted in less than a year from the date of its publication has necessitated the publication of a second edition of the same. The Authors feel it their duty to thank the members of the legal profession for the warm reception and high appreciation of the work.

This Second Edition has been carefully revised, brought up-to-date and re-written, wherever necessary, in the light of the various decisions since the publication of the first edition.

The style in printing has also been changed to facilitate easy reading. In the synopsis, the main headings have been differentiated from subordinate headings by a difference in type. The difficulty in reading the closely printed matter of the foot-notes has been removed by giving a separate line for each case which thus gives a great relief to the eye.

February 11th, 1935.

V. V. C.
K. N. A.

PREFACE TO THE FIRST EDITION

Judicial decisions on the Law of Civil Procedure occupy a considerable portion of our Law Reports and Digests. There are, on many points of importance, conflicts of opinion between the several High Courts, and sometimes between the decisions of the same High Court. Full Bench decisions of various High Courts and decisions of the Judicial Committee of the Privy Council, no doubt, often help to settle such conflicts, but on a few occasions, while settling the conflicts, they open up further fields for controversy. Decisions differing in the interpretation or application of a ruling of the Judicial Committee are not rare.

In this state of judicial decisions, a practitioner or a Judge, who has to ascertain the law on any important point of procedure, has to collect all the decisions bearing on the point, study them carefully, and then deduce, *if possible*, a definite rule of law. In cases of conflicts of opinion, he has to find out how far a decision of the Full Bench or of the Judicial Committee, has settled, or helped to settle the conflict. In the absence of such help, he has to choose between the conflicting views, and find arguments in support of the view adopted by him. This is no doubt an interesting process of ascertaining the law, but the regret of a Judge or a busy practitioner is that sometimes he does not find the necessary time for it.

It is the aim of the authors to be of some service to the Bench and the Bar in this direction, and this, they hope, will justify the addition of one more to the already existing commentaries on the Code. The authors have attempted to ascertain all the important questions that arise for consideration under the several provisions of the Code and have tried to collect together all the decisions of all the superior Courts of India and Burma and of the Judicial Committee of the Privy Council, on such questions. These decisions have been studied carefully and analytically and definite rules of law, wherever possible, have been attempted to be deduced therefrom. In cases of conflicts of opinion, the authors have discussed the questions on first principles and have attempted to test the conflicting views in the light of these principles and to arrive at definite conclusions.

In the course of their practice at the Bar, the authors have often found that there are still many difficulties arising in daily practice, which are not covered either by the provisions of the Code or by the existing voluminous case-law. An attempt has been made to solve these difficulties by discussing such questions and suggesting solutions. In thus discussing subjects not provided for in the Code, the authors have kept in view the future course of law on the subject.

The application of a rule of law to the facts of particular cases is a matter of some difficulty in some cases. It has, therefore, been indicated, within brackets, against important decisions collected in the foot-notes, as to how rules of law have been applied to the facts of those cases. In the commentary, the general propositions of law as derived from the decisions are given. These, the authors hope, will enable the lawyer to pick out the case he requires without much loss of time.

The conclusions of law, dissociated from facts, or discussions of law, are sometimes necessary for quick reference during the course of arguments in Courts. The particular pages, where such conclusions can be found, are indicated in every case with only a few exceptions in the case of very old Reports.

V. V. C.
K. N. A.

August 31st, 1932.

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154	O. 15, r. 3.	209	S. 34.	253	Cf. S. 145.
155	O. 15, r. 4.	210	O. 20, r. 11.	254	O. 21, r. 30.
156	O. 17, r. 1.	211 & 212.	S. 2 (12), O. 20, r. 12.	255	O. 21, r. 42.
157	O. 17, r. 2.	213	O. 20, r. 13.	256	O. 21, r. 11 (1).
158	O. 17, r. 3.	214	O. 20, r. 14.	257	O. 21, r. 1.
159	O. 16, r. 1.	215	O. 20, r. 15.	257A	Omitted.
160	O. 16, r. 2.	215A	O. 20, r. 16.	258	O. 21, r. 2.
161	O. 16, r. 3.	216	O. 20, r. 19.	259	O. 21, r. 31.
162	O. 16, r. 4.	217	O. 20, r. 20.	260	O. 21, r. 32.
163	O. 16, r. 5.	218-20	Cf. S. 35 (1, 2).	261	O. 21, r. 34 (1-4).
164	O, 16, r. 6.	221	O. 20, r. 6 (3).	262	O. 21, r. 34 (5).
165	O. 16, r. 7.	222	Cf. S. 35 (3).	263	O. 21, r. 35
166	O. 16, r. 8.	223, first para.	S. 38.	264	O. 21, r. 36.
167	O. 16, r. 9.			265	S. 54.
168	O. 16, r. 10.	223,second and third paras.	S. 39.	266	S. 60.
169	O. 16, r. 11.			267	O. 21, r. 41.
170	O. 16, r. 12.			268	O. 21, r. 46.
171	O. 16, r. 14.	223,fourth para.	S. 41	269	O. 21, r. 43
172	O. 16, r. 15.			270	O. 21, r. 51.
173	O. 16. r. 16.	223, fifth para.	O. 21, r. 4.	271	S. 62.
174 & 175	O. 16, rr.10,13,17&18.			272	O. 21, r. 52.
176	O. 16, r. 19.	223, sixth para.	O. 21, r. 5.	273	O. 21, r. 53
177	O. 16, r. 20.			274	O. 21, r. 54.
178	O. 16, r. 21.	224	O. 21, r. 6.	275	O. 21, r. 55.
179	O. 18, rr. 1, 2 (1).	225	O. 21, r. 7.	276	S. 64
180	O. 18, rr. 2 (2, 3) 3.	226	O. 21, r. 8.	277	O. 21, r. 56.
181	O. 18, r. 4.	227	O. 21, r. 9.	278	O. 21, r. 58.
182	O. 18, r. 5.	228	S. 42.	279	O. 21, r. 59.
183	O. 18, r. 6.	229	S. 43.	280	O. 21, r. 60.
184	O. 18, r. 8.	229A	S. 45.	281	O. 21, r. 61.
185	O. 18, r. 9.	229B	S. 44.	282	O. 21, r. 62.
185A, first and second paras.	S. 138.	230, first para.	O. 21, r. 10.	283	O. 21, r. 63.
				284	O. 21, r. 64.
185A, third para.	O. 18, r. 7.	230,second para.	O. 21, r. 21.	285	S. 63.
				286	O. 21, r. 65.
186	O. 18, r. 10.	230, third and fourth paras.	S. 48.	287	O. 21, rr. 66, 70.
187	O. 18, r. 11.			288	Omitted.
188	O. 18, r. 12.			289	O. 21, r. 67.
189	O. 18, r. 13.	231	O. 21, r. 15.	290	O. 21, r. 68.
190	O. 18, r. 14.	232	O. 21, r. 16.	291	O. 21, r. 69.
191	O. 18, r. 15.	233	S. 49.	292	O. 21, r. 73.
192	O. 18, r. 16.	234	S. 50.	293	O. 21, r. 71.
193	O. 18, r. 17.	235	O. 21, r. 11 (2).	294	O. 21, r. 72.
194	O. 19, r. 1.	236	O. 21, r. 12.	295	S. 73.
195	O. 19, r. 2.	237	O. 21, r. 13.	296	O. 21, r. 76.
196	O. 19, r. 3.	238	O. 21, r. 14.	297	O. 21, r. 77.
197	S. 139.	239	O. 21, r. 26 (1, 2).	298	O. 21, r. 78.
198	S. 33, O. 20, R. 1.	240	O. 21, r. 26 (3).	299	O. 21, r. 79 (1).
199	O. 20, r. 2.	241	O. 21, r. 27.	300	O. 21, r. 79 (2).
200 & 201	Cf. S. 137.	242	O. 21, r. 28.	301	O. 21, r. 79 (3).
202	O. 20, r. 3.	243	O. 21, r. 29.	302	O. 21, r. 80.
203	O. 20, r. 4.	244	S. 47.	303	O. 21, r. 81.
204	O. 20, r. 5.	245	O. 21, r. 17.	304	O. 21, r. 82.
205	O. 20, r. 7.	245A	S. 56.	305	O. 21, r. 83.
206, first and second paras.	O. 20, r. 6.	245B	O. 21, r. 37.	306	O. 21, r. 84.
		246	O. 21, r. 18.	307	O. 21, r. 85.
		247	O. 21, r. 19.	308	O. 21, r. 86.
		248	O. 21, r. 22.		

C. P. C. 1882.	C. P. C. 1908.
309	O. 21, r. 87.
310	O. 21, r. 88.
310A	O. 21, r. 89.
311	O. 21, r. 90.
312	O. 21, r. 92.
313	O. 21, r. 91.
314	O. 21, r. 92.
315	O. 21, r. 93.
316	S. 65, O. 21, r. 94.
317	S. 66.
318	O. 21, r. 95.
319	O. 21, r. 96.
320	Ss. 68, 70, 71.
321	The Third Schedule.
322	
322A	
322B	
322C	
322D	
323	
324	
324A	
325	
325A	
325B	
325C	
326	S. 72.
327	S. 67.
328	O. 21, r. 97.
329	O. 21, r. 98.
330	O. 21, r. 98.
331	O 21, r. 99.
332	O.21,rr.100,101,103.
333	O. 21, r. 102.
334	O. 21, rr. 97, 98.
335	O. 21, rr. 97, 99, 103.
336	S. 55.
337	O. 21, r. 38.
337A	O. 21, r. 40.
338	S. 57.
339	O. 21, r. 39 (1-4).
340	O. 21, r. 39 (5).
341 & 342	S. 58.
343	O. 21, r. 25.
344-360A	Repealed by the Provincial Insolvency Act, 1907.
361	O. 22, r. 1.
362	O. 22, r. 2.
363	O. 22, r. 3 (1).
365	O. 22, r. 3 (1).
366	O. 22, r. 3 (2).
367	O. 22, r. 5.
368	O. 22, r. 4.
369	O. 22, r. 7.
370	O. 22, r. 8.
371	O. 22, r. 9 (1, 2).
372	O. 22, r. 10.
372A	O. 22, r. 9 (3).
373	O. 23, r. 1.
374	O. 23, r. 2.
375	O. 23, r. 3.
375A	O. 23, r. 4.
376	O. 24, r. 1.
377	O. 24, r. 2.
378	O. 24, r. 3.
379	O. 24, r. 4.
380	O. 25, r. 1 (1, 3).
381	O. 25, r. 2.
382	O. 25, r. 1 (2).
383	O. 26, r. 1.
384	O. 26, r. 2.
385	O. 26, r. 3.
386	S. 76, O. 26, r. 4.
387	O. 26, r. 5.
388	O. 26, r. 6.
389	O. 26, r. 7.
390	O. 26, r. 8.
391	S. 78.
392	O. 26, r. 9.
393	O. 26, r. 10.
394	O. 26, r. 11.
395	O. 26, r. 12.
396	O. 26, rr. 13, 14.
397	O. 26, r. 15.
398	O. 26, r. 16.
399	O. 26, r. 17.
400	O. 26, r. 18.
401	O. 33, r. 1.
402	Omitted.
403	O. 33, r. 2.
404	O. 33, r. 3.
405	O. 33, r. 5.
406	O. 33, r. 4.
407	O. 33, r. 5.
408	O. 33, r. 6.
409	O. 33, r. 7.
410	O. 33, r. 8.
411	O. 33, r. 10.
412	O. 33. r. 11.
413	O. 33, r. 15.
414	O. 33, r. 9.
415	O. 33, r. 16.
416	S. 79, O. 27, r. 1.
417	O. 27, r. 2.
418	O. 27, r. 3.
419	O. 27, r. 4.
420	O. 27, r. 5.
421	O. 27, r. 6.
422	O. 5, r. 27.
423	O. 27, r. 7.
424	S. 80.
425	Omitted (see Sec. 55, sub-sec. 2).
426	O. 27, r. 8 (1).
427	O. 27, r. 8 (2).
428	S. 81.
429	S. 82.
430	S. 83.
431	S. 84.
432	S. 85.
433	S. 86.
434	S. 87.
435	O. 29, r. 1.
436	O. 29, rr. 2, 3.
437	O. 31, r. 1.
438	O. 31, r. 2.
439	O. 31, r. 3.
440	O. 32, rr. 1, 4 (2).
441	O. 32, r. 5 (1).
442	O. 32, r. 2.
443	O. 32, rr. 3 (1), 4 (2).
444	O. 32, r. 5 (2).
445	O. 32, r. 4 (1).
446	O. 32, r. 9.
447	O. 32, r. 8.
448	O. 32, r. 10 (1).
449	O. 32, r. 10 (2).
450	O. 32, r. 12 (1).
451	O. 32, r. 12 (2, 3).
452	O. 32, r. 12 (4).
453	O. 32, r. 12 (5).
454	O. 32, r. 13.
455	O. 32, r. 14.
456	O. 32, rr.3 (2,3), 4 (4).
457	O. 32, r. 4 (1).
458	O. 32, r. 11 (1).
459	O. 32, r. 11 (2).
460	Omitted.
461	O. 32, r. 6.
462	O. 32, r. 7.
463	O. 32, r. 15.
464	O. 32, r. 16.
465	O. 28, r. 1.
466	O. 28, r. 2.
467	O. 28, r. 3.
468	O. 5, r. 28, 29.
470	S. 88.
471	O. 35, r. 1.
472	O. 35, r. 2.
473	O. 35, r. 4.
474	O. 35, r. 5.
475	O. 35, r. 6.
476	O. 35, r. 3.
477 & 478	O. 38, r. 1.
479	O 38, r. 2.
480	O. 38, r. 3.
481	O. 38, r. 4.
482	Omitted.
483 & 484	O. 38, r. 5.
485	O. 38, r. 6.
486	O. 38, r. 7.
487	O. 38, r. 8.
488	O. 38, r. 9.
489	O. 38, r. 10.
490	O. 38, r. 11.
491	S. 95.
492	O. 39, r. 1.
493	O. 39, r. 2.
494	O. 39, r. 3.
495	O. 39, r. 5.
496	O. 39, r. 4.
497	S. 95.
498	O. 39, r. 6.

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499	O. 39, r. 7.
500	O. 39, r. 8.
501	O. 39, r. 9.
502	O. 39, r. 10.
503	O. 40, rr. 1-3.
504	O. 40, r. 5.
505	Omitted.
506-526	The Second Schedule.
527	O. 36, r. 1.
528	O. 36, r. 2.
529	O. 36, r. 3.
530	O. 36, r. 4.
531	O. 36, r. 5.
532	O. 37, r. 2.
533	O. 37, r. 3.
534	O. 37, r. 4.
535	O. 37, r. 5.
536	O. 37, r. 6.
537	O. 37, r. 7.
538	O. 37, r. 1.
539	Ss. 92, 93.
540	S. 96
541	O. 41, r. 1.
542	O. 41, r. 2.
543	O. 41, r. 3.
544	O. 41, r. 4.
545	O. 41, r. 5.
546	O. 41, r. 6.
547	O. 41, r. 7.
548	O. 41. r. 9.
549	O. 41, r. 10.
550	O. 41, r. 13.
551	O. 41, r. 11.
552	O. 41, r. 12.
553	O. 41, r. 14.
554	O. 41, r. 15.
555	O. 41. r. 16.
556	O. 41, r. 17.
557	O. 41, r. 18.
558	O. 41, r. 19.
559	O. 41, r. 20.
560	O. 41, r. 21.
561	O. 41, r. 22.
562	O. 41, r. 23.
564	Omitted.
565	O. 41, r. 24.
566	O. 41, r. 25.
567	O. 41, r. 26.
568	O. 41, r. 27.
569	O. 41, r. 28.
570	O. 41, r. 29.
571	O. 41, r. 30.
572 & 573	Cf. S. 135.
574	O. 41, r. 31.
575	S. 98.
576	O. 41, r. 34.
577	O. 41, r. 32.
578	S. 99.
579	O. 41, r. 35.
580	O. 41, r. 36.
581	O. 41, r. 37.
582	S. 107 (2), O. 22, r. 11.
582A	Cf. S. 146.
583	Cf. S. 144 (1).
584	Cf. S. 100.
585	Cf. S. 101.
586	S. 102.
587	S. 108, O. 42, r. 1.
588	S. 104, O. 43, r. 1.
589	S. 106.
590	S. 108, O. 43, r. 2.
591	S. 105.
592	O. 44, r. 1.
593	O. 44, r. 2.
594	O. 45, r. 1.
595	S. 109.
596	S. 110.
597	S. 111.
598	O. 45, r. 2.
600	O. 45, r. 3.
601	O. 45, r. 6.
602	O. 45, r. 7.
603	O. 45, r. 8.
604	O. 45, r. 9.
605	O. 45, r. 10.
606	O. 45, r. 11.
607	O. 45, r. 12.
608	O. 45, r. 13.
609	O. 45, r. 14.
610	O. 45, r. 15.
611	O. 45, r. 16.
612,613,614	
615	Omitted.
616	S. 112.
617	S. 113, O. 46, r. 1.
618	O. 46, r. 2.
619	O. 46, r. 3.
620	O. 46, r. 4.
621	O. 46, r. 5.
622	S. 115.
623	S. 114, O. 47, r. 1.
624	O. 47, r. 1.
625	O. 47, r. 3.
626	O. 47, r. 4.
627	O. 47, r. 5.
628	O. 47, r. 6.
629	O. 47, rr. 7, 9.
630	O. 47, r. 8.
631	S. 116.
632	S. 117.
633	S. 122.
634	S. 118.
635	S. 119.
636	O. 49, r. 1.
637	...
688	S. 120 (1), O. 49, r. 3.
639	S. 120 (2).
640	S. 132.
641	S. 133.
642	S. 135.
643	Omitted.
644	O. 48, r. 4.
645	S. 137.
645A	S. 140.
646	Omitted.
646A	O. 46, r. 6.
646B	O. 46, r. 7.
647	S. 141.
648	S. 136.
649	Ss. 36, 37.
650	Omitted.
650A	S. 29.
652	Ss. 122,129,130,131.
653	S. 59.

CHRONOLOGICAL TABLE OF PREVIOUS ACTS AND SUBSEQUENT AMENDING ACTS.

Year.	No. of Act.	Short Title.	How affected.
1841	VIII	Inter pleader	Repealed by X of 1877.
1847	XVII	Defects in Civil Procedure	,, XII of 1873.
1854	IX	Civil Appeals	,, XII of 1873.
1859	VIII	Code of Civil Procedure	,, X of 1877.
1860	IV	Civil Procedure	,, XXIII of 1861.
1861	X	Repealing Enactments relating to Civil Procedure	,, XIV of 1870.
1861	XXIII	Code of Civil Procedure	,, X of 1877.
1863	IX	Amending the Code of Civil Procedure	,, X of 1877.
1864	V	Extension of Civil Procedure to Sind	,, VIII of 1868.
1865	XXVII	Civil Appeals Punjab	,, XIII of 1879.
1871	XXXII	Oudh Civil Courts Act	,, ,,
1877	X	Code of Civil Procedure	,, XIV of 1882.
1878	XVIII	Amending the Code of Civil Procedure	,, XII of 1879.
1879	XII	Do.	,, XIV of 1882.
1882	XIV	Code of Civil Procedure	,, V of 1908.
1908	V	THE CODE OF CIVIL PROCEDURE	
1909	III	Presidency Towns Insolvency Act	
1914	I	The Code of Civil Procedure (Amendment) Act	Amending S. 8 and S. 67.
1914	IV	The Decentralisation Act	Amending S. 138.
1914	X	The Repealing and Amending Act	Amending S. 60 and Form No. 7 in Appendix E.
1914	XVII	The Second Repealing and Amending Act	1. Amending O. 5, R. 26. 2. Repealing S. 156 and the Fifth Schedule.
1916	XIII	The Amending Act	Amending Ss. 111, 116, 122, 123, 126, 129 and 130.
1917	XXIV	The Repealing and Amending Act	Amending S. 127 and S. 130.
1919	XVIII	The Repealing and Amending Act	Amending S. 122 and S. 123.
1920	XXIV	The Code of Civil Procedure (Amendment) Act	Amending O. 9 R. 5.
1920	XXVI	The Indian Limitation and Code of Civil Procedure (Amendment) Act	1. Amending O. 45 R. 7. 2. Inserting new Rule 9A in O.45. 3. Adding new sub-rule (4) to R. 15 of O. 45.
1920	XXXVIII	The Devolution Act	Amending Ss. 5, 61, 67, 68, 125 & 143.
1921	III	The Code of Civil Procedure (Amendment) Act	Amending S. 55.
1922	IX	The Civil Procedure (Amendment) Act	1. Inserting new S. 35A. 2. Amending S.104 and O.41R.33.

Year.	No. of Act.	Short Title.	How affected.
1923	XI	The Repealing and Amending Act	Amending S. 122 and S. 123.
1923	XXVI	The Code of Civil Procedure (Amendment) Act	Amending S. 60.
1923	XXIX	The Code of Civil Procedure (Amendment) Act	Amending O. 21 R. 32 and R. 33.
1925	XX	The Code of Civil Procedure (Amendment) Act	Amending S. 60.
1925	XXIII	The Legislative Members Exemption Act	Inserting new S. 135A.
1925	XXXII	The Oudh Courts (Supplementary) Act	Amending S. 122 and S. 123.
1926	I	The Small Cause Courts (Attachment of immoveable property) Act	1. Amending S. 7. 2. Inserting new R. 13 in O. 38.
1926	VI	The Code of Civil Procedure (Amendment) Act	Amending S. 103.
1926	XXII	The Code of Civil Procedure (Second Amendment) Act	Amending O. 3 R. 1 and R. 4.
1926	XXX	The Negotiable Instruments (Interest) Act	Amending O. 37 R. 2 and Form No. 4 in Appendix B.
1926	XXXIV	The Sind Courts (Supplementary)Act	Amending S. 122 and S. 123.
1927	X	The Repealing and Amending Act	Amending— i. O. 5 R. 27 and R. 28. ii. Heading of O. 28. iii. O. 28 R. 1, R. 2, and R. 3.
1928	XVIII	The Repealing and Amending Act	Adding new sub-section (3)to S.98.
1929	XXI	The Transfer of Property (Amendment) Supplementary Act	1. Substituting new Rules 2 to 8, 10, 11 and 15 for the old Rules in O. 34. 2. Substituting new Forms 3 to 11 in Appendix D for the old Forms. 3. Inserting new Rule 8A in O. 34.
1930	XVI	The Transfer of Property (Amendment) Supplementary Act	Amending O. 43 R. 1.
1932	X	The Code of Civil Procedure (Amendment) Act	1. Amending S. 78. 2. Inserting new Rules 19, 20, 21, and 22 in O. 26 with heading.
1934	XXXV	The Amending Act	Amending S. 2, clause (17), S. 60, sub-section (1), clause (j), O. 5 R. 27 and R. 28 and O. 28.
1936	XXI	The Code of Civil Procedure (Amendment) Act	1. Amending S. 51 and O. 21 R. 37. 2. Substituting new Rule 40 in O. 21 in place of the old Rule.
1937	VIII	The Code of Civil Procedure (Amendment) Act	1. Inserting new S. 41A. 2. Amending O. 21 R. 22.
1937	IX	The Code of Civil Procedure (Second Amendment) Act	Amending S. 60.

Year.	No. of Act.	Short Title.	How affected
1937	XVI	The Code of Civil Procedure (Third Amendment) Act	Amending O. 32 R. 3.
1937		The Government of India (Adaptation of Indian Laws) Order	
1939	XXVI	The Code of Civil Procedure (Amendment) Act	Amending O. 21 R. 48.
1940	X	The Arbitration Act	Repealing S. 89, clauses (a) to (f) (both inclusive) of sub-section (1) of S. 104 and the Second Schedule.
1940	XXXIV	The Code of Civil Procedure (Amendment) Act	Amending Ss. 29 and 48.
1941	IV	The Berar Laws Act	Amending S. 7 and O. 50, R. 1.
1941	XXI	The Federal Court Act	Repealing S. 111A and O. 45, R. 17.
1942	XXIII	The Code of Civil Procedure (Amendment) Act	Adding new O. 27A.
1942	XXIV	The Code of Civil Procedure (Second Amendment) Act	1. Inserting new R. 11A in O. 33. 2. Amending O. 33, Rr. 12 and 13. 3. Substituting new R. 14 in O. 33 for the original.
1942	XXV	The Repealing and Amending Act	Amending O. 21, R. 48.
1943	V	The Code of Civil Procedure (Amendment) Act	Amending S. 60 and O. 21, R. 48.

ABBREVIATIONS

A. O.	...	Government of India (Adaptation of Indian Laws) Order, 1937 as modified by the Government of India (Adaptation of Indian Laws) Supplementary Order, 1937.
A.I.R. 1914 All., Bom., etc.	...	All India Reporter, Allahabad, Bombay, etc., sections of the respective years.
All. or I. L. R. All.	...	Indian Law Reports, Allahabad Series.
Agra.	...	Agra High Court Reports.
All. L. Jour.	...	Allahabad Law Journal.
All. W. N.	...	Allahabad Weekly Notes.
All. W. R.	...	Allahabad Weekly Reporter.
App. Cas.	...	Law Reports, Appeal Cases (England).
Beng. L. R.	...	Bengal Law Reports.
B. R.	...	Bihar Reports.
Bom. or I. L. R. Bom.	...	Indian Law Reports, Bombay Series.
Bom. H. C. R.	...	Bombay High Court Reports.
Bom. L. R.	...	Bombay Law Reporter.
Bom. P. J.	...	Bombay Printed Judgments.
Bourke	...	Bourke's Reports.
Bur. L. Jour.	...	Burma Law Journal.
Bur. L. R.	...	Burma Law Reports.
Bur. L. Tim.	...	Burma Law Times.
Cal. or I. L. R. Cal.	...	Indian Law Reports, Calcutta Series.
Cal. L. Jour.	...	Calcutta Law Journal.
Cal. L. R.	...	Calcutta Law Reports.
Cal. W. N.	...	Calcutta Weekly Notes.
C. P. L. R.	...	Central Provinces Law Reports.
Cor.	...	Coryton's Reports.
Cr. L. J.	...	Criminal Law Journal.
E. R.	...	English Reports (England).
Hay	...	Hay's Reports.
Hyde	...	Hyde's Reports.
Ind. App.	...	Law Reports, Indian Appeals.
Ind. Cas.	...	Indian Cases.
Ind. Jur. (N.S.)	...	Indian Jurist (New Series).
Ind. Jur. (O.S.)	...	Indian Jurist (Old Series).
Ind. Rul.	...	Indian Rulings.
Kar. (I. L. R.)	...	Indian Law Reports, Karachi Series.
K. B.	...	Law Reports, King's Bench (England)
Knapp	...	Knapp's Reports.
Lah. or I. L. R. Lah.	...	Indian Law Reports, Lahore Series.
Lah. L. Jour	...	Lahore Law Journal.

L. J.	...	Law Journal (England).
L. R.	...	Law Reports (England).
L. R. A.	...	Law Reporter, Allahabad.
Low. Bur. Rul.	...	Lower Burma Rulings.
Luck. or I. L. R. Luck.	...	Indian Law Reports, Lucknow Series.
Luck. Cas.	...	Lucknow Cases.
Mad. or I. L. R. Mad.	...	Indian Law Reports, Madras Series.
Mad. H. C. R.	...	Madras High Court Reports.
Mad. Jur.	...	Madras Jurist.
Mad. L. Jour.	...	Madras Law Journal.
Mad. L. Tim.	...	Madras Law Times.
Mad. L. W.	...	Madras Law Weekly.
Mad. W. N.	...	Madras Weekly Notes.
Marsh.	...	Marshall's Reports.
Moo. Ind. App.	...	Moore's Indian Appeals.
Moo. P. C. C.	...	Moore's Privy Council Cases.
Nag. (I. L. R.)	...	Indian Law Reports, Nagpur Series.
Nag. L. Jour.	...	Nagpur Law Journal.
Nag. L. R.	...	Nagpur Law Reports.
N.-W. P. H. C. R.	...	North-West Provinces High Court Reports.
Oudh Cas.	...	Oudh Cases.
Oudh L. Jour.	...	Oudh Law Journal.
Oudh L. R.	...	Oudh Law Reports.
Oudh S. C.	...	Oudh Select Cases.
Oudh W. N.	...	Oudh Weekly Notes.
Pat. or I. L. R. Pat.	...	Indian Law Reports, Patna Series.
Pat. H. C. C.	...	Patna High Court Cases.
Pat. L. Jour.	...	Patna Law Journal.
Pat. L. Tim.	...	Patna Law Times.
Pat. L. R.	...	Patna Law Reporter.
Pat. L. W.	...	Patna Law Weekly.
Pun. L. R.	...	Punjab Law Reporter.
Pun. Re.	...	Punjab Records.
Pun. W. R.	...	Punjab Weekly Reporter.
Q. B.	...	Law Reports, Queen's Bench (England.)
R. & J.s'	...	Rafique and Jackson's Oudh Privy Council Decisions.
Rang.	...	Indian Law Reports, Rangoon Series.
Rang. L. R.	...	Rangoon Law Reports.
R. R.	...	Revised Reports (England).
R. S. C.	...	Rules of the Supreme Court of England.

Sar.	...	Saraswati's Privy Council Judgments.
Shome L. R.	...	Shome's Law Reports.
Sind L. R.	...	Sind Law Reporter.
Suther.	...	Sutherland's Privy Council Judgments.
Suth. W. R.	...	Sutherland's Weekly Reporter.
Times L. R.	...	Times Law Reports.
U. P. L. R.	...	United Provinces Law Reports.
Upp. Bur. Rul.	...	Upper Burma Rulings.
Weir.	...	Weir's Criminal Rulings.
W. R. (Eng.)	...	Weekly Reporter (England).

Other Abbreviations

Art.	...	Article.
B. R.	...	Board of Revenue.
Civ.	...	Civil.
C. A.	...	Court of Appeal.
Cl.	...	Clause.
Cr.	...	Criminal.
D. B.	...	Division Bench.
F. B.	...	Full Bench.
F. C.	...	Federal Court.
F.-N.	...	Foot-Note.
G. I.	...	Government of India Act, 1915.
Jour.	...	Journal.
L. P.	...	Letters Patent.
N.	...	Note.
O.	...	Order.
P.	...	Page.
P. C.	...	Privy Council.
Pre.	...	Preamble.
Rev.	...	Revenue.
R.	...	Rule.
S.	...	Section.
S. B.	...	Special Bench.
U. P. B. R.	...	United Provinces Board of Revenue.

IN FOOT-NOTES —

('66) means (1866); ('04) means (1904); ('27) means (1927); ('39) means (1939).

Full year reference is given prior to 1866, like (1818) and *not* ('18); (1865) and *not* ('65) and so on and to all English cases.

The figure preceding the A. I. R. reference denotes the *Volume* Number of the All India Reporter. Thus, in ('40) *27* A. I. R 1940 Oudh 441, the figure *27* denotes the 27th Volume of the All India Reporter, "1914" being the 1st Volume.

✣ Indicates either a leading case or a case giving fuller reasons.

† Indicates a case which is most appropriate or most direct for the proposition.

THE CODE OF CIVIL PROCEDURE, 1908
(ACT V OF 1908)

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THE
CODE OF CIVIL PROCEDURE
ACT V OF 1908

Volume I

ACT No. V OF 1908.

[*21st March, 1908.*]

An Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature.

WHEREAS it is expedient to consolidate and amend[2] the laws relating to the procedure of the Courts of Civil Judicature;[17] It is hereby[3] enacted as follows :—

PREAMBLE

Synopsis

1. History of the Code.
2. Scope and applicability of the Code.
3. Retrospective operation of the Code.
4. Code, how far exhaustive.
5. Inherent powers. See Section 151.
6. Judicial discretion.
7. Interpretation of statutes—General.
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10. Reference to Preamble and headings prefixed to the Sections.
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13. Punctuation marks.
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14a. Explanation.
15. Judicial precedents.
16. English and American decisions.
17. "Laws relating to the procedure of the Courts of Civil Judicature."
18. Revenue Courts. See Note 2 under S. 5.
19. Mamlatdar's Courts. See Note 3 under S. 5.

NOTE to the Synopsis. See the Notes indicated, for the following topics :

"Consolidate and amend." See Note 2.
Courts of Civil Judicature. See Note 17.
Enforcement of rights under the Code. See Note 3.
Plain and natural meaning. See Note 7.
Previous procedure. See Note 1.
Sections and Rules. See Note 7.

1. History of the Code.— Before the year 1859, there was no law of procedure applicable to the *whole* of India. The Courts in the Presidency Towns were governed by their own rules and orders and certain Acts,[1] while the Provincial Courts were governed by certain Regulations and Acts particularly applicable to them. In 1859 the first Civil Procedure Code[2] was passed and it enacted that *where it came into force*, the procedure of Civil Courts was to be regulated by it alone.[3] The Code did not, however, apply to Courts established by Royal Charter and consequently the Supreme Courts and the Sudder Dewanny Adawlats followed their original procedure. In 1862 when the Supreme Courts and the Sudder Courts were abolished, and the High Courts were established, the Code was made applicable to the High Courts as well. After various amendments in the years 1860, 1861 and 1871,[4] a second Code was enacted in 1877,[5] which very considerably amended and altered and added to the Code of 1859.[6] The Code of 1877 was soon followed by two amending Acts, Act XVIII of 1878 and Act XII of 1879, and in the year 1882 a third Code came into being as Act XIV of 1882. This was also amended and repealed in part by various subsequent Acts[7] and in 1908, the present Code was enacted consolidating and amending the law up to that date.[8]

2. Scope and applicability of the Code.—The Code, as the preamble shows, consolidates and amends the laws relating to the procedure of the Courts of Civil Judicature in India. The object of consolidation is "to collect the statutory law bearing upon a particular subject and to bring it down to date in order that it may form a useful Code applicable to the circumstances existing at the time when the consolidating Act was passed."[1] In the case therefore of a consolidating statute the construction must be not with reference to the circumstances existing at the time of the preceding Acts but in relation to those existing at the time of the consolidating Act itself[2] and the law should thenceforth be ascertained from that enactment itself instead of being searched for in prior decisions.[3] But in applying a consolidating Act, statutes not expressly repealed should be held to continue in force without modification.[4]

Preamble — Note 1

1. Act XVIII of 1852 and Act VI of 1853.
2. Act VIII of 1859.
3. Section 388 of Act VIII of 1859.
4. Some of the Acts passed modifying and amending the Code are as follows :—

   Act IV of 1860 — Civil Procedure — Repealed by Act XXIII of 1861 and by Act X of 1877.

   Act XLIII of 1860—Amending Act—
   Repealed in part by Act VIII of 1868;
   Do. do. by Act XIV of 1870;
   Do. do. by Act XII of 1873;
   Do. do. by Act XVI of 1874;
   Do. do. by Act XII of 1876.

   Act XXIII of 1861 — Civil Procedure — Repealed by Act X of 1877.

   Act XXXII of 1871 — Civil Courts — Repealed by (Excepting S. 40) Act XIII of 1879 (S. 40 repealed by Act XXII of 1859).
5. Act X of 1877.
6. Whereas the 1859 Code contained 388 Sections, the 1877 Code contained 652.
7. Repealed in part by—Acts XIV of 1885—S. 3; X of 1886 — S. 24 (2); XIV of 1886 — S. 2; VIII of 1887 — S. 2; XIII of 1889; VIII of 1890—S. 2. Amended by Acts XV of 1882 — S. 3; VII of 1887—S. 11; VI of 1888—Ss. 2-8; X of 1888—Ss. 1-3; VIII of 1890 — S. 53; VI of 1892 — Ss. 2-8; V of 1894; VII of 1895—Ss. 1, 2; XIII of 1895.
8. Act V of 1908. See the Preamble to the present Code.

Note 2

1. ('95) 22 Cal 788 (798) : 22 Ind App 107 (PC). ('30) 17 AIR 1930 All 225 (230) : 52 All 619 (FB). ("Consolidation" means reduction to a systematic form of the whole of the statute law relating to the same subject-matter as illustrated by judicial decisions.)
2. ('95) 22 Cal 788 (798) : 22 Ind App 107 (PC).
3. ('96) 23 Cal 563 (571, 572) : 23 Ind App 18 (PC). ('01) 28 Cal 517 (528, 529, 530) (SB). ('09) 36 Cal 354 (364) (SB). ('09) 4 Ind Cas 442 (445) (DB) (Cal). ('26) 13 AIR 1926 Mad 906 (908) : 49 Mad 728 (FB). (A reference to earlier case-law is however permitted for construing the words of the statute but not for the purpose of adding something to it.) ('23) 10 AIR 1923 Mad 523 (525) : 46 Mad 605 (FB).
4. ('30) 17 AIR 1930 All 225 (230) : 52 All 619 (FB).

The Code applies to the procedure of all Courts of Civil Judicature except that it does not affect any special or local law or any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force.[5] (See section 4.) Where there is a conflict between the Civil Procedure Code and a special law, the latter prevails over the former on the principle that the special law prevails over the general.[6]

For instance, the jurisdiction and procedure in insolvency are specially provided for by the Presidency Towns Insolvency Act, III of 1909, and the Provincial Insolvency Act, V of 1920;[7] the jurisdiction and procedure in testamentary and intestate matters by the Indian Succession Act, XXXIX of 1925;[8] and those in matrimonial matters by the Indian Divorce Act, IV of 1869. In such cases the provisions of the Code will be controlled by those in the special enactments. In the absence of any provision, however, on any particular matter in those Acts, the Code will apply.[9] It must, however, be applied

5. ('42) 29 AIR 1942 Cal 429 (434) (DB). (Section 168A, Bengal Tenancy Act, inserted by Bengal Act 18 of 1940 is not contrary to or inconsistent with S. 51, C. P. C., but limits the power contained therein.)
('40) 27 AIR 1940 All 24 (26, 27) : ILR (1939) All 901 (DB). (Section 60, C. P. C., is subject to S. 5, Electricity Act.)
('32) 19 AIR 1932 Oudh 199 (201): 7 Luck 716 (FB). (C. P. C. and U. P. Land Revenue Act, 1901.)
('21) 8 AIR 1921 P C 80 (82, 84): 48 Cal 481: 48 Ind App 76 (PC). (Code applies to High Courts except where otherwise provided by Letters Patent or the Rules for the exercise of Original Civil Jurisdiction.)
('25) 12 AIR 1925 All 154 (155) : 47 All 179 (DB). (Code applies to proceedings under the Arbitration Act, 1899.)
('19) 6 AIR 1919 Bom 133 (134) : 43 Bom 368 (DB). (Procedure in S. 145 of the Army Act overrides S. 60 of the Code.)
('34) 21 AIR 1934 Cal 725 (729) : 61 Cal 450. (The C. P. Code is not applicable to proceedings before the controller of accounts under the Patents and Designs Act.)
('32) 19 AIR 1932 Cal 1 (2) : 59 Cal 370 (DB). (Rules under the Letters Patent prevail against rules of the Code.)
('31) 18 AIR 1931 Cal 688 (692) : 58 Cal 510 (DB). (C. P. Code applies to Original Side of High Courts subject to O. 49 and High Court rules.)
('31) 18 AIR 1931 Cal 604 (605) : 59 Cal 68. (C. P. C. applies to proceedings in Civil Courts under Ss. 476, 476B of the Cr. P. Code.)
('09) 1 Ind Cas 55 (55, 56) (Lah). (Insolvency proceedings taken under the Punjab Laws Act, IV of 1872—Ss. 351 and 354 of the C. P. C. of 1882 are not applicable.)
('38) 25 AIR 1938 Mad 497 (498). (Madras Village Courts Act, S. 15—Such Courts being special tribunals, general provisions of C. P. Code do not apply.)
('35) 22 AIR 1935 Mad 755 (757). (Provisions of Civil Procedure Code are not in terms applicable to the proceedings of the Hindu Religious Endowments Board under Madras Hindu Religious Endowments Act.)
('30) 17 AIR 1930 Mad 795 (795). (C. P. Code does not apply to proceedings before village Courts.)
('16) 3 AIR 1916 Mad 544 (546) (DB). (Code does not apply to village Munsif's Court; following 13 Mad 145.)
('32) 19 AIR 1932 Oudh 163 (164) (DB). (S. 109, C. P. Code is subject to special jurisdiction under S. 12 (1), Oudh Courts Act.)
('31) 18 AIR 1931 Oudh 385 (385). (Oudh Laws Act, S. 19—Recording of evidence—O. 18, R. 6 excluded.)
('36) 23 AIR 1936 Pat 150 (150) (DB). (C. P. C. does not apply to the Panchayat Court under Bihar and Orissa Village Administration Act.)
('06) 3 Low Bur Rul 241 (242) (DB). (Cases under Code of 1882—Special provisions of Insolvency Act not overridden by the Code.)
('11), 9 Ind Cas 712 (715): 4 Sind L R 196. (Proceedings in arbitration—C. P. C. cannot be strictly applied.)
('09) 3 Sind L R 162 (163). (Stay of proceedings under the Arbitration Act (IX of 1899) must be made under S. 19 thereof and not under Para. 18 of the Second Schedule of the Code.)
('12) 17 Ind Cas 902 (902) : 6 Low Bur Rul 88 (DB). (S. 89 of the Code excepts arbitration under the Arbitration Act (IX of 1899) from the operation of the Code.)
6. ('42) 29 AIR 1942 Cal 49 (50): ILR (1942) 1 Cal 497 (SB). (Provisions of Bengal Non-Agricultural Tenancy Act of 1940 which direct the Court to stay proceedings for ejectment of non-agricultural tenant prevail over O. 21, R. 24.)
('32) 19 AIR 1932 Oudh 163 (164) (DB). (S. 12 (1) of Oudh Courts Act prevails over S. 109, C. P. C.) [*See also* ('32) 19 AIR 1932 Oudh 193 (195) : 8 Luck 1 (FB).]
7. ('86) 12 Cal 629 (634) (DB). (Orders in insolvency are orders under a special law. Code not applicable.)
('92) 17 Bom 334 (340). (Provisions of S. 545, old C. P. Code, for stay of execution held inapplicable in case of appeals from orders in insolvency.)
('36) 23 AIR 1936 All 80 (82) : 58 All 639 (DB).
8. ('93) 17 Bom 388 (391). (Succession Act is regulated by the C. P. C.)
('94) 18 Bom 237 (238). (Do.)
('95) 17 All 475 (477). (Do.)
9. See section 5 of the Provincial Insolvency Act, 1920; S. 45 of the Divorce Act, 1869; S. 8 of the Indian Naval Armament Act, VII of 1923; and Ss. 268 and 295 of the Indian Succession Act, XXXIX of 1925.
('89) 13 Bom 520 (524) : 16 Ind App 156 (P C). (Execution of order in insolvency — Procedure of C. P. C. applies.)

with reference to the circumstances peculiar to those matters.[10] Thus, unless a will is proved in some form no probate can be granted on the consent of the parties.[11] The reason is that the order is one *in rem* affecting all individuals and cannot, therefore, be passed with the consent of only the parties to the proceeding.

Foreigners are not exempted from the operation of the Code,[12] nor is property having a foreign origin outside the jurisdiction of British Courts.[13]

The Code, being an adjective law, is not primarily intended to create new rights or to take away existing rights. It mainly regulates the procedure in Civil Courts.[14]

3. Retrospective operation of the Code. — It is a general principle of law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction.[1] Similarly, a statute is not to

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('33) 20 AIR 1933 All 135 (137) : 55 All 243. (Divorce Act, S. 49 : C. P. C. applies.)
('14) 1 AIR 1914 Bom 211 (213) : 38 Bom 125 (DB). (Divorce Act—C. P. C. — Applicability of.)
('87) 12 Bom 237 (241). (Code applies to proceedings on the Admiralty Side of the High Court.)
('84) 8 Bom 511 (522, 525) (DB). (Execution of decision in insolvency—C. P. C. applicable.)
('13) 19 Ind Cas 435 (435): 40 Cal 685 (DB). (Appeal to Privy Council in insolvency case—Procedure in Ss. 109 and 110 applies.)
('05) 1 Cal L Jour 557 (564) (DB). (Section 4 is no bar to suit for declaration that plaintiff's title is not affected by order under S. 34 of the Chota Nagpur Landlord and Tenant Act, I of 1859.)
('01) 28 Cal 532 (537) (DB). (Suit for recovery of rent under the Bengal Rent Act, X of 1859 — Second appeal lies under the Code.)
(1900) 27 Cal 860 (889). (Costs in salvage actions are given as per rules framed under C. P. C.)
('95) 22 Cal 511 (516, 517). (Where no provision is found either in C. P. C., or in the Admiralty Rules, practice in England is to be followed.)
('90) 17 Cal 66 (82) (DB). (Appeals in Admiralty or Vice-Admiralty cases are governed by C. P. C. and not by R. 35 of the Vice-Admiralty Rules.)
('90) 17 Cal 337 (340). (Code applies to proceedings on the Admiralty Side of the High Court.)
('79) 4 Cal 94 (95) (DB). (S. 66, Burma Courts Act and Ss. 6 and 4, C. P. Code (1877) do not debar a debtor in jail from applying for being adjudged insolvent under S. 344, C. P. Code.)
('70) 4 Beng L R (O J) 51 (52). (S. 7, Divorce Act, does not apply to points of procedure.)
('15) 2 AIR 1915 Lah 204 (206) : 1915 Pun Re No. 63. (Suit under Companies Act, VII of 1913—O. 8 R. 6 applies and defendant can plead set-off.)
('02) 26 Mad 518 (520) (DB). (Madras Rent Recovery Act, VIII of 1865—Order of remand in proceedings under, is a decree and is therefore appealable under the Code.)
[*See also* ('14) 1 AIR 1914 Bom 30 (31) : 38 Bom 340 (DB). (S. 5 of Bombay Regulation XIII of 1830 providing for special appeal in certain cases but not providing any procedure therefor—Procedure under S. 100, C. P. C., must be applied.)]
10. ('84) 9 Bom 241 (244) (DB). (Caveator refusing to answer a question—S. 177 of the old Code not to be applied and proof of will dispensed with.)
11. ('03) 31 Cal 357 (363, 364).
12. ('27) 14 AIR 1927 All 413 (414): 49 All 669 (DB). ('96) 20 Bom 133 (143) (DB). ('19) 6 AIR 1919 Mad 883 (884) (DB). ('03) 26 Mad 544 (552) : 30 Ind App 220 (PC). (Approving 17 Bom 662.)
13. (1900) 24 Bom 407 (410, 413, 414) (DB). (Suit for share of income received in British India from property situated beyond British India, the title to property not being in dispute.)
14. ('32) 19 AIR 1932 Lah 401 (407): 13 Lah 618 (FB).

Note 3

1. ('43) 56 Mad L W 289 (295).
('43) 30 AIR 1943 Pat 239 (241) (DB). (Case relating to Special Courts Ordinance of 1942.)
('42) 29 AIR 1942 All 19 (29) : I L R (1942) All 45 (FB). (It is a proper principle of construction that in the absence of some compelling indication to the contrary, an adverb of time has reference to the present and, in relation to a statute, to the time from which the statute speaks.)
('41) 28 AIR 1941 Pat 59 (61) : 20 Pat 202 (SB).
('40) 27 AIR 1940 Pat 385 (387) : 19 Pat 752 (FB).
('34) 21 AIR 1934 Lah 1013 (1014, 1015) (DB). (Income-tax amending Act giving a right of appeal —Such Act will not affect finality of orders already passed.)
(1901) 1901 App Cas 297 (305), Smith v. Callandar.
(1892) 3 Ch 402 (421), Lauri v. Renad.
('36) 23 AIR 1936 Bom 37 (40): 60 Bom 125 (DB).
('29) 16 AIR 1929 Bom 262 (264) : 53 Bom 453 (DB).
('77) 2 Bom 148 (158) (FB).
('31) 18 AIR 1931 Cal 321 (322) : 58 Cal 817 (DB). (Bengal Tenancy Act — Retrospective operation extends only to the extent the language permits and not beyond that.)
('31) 18 AIR 1931 Cal 25 (26) : 57 Cal 796 (DB).
('16) 3 AIR 1916 Cal 446 (449) : 43 Cal 973 (DB).
('88) 15 Cal 376 (382) (FB).
('28) 15 A I R 1928 Lah 627 (631) : 10 Lah 165 (FB). (Some sections retrospective—Act silent as to other sections — Particular section must be examined to see if it is retrospective.)
('32) 19 A I R 1932 Mad 734 (736) : 56 Mad 169. (T. P. Act.)
('31) 18 AIR 1931 Mad 83 (85, 91) : 54 Mad 627 (DB). (Madras Local Boards Act.)
('17) 4 AIR 1917 Mad 937 (939) : 40 Mad 34 (DB). (Penal statute has no retrospective operation.)
[*See* ('33) 20 AIR 1933 All 20 (21) : 54 All 1092. (Court-Fees (Amending) Act is not retrospective.)

be construed so as to have a greater retrospective operation than its language renders necessary.[2] In fact a statute which takes away or affects vested rights, imposes a new disability or confers a new right, must be *presumed* not to have a retrospective operation[3] although it is competent to the Legislature to make an Act retrospective so as to affect even vested rights.[4] Statutes, which are in their nature *declaratory* or *explanatory* are, however, an exception to this rule and are to be construed so as to have retrospective operation,[5] although nothing in a declaratory statute can render void that which has been

('28) 15 AIR 1928 P C 128 (130). (S. 17 of the Sydney Corporation Act.)
('87) 14 Cal 553 (556) (DB). (Although on general principles change in the law affecting the rights of parties does not ordinarily govern pending suits, yet where Legislature makes provision to the contrary, the Courts are bound to carry out the law.)]
[*See also* ('40) 1940 Nag L Jour 638 (645) (DB). (Retrospective ex-propriatory legislation must always be rigorously construed.)
('80) 5 Bom 435 (437) (DB). (Subsequent repeal of an Act does not make the transactions, made during the continuance of the Act, valid if they were invalid under the Act.)
('28) 15 AIR 1928 Mad 1173 (1174). (Declaratory Act — Usual presumption against retrospective effect does not apply.)
('31) 18 AIR 1931 All 317 (317):53 All 524 (DB). (Amending Act is not retrospective.)]

2. ('42) 29 AIR 1942 All 50 (70) : I L R (1942) All 185 (FB). (Laurie v. Renad, (1892) 3 Ch 402, followed.)
('41) 28 AIR 1941 FC 16 (46, 47) : ILR 1941 Kar (FC) 72 : 1940 F C R 110 (FC).

3. ('31) 18 AIR 1931 Cal 92 (93) : 58 Cal 167. (Right of appeal is a vested right.)
('42) 29 AIR 1942 F C 17 (21) : I L R (1942) Kar (FC) 21 : 21 Pat 587 (F C).
('42) 29 AIR 1942 Lah 102 (103, 104) : I L R (1942) Lah 349 (FB).
('41) 28 AIR 1941 Pat 253 (254) : 20 Pat 556 (DB).
('40) 27 AIR 1940 Cal 345 (346) (DB).
('38) 25 AIR 1938 Pat 484 (487) (DB). (Change in law cannot make a decree already obtained invalid.)
('36) 23 AIR 1936 Pat 173 (175) (DB). (Decree already passed cannot be invalidated by subsequent Act.)
('99) 1 Bom L R 849 (849). (Rights under decree.)
('75) 1 Bom 581 (585) (DB).
('04) 26 All 119 (130) : 7 Oudh Cas 251 (PC). (Right of succession cannot be divested by later statutes.)
('14) 1 AIR 1914 P C 66 (67) : 36 All 350 (PC). (It cannot revive a barred right.)
('35) 22 AIR 1935 All 706 (710) : 58 All 63 (FB).
('12) 16 Ind Cas 1002 (1003) : 36 Bom 617 (DB). (Vested rights under decrees cannot be affected.)
('10) 34 Bom 260 (266) (DB). (Change in law cannot annul a decree already obtained.)
('14) 1 AIR 1914 Cal 806 (810) : 41 Cal 1125 (FB).
('11) 9 Ind Cas 805 (806) (DB) (Cal). (Rights barred under old Act are not revived by new Act.)
('86) 12 Cal 583 (586) (FB).
('28) 15 AIR 1928 Lah 627 (631) : 10 Lah 165 (FB).
('38) 25 AIR 1938 Mad 688 (700) (DB).
('36) 23 AIR 1936 Mad 18 (19).
('18) 5 AIR 1918 Mad 162 (163) (DB). (Right to treat decree as final is a vested right.)
('25) 12 AIR 1925 Nag 377 (377). (Decree already passed cannot be invalidated by subsequent Act.)
(1876) 1 Ch D 48 (50), In re Suche & Co. (New right of action conferred —Followed in AIR 1921 Pat 185.)
[See however ('40) 27 AIR 1940 Bom 90 (91) : I L R (1940) Bom 50 (DB). (In applying the principle against retrospective construction, one must have regard to the general character of the Act in question, and when construing an Act introduced for the purpose of applying an equitable doctrine to certain transactions considered *ex hypothesi* to be lacking in equity one should not assume that the Legislature intended that the Act should not have retrospective effect, but wished to preserve rights acquired in such transactions.)]

4. ('41) 28 AIR 1941 Cal 432 (433). (Whenever the intention is clear that the Act shall have retrospective operation it must be so construed even if the consequences may appear unjust and hard.)

5. ('42) 29 AIR 1942 Cal 442 (443) (DB).
('41) 28 AIR 1941 Lah 291 (292). (In the case of a declaratory Act there is no presumption against retrospective effect —Dissolution of Muslim Marriages Act (1939) not declaratory and not retrospective.)
('41) 28 AIR 1941 Lah 22 (23). (Dissolution of Muslim Marriages Act (1939) is declaratory and retrospective.)
('40) 27 AIR 1940 Pat 385 (396) : 19 Pat 752 (FB). (Retrospective operation is one matter and interference with existing rights is another — If an Act provides that as at a particular date, the law shall be taken to have been that which it was not, that Act is retrospective (Per Manohar Lall, J).)
('38) 25 AIR 1938 Oudh 127 (128) : 14 Luck 71 : 13 Luck 761 (FB). (Declaratory statutes passed to remedy defects in form have retrospective effect.)
('27) 14 AIR 1927 Mad 85 (86). (Act may be declaratory or explanatory, though it is not called declaratory or explanatory.)
('27) 14 AIR 1927 Cal 748 (750) (DB).
('13) 13 Ind Cas 264 (266) : 5 Sind L R 184.
(1894) 24 Q B D 557 (559, 560) : 62 L T 768 : 38 W R (Eng) 527, Attorney-General v. Theobold.
(1883) 11 Q B D 84 (91) : 52 L J Q B 590, Leeds and County Bank v. Walker.

declared by the Courts to have been done rightly under the law for the time being in force.[6] So also, enactments dealing with *procedure* are always retrospective in the sense that their provisions will apply to proceedings already commenced at the time of their enactment.[7] The reason is that no one can have a vested right in forms of procedure.[8] But where some of the provisions of the enactment of procedure do affect vested rights, whether substantive[9] or remedial,[10] the rule against retrospective operation of statute will apply[11]

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6. ('37) 24 AIR 1937 Pat 605 (606).
('27) 14 AIR 1927 Mad 85 (86).
7. ('43) 30 AIR 1943 Bom 169 (172) (FB).
('42) 29 AIR 1942 Mad 474 (477). (Ss. 38 and 39 of the Provincial Insolvency Act (1920) deal essentially with procedure.)
('40) 27 AIR 1940 Cal 423 (425) : I L R (1940) 2 Cal 148 (DB).
('40) 27 AIR 1940 Pat 567 (568): 19 Pat 289 (DB).
(1916) 2 Ch 1 (5) : 85 L J Ch 564 : 114 L T 876, Welby v. Parker.
(1868) L R 3 Q B 160 (163) : 37 L J Q B 80 : 18 L T 540 : 16 W R (Eng) 539, Kimbray v. Draper.
('89) 11 All 408 (412) (FB).
('31) 18 AIR 1931 All 635 (639) : 54 All 299 (FB). (No vested right in choice of forum and limitation — Limitation Act a mere matter of procedure and operates retrospectively.)
('36) 23 AIR 1936 All 3 (5) : 58 All 495 (DB). (S. 74, Partnership Act, applies to substantive right.)
('35) 22 AIR 1935 All 706 (716) : 58 All 63 (FB).
('33) 20 AIR 1933 All 846 (849) : 56 All 142 (DB).
('32) 19 AIR 1932 All 30 (31) (DB). (Choice of forum is a matter of procedure.)
('31) 18 AIR 1931 All 735 (736) (DB). (Do.)
('31) 18 AIR 1931 All 489 (490) : 53 All 687 (FB). (S. 276 of the Succession Act is only of procedure.)
('30) 17 AIR 1930 All 706 (709) : 52 All 886 (DB).
('30) 17 AIR 1930 All 561 (567) (DB).
('27) 14 AIR 1927 All 657 (659) : 50 All 202 (DB).
('10) 7 Ind Cas 11 (14) (DB) (All). (Case law discussed.)
('29) 16 AIR 1929 Bom 262 (264) : 53 Bom 453 (DB).
('30) 17 AIR 1930 Cal 422 (423): 57 Cal 148 (DB).
('30) 17 AIR 1930 Cal 34 (36) : 56 Cal 1117 (DB). (Limitation Act is mere procedural law.)
('24) 11 AIR 1924 Cal 983 (984) (DB).
('86) 12 Cal 583 (586, 587) (FB).
('29) 16 AIR 1929 Nag 282 (283). (Change in forum of suit operates retrospectively.)
('10) 6 Ind Cas 1015 (1016) : 13 Oudh Cas 152.
('21) 8 AIR 1921 Pat 185 (186) (DB).
('38) 25 AIR 1938 Rang 130 (134): 1938 Rang L R 176 (FB).
('10) 5 Ind Cas 980 (980) : 5 Low Bur Rul 148 (DB). (Right of appeal—Not a mere procedure.)
(1878) 3 App Cas 582 (601, 603), Gardner v. Lucas. (Referred to in 22 Cal 364.)
(1876) 1 Ch D 48 (50), In re Suche & Co.
[*See* ('30) 17 AIR 1930 Lah 1004 (1008): 12 Lah 172 (DB). (A change in procedure cannot affect a decided matter.)
('33) 20 AIR 1933 Oudh 38 (40). (Limitation Act is not always a law of procedure.)]
8. ('42) 29 AIR 1942 Mad 471 (477).
('42) 29 AIR 1942 Pat 1 (15) : 21 Pat 1 (FB).
('40) 27 AIR 1940 Pat 567 (568): 19 Pat 289 (DB).
('40) 27 AIR 1940 Pat 385 (392): 19 Pat 752 (FB). (If an alteration is made in a rule of evidence, the alteration shall be ordinarily deemed to be retrospective.)
('09) 4 Ind Cas 492 (493) (All).
('10) 7 Ind Cas 11 (14) (DB) (All).
('11) 9 Ind Cas 800 (801) (All).
('84) 6 All 262 (268) (FB). ((1861) 30 L J Ex 40; (1876) 3 Ch D 69 and (1877) 4 Ch D 752, App.)
('30) 17 AIR 1930 Cal 422 (423): 57 Cal 148 (DB).
('14) 1 AIR 1914 Oudh 125 (126).
9. Such as rights of appeal or under contract.
10. Such as right of appeal or of reference.
11. ('42) 29 AIR 1942 Lah 102 (104): ILR (1942) Lah 349 (FB).
('26) 13 AIR 1926 Pat 561 (563).
('10) 7 Ind Cas 982 (985) (DB) (Bom).
('10) 5 Ind Cas 980 (980): 5 Low Bur Rul 148(DB).
('10) 5 Ind Cas 102 (105) (SB) (Mad). (Party having become entitled to hold decree cannot be deprived of it.)
('30) 17 AIR 1930 Nag 213 (215): 26 Nag L R 195.
('27) 14 AIR 1927 P C 242 (244): 9 Lah 284: 54 Ind App 421 (PC). (Provisions which deprive orders of their finality are those which touch existing rights.)
('31) 18 AIR 1931 All 635 (649) : 54 All 299 (FB). (Limitation Act is not pure procedural law—Rights vested under old Act cannot be divested under the new Act.)
('30) 17 AIR 1930 All 706 (709) : 52 All 886 (DB).
('29) 16 AIR 1929 All 756 (756) (DB). (Agra Tenancy Act—Provision regarding appeal not retrospective.)
('28) 15 AIR 1928 All 437 (438) : 50 All 965 (FB). (Rights of appeal not taken away by the repealing Act.)
('09) 3 Ind Cas 497 (498) (DB) (All). (Liability under the old Code to pay purchase-money in pre-emption suit is not a matter of procedure.)
('29) 16 AIR 1929 Bom 262 (264) : 53 Bom 453 (DB). (Right of appeal.)
('33) 20 AIR 1933 Cal 435 (437) : 60 Cal 1037 (SB).
('31) 18 AIR 1931 Cal 100 (101) (DB). (Amendment affecting right of appeal not retrospective.)
('31) 18 AIR 1931 Cal 92 (93) : 58 Cal 167.
('28) 15 AIR 1928 Cal 640 (643): 56 Cal 512 (FB). (Letters Patent—Amendment restricting appeal is not retrospective.)
('06) 33 Cal 789 (801).
('79) 3 Cal L Rep 437 (438) (DB). (Right of second appeal.)
(1864) 1864 Suth W R (Gap) C R 35 (36) (DB). ("Pending" meaning.)
('28) 15 AIR 1928 Lah 627 (631): 10 Lah 165 (FB).
('15) 2 AIR 1915 Lah 171 (173) : 1915 Pun Re No. 30 (DB). (Right of appeal.)

unless there is an indication to the contrary in the Act.[13]

Such indications can be found in the following circumstances :

(1) When the commencement of the Act is *postponed* to a particular day, the object of the *postponement* is to enable persons to enforce their rights, if any, before the new Act, negativing such rights, comes into force.[13]

(2) When the language of the enactment implies it.

Both these circumstances exist in the case of the Civil Procedure Code. Though passed in 1908 it is made to come into force from 1st January, 1909. Again, S. 154 implies that *except in the case of a right of appeal*, the Code applies retrospectively so as to affect all other rights and matters dealt with by it,[14] and to all cases pending or about to be instituted at the time it came into force.[15]

A suit must be determined according to the law in force at its *institution*. A change in the law pending the action cannot affect the rights of the parties in the absence of a provision to the contrary.[16]

4. Code, how far exhaustive. — The Code is exhaustive on all matters *specifically dealt with by it*. The law in such matters must be ascertained only with reference to its provisions and a judge cannot disregard or go outside the letter of the enactment according to its true construction.[1]

('12) 15 Ind Cas 725 (727) : 1913 Pun Re No. 1 (DB). (Right of appeal is not a matter of procedure.)
('31) 18 AIR 1931 Mad 83 (85, 93) : 54 Mad 627 (DB). (Declaratory Act is ordinarily retrospective.)
('29) 16 AIR 1929 Mad 381 (382) : 52 Mad 361 (SB). (Vested right of Letters Patent Appeal cannot be taken away.)
('18) 5 AIR 1918 Mad 548 (549, 550) (DB). (The right of appeal cannot be taken away.)
('16) 3 AIR 1916 Mad 1035 (1036) (DB). (Do.)
('16) 3 AIR 1916 Mad 607(608) : 38 Mad 101 (DB). (Rule applies to remedial rights also.)
('11) 12 Ind Cas 553 (553) (DB) (Mad). (Benefit of order obtained under old Code.)
('24) 11 AIR 1924 Nag 24 (25) (DB). (Rule regarding vested rights applies to remedial rights.)
('23) 10 AIR 1923 Nag 227 (228) : 19 Nag L R 110.
('33) 20 AIR 1933 Oudh 38 (40). (Limitation Act is not pure procedural law—Rights vested under old Act cannot be divested under new Act.)
('24) 11 AIR 1924 Pat 183 (184).
('27) 14 AIR 1927 Sind 270 (271) : 21 Sind L R 195 (DB).
('30) 17 AIR 1930 Oudh 148 (153) : 5 Luck 552 (FB). (Per Wazir Hasan, J.)
[*See also* ('31) 18 AIR 1931 Cal 321 (322) : 58 Cal 817 (DB).
('32) 19 AIR 1932 Cal 207 (208, 209) (DB).]

12. ('27) 14 AIR 1927 Mad 85 (88). (If the language of the statute is clear and express.)
('79) 3 Bom 161 (166). (Under Code of 1877.)
('79) 4 Cal 825 (828) (DB).
See also Section 154 of the Code.

13. ('39) 26 AIR 1939 Pat 122(125) : 18 Pat 1 (DB).
('37) 24 AIR 1937 Pat 311 (313). (Amended Act, commencement of which is postponed, providing shorter period of limitation—The cause of action which arose prior to passing of amending Act is governed by such shorter period of limitation.)
('16) 3 AIR 1916 Lah 146 (148) : 1916 Pun Re No. 88.
('22) 9 AIR 1922 Mad 417 (418, 419) (DB).
[*See* ('13) 20 Ind Cas 821 (822) (DB) (Cal). (Immediate enforcement of new law without affording an opportunity to litigants to enforce their rights under the old law indicates that the new statute is not retrospective.)]

14. ('13) 19 Ind Cas 391 (392) : 40 Cal 704 (DB).
('12) 16 Ind Cas 834 (834) (Lah). (Right of appeal not affected.)
('30) 17 AIR 1930 Cal 422 (423) : 57 Cal 148 (DB). (Rules as regards abatement will apply to pending suits.)

15. ('11) 9 Ind Cas 815 (816) (Cal).

16. ('42) 29 AIR 1942 Lah 102 (104) : I L R (1942) Lah 349 (FB).
('41) 28 AIR 1941 F C 16 (37, 47) : 1940 F C R 110 : I L R (1941) Kar (F C) 72 (FC).
('08) 10 Bom L R 625 (627) (DB).
('35) 22 AIR 1935 Bom 257 (259) (DB).
('35) 22 AIR 1935 Cal 541 (543) : 62 Cal 492. (The ordinary law is that rights of parties with regard to suit should be determined upon law as it stands at the date of institution of suit.)
[*See* ('43) 30 AIR 1943 Pat 206 (209) (FB). (An Act which in terms, is retrospective in effect, has got to be applied at the date of the decision of the Court with reference to the state of things in existence at the date of the suit. The Court will not ordinarily take into consideration events happening after the institution of the suit.)]

Note 4

1. ('02) 29 Cal 707 (715) : 29 Ind App 196 (PC).
('09) 4 Ind Cas 442 (445) (DB) (Cal).
('01) 23 All 167 (173) (DB).
('26) 13 AIR 1926 Cal 568 (574) (DB).
('13) 20 Ind Cas 815 (816) (DB) (Cal).
('09) 1 Ind Cas 829 (832) : 36 Cal 354 (SB).
('08) 35 Cal 353 (359) (DB).
('06) 33 Cal 927 (931) (DB).

But the absence of any provision on any particular matter does not mean that the Court has no power to act in regard to the matter.[2] It is a rule of construction of a statute like the Civil Procedure Code, that the Court ought not to act on the principle that every procedure is to be taken as *prohibited* unless it is expressly provided for, but should proceed on the opposite principle that every procedure is to be understood as *permissible* till it is shown to be prohibited by law.[3]

The Code is thus not exhaustive of *all* forms of procedure necessary to be used in the administration of justice.[4] For instance, where a Court had a power before the Code was passed and the same *is not taken away* by the Code, the power remains.[5]

5. Inherent powers. — See Section 151.

6. Judicial discretion. — The Code in many of the sections leaves certain matters to the *discretion*[1] of the Court. The discretion, in such cases, must not be exercised in an arbitrary, vague or fanciful manner, but on *judicial principles.*[2]

7. Interpretation of statutes — General. — It is a cardinal rule of construction of statutes in general that the intention of an enactment should be gathered from the *language* employed by it,[1] and that where words used are *clear and unambiguous,*

('26) 13 AIR 1926 Lah 670 (671) (DB).
('35) 22 AIR 1935 Pesh 176 (176) (DB).
2. ('09) 1 Ind Cas 677 (681) (DB) (Cal).
('10) 6 Ind Cas 95 (97) (DB) (Cal).
('95) 17 All 29 (31) (DB).
('93) 15 All 84 (95) (FB).
('84) 8 Bom 380 (387). (High Court has power to punish for contempt summarily.)
('09) 1 Ind Cas 913 (917) : 36 Cal 193 (DB).
('06) 33 Cal 1094 (1098) (DB).
('06) 33 Cal 927 (931) (DB).
('06) 3 Cal L Jour 29 (31, 35) (DB).
('20) 7 AIR 1920 Lah 304 (304) : 1 Lah 339.
Also see Section 151 Note 1.
3. ('82) 5 All 163 (172) (FB).
('25) 12 AIR 1925 Mad 42 (44) : 48 Mad 494.
('89) 11 All 267 (287) (FB).
('10) 5 Ind Cas 532 (534) : 37 Cal 399.
[*See* ('31) 18 AIR 1931 All 162 (173) : 53 All 239 (FB). (Presidency Towns Insolvency Act, S. 52 (2) (b).)]
4. ('17) 4 AIR 1917 Pat 495 (497) (DB).
('06) 33 Cal 927 (932) (DB).
('17) 4 AIR 1917 Pat 375 (377) (DB).
5. ('80) 5 Cal 819 (820).
('07) 34 Cal 97 (99).
('86) 13 Cal 189 (191) (DB).

Note 6

1. ('31) 18 AIR 1931 Rang 194 (198) : 9 Rang 281 (FB). ("Judicial discretion" means that in certain proved or admitted circumstances the Court has been given the power to act or not to act in a particular way and such discretion must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself.)
2. ('79) 5 Cal 259 (265) (DB).
('24) 11 AIR 1924 Bom 1 (18) : 48 Bom 87.

Note 7

1. ('43) 30 AIR 1943 FC 36 (58, 63). (Same rule applies to construction of statutes affecting liberty of subject.)
('43) 30 AIR 1943 Bom 213 : 45 Bom L R 434 (437) (DB). (In a statute, especially a statute dealing with inheritance, precision of language might be expected—Case relating to Hindu Law of Inheritance Amendment Act (II of 1929)— "Sister" does not include half sister.)
('43) 30 AIR 1943 Bom 169 (174) (FB).
('42) 29 AIR 1942 All 153 (155) : I L R (1942) All 174 (FB). (If the words go beyond what was probably the intention, effect must nevertheless be given to them.)
('42) 29 AIR 1942 Bom 39 (41) : I L R (1942) Bom 107 (DB). (Intention to be gathered from Act as a whole.)
('41) 28 AIR 1941 F C 16 (33) : I L R (1941) Kar (F C) 72 : 1940 F C R 110 (FC).
('41) 28 AIR 1941 Mad 558 (559) (DB). (Scheme of Act to be examined only if words are ambiguous.)
('41) 28 AIR 1941 Mad 650 (651). (Intention of Legislature in particular Act is question of construction of Act.)
('40) 27 AIR 1940 Oudh 67 (71) : 15 Luck 209 (FB).
(1897) 1897 A C 22 (38) : 66 LJCh 35 : 75 L T 426 : 45 W R (Eng) 193, Salomon v. Salomon & Co.
(1893) 67 L T 688 (689) : (1893) 1 Q B 41 : 62 L J Q B 28 : 41 W R (Eng) 125, Knight v. Lee.
(1846) 4 Moo Ind App 179 (187) : 6 Moo PC 1 (PC).
('28) 15 AIR 1928 P C 2 (4) : 7 Pat 221 : 55 Ind App 18 (PC).
('20) 7 AIR 1920 P C 181 (185) (PC).
('20) 7 AIR 1920 P C 56 (60) : 43 Mad 550 : 47 Ind App 33 (P C).
('18) 5 AIR 1918 P C 352 (354) (P C). (Court is not concerned with the policy of the Act.)
('33) 20 AIR 1933 All 513 (516) : 55 All 654 (DB).
('20) 7 AIR 1920 Mad 640 (642, 643) : 43 Mad 94 (FB). (Affirmative language may be construed as having a negative implication if it is a necessary and reasonable one.)
('15) 2 AIR 1915 Nag 2 (6) : 11 Nag L R 76. (Intention of the Legislature does not mean a speculative opinion as to what it would have probably meant.)
('21) 8 AIR 1921 Pat 193 (198) : 6 Pat L Jour 373 (F B). ("No suit shall lie" means no suit shall lie even on ground of fraud.)

it is the duty of the Court to give effect to them according to their *plain meaning*, neither adding to nor subtracting from them.[3] Due meaning must be given to every part

('38) 25 AIR 1938 Sind 9 (10) : 32 Sind L R 129 (DB). (A section of a statute must be construed literally unless (1) the section itself is repugnant to the general purpose of the act, and (2) there is some other section which cuts down its meaning.)

2. ('43) 30 AIR 1943 Bom 169 (174) (FB).

('43) 30 AIR 1943 Pat 185 (187) : 22 Pat 148. (Intention of Legislature is immaterial when statute is unambiguous.)

('42) 29 AIR 1942 Lah 92 (93).[1] (Whatever the consequences may be.)

('42) 29 A I R 1942 Lah 243 (251) (DB). (It is not competent to any Court to proceed upon the assumption that the Legislature has made a mistake. A Court of law is bound to proceed upon the assumption that the Legislature is an ideal person that does not make mistakes. It must be assumed that it has intended what it has said. What is expressed makes what is not expressed to cease.)

('42) 29 AIR 1942 Mad 690 (691) : I L R (1942) Mad 9 (S B).

('41) 28 AIR 1941 Mad 449 (460) : I L R (1941) Mad 599 (F B).

('41) 28 AIR 1941 Mad 877 (877, 878). (If there is a lacuna in a statute, it is not the function of the Court to remedy it.)

('40) 27 AIR 1940 Lah 129 (132) : I L R (1940) Lah 242 (F B).

('39) 26 AIR 1939 P C 47 (51) : 66 Ind App 66 : I L R (1939) Kar (P C) 123 : 18 Pat 234 (P C).

('38) 25 AIR 1938 P C 130 (133) : I L R (1938) 2 Cal 295 : 32 Sind L R 476 : 65 Ind App 158(PC). (Case under Criminal Procedure Code.)

('38) 25 AIR 1938 P C 281 (283) : 66 Ind App 1 : ILR (1939) 1 Cal 222 : ILR (1939) Kar (PC) 1 (PC). (The Court cannot put into an Act words which are not expressed and which cannot reasonably be implied on any recognized principle of construction. That would be a work of legislation, not of construction and outside the province of the Court.)

('36) 23 AIR 1936 P C 5 (8) : 63 Ind App 74 : 59 Mad 175 (P C).

('35) 22 AIR 1935 Pat 243 (248): 14 Pat 799 (DB). (Words "other laws" in a certain section in a statute do not refer to same statute but only to provisions in other statutes.)

('28) 15 AIR 1928 Bom 69 (71).

('27) 14 AIR 1927 Nag 203 (203). (Abrogation of S. 27, Evidence Act, by implication is no reason for not interpreting S. 162, Criminal Procedure Code, according to its plain meaning.)

('83) 5 All 121 (136, 137) (FB). (Popular meaning of words to be taken except when the Legislature uses technical language.)

(1846) 4 Moo Ind App 179 (187): 6 Moo P C 1 (PC).

('28) 15 AIR 1928 All 241 (246) : 50 All 569 (DB).

('29) 16 AIR 1929 All 625 (641) : 52 All 11 (FB).

('35) 22 AIR 1935 P C 89 (91): 62 Cal 983: 62 Ind App 129 (P C).

('21) 8 AIR 1921 P C 240 (242) (P C). (Reasonableness of the provision is only material when the statute is not clear.)

('35) 22 AIR 1935 All 723 (725): 58 All 191 (FB). (Every word must be given its full meaning and effect.)

('35) 22 AIR 1935 All 378 (379) : 57 All 737 (DB).

('33) 20 AIR 1933 All 321 (322) : 55 All 468 (FB).

('30) 17 AIR 1930 All 49 (53) (FB).

('25) 12 AIR 1925 All 610 (612) : 48 All 175 (FB). (Words not found in a section may be supplied by necessary implication if the context so requires it.)

('17) 4 AIR 1917 All 295 (296) (DB). (Court cannot read into statute words not found there.)

('10) 5 Ind Cas 503 (509, 510) (All). (Court must not be swayed by what was understood to be the law in a particular locality or by a section of a community.)

('91) 13 All 432 (457) (FB). (Each Act must be construed on its own wording and in accordance with its own context.)

('90) 12 All 129 (141) (FB). (Practice of the Court cannot be used to nullify express enactment.)

('39) 26 AIR 1939 Bom 61 (63): ILR (1939) Bom 104 (DB).

('38) 25 AIR 1938 Bom 218 (221) : I L R (1938) Bom 280 (DB). (Unless Legislature has omitted to express something which it intended.)

('34) 21 AIR 1934 Bom 62 (63): 58 Bom 361 (DB). (Courts have to construe an Act as they find it.)

('33) 20 AIR 1933 Bom 91 (92): 58 Bom 505 (DB). (Do.)

('21) 8 AIR 1921 Bom 374 (374, 375): 45 Bom 672 (DB). (Plain meaning not to be controlled by considerations of convenience.)

('10) 7 Ind Cas 935 (936) : 34 Bom 593 (DB). (Words must be construed in the popular sense unless the law has attached a technical sense to it.)

('29) 16 AIR 1929 Cal 617 (630) (SB). (Words plain and clear—Court should not raise any doubts as to what they mean.)

('29) 16 AIR 1929 Cal 141 (143).

('25) 12 AIR 1925 Cal 1067 (1068) (DB). ("And" and "or" are sometimes interchangeable.)

('21) 8 AIR 1921 Cal 397 (399) : 48 Cal 556 (FB). (Reference to pre-existing law not permissible unless provisions are doubtful.)

('17) 4 AIR 1917 Cal 392 (394) (DB).

('96) 23 Cal 563 (572) : 23 Ind App 18 (P C).

('81) 7 Cal 127 (132) (SB).

('39) 26 AIR 1939 Lah 237 (238).

('38) 25 AIR 1938 Lah 251 (252): ILR (1938) Lah 236 (DB).

('38) 25 AIR 1938 Lah 158 (159): ILR (1938) Lah 332 (DB). (It is not for Judges, where words are clear, to attempt to get round a statute.)

('35) 22 AIR 1935 Lah 742 (746): 16 Lah 937 (FB).

('35) 22 AIR 1935 Lah 423 (421) (DB).

('35) 22 AIR 1935 Lah 364 (367): 16 Lah 667 (DB).

('35) 22 AIR 1935 Lah 150 (153) : 16 Lah 201 (DB). (Court cannot speculate on the real intention of the framers of the Act.)

('34) 21 AIR 1934 Lah 115 (115). (Primary meaning of a word must be considered unless there is anything to show that that was not the meaning of the Legislature.)

('31) 18 AIR 1931 Lah 399 (400) : 12 Lah 658 (DB). (Statutes to be construed in their ordinary sense unless there is any clear indication to the contrary.)

of the language employed.[3] The language of the statute must be taken as a whole and detached words should not be given undue importance.[4] The ordinary and grammatical sense of the words is to be adhered to, unless it would lead to repugnance with the rest of the statute.[5] Even if the result of the construction were absurd[6] or anomalous[7] there

('28) 15 AIR 1928 Lah 337 (340): 9 Lah 689 (DB). (Courts cannot supply omissions in an Act.)
('26) 13 AIR 1926 Lah 447 (449): 7 Lah 507 (DB). (Command to a body to make rules — Whether directory or mandatory depends on scope and object.)
('26) 13 AIR 1926 Lah 357(359): 7 Lah 348 (DB).
('23) 10 AIR 1923 Lah 655 (656): 4 Lah 323 (DB).
('12) 17 Ind Cas 979 (983) : 1912 Pun Re No. 5 (Rev).
('34) 21 AIR 1934 Mad 162 (168): 57 Mad 378(DB).
('33) 20 AIR 1933 Mad 120 (122). (Words to qualify the general language of the section should not be added.)
('32) 19 AIR 1932 Mad 612(619): 55 Mad 883(FB).
('29) 16 AIR 1929 Mad 236 (237) : 52 Mad 432 (DB). (Words of statute should not be departed from on the ground that something was omitted to be enacted.)
('25) 12 AIR 1925 Mad 723 (724) : 48 Mad 454 (DB). (Instrument defined by Act—Understanding of common people not to considered : *obiter*.)
('25) 12 AIR 1925 Mad 449 (451) : 48 Mad 559 (DB). (Construction clear — Reasons cannot be gone into.)
('18) 5 AIR 1918 Mad 1026 (1030) : 40 Mad 594 (FB). ("And" may be read as "or" to carry out obvious intention of the Legislature.)
('15) 2 AIR 1915 Mad 63 (63, 66) : 38 Mad 1144 (DB). (Words must be construed in their primary sense.)
('14) 1 AIR 1914 Mad 502 (504): 37 Mad 113 (DB). (Court cannot introduce exception to a section which is universal in terms.)
('09) 4 Ind Cas 1115 (1116) (DB) (Mad). (Court cannot introduce and enforce equities to modify expess provisions of the statute law.)
('38) 25 AIR 1938 Nag 433 (434). (Language of section clear—Court should not indulge in surmises.)
('33) 20 AIR 1933 Nag 193 (199) : 29 Nag L R 278 (FB).
('14) 1 AIR 1914 Nag 62 (63) : 10 Nag L R 42. (Though it has the effect of divesting a vested right.)
('36) 23 AIR 1936 Oudh 32 (40): 11 Luck 611(FB).
('26) 13 AIR 1926 Oudh 101 (111) (DB). (Clear words cannot be destroyed on the ground of equity or unreasonableness.)
('35) 22 AIR 1935 Pat 237 (241). (Act or part of Act cannot be ignored or treated as being meaningless; it must be construed as having some operative value.)
('33) 20 AIR 1933 Pesh 3 (5).
('36) 23 AIR 1936 Rang 393 (395) : 14 Rang 529 (DB). (If the words can be given a meaning, they must be given that meaning and cannot be regarded as purely superfluous verbiage.)
('35) 22 AIR 1935 Rang 123 (125).
('35) 22 AIR 1935 Rang 53 (53) : 12 Rang 625(DB).
('33) 20 AIR 1933 Rang 363(371): 12 Rang 64 (DB).
('28) 15 AIR 1928 Rang 326 (327) : 6 Rang 533.
('36) 23 AIR 1936 Sind 108 (112) : 29 Sind L R 382 (DB). (Words can be added only where it is necessary to do so to give effect to the intention of Legislature to be ascertained from careful consideration of entire statute.)
('32) 19 AIR 1932 Sind 107 (110).
('30) 17 AIR 1930 Sind 287 (293) : 25 Sind L R 142 (DB).
('29) 16 AIR 1929 Sind 235 (237) (DB).
('29) 16 AIR 1929 Sind 209 (209) (DB).
('25) 12 AIR 1925 Sind 49 (51) : 18 Sind L R 19 (FB). (Rule having the force of law — Courts should abide by it.)
('23) 10 AIR 1923 Sind 5 (9) : 16 Sind L R 112 (FB). (Words must be assumed to be used in their popular meaning unless they have acquired a technical meaning.)
('18) 5 AIR 1918 Sind 38 (39) : 12 Sind L R 20 (DB). (Do.)

3. ('35) 22 AIR 1935 Mad 442 (443, 444) : 58 Mad 787.
('27) 14 AIR 1927 Mad 998 (999).

4. ('43) 30 AIR 1943 All 281 (282). (Reading of section in light of another section—Reading should be *mutatis mutandis*.)
('07) 9 Bom L R 359 (361) (DB).

5. ('33) 20 AIR 1933 Mad 207 (210) : 56 Mad 177 (DB).
('42) 29 AIR 1942 Mad 558 (561) (DB).
('41) 28 AIR 1941 All 243 (249) : I L R (1941) All 471 (FB). (Literal interpretation, destroying object of enactment and leading to anomalies and absurdities—Conversion of 'and' into 'or' is permissible.)
('40) 27 AIR 1940 Lah 27 (28).
('38) 25 AIR 1938 All 456 (460) : ILR (1938) All 702 (FB).
('18) 5 AIR 1918 Mad 1187 (1192) : 40 Mad 989(FB).

6. ('42) 29 AIR 1942 Nag 5 (7) : I L R (1941) Nag 581 (DB).
('39) 26 AIR 1939 Nag 150 (154) : I L R (1939) Nag 185 (DB).
('10) 6 Ind Cas 609 (614) : 32 All 427 (FB).
('33) 20 AIR 1933 Mad 207 (210): 56 Mad 177 (DB). [See however (39) 26 AIR 1939 Nag 227 (229) : I L R (1939) Nag 503 (DB). (Grammatical and ordinary sense of words leading to absurdity or inconsistency — It can be modified so as to avoid these consequences.)
(1913) 1913 App Cas 107 (117) : 82 L J Q B 232: 107 L T 722, Vacher & Sons, Ltd. v. London Society of Compositors. (In construing statutes the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.)]

7. ('43) 30 AIR 1943 F. C. 13 (17) (FC).
('41) 28 AIR 1941 All 68 (70) : I L R (1941) All 127 (DB).

would be no reason to depart from clear and unequivocal language capable of only one meaning. In other words, the interpretation should not, where the language is clear, be influenced by extraneous considerations, such as the previous state of the law,[8] or hardship,[9] or expediency,[10] or the policy or the intention of the law,[11] or the reference to

('40) 27 AIR 1940 All 507 (510) : I L R (1940) All 771 (FB).
('40) 27 AIR 1940 Mad 127 (129) : I L R (1940) Mad 349 (FB).
('32) 19 AIR 1932 Mad 369 (371): 55 Mad 622 (FB).
8. ('86) 163 Ind Cas 331 (334) : 62 Cal 612 (DB).
('34) 21 AIR 1934 Lah 1013 (1014.)
('28) 15 AIR 1928 Bom 35 (37) : 52 Bom 88 (FB).
('11) 5 Ind Cas 884 (887) : 34 Mad 505 (FB).
('08) 35 Cal 34 (55) (FB).
('28) 15 AIR 1928 P C 16 (18) : 55 Cal 519 : 55 Ind App 96 (PC).
('32) 19 AIR 1932 Bom 168 (172): 56 Bom 101 (DB).
('28) 15 AIR 1928 P C 2 (4) : 7 Pat 221 : 55 Ind App 18 (PC).
('36) 23 AIR 1936 All 222 (237) : 58 All 413 (SB).
('36) 23 AIR 1936 Cal 593 (608) (DB).
('36) 23 AIR 1936 Cal 145 (146).
('29) 16 AIR 1929 Cal 497 (503) : 56 Cal 367.
('21) 8 AIR 1921 Cal 397 (399) : 48 Cal 556 (FB).
('35) 22 AIR 1935 Mad 628 (634).
('32) 19 AIR 1932 Mad 8 (13) : 55 Mad 151 (DB).
('36) 23 AIR 1936 Nag 55 (60) (DB).
('32) 19 AIR 1932 Oudh 308 (310) : 8 Luck 156.
('30) 17 AIR 1930 Oudh 148 (159): 5 Luck 552 (FB).
('36) 23 AIR 1936 Rang 105 (106) : 14 Rang 146 (DB).
('35) 22 AIR 1935 Sind 62 (64) : 28 Sind L R 366 (DB).
Also see Preamble Note 8.
9. ('42) 29 AIR 1942 Bom 61 (63, 64) (DB).
('38) 25 AIR 1938 P C 130 (133, 134) :ILR (1938) 2 Cal 295: 32 Sind L R 476:65 Ind App 158 (PC).
('22) 9 AIR 1922 Cal 454 (456) : 49 Cal 721 (SB).
(1902) 2 Ch D 585 (593), Jeremiah Ambler & Sons Ltd. v. Bradford Corporation.
('17) 4 AIR 1917 Cal 841 (843) : 43 Cal 95 (DB).
('29) 16 AIR 1929 Lah 593 (594): 10 Lah 596 (FB).
('32) 19 AIR 1932 All 494 (498) : 54 All 954 (FB).
('02) 24 All 582 (537, 538) (FB).
('90) 12 All 129 (137, 138) (FB).
('34) 21 AIR 1934 Cal 862 (863): 61 Cal 1047 (DB).
('33) 20 AIR 1933 Cal 124 (126) : 60 Cal 571 (DB).
('27) 14 AIR 1927 Cal 474 (476) (DB).
('19) 6 AIR 1919 Cal 819 (822) : 46 Cal 199 (DB).
('37) 24 AIR 1937 Lah 507 (510) : I L R (1937) Lah 171 (DB).
('13) 19 Ind Cas 239 (240) : 1913 Pun Re No. 79 (DB).
('37) 24 AIR 1937 Mad 667 (670) : I L R (1937) Mad 841 (DB).
('19) 6 AIR 1919 Mad 972 (979) : 40 Mad 1040 (FB).
('12) 13 Ind Cas 234 (236) : 5 Sind L R 190.
('11) 9 Ind Cas 720 (721) : 4 Sind L R 214 (DB).
10. ('30) 17 AIR 1930 All 263 (264).
11. ('43) 30 AIR 1943 Bom 169 (174) (FB). (Court should not refuse to give effect to the plain and natural meaning of words used on some supposed reluctance of the enacting authority to interfere with individual liberties and vested rights.)
('42) 29 AIR 1942 All 394 (396) (FB).
('42) 29 AIR 1942 Lah 19 (26) : I L R (1942) Lah 217 (FB).
('41) 28 AIR 1941 P C 109 (111, 112) (PC).
('41) 28 AIR 1941 F C 16 (24) : 1940 F C R 110 : I L R (1941) Kar (FC) 72 (FC).
('41) 28 AIR 1941 All 110 (112): I L R (1941) All 77 (FB).
('40) 27 AIR 1940 Sind 97 (100) : I L R (1940) Kar 287 (DB). (Intention.)
('40) 27 AIR 1940 Sind 33 (37) : I L R (1940) Kar 162 (DB).
('39) 26 AIR 1939 P C 47 (51) : 18 Pat 234: I L R (1939) Kar (PC) 123 : 66 Ind App 66 (PC).
('39) 26 AIR 1939 All 157 (157) : I L R (1938) All 1001 (DB).
('37) 24 AIR 1937 Lah 504 (506) : I L R (1937) Lah 143 : (DB). (Courts have to administer law as they find it — They are not concerned with policy of administration or effect of particular legislation on any section of society.)
('37) 24 AIR 1937 Lah 558 (559). (Courts cannot gather the supposed intention of the Legislature from the debates or even the statement of objects and reasons when the language is plain.)
('37) 24 AIR 1937 Oudh 312 (317) (FB).
('26) 13 AIR 1926 Nag 432 (432).
('82) 5 All 121 (135) (FB).
(1846) 4 Moo Ind App 179 (187) : 6 Moo P C 1 (PC).
('73) 1 Ind App 89 (104) (PC).
('24) 11 AIR 1924 Lah 513 (514) : 5 Lah 147 (FB). (Wisdom or policy.)
('32) 19 AIR 1932 Pat 293 (295) : 12 Pat 46 (SB). (Object of Legislature is immaterial unless it is stated to be guiding principle in interpretation.)
('36) 23 AIR 1936 All 222 (238) : 58 All 413 (DB).
('25) 12 AIR 1925 Bom 505 (508) (DB). (Wisdom or policy.)
('68) 5 Bom H C R (OC) 55 (58). (Intention.)
('34) 21 AIR 1934 Cal 537 (540) (DB). (Do.)
('67) 8 Suth W R 3 (12) : 11 Moo Ind App 75 (PC).
('38) 25 A I R 1938 Mad 263 (264). (Courts cannot avoid giving effect to plain meaning merely because the Legislature did not contemplate such a case when it drew up the Act in question.)
('35) 22 AIR 1935 Mad 628 (634). (Intention.)
('34) 21 A I R 1934 Mad 126 (129) : 57 Mad 362 (DB). (Do.)
('16) 3 A I R 1916 Mad 1 (2) : 38 Mad 419 (FB). (Policy.)
('33) 20 AIR 1933 Pesh 3 (5).
('33) 20 AIR 1933 Pesh 69 (70) (DB). (Intention.)
('28) 15 A I R 1928 Rang 326 (327) : 6 Rang 533. (Policy.)
('16) 3 A I R 1916 Sind 17 (19) : 9 Sind L R 126 (DB). (Intention.)
('12) 13 Ind Cas 244 (249) : 5 Sind L R 155 (DB).
('11) 12 Ind Cas 646 (646, 647) : 5 Sind L R 54 (DB). (Intention.)
[*See also* (1882) 22 Ch D 511 (517), Sutton v. Sutton. (You cannot cut down the words by reference to the general purview of the Act.)]

or the analogy of other enactments,[12] or the terms of the enactment being against general principles of law or equity,[13] or that giving effect to the words leads to absurdity or inconvenience or injustice[14] or that the law is different elsewhere.[15] Nor can the advantages

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12. ('41) 28 AIR 1941 Mad 713 (718) : ILR (1941) Mad 824 (DB). (English law not relevant in construing Indian Acts.)
('38) 25 A I R 1938 P C 152 (158) : ILR (1938) 2 Cal 381 : 32 Sind L R 502 : 65 Ind App 263 (PC).
('36) 163 Ind Cas 331 (334) : 62 Cal 612 (DB). (Considerations derived from English law upon which Indian statute may be based are irrelevant in construing latter Act.)
('99) 22 All 149 (159) : 27 Ind App 58 (PC).
('24) 11 AIR 1924 Cal 405 (408) : 51 Cal 62.
('34) 21 AIR 1934 Mad 75 (79) : 57 Mad 472 (DB). (Terms of Indian statute clear and unambiguous —Corresponding English law cannot be referred to.)
('32) 19 AIR 1932 PC 138 (140) : 59 Cal 1343 : 59 Ind App 206 (PC).
('31) 18 AIR 1931 Bom 50 (53):50 Bom 110 (DB).
('25) 12 AIR 1925 Cal 116 (138) (DB).
('24) 11 AIR 1924 Cal 881 (884) (DB).
('33) 20 AIR 1933 Mad 791 (793). (Statutes which are frequently repealed, re-enacted or amended should not be construed by reference to language of similar legislation elsewhere.)
('38) 25 AIR 1938 Nag 292 (294) : ILR (1940) Nag 190 (DB).
('35) 22 A I R 1935 Nag 90 (101). (Court should examine language of the Act itself, without any reference to English law.)
('33) 20 A I R 1933 Rang 275 (277). (Provisions of an Act of one Provincial Legislature form a very poor guide to the construction of the provisions of the Act of another Provincial Legislature).
[*See* ('87) 11 Bom 727 (732) (DB).]

13. ('23) 10 AIR 1923 Mad 241 (244): 45 Mad 537 (DB). (Equitable construction not allowed.)
('01) 11 Mad L Jour 91 (105) (DB). (International law contravened—Still, Act must be given effect to.)
('23) 10 A I R 1923 PC 211 (216) : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283 (PC). (Considerations of facility and practical importance are out of place.)
(1900) 23 All 152 (156, 157) : 27 Ind App 209 (PC).
('32) 19 A I R 1932 P C 165 (167) : 60 Cal 1 : 59 Ind App 283 (PC).
('31) 18 AIR 1931 All 380 (381) : 53 All 580 (DB).
('31) 18 AIR 1931 All 277 (291) : 53 All 334 (FB).
('19) 6 A I R 1919 Cal 989 (991) (DB).
('10) 8 Ind Cas 364 (365) : 34 Mad 543 (DB).
('35) 22 A I R 1935 Sind 145 (175) : 28 Sind L R 397.
('29) 16 AIR 1929 Sind 223 (226) : 24 Sind L R 167 (DB). (Enactment being against equity.)
('13) 19 Ind Cas 838 (840) : 6 Sind L R 250 (DB).
[*See also* ('23) 10 A I R 1923 Lah 529 (530). (Avoiding anomaly is no proper ground.)
('19) 6 A I R 1919 P C 192 (193) (PC). (Public policy, question of, not relevant.)]

14. ('43) 30 AIR 1943 PC 76 (83) (PC).
('42) 29 A I R 1942 All 19 (24) : ILR (1942) All 15 (FB). (Per Iqbal Ahmad, C. J.)
('42) 29 AIR 1942 All 153 (155) : ILR (1942) All 174 (FB).
('42) 29 A I R 1942 Lah 19 (23) : ILR (1942) Lah 217 (FB). (Per Din Mohammad, J., in Order of Reference to Full Bench.)
('41) 28 A I R 1941 Bom 327 (328) : I L R (1941) Bom 544 (DB).
('41) 28 AIR 1941 Mad 713 (718) : ILR (1941) Mad 824 (DB).
('38) 25 AIR 1938 PC 130 (133, 134) : 65 Ind App 158 : I L R (1938) 2 Cal 295 (PC).
('38) 25 AIR 1938 Pat 403 (408) : 17 Pat 632 (FB).
('03) 30 Cal 36 (76, 77) (DB).
('21) 8 AIR 1921 P C 240 (242) (PC).
('31) 18 AIR 1931 Cal 688 (690) : 58 Cal 510.
('32) 19 AIR 1932 All 494 (498) : 54 All 954 (FB).
('31) 18 AIR 1931 All 162 (173) : 53 All 239 (FB).
('29) 16 AIR 1929 All 850 (854).
('10) 32 All 427 (440) (FB).
('34) 21 AIR 1934 Bom 74 (78) : 58 Bom 152 (DB). (Argument *ad inconvenienti* has always to be received with great caution.)
('29) 16 AIR 1929 Cal 141 (143). (Enactment to be interpreted as per the plain meaning of its words uninfluenced by considerations of justice.)
('31) 18 AIR 1931 Lah 87 (92) : 12 Lah 129 (FB).
('10) 7 Ind Cas 754 (757) : 34 Mad 1 (DB).
('32) 19 AIR 1932 Nag 105 (106) : 28 Nag L R 98. (It is not the function of the Court to make the law reasonable.)
('37) 24 AIR 1937 Pat 131 (132). (Court cannot refuse to comply with the provisions of a statute on the ground that inconvenience would be caused by so doing.)
('29) 16 AIR 1929 Pat 731 (732) : 8 Pat 906 (DB). (Statute enacted for purposes of revenue should not be examined as to its reasonableness in all eventualities.)
('33) 20 AIR 1933 Pesh 3 (5).
('35) 22 AIR 1935 Sind 145 (175) : 28 Sind L R 397. (Courts are not concerned with desirability. utility or reasonableness of enactment.)
('28) 15 AIR 1928 Sind 1 (11) : 22 Sind L R 157 (FB).
(1892) 1 Q B 273 (290), Queen v. Judge of City London Court.
[But see ('28) 15 AIR 1928 Sind 149 (158) : 22 Sind L R 349 (FB). (Ordinary meaning to be modified to avoid absurdity, repugnance or inconsistency.)
('21) 8 AIR 1921 Cal 397 (399) : 48 Cal 556 (FB).]

15. ('41) 28 AIR 1941 Pat 70 (83) : 20 Pat 223 (DB). (Matter expressly governed by Indian statute — Court cannot embark on examination of English law.)
('39) 26 AIR 1939 P C 63 (65) (PC). (Law of Ceylon not recognizing certain doctrine of Roman Law at date of passing of Ordinance. Section of Ordinance should not be interpreted as introducing the Roman Law doctrine.)
('32) 19 AIR 1932 Mad 21 (21) (DB).
('37) 24 AIR 1937 Lah 507 (510) : I L R (1937) Lah 171 (DB). (Court cannot be influenced by English law on the subject.)

of liberal construction be balanced against the advantages of literal construction.[16]

The Court's function is, in fact, to say not what the Legislature meant or ought to have meant but what it has said that it meant.[17] It is always dangerous to paraphrase an enactment even if badly worded[18] and no modification of the language to meet the intention can be made[19] unless it is impossible to resist the conviction that the Legislature could not possibly have intended what its words signify and that the modifications thus to be made are mere corrections of careless language and really give the true meaning.[20] Where, however, the language of the enactment is not itself precise or is ambiguous or of doubtful import, or the question arises to what extent changes in the pre-existing law have been effected by any particular amendment, recourse may be had to extraneous considerations.[21] Thus, the provisions of the other statutes which

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[*See also* ('43) 30 AIR 1943 Pat 73 (75) : 21 Pat 794 (DB). (When the Court finds that the words of a section in an Act are quite plain, it should refuse to be guided by any extraneous consideration, such as the wording or effect of another section—Case under Bihar Act IX of 1938.)]

16. ('39) 26 AIR 1939 P C 47 (51, 52) : 18 Pat 234 : I L R (1939) Kar (PC) 123 : 66 Ind App 66 (PC). (Where the words themselves declare the intention of the Legislature, it is inadmissible to consider the advantages or disadvantages of applying the plain meaning.)
('29) 16 AIR 1929 Oudh 526 (526) : 5 Luck 440.
[*See also* ('23) 10 AIR 1923 Mad 114 (119) (DB). (A liberal construction can be adopted only where two constructions are possible but not otherwise.)]

17. ('40) 27 AIR 1940 Lah 27 (28).
('31) 18 AIR 1931 Lah 283 (287) : 12 Lah 345 (FB). (Court not to scan policy or wisdom of the enactment.)
(1879) 4 Q B D 245 (263), The Queen v. Bishop of Oxford.
(1846) 4 Moo Ind App 179 (187) : 6 Moo P C 1 (PC).
(1900) 27 Cal 724 (755) (DB).
('32) 19 AIR 1932 All 110 (111) : 54 All 1.
('30) 17 AIR 1930 P C 120 (126) (PC).
('35) 62 Cal 133 (142, 144) (DB).
('24) 11 AIR 1924 Cal 881 (882) (DB). (To read into a statute words which are not there is objectionable.)
('39) 26 AIR 1939 Lah 70 (72) : I L R (1939) Lah 283 (FB).
('36) 23 AIR 1936 Lah 298 (299) (DB).
('33) 20 AIR 1933 Lah 492 (493) : 14 Lah 389 (DB).

18. ('91) 18 Cal 23 (30) : 17 Ind App 122 (PC).

19. ('74) 21 Suth W R 318 (320) : 1 Ind App 167 (PC).

20. ('42) 29 AIR 1942 Pat 1 (27, 28) : 21 Pat 1 (FB).
('40) 27 AIR 1940 All 500 (503) : I L R (1940) All 681 (DB). (Nothing is to be added to or to be taken away from a statute unless there are adequate grounds to justify the inference that the Legislature intended something which it omitted to express.)
('33) 20) AIR 1933 Mad 207 (211) : 56 Mad 177 (DB). (Omission of a word in section—Carelessness on the part of Legislature is not to be presupposed.)
('24) 11 AIR 1924 Bom 412 (416) : 48 Bom 625. (Modification of language to meet intention of statute legal.)
('01) 28 Cal 744 (747) (DB).
(1894) 2 Q B 906 (911, 912), Wardens & Governors of Cholomeley School, Highgate v. Sewell.
('30) 17 AIR 1930 Cal 767 (769, 770) (DB).
[*See* ('37) 24 AIR 1937 Sind 129 (143) : 32 Sind L R 567 (FB).
('89) 11 All 490 (504) (FB). (Construction which would have led to anomalous results which Legislature could not have intended, avoided.)]

21. ('28) 15 AIR 1928 P C 16 (18) : 55 Ind App 96 : 55 Cal 519 (PC). (Substantial changes in law pleaded—Pre-existing law should be looked to.)
('20) 7 AIR 1920 P C 181 (185) (PC).
('24) 11 AIR 1924 All 328 (335, 336) : 46 All 489 (FB). (Comparison with old law is permitted in case of doubt.)
('99) 21 All 391 (396, 403) (FB).
('20) 7 AIR 1920 Bom 121 (127) : 44 Bom 986. (The Judge may infer that no change in the law is intended unless the contrary inference is necessary to be drawn owing to expediency or convenience.)
('04) 6 Bom L R 131 (209, 210) : 27 Bom 189 (DB). (Where language is doubtful, the practice of the Court and administrative convenience may be looked to.)
('36) 23 AIR 1936 Cal 593 (620) (DB).
('28) 15 AIR 1928 Cal 828 (830).
('25) 12 AIR 1925 Cal 34 (41) : 52 Cal 1 (DB).
('24) 11 AIR 1924 Cal 257 (272) (FB). (Historical survey is permissible only if there is a reasonable doubt.)
('22) 9 AIR 1922 Mad 491 (492) (DB).
('31) 18 AIR 1931 Oudh 22 (24) : 5 Luck 116 (DB).
('30) 17 AIR 1930 Sind 287 (293) : 25 Sind L R 142 (DB).
[*See* ('36) 23 AIR 1936 Cal 64 (65) (DB). (There are occasions when expressions used by Legislature in subsequent enactments or amendments of law can be used for the purpose of interpreting earliar enactment and in giving effect to intention of Legislature, express, or implied, so far as the particular provisions of the law are concerned.)
('30) 17 AIR 1930 P C 120 (121, 122) (PC).]

are in *pari materia*,[22] or the previous state of the law,[23] or the scope and intention of the Act,[24] may be considered in such cases. It is not, however, permissible to construe the provisions of one statute in the light of judicial decisions on another statute not in *pari materia* with the statute in question.[25] In cases of reasonable doubt as to the

22. ('42) 29 AIR 1942 Lah 102 (103) : ILR (1942) Lah 349 (FB).
('41) 28 AIR 1941 Bom 85 (89) : ILR (1941) Bom 191 (DB). (Similar words in two statutes with the same object—Same interpretation should be given.)
('41) 28 AIR 1941 Pat 465 (471, 472) : 20 Pat 280 (DB).
('40) 27 AIR 1940 Cal 406 (410).
('39) 26 AIR 1939 All 403 (405, 412) : ILR (1939) All 647 (FB). (The provisions of the Civil Procedure Code are subject to the provisions of the Limitation Act—Both Acts are general Acts and are *in pari materia*.)
('39) 26 AIR 1939 Bom 221 (224, 225): ILR (1939) Bom 271. (Where the Acts deal with a similar subject, e. g., transfer, although not for the identical purpose, it would not be improper to refer to the difference observed by the Legislature in the use of similar expressions.)
('25) 12 AIR 1925 Mad 248 (249) : 48 Mad 656 (DB). (Decisions on the words "assets realised in the course of execution" occurring in S.73, C.P.C., were referred to for elucidating the meaning of "assets realised in the course of the execution" occurring in S. 51 (1), Provincial Insolvency Act.)
('80) 4 Bom 515 (526) (FB).
('77) 2 Bom 84 (89) (DB). (Such statutes should be read together as if they were one law, and interpreted as consistently and harmoniously as their language will fairly admit.)
('99) 22 Mad 494 (502) (DB).
('25) 12 AIR 1925 Pat 1 (8) : 3 Pat 371 (FB). (For example the Limitation Act and the Civil Procedure Code)
('10) 7 Ind Cas 196 (198): 32 All 351 : 37 Ind App 124 (PC). (Oudh Laws Act and Oudh Land Revenue Act.)
('32) 19 AIR 1932 Oudh 210 (216): 7 Luck 601 (FB).
('31) 18 AIR 1931 Pat 241 (246) : 10 Pat 670 (FB). (Per Jwala Prasad, J.)
('31) 18 AIR 1931 Sind 44 (46) : 25 Sind L R 310. (Presidency Towns Insolvency Act — English rulings on Bankruptcy Act should be followed in interpreting the Act when provisions and wording are same.)
[*See* (1902) 1902 App Cas 474 (478) : 71 L J Ch 781, Hilder v. Dexter.]
[*See also* ('29) 16 AIR 1929 Cal 33 (36) : 56 Cal 280 (DB).]
23. ('41) 28 AIR 1941 Mad 449 (452) : ILR (1941) Mad 599 (FB). (Per Venkataramana Rao, J., in Order of Reference.)
('40) 27 A I R 1940 P C 105 (109) : I L R (1940) Mad 599: ILR (1940) Kar (PC) 194 : 67 Ind App 222 (PC).
('39) 26 A I R 1939 Bom 215 (218) : ILR (1939) Bom 320. (But a recent statute must be construed according to its own terms when these are brought into controversy and not according to its historical origin or otherwise.)
('38) 25 AIR 1938 Cal 97 (101) : ILR (1938) 1 Cal 607 (DB). (Previous state of the law can be considered provided the language is not strained unduly to bring it within the supposed intention of the Legislature.)
('28) 15 AIR 1928 All 682 (683) : 51 All 459.
('27) 14 AIR 1927 Bom 278 (300): 51 Bom 516(FB).
('28) 15 A I R 1928 P C 16 (18) : 55 Cal 519 ; 55 Ind App 96 (PC).
('24) 11 AIR 1924 Cal 257 (272) (FB).
('24) 11 AIR 1924 All 328 (335) : 46 All 489 (FB).
('36) 40 Cal W N 1034 (1035) (DB).
('21) 8 AIR 1921 Cal 397 (399) : 48 Cal 556 (FB).
('36) 23 AIR 1936 Rang 17 (19) : 13 Rang 385 (DB).
24. ('43) 30 AIR 1943 Lah 65 (68) (FB).
('43) 30 AIR 1943 Lah 148 (154) (FB).
('41) 28 A I R 1941 Mad 558 (559) (DB). (Scheme of Act.)
('40) 27 A I R 1940 Bom 172 (177) : I L R (1940) Bom 225 (DB).
('39) 26 AIR 1939 All 328 (331).
('39) 26 A I R 1939 Cal 435 (451): I L R (1939) 2 Cal 93 (FB).
('27) 14 AIR 1927 Bom 460 (461) : 51 Bom 809 (DB). (Argument of inconvenience can be used in case of doubtful meaning.)
(1891) 1 Ch 423 (430), Re Dick Lopes v. Hume-Dick.
('81) 3 Mad 271 (280, 287) (FB). (Proceedings of Legislature etc., may be considered.)
(1879) 4 Q B D 245 (255). The Queen v. The Bishop of Oxford.
('24) 11 AIR 1924 All 328 (336) : 46 All 489 (FB). (Where a Section of an Act is capable of two interpretations.)
('34) 21 A I R 1934 All 388 (389) : 56 All 781. (Language of statute leading to absurdity and hardship—Object and intention may be considered.)
('99) 21 All 391 (396, 397) (FB).
('34) 21 AIR 1934 Bom 213 (214) (DB). (Wording open to two possible constructions — That which appears to be real object of Act should be taken.)
('34) 21 A I R 1934 Cal 325 (326) : 60 Cal 1470. (The more literal construction of a statute ought not to prevail if it is opposed to the intentions of the Legislature as apparent from the statute and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effectuated.)
('84) 10 Cal 166 (184, 192, 193) (FB).
('18) 5 AIR 1918 Pat 398(407): 3 Pat L Jour 1 (FB).
('14) 1 A I R 1914 Low Bur 15 (19) : 7 Low Bur Rul 306 (DB).
('14) 25 Ind Cas 594 (595) (DB) (Oudh).
25. ('41) 28 AIR 1941 Pat 465 (471, 472) : 20 Pat 280 (DB).
('40) 27 A I R 1940 P C 105 (110) : ILR (1940) Mad 599 : 67 Ind App 222 : ILR (1940) Kar (PC) 194 (PC). (Decisions on other statutory provisions are not of material assistance in construing terms of a particular statute, except in so far as general principles of construction are laid down.)

expression contained in a penal provision, the benefit of doubt must be given to the subject.[26]

Subject to the board principles mentioned above, the following general rules of interpretation of statutes should also be borne in mind in construing the provisions of the Code :

(1). Where an Act, such as the Code, is divided into sections and rules, the sections must be taken to lay down *general principles* and the rules as providing the machinery or the means of *applying* them.[27]

(2). Where the language of an enactment is difficult and ambiguous, the Court may, for its assistance in its construction, refer to rules made under the provisions of the Act, especially where such rules are, by the statute authorising them, directed to be read as part of the Act.[28] But where rules are framed under a power given by the enactment such rules cannot govern or control the words of the enactment, [29] though in case of a conflict between such rules and a bye-law, the rule prevails over the bye-law.[30]

('36) 23 AIR 1936 Bom 49 (51) : 60 Bom 232 (DB). (Even though the actual phrase in the several Acts may be the same.)

('35) 22 A I R 1935 Lah 570 (586) : 16 Lah 829 (FB). (Reference to English Rulings bearing on English statutes.)

('24) 11 AIR 1924 Mad 217 (219) : 46 Mad 736 (DB).

('03) 30 Cal 36 (76) (DB). (Cases decided under the English statute cannot be referred to in construing Indian enactments unless the English statute and the Indian Act are *in pari materia*.)

('97) 25 Cal 346 (352) (DB).

('32) 19 AIR 1932 All 293 (307) : 54 All 646 (FB).

('36) 23 AIR 1936 All 239 (251) : 58 All 505 (DB). (Stamp Act and Registration Act are not *in pari materia*.)

('36) 23 AIR 1936 Cal 593 (617) (DB). (Applicability of decision to different statute — Authority is of little value.)

('36) 23 A I R 1936 Lah 301 (303). (It is always more or less dangerous, when discussing authorities on a particular provision of law to cite cases upon entirely different provisions of law by way of mere analogy.)

[*See* ('35) 22 AIR 1935 P C 143 (146) : 14 Pat 552 (PC). (Income-tax Act of one country not to be construed in the light of decisions on income-tax legislation of another country.)]

[*See also* ('36) 23 AIR 1936 Nag 278 (279) : ILR (1937) Nag 108. (Tendency on the part of the Subordinate Courts of the Central Provinces to take recourse to the decisions of the Allahabad High Court in matters specifically provided for by any local enactments of the C. P. deprecated.)]

26 ('35) 22 AIR 1935 Sind 102 (104) : 29 Sind L R 19 (DB).

('31) 18 AIR 1931 Lah 283 (285) : 12 Lah 345 (DB). (Reasonable construction should be put.)

('27) 14 AIR 1927 Lah 338 (340) : 8 Lah 320.

('32) 19 AIR 1932 Nag 174 (176) : 28 Nag L R 302.

('30) 17 AIR 1930 All 265 (267) : 52 All 568 (FB). (Principle is applicable to fiscal statutes as well.)

('39) 26 AIR 1939 Lah 81 (85) (FB).

('30) 1930 Mad W N 249 (280) (SB).

('36) 23 AIR 1936 Nag 55 (62) (DB).

[*See* ('31) 18 AIR 1931 Sind 146 (149) : 25 Sind L R 230 (DB).]

[*See also* ('31) 18 AIR 1931 Mad 177 (179) : 54 Mad 75 (DB).]

27. ('17) 4 AIR 1917 Cal 657 (658) : 43 Cal 148 (DB). (Sections create jurisdiction, while rules indicate the mode in which they are to be exercised.)

('14) 1 AIR 1914 Cal 163 (164) : 41 Cal 108 (DB). (Rules restrict sections.)

('17) 4 AIR 1917 Cal 44 (46) : 44 Cal 929 (FB). (View that rules restrict sections is dissented from at page 47 by Mookerjee, J.)

[*See* ('34) 21 AIR 1934 Sind 110 (111) (DB). (The rules framed under an Act shall be consistent with the Act—Courts cannot put a forced or unnatural construction upon the language of the Act in order to bring it into conformity with a rule.)]

28. ('37) 24 AIR 1937 Mad 481 (483) : ILR (1937) Mad 1023.

[*See also* ('31) 18 AIR 1931 Lah 320 (323, 331) (FB). (Per Addison, J.—Departmental instructions issued on the working of Act may be referred to—Per Tek Chand, J. *Contra*.)]

[But see ('26) 13 AIR 1926 Cal 856 (858) : 53 Cal 615 (DB). (Bengal Cess Manual cannot be looked at for construing Bengal Cess Act.)]

29. ('42) 29 AIR 1942 Sind 65 (71) : ILR (1942) Kar 127 (SB).

('36) 23 AIR 1936 Pesh 57 (59) (DB).

[*See also* ('39) 26 AIR 1939 Sind 293 (294) : ILR (1939) Kar 779 (DB). (Statutory rules framed under Act must be interpreted with the section under which they are made.)]

30. ('38) 25 AIR 1938 Lah 8 (10) (DB).

(3). Where two constructions are possible, a section should be construed so as to avoid *inconsistency* of meaning,[31] or the making of a word, clause or sentence either superfluous or insignificant.[32] It may be noted that a section which is clear in itself will be affected by previous or succeeding sections, only when those sections are capable of an interpretation which is repugnant to or startling in juxtaposition with the section in question.[33] In other words, the statute should be examined as a self-contained unit, the different sections being considered simultaneously in view of each other.[34] It

31. ('42) 29 AIR 1942 Lah 114 (117): ILR (1942) Lah 364 (FB). (That alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to regulate.)
('40) 27 AIR 1940 Nag 39 (42): ILR (1940) Nag 141 (FB).
('27) 14 AIR 1927 Mad 163 (164): 50 Mad 300 (DB).
('17) 4 AIR 1917 Mad 958 (960): 40 Mad 529 (SB).
('28) 15 AIR 1928 Lah 609 (613): 9 Lah 701 (FB).
('32) 19 AIR 1932 Bom 427 (428): 56 Bom 264 (DB).
('24) 11 AIR 1924 Bom 219 (225, 226): 48 Bom 214 (FB).
('33) 20 AIR 1933 Cal 443 (445): 60 Cal 1008 (DB).
('32) 19 AIR 1932 Cal 753 (757): 60 Cal 364 (DB).
('32) 19 AIR 1932 Cal 699 (700, 701): 60 Cal 233.
('09) 1 Ind Cas 447 (449): 36 Cal 115 (DB).
('31) 18 AIR 1931 Lah 353 (359): 12 Lah 604 (DB).
('31) 18 AIR 1931 Lah 476 (479): 12 Lah 635 (DB).
('32) 19 AIR 1932 Mad 336 (342): 55 Mad 671 (DB).
('29) 16 AIR 1929 Mad 43 (44): 52 Mad 337 (DB).
('14) 1 AIR 1914 Mad 258 (260): 37 Mad 119 (DB).
('33) 20 AIR 1933 Nag 193 (197): 29 Nag L R 278 (FB).
('16) 3 AIR 1916 Oudh 79 (81) (DB).
('13) 19 Ind Cas 347 (347, 348): 16 Oudh Cas 5.
('35) 22 AIR 1935 Pesh 69 (71) (DB).
('28) 15 AIR 1928 Sind 149 (159) (FB).
('27) 14 AIR 1927 Sind 173 (173) (DB).
[*See* ('35) 22 AIR 1935 Lah 492 (498): 16 Lah 280 (DB). (Words having more than one meaning —Context should be seen.)
(1879) 4 Q B D 245 (255), The Queen v. Bishop of Oxford. (Meaning of the words must be sought in the context of the particular enactment or in other sections of the statute.)]
[*See also* ('40) 27 AIR 1940 Mad 674 (675). (Where a section primarily intended to apply to suits is also to be applied to appeals, the ordinary canon of construction is that necessary changes in the wording should be made so as to make the section good sense.)
('18) 5 AIR 1918 Pat 103 (105): 3 Pat L Jour 581 (FB). (That construction is to be accepted which will avoid consequences which the Legislature did not intend to bring about.)]

32. ('42) 29 AIR 1942 Bom 191 (193): ILR (1942) Bom 287.
('40) 27 AIR 1940 Cal 47 (50): ILR (1940) 1 Cal 168 (DB).
('05) 28 Mad 466 (471) (FB).
('09) 4 Ind Cas 801 (802): 5 Nag L R 189.
('30) 17 AIR 1930 Sind 265 (279): 24 Sind L R 277 (FB).
('26) 13 AIR 1926 All 653 (656) (DB). (Construction of two contiguous sections.)
('25) 12 AIR 1925 Cal 1 (3): 52 Cal 275 (FB).
('18) 5 AIR 1918 Mad 921 (923) (DB).
('38) 25 AIR 1938 Nag 180 (181): ILR (1940) Nag 441. (Law must be interpreted in a way which will not render one of its provisions entirely nugatory.)
('34) 21 AIR 1934 Oudh 145 (148): 9 Luck 670 (DB).
('32) 19 AIR 1932 Oudh 63 (64, 65): 7 Luck 350 (DB).
('36) 23 AIR 1936 Sind 175 (178): 29 Sind L R 410.

33. ('32) 19 AIR 1932 Mad 391 (395): 55 Mad 903 (FB).
[*See* ('35) 22 AIR 1935 Oudh 427 (428, 429): 11 Luck 289 (DB). (Certain words not found in the statute held as "understood" in order to avoid inconsistency between two provisions of the section.)]

34. ('42) 29 AIR 1942 Pat 1 (27): 21 Pat 1 (FB).
('41) 28 AIR 1941 Sind 221 (222): I L R (1941) Kar 431 (DB).
('39) 26 AIR 1939 Pat 392 (396): 18 Pat 404 (DB). (Construction avoiding conflict to be adopted.)
('36) 23 AIR 1936 Lah 545 (545, 546): 17 Lah 531 (DB). (Restrictive legislation — Construction though strict must be harmonious.)
('29) 16 AIR 1929 All 421 (425): 51 All 780 (DB).
('27) 14 AIR 1927 Bom 474 (475): 51 Bom 771 (DB).
('27) 14 AIR 1927 Nag 132 (133): 23 Nag L R 20. (Inconsistency in the meaning to be avoided.)
('23) 10 AIR 1923 Mad 609 (614): 46 Mad 449 (FB). (Per Devadoss, J.)
('22) 9 AIR 1922 Bom 247 (252): 46 Bom 663 (FB).
('20) 7 AIR 1920 Pat 428 (429): 5 Pat L Jour 58.
(1900) 3 Oudh Cas 325 (327) (DB).
(1886) 11 App Cas 286 (291): 55 L J Q B 417, Turquand v. Board of Trade.
('14) 1 AIR 1914 Low Bur 15 (19): 7 Low Bur Rul 306 (DB).
('32) 19 AIR 1932 Cal 699 (700): 60 Cal 233.
('32) 19 AIR 1932 P C 168 (171): 56 Bom 313: 59 Ind App 258 (P C). (Terms of a composite enactment not to be considered separately.)
('20) 7 AIR 1920 P C 181 (184, 185) (PC).
('31) 18 AIR 1931 All 49 (50): 53 All 233. (Effect must be given to every part of the statute.)
('32) 19 AIR 1932 Bom 427 (428): 56 Bom 264 (DB.)
('32) 19 AIR 1932 Bom 210 (211).

follows from this that where two remedies or two procedures are provided for, one must not be taken as operating in derogation of the other.[35]

(4). Everything is to be taken as permissible unless there is some prohibition against it.[36] In the case of consolidating statutes, like the Civil Procedure Code, the *statute itself* must be consulted in order to find the authority or the prohibition.[37]

(5). Where the statute is not clear, reasonable construction should be adopted.[38]

('09) 1 Ind Cas 280 (281) (Bom).
('36) 23 AIR 1936 Cal 506 (512) : I L R (1937) 1 Cal 25 (F B). (Construction, though not strictly grammatical, must be consistent with the Act in all its parts.)
('33) 20 AIR 1933 Cal 283 (283, 284):60 Cal 289 (DB). (Scope and significance of any passage in an Act may be found out also on comparison of the same with other parts of the same statute.)
('16) 3 AIR 1916 Cal 136 (143) : 43 Cal 790 (DB).
('96) 23 Cal 738 (751, 752) (FB). (Bank of England v. Vagliano, L R (1891) App Cas 107 relied on.)
('37) 24 AIR 1937 Lah 912 (912).
('14) 1 AIR 1914 Lah 511 (512) : 1915 Pun Re No. 20. (Construction is to be made of all the parts together and not of one part only by itself.)
('33) 20 AIR 1933 Nag 193 (197, 199, 200) : 29 Nag L R 278 (F B).
('11) 12 Ind Cas 364 (368) : 7 Nag L R 136.
('11) 12 Ind Cas 357 (358) : 7 Nag L R 130.
('35) 22 AIR 1935 Oudh 313 (315) : 11 Luck 116 (DB). (Various provisions should be construed so as to make them consistent.)
('35) 22 AIR 1935 Pat 492 (494). (Construction should be harmonious.)
('35) 22 AIR 1935 Pat 342 (345):14 Pat 785 (SB). (Other parts of Act throwing light on intention of Legislature can be considered when interpreting any provision.)
('38) 25 AIR 1938 Sind 1 (5) : 32 Sind L R 185 (F B). (It is a well-recognised canon of construction that the more literal construction ought not to prevail if it is opposed to the intention of the Legislature as apparent from the statute and if the words are sufficiently flexible to admit of some other construction by which the intention will be better appreciated.)
[*See* ('35) 22 AIR 1935 All 946 (952):58 All 261 (FB). (Per Thom, J.)
('35) 22 AIR 1935 Bom 402 (403) : 60 Bom 55 (FB). (It may sometimes be necessary to do violence to the language used in a particular part of the statute in order to give effect to the enactment as a whole.)
('36) 23 AIR 1936 Cal 593 (619) (DB).
('23) 10 AIR 1923 Rang 71 (73):11 Low Bur Rul 335 (DB).]
[*See also* ('36) 23 AIR 1936 Nag 55 (58) (DB). (The best and the least dangerous method of interpreting any enactment is to take the words used in it as a guide to the discovery of the intention of the Legislature.)]

35. ('40) 27 AIR 1940 Nag 101 (106). (Right of appeal expressly conferred by S. 104, C. P. C., followed by S. 105 which confers additional rights in certain cases—*Held* S. 105 which is an enabling section cannot be read as taking away rights already conferred by S. 104.)
('86) 8 All 354 (361) (FB).
('76) 2 Cal 114 (116) : 25 Suth W R 304 (305).
('22) 9 AIR 1922 P C 17 (19) : 44 All 185:49 Ind App 60 (PC).
('33) 20 AIR 1933 All 230 (230) : 55 All 241 (DB).
('27) 14 AIR 1927 All 346 (348).
('27) 14 AIR 1927 Mad 602 (602,603):50 Mad 845.
('26) 13 AIR 1926 Nag 491 (492). (Evidence Act, S. 115, cannot override substantive law such as Contract Act, S. 11.)

36. ('89) 11 All 267 (287) (FB). (Per Mahmood, J.)
('25) 12 AIR 1925 Mad 42 (44) : 48 Mad 494.
('82) 5 All 163 (172) (FB). (Per Mahmood, J.; Followed in 37 Cal 399.)
('36) 23 AIR 1936 Nag 55 (61) (DB). (Law is always subject to evasion in the sense that there is no obligation not to do what the Legislature has not really prohibited and it is not evading an Act to keep outside it.)
[*See* ('35) 22 AIR 1935 Mad 755 (761). (The general principle that where an Act confers jurisdiction, it impliedly also grants the power of doing all such acts or employing such means as are essentially necessary to its execution cannot override the more particular provisions of the Act which define the powers.)]

37. ('89) 11 All 267 (288) (FB).

38. ('42) 29 AIR 1942 Oudh 39 (44, 45):17 Luck 52 (DB). (Law not clear — Court can rely on maxim "*argumentum ab inconvenienti plurium valet in lege*".)
('41) 28 AIR 1941 F C 16 (31) : I L R (1941) Kar (FC) 72 : 1940 F C R 110 (FC).
('38) 25 AIR 1938 Bom 427 (429) (DB).
('38) 25 AIR 1938 Cal 51 (66) : I L R (1938) 1 Cal 290 (DB).
('38) 25 AIR 1938 Lah 698 (700) : I L R (1938) Lah 417 (DB). (Thus, in O. 3, R. 4, sub-r. (1) "act" was held to include "apply".)
('35) 22 AIR 1935 Rang 181 (183) : 13 Rang 130 (DB). (Words of a statute should be given a sensible meaning if possible.)
('27) 14 AIR 1927 Mad 826 (829) (DB). (A Court is entitled in case of doubt to reject an alternative which must lead to undesirable, if not anomalous, results.)
('22) 9 AIR 1922 Bom 257 (260):46 Bom 470 (DB).
('07) 9 Bom L R 363 (366) (DB). (So as not to create a *casus omissus* by interpretation save in some case of strong necessity.)
('98) 25 Cal 571 (578) (DB). (In interpreting a statute, to meet the obvious intention of the Legislature, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence.)

In the case of ambiguity that meaning should be preferred which is more in accord with justice and convenience.[39] A construction which leads to an absurd result,[40] or unjust consequences entailing hardship,[41] or produces injustice,[42] or defeats the object of the Act itself[43] should, if possible, be avoided.

('21) 8 AIR 1921 P C 240 (242) (PC).
('32) 19 AIR 1932 Cal 236 (240) : 59 Cal 40 (DB).
('31) 18 AIR 1931 P C 24 (26) (PC).
('36) 23 AIR 1936 All 576 (578): 58 All 1064 (FB). (Two interpretations possible—Interpretation most consistent with reason, commonsense and convenience prevails.)
('29) 16 AIR 1929 All 750 (750) : 51 All 996.
('28) 15 AIR 1928 All 207 (210) : 50 All 625 (FB).
('27) 14 AIR 1927 All 50 (51) : 49 All 240 (DB).
('88) 10 All 223 (234) (FB).
('19) 6 AIR 1919 Cal 551 (569) : 45 Cal 343 (FB). (Intention of the statute must be gathered from the language used in the particular statute.)
('81) 7 Cal 127 (130, 132). (But where the terms of an Act are clear and plain, it is the duty of the Court to expound it as it stands.)
('39) 26 AIR 1939 Lah 81 (85) (FB).
('36) 23 AIR 1936 Pat 393 (394): 15 Pat 394 (DB).
('26) 13 AIR 1926 Sind 1 (3) : 20 Sind L R 34 (FB). (The law does not favour legal and strained intendments, when over-minute precision may confound legal certainty.)
[*See* ('26) 13 AIR 1926 Nag 253 (254). (Meaning is to be sought from such conjectures as are drawn from the words alone or something contained in them.)]
[*See also* (1863) 8 L T 44 (46) : 142 R R 139 : 11 W R (Eng) 739 : 33 L J Ch 411, Biddulph v. St. George's Vestry. (Construction leading to abuse of powers not to be placed.)]

39. ('38) 25 AIR 1938 P C 130 (133) : I L R (1938) 2 Cal 295 : 65 Ind App 158 : 32 Sind L R 476 (PC).
[*See* (1886) 31 Ch D 402 (407) : 55 L J Ch 294 : 54 L T 100 : 34 W R (Eng) 332, Reid v. Reid.]

40. ('43) 30 AIR 1943 Lah 148 (154) (FB).
('42) 29 AIR 1942 Bom 191 (193) : I L R (1942) Bom 287.
('42) 29 AIR 1942 Lah 114 (117) : I L R (1942) Lah 364 (FB). (Two constructions possible — That alternative is to be rejected which will introduce absurdity, uncertainty, friction or confusion in the working of the system.)
('42) 29 AIR 1942 Lah 257 (259) (SB).
('41) 28 AIR 1941 Cal 540 (541) : I L R (1941) 2 Cal 73. (Narrower construction possible and not entailing those results—Broad construction should not be given.)
('40) 27 AIR 1940 Mad 62 (65). (Language of statute in its grammatical meaning leading to absurdity and injustice — Construction modifying meaning of words and sentence may be put upon it.)
('28) 15 AIR 1928 Lah 325 (329): 9 Lah 649 (DB). (Anomaly.)
('27) 14 AIR 1927 Cal 415 (416) (DB).
('27) 14 AIR 1927 Mad 166 (169): 50 Mad 289 (DB).
('27) 14 AIR 1927 Nag 68 (70) : 23 Nag L R 9.
(1883) 22 Ch D 511 (518) : 52 L J Ch 333 : 48 L T 95 : 31 W R (Eng) 369, Sutton v. Sutton.
('28) 15 AIR 1928 Mad 571 (577) (DB).
('32) 19 AIR 1932 Cal 699 (700, 701) : 60 Cal 233 (DB).
('21) 8 AIR 1921 Cal 397 (399) : 48 Cal 556 (FB).
('31) 18 AIR 1931 Lah 353 (359): 12 Lah 604 (DB).
('28) 15 AIR 1928 Mad 746 (755) (DB).
('38) 25 AIR 1938 Nag 91 (92).
('33) 20 AIR 1933 Sind 151 (154) : 27 Sind L R 121 (FB).
('28) 15 AIR 1928 Sind 149 (158) : 22 Sind L R 349 (FB).
('26) 13 AIR 1926 Sind 81 (83 : 20 Sind L R 238. (Two constructions possible — One leading to absurdity to be rejected.)

41. ('42) 29 AIR 1942 Lah 257 (259) (SB).
('42) 29 AIR 1942 Pat 1 (14) : 21 Pat 1 (FB).
('40) 27 AIR 1940 Mad 62 (65).
('30) 17 AIR 1930 Mad 200 (205):52 Mad 866 (DB).
('22) 9 AIR 1922 Bom 257(260): 46 Bom 470(DB).
('22) 9 AIR 1922 Nag 89 (93, 94) (FB).
('02) 27 Bom 23 (30) (DB). (Argument drawn from inconvenience is forcible in law.)
('76) 1 All 311 (315) (FB).
('31) 18 AIR 1931 Pat 285 (291): 11 Pat 112 (DB).
('34) 21 AIR 1934 All 626 (639) (FB).

42. ('43) 30 AIR 1943 Lah 148 (154) (FB).
('42) 29 AIR 1942 Cal 476 (477) : I L R (1942) 2 Cal 389 (DB).
('42) 29 AIR 1942 Lah 257 (259) (SB).
('41) 28 AIR 1941 Bom 327 (328) : I L R (1941) Bom 544 (DB).
('41) 28 AIR 1941 Cal 353 (356) (DB). (Courts should act upon the view that injustice could not have been intended, unless the intention had been manifested in express words.)
('41) 28 AIR 1941 Cal 432 (433). (Do.)
('40) 27 AIR 1940 Mad 62 (65).
('38) 25 AIR 1938 Cal 51 (66) : I L R (1938) 1 Cal 290 (DB).
('38) 1938 Nag L Jour 141 (143). (Two constructions possible — One leading to obvious injustice should be avoided.)
('27) 14 AIR 1927 Mad 166 (169) : 50 Mad 289 (DB).
('22) 9 AIR 1922 Bom 257 (260) : 46 Bom 470(DB).
('26) 13 AIR 1926 All 617 (622) : 49 All 8 (FB).
('38) 25 AIR 1938 Bom 484 (488) : I L R (1939) Bom 53 (FB).
('33) 20 AIR 1933 Bom 358 (361): 57 Bom 616(DB).
('31) 18 AIR 1931 Lah 353 (359) : 12 Lah 604 (DB).
('35) 22 AIR 1935 Nag 168 (170): 31 Nag L R 386.

43. ('43) 30 AIR 1943 Lah 65 (68, 78) (FB). (A beneficial construction should be placed when this appears to be consonant with its object.)
('42) 29 AIR 1942 Lah 257 (259) (SB).
('41) 28 AIR 1941 All 110 (112) : I L R (1941) All 77 (FB).
('41) 28 AIR 1941 All 243 (249, 275): I L R (1941) All 471 (FB). (Court must primarily adhere to

(6). Words operating in derogation of the rights of the subject[44] or imposing

literal interpretation of words used— Such adherence destroying object of enactment and leading to anomalies and absurdities—Conversion of 'and' into 'or' is permissible.)
('40) 27 AIR 1940 Cal 406 (411). (This principle applies with equal force to interpretation of statutory rules.)
('39) 26 AIR 1939 Cal 435 (451) : I L R (1939) 2 Cal 93 (FB). (Conflict between two parts of statute — Part agreeing with governing intention of Legislature should be given effect to—Governing intention should be taken from sections and not rules made thereunder.)
('37) 24 AIR 1937 Bom 275 (278) : I L R (1937) Bom 655 (FB).
('36) 23 AIR 1936 Sind 138 (139): 30 Sind L R 88.
('28) 15 AIR 1928 Bom 104 (105).
('25) 12 AIR 1925 Mad 248 (249):48 Mad656(DB).
('18) 5 AIR 1918 Pat 103 (105) : 3 Pat L Jour 581 (FB). (Defence of India Act.)
(1884) 12 Q B D 224 (229) : 53 L J Q B 165 : 50 L T 312 : 32 W R (Eng) 452, Hough v. Windus. (Where the words admit of it, that interpretation which makes them more officious with respect to the clear and ascertained policy of the statute, or purpose of the instrument is to be preferred to that which makes them less so.)
(1860) 2 L T (NS) 748 (753, 755) : 8 H L C 594 : 31 L J Ch 9 : 125 R R 286, Jeffries v. Alexander. (An Act must be so construed that an attempt to evade it would be defeated.)
('31) 18 AIR 1931 All 727 (732) : 54 All 154 (FB).
('11) 10 Ind Cas 787 (789) (Low Bur).
('26) 13 AIR 1926 All 617 (622) : 49 All 8 (FB).
('26) 13 AIR 1926 Cal 927 (934) : 53 Cal 492(DB).
('12) 17 Ind Cas 370 (370) : 8 Nag L R 147.
('32) 19 AIR 1932 Oudh 210 (211) : 7 Luck 601 (FB).
('09) 4 Ind Cas 145 (154) : 12 Oudh Cas 323 (DB).
('33) 20 AIR 1913 Rang 68 (69) : 11 Rang 182 (DB).
('33) 20 AIR 1933 Sind 151 (154) : 27 Sind L R 121 (FB). (Words nullifying a statute can be ignored.)
('25) 12 AIR 1925 Sind 90 (93) : 17 Sind L R 273.
(1881) 6 App Cas 114 (122), Caledonian Railway Co. v. N. B. Railway Co.

44. (39) 26 AIR 1939 Bom 305 (307) : I L R (1939) Bom 586 (FB).
('39) 26 AIR 1939 Cal 614 (615). (Purporting to limit the rights of the subject.)
('37) 24 AIR 1937 Bom 266 (271) (DB).
('36) 23 AIR 1936 Sind 114 (118): 30 Sind L R 59. (Provision restricting access to civil Court should be strictly construed.)
('27) 14 AIR 1927 Lah 276 (277). (Penal statutes must be strictly construed.)
('27) 14 AIR 1927 Mad 166 (169): 50Mad239(DB).
('27) 14 AIR 1927 Mad 1035 (1036) : 51 Mad 76 (DB).
('22) 9 AIR 1922 Bom 257 (259) : 46 Bom 470 (DB).
('22) 9 AIR 1922 Cal 194 (196) : 49 Cal 1014 (DB).
('20) 7 AIR 1920 Low Bur 132 (133).
(1917) 1917 App Cas 260 (274): 86 L J K B 1119 : 116 L T 417, Rex v. Halliday.
('16) 3 AIR 1916 All 104 (105) : 38 All 339 (DB).
('90) 14 Bom 180 (184) (DB).
(1882) 7 App Cas 178 (188) : 51 L J P C 43 : 46 L T 351, Western Counties Rly. Co. v. Windsor & Annapolis Rly. Co.
('28) 15 AIR 1928 Rang 87 (94) : 5 Rang 722.
('86) 8 All 354 (361) (FB).
('34) 21 AIR 1934 P C 36 (40) (PC).
('28) 15 AIR 1928 P C 287 (290) (PC). (Person aggrieved is entitled to compensation unless expressly deprived.)
('21) 8 AIR 1921 P C 224 (227) (PC). (Intention to alienate private rights without compensation should not be imputed to the Legislature, unless expressed in clear terms.)
('27) 14 AIR 1927 All 599 (600) (DB). (Penal statute must be strictly construed.)
('13) 35 All 24 (26) (DB).
('31) 18 AIR 1931 Bom 505 (506) : 55 Bom 461 (DB).
('25) 12 AIR 1925 Bom 458 (462).
('90) 14 Bom 331 (352) (DB). (Law must not be strained against individuals)
('33) 20 AIR 1933 Cal 280 (282) : 60 Cal 742 (DB).
('31) 18 AIR 1931 Cal 642 (643) : 59 Cal 19.
('29) 16 AIR 1929 Cal 133 (134).
('25) 12 AIR 1925 Cal 116 (139) (DB).
('87) 14 Cal 67 (87) (FB).
('32) 19 AIR 1932 Lah 597 (599).
('31) 18 AIR 1931 Lah 476 (479) : 12 Lah 635 (DB). (In case of doubts or ambiguity, the construction must be in favour of the personal liberty of the subject.)
('31) 18 AIR 1931 Lah 79 (80) : 12 Lah 275 (DB).
('30) 17 AIR 1930 Lah 1034 (1036) : 12 Lah 367 (DB). (Provisions conferring privilege on certain classes of debtors and trenching on ordinary rights of a creditor to realize his money from property of debtor must be strictly construed.)
('24) 11 AIR 1924 Lah 418 (419) (DB).
('16) 3 AIR 1916 Lah 177 (179) : 1916 Pun Re No. 48 (DB). (Provisions in bar of suit such as Section 11.)
('32) 1932 Mad W N 922 (923).
('31) 18 AIR 1931 Mad 729 (736) (DB).
('25) 12 AIR 1925 Nag 190 (192) (DB). (Statutes dealing with vested rights should be strictly construed.)
('30) 17 AIR 1930 Oudh 434 (439) (DB).
('32) 19 AIR 1932 Pat 281 (284). (Penal section must be strictly construed.)
('33) 20 AIR 1933 Rang 68 (69): 11 Rang 182 (DB).
('27) 14 AIR 1927 Rang 306 (310) : 5 Rang 483.
('20) 7 AIR 1920 Low Bur 79 (81) : 10 Low Bur Rul 203 (DB).
('20) 7 AIR 1920 Upp Bur 1 (1) : 3 Upp Bur Rul 212.
(18) 5 AIR 1918 Upp Bur 3 (3) : 3 Upp Bur Rul 79.
[*See also* ('43) 30 AIR 1943 Cal 285 (318) (SB). (Ordinance taking rights from subject — Courts should see that all neceesary conditions are complied with (*Per* Sen J.).)
('32) 19 AIR 1932 Mad 724 (727):56 Mad 134 (DB).]

pecuniary burden,[45] should be strictly construed.

(7). A restricted construction ought not to be placed upon the language of a remedial Act.[46]

(8). General words must be given the broadest possible effect unless there is some specific reason to the contrary.[47] But general words and phrases, however comprehensive and wide they may be in their literal sense, must be usually construed as limited to the actual objects of the Act and not as altering the law beyond.[48] Specific words of importance like "mortgage" should be given their appropriate meaning.[49]

('34) 21 AIR 1934 Sind 46 (51): 28 Sind L R 174 (DB). (It is a well settled rule of construction that the Court will not hold that a penalty has been incurred unless the language of the clause which is said to impose it, is so clear that the case must necessarily be within it. And where a proviso to a section is open to a double construction, one which inflicts a penalty and the other which does not, the latter construction should prevail.)
('32) 19 AIR 1932 Mad 593 (599) : 56 Mad 40 (DB).
('86) 12 Cal 279 (284, 285) (DB).]

45. ('41) 28 AIR 1941 Rang 212 (219) (SB).
('39) 26 AIR 1939 Bom 471 (476) (DB).
('38) 25 AIR 1938 Cal 785 (788) : I L R (1939) 1 Cal 152. (A fiscal statute.)
('38) 25 AIR 1938 Mad 498 (499) : I L R (1938) Mad 981 (DB). (Fiscal statutes — Two constructions of fiscal enactment equally possible and reasonable — Construction more favourable to subject must be enforced.)
('38) 25 AIR 1938 Rang 141 (143): 1938 Rang L R 72. (Case under Court-fees Act.)
('37) 24 AIR 1937 Cal 551 (552) : I L R (1938) 1 Cal 35 (DB). (Taxing statute must be construed strictly.)
('37) 24 AIR 1937 Mad 604 (605) : I L R (1938) Mad 63.
('37) 24 AIR 1937 Nag 11 (12).
('37) 24 AIR 1937 Oudh 416 (419) (DB). (Technicalities in a fiscal statute must be strained in favour of the subject, if they are to be strained at all, and not against him.)
('37) 24 AIR 1937 Pat 550 (553): 16 Pat 600 (SB).
('37) 24 AIR 1937 Sind 93 (93, 94) (DB). (Case relating to Court-fees Act.)
('36) 23 AIR 1936 Cal 813 (813) (DB). (A taxation statute like the Cess Act must be strictly interpreted. Equitable considerations in favour of person entitled to cess not allowed to override definite provisions of the Act.)
('36) 23 AIR 1936 Cal 814 (815) : I L R (1937) 1 Cal 461 (DB). (Fiscal statute — It should be construed strictly and in favour of and beneficial to subject)
('36) 23 AIR 1936 Lah 990 (990) (DB).
('36) 23 AIR 1936 Oudh 180 (181) : 11 Luck 704 (DB). (Court-fees Act — No court-fee payable in respect of memorandum of objections filed under O. 41. R. 26, C. P Code.)
('35) 22 AIR 1935 Bom 167 (168) (DB).
('35) 22 AIR 1935 Bom 256 (257) : 59 Bom 469 (SB).
('35) 22 AIR 1935 Bom 423 (425) : 59 Bom 719 (DB). (The Court ought not to strain the language of the Act against the tax-payer.)
('35) 22 AIR 1935 Cal 298 (301) : 62 Cal 886. (Fiscal enactment — Benefit of doubt should be given to those who might be prejudiced by exercise of powers.)
('35) 22 AIR 1935 Lah 570 (576, 578) : 16 Lah 829 (FB). (Per Jai Lal and Skemp, JJ., in judgment of Division Bench.)
('30) 17 AIR 1930 Mad 200 (205) : 52 Mad 866 (DB).
('28) 15 AIR 1928 Mad 569 (570) : 51 Mad 301 (DB).
('27) 14 AIR 1927 Bom 483 (484, 487) : 51 Bom 896 (DB).
(1902) 1 K B 388 (396, 399, 400) : 71 L J K B 289 : 85 L T 714 : 50 W R (Eng) 210, Attorney-General v. Selbourne.
('05) 29 Bom 203 (207) (DB). (Exemptions in the Stamp Act must be construed strictly in favour of the State.)
('71) 16 Suth W R 208 (209) (SB).

46. ('28) 15 AIR 1928 Oudh 396 (400) : 4 Luck 1 (FB). (Per Srivastava, J., on the construction of the Usurious Loans Act.)
(1906) 1906 App Cas 461 (467) : 75 L J Ch 705 : 95 L T 202, Samuel v. Newbold. (Lord Loreburn, L. C., on the construction of Money-Lenders Act, 1900 (63 & 64 Vict., Ch. 51).)

47. (1877) 2 C P D 469 (486): 36 L T 812: 25 W R (Eng) 701 : 46 L J C P 639, Twycross v. Grant. (General language of Statute passed to prevent fraud ought not to be cut down so as to leave a large portion of such fraud entirely undefeated.)
('86) 8 All 354 (360, 361) (FB).
('68) 9 Suth W R 402 (406).
('11) 35 Bom 412 (417). (Definition clauses—When to be used.)
('16) 3 AIR 1916 Pat 133 (134) : 2 Pat L Jour 91 (FB) (Do.)

48. ('41) 28 AIR 1941 Pat 465 (470) : 20 Pat 280 (DB). (Words whenever possible should be given natural meaning — Restricted meaning must be given where it is clearly intended.)
('39) 26 AIR 1939 Lah 388 (392) : I L R (1940) Lah 23 (FB). (Word capable of various shades of meaning—Particular meaning must be arrived at by reference to scheme of Act or of Section as a whole.)
('22) 9 AIR 1922 Bom 416 (419, 420): 47 Bom 18.
('29) 16 AIR 1929 Nag 246 (249) : 25 Nag L R 19.

49. ('29) 16 AIR 1929 All 174 (176).

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(9). A *general* provision must yield to a *special* provision providing for particular cases.[50] If the Legislature makes a special Act dealing with a particular case and later makes a general Act which by its terms would include the subject of the special Act and is in conflict with the special Act, nevertheless, unless it is clear that in making the general Act the Legislature intended to abrogate the special Act, the provisions of the general Act do not override the special.[51] As a matter of fact a repeal of the special Act by the general Act by implication will not be admitted if the two can be read together.[52] The same rule applies to general and special expressions used in different clauses of a section[53] as also to two special Acts.[54] But such special provision must be applied only to those cases to which it is confined by the Legislature.[55] Thus, a special Act of the Legislature as the Sale of Goods Act cannot possibly, except in the branch of the law to which it relates, overrule a statute of the nature of the General Clauses Act.[56] Again, when on the same subject two incompatible provisions are in force, one general and the other particular, the particular provision must be taken to be an exception to the general one.[57]

(10). Where there are general words following particular and specific words in a section, the general words must be confined to things of the same kind *(ejusdem generis)* as those specified.[58] The applicability of this rule, however, will not arise if the class of

50. ('21) 8 AIR 1921 Bom 374 (374, 375) : 45 Bom 672 (DB).
('42) 29 AIR 1942 Cal 607 (609).
('42) 29 AIR 1942 Oudh 358 (359) (DB).
('40) 27 AIR 1940 Bom 20 (22):ILR (1939) Bom 721.
('30) 17 AIR 1930 Bom 490 (492):55 Bom 59 (FB).
('22) 9 AIR 1922 Bom 247 (251):46 Bom 663 (FB).
('32) 19 AIR 1932 Oudh 163 (164) (DB). (Special Act prevails over general Act.)
('25) 12 AIR 1925 All 230 (232) : 47 All 268.
('24) 11 AIR 1924 Cal 668 (676) : 51 Cal 504.
('26) 13 AIR 1926 Lah 88 (89) : 7 Lah 84 (DB).
('32) 19 AIR 1932 Mad 605 (608) : 56 Mad 212.
('22) 9 AIR 1922 Mad 143 (144) : 45 Mad 31.
('16) 3 AIR 1916 Mad 438 (439) : 39 Mad 576.
('36) 23 AIR 1936 Nag 180 (180):ILR (1936) Nag 5.
('32) 19 AIR 1932 Oudh 193 (195):8 Luck 1 (FB).

51. ('41) 28 AIR 1941 Lah 361 (367):ILR (1942) Lah 199 (DB).
('26) 13 AIR 1926 Cal 819 (821):53 Cal 524 (DB).
('02) 25 Mad 457 (484) (DB).
(1898) 1898 App Cas 748 (754) : 67 L J P C 115, Barker v. Edger.
(1882) 9 Q B D 744 (753):51 L J Q B 529, Brown v. Great Western Rly.
(1878) 3 App Cas 944 (950):48 L J Ex 186, Garnet v. Bradley.
(1877) 4 Ch D 395 (410) : 46 L J Ch 165, Taylor v. Corporation of Oldham.
('31) 18 AIR 1931 Mad 152 (156) : 54 Mad 364.
('32) 19 AIR 1932 P C 252 (254) (PC).
('29) 16 AIR 1929 Nag 17 (21):24 Nag L R 158 (FB).
[See however ('37) 24 AIR 1937 Pat 1 (2) : 15 Pat 792 (DB). (Earlier treaty exempting a Raja from taxation — Later general provisions of income-tax without any specified exemption of any person — Two provisions inconsistent — *Held* general provisions of Income-tax will prevail.)]

52. ('42) 29 AIR 1942 Cal 607 (609).
('40) 27 AIR 1940 Lah 129 (131):ILR (1940) Lah 242 (FB). (But if the general statute is so worded that the repeal flows from it as a necessary consequence, Courts should give effect to it.)
('38) 1938 Nag L Jour 133 (135).
('37) 24 AIR 1937 Pat 1 (2) : 15 Pat 792 (DB).
(1917) 1917 App Cas 260 (305):86 L J K B 1119, Rex v. Halliday.
(1892) 1 Q B 654 (658) : 61 L J M C 128, West Ham v. Fourth Building Society.
(1862) 1 Mad H C R 115 (120) (DB).
('30) 17 AIR 1930 Pat 301 (304) : 9 Pat 747.

53. ('42) 29 AIR 1942 Bom 191 (193):ILR (1942) Bom 287.

54. ('42) 29 AIR 1942 Rang 30 (36) : 1941 Rang L R 615. (If it is possible to read the later Act in such a way as to make it consistent with the law as it was before the later Act came into operation, then that is the way in which the Court ought to read it.)
('28) 15 AIR 1928 All 186 (189, 190) : 50 All 430 (DB). (The former enactment must be specifically repealed or its continuance must be inconsistent with a provision of a later Act, in which case, repeal will be deemed by necessary implication.)
('30) 17 AIR 1930 Mad 963 (968) : 54 Mad 92.
('30) 17 AIR 1930 Bom 551 (563):54 Bom 902 (DB).

55. ('15) 2 AIR 1915 Mad 781 (784):38 Mad 738.
('17) 4 AIR 1917 Mad 951 (954):39 Mad 981 (DB).
('29) 16 AIR 1929 Oudh 389 (392):4 Luck 539 (FB).

56. *See* ('29) 16 AIR 1929 Nag 246 (249):25 Nag L R 19. (General statute cannot be impliedly repealed by local or special statute.)

57. ('10) 27 AIR 1910 Pat 577 (578).
('33) 20 AIR 1933 All 241 (244,245):55 All 432 (FB).
See ('42) 29 AIR 1942 Cal 587 (592) (DB). (The one test of repugnancy between two provisions of law is to see if the two can co-exist.)]

58. ('43) 30 AIR 1943 Lah 140 (143) (FB). (The rule of *ejusdem generis* applies as much to associated words in one sentence as to terms or phrases appearing in parts of the same section or in different sections in the same chapter.)
('42) 29 AIR 1942 Cal 343 (347):ILR (1942) 1 Cal 211 (DB).

cases intended to be provided for by the section is clear from the language of the section[59] or by the general object of the Act,[60] or where the specific words are of different genera.[61]

(11). Where this Code has adopted part of the language of the old Code, the interpretation put upon such language by the Courts must be taken to have been accepted by the Legislature.[62] When legislation follows a continuous practice and repeats the very words on which that practice was founded, it may be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning.[63]

(12). Provisions ousting the jurisdiction of the Courts,[64] and those conferring

('41) 28 AIR 1941 All 345 (346) : I L R (1941) All 691 (FB).
('38) 25 AIR 1938 Bom 41 (42) : ILR (1937) Bom 830 (DB). (But that rule being one of construction should never be invoked where its application appears to defeat the general intent of the instrument to be construed.)
('37) 24 AIR 1937 Nag 102 (102).
('13) 19 Ind Cas 765 (768) (PC).
('88) 12 Bom 507 (520). (Interpretation should not be inconsistent with the comity of nations or with the established rules of international law.)
('83) 9 Cal 271 (274) (DB). (Interpretation of words "any other cause" in S. 20 of Bengal Act XI of 1859.)
('28) 15 AIR 1928 P C 16 (18) : 55 Cal 519 : 55 Ind App 96 (P C).
('32) 19 AIR 1932 Lah 239 (241) : 13 Lah 528 (DB).
('39) 26 AIR 1939 Nag 186 (189) : ILR (1939) Nag 250 (FB).
('19) 6 AIR 1919 Pat 541 (542) : 4 Pat L Jour 561.
[*See also* ('37) 24 AIR 1937 Cal 603 (617) : ILR (1937) 2 Cal 397. (The *ejusdem generis* rule not only applies where there is more than one thing mentioned and then an expression of general import and intent added to the end, but also where there is only one thing mentioned.)]
[But see ('25) 12 AIR 1925 Cal 116 (135) (DB). (*Prima facie* to be taken in general sense.)]

59. ('42) 29 AIR 1942 Mad 462 (463). (*Ejusdem generis* rule should not be applied when context makes clear that it was intention of the Legislature that general words should be construed generally.)
('02) 29 Cal 890 (907, 909) (FB). (If the particular words exhaust a whole genus, the general words must refer to some larger genus.)
('20) 7 AIR 1920 Mad 413 (413) : 43 Mad 65 (DB).
('32) 19 AIR 1932 Lah 239 (241) : 13 Lah 528 (DB).

60. ('41) 28 AIR 1941 All 345 (347) : ILR (1941) All 691 (FB).

61. ('39) 26 AIR 1939 Bom 421 (422).

62. ('38) 25 AIR 1938 Mad 638 (640) (DB).
('36) 23 AIR 1936 Mad 158 (159).
('27) 14 AIR 1927 All 369 (371) : 50 All 130 (FB).
('30) 17 AIR 1930 All 69 (71) : 52 All 363 (FB).
('31) 18 AIR 1931 All 489 (490) : 53 All 687 (FB).
('31) 18 AIR 1931 All 291 (299) : 53 All 612 (FB).
('29) 16 AIR 1929 All 845 (846) : 52 All 88.
('29) 16 AIR 1929 All 625 (630) : 52 All 11 (FB).
('38) 25 AIR 1938 Bom 481 (488) : I L R (1939) Bom 53 (FB).
('10) 5 Ind Cas 157 (162) (DB) (Bom).
('31) 18 AIR 1931 Cal 560 (562, 563) : 58 Cal 761.
('29) 16 AIR 1929 Cal 566 (567) : 57 Cal 381.
('11) 8 Ind Cas 1061 (1064) : 38 Cal 188 (DB).
('30) 17 AIR 1930 Lah 764 (767): 11 Lah 481 (FB).
('33) 20 AIR 1933 Sind 179 (181, 182) : 27 Sind L R 230 (DB). (This rule applies with greater force when the provisions of an English statute have been reproduced by the Indian Legislature.)
('31) 18 AIR 1931 Sind 44 (46) : 25 Sind L R 310.
[*See* ('30) 17 AIR 1930 Nag 300 (304) : 27 Nag L R 152. (Case under S. 92, T. P. Act.)
('15) 2 AIR 1915 Cal 339 (340) : 43 Cal 103 (DB). (Bengal Estates Partition Act.)
('10) 6 Ind Cas 819 (820) : 6 Nag L R 69. (C. P. Tenancy Act.)]

63. ('42) 29 AIR 1942 Cal 442 (443) (DB). (Later legislation attaching meaning to words in previous Act—Interpretation applies to old Act.)
('39) 26 AIR 1939 Mad 421 (427) : ILR (1939) Mad 566 (FB).
('38) 25 AIR 1938 Bom 231 (232) : I L R (1938) Bom 655 (FB).
('11) 11 Ind Cas 453 (456) (DB) (Cal).
('11) 10 Ind Cas 491 (493) : 39 Cal 33 (DB).
('09) 1 Ind Cas 168 (173) : 36 Cal 543 (DB).
('07) 30 Mad 426 (433) : 34 Ind App 186 (PC).
('02) 29 Cal 890 (905, 906) (FB).
('33) 20 AIR 1933 Mad 489 (490) : 56 Mad 837 (SB).
('34) 21 AIR 1934 Rang 27 (29) : 11 Rang 521 (SB).

64. ('42) 29 AIR 1942 Lah 217 (227) : ILR (1943) Lah 191 (FB).
('41) 28 AIR 1941 Nag 226 (230) : ILR (1941) Nag 279 (DB).
('39) 26 AIR 1939 Cal 435 (446) : ILR (1939) 2 Cal 93 (FB).
('37) 169 Ind Cas 323 (324) (Nag).
('28) 15 AIR 1928 Lah 121 (122) : 9 Lah 504 (FB). (When the language is doubtful, the Courts should lean against an ouster of the jurisdiction of the ordinary tribunals.)
('28) 15 AIR 1928 Pat 615 (626) : 8 Pat 122 (DB).
('30) 17 AIR 1930 All 225 (230) : 52 All 619 (FB).
('31) 18 AIR 1931 All 706 (707) : 53 All 799 (DB).
('28) 15 AIR 1928 All 511 (513) (DB).
('88) 10 All 396 (398) (DB).
('29) 16 AIR 1929 Bom 471 (473) : 53 Bom 819.
('05) 29 Bom 480 (490) (DB).
('89) 4 Bom 624 (628).
('75) 1 Bom 531 (533) (DB).
('67) 8 Suth W R 428 (436) (FB).
('39) 26 AIR 1939 Lah 237 (238, 239). (Provision of the law which trenches on the usual jurisdiction of a Civil Court must be very strictly construed.)

jurisdiction on special bodies or persons or Courts,[65] should be strictly construed. The grant of a special jurisdiction does not carry with it the power to act outside such jurisdiction.[66]

(13). In the absence of any context indicating a contrary intention, the Legislature must be taken to attach the same meaning to the same words used in different parts of the statute[67] or in subsequent statutes in a similar connexion.[68] But, if sufficient reasons exist, a word can be construed in one part of an Act in a sense different from

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('38) 25 AIR 1938 Lah 14 (15) (DB).
('35) 22 AIR 1935 Lah 613 (615) (DB). (The onus lies on the party who seeks to oust the jurisdiction.)
('30) 17 AIR 1930 Lah 781 (786): 12 Lah 26 (DB).
('36) 23 AIR 1936 Mad 574 (575): 59 Mad 895 (DB).
('36) 23 AIR 1936 Mad 522 (523).
('32) 19 AIR 1932 Mad 724 (729): 56 Mad 134 (DB).
('31) 18 AIR 1931 Mad 801 (803): 54 Mad 1011 (DB).
('13) 19 Ind Cas 68 (75) (DB) (Mad).
('38) 25 AIR 1938 Nag 80 (82) : I L R (1938) Nag 268 (DB).
('26) 13 AIR 1926 Nag 212 (214).
('17) 4 AIR 1917 Nag 25 (26).
('13) 19 Ind Cas 759 (763) : 9 Nag L R 54.
('12) 16 Ind Cas 449 (451) : 8 Nag L R 107 (112).
('35) 22 AIR 1935 Oudh 96 (106) (DB). (Statutes affecting jurisdiction of Civil Courts are to be construed as far as possible so as not to transfer suits from the ordinary Civil Courts to executive officers.)
('33) 20 AIR 1933 Pat 52 (56).
('19) 6 AIR 1919 Pat 71 (73) (DB).
('27) 14 AIR 1927 Sind 173 (175) (DB).
[*See also* ('43) 30 AIR 1943 Cal 285 (318) (SB). (Where an Ordinance or Act curtails the jurisdiction and powers of the Court, the duty of the Court is to be vigilant and to satisfy that all the conditions necessary for the validity of such an Ordinance or Act have been complied with (Per Sen J).)
('31) 18 AIR 1931 Mad 61 (64). (Rules of High Court affecting jurisdiction of High Court should be clear.)]

65. ('09) 6 Ind Cas 857 (857) : 3 Sind L R 221. (Provisions conferring jurisdiction on arbitrators.)
('31) 18 AIR 1931 Nag 48 (50).
('12) 17 Ind Cas 342 (343) (Mad).
('30) 17 AIR 1930 Nag 205 (206).
('33) 20 AIR 1933 Oudh 100 (102) : 8 Luck 295. (When jurisdiction has been conferred upon a special Court for investigation of particular matter such jurisdiction is exclusive.)
('32) 19 AIR 1932 Rang 123 (127) : 10 Rang 412 (FB). (Conditions precedent for vesting jurisdiction not fulfilled—Proceedings before the special tribunal are null and void.)
('23) 10 AIR 1923 Rang 238 (239) (DB). (Succession Certificate Act.)
[*See also* ('32) 19 AIR 1932 Mad 90 (95): 55 Mad 298.)]

66. ('30) 17 AIR 1930 Nag 205 (205).
('33) 20 AIR 1933 Nag 193 (196): 29 Nag LR 278 (FB).

67. ('42) 29 AIR 1942 Bom 57 (58) : I L R (1942) Bom 94 (DB).
('42) 29 AIR 1942 Bom 191 (192) : I L R (1942) Bom 287.
('42) 29 AIR 1942 Cal 357 (359) (DB).
('42) 29 AIR 1942 Lah 102 (103) : I L R (1942) Lah 349 (FB).
('42) 29 AIR 1942 Mad 495 (500).
('41) 28 AIR 1941 Nag 364 (368) : I L R (1941) Nag 266 (DB).
('39) 26 AIR 1939 Cal 435 (446) : I L R (1939) 2 Cal 93 (FB).
('36) 23 AIR 1936 Oudh 115 (116): 11 Luck 583 (DB).
('35) 22 AIR 1935 Lah 570 (575): 16 Lah 829 (FB). (Per Jai Lal, J. in judgment of Division Bench.)
('34) 21 AIR 1934 Bom 176 (177) (DB). (Same word used in the section and notification under it.)
('29) 16 AIR 1929 All 977 (980) : 52 All 225 (FB).
('27) 14 AIR 1927 Nag 245 (247) : 23 Nag L R 75.
('18) 5 AIR 1918 Mad 998 (1002) : 40 Mad 1 (FB).
('02) 24 All 319 (326) (FB).
('11) 11 Ind Cas 614 (614) : 35 Bom 401 (DB).
('30) 17 AIR 1930 All 669 (673) (DB).
('36) 23 AIR 1936 All 495 (503) : 58 All 949 (FB). (Interpretation of the same word used in the same section.)
('35) 22 AIR 1935 All 444 (445) : 57 All 745 (DB). (Same word used in the section and its proviso—Different constructions may be placed.)
('32) 19 AIR 1932 Bom 71 (77) (FB).
('26) 13 AIR 1926 Bom 497 (500): 50 Bom 566 (FB).
('10) 5 Ind Cas 610 (610) : 34 Bom 239.
('09) 3 Ind Cas 750 (751) : 33 Bom 452 (DB). (Applicability of the rule to Hindu law texts.)
('36) 23 AIR 1936 Cal 331 (333).
('37) 24 AIR 1937 Mad 385 (390) : I L R (1937) Mad 616 (FB).
('36) 23 AIR 1936 Mad 42 (46) : 59 Mad 107 (DB).
('38) 25 AIR 1938 Nag 59 (61): I L R (1937) Nag 469.
('37) 24 AIR 1937 Nag 17 (22) : I L R (1937) Nag 315 (FB).
('35) 22 AIR 1935 Nag 20 (22).
('31) 18 AIR 1931 Nag 177 (178): 27 Nag L R 270.
('14) 1 AIR 1914 Nag 58 (60) : 10 Nag L R 28.
('36) 23 AIR 1936 Sind 108 (112) : 29 Sind L R 382 (DB). (Interpretation of the same word in a clause of a section.)
('10) 7 Ind Cas 595 (598) : 4 Sind L R 26.
[*See also* ('41) 28 AIR 1941 Bom 100 (103).]

68. ('42) 29 AIR 1942 Lah 102 (103) : I L R (1942) Lah 349 (FB). (Word "sale" as used in Art. 166, Limitation Act, has the same meaning as in the Civil Procedure Code.)
('42) 29 AIR 1942 Sind 45 (46) : I L R (1941) Kar 557 (DB). (Where the same or exactly similar words are used in statutory provisions which have a similar object, they are to be interpreted in the same way.)
('28) 15 AIR 1928 Bom 69 (71).
('19) 6 AIR 1919 P C 142 (142, 143) (PC).
('20) 7 AIR 1920 Pat 349 (350).

that it bears in another part.[69] Where an expression is *defined* in an Act, it must be given the same meaning throughout the Act,[70] unless there is some provision which makes it clear that for certain purposes, the expression must be given a different meaning.[71] But definitions are of limited scope being framed only for the purpose of the Act in which they occur, unless specially extended.[72] Where, however, the Legislature has not defined a legal expression it would be wrong for a Court to lay down a rigid definition of it.[73]

(14). *Prima facie* when two different expressions are used in a statute the Court ought to assume that they are intended to bear distinct meanings;[74] but on the other hand, it may appear from the context that the two expressions are used interchangeably and are not intended to have different meaning.[75]

(15). All rules of law are founded on the assumption that the constituted tribunals are fairly competent and have power to carry out the provisions of the Acts.[76] They should, therefore, be construed so as to further and not so as to restrict the purposes of the Act.[77] Where jurisdiction is given to a Court to make a particular order, the Legislature must be deemed to have granted also the power to enforce such order.[78]

(16). Where a statute creates a right and provides a remedy, that remedy and *no other* is available.[79] This rule, however, does not apply where the right exists

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69. ('42) 29 AIR 1942 Mad 495 (500).
('37) 24 AIR 1937 Sind 129 (144) : 32 Sind L R 567 (FB).
('35) 22 AIR 1935 Lah 570 (575):16 Lah 829 (FB). (Per Jai Lal, J., in judgment of Division Bench.)
('93) 13 All 224 (245, 246) (DB). (Per Mahmood J. —The rule that a word used in a statute is to be understood in the same sense throughout, is only rule of presumption, by no means inflexible.)
('37) 24 AIR 1937 Mad 385 (390) :ILR (1937) Mad 616 (FB).

70. ('40) 27 AIR 1940 Mad 385 (390) : I L R (1940) Mad 526 (FB). (Per Krishnaswami Ayyangar, J., in Order of Reference.)
('39) 26 AIR 1939 P C 63 (65) (PC). (Interpretation of definition must be appropriate to the purpose of the Act.)
('39) 26 AIR 1939 All 1 (3) : ILR (1939) All 6.
('28) 15 AIR 1928 Lah 325 (328): 9 Lah 649 (DB).
('13) 19 Ind Cas 40 (41) : 1913 Pun Re No. 2 (FB). (Order of Reference.)
('85) 12 Cal 430 (433) (DB).
('38) 25 AIR 1938 All 613 (615):ILR (1938) All 957.
('37) 24 AIR 1937 Pat 531 (532).
See however (1880) 5 Q B D 386 (389), R. v. Pearce. (Interpretation clause should be used for the purpose of interpreting words which are ambigous or equivocal, and not so as to disturb the meaning of such as are plain.)]

71. ('42) 29 AIR 1942 All 50 (65) : I L R (1942) All 185 (FB). (Per Dar, J.)
('38) 25 AIR 1938 All 613 (615) : ILR (1938) All 957.

72. ('93) 15 All 141 (143).
('25) 12 AIR 1925 Lah 415 (416): 6 Lah 276 (DB).
('78) 1 Cal 665 (666, 667).
[*See* ('29) 16 AIR 1929 P C 181 (183) (P C). (Seeking meaning of words in one Act from definition even in another cognate Act is unsatisfactory.)]

73. ('17) 4 AIR 1917 Cal 502 (507) : 44 Cal 162 (DB).

74. ('39) 26 AIR 1939 Bom 478 (479) : ILR (1939) Bom 701.
('42) 29 AIR 1942 Bom 191 (192, 193): ILR (1942) Bom 287. (Two analogous expressions, such as 'wages' and 'salary' should be taken to be used in different senses.)
('29) 16 AIR 1929 All 33 (37) : 50 All 909 (FB).

75. ('39) 26 AIR 1939 Bom 478 (479) : ILR (1939) Bom 701.

76. ('22) 9 AIR 1922 Cal 118 (120) : 47 Cal 354 (DB).

77. ('21) 8 AIR 1921 Cal 85 (86) : 48 Cal 378 (DB).

78. ('33) 20 AIR 1933 Mad 689 (689) : 57 Mad 35 (DB).
('33) 20 AIR 1933 Mad 748 (750) : 57 Mad 237 (DB).

79. ('39) 26 AIR 1939 Mad 967 (968).
('35) 22 AIR 1935 Lah 406 (408) : 16 Lah 975 (DB). (When a new cause of action is created by statute and a special jurisdiction outside the course of the general law is prescribed, there is no ouster of the jurisdiction of the ordinary Courts for they never had any.)
('27) 14 AIR 1927 Cal 149 (150) : 53 Cal 929 (DB).
('24) 11 AIR 1924 Mad 521 (522) (DB).
('28) 15 AIR 1928 Mad 641 (647).
('33) 20 AIR 1933 All 358 (363) : 55 All 406 (DB).
('18) 5 AIR 1918 Cal 850 (856) : 44 Cal 804 & 816 (DB). (Case law discussed.)
('30) 1930 Mad W N 651 (652).
('33) 20 AIR 1933 Nag 193 (195) : 29 Nag L R 278 (FB).
('21) 8 AIR 1921 Nag 60 (64).
('17) 4 AIR 1917 Nag 149 (151) : 13 Nag L R 210.
('09) 4 Ind Cas 795 (795) : 5 Nag L R 176.

independently of the statute.[80] Where, again, a statute gives power to any person for a public purpose from which an individual may receive an injury, and where the mode of redress for such injury is also specified in the statute, the jurisdiction of the ordinary Courts will be ousted.[81]

(17). Where a statute confers rights on a party in general terms, the cutting down of those rights by a rule would make the rule repugnant to the Act.[82] But such rules must be supported unless they are manifestly unreasonable or unfair.[83] If a new rule is in conflict with the previous existing rule, the new rule must by implication be deemed to have annulled or altered that rule.[84]

(18). A change in the language of the present Code from that of the old Code may be presumed to indicate a change of intention on the part of the Legislature.[85] In regard to the matters dealt with by the change, only the new provisions should be looked to,[86] and the Court in construing the later statute is not bound by the decisions under the earlier one.[87] But it is also a recognised presumption that the Legislature does not intend to make any alteration beyond what it expressly declares,[88] and where the language used is doubtful no change will be deemed to have been made.[89] Any change in the language of the statute would be presumed to have been made by the Legislature with the knowledge of the course of decisions previous to the change.[90] However, a change in the wording of a section of an enactment does not necessarily involve a change in the law as amendments are often made to clear up ambiguities.[91]

(19). Where a question arises as to whether any particular provision is mandatory or directory, the general test is the relation which the provision has to the general object intended to be secured by the Act.[92] Another test has also been applied and that is to see

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80. ('17) 4 AIR 1917 Lah 75 (78) : 1917 Pun Re No. 22 (DB).
[*See also* ('33) 20 AIR 1933 Nag 193 (196) : 29 Nag L R 278 (FB).
('31) 18 AIR 1931 Mad 83 (87) : 54 Mad 627 (DB).]

81. ('39) 26 AIR 1939 Mad 967 (968).
('38) 25 AIR 1938 Mad 972(974): ILR (1939)Mad 81.
('36) 23 AIR 1936 Lah 901 (903): ILR (1937)Lah 92 (DB). (The principle will not apply where there is no matter in existence with which the person empowered is authorised to deal.)
('28) 15 AIR 1928 Lah 562 (564):10 Lah 338 (DB).
('31) 18 AIR 1931 Mad 574 (575): 54 Mad 928(DB).

82. ('28) 15 AIR 1928 Mad 1182 (1186) : 52 Mad 92 (FB).

83. ('33) 20 AIR 1933 Cal 243 (245) : 60 Cal 689.

84. ('31) 18 AIR 1931 All 567 (567) : 54 All 263 (FB).

85. ('14) 1 AIR 1914 Sind 11 (12):8 Sind L R 215 (DB).
('08) 35 Cal 34 (44) (FB).
[*See* ('28) 15 AIR 1928 Bom 69 (71). (Presumption is that any change of language in a statute is some indication of a change of intention of the Legislature.)
('38) 25 AIR 1938 Rang 317 (317):1938 Rang L R 580 (DB). (Do.)]
[*See also* ('40) 27 AIR 1940 Mad 385 (392) : ILR (1940) Mad 526 (FB). (If the words of a later statute differ materially from those of an earlier one effect should be given to the change especially where to do so would be to advance the policy underlying it.)]

86. ('32) 19 AIR 1932 All 188 (190) : 54 All 416.

87. ('40) 27 AIR 1940 Mad 385 (392) : ILR (1940) Mad 526 (FB).

88. ('40) 27 AIR 1940 Oudh 138 (142) : 15 Luck 229 (FB).
('39) 26 AIR 1939 Nag 35 (38). (When a law is merely being codified, and especially when it is being transferred almost bodily from one Code to another, departure is not to be presumed unless it is made in express terms.)
('38) 25 AIR 1938 P C 191 (194) : 65 Ind App 286 : ILR (1938) Bom 502 : 32 Sind L R 786 (PC).
('19) 6 AIR 1919 Mad 7 (8) : 42 Mad 540 (FB). (Interpretation of section repealed and re-enacted with slight difference.)
('13) 20 Ind Cas 572 (574) : 7 Sind L R 31.
('30) 17 AIR 1930 Sind 265 (279) : 24 Sind L R 277 (FB).
('35) 22 AIR 1935 Sind 73 (76).
('18) 5 AIR 1918 Sind 22 (23) : 11 Sind L R 128 (DB).

89. ('18) 5 AIR 1918 Mad 1100 (1102) (DB).
('30) 17 AIR 1930 All 193 (197) : 52 All 501 (FB).
('31) 18 AIR 1931 Pat 1 (3).

90. ('30) 17 AIR 1930 All 225 (240): 52 All 619(FB).

91. ('13) 18 Ind Cas 939 (943) : 40 Cal 123 (DB).

92. ('43) 30 AIR 1943 Cal 266 (277, 278) (DB). (The scope and object of a statute are the only guides in determining whether its provisions are directory or imperative.)
('41) 28 AIR 1941 Lah 310 (311) : ILR (1942) Lah 275. (The word "shall" as used in an Act of the Legislature does not always mean that compliance with the condition is obligatory.)

whether a party may waive the benefit of the particular provision.[93] In deciding the question, the Court should take into account the possibility of justice suffering from a too rigid application of the rule.[94] In case of affirmative words, even the word "shall" might be taken to be only directory as distinguished from imperative, while in cases of negative words, the proper construction is to take the words as prohibitive. In other words, a provision that a certain thing shall be done may be held to be only directory. But a provision that a certain thing shall not be done should be treated as prohibitive.[95]

(20). Words in singular should be read as including the plural unless there is anything in the context to the contrary.[96]

(21). In following decided cases in regard to the interpretation placed by them upon words in a statute, the danger of diverting attention from what has been enacted to what has been judicially said about the enactment must be avoided.[97]

(22). Forms given in the Schedule do not control the clear words of the Code itself.[98]

(23). Where certain provisions from an existing Act have been incorporated into a subsequent Act, no addition to the former Act which is not expressly made applicable to the subsequent Act can be deemed to be incorporated in it, at all events, if it is possible for the subsequent Act to function effectively without the addition, nor can the repeal of the first statute affect the second.[99]

(24). Provisions of Acts passed by the same Legislature, when apparently inconsistent, should so far as possible be reconciled with each other[100] by reading one as a qualification to the other. If that is not possible the later Act should prevail.[101]

('40) 27 AIR 1940 Lah 266 (267) : ILR (1940) Lah 649 (DB). (Use of word "shall" does not necessarily imply that particular provision is imperative.)
('38) 25 AIR 1938 Pat 539 (541) : 17 Pat 726 (DB). (The scope and object of a statute are the only guides in determining whether its provisions are directory or imperative and in the absence of express provision, the intention of the Legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative.)
('37) 24 AIR 1937 Mad 51 (57, 58, 77): ILR (1937) Mad 383 (DB).
('77) 3 Cal 47 (57) : 4 Ind App 127 (PC). ('Must' or 'shall' may be substituted for 'may' for giving effect to intention of Legislature.)
('24) 11 AIR 1924 Cal 889 (889): 52 Cal 159 (DB).
('30) 17 AIR 1930 Mad 278 (283): 52 Mad 648 (DB).
[*See also* ('25) 12 AIR 1925 Cal 1246 (1247) : 53 Cal 46 (DB). (Whether a mandatory provision is imperative or only directory depends upon a consideration of various circumstances.)]

93. ('10) 5 Ind Cas 390 (395) (DB) (Cal.)
('29) 16 AIR 1929 Cal 433 (435) : 56 Cal 252.

94. ('15) 2 AIR 1915 Mad 920 (921): 39 Mad 485 (DB).
('31) 18 AIR 1931 Lah 15 (16).
[*See* ('43) 30 AIR 1943 Cal 266 (278) (DB). (Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it is neither unjust nor inconvenient to exact rigorous observance of them as essential to the acquisition of the right or authority conferred.)]

95. ('90) 12 All 510 (517, 521) (FB).

96. ('25) 12 AIR 1925 Rang 94 (95): 2 Rang 579 (DB).

97. ('32) 19 AIR 1932 P C 36 (40) (PC).
Also see Preamble Note 15.

98. ('41) 28 AIR 1941 Rang 135 (140) : 1941 Rang L R 65 (DB). (Scheduled forms are dangerous guides to the meaning of a statute.)
('18) 5 AIR 1918 Cal 631 (632).
('32) 19 AIR 1932 Mad 523 (524) : 55 Mad 982.

99. ('31) 18 AIR 1931 P C 149 (152): 58 Ind App 259 : 59 Cal 55 (PC).

100. ('41) 28 AIR 1941 Bom 158 (159): ILR (1941) Bom 147. (Adjective law cannot control substantive law in absence of express provision.)
('27) 14 AIR 1927 Cal 432 (443) : 54 Cal 863 (FB).
('27) 14 AIR 1927 Lah 435 (438) : 8 Lah 617.
('26) 13 AIR 1926 Nag 491 (492). (Provision of adjective law, e. g. S. 115, Evidence Act, cannot be invoked to defeat the plain provision of a statute, e. g. S. 11, Contract Act.)
('13) 19 Ind Cas 387 (390) : 37 Bom 231 (DB).
('76) 1 Mad 89 (110, 114, 116) (FB).
('75) 1 Bom 67 (69) (DB).
(1875) L R 10 Ch App 479 (484) : 44 L J Ch 691, Ebbs v. Boulnois.
('31) 18 AIR 1931 Sind 124 (126): 25 Sind LR 222.
('29) 16 AIR 1929 Bom 274 (275): 53 Bom 627 (DB).
('28) 15 AIR 1928 Lah 609 (614): 9 Lah 701 (FB).

101. ('41) 28 AIR 1941 F C 16 (31) : 1940 F C R 110 : ILR (1941) Kar F C 72 (FC).
('30) 17 AIR 1930 Pat 442 (445) : 10 Pat 63 (DB).
('27) 14 AIR 1927 Lah 435 (438) : 8 Lah 617.
('24) 11 AIR 1924 Cal 980 (980) (DB). (If there is an earlier Act with certain penalties and a subsequent Act with other penalties, as general proposition the earlier statute is repealed by later statute even if there are no express words to that effect in the later statute.)
(1912) 2 Ch 371 (380, 381) : 81 L J Ch 741, Luby v. Warwickshire Miners' Association.

The same rule applies to two apparently inconsistent sections in the same Act.[102]

(25). A repealing section should not be interpreted with reference to the reading of the repealed section.[103] The effect of repeal of a statute, in the absence of saving clauses, is that it has to be considered as if the statute so repealed has never existed.[104] Unless so repealed or altered the prior existing law will continue in force.[105] Where the Act repealed is a parent Act, all the laws passed under that Act also stand repealed, unless there is a saving provision in the repealing Act.[106]

(26). A repealing Act does not affect any legal proceedings in respect of rights acquired before the repeal.[107] When an Act is in force on the date of a transaction, a subsequent repealment of the Act does not affect the merits, rights or liabilities of the parties on the date of the transaction.[108]

(27). It is not proper to use one Act for the purpose of interpreting another Act.[109]

(28). In interpreting foreign statutes, Courts should not be guided by outside opinion, however eminent such opinion may be.[110]

(29). Technical language must have technical meaning attached to it, unless the contrary manifestly appears.[111]

('80) 6 Cal 249 (250, 251). (Amended definition held applicable.)
(1879) 4 Q B D 245 (275), Queen v. Bishop of Oxford. (Where two statutes are *in pari materia* and their enactments cannot stand together, the later statute shall prevail as being the later exponent of the legislative will.)
(1934) 1934 L J K B 364 (367) : (1934) 1 K B 590, Ellen Street Estates Ltd. v. Minister of Health.
('31) 18 AIR 1931 Sind 124 (126): 25 Sind L R 222. [See however ('26) 13 AIR 1926 Sind 115 (116). (Where there are two conflicting provisions of the Legislature, that provision, the terms of which are more appropriate to the circumstances of the case, governs it.)]

102. ('39) 26 AIR 1939 Mad 361 (365): ILR (1939) Mad 151 (FB). (In order to avoid a conflict between two sections, they must be read together and the language of one interpreted and where necessary modified by that of the other.)
('21) 8 AIR 1921 Cal 603 (604) (DB). (Particular enactment, whenever found, must be construed strictly as against the general provision.)

103. ('32) 19 AIR 1932 P C 92 (94) : 59 Ind App 112 : 55 Mad 443 (PC).
('28) 15 AIR 1928 Nag 136 (142) (DB). (Section 65 and O. 21, R. 94 of the present Code should not be interpreted with reference to the repealed S. 316 of the old Code.)

104. ('34) 21 AIR 1934 Cal 80 (82): 60 Cal 1438 (DB).

105. ('41) 28 AIR 1941 F C 16 (31) : 1940 F C R 110 : ILR (1941) Kar F C 72 (FC). (It is not absolutely necessary that a statute must be repealed by express language—Repeal, alteration or amendment can be effected by necessary implication also.)

106. ('40) 27 AIR 1940 All 272 (280) : ILR (1940) All 455 (FB).

107. ('33) 20 AIR 1933 Mad 57 (58).
('27) 14 AIR 1927 Pat 203 (205) : 6 Pat 296 (DB).

108. ('33) 20 AIR 1933 Bom 262 (265).
(1926) 1 K B 393 (409) : 95 L J K B 148, Falcon v. Famous Players Film Co.
('25) 12 AIR 1925 Pat 346 (349) : 4 Pat 272 (DB).
(1923) 2 K B 193 (196, 197) : 62 L J K B 866, Hensball v. Porter.
('76) 1 Bom 286 (291) (DB).

109. ('42) 29 AIR 1942 All 440 (441): ILR (1942) All 933. (Every word in particular statute must be construed in its technical sense — It is not satisfactory to refer to other statutes for that purpose.)
('42) 29 AIR 1942 Cal 47 (48) : I L R (1941) 2 Cal 273 (DB). (Especially when it is not *in pari materia*.)
('41) 28 AIR 1941 Nag 292 (293) : ILR (1942) Nag 269.
('40) 27 AIR 1940 All 291 (300) (DB). (It is a dangerous practice to take words from one statute to illustrate the meaning of words in another statute.)
('39) 26 AIR 1939 Cal 435 (444, 447) : ILR (1939) 2 Cal 93 (FB). (A particular meaning assigned by the Court to a particular word used in one statute should not necessarily be attributed to the same word used in another statute unless the scope and object of the two statutes be similar.)
('39) 26 A I R 1939 Pat 323 (329). (Citation of English case law to consider Indian statutes not *in pari materia* is improper.)
('39) 26 AIR 1939 Pat 55 (57) : 18 Pat 13 (FB). (In interpreting Government of India Act, 1935, decisions of Privy Council regarding British North America Act are of little assistance and it would be dangerous to apply those decisions.)
('35) 22 AIR 1935 Cal 732 (733) (DB).
('32) 19 AIR 1932 Mad 343 (345) (DB).
('34) 21 AIR 1934 All 681 (683) (DB). (The meaning of an expression in a statute need not be restricted because the same expression has been used in a restricted sense in other enactments.)
('35) 22 A I R 1935 Mad 600 (601) (DB). (Word having certain meaning in one Act should not be given same meaning found in different context in different Act.)

110. ('30) 17 AIR 1930 Mad 146 (146) (DB).

111. ('33) 20 AIR 1933 Cal 467 (468): 60 Cal 379 (DB).

(30). Special Acts must be strictly construed.[112]

(31). Where the terms of a statute are not imperative, the use of general powers conferred by that statute should be in strict conformity with private rights.[113]

(32). In enactments which confer powers upon public authorities, the language of permission may not preclude the existence of a duty.[114]

(33). The words in an Act are used correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken the burden of establishing their proposition lies heavily and they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred.[115]

(34). While it is possible that there might be an overlapping of powers conferred on different persons, by a statute, yet, at least where the matter admits of doubt, the construction against overlapping of powers should be adopted ordinarily.[116]

(35). In construing a statute one should endeavour to give it a meaning, in all cases of ambiguity, which will make it consonant to, rather than in disagreement with, other Acts.[117] Similarly, where two constructions are possible, the interpretation that will promote the object of the statute and not defeat it, should be preferred.[118] There is a presumption that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication, or in other words, beyond the immediate scope and object of the statute.[119]

(36). In the case of statutes the maxim *expressio unius est exclusio alterius* (mention of one thing is the exclusion of others) is to be applied with great caution.[120]

See also the undermentioned cases.[121]

('37) 24 AIR 1937 Lah 178 (179) : ILR (1937) Lah 415 (DB). (The word 'pensions' has been employed in the Code in its etymological sense.)
('12) 15 Ind Cas 122 (123) (DB) (Lah).
('82) 5 All 121 (137) (FB).
(1854) 5 Moo Ind App 231 (250) : 8 Moo P C 4 (PC). (Words long used in a technical sense and judicially also construed as such—Same words used in a statute must be taken to have been used in the technical sense.)
[*See* ('28) 15 AIR 1928 Bom 69 (73).]

112. ('41) 28 AIR 1941 Nag 249 (251): ILR (1941) Nag 428. (Statute harsh and effecting departure from ordinary law—It must be construed strictly in favour of subject relying on ordinary law.)
('30) 17 AIR 1930 Lah 333 (334).

113. ('37) 24 AIR 1937 Mad 51 (78) : ILR (1937) Mad 383 (DB).
('31) 18 AIR 1931 Rang 95 (96).

114. ('37) 24 AIR 1937 Mad 51 (78) : ILR (1937) Mad 383. (Word 'may' construed as obligatory.)
('34) 21 AIR 1934 Pat 670 (672) : 14 Pat 24 (FB).
('30) 17 AIR 1930 Rang 297 (300): 8 Rang 333 (FB).

115. ('33) 20 AIR 1933 P C 216 (217) (PC).
('34) 21 AIR 1934 Pat 304 (305) (DB).

116. ('35) 22 AIR 1935 Lah 742 (753) : 16 Lah 937 (FB).

117. ('39) 26 AIR 1939 Nag 50 (52) : ILR (1938) Nag 558 (FB).
('39) 26 AIR 1939 Pat 49 (54) : 18 Pat 141 (DB). (Two constructions possible — One in accordance with existing enactments and other repugnant to them — Construction avoiding repugnancy to be preferred.)
('35) 22 AIR 1935 Pat 508 (513) : 15 Pat 8 (DB). (If there are two inconsistent enactments it must be seen if one cannot be read as a qualification of the other.)
('14) 1 AIR 1914 Oudh 199(200):17 OudhCas99(DB).
[*See also* ('36) 23 AIR 1936 Pesh 57 (59) (DB). (Section in one Act should not be interpreted contrary to any other Indian statute, because the section is copied from an English Act.)]

118. ('40) 27 AIR 1940 Nag 337 (340): ILR (1941) Nag 150.

119. ('43) 30 A I R 1943 Bom 213 : 45 Bom L R 431 (438). (Special Act dealing with succession among Hindus—Settled law cannot be held to be changed merely by implication.)
('40) 27 AIR 1940 Oudh 138 (142, 143) : 15 Luck 229 (FB).
('31) 18 AIR 1931 Cal 580 (581) : 58 Cal 801. (Presumption that the Legislature did not intend to *alter the law* by an Act described as a consolidatory Act cannot override the plain meaning of the words used.)

120. ('26) 13 AIR 1926 Sind 133 (134) : 20 Sind L R 197.
('23) 10 AIR 1923 Cal 66 (69) (DB).

121. ('43) 30 AIR 1943 Cal 108 (110) (DB). ("Include" is very generally used in interpretation clause in order to enlarge meaning of words and phrases occurring in body of statute and in such cases, the word or phrase must be construed as comprehending not only such things as it signifies according to its natural import but also things which the interpretation clause declares that it shall include. 1899 A C 99 at 105 cited.)

8. Reference to pre-existing state of the law. — It follows from the principles set forth in Note 2, that where the language of a statute is *plain and clear*, it cannot be qualified or neutralised by indications of intention gathered from the previous state of law.[1] In the leading case of *Bank of England* v. *Vagliano Bros.*,[2] Lord Herschell observed as follows :

> "I think the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

But where the language is not clear or the statute has made no provision for any particular case, the previous legislation may be referred to for the purpose of ascertaining the object and intention of the Legislature.[3]

('43) 47 Cal W N 323 (325) (DB). (Word "may" when may have compulsive force.)
('43) 30 AIR 1943 Cal 285 (301) (SB). (Validity of statute—Court can take judicial notice of historical facts (Per Derbyshire, C. J. and Khundkar, J.; Sen, J., *contra*.)
('42) 29 AIR 1942 Cal 607 (609). (Earlier and later enactments so inconsistent that they cannot stand together and effect cannot be given to both at same time—There must be implied repeal of earlier Act.)
('40) 27 AIR 1940 Oudh 138 (142, 143) : 15 Luck 229 (FB). (There is no presumption that when one view as to the meaning of an Act would apply the Act to a larger number and another view to a smaller number, the Legislature meant it to affect the larger number.)
('37) 24 A I R 1937 Bom 15 (16). (The word "include" in interpretation clause is enumerative and not exhaustive.)
('37) 24 AIR 1937 Pat 185 (187) : 16 Pat 60 (FB). (When in an interpretation clause, it is stated that a certain term includes so and so, it is implied that the term retains its ordinary meaning whatever else it may mean.)
('35) 22 AIR 1935 Pat 243 (247) : 14 Pat 799 (DB). (The current meaning of any particular word may differ widely from that of the word from which it was derived and no useful purpose is served by the method of considering etymological derivations of a word.)
('33) 20 AIR 1933 Bom 234 (237) : 57 Bom 441 (DB). (Government resolution cannot override the law.)

Note 8

1. ('40) 44 Cal W N 511 (512). (Reference to reported cases on which the statutory provisions are thought to be based is not desirable.)
('07) 35 Cal 34 (55) (FB).
(1900) 3 Oudh Cas 325 (327) (DB).
('95) 22 Cal 788 (797) : 22 Ind App 107 (PC). (Reversing 21 Cal 732.)
('32) 19 AIR 1932 Mad 8 (13) : 55 Mad 151 (DB).
('20) 7 AIR 1920 P C 140 (142) (PC). (Mere omission in later statute of negative provision in earlier one cannot by itself effect substantive affirmation.)
('28) 15 A I R 1928 P C 2 (4) : 7 Pat 221 : 55 Ind App 18 (PC).
(1891) 1891 App Cas 107 (120), Bank of England v. Vagliano.
('32) 19 AIR 1932 All 434 (435) : 54 All 616 (DB).
('30) 17 AIR 1930 All 837 (839) : 52 All 748 (DB).
('10) 6 Ind Cas 101 (106) (DB) (All). (Karamat Husain, J.) (Per Knox, J., *contra* at p. 104.)
('17) 4 AIR 1917 Bom 268 (270).
('35) 62 Cal 612 (627) (DB). (English law not to be considered.)
('36) 23 AIR 1936 Cal 593 (608) (DB).
('21) 8 AIR 1921 Cal 397 (399, 402) : 48 Cal 556 (FB).
('24) 11 AIR 1924 Cal 424 (425).
('29) 16 AIR 1929 Cal 497 (503) : 56 Cal 367.
('01) 28 Cal 517 (528).
('96) 23 Cal 563 (572) : 23 Ind App 18 (PC).
('80) 5 Cal 300 (303) (DB).
('25) 12 AIR 1925 Mad 589 (590) : 48 Mad 488 (DB).
('17) 4 AIR 1917 Oudh 316 (319) : 20 Oudh Cas 104.
('34) 21 AIR 1934 Pat 555 (556).
('20) 7 AIR 1920 Low Bur 138 (139) : 10 Low Bur Rul 326.
('35) 22 AIR 1935 Sind 62 (64) : 28 Sind L R 366 (DB).
[*See* ('30) 17 A I R 1930 Oudh 148 (159, 164) : 5 Luck 552 (FB).]
[*See also* ('22) 9 AIR 1922 Nag 207 (208). (Alteration of provisions in new Act—Reference to new Act cannot be of any help in interpreting old Act.)
('39) 26 AIR 1939 Oudh 131 (137) : 14 Luck 492 (FB). (It is not to be doubted that both the heading and the preamble are to be taken into consideration in interpreting the clauses of the Contempt of Courts Act, 1926, but they are not the operative portions of the Act.)]
Also see Preamble Note 7.

2. (1891) 1891 App Cas 107 (144, 145).
See also the following cases where the principle of the above observation is accepted:
('28) 15 AIR 1928 P C 16 (18) : 55 Ind App 96 : 55 Cal 519 (PC).
('25) 12 AIR 1925 Cal 34 (41) : 52 Cal 1 (SB).
('24) 11 AIR 1924 Cal 257 (272, 273) (FB). (Case law referred to.)
('21) 8 AIR 1921 Cal 1 (6) : 48 Cal 388 (SB). (Do.)
('28) 15 AIR 1928 Lah 361 (368) : 10 Lah 106 (FB).
('97) 20 Mad 97 (101).
('32) 19 AIR 1932 Oudh 71 (72) : 7 Luck 300.
('18) 5 AIR 1918 Pat 633 (635). (But the Court is certainly entitled to see the course of legislation.)

3. ('43) 30 AIR 1943 F C 36 (70). (History of legislation and facts giving rise to enactment can be referred to.)

9. Reference to proceedings of the Legislature. — In the case of *The Administrator-General* v. *Prem Lal Mullick*,[1] their Lordships of the Privy Council have laid down definitely that it is not competent to refer to the proceedings of the Legislature as legitimate *aids* to the construction of the *statute*.[2] This is in consonance with the principle that where the language is *plain* no *extraneous* matter should be taken into account in the interpretation of the Act.

('41) 28 AIR 1941 Mad 449 (452, 468): ILR (1941) Mad 599 (FB).
('41) 28 AIR 1941 Rang 135 (139) : 1941 Rang L R 65 (DB).
('40) 27 AIR 1940 P C 105 (109) : I L R (1940) Mad 599: 67 Ind App 222 (PC).
('40) 27 AIR 1940 Oudh 138 (143) : 15 Luck 229 (FB). (Previous state of the law can be considered so as to find the mischief sought to be cured by the Legislature.)
('28) 15 AIR 1928 All 682 (683) : 51 All 459. (It is always interesting to discover how legislation as to particular sections of a certain Code came into effect in order to understand the meaning thereof.)
('22) 9 AIR 1922 Cal 287 (297) : 49 Cal 280 (DB).
('13) 19 Ind Cas 227 (228) (DB) (Mad). (To ascertain the meaning of an enactment the events which led to the passing of the Act may be looked to.)
('08) 35 Cal 34 (55) (FB).
('08) 35 Cal 701 (711) (DB).
('07) 9 Bom L R 359 (361) (DB).
('05) 2 Cal L Jour 546 (553) (DB).
('02) 26 Bom 757 (763, 764) (DB). (When there is verbal ambiguity, the history of the legislation, its scope and object, the mischief or defect for which it was intended to provide can be referred to.)
(1900) 3 Oudh Cas 325 (327) (DB).
('87) 11 Bom 1 (4). (Courts are at liberty to consider the general state of law which prevailed *in pari materia* prior to enactment of any statute under consideration.)
('82) 5 All 121 (135) (FB). (The general state of the law which prevailed *in pari materia* prior to the enactment of any statute may be considered for the purpose of ascertaining the policy of the Legislature.)
('84) 8 Bom 313 (321) (FB). (Case not provided for in the consolidating statute.)
('90) 17 Cal 590 (599, 602) : 17 Ind App 40 (PC).
('33) 20 AIR 1933 Pat 435 (437, 438) : 12 Pat 665 (SB). (In case of ambiguity previous state of law may be consulted.)
('32) 19 AIR 1932 All 434 (435) : 54 All 616.
('24) 11 AIR 1924 All 328 (335) : 46 All 489 (FB).
('03) 26 All 144 (147).
('84) 6 All 509 (530, 531, 540) (FB).
('31) 18 AIR 1931 Cal 140 (143) : 58 Cal 290.
('30) 17 AIR 1930 Sind 265 (279) : 24 Sind L R 277 (FB).

Note 9

1. ('95) 22 Cal 788 (798, 799) : 22 Ind App 107 (PC).

2. *See also the undermentioned cases* :
('42) 29 AIR 1942 Lah 213 (252) (DB).
('42) 29 AIR 1942 Nag 5 (7) : I L R (1941) Nag 581 (FB).
('42) 29 AIR 1942 Oudh 231 (235) : 17 Luck 530 (DB). (Courts cannot consider the Parliamentary history of an enactment for the purpose of ascertaining its meanings.)
('42) 29 AIR 1942 Pat 304 (306).
('42) 29 AIR 1942 Sind 65 (69) : I L R (1942) Kar 127 (SB).
('41) 28 AIR 1941 Cal 673 (675) : I L R (1941) 1 Cal 499 (DB).
('40) 27 AIR 1940 Oudh 138 (143, 145) : 15 Luck 229 (FB). (The Statement of Objects and Reasons is part of the Parliamentary history of the Act. It is merely the opinion and the desire of the person who introduced the Act, not of the Legislature after it had passed it.)
('39) 26 AIR 1939 Pesh 40 (40). (Objects and reasons not material.)
('38) 25 AIR 1938 Nag 144 (145) : I L R (1940) Nag 517.
('37) 24 AIR 1937 Lah 558 (559). (Gathering of supposed intention of Legislature from debates or even Statement of Objects and Reasons not permissible.)
('28) 15 AIR 1928 All 124 (125) : 50 All 348 (DB).
('28) 15 AIR 1928 Lah 35 (38) : 9 Lah 260 (DB).
('27) 14 AIR 1927 Cal 149 (153): 53 Cal 929 (DB).
('27) 14 AIR 1927 Cal 821 (822) (DB). (Report of Select Committee.)
('23) 10 AIR 1923 Rang 21 (21) : 11 Low Bur Rul 354 (DB). (Statement of Objects and Reasons should not be referred to.)
('20) 7 AIR 1920 Low Bur 132 (133). (Do.)
(1906) 2 K B 676 (716) : 75 L J K B 933, Rex v. West Riding of Yorkshire County Council.
('05) 2 Cal L Jour 546 (553) (DB).
('04) 31 Cal 628 (640) (DB).
(1902) 2 Ch 585 (593) : 71 L J Ch 744, Ambler & Sons Ltd. v. Bradford Corporation.
('93) 18 Bom 133 (136) (DB). (No reference to the debate on the bill is to be made.)
('87) 11 Bom 1 (4). (Reference to previous forms in which the Act appeared before the Legislature for the purpose of finding intention of the framers cannot be made.)
('82) 5 All 121 (135) (FB).
('77) 2 Bom 84 (88) (DB). (An inquiry into the vicissitudes which a measure experienced in the course of its passage as a bill through the Legislature.)
('18) 5 AIR 1918 Mad 381 (382) : 43 Ind Cas 173 (174) (DB). (The language of the enactment in Premlal's case was plain and clear.)
('14) 1 AIR 1914 Mad 174 (176) : 38 Mad 997 (DB). (Interpretation of the plain words of the Act in the light of expressions of the views of Government before its enactment is not advisable.)

The cases in India,[3] before the date of the above Privy Council decision, which had taken the view that such proceedings could be always referred to in aid of the construction of statutes, cannot be considered to be good law after the date of the said decision.

Where the language is doubtful or ambiguous, such proceedings may of course be looked into.[4]

The proceedings of the Legislature will include —

(1) The Statement of Objects and Reasons;
(2) The Report of the Select Committee;
(3) The Draft stages of the Bill, and
(4) The Debates of the Legislature.

('20) 7 AIR 1920 P C 56 (59) : 43 Mad 550 : 47 Ind App 33 (PC). (Statement made on the introduction of the measure or its discussion cannot be looked at as affording any guidance as to the meaning of the words.)
('19) 6 AIR 1919 All 50 (51) : 42 All 76.
('04) 26 All 144 (147) (DB).
('91) 14 All 145 (150, 153, 154) (DB).
('33) 20 AIR 1933 Bom 272 (274) : 57 Bom 377. (Proceedings in Council not to be looked into.)
('31) 18 AIR 1931 Bom 70 (72) : 55 Bom 220 (DB).
('29) 16 AIR 1929 Bom 274 (276) : 53 Bom 627 (DB). (Statement of Objects and Reasons not to be looked into.)
('98) 22 Bom 112 (126, 127, 128). (Following 22 Cal 788 and distinguishing the view taken in the English cases of In re Mew, (1862) 31 L J B K 87 and Reg. v. Bishop of Oxford, (1879) 4 Q B D 525.)
('36) 23 AIR 1936 Cal 593 (619) (DB).
('36) 23 AIR 1936 Cal 145 (146).
('34) 21 AIR 1934 Cal 119 (120) (DB).
('31) 18 AIR 1931 Cal 550 (552) (DB).
('23) 10 AIR 1923 Cal 74 (77) (DB). (Case-law fully discussed. Even in case of ambiguity reference is not permissible.)
('95) 22 Cal 1017 (1022) (FB). (Following 22 Cal 788 : 22 Ind App 107 (PC)).
('94) 21 Cal 732 (753) (FB). (Approved by P. C. in 22 Cal 788 : 22 Ind App 107 (PC)).
('73) 19 Suth W R 48 (53) (DB).
('37) 24 AIR 1937 Lah 497 (499) : I L R (1937) Lah 69 (SB). (Statement of Objects and Reasons.)
('29) 16 AIR 1929 Lah 641 (644) : 11 Lah 55. (*Quære*: If report of Select Committee can be looked into—Bhide, J.)
('28) 15 AIR 1928 Lah 337 (341) : 9 Lah 689 (DB). (Debates in Council cannot be referred to.)
('24) 11 AIR 1924 Lah 374 (376) (DB).
('22) 9 AIR 1922 Lah 211 (212).
('33) 20 AIR 1933 Mad 120 (121). (Statement of Objects and Reasons not to be looked into.)
('26) 13 AIR 1926 Mad 381 (382, 383).
('20) 7 AIR 1920 Mad 1019 (1024) : 43 Mad 675 (FB).
('35) 22 AIR 1935 Nag 149 (151, 152) : 31 Nag L R 318. (Statements made in Legislative Assembly on behalf of Government cannot be considered by Court.)
('24) 11 AIR 1924 Nag 162 (163).
('10) 5 Ind Cas 805 (806) : 13 Oudh Cas 55 (DB).
('35) 22 AIR 1935 Pat 346 (348) : 14 Pat 720 (SB). (Speeches in Assembly at the time of passing of Act are of no value in interpreting the statute.)
('14) 1 AIR 1914 Upp Bur 17 (18) : 2 Upp Bur Rul 16.
('39) 26 AIR 1939 Sind 134 (135).
('36) 23 AIR 1936 Sind 209 (210) : 30 Sind L R 196 (DB). (Statement of Objects and Reasons is not part of an Act and Objects and Reasons should not be referred to in interpretation of Act.)
('19) 6 AIR 1919 Sind 80 (80) : 13 Sind L R 23 (FB). (But they have been referred to, to ascertain the object of the statute where there is ambiguity.)
[*See* ('13) 19 Ind Cas 765 (766, 767) (PC). (In the course of argument Lord Loreburn remarked : "The decision of the Select Committee, eminent though the members were, did not possess the same authority on the interpretation of a statute as that of a Court of Law.")]
[But see ('24) 11 AIR 1924 Nag 249 (250) : 20 Nag L R 103. (The case holds contrary to what the Privy Council has held but does not refer to that decision or to any principle—This cannot be considered to lay down correct law.)]

3. ('83) 7 Bom 310 (315). (Reference to debates in Council.)
('94) 18 Bom 616 (625) (DB). (Recommendation of the Law Commissioners.)
('91) 15 Bom 583 (585) (DB). (Report of Special Committee.)
('90) 17 Cal 852 (860) (DB). (Reference to Report of Indian Law Commissioners and of Select Committee.)
('84) 10 Cal 167 (192, 193) (FB). (It is, however, unusual to refer to Objects and Reasons given for introducing a Bill into the Legislative Council.)
('99) 22 Mad 494 (504). (The High Court referred to such proceedings but the Privy Council decision was not referred to and there was no decision on the point.)
('93) 16 Mad 207 (210) (DB). (Report of Select Committee.)

4. ('84) 8 Bom 241 (246, 247) (DB) (Statement of Objects and Reasons can be looked into.)
('92) 19 Cal 544 (567, 569) (FB).
('31) 18 AIR 1931 Cal 633 (634).
('28) 15 AIR 1928 Lah 337 (340) : 9 Lah 689 (DB).
('18) 5 AIR 1918 Mad 381 (382) (DB).
('11) 12 Ind Cas 799 (801) : 7 Nag L R 165.
('19) 6 AIR 1919 Sind 80 (80) : 13 Sind L R 23 (FB).

10. Reference to Preamble and headings prefixed to the sections. — Where the language of the enactment itself is clear, then under the general principles set forth in Note 7, its construction cannot be affected in any way by a consideration of the title of an Act,[1] the preamble or the headings prefixed to the sections.[2] In cases of ambiguity of the language of the enactment, however, they may be usefully referred to for the purpose of finding out the object and intention of the enactment.[3] In the

('87) 14 Cal 721 (728, 729) (FB). (In case of difficulties the proceedings of the Legislature may be looked to.)
(1871) L R 3 P C 605 (648, 649) : 40 L J (Eccl) 33: 7 Moo P C C (NS) 468, Hebbert v. Purchas. (Proceedings in the House of Lords and House of Commons referred to.)
[*See also* ('30) 17 AIR 1930 All 225 (238) : 52 All 619 (FB).]

Note 10

1. ('43) 30 AIR 1943 F C 36 (71). (Rule that preamble cannot be made use of to control the enactment—Scope and meaning of rule, explained.)
(1903) 1903 App Cas 443 (447) : 72 L J K B 787, Fenton v. Thorley & Co. Ltd.
(1870) L R 3 C P 511 (522) : 37 L J C P 226, Claydon v. Green.
2. ('43) 30 AIR 1943 Cal 285 (312) (SB).
('40) 27 AIR 1940 P C 105 (109): ILR (1940) Mad 599 : 67 Ind App 222 (PC). (The heading of the chapter is of no material assistance in the construction of S. 188 of Sea Customs Act.)
('42) 29 AIR 1942 Sind 65 (69) : I L R (1942) Kar 127 (SB). (Act is not controlled by its preamble.)
('41) 28 AIR 1941 Lah 291 (292).
('41) 28 AIR 1941 Sind 221 (223): ILR (1941) Kar 131 (DB). (A preamble does not override the plain provisions of a statute—It is a key to an Act.)
('40) 27 AIR 1940 Nag 114 (116): ILR (1942) Nag 377.
('40) 27 AIR 1940 Oudh 138 (147): 15 Luck 229 (FB).
('39) 26 AIR 1939 All 157 (157) : ILR (1938) All 1001 (DB). (Preamble.)
('39) 26 AIR 1939 All 305 (307) : ILR (1939) All 275 (DB).
('38) 25 AIR 1938 Nag 134 (141) : ILR (1938) Nag 115 (FB).
('36) 23 AIR 1936 Mad 841 (848).
('31) 18 AIR 1931 All 597 (599) : 54 All 220 (FB).
('28) 15 AIR 1928 Lah 35 (38) : 9 Lah 260 (DB).
('09) 4 Ind Cas 827 (827, 828) : 1907-09 Upp Bur Rul 1.
(1883) 22 Ch D 511 (520, 521) : 52 L J Ch 333, Sutton v. Sutton.
(1877) 4 Ch D 395 (401) : 46 L J Ch 105, Taylor v. Corporation of Oldham.
(1865) 2 Mad H C R 322 (323, 324) (DB).
('36) 23 AIR 1936 All 507 (511) : 58 All 1041 (FB). (Where the language of the section is clear a preamble cannot control its provisions.)
('26) 13 AIR 1926 Cal 638 (639). (Also schedules.)
('19) 6 AIR 1919 P C 52 (53) : 43 Mad 529 : 46 Ind App 302 (PC). (Section beyond preamble governs preamble.)
('26) 13 AIR 1926 All 312 (316) (DB). (The headings themselves have no operative effect.)
('25) 12 AIR 1925 All 787 (789) : 47 All 756 (DB). (Headings to be ignored.)
('18) 5 AIR 1918 All 264 (264).
('35) 22 AIR 1935 Cal 304 (305) : 62 Cal 666 (DB).
('32) 19 AIR 1932 Cal 346 (348) : 59 Cal 528.
('27) 14 AIR 1927 Cal 763 (765) : 55 Cal 67 (DB). (Preamble cannot control if meaning is clear.)
('19) 6 AIR 1919 Cal 551 (560) : 45 Cal 343 (FB).
('13) 21 Ind Cas 538 (540) (DB) (Cal).
('10) 6 Ind Cas 259 (261) (DB) (Cal).
('30) 122 Ind Cas 226 (227) (DB) (Lah). (Preamble cannot control if meaning is clear.)
('38) 25 AIR 1938 Mad 441 (445) : I L R (1938) Mad 841 (FB).
('33) 20 AIR 1933 Mad 120 (122). (Preamble cannot control if meaning is clear.)
('25) 12 AIR 1925 Mad 609 (612): 48 Mad 395 (DB). (Headings to be ignored if section is clear.)
('26) 13 AIR 1926 Mad 381 (382).
('38) 25 AIR 1938 Nag 293 (300) : ILR (1939) Nag 526. (Where the enacting part is clear, the preamble cannot operate to restrict that meaning.)
('16) 3 AIR 1916 Nag 67 (70) : 13 Nag L R 181.
('35) 22 AIR 1935 Pesh 69 (72) (DB). (Preamble is not exhaustive.)
('35) 22 AIR 1935 Rang 460 (463) : 13 Rang 156.
[*See* ('40) 27 AIR 1940 Rang 84 (90) : 1940 Rang L R 325 (SB). (Preamble of Letters Patent Rangoon.)]
[See however ('32) 19 AIR 1932 Oudh 152 (153): 7 Luck 648 (FB).]
[But see ('18) 5 AIR 1918 Pat 398 (408, 409) : 3 Pat L Jour 1 (FB).]
3. ('43) 30 AIR 1943 Lah 1 (2) : ILR (1943) Lah 95 (DB). (Per Ram Lall, J., in Order of Reference to Division Bench.)
('42) 29 AIR 1942 FC 17 (21): 21 Pat 587: ILR (1942) Kar F C 21 (FC). (But it is very doubtful whether a preamble retrospectively inserted in 1940 in an Act passed 25 years before can be looked at by the Court for the purpose of discovering what the true intention of the Legislature was at the earlier date.)
('41) 28 AIR 1941 Pat 465 (466) : 20 Pat 280 (DB).
('40) 27 AIR 1940 Oudh 138 (140, 141) : 15 Luck 229 (FB).
('31) 18 AIR 1931 All 597 (599) : 54 All 220 (FB). (Headings.)
('28) 15 AIR 1928 Lah 35 (38) : 9 Lah 260 (DB).
('27) 14 AIR 1927 Mad 85 (87). (The preamble and the title should be read together to see whether the Act is an amending Act or an explanatory Act.)
('17) 4 AIR 1917 Pat 305 (315) (FB). (Per Jwala Prasad, J.)
('07) 29 All 385 (414) (FB).
(1902) 2 Ch 585 (594) : 71 L J Ch 744, Ambler & Sons Ltd. v. Bradford Corporation.
('87) 14 Cal 176 (183).
(1886) 11 App Cas 286 (288) : 55 L J Q B 417, Tarquand v. Board of Trade.
('82) 8 Cal 637 (643) (DB).
(1877) 4 Ch D 395 (405) : 46 L J Ch 105, Taylor v. Corporation of Oldham.

undermentioned case[4] the High Court of Madras cited with approval the view expressed in *Eastern Counties etc., Railway Companies* v. *Francis Marriage*[5] that headings are not to be treated as if they were marginal notes or were introduced merely for the purpose of classifying the enactments, that they constitute an important part of the Act itself and that they may be read, not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to, but as affording a better key to the construction of the sections which follow than might be afforded by a mere preamble.

11. Marginal notes to sections. — It is now settled that marginal notes to sections *do not form part of the statute* itself and cannot be referred to for explaining or construing the section.[1] In *Balraj Kunwar* v. *Jagatpal*

(1869-70) 21 L T 238 (246) : L R 4 H L 171 : 38 L J Q B 265, Hammersmith & City Rly. Co. v. Brand and Wife. (Headings of different portions of a statute are to be referred to to determine the sense of any doubtful expression in a section ranged under any particular heading.)
(1857) 7 Moo Ind App 72 (99) (PC).
('36) 23 AIR 1936 All 507 (511) : 58 All 1041 (FB). (Preamble.)
('10) 5 Ind Cas 862 (862) : 34 Bom 316 (DB). (Headings of chapter.)
('27) 14 AIR 1927 All 593 (596) : 49 All 903 (DB). (Headings and preamble are unlike marginal headings which have no force for the purpose of interpretation and may be used as a "key to open the minds of the makers of the Act.")
('33) 20 AIR 1933 Bom 417 (420) : 57 Bom 537 (FB).
('33) 20 AIR 1933 Bom 51 (57, 58) : 57 Bom 346 (DB).
('38) 25 AIR 1938 Cal 211 (214) : I L R (1938) 1 Cal 626. (Preamble.)
('36) 23 AIR 1936 Cal 593 (620) (DB). (Do.)
('34) 21 AIR 1934 Cal 741 (742) : 62 Cal 125.
('19) 6 AIR 1919 Cal 551 (560) : 45 Cal 343 (FB). (Preamble.)
('17) 4 AIR 1917 Cal 715 (716) : 44 Cal 267 (DB). (Headings to the chapter.)
('17) 4 AIR 1917 Cal 681 (685, 686) (DB).
('10) 6 Ind Cas 259 (261) (Cal). (Preamble can be referred in case of an ambiguity — In this case it was not referred to as the section was clear.)
('31) 18 AIR 1931 Lah 706 (707) : 14 Lah 203 (DB). (Do.)
('34) 21 AIR 1934 Mad 138 (138, 139) : 57 Mad 718 (DB).
('31) 18 AIR 1931 Mad 629 (630, 631) : 54 Mad 845 (DB).
('18) 5 AIR 1918 Mad 381 (382) (DB). (Preamble.)
('38) 25 AIR 1938 Nag 298 (300) : ILR (1939) Nag 526. (Preamble can be referred to in case of an ambiguity — In this case it was not referred to as the enacting part was clear.)
('35) 22 AIR 1935 Pesh 69 (72) (DB). (Do.)
4. ('38) 25 AIR 1938 Mad 449 (454) : ILR (1938) Mad 1063 (DB).
5. (1862) 9 H L C 32 (41) : 8 W R (Eng) 748.
[*See also* (1882) 10 Q B D 309 (321) : 52 L J M C 4, R. v. Local Government Board. (Heading of a series of sections must be considered as a part of the section and used for construing any doubtful matter in the sections under that very heading.)]

Note 11

1. ('42) 29 AIR 1942 All 19 (34) : I L R (1942) All 45 (FB).
('41) 28 AIR 1941 Bom 397 (402) : I L R (1942) Bom 39 (SB).
('40) 27 AIR 1940 Bom 363 (364) : I L R (1940) Bom 709 (DB).
('40) 27 AIR 1940 Mad 8 (9) : I L R (1939) Mad 977 (DB). (Words free from ambiguity—Intention to be gathered from words used uninfluenced by marginal note.)
('40) 27 AIR 1940 Nag 377 (380) : I L R (1942) Nag 53 (DB).
('28) 15 AIR 1928 Bom 341 (343) (DB).
('27) 14 AIR 1927 Mad 85 (87).
('27) 14 AIR 1927 Nag 203 (203).
(1923) 1 Ch 143 (147) : 92 L J Ch 145, Settlement Trusts, Penrhyn v. Robarts.
('22) 9 AIR 1922 Bom 161 (165) : 46 Bom 366 (DB).
('19) 6 AIR 1919 Mad 514 (514) : 42 Mad 451 (DB).
(1916) 1 App Cas 242 (247) : 85 L J K B 146, Bradford Corporation v. Meyers.
('04) 26 All 393 (406) : 7 Oudh Cas 248 : 31 Ind App 132 (PC).
(1900) 2 Bom L R 918 (923) (DB).
(1882) 22 Ch D 511 (513), Sutton v. Sutton.
(1879) 11 Ch 449 (460, 461, 465), A.-G. v. Great Eastern Ry. Co.
(1934) 103 L J K B 364 (369) : (1934) 1 K B 590, Ellen Street Estates, Ltd. v. Minister of Health.
('20) 7 AIR 1920 Pat 526 (527).
('34) 21 AIR 1934 All 681 (683) : 57 All 212 (DB).
('37) 24 AIR 1937 Bom 198 (202) : I L R (1937) Bom 293.
('33) 20 AIR 1933 Bom 338 (339) : 57 Bom 699.
('30) 17 AIR 1930 Bom 105 (111) : 54 Bom 288 (DB). (Marginal note not to be used to limit the plain meaning of the section.)
('27) 14 AIR 1927 Bom 424 (425).
('26) 13 AIR 1926 Bom 382 (383) (DB).
('98) 25 Cal 858 (860).
('95) 23 Cal 55 (59).
('15) 2 AIR 1915 Lah 271 (272) : 1916 Pun Re No. 36 (DB). (Marginal note cannot be referred to even in cases of ambiguity. But it may with advantage be referred to when it confirms the conclusion warranted by the language of the section.)

Singh,[2] their Lordships of the Privy Council observed as follows :

> "It is well settled that the marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian Statute any greater authority than the marginal notes in an English Act of Parliament."

Where, however, there is *ambiguity* in the section the marginal note can be referred to for solving the ambiguity.[3]

In the undermentioned cases[4] it has been held that there can be no objection to the reference to marginal notes for the purposes of construing or interpreting the sections of an Act, *if they are inserted by or under the authority of or assented to by the Legislature.*

12. Illustrations. — Illustrations, unlike marginal notes, are to be considered as part of the statute itself.[1] They are to be accepted, if that can be done, as being both of relevance and of value, in the construction of the section.[2] The rule, however, is subject to two limitations —

('27) 14 AIR 1927 Mad 156 (157) : 50 Mad 733 (DB).
('21) 8 AIR 1921 Mad 510 (511).
('32) 19 AIR 1932 Nag 174 (176):28 Nag L R 302.
('17) 4 AIR 1917 Nag 215 (224) : 13 Nag L R 130 (FB).
('28) 15 AIR 1928 Oudh 15 (17): 3 Luck 244 (DB).
('35) 22 AIR 1935 Pat 439 (443) : 14 Pat 356 (DB).
('38) 25 AIR 1938 Sind 9 (10) : 32 Sind L R 129 (DB).
[*See* (1868) L R 3 C P 511 (519, 522) : 37 L J C P 226, Claydon v. Green. (Marginal notes cannot be used in construction of Acts of Parliament as they are not put there by the Legislature or assented to by them.)]
[*See also* ('11) 6 Ind Cas 392 (395) (DB) (Cal). (*Quære* — Whether the marginal note can be considered in construing the section : Case law except 26 All 393 (PC) discussed.)]
[But see ('41) 28 AIR 1941 Nag 292 (293) : ILR (1942) Nag 269. (Marginal note can be taken into consideration as showing the intention of the section.)
('39) 26 AIR 1939 Cal 313 (314) : I L R (1939) 1 Cal 425 (DB). (The side note, although it forms no part of the section, is of some assistance in interpreting the section inasmuch as it shows the drift of the section.)
('35) 22 AIR 1935 Bom 347 (349) : 59 Bom 681 (DB). (Marginal notes can be looked at in order to see general trend of section.)
('29) 16 AIR 1929 Nag 17 (20) : 21 Nag L R 158 (FB). (Although a marginal note does not form part of the section, it is of some assistance in properly construing a section.)]

2. ('01) 26 All 393 (406): 31 Ind App 132: 7 Oudh Cas 248 (PC).
[*See also* ('38) 25 AIR 1938 Bom 284 (285) (DB). (Marginal notes may be referred to as aids in construing section, but cannot curtail plain meaning of section.)]

3. ('40) 27 AIR 1940 Bom 363 (364) : ILR (1940) Bom 709 (DB).
('39) 26 AIR 1939 Nag 230 (231) (DB). (Marginal notes can be looked into if particular construction leads to conflict of rights granted by Act and those acquired under old Act and saved by new Act.)
('24) 11 AIR 1924 Mad 389 (390).
('25) 12 AIR 1925 All 503 (515) : 47 All 637 (FB). (The view was expressed obiter — There was no ambiguity in that case.)
('25) 12 AIR 1925 Cal 329 (330): 52 Cal 463 (DB).
('26) 13 AIR 1926 Mad 749 (751):49 Mad 716 (DB).
('32) 19 AIR 1932 Nag 174 (176): 28 Nag L R 302. (In case of ambiguity or obscurity, marginal notes may be looked into.)
('27) 14 AIR 1927 Sind 39 (43) : 21 Sind L R 107. (20 Cal 609 and 21 Cal 732 were relied on. The principle of 20 Cal 609 was dissented from in the Privy Council decision in 26 All 393 and the decision in 21 Cal 732 was reversed by the Privy Council in 22 Cal 788.)
[But see ('15) 2 AIR 1915 Lah 271 (272) : 1916 Pun Re No. 36 (DB). (Marginal note cannot be relied upon in clearing up the ambiguity but it may be referred to when it confirms the conclusion warranted by the language of the section.)]

4. ('29) 16 AIR 1929 All 53 (58) : 51 All 411 (FB).
('33) 20 AIR 1933 Bom 417 (421):57 Bom 537 (FB).
('35) 22 AIR 1935 Cal 287 (289): 62 Cal 266 (DB).
('35) 22 AIR 1935 Oudh 337 (342) : 11 Luck 123 (FB).

Note 12

1. ('18) 5 AIR 1918 P C 249 (250) : 1918 Pun Re No. 124 (PC).
('28) 15 AIR 1928 Oudh 15 (17) : 3 Luck 244 (DB).
('37) 24 AIR 1937 Oudh 57 (60) : 13 Luck 1 (DB).
[But see ('34) 21 AIR 1934 Cal 402 (403) : 61 Cal 148 (DB). (Submitted wrong.)
('35) 22 AIR 1935 Sind 145 (157) : 28 Sind LR 397.
('77) 1 All 487 (495) (DB).]

2. ('43) 30 AIR 1943 P C 34 (38) (PC). (An illustration cannot be ignored or brushed aside because it is not part of the body of the section — AIR 1916 P C 242 : 43 Ind App 256 (PC), followed.)
('40) 44 Cal W N 11 (31).
('27) 14 AIR 1927 Mad 99 (108) : 50 Mad 94 (FB).
('74) 22 Suth W R 367 (368) (DB). (But the practice of looking more at the illustrations than at the words of the sections is a mistake.)

(1) An illustration only exemplifies the section and cannot be taken to *restrict* or modify the sense of the section.[3]

(2) Where the illustration is in *conflict* with the main section, the illustration must give way to the section.[4] But it would require a very special case to warrant its rejection on the ground of its assumed repugnance to the section itself.[5]

13: Punctuation marks.—Before the year 1849, the English Acts of Parliament were not punctuated by any stops and the then accepted rule of interpretation was that such marks could not be relied upon in construing Acts of Parliament.[1] In *Maharani of Burdwan* v. *Krishna Kamini Dasi*,[2] which was a case under the Bengal Regulation of 1819, their Lordships of the Privy Council held that "it is an error to rely on punctuation in construing Acts of the Legislature."

Since the constitution of the regular Legislatures in India, however, the practice has been to insert stops in Bills before the Legislatures and to retain them in the authentic copies of the Acts signed by the Governor-General and published in the Gazette of India.[3] In these circumstances, it was held by the High Court of Bombay,[4] that punctuation marks may be considered as aids to the interpretation of the statute *where the language thereof might otherwise be doubtful*. The High Court of Madras took the view that the

('16) 3 AIR 1916 P C 242 (244) : 43 Ind App 256 (PC).
('22) 9 AIR 1922 Bom 415 (416) : 46 Bom 813 (DB).
('36) 23 AIR 1936 Bom 459 (462) : I L R (1937) Bom 679. (But an illustration ordinarily exemplifies the particular section to which it is appended, and the Court cannot import into an illustration to one section which is applicable to Hindu wills, a substantive proposition of law or a rule of construction embodied in another section which is not so applicable.)
('34) 21 AIR 1934 Cal 402 (403) : 61 Cal 148 (DB).
('28) 15 AIR 1928 Cal 204 (205) : 55 Cal 154 (DB).
('21) 8 AIR 1921 Cal 1 (4) : 48 Cal 388 (SB). (Illustration does not bind the Courts to place a meaning on the section quite inconsistent with its language.)
('16) 3 AIR 1916 Cal 693 (705). (Illustrations have no force of law but are useful to explain intention of Legislature.)
('18) 5 AIR 1918 Mad 1012 (1015) (DB).
('25) 12 AIR 1925 Oudh 24 (26, 27) (DB).
('18) 5 AIR 1918 Low Bur 97 (99).
('16) 3 AIR 1916 Low Bur 114 (116) : 8 Low Bur Rul 306 (FB). (Illustrations cannot be taken as laying down substantive law and they merely go to show the intention of the framers of the Act.)
('35) 22 AIR 1935 Sind 145 (157) : 28 Sind L R 397. (Illustrations are intended only to assist in construing language of Act—Words of Act and not illustration should be looked into.)

3. ('38) 25 AIR 1938 P C 67 (70) : 65 Ind App 66 : 32 Sind L R 374 : I L R (1938) 2 Cal 72 (PC).
('25) 12 AIR 1925 All 220 (221).
('17) 4 AIR 1917 Bom 268 (270).
('21) 8 AIR 1921 Cal 1 (4) : 48 Cal 388 (SB).
('28) 15 AIR 1928 Bom 143 (144) : 52 Bom 257 (DB).
('28) 15 AIR 1928 Bom 78 (79).
('15) 2 AIR 1915 Cal 594 (595) (DB).
('81) 7 Cal 132 (135) (DB).
('05) 20 Mad 481 (483) (DB).
('29) 16 AIR 1929 Pat 164 (167) : 8 Pat 153 (DB).
('35) 22 AIR 1935 Rang 420 (422) (DB).

4. ('24) 11 AIR 1924 All 748 (749).
('30) 17 AIR 1930 Rang 173 (174) : 8 Rang 320 (DB). (Illustration in conflict with the section was treated as a bad statement of law.)
('33) 20 AIR 1933 Bom 313 (314).
('15) 2 AIR 1915 Lah 16 (50) (DB). (The illustration in the case was contrary to the section.)
('30) 1930 Mad W N 638 (643).

5. ('40) 44 Cal W N 11 (31). (Illustrations should be rejected as repugnant to the section only as the last resort of construction.)
('27) 14 AIR 1927 Mad 99 (108, 109) : 50 Mad 94 (FB).
('16) 3 AIR 1916 P C 242 (244) : 43 Ind App 256 (PC).

Note 13

1. *See* ('15) 2 AIR 1915 Bom 50 (52, 53) : 39 Bom 182 (DB).
[*See also* (1890) 24 Q B D 468 (478) : 59 L J Q B 206, Devonshire (Duke) v. O'Connor. ("To my mind, it is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such things as stops."—Per Lord Esher, M. R.)
(1868) L R 3 C P 511 (522) : 37 L J C P 226, Claydon v. Green. ("It is an error to rely on punctuation in construing Acts of the Legislature.")]

2. ('87) 14 Cal 365 (372) (PC).
[*See also* ('31) 18 AIR 1931 All 154 (156) : 53 All 374 (DB). (Following 14 Cal 365 and A I R 1929 P C 69. Practice of Indian Legislature ignored.)
('29) 16 AIR 1929 P C 69 (71) : 8 Pat 516 : 56 Ind App 93 (PC).
('23) 10 AIR 1923 Rang 185 (186) : 1 Rang 226 (DB).]

3. ('15) 2 AIR 1915 Bom 50 (53) : 39 Bom 182 (DB).

4. ('15) 2 AIR 1915 Bom 50 (53) : 39 Bom 182 (DB).

marks were part of the statute and should be considered as such.[5] On the other hand, it was held by the High Courts of Allahabad[6] and Calcutta[7] following the case of the *Maharani of Burdwan* that punctuation marks could not be taken into consideration in construing the statute.

The question came again before the Privy Council in *Lewis Pugh* v. *Ashutosh Sen*,[8] a case under Arts. 48 and 49 of the Indian Limitation Act and it was held that a Court was *bound to read those articles without the commas inserted in the print.* This view as to the use of punctuation marks has now been followed by the High Courts of Allahabad,[9] Bombay[10] and Lahore.[11] In the undermentioned case,[12] however, the High Court of Calcutta has held that where it is not contended that the punctuation is wrongly placed, there is no reason why the punctuation should not be taken as a good guide for the purpose for which it is there, namely, to understand the sense of the passage.

14. Proviso. — A proviso is subordinate to the main enactment[1] to which it is appended either to allay unfounded fears,[2] or as a condition precedent to the enforcement of the operative clause,[3] or for explaining what particular matters are not within the meaning of the enactment, or for providing exceptions and qualifications for the enactment.[4]

A proviso should be taken together with the language of the previous portion of the enactment[5] and construed in the ordinary manner.[6] As a general rule, it must be taken to govern the main proposition of law which *immediately precedes* such proviso, unless the language of the statute shows a different intention.[7]

But in no case can a proviso *extend* or *enlarge* the operative effect of the substantive portion, unless there is an ambiguity therein.[8] Likewise, exceptions should not be enlarged in their scope more than what their words properly justify.[9]

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5. ('24) 11 AIR 1924 Mad 455 (456) (DB).
6. (1900) 22 All 270 (277) (FB).
7. ('19) 6 AIR 1919 Cal 551 (563): 45 Cal 343 (FB).
8. ('29) 16 AIR 1929 P C 69 (71): 56 Ind App 93: 8 Pat 516 (PC).
9. ('31) 18 AIR 1931 All 154 (156, 157) : 53 All 374.
('33) 20 AIR 1933 All 521 (522) : 55 All 700.
10. ('37) 24 AIR 1937 Bom 39 (41) : I L R (1937) Bom 763.
11. ('41) 28 AIR 1941 Lah 28 (30) (DB).
12. ('36) 163 Ind Cas 573 (575) (Cal).

Note 14

1. ('18) 5 AIR 1918 Mad 1210 (1230) : 39 Mad 1085 (SB).
2. ('10) 6 Ind Cas 410 (412) : 37 Cal 697 (DB). (Following West Derby Union v. Metropolitan Life Assurance Society, 1897 App Cas 647.)
3. ('18) 5 AIR 1918 Mad 1266 (1278) : 39 Mad 1164 (SB).
[*See* ('82) 8 Cal 637 (641, 642) (DB).]
4. ('27) 14 AIR 1927 Bom 149 (150): 51 Bom 224 (DB).
('27) 14 AIR 1927 Nag 68 (70) : 23 Nag L R 9.
(1880) 5 Q B D 170 (173), Mullins v. The Treasurer of the County of Surrey.
('18) 5 AIR 1918 Mad 1210 (1230) : 39 Mad 1085 (S B).
('39) 20 AIR 1933 Oudh 491 (500) (DB).
[But see ('15) 2 AIR 1915 Mad 750 (755) : 39 Mad 341 (DB). (A proviso is in the nature of a substantive rule and should not be treated as an exception to the proposition stated in the section.)]
5. ('14) 1 AIR 1914 P C 140 (144) : 42 Cal 116 : 41 Ind App 197 (PC).
6. ('19) 6 AIR 1919 P C 31 (33) : 43 Mad 146: 46 Ind App 176 (PC).
('32) 19 AIR 1932 Mad 46 (52) (DB). (It is not open to Court to add words to a proviso with a view to enlarge the scope of the proviso.)
[See however ('82) 8 Cal 637 (641, 642) (DB).]
7. ('84) 6 All 509 (531, 540) (FB).
('10) 6 Ind Cas 410 (412) : 37 Cal 697 (DB). (Two constructions possible—Proviso may be taken as a guide to choose one of the two.)
8. ('39) 26 AIR 1939 Cal 669 (670) : I L R (1939) 2 Cal 401 (DB).
('26) 13 AIR 1926 Cal 927 (932) : 53 Cal 492 (DB).
('32) 19 AIR 1932 Mad 46 (52) (DB).
('30) 17 AIR 1930 Cal 38 (40) : 57 Cal 162 (DB).
9. ('42) 29 AIR 1942 Lah 243 (248) (DB).
('28) 15 AIR 1928 Lah 162 (163). (Exceptions are to be taken most strongly against the party for whose benefit they are introduced.)
('32) 19 AIR 1932 Mad 120 (123) (DB).
('30) 17 AIR 1930 Mad 124 (125) : 53 Mad 702 (SB). (Proviso should not by implication withdraw what the main provisions have given.)

14a. Explanation. — An explanation added to the section does not enlarge the scope of the section.[1]

When any word, phrase or expression in an enactment is explained by the Legislature, the section has to be understood in the light of the explanation.[2]

15. Judicial precedents. — Judicial precedents constitute an important guide to the proper interpretation of statutes. It is a general principle of construction of statutes that the Courts should follow existing rulings so as not to upset or disturb existing and *settled* practice,[1] unless such practice is *clearly contrary* to an express enactment or is inconsistent with it.[2] This rule is based, in the case of statutes enacting substantive law, on the ground that otherwise it would embarrass trade and commerce, affect the status of persons and unsettle many titles.[3] Though that particular ground does

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Note 14a

1. ('40) 1940 Nag L Jour 638 (645) (DB).
('39) 26AIR 1939 Lab 587 (589):ILR(1940)Lah 223.
2. ('27) 14 AIR 1927 Mad 85 (88).

Note 15

1. ('41) 28 AIR 1941 Mad 161 (171): I L R (1941) Mad 438 (FB). (Long course of decisions on question merely of procedure should not be departed from—Per Patanjali Sastri, J.)
('40) 27 AIR 1940 Pat 633 (640) : 20 Pat 13 (SB).
('39) 26 AIR 1939 Mad 614 (635) : I L R (1939) Mad 622 (DB). (It is not the function of the High Court to cavil at an established principle if it has the support of the Judicial Committee. Its want of logic, if any, has to be mended only by resort to legislation.)
('39) 26 AIR 1939 Mad 369 (370) : I L R (1939) Mad 456 (DB).
('18) 5 AIR 1918 All 412 (413) : 40 All 292 (DB). (Decision before an amendment of an Act—Amendment not altering the law—The decision is binding and should be followed.)
(1917) 1 K B 98 (138, 139) : 86 L J K B 467, R. v. Casement. (Long acquiescence of the Legislature in the interpretation put upon its enactment by notorious practice may perhaps be regarded as some sanction and approval of it.)
('03) 27 Bom 189 (219) : 6 Bom L R 131 (209, 210). (When language is doubtful the practice of the Court and administrative convenience may be looked to.)
('82) 8 Cal 593 (597) (FB). (Especially where the subject of interpretation is a matter of every day occurrence like the provisions of Court-fees Act.)
('03) 31 Cal 511 (513, 515).
('94) 18 Bom 136 (140) (DB).
('24) 11 AIR 1924 P C 50 (55) : 51 Ind App 129 : 46 All 95 (P C). (Particular plea not being raised in a series of cases—Irresistible conclusion is that the plea was felt to be bad.)
('16) 3 AIR 1916 P C 182 (184) : 44 Cal 759 : 44 Ind App 65 (P C).
('33) 20 AIR 1933 All 634 (638) : 55 All 743 (DB). (Principle of *stare decisis* to be adhered to.)
('32) 19 AIR 1932 All 617 (620) : 55 All 24 (FB).
('96) 18 All 403 (409).
('33) 20 AIR 1933 Bom 120 (120) (DB). (If any alteration is to be made it should be by the Legislature.)
('30) 17 AIR 1930 Bom 213 (214) (DB). (Principle of *stare decisis* to be adhered to.)
('24) 11 AIR 1924 Cal 473 (475) : 51 Cal 331 (DB).
('10) 5 Ind Cas 309 (310) (DB) (Cal).
('03) 30 Cal 999 (1003).
('80) 13 Cal 189 (191) (DB).
('11) 12 Ind Cas 1007 (1008) : 36 Mad 380 (DB). (Madras Sudder Court's rulings are good authorities.)
('31) 18 AIR 1931 Pat 285 (291) : 11 Pat 112 (DB).
('31) 18 AIR 1931 Pat 241 (251) : 10 Pat 670 (FB).
[*See* ('33) 20 AIR 1933 All 298 (299).]
[*See also* ('38) 25 AIR 1938 All 91 (91). (When there is authority for the interpretation of some part of a statute which is susceptible of more than one interpretation authority must be followed.)]
2. ('16) 3 AIR 1916 P C 182 (184) : 44 Cal 759 : 44 Ind App 65 (P C).
('29) 16 AIR 1929 Mad 53 (57) : 52 Mad 105 (FB).
('15) 2 AIR 1915 P C 127 (130) (P C).
('32) 19 AIR 1932 All 617 (620) : 55 All 24 (F B).
('22) 9 AIR 1922 All 467 (469) : 45 All 115 (F B).
('32) 19 AIR 1932 Bom 180 (181) : 56 Bom 200 (DB).
('28) 15 AIR 1928 Bom 123 (125, 126) : 52 Bom 159 (DB).
('20) 7 AIR 1920 Bom 419 (422) : 44 Bom 555.
('17) 4 AIR 1917 Bom 254 (257, 258) : 41 Bom 588 (F B). (*Stare decisis.*)
('84) 8 Bom 313 (316, 317) (DB).
('29) 16 AIR 1929 Cal 822 (824) (DB).
('17) 4 AIR 1917 Cal 527 (529) (DB).
('27) 14 AIR 1927 Mad 1043 (1051) : 51 Mad 46 (FB).
('10) 5 Ind Cas 727 (728) (DB) (Mad).
('25) 12 AIR 1925 Rang 340 (344) : 3 Rang 549 (FB).
('09) 4 Ind Cas 289 (291) : 5 Low Bur Rul 94.
('30) 17 AIR 1930 Sind 287 (293) : 25 Sind L R 142 (DB). (Course of decisions founded upon an erroneous interpretation of statutes can be reviewed.)
[*See* ('35) 22 AIR 1935 Pat 291 (301) : 14 Pat 672 (FB). (Principle of *cursus curiæ* or the rule of practice can only be applied when (1) the statute is ambiguous; (2) when decisions are consistent throughout and (3) when titles are dependent on those decisions.)]
3. ('41) 28 AIR 1941 Bom 1 (3) : I L R (1941) Bom 34 (DB).

not apply in the case of statutes of procedure which cannot be considered to affect any rights in or titles to property,[4] it is nevertheless of great practical importance that on questions of procedure the law should be certain rather than that it should be logical[5] and that there should be uniformity of decisions.[6]

But it is necessary that the Courts should ascertain the facts with accuracy before turning their attention to the authorities.[7] They should also bear in mind the rules that no decision can cut down the express and clear words used by the section,[8] that a decision is applicable only to the facts of that particular case[9] and that a decision is only an authority for what it actually decides and not for every proposition that may seem to follow logically from it.[10] To use the words of Lord Halsbury in *Quinn* v. *Leathem*[11]:

('21) 8 AIR 1921 Cal 15 (29) : 48 Cal 184 (SB).
('25) 12 AIR 1925 Bom 12 (18) : 49 Bom 99 (DB).
('22) 9 AIR 1922 Cal 331 (333, 334) (DB).
('27) 14 AIR 1927 Mad 636 (639) : 50 Mad 687 (FB).

4. ('28) 15 AIR 1928 All 629 (630) : 51 All 237 (FB).
('29) 16 AIR 1929 Rang 41 (43) : 6 Rang 703 (FB). (Principle of *stare decisis* has far less applicability to law of procedure than substantive law.)

5. ('17) 4 AIR 1917 P C 156 (159) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 (PC).
('03) 31 Cal 511 (513) (DB).

6. ('25) 12 AIR 1925 Cal 966 (969) (DB). (A I R 1915 Cal 126 : 41 Cal 825 referred to.)
('14) 1 AIR 1914 P C 87 (89) : 37 Mad 443 : 41 Ind App 258 (PC).
('17) 4 AIR 1917 P C 156 (159) : 45 Cal 94 : 1917 Pun Re No. 104 : 44 Ind App 218 (PC).
('16) 3 AIR 1916 All 286 (287) : 38 All 280 (DB).
('75) 24 Suth W R 193 (195) : 2 Ind App 219 (PC)
('28) 15 AIR 1928 Mad 440 (441) (DB).
('21) 8 AIR 1921 Mad 612 (615) (DB).
(1876) 3 Ch D 512 (515), Dymond v. Croft.

7. (1900) 24 Bom 407 (410) (DB).
('26) 13 AIR 1926 Mad 101 (104).
('24) 11 AIR 1924 P C 126 (132) : 5 Lah 92 : 51 Ind App 163 (PC).
('25) 12 AIR 1925 Cal 845 (848) : 52 Cal 894 (FB).
('25) 12 AIR 1925 Mad 1032 (1034) (DB).
('32) 19 AIR 1932 Oudh 90 (97) : 7 Luck 360 (DB).

8. ('38) 25 AIR 1938 All 91 (94). (When there is no ambiguity, dicta which might suggest that a meaning is imputed to a statute which it cannot bear must be read in connection with the facts of the case in which they are expressed.)
('17) 4 AIR 1917 Cal 9 (10) (DB).

9. ('17) 4 AIR 1917 Cal 2 (4) : 45 Cal 294 (DB).
('26) 13 AIR 1926 Oudh 316 (317).
('21) 8 AIR 1921 P C 59 (61) : 48 Cal 30 : 16 Nag L R 187 : 47 Ind App 213 (PC). (Decision must be treated only as merely declaratory of the law as it has existed.)
('31) 18 AIR 1931 All 490 (493) : 54 All 25 (FB).
('31) 18 AIR 1931 All 398 (400) (DB).
('29) 16 AIR 1929 All 593 (596) : 51 All 910 (DB). (Where the law has changed since a decision was given the principle of *stare decisis* does not apply.)
('27) 14 AIR 1927 All 292 (295) : 49 All 161 (DB). (Cases merely illustrating the application of the language of a statute are not binding.)
('24) 11 AIR 1924 All 851 (853) : 46 All 884 (DB). (A case distinguished is not treated as authority or otherwise.)
('87) 9 All 528 (555) (FB).
('12) 12 Ind Cas 737 (738) : 36 Bom 146 (DB).
('90) 14 Bom 331 (346).
('24) 11 AIR 1924 Cal 257 (275) (FB).
('18) 5 AIR 1918 Cal 521 (522) (DB).
('30) 17 AIR 1930 Lah 379 (382) (DB). (Damages.)
('29) 16 AIR 1929 Lah 609 (611) : 10 Lah 657 (FB).
('29) 16 AIR 1929 Lah 161 (162).
('26) 13 AIR 1926 Lah 65 (69) : 7 Lah 179 (DB).
('26) 13 AIR 1926 Mad 1038 (1039) : 49 Mad 903 (FB). (Decisions under Acts not now in force serve rather as guides for interpretation than as authorities.)
('26) 13 AIR 1926 Mad 218 (221).
('10) 5 Ind Cas 4 (8) : 33 Mad 265 (FB).
('20) 7 AIR 1920 Nag 150 (151) : 16 Nag L R 131.
('16) 3 AIR 1916 Nag 116 (117).
('16) 3 AIR 1916 Low Bur 114 (123) : 8 Low Bur Rul 306 (FB).
('41) 28 AIR 1941 Cal 574 (577).
('40) 27 AIR 1940 P C 230 (234) : I L R (1940) Lah 685 : 67 Ind App 464 : I L R (1940) Kar P C 447 (PC).

10. ('42) 29 AIR 1942 P C 13 (17) : I L R (1942) Kar P C 33 (PC). (An abstract proposition of law which will govern every case should not be attempted to be laid down.)
('26) 13 AIR 1926 Cal 913 (914) (DB).
('31) 18 AIR 1931 All 277 (280) : 53 All 334 (FB).
('30) 17 AIR 1930 All 82 (85) (DB).
('29) 16 AIR 1929 All 625 (630) : 52 All 11 (FB).
('32) 19 AIR 1932 Bom 654 (671) : 56 Bom 619 (DB).
('27) 14 AIR 1927 Oudh 138 (139, 140).
('32) 19 AIR 1932 Mad 482 (483) : 55 Mad 656 (DB).
('31) 18 AIR 1931 Mad 55 (57) : 54 Mad 495.
('31) 18 AIR 1931 Oudh 177 (236).
('26) 13 AIR 1926 Oudh 316 (317).
('27) 14 AIR 1927 Cal 657 (658) (DB).
('16) 3 AIR 1916 Oudh 30 (48) (DB). (Case law discussed.)
('34) 21 AIR 1934 Pat 292 (297) : 13 Pat 486.
[*See also* ('43) 30 AIR 1943 Pat 194 (205) (FB). (Principles laid down in case which make an inroad into the general principles of law and rights of ownership should not be further extended.)]

11. (1901) 1901 App Cas 495 (506).
[*See also* discussion in (1914) 1914 App Cas 25 ('40), G. and C. Kreglinger v. New Patagonia Meat and Gold Storage Co., Ltd.]

> "Every judgment must be read as applicable to the particular facts proved, ... since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

The only use of the authorities or decided cases is the establishment of some principle of law which the Judge can follow in deciding the case before him.[12] There can be no precedent on questions of fact and matters of discretion.[13] Nor can the *dicta* of Judges, however eminent, be cited as establishing authoritatively propositions of law unless such *dicta* form the integral part of the train of reasoning directed to the real question decided.[14] It should also be noted that in relying on decided cases in regard to the interpretation of the words of any statute, the danger of the terms of the statute being unduly extended by such reliance, the diversion of attention from what has been enacted to what has been judicially said about the enactment is to be avoided.[15]

Subject to the principles mentioned above, the following rules may be remembered:

(1) All Courts in India are bound by the decisions of the Privy Council.[16]

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12. ('15) 2 AIR 1915 All 360 (362) : 37 All 496.
(1879) 13 Ch D 696 (712), In re Hallett's Estate; Knatchbull v. Hallett.
('25) 12 AIR 1925 All 658 (660). (Authorities only useful so far as they lay down the law but are not safe guides on questions of fact.)
('19) 6 AIR 1919 Bom 40 (41) (DB). (Decision arising from the application of a rule to a set of facts is no authority for its application to another set of facts.)
('29) 16 AIR 1929 Cal 641 (642) : 56 Cal 575.
('24) 11 AIR 1924 Cal 508 (509) : 51 Cal 124 (DB).
('28) 15 AIR 1928 Pat 304 (310) : 7 Pat 520 (DB). (Similar facts both in the authority cited and case decided.)
[*See also* ('15) 2 AIR 1915 P C 139 (142) (PC). (The plainer a proposition, the more difficult it is to find a decision actually in point.)]

13. ('26) 13 AIR 1926 Rang 109 (110):4 Rang 18.
('28) 15 AIR 1928 Pat 316 (317):7 Pat 275 (DB).
('28) 15 AIR 1928 Oudh 430 (435) (DB).
('27) 14 AIR 1927 Bom 660 (661) (DB). (Matter of discretion.)
[*See also* ('41) 28 AIR 1941 Rang 66 (66) : 1940 Rang L R 685. (Decisions as to existence of personal law or custom not *res judicata*.)]

14. ('19) 6 AIR 1919 Mad 75 (86) (FB).
('41) 28 AIR 1941 Nag 3 (4) : ILR (1942) Nag 172 (DB).
('28) 15 AIR 1928 Cal 148 (150):55 Cal 551 (DB).
('22) 9 AIR 1922 Nag 1 (7) : 19 Nag L R 81 (FB).
('32) 19 AIR 1932 Bom 122 (124) : 56 Bom 242 (FB).
('25) 12 AIR 1925 All 230 (232) : 47 All 268.
('13) 20 Ind Cas 280 (281) (DB) (Lah).
('29) 16 AIR 1929 Pat 392 (395):8 Pat 471 (DB). (It will be an abuse of precedents to apply isolated dicta to cases entirely different on facts.)
[*See* ('35) 22 AIR 1935 All 247 (250):57 All 357 (DB). (Though entitled to great weight, obiter dicta of Full Bench are not binding.)]
[But see ('33) 20 AIR 1933 Lah 159 (160) (DB). (Obiter dicta containing reasoning.)]

15. ('38) 25 AIR 1938 All 91 (94). (There is a grave danger in relying upon a course of rulings rather than upon the terms of the statute itself when a question of law arises which depends upon the interpretation of the statute.)
('35) 22 AIR 1935 Mad 70 (71). (It is always dangerous to modify the plain reading of a statute by what it is claimed can be inferred from various judicial decisions.)
('21) 8 AIR 1921 Cal 40 (43) : 48 Cal 161 (SB). (Fact that a mistaken interpretation has been put upon it cannot alter the law.)
('32) 19 AIR 1932 P C 36 (40) (PC).
[*See also* ('33) 20 AIR 1933 Mad 782 (784). (Unintentional wrong interpretation which is against authorities not binding.)]
Also see Preamble Note 7.

16. ('42) 29 AIR 1942 Lah 186 (188) (DB).
('40) 27 AIR 1940 Cal 97 (101) : ILR (1940) 1 Cal 231 (DB). (Obiter dicta binding if principle of law is laid down.)
('40) 27 AIR 1940 Cal 317 (320) : ILR (1940) 2 Cal 41 (DB). (A pronouncement of the Judicial Committee on a point of law though obiter is binding on High Court.)
('39) 26 AIR 1939 Mad 614 (635) : ILR (1939) Mad 622 (DB). (It is not the function of the High Court to cavil at an established principle if it has the support of the Judicial Committee.)
('25) 12 AIR 1925 P C 272 (279) : 47 All 883 : 28 Oudh Cas 352 : 52 Ind App 398 (PC).
('31) 18 AIR 1931 Rang 113 (116) : 9 Rang 217 (FB). (High Court to follow Privy Council decision loyally.)
('15) 2 AIR 1915 All 360 (364) : 37 All 496.
('28) 15 AIR 1928 Bom 130 (133) : 52 Bom 385 (DB).
('27) 14 AIR 1927 Bom 157 (158) : 51 Bom 231 (DB).
('32) 19 AIR 1932 Cal 436 (438).

A considered decision of the Privy Council cannot be ignored as being *obiter*.[17]

In the case of different views among the High Courts on any point of law, the view of the Privy Council, even if *obiter*, is to be accepted.[18]

(2) A Judge of the High Court sitting alone is not bound on a question of law by the decision of another Judge sitting alone;[18a] but a Single Judge of the High Court is bound by the decision of a Bench of two or more Judges[19] and a Bench of two or more Judges is itself bound by the decisions of the Full Bench of the same Court until they are overruled by the Privy Council or by another Full Bench.[20] Similarly, a decision of a Bench of Judges is also binding on other Division Benches of the same Court.[21] When a Division Bench disagrees with the decision of another Division Bench it is its duty to refer the matter to a Full Bench and it cannot simply ignore the earlier decision. But

('36) 23 AIR 1936 Lah 183 (186) (DB). (Judge is bound to follow Privy Council ruling—He cannot follow ruling of his own High Court in preference to Privy Council ruling even though High Court ruling is given subsequent to Privy Council ruling.)
('27) 14 AIR 1927 Mad 261 (263).
('15) 2 AIR 1915 Mad 833 (835) : 38 Mad 941 (DB). (Even if the decision is not given in an appeal from an Indian Tribunal.)
('29) 16 AIR 1929 Nag 98 (105):25 Nag LR 144(FB).
('26) 13 AIR 1926 Nag 49 (50). (Privy Council decision in laying down a principle only declares what is and has always been the law.)
[*See also* ('40) 27 AIR 1940 Pat 707 (712) : 19 Pat 688 (DB). (It is not open to the Indian Courts to attempt to draw fine distinctions in the pronouncements of their Lordships of the Judicial Committee.)]

17. ('40) 27 AIR 1940 All 544 (550) : ILR (1941) All 153 (FB).
('25) 12 AIR 1925 Oudh 94 (95) : 27 Oudh Cas 161.
('32) 19 AIR 1932 Cal 170 (171).
('35) 22 AIR 1935 Cal 419 (442) : 63 Cal 217 (FB). (Privy Council *obiter dictum* is entitled to highest respect in precedents.)
('16) 3 A I R 1916 Cal 693 (696). (Even general remarks are binding.)
('15) 2 AIR 1915 Mad 208 (209) : 37 Mad 22 (DB). (Decision on mixed question of law and fact carries great weight.)
('29) 16 AIR 1929 Nag 211 (212) : 26 Nag LR 39 (DB).
('21) 8 A I R 1921 Low Bur 37 (41) : 11 Low Bur Rul 163 (DB).
[*See* ('31) 18 AIR 1931 All 162 (172) : 53 All 239 (FB). (Long course of decisions should not be departed from on the basis of an obiter dictum of the Privy Council.)]

18. ('40) 27 AIR 1940 Lah 129 (130) : ILR (1940) Lah 242 (FB). (Even the obiter dicta of the Privy Council are entitled to the greatest respect — Per Abdul Rashid, J., in Order of Reference.)
('26) 13 AIR 1926 Nag 154 (155).

18a. ('40) 27 AIR 1940 Mad 356 (362) : ILR (1940) Mad 454 (FB).
('21) 8 AIR 1921 Cal 169 (171): 48 Cal 69 (77)(DB).

19. ('40) 27 AIR 1940 Cal 584 (584). (Single Judge disagreeing with Division Bench decision must refer case to Division Bench.)
('40) 42 Pun L R 101 (102). (A Taxing Judge is bound to follow the law as laid down by a Division Bench of the High Court.)
('25) 12 AIR 1925 Mad 441 (442).
('33) 20 A I R 1933 Pat 38 (39) : 11 Pat 697 (DB). (Even if contrary to his view.)
('36) 23 A I R 1936 All 555 (556) (DB). (Single Judge can entertain doubt but must follow Full Bench ruling.)
('32) 19 AIR 1932 All 188 (189) : 54 All 416.
('29) 16 A I R 1929 Cal 572 (574) (DB). (Single Judge if he cannot follow the decision of a Bench should send the case before a Bench and not decide it himself.)
('32) 19 AIR 1932 Mad 693 (694).
('91) 14 Mad 186 (191).
('34) 21 AIR 1934 Sind 95 (95).
[*See* ('33) 20 AIR 1933 Pat 81 (83) : 12 Pat 188. (Obiter dictum of Division Bench must be treated with respect.)]
[See however ('83) 9 Cal 604 (607). (Decision of Appellate Bench though not binding should receive respectful consideration by a single Judge on original side.)
('29) 16 A I R 1929 All 896 (896). (Obvious error in a Bench decision.)]
[But see ('24) 11 A I R 1924 Cal 733 (738) : 51 Cal 588. (Judge on original side not bound by Division Bench on appellate side.)]

20. ('07) 34 Cal 735 (741) (DB).
('32) 19 AIR 1932 All 293 (303) : 54 All 646 (FB).
('27) 14 AIR 1927 All 214 (244) (DB).
('67) 7 Suth W R 277 (278).
('21) 8 A I R 1921 Oudh 217 (219) : 24 Oudh Cas 361. (Considered dictum of Full Bench should not be ignored as being obiter.)
[*See* ('18) 5 AIR 1918 Cal 952 (957):45 Cal 259(DB).
('41) 28 AIR 1941 Bom 408 (409) : I L R (1942) Bom 26 (DB). (*Quære* :— Whether a later Full Bench of a High Court can overrule an earlier Full Bench merely because the later Bench consists of more Judges than the earlier.)]
[See however ('32) 19 AIR 1932 All 149 (150):54 All 89. (Decisions of Board of Revenue not binding on High Court.)]

21. ('34) 21 AIR 1934 Pat 173 (174) : 13 Pat 303.
('40) 27 AIR 1940 Mad 356 (362) : ILR (1940) Mad 454 (FB). (If a Division Bench does not accept as correct the decision on a question of law of another Division Bench, the only right and proper course to adopt is to refer the matter to a Full Bench.)
('34) 21 AIR 1934 Mad 392 (394) : 57 Mad 808.
('34) 21 AIR 1934 Pat 85 (86).
('35) 22 AIR 1935 Rang 370 (375):13 Rang 570(FB).

when there is a decision of the Judicial Committee on the point the previous Division Bench ruling need not be acted upon and the point need not be referred to a Full Bench.[21a] As to whether, when a Bench differs from the decision of a Full Bench, it has got the power to refer the Full Bench decision to a fuller Bench itself or to refer the matter to the Chief Justice who is to consider if a fuller Bench should consider the question, see the undermentioned case.[22]

(3) Subordinate Courts[23] are bound to follow the rulings of the High Court to which they are subordinate,[23a] and, in the absence of such rulings, they should follow the rulings, if any, of the other High Courts.[24] If there are two decisions of a High Court, one of a single Judge and another of a Bench of two Judges, then, unless the subordinate Court finds some grounds for distinguishing one from the other, it is bound to follow the decision of the Bench.[25]

(4) Where there are conflicting rulings both binding on the Court and they cannot be reconciled, the authority which is at once the more recent and more consistent with general principles and equity should prevail.[26]

(5) In a matter which is open to divergence of view among various High Courts, the Court should follow its own *cursus curiæ* unless it is of opinion that the former decisions of the Court are clearly wrong.[27]

[See however ('28) 15 A I R 1928 Bom 130 (133) : 52 Bom 385 (DB). (Practice of Bombay High Court is that no Bench has power to bind all other Benches as to the practice to be adopted in cases coming before them.)]

21a. ('43) 30 AIR 1943 Cal 114 (118) : ILR (1943) 1 Cal 22.

22. ('32) 19 A I R 1932 Mad 612 (614 & 647) : 55 Mad 883 (FB).

23. See S. 3 for definition of Subordinate Courts.

23a. ('43) 30 AIR 1943 Mad 471 (473) (DB). (A Judge may express his contrary opinion — Fact that some argument was overlooked in the judgment binding on him is immaterial.)

24. ('41) 28 AIR 1941 Sind 221 (223) : ILR (1941) Kar 431 (DB). (But they are not bound by decisions of other High Courts.)
('15) 2 AIR 1915 P C 15 (17) : 37 All 359 : 42 Ind App 155 (PC).
('31) 18 AIR 1931 Rang 89 (89) : 8 Rang 460. (Subordinate Judicial Officers in Rangoon should follow Burma rulings in preference to Indian rulings.)
('30) 17 AIR 1930 All 573 (575) (DB).
('29) 16 AIR 1929 All 134 (138).
('26) 13 AIR 1926 All 346(349,350): 48 All 432 (DB).
('23) 10 AIR 1923 All 392 (393) : 45 All 425 (FB).
('23) 10 AIR 1923 All 231 (231) (DB).
('36) 23 AIR 1936 Bom 59 (59) : 60 Bom 311 (FB). (Lower Court is bound to follow High Court's ruling until it is overruled.)
('92) 17 Bom 555 (558) (DB).
('90) 15 Bom 419 (422) (DB).
('98) 25 Cal 488 (491) (SB).
('84) 10 Cal 82 (84) (DB).
('78) 3 Cal 696 (701) (DB).
('36) 23 AIR 1936 Lah 612 (615). (Courts in the Punjab should as far as possible follow case-law in the Punjab when it is uniform and based on sound legal principles.)
('30) 17 AIR 1930 Lah 1051 (1052).
('11) 12 Ind Cas 442 (443) : 1911 Pun Re No. 3 (Rev). (Revenue Courts must follow rulings of Financial Commissioners—But it is open to High Court to distinguish it or overrule it.)
('31) 18 AIR 1931 Mad 71 (72) (DB). (Subordinate Court not entitled to compare the soundness of the views of the High Court to which it is subordinate with the views of other High Courts.)
('30) 17 AIR 1930 Mad 869 (870).
('25) 12 AIR 1925 Mad 261 (262): 48 Mad 693 (DB).
('20) 7 AIR 1920 Mad 652 (652).
('16) 3 AIR 1916 Mad 747 (749). (Opinion of the majority of the Full Bench and not of the dissenting Judge is to be followed.)
('29) 16 AIR 1929 Nag 156 (158) : 25 Nag L R 85.
('18) 5 AIR 1918 Nag 237 (238). (Subordinate Judges can assist themselves on question of law by study of the rulings of all the High Courts.)
('19) 6 AIR 1919 Pat 293(296): 4 Pat L Jour 565(DB).
('32) 19 AIR 1932 Pat 346 (347) : 11 Pat 616 (DB). (Subordinate Courts should follow a single judge's decision of their own Court in preference to Bench decision of another High Court.)
('34) 21 AIR 1934 Pat 173 (174) : 13 Pat 303 (DB).
('15) 2 AIR 1915 Low Bur 94 (95).
[*See also* ('16) 3 AIR 1916 Mad 421 (422) (DB). (Subordinate Court bound by finding of higher Court in another case.)
('15) 2 AIR 1915 Mad 613 (613) (DB).]

25. ('31) 18 AIR 1931 Mad 71 (72) (DB).

26. (1880) 5 App Cas 787 (798), Campbell v. Campbell. (Referred to in 9 Ind Cas 173 (FB).)
('11) 9 Ind Cas 173 (176) (FB) (Mad). (But as far as possible the authority of all former decisions ought to be supported and later decisions must, whenever possible, be treated as interpreting and limiting the application of the earlier cases.)

27. ('41) 28 AIR 1941 Mad 161 (171) : ILR (1941) Mad 438 (FB). (As the question is merely one of procedure, it will not be desirable to depart from the long course of decisions and upset what has been regarded as a settled *cursus curiæ* for over 50 years (Per Patanjali Sastri, J.))

(6) Section 3, Law Reports Act, enacts that no Court is bound to treat as authority any unauthorised report quoted before it.[28] But the Judges, in exercising their discretion under this section, would generally have regard to the practice prevailing in their Courts with regard to the particular report quoted before them.[29]

(7) Where the authorities have laid down a rule, it is not always necessary to discover the original basis of it.[30]

16. English and American decisions.—English and American decisions are not precedents and are not binding as authority upon Courts in India not administering English law,[1] and where the law in India has been codified it is not open to the Courts

('39) 26 AIR 1939 Mad 369 (370) : ILR (1939) Mad 456 (SB).
('83) 9 Cal 82 (87) (FB). (Especially where the measure relates not to any general principle of law but to some technical or fiscal rule such as the registration of documents.)
('26) 13 AIR 1926 Mad 530 (531):49 Mad 302 (DB).
('33) 20 AIR 1933 All 634 (638) : 55 All 743 (DB).
('29) 16 AIR 1929 Lah 174 (175). (Direct decision of Chief Court should be preferred to that of the High Court if it is not direct.)
('27) 14 AIR 1927 Oudh 1 (2) (DB). (Old Oudh Judicial Commissioner's Court decisions are not binding on the Chief Court.)
('26) 13 AIR 1926 Oudh 544 (544). (Do.)
('26) 13 AIR 1926 Oudh 367 (367). (Do.)
('28) 15 AIR 1928 Pat 641 (649) : 7 Pat 613 (DB). (It is the practice of the Patna High Court not to depart from the *cursus curiæ* established by the Calcutta High Court.)
('28) 15 AIR 1928 Pat 410 (419) : 7 Pat 690. (Do.)
('20) 7 AIR 1920 Pat 419 (420):5 Pat L Jour 23 (Do.)
('18) 5 AIR 1918 Pat 457 (457) : 3 Pat L Jour 285 (DB). (Do.)
('18) 5 AIR 1918 Pat 377 (377) : 3 Pat L Jour 377 (DB). (Do.)
('18) 5 AIR 1918 Pat 91 (92) : 4 Pat L Jour 38 (DB). (Do.)
('17) 4 AIR 1917 Pat 575 (576) (DB). (Do.)
('27) 14 AIR 1927 Rang 4 (14) : 4 Rang 313 (FB). (Rangoon High Court not bound to follow the decisions of the Lower Burma Chief Court — But Subordinate Courts are bound by authorized reports of Chief Court.)
('28) 15 AIR 1928 Sind 166 (167) (DB). (Bombay decisions are considered by the Sind Courts as of more authority than those of other High Courts.)
('27) 14 AIR 1927 Sind 225 (226) : 22 Sind L R 82 (DB). (Sind Sadar Court judgments are not binding on Judicial Commissioner's Court but are entitled to great respect.)
('24) 11 AIR 1924 Sind 75 (83) : 17 Sind L R 133 (FB). (Do.)

28. ('34) 21 AIR 1934 Rang 39 (40).
('32) 19 AIR 1932 Nag 137 (138): 28 Nag L R 116.
('31) 18 AIR 1931 Rang 279 (280) : 9 Rang 561. (Two decisions of the High Court—One in official report, the other in unauthorized report—Subordinate Court can follow officially reported case.)

29. ('31) 18 AIR 1931 Mad 71 (72) (DB).
('30) 17 AIR 1930 Bom 320 (326) (DB).
See also the following cases :
('32) 19 AIR 1932 Cal 550 (551) (DB). (Bench decision in unauthorized report preferred to single Judge's decision in authorized report.)
('31) 18 AIR 1931 Mad 782 (784) : 55 Mad 251.
('32) 19 AIR 1932 Nag 137 (138): 12 Nag L R 116.
('30) 17 AIR 1930 Nag 270 (270): 26 Nag L R 178.
('30) 17 AIR 1930 Oudh 57 (58): 4 Luck 721 (DB).
('33) 20 AIR 1933 Rang 75 (76). (Courts should fall back on unofficially reported cases only when they can find no officially reported case on the point.)
('29) 16 AIR 1929 Rang 273 (273): 7 Rang 361(DB).

30. ('28) 15 AIR 1928 All 596(598):51 All 136(FB).

Note 16

1. ('42) 29 AIR 1942 All 302 (307) (DB).
('41) 28 AIR 1941 Mad 713 (718): ILR (1941) Mad 824 (DB).
('41) 28 AIR 1941 Mad 129 (145) (DB).
('41) 28 AIR 1941 Nag 282 (284) : ILR (1941) Nag 397. (Language of Indian Statutes ought not to be enlarged by any implication of English doctrines.)
('39) 26 AIR 1939 Pat 323 (329) (SB). (Per Manohar Lal, J.—Citation of English authorities to consider Indian Statutes not *in pari materia* is not proper.)
('38) 25 AIR 1938 Sind 116 (121) : 32 Sind L R 622 (DB).
('18) 5 AIR 1918 P C 11 (20) : 45 Cal 878 : 45 Ind App 73 (PC).
('83) 7 Bom 341 (359) (FB). (English decisions are not precedents but afford useful analogies.)
('32) 19 AIR 1932 P C 207 (211) : 7 Luck 442 : 59 Ind App 376 (PC).
('24) 11 AIR 1924 P C 40 (41) : 51 Cal 304 : 51 Ind App 28 (PC). (Reference to English cases unnecessary on points under Indian law.)
('33) 20 AIR 1933 All 366 (368) : 55 All 496 (DB). (Companies Act, 1913—English decisions are not binding.)
('27) 14 AIR 1927 All 246 (251) : 49 All 353. (Indian Statute—Reference to English cases likely to lead to misunderstanding.)
('23) 10 AIR 1923 Bom 321 (350) : 47 Bom 813 (FB). (English judgments are in no better position than the opinion of eminent jurists.)
('15) 2 AIR 1915 Bom 22 (23) : 39 Bom 472. (Express words of Indian statute cannot be overriden by English rules.)
('24) 11 AIR 1924 Cal 864 (867) : 51 Cal 745 (DB).
('24) 11 AIR 1924 Cal 405 (408) : 51 Cal 62. (Questions of practice in India are to be determined according to principles laid down in the Courts in India.)
('09) 1 Ind Cas 829 (831) : 36 Cal 354. (English authorities not useful in dealing with codified law in India.)
(1900) 28 Cal 171 (175) (DB).

in India to ignore the enacted law and follow the English law, simply because in certain cases the enforcement of such statute law might create hardship.[2] But, if an Indian Act is silent on any question or there is ambiguity, it may be necessary to apply English principles.[3]

They may, however, be referred to with advantage as affording analogies in the following cases :

(1) Where an Indian statute has been passed in the *same terms* and on the *same lines* as those of an English statute and the latter has been authoritatively construed by English decisions.[4] But where the terms of a section in an Indian Act are taken from

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('24) 11 AIR 1924 Lah 513 (522, 524) : 5 Lah 147 (FB). (Law of the land to be obeyed in preference to laws of other countries.)
('27) 14 AIR 1927 Mad 988 (990) : 50 Mad 961 (DB). (American decisions.)
('26) 13 AIR 1926 Mad 357 (358). (Indian statute clear—Reference to English cases is of no use.)
('20) 7 AIR 1920 Mad 427 (432) : 42 Mad 821 (FB). (Following American decisions deprecated.)
('18) 5 AIR 1918 Mad 700 (701) (DB). (English law to be followed only if in conformity with justice, equity and good conscience.)
('13) 19 Ind Cas 12 (16) : 36 Mad 544 (FB). (English cases are no precedents but may be referred to as explanatory of Indian statutes which are usually based on those decisions.)
('97) 20 Mad 97 (103) (DB). (English case can be referred to if law is same.)
('29) 16 AIR 1929 Rang 71 (72) : 6 Rang 771 (DB). (English cases not necessarily good guide in mortgage suits.)
('27) 14 AIR 1927 Rang 183 (186) : 5 Rang 212 (DB). (AIR 1918 P C 11 : 45 Cal 878 : 45 Ind App 73 (PC) referred to.)
('27) 14 AIR 1927 Sind 130 (131) : 23 Sind L R 137 (FB). (Especially in partnership suits English cases are not good guide.)
[*See* ('95) 18 Mad 88 (91). (English law referred to.)
('37) 24 AIR 1937 Sind 129 (144) : 32 Sind L R 567 (FB). (Decisions on expressions used in an English Act are hardly a guide in the interpretation of similar words used in an Indian Act.)]
[*See also* ('20) 7 AIR 1920 Cal 150 (157) (DB).]

2. ('41) 28 AIR 1941 Bom 339 (344) : ILR (1941) Bom 506. (It is dangerous to apply English decisions.)
('41) 28 AIR 1941 Pat 70 (83) : 20 Pat 223 (DB).
('40) 27 AIR 1940 Cal 429 (431, 432) : ILR (1940) 1 Cal 197.
('39) 26 AIR 1939 Bom 522 (523) : ILR (1939) Bom 639.
('36) 23 AIR 1936 Cal 356 (367) : ILR (1937) 1 Cal 711 (FB).
('30) 17 AIR 1930 Cal 731 (734) (DB). (When the case is not one of legislative omission, the Court cannot take recourse to English authorities for determining the intention of the Legislature.)
('30) 17 AIR 1930 Mad 441 (442) : 53 Mad 439 (DB). (Words clearly expressing intention of Legislature —Definition from English cases should not be accepted.)
('99) 22 All 149 (159) : 27 Ind App 58 (PC).
('31) 18 AIR 1931 All 183 (185) : 53 All 114 (FB).
('32) 19 AIR 1932 All 18 (22) : 53 All 642 (DB).
('32) 19 AIR 1932 P C 207 (211) : 7 Luck 442 : 59 Ind App 376 (PC).
('31) 18 AIR 1931 P C 79 (82) : 58 Cal 1235 : 58 Ind App 91 (PC).
('37) 24 AIR 1937 All 502 (503).
('33) 20 AIR 1933 All 70 (71) : 54 All 1041.
('32) 19 AIR 1932 Bom 291 (294) : 56 Bom 324 (DB). (At the most English case may assist by way of analogy.)
('32) 19 AIR 1932 Cal 63 (63) : 58 Cal 1293.
('31) 18 AIR 1931 Cal 463 (466) (DB).
('34) 21 AIR 1934 Lah 840 (841) : 16 Lah 51. (Indian Courts are not bound by Common law prevailing in England and should interpret the word used in a statute in its current meaning.)
('31) 18 AIR 1931 Lah 746 (748) : 13 Lah 233 (DB).
('30) 17 AIR 1930 Lah 364 (369) : 11 Lah 375 (DB).
('29) 16 AIR 1929 Lah 344 (354) : 10 Lah 283 (FB).
('35) 22 AIR 1935 Mad 528 (532) : 58 Mad 642 (FB). (When terms of section are clear, English law should not be applied.)
('32) 19 AIR 1932 Mad 516 (518) : 55 Mad 758 (DB).
('38) 25 AIR 1938 Nag 540 (543) : ILR (1938) Nag 174.
('32) 19 AIR 1932 Oudh 145 (147) : 6 Luck 435. (In India the Courts have to construe not the English law but Indian Codes.)
('32) 19 AIR 1932 Oudh 1 (4) : 7 Luck 270 (DB). (English authorities not helpful to decide questions regarding acknowledgment in Limitation Act.)
('32) 19 AIR 1932 Rang 185 (187) : 10 Rang 403.
('31) 18 AIR 1931 Rang 235 (243) : 9 Rang 404 (SB).
[*See* ('33) 20 AIR 1933 P C 145 (147) : 60 Cal 1029 : 60 Ind App 196 (PC). (Application of decisions on Imperial Income-tax Code is misleading.)]
[*See also* ('31) 18 AIR 1931 P C 165 (170) : 54 Mad 691 : 58 Ind App 239 (PC).
('08) 35 Cal 34 (48, 58, 59) (FB). (Per Mookerjee, J. — Such rules cannot be disregarded especially where the plain construction of the statute lead to manifest injustice.)
('43) 22 Pat 133 (146). (It will be worse than useless to construe the terms of a section of an Indian Statute by the terms of some remotely kindred English Statute.)]

3. ('37) 24 AIR 1937 Rang 302 (307) (DB).
4. ('41) 28 AIR 1941 Lah 316 (320) : ILR (1942) Lah 330 (DB).
('41) 28 AIR 1941 Pat 151 (152) : 20 Pat 75 (DB).
('35) 22 AIR 1935 Lah 570 (572) : 16 Lah 829 (FB). (Guidance may be taken from the English cases in which certain expressions have been interpreted when the question is as to the meaning of the same expressions as used in the Indian Acts.)
('31) 18 AIR 1931 Lah 578 (581) : 12 Lah 725 (FB).

the English law, such section should be construed strictly in relation to the immediate context of the Indian Act, and the Court should decline to be guided by evidence as to their meaning or judicial interpretations of them when they occur in another context or other statutes.[5]

(2) Where an English or American decision is based upon *general legal principles* recognised by the laws of all civilised countries.[6] But it must be applied with reference to Indian conditions,[7] and where the law of this country is different from that of England or America, English or American decisions should be quoted with greatest care.[8]

(3) Where the point is a novel one and there is no precedent in India dealing with it.[9]

('03) 30 Cal 36 (76) (DB).
('01) 11 Mad L Jour 91 (108) (DB).
('94) 22 Cal 77 (81, 85) (DB).
('78) 4 Cal 260 (276) (DB).
('85) 7 All 44 (50, 51) (DB).
('75) 2 Ind App 169 (181) : 23 Suth W R 314 (PC).
('33) 20 AIR 1933 All 789 (793): 55 All 912 (FB).
('34) 21 AIR 1934 Bom 28 (30): 58 Bom 128 (DB).
('18) 5 AIR 1918 Cal 467 (470): 45 Cal 138 (DB).
('31) 18 AIR 1931 Lah 756 (757) (DB).
('15) 2 AIR 1915 Lah 405 (406): 1915 Pun Re No. 54. (Companies Act.)
('31) 18 AIR 1931 Mad 729 (738).
('30) 17 AIR 1930 Mad 609(615): 53 Mad 449(DB).
('21) 8 AIR 1921 Mad 524(527): 44 Mad 718(DB).
('17) 4 AIR 1917 Mad 525 (532):39 Mad 250(DB).
('13) 18 Ind Cas 997 (1001) (DB) (Mad).
('33) 20 AIR 1933 Pat 461 (463) : 13 Pat 78 (DB).
('33) 20 AIR 1933 Pat 196 (199): 12 Pat 216(DB).
('30) 17 AIR 1930 Rang 47 (48): 7 Rang 514.
('32) 19 AIR 1932 Sind 50 (51) : 25 Sind LR 521.
('31) 18 AIR 1931 Sind 70 (71): 25 Sind L R 381.
('31) 18 AIR 1931 Sind 44 (46): 25 Sind L R 310.
[*See* ('33) 20 AIR 1933 Sind 179 (181):27 Sind LR 230 (DB).
('30) 17 AIR 1930 Cal 291(294): 57 Cal 1062 (DB).]
[*See also* ('32) 19 AIR 1932 Bom 341 (350) : 57 Bom 623.
('21) 8 AIR 1921 Lah 134 (135) : 2 Lab 239.
(1879) 5 App Cas 342 (344, 345), Trimble v. Hill. (Referred to in 23 Bom 191.)]

5. ('22) 9 AIR 1922 Mad 263 (265) : 46 Mad 177 (DB). (Per Coutts-Trotter, J.)

6. ('87) 11 Bom 551 (561) : 14 Ind App 89 (PC).
('42) 29 AIR 1942 All 302 (307) (DB).
('41) 28 AIR 1941 All 9 (13).
('41) 28 AIR 1941 Mad 129 (145) (DB).
('40) 27 AIR 1940 Cal 429 (432) : 1LR (1940) 1 Cal 197.
('22) 9 AIR 1922 Pat 104 (106) : 1 Pat 371 (DB). (Principles of justice, equity and good conscience for instance should be identical with corresponding relevant rules of the Common Law of England.)
('74) 22 Suth W R 279 (281): 1 Ind App 364 (PC).
('83) 7 Bom 341 (359) (FB).
('20) 7 AIR 1920 Nag 144 (145). (e. g., Rules of justice, equity and good conscience.)
('20) 7 AIR 1920 Pat 705 (707). (Except as rules of justice, equity and good conscience rules of Common Law in England do not apply to Moffusil towns in India.)
(1848) 1848 Tay Rep 283 (283), Malcolm v. Smith.
[*See* ('36) 23 AIR 1936 Rang 141 (142) (DB). (Decision of Court of law as opposed to Court of equity and which is inequitable should not be followed in India.)
('89) 16 Cal 677 (682) : 16 Ind App 44 (PC).]
[*See also* ('35) 22 AIR 1935 Cal 33 (34) : 61 Cal 986. (Principles of equity as applied in Courts of England should be applied in absence of law in India laying down different procedure.)
(1880) 5 C P D 295 (303), Scaramanga v. Stamp.
('37) 24 AIR 1937 Sind 129 (144):32 Sind L R 567 (FB). (Drafting inaccurate.)]

7. ('28) 15 AIR 1928 Mad 23 (28) (DB).
('32) 19 AIR 1932 Mad 445 (452):55 Mad 727(DB).
('24) 11 AIR 1924 Cal 240 (242) : 50 Cal 667.
('30) 17 AIR 1930 Lah 920 (926): 11 Lah 564(DB).
('25) 12 AIR 1925 Oudh 337 (346) : 28 Oudh Cas 8 (DB).
[*See* ('85) 11 Cal 301 (310) : 12 Ind App 23 (PC). (There is no room in India for the rule of English law in favour of a tenancy in common; the presumption is generally the reverse.)]
[*See also* ('32) 19 AIR 1932 Rang 27 (34, 49): 10 Rang 1.]

8. ('42) 29 AIR 1942 Bom 18 (19):ILR (1942)Bom 139 (FB). (In such cases, reference to English decisions causes confusion.)
('38) 25 AIR 1938 Rang 289 (289): 1938 Rang L R 299 (DB).
('38) 25 AIR 1938 Sind 116 (121) : 32 Sind L R 622 (DB).
('33) 20 AIR 1933 Mad 293(296):56 Mad 546(DB).
('12) 16 Ind Cas 601 (606) (DB) (Mad). (Great care to be taken in applying to India English rules with regard to equitable rights.)
[*See* ('42) 29 AIR 1942 All 344 (347): ILR (1942) All 848 (DB).
('35) 22 AIR 1935 Cal 316 (327) : 62 Cal 749 (DB). (Provisions of statutory enactments must always and necessarily be somewhat less elastic than those to be gathered from the Common law which in effect is enshrined in judgments in decided cases. Courts have to administer and to apply as accurately as lies in their powers the precise words of the relevant statutory enactments.)]

9. ('35) 22 AIR 1935 Cal 33 (34) : 61 Cal 986. (Principles of equity as applied in Courts of England should be applied in absence of law laying down different procedure.)

(4) Where the Indian Act makes express reference to the Court in England and to the principles and rules on which such Court acts.[10]

See also the undermentioned case.[11]

17. "Laws relating to the procedure of the Courts of Civil Judicature." — These words mean all the laws in operation *at the time* of the passing of the Code.[1]

The words "Courts of Civil Judicature" mean all Courts which try suits and proceedings of a civil nature.[2] Where an Act allows suits or applications to be filed in a Civil Court relating to matters arising under it, the procedure to be followed in such suit or application will be governed by the provisions of the Code.[3]

18. Revenue Courts. — See Note 2 under Section 5.

19. Mamlatdar's Courts. — See Note 3 under Section 5.

PRELIMINARY.

Short title, commencement and extent.

1. [S. 1.] (1) This Act may be cited as THE CODE OF CIVIL PROCEDURE, 1908.

(2) It shall come into force on the first day of January, 1909.

(3) This section and sections 155 to 158 extend to the whole of British India : the rest of the Code extends to the whole of British India, except the Scheduled Districts.

Synopsis

1. "British India."
2. "Scheduled Districts."

1. "British India." — The term "British India" is not defined in the Code and therefore the definition thereof in the General Clauses Act, X of 1897, will apply.[1] Under S. 3, cl. (7) of that Act, "British India" has been defined as follows : "'British India' shall mean, as respects the period before the commencement of Part III of the Government of India Act, 1935, all territories and places within His Majesty's dominions which were for the time being governed by His Majesty through the Governor-General of India or through any Governor or officer subordinate to the Governor-General of India, and as respects any period after that date means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces, except that a reference to British India in an Indian law passed or made before the

10. ('31) 18 AIR 1931 P C 234 (239) : 54 Mad 774 : 58 Ind App 350 (PC).
('94) 19 Bom 293 (296). (English rules applied where no provision for payment of wife's costs is found in the Divorce Act or in the Code.)
('82) 6 Bom 416 (419). (Absence of provisions in Divorce Act and the Code—English rules applied.)
('02) 29 Cal 619 (620). (English rules applied when no provision for payment of wife's costs is found in the Divorce Act or in the Code.)
('79) 4 Cal 260 (269, 281). (Do.)

11. ('43) 30 AIR 1943 PC 34 (38) (PC). (Though the Indian Act is to be interpreted according to the meaning of the words used in it, passages from English decisions laying down general principles can be referred to in interpreting the sections of the Indian Act when the meaning is not clear.)
('36) 23 AIR 1936 Lah 337 (338) : 16 Lah 651 (DB). (It may be permissible to refer to the principles of English law, if there is any ambiguity in the language used by the statute, and to adopt the interpretation which is in conformity with those principles.)

Note 17

1. ('78) 2 All 74 (90)(DB). ("Laws relating to Civil Procedure" include General Clauses Act, I of 1868.)
2. See Section 9.
3. ('37) 24 AIR 1937 Mad 653 (653) : ILR (1938) Mad 216.

Section 1—Note 1

1. See S. 3 of the General Clauses Act, X of 1897.

commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar."

Aden[2] and British Burma[3] were governed by His Majesty through Governors or other officers subordinate to the Governor-General of India and were thus within "British India." As regards Aden, it has now been provided by the Government of India Act, 1935 (25 & 26, Geo. V., Chap. 42), S. 94 (which came into force on 1st April 1937[4]) that Aden ceases to be a part of India. By virtue of S. 46, sub-s. (2) of the said Act, Burma ceased to be part of British India from 1st April 1937.[5] But by S. 466 of the Government of India Act of 1935, it was provided that the law previously in force in Burma would continue to be in force there until altered or repealed or amended by the Legislature or other competent authority. Burma has since passed out of British hands.

"Scheduled Districts"[6] were within British India.

The following classes of territories do not fall within the scope of the definition of "British India":

(1) Native States in India.[7]

(2) Lands ceded by the Native Princes to the British Government for limited purposes,[8] e. g., civil stations and cantonment areas,[9] and land over which jurisdiction has been ceded for the purposes of Railway Administration.[10] Thus, the cantonments of Wadhwan,[11] Secunderabad[12] and the Rajkot Civil Station[13] are not included in "British India." Where *full sovereignty* has been ceded by the Native Princes of India, or a new territory acquired by conquest from Native Rulers and has come under the British rule in India, the territory will form part of "British India."[14]

Singapore was not within "British India."[15] It has now ceased to be a British possession.

2. **"Scheduled Districts."**—For reasons of State several parts of British India were never brought within or were, from time to time, removed from, the operation of the general Acts and Regulations and the jurisdiction of the ordinary Courts of Judicature.[1]

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2. See also Aden Laws Regulation of 1891, S. 2.
3. ('86) 13 Cal 221 (223) (DB).
4. Government of India (Adaptation of Acts of Parliament) Order, 1937.
5. Government of India (Adaptation of Acts of Parliament) Order, 1937.
6. See Note 2.
7. ('88) 1888 Pun Re No. 191, page 499. (Reversed by Privy Council in 22 Cal 222 on another point.) ('02) 29 Cal 400 (401, 402) (DB). (The Tributory Mahals of Orissa such as Mayoorbhunj do not form part of British India.)
('06) 33 Cal 219 (253): 33 Ind App 1 (PC). (Kathiawar States are not included in British India, but even a non-British subject suing in the Political Agent's Court which is a British Indian Court can appeal to the King.)
8. ('12) 17 Ind Cas 534 (535, 536) : 37 Bom 152 (DB). (Land ceded for civil stations in Native States are not ceded in full sovereignty.)
('10) 6 Ind Cas 429 (429) : 6 Nag L R 49. (Berar is held under a sort of mortgage as security for the fulfilment of certain engagements under the treaty of 21st May 1853, with the Nizam. The Code was extended to it by Notification No. 949—I. B. of 26th March 1909.)
('25) 12 AIR 1925 Mad 1100 (1101) (DB). (Agency Tracts of Vizag.)
9. ('12) 17 Ind Cas 534 (535, 536) : 37 Bom 152 (DB).
Also see Preamble Note 7.
10. ('97) 25 Cal 20 (31) : 24 Ind App 137 : 1897 Pun Re No. 6 (P C).
11. ('13) 37 Bom 152 (156) (DB). (Dissenting from 9 Bom 244.)
12. ('94) 21 Cal 177 (179).
13. ('86) 10 Bom 186 (188) (DB).
14. ('95) 19 Bom 680 (686) (DB). (But the law of conquered countries continues until the Crown or Legislature changes it. Case relating to the conquest of the Island of Salsette from the Marathas.)
15. See Straits Settlements Act 1866, S. 1.

Note 2

1. ('95) 17 All 483 (484) (DB). (General Acts do not apply unless the Legislature has expressly made them applicable to such districts.)
('19) 6 AIR 1919 P C 150 (152) : 42 Mad 813 : 46 Ind App 151 (P C). (Property in Scheduled Districts — Order by British Indian Court for sale under mortgage decree is without jurisdiction.)

These parts were known as the Scheduled Districts as all such parts were given in a schedule to the Scheduled Districts Act, XIV of 1874.

By sections 5 and 5A of that Act, however, the Local Government, with the sanction of the Governor-General in Council, had power to extend to any such District, any enactment in force in British India with such modifications and limitations as it thought fit. The Civil Procedure Code, 1882, was under that section extended to various Scheduled Districts by notification. The Code of 1908 was extended to several parts of the Scheduled Districts[2] under notifications after the passing of the Code.

The Scheduled Districts Act of 1874 has now ceased to be of effect.[3] But, by virtue of S. 92 of the Government of India Act, 1935, no Act of the Federal Legislature or

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†('14) 1 AIR 1914 P C 140 (144) : 42 Cal 116 : 41 Ind App 197 (PC). (Code is made applicable to Sonthal Parganas with modification.)

('69) 1 N W P H C R 280 (284) (DB).

('07) 34 Cal 576 (581) (DB). (Family domains of Maharaja of Benares—C. P. Code applies.)

(1900) 4 Cal W N 287 (288) (DB). (Code has been made applicable to Jalpaiguri which includes Bhutan Duars.)

('91) 18 Cal 133 (138). (Do.)

('88) 15 Cal 365 (370) (DB). (Decrees obtained in Scheduled District not executable in British India unless Civil Procedure Code has been extended to it under S. 5 of the Scheduled Districts Act.)

('84) 10 Cal 761 (764) (DB). (Do.)

('79) 4 Cal 222 (228) (DB). (Do.)

2. The following is the list of the Scheduled Districts to which the Code or a provision thereof has been extended by notifications:—

The Act has been extended by notification under Ss. 5 and 5A of the Scheduled Districts Act, 1874 (XIV of 1874), to the following Scheduled Districts:—

(1) The Districts of Jalpaiguri, Cachar (excluding the North Cachar Hill), Sylhet, Goalpara (including the Eastern Duars), Kamrup, Darrang, Nowgong (excluding the Mikir Hill Tracts), Sibsagar (excluding the Mikir Hill Tracts) and Lakhimpur (excluding the Dibrugar Frontier Tracts), *Gazette of India*, 1909, Pt. I, p: 5, *Gazette of India*, 1914, Pt. I, p. 1690.

(2) Upper Burma (except the Shan States), *Gazette of India*, 1909. Pt. I, p. 5.

(3) The Province of Sind. *Bombay Government Gazette Extraordinary*, 1909, Pt. I, *Gazette of India*, 1909, Pt. I, p. 32.

(4) The district of Darjeeling and the districts of Hazaribagh, Ranchi, Palamau and Manbhum in Chota Nagpur. *Calcutta Gazette*, 1909, Pt. I, p. 25, *Gazette of India*, 1909, Pt. I, p. 33.

(5) The province of Kumaun and Garwal and the Tarai Parganas with modifications, *United Provinces Gazette*, 1909, Pt. I, p. 3, *Gazette of India*, 1909, Pt. I, p. 31.

(6) The Pargana of Jaunswar Bawar in Dehra Dun and the scheduled portion of the Mirzapur district, *United Provinces Gazette*, 1909, Pt. I, p. 4. *Gazette of India*, 1909, Pt. I, p. 32.

(7) Coorg, *Gazette of India*, 1909, Pt. I, p. 32.

(8) Scheduled districts in the Punjab, *Gazette of India*, 1909, Pt. I, p. 33.

(9) The districts of Peshawar, Hazara, Kohat, Bannu, Dera Ismail Khan composing the North-West Frontier Province, *Gazette of India*, 1909, Pt. II, p. 80.

(10) Sections 36 to 43 to all the scheduled districts in Madras, *Gazette of India*, 1909, Pt. I, p. 152.

(11) To the scheduled districts of the Central Provinces, except so much, as is already in force, and so much, as authorizes the attachment and sale of immovable property in execution of a decree, not being a decree directing the sale of such property. *Gazette of India*, 1909, Pt. I, p. 239.

(12) To Ajmer-Merwara, except Sections 1 and 155 to 158. *Gazette of India*, 1909, Pt. II, p. 480.

(13) To Pargana Dhalbhum, the Municipality of Chaibassa in the Kolhan and the Porahat estate in the district of Singhbhum. *Calcutta Gazette*, 1909, Pt. I, p. 453, *Gazette of India*, 1909, Pt. 1, p. 443.

Under Section 3 (3) *(a)* of the Sonthal Parganas Settlement Regulation (III of 1872), Sections 38 to 42 and 156 and Rules 4 to 9 in O. XXI in the first schedule have been declared to be in force in the Sonthal Parganas and the rest of the Code for the trial of suits referred to in Section 10 of the Sonthal Parganas Justice Regulation, 1893 (V of 1893). *Calcutta Gazette*, 1909, Pt. I, p. 45, and the whole Code in the Angul District under Section 3 of the Angul Laws Regulation, 1913 (III of 1913), B. and O. Code. This Act has been declared to be in force in British Baluchistan under Section 3 of the Baluchistan Laws Regulation, 1913 (II of 1913), Baluchistan Code. Sections 38, 39, 41, 42, 45 and 46, Order IX, Rules 1 and 2, and Order XXI, Rules 1-9 have been declared to be in force in the Arakan Hill District by Regulation I of 1916, Section 2. See Supplement to Burma Code.

This Act has been declared to be in force in the Pargana of Manpur, Regulation II of 1926, Section 2; in Panth Piploda, Regulation I of 1929, Section 2.

3. *Vide* Government of India (Adaptation of Indian Laws) Order of 1937.

Provincial Legislature shall apply to an excluded area or a partially excluded area, unless the Governor by public notification so directs.

Definitions.

2. [S. 2.] In this Act, unless there is anything repugnant in the subject or context,—

(1) "Code" includes rules :

1. Distinction between the body of the Code and the "rules." — The chief feature of the present Code is the distinction drawn between what is termed "body of the Code" and "the rules." The body of the Code creates *jurisdiction*[1] and is unalterable except by the Legislature, but the rules which indicate the *mode* in which such jurisdiction is to be *exercised*[2] can be altered or amended by the High Courts under certain circumstances,[3] such alterations or amendments having force or effect within the local limits of the jurisdiction of the High Courts which made them. This division was introduced "to enable variations to be introduced in procedure to meet the requirements of different localities as well as to enable defects to be remedied as they are discovered without resort to the tardy process of legislation."[4]

The body of the Code has, expressed as it is in the most general terms, to be read in conjunction with the more particular provisions of the rules,[5] but in case of conflict between them the body of the Code must prevail.[6] Similarly, the forms in the schedule cannot control the clear words of the Code.[7]

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(2) "decree" means the formal expression[8] of an adjudication[4] which, so far as regards the Court expressing it, conclusively determines the rights of the parties[7] with regard to all or any of the matters in controversy[8] in the suit[5] and may be either preliminary[10] or final.[11] It shall be deemed to include the rejection of a plaint[13] and the determination of any question within section 47 or section 144,[14] but shall not include —

(a) any adjudication from which an appeal lies as an appeal from an order,[15] or

(b) any order of dismissal for default.[16]

Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.[12]

Section 2 (1) — Note 1

1. ('17) 4 AIR 1917 Cal 44 (46) : 44 Cal 929 (FB). (Inherent jurisdiction to remand a case even when case is not covered by S. 107 read with O. 41, R. 23, is saved by S. 151.)

2. ('17) 4 AIR 1917 Cal 44 (46): 44 Cal 929 (FB). (Power to remand given by S. 107 is controlled by O. 41, R. 23.)

3. ('17) 4 AIR 1917 Cal 657 (658) : 43 Cal 148 (DB). (Power of lower Appellate Court to remand under S. 107 (1) (b) is limited to O. 41, R. 23.)
See also Ss. 121 to 131.

4. See the Statement of Objects and Reasons.

5. ('17) 4 AIR 1917 Cal 657 (658) : 43 Cal 148 (DB). (S. 107 is to be read with O. 41, R. 23.)
('14) 1 AIR 1914 Cal 163 (164) : 41 Cal 108 (DB). (Rules restrict sections.)
('17) 4 AIR 1917 Cal 44 (46) : 44 Cal 929 (FB). (S. 107 is to be read with O. 41, R. 23.)

6. ('14) 1 AIR 1914 Cal 581 (582) (DB). (There was no conflict in this case.)
('26) 13 AIR 1926 Mad 676(678). (Conflict between S. 149 and O. 7, R. 11—S. 149 prevails.)
('39) 26 AIR 1939 Nag 186 (190) : I L R (1939) Nag 250 (FB).

7. ('18) 5 AIR 1918 Cal 631 (632) (DB).
See also Note 7 under Preamble.

Synopsis

1. Legislative changes.
2. Distinction between a decree and an order.
3. Essential elements of a decree.
4. There must be an adjudication.
5. The decision must have been given in a suit.
6. The decision must have been given on the rights of parties with regard to all or any of the matters in controversy in the suit.
7. The decision must conclusively determine the rights of the parties.
8. There must be a formal expression of the adjudication.
9. Classes of decrees.
10. Preliminary decree.
11. Final decree.
12. Decree partly preliminary and partly final.
13. Order rejecting plaint.
14. Determination of a question within Section 47 or Section 144.
15. "Decree" does not include appealable orders.
16. Decree does not include order of dismissal for default.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Cases where Code provides for preliminary decree. See Note 10.
Decision on preliminary issues. See Note 10.
Decisions under other Acts. See Note 5.
Distinction between definition of decree in old and new Codes. See Note 1.
Execution proceedings. See Notes 5 and 14.
Importance of the definition of decree. See Note 2.
Interlocutory order in suits. See Note 6.
Non-appealable orders. See Note 2.
Order of abatement. See Note 6.
Order rejecting an application to sue in forma pauperis. See Note 5.
Order returning plaint or appeal. See Note 13.
Rejection of appeal. See Note 13.

1. Legislative changes. — A "decree" was defined under S. 2 of the old Code as follows :

> " 'Decree' means the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, where such adjudication, so far as regards the Court expressing it, decided the suit or appeal. An order rejecting a plaint, or directing accounts to be taken, or determining any question mentioned or referred to in S. 244, but not specified in S. 588, is within this definition : An order specified in S. 588 is not within this definition."

In the present definition the language has been re-cast so as to effect some important changes —

(i) Whereas under the old definition, an adjudication, in order to constitute a decree, must have *decided the suit or appeal*, it is sufficient, under this definition, that it *conclusively determines the rights of the parties* though not deciding the suit itself. This change has been effected in view of the express provision recognizing the distinction between preliminary and final decrees.[1]

(ii) Under the old definition, orders, determining any question not *mentioned* or *referred to* in S. 244 (now S. 47), were not decrees though they were *within* S. 244. Thus, orders against sureties under S. 145, for example, were not decrees. The word "within" has now been substituted for the words "mentioned or referred to in" so as to constitute such orders also decrees.[2]

(iii) An order of dismissal for default is expressly excluded from the definition of a decree and the conflict of decisions that had existed on that point has been thus set at rest. (See Note 16.)

Section 2 (2) — Note 1

1. See the Report of the Special Committee and the Notes on clauses.
[*See* ('01) 29 Cal 758 (769) (FB). (The definition under the Code of 1882 was itself a much more comprehensive one than that of the Code of 1877.)]
2. See Notes on clauses by the Special Committee.

2. Distinction between a decree and an order. — The importance of the definition of the word "decree" rests on the fact that by reference to it the right of first appeal and second appeal is determined.[1]

Where an adjudication is a *decree*, then, unless expressly otherwise provided,

(i) a first appeal *invariably lies* therefrom,[2] and

(ii) a *second* appeal (i. e., an appeal from the decision on first appeal) also lies on the grounds mentioned in section 100.

But where an adjudication is an *order* as defined in S. 2 (14),

(i) *no* appeal lies therefrom unless it is one of the "appealable orders" specified in section 104, and

(ii) *no* second appeal lies in *any* case.[3]

But where an order though not falling within the definition of a decree under this section is expressly given the force of a decree by any provision it will be subject to second appeal. Thus, an order under O. 21, R. 50 (2) is expressly given the force of a decree by virtue of O. 21, R. 50 (3) and hence would be subject to second appeal.

It is in view of the distinction abovementioned that it becomes very often necessary to determine whether an adjudication is a "decree" or an "order." In each case the question must be tested, not by reference to general principles but by the *expression* of the Code which must be construed in its plain and obvious sense.[4] The mere fact that on its face the order appealed from purports to be only an *order* is not conclusive of its real character which has to be determined by reference to its true nature in the light of the provisions of the Code.[5] An adjudication must, however, be either a "decree" or an "order," it cannot be both and cannot be resolved into diverse elements some of which are decrees and some orders.[6]

As the words "formal expression" appear in the definitions, both of 'decree' and 'order' in this section, the presence or absence of a formal expression cannot be the true criterion of the difference between a decree and an order. The essence of the distinction lies in the nature of the decision—whether it is an adjudication of a particular kind or not—rather than in the manner of its expression.[7]

Where an adjudication is spoken of as an "order" in the provisions of the Code, it must, it is conceived, be taken to be only an "order" and not a "decree," though the necessary elements of a decree are also present in such adjudication. Thus, it is provided, for example in O. 1, R. 10 and in O. 9, R. 2 that the Court may *order* that the suit be

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Note 2

1. See Clause 2 of the Notes on clauses by the Special Committee.
('41) 28 AIR 1941 Oudh 590 (591) (DB). (In order to succeed on the ground that an appeal lies against the finding arrived at by the trial Court, the appellant must show that the finding in question amounts to a decree within the definition of that term in S. 2 (2).)
('78) 1 Shome 244.
[*See* ('31) 18 AIR 1931 Cal 779 (781) (DB). (Court of first instance passing order of restitution under S. 151 exercises same jurisdiction which S. 144 gives — *Held* the order even though made under S. 151, was a decree and hence appealable.)]
2. See S. 96.
3. That is, even in the case of appealable orders, see S. 104.
4. ('01) 23 All 152 (156, 157) : 27 Ind App 209 (PC). (In this case it was held that the plaintiff had right to appeal.)
('03) 30 Cal 660 (663, 664) (FB). (Construction leading to injustice should not be placed upon the language of S. 2 (2).)
5. ('39) 26 AIR 1939 Mad 897 (899): I L R (1940) Mad 394 (DB). (Per Krishnaswami Ayyangar, J.)
6. (15) 2 AIR 1915 P C 116 (117, 118) : 42 Ind App 91 : 42 Cal 914 (P C). (Formal adjudication declaring dissolution of partnership and taking of account is a decree and does not cease to be such because a portion of it might have been passed separately by way of an order.)
7. ('37) 24 AIR 1937 Pat 349 (350).

dismissed. A dismissal of a suit is ordinarily a decree within S. 2 (2), but in view of the fact that the dismissals under O. 1, R. 10 and O. 9, R. 2 are called *orders*, they are not decrees within S. 2 (2).[8] See also Note 16.

As to the meaning of the term "decree" under the Agra Tenancy Act (III of 1926), see S. 3, sub-s. (14) thereof and the undermentioned cases.[9] There are also other instances of special definitions of "decree."[10]

3. Essential elements of a decree. — In order that a decision of a Court may be a "decree," there must be the following essential elements[1] :

(1) There must be an *adjudication*.

(2) The adjudication must have been given in a *suit*.

(3) It must have determined the *rights* of the *parties* with regard to all or any of the *matters in controversy* in the suit.

(4) Such determination must be a *conclusive* determination.

(5) There must be a *formal expression* of the adjudication. The definition in this section must be taken along with the provisions of the Code regarding the *stage* at which a decree may be prepared, and it is not every finding that will amount to a decree even though it may conclusively determine the rights of the parties with regard to some of the matters in controversy in the suit.[2]

The clause expressly includes certain orders which though they may lack the above elements will nevertheless be decrees. There may also be other special provisions conferring the force of a decree on orders which otherwise would not have such force. For instance, under O. 21 R. 50 (3), an order under sub-rule (2) of R. 50 is expressly given the force of a decree for the purpose of appeal and otherwise.

4. There must be an adjudication. — There must be a judicial determination of the matter in dispute. A decision on a mere matter of administration is not a decree. A decree-holder applies for leave to bid at a sale held in execution of his decree. The Court passes an order refusing the application. The order is not appealable, the matter being one of administration.[1] An order assessing the value of properties under O. 21 R. 66 is similarly a matter of administration and is not a decree.[2] Nor is an order, dismissing an appeal for want of prosecution, a decree, inasmuch as it does not deal judicially with

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8. ('16) 3 AIR 1916 All 326 (326) : 38 All 357 (DB). (O. 9, R. 2.)
('83) 9 Cal 627 (628) (DB). (Order passed under S. 97 of 1877 Code (O. 9, R. 2).)
('19) 6 AIR 1919 Mad 871 (873) : 42 Mad 219 (DB). (Order striking out a defendant and deleting a substantial relief claimed in the suit is a decree.)
('26) 13 AIR 1926 Nag 75 (75). (O. 1, R. 10.)
('10) 8 Ind Cas 409 (409) (DB) (Oudh). (An order striking out a defendant as case not having been proved against him is held a decree.)

9. ('34) 21 AIR 1934 All 100 (100) (DB). (Adjudication upon rights not necessary — Enough if suit is finally disposed of.)
('38) 25 AIR 1938 All 124 (125). (The definition of a 'decree' given in S. 2, cl. (2) of the C. P. Code, does not apply to the Agra Tenancy Act. Under the Agra Tenancy Act, a 'decree' as defined in S. 3, cl. (14) means any order which so far as the Revenue Court is concerned, finally disposes of a suit; so it does not include the determination of any question within S. 47, C. P. Code.)
('36) 23 AIR 1936 All 451 (451).

10. ('41) 28 AIR 1941 Cal 311 (314) (DB). (Order rejecting an application for sale under S. 4 of the Partition Act is not a "decree".)

Note 3

1. ('16) 3 AIR 1916 Lah 245 (246, 247) : 1916 Pun Re No. 128 (F B). (Order of abatement when does and when does not amount to a decree explained.)

2. ('34) 21 AIR 1934 Pat 97 (99). (Directions by the Court with regard to the mode in which the account is to be taken in a redemption suit do not amount to a decree.)

Note 4

1. ('11) 11 Ind Cas 545 (545) : 38 Cal 717 (P C).

2. ('04) 27 Mad 259 (261) (F B). (Proceedings under O. 21, R. 66 are administrative.)
('11) 10 Ind Cas 371 (372) (DB) (Cal). (Order passed in execution of decree assessing value of property to be sold — Such order does not fall under S. 47 and is not appealable.)

the matter of the suit.[3] Where, however, appeal against preliminary decree is withdrawn and dismissed, the order of dismissal is a decree.[4]

Where the officer passing a judgment is not a "Court" at all, the judgment or order is not a decree.[5]

5. The decision must have been given in a suit. — The word "suit" has not been defined in the Code. For the purposes of the Code, it may be taken to mean —

(1) A civil proceeeding which is instituted by the presentation of a plaint.[1] See S. 26. In *Hansraj* v. *Dehradun-Mussorie Electric Tramway Co., Ltd.*,[2] their Lordships of the Privy Council observed as follows : "The word 'suit' ordinarily means and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint." The case was one which related to the meaning of the word 'suit' as used in the Limitation Act which in S. 2 only defines a suit as ordinarily *not* including an appeal or application. This Code gives no definition of the word. The remarks of their Lordships of the Privy Council in the above case may be taken as a useful working guide. But it seems to be like arguing in a circle, from the strict logical point of view, to define a suit as a proceeding which is instituted by the presentation of a plaint. The reason is that S. 26 of the Code merely provides that a *suit* is to be instituted by the presentation of a plaint, and gives no other clue as to the nature of the proceedings that require the presentation of a plaint for their institution.

(2) Any proceeding under other Acts which, according to specific provisions therein, should be regarded as a suit under the Code.[3] See Ss. 295 and 299 of the Indian Succession Act, 1925, which provide that proceedings thereunder should be regarded as suits under the Code. See also S. 158 of the Bengal Tenancy Act, and also the undermentioned cases.[4]

See also Note 21 on S. 11 and Note 6 on O. 9 R. 9.

✠ ('11) 11 Ind Cas 759 (760) (DB) (Cal). (No appeal lies against an order coming under O. 21, R. 66, which does not assess any value whatever but merely reproduces the two statements made by the decree-holder and the judgment-debtor.)

('20) 7 AIR 1920 Pat 636 (638) (DB). (Order against judgment-debtor passed under O. 21, R. 66, is not a decree.)

3. ('14) 1 AIR 1914 P C 66 (67) : 36 All 350 (PC).

4. ('33) 20 AIR 1933 Mad 442 (446) : 56 Mad 520 (DB). (Time for applying for final decree is from order of dismissal of appeal.)

5. ('23) 12 AIR 1925 Bom 241 (241, 242) : 49 Bom 442 (F B). (Taluqdari Settlement Officer is not a Court—His order is not a decree—16 Bom 408 overruled.)

Note 5

1. ('33) 20 AIR 1933 P C 63 (64) : 54 All 1067:60 Ind App 13 (PC).

('39) 26 AIR 1939 All 233 (234). (Order by Court declaring certain amounts due by plaintiff in suit under S. 33 (1), U. P. Agriculturists' Relief Act, is a decree.)

('39) 26 AIR 1939 Nag 110 (111) : I L R (1939) Nag 452 (DB) (Dismissal of suit under S. 112 (2), Berar Land Revenue Code, is a decree.)

Also see O. 4, R. 1 Note 1a.

2. ('33) 20 AIR 1933 P C 63 (64) : 54 All 1067 : 60 Ind App 13 (P C).

3. ('04) 8 Cal W N 748 (749) (DB). (Application under S. 50, Probate and Administration Act, 1881, read with Ss 55 and 83, is a suit.)

('95) 17 All 475 (477) (DB). (An order granting probate under Ch. V of Act V of 1881 was held to be a decree under S. 2 of Act XIV of 1882.)

('13) 35 All 448 (450) (DB). (Order refusing letters of administration treated as decree for appeal.)

('09) 1 Ind Cas 677 (679) (DB) (Cal). (An order absolute for sale under S. 89, T. P. Act, is a decree and it is a decision in a suit.)

('02) 29 Cal 651 (653, 654) (DB). (Proceedings under S 89, T. P. Act, are proceedings in continuation of the original suit.)

('94) 21 Cal 539 (541) (DB). (Order under S 86 of the Probate and Administration Act, is for purposes of appeal governed by the C. P. Code.)

('90) 17 Cal 48 (51) (DB). (S. 86 of the Probate and Administration Act only allows appeals in cases appealable under the C. P. Code.)

('34) 21 AIR 1934 Mad 103 (107):57 Mad 271 (FB).

('37) 24 AIR 1937 Nag 4 (5, 6) : I L R (1937) Nag 73. (An order for sale passed on an application made under S. 4 of the Partition Act is a decree by reason of the provisions of S. 8 of that Act.)

[But see ('93) 20 Cal 888 (895) (DB). (Probate proceeding is not a suit properly so called though it takes the form of a suit and decision in such proceedings cannot conclude title to the estate.)]

4. ('98) 25 Cal 146 (153). (Proceedings under S. 103, Bengal Tenancy Act, are suits.)

('33) 20 AIR 1933 Sind 78 (79) : 27 Sind L R 109 (DB) (Award under S. 11, Arbitration Act, has force of a decree from the date it is received in Court.)

('30) 17 AIR 1930 Cal 411 (416) (DB). (Decision of Collector in case under S. 20, Regulation II of 1819, has the effect of a decree.)

A proceeding therefore which does not commence with a *plaint*[5] and which is not to be treated as a suit under any other Act, is not a "suit" and a decision given therein is not a "decree."[6] Thus, an application for leave to sue in *forma pauperis* is not a suit as the application becomes a suit only *after* the leave is granted. An order passed on such an application is not a decree.[7] Similarly, an order on an application for leave to institute a suit under the Religious Endowments Act (XX of 1863),[8] or an order in a proceeding taken by the Court in the exercise of its inherent powers to punish for contempt of Court,[9] is not a decree. For other cases of proceedings under the Code and under other Acts which are not "suits," see the undermentioned cases.[10] In the case noted

('81) 7 Cal 684 (687) (DB). (Application under S. 37 of Bengal Act VIII of 1869 is a suit under that section)

('78) 3 Cal 340 (346) (DB). (Application by petition under S. 63 of the Administrator-Generals' Act (II of 1874) is a "suit." NOTE.—But in 25 Mad 244, (265, 269, 283, 288) (FB), it was held that such an order is one in execution coming within S. 244 of the old Code and not one in the suit itself.)

5. ✠ ('34) 21 AIR 1934 Mad 103 (106,107)·57 Mad 271 (FB). (Dissenting from AIR 1929 Mad 223).

6. ('42) 29 AIR 1942 Mad 73 (74) : I L R (1942) Mad 236. (Proceedings arising out of application under S. 74, Madras Estates Land Act.)

('99) 22 Mad 256 (258) (DB). (Proceeding under S. 244 of C. P. C., 1882, though terminates in a decree is not a suit—*Obiter*.)

('96) 23 Cal 723 (729, 730) (FB). (Proceeding under S. 104 (2) of the Bengal Tenancy Act is not a suit.)

('96) 18 All 101 (103) (FB). (Order rejecting appeal for failure to furnish security for costs under S. 549 (O. 41, R. 10) is not a matter in controversy in the suit.)

† ('95) 22 Cal 943 (948). ('Suit' should be confined to such proceedings as under that description are directly dealt with in the Code or such as by the operation of the particular Act which regulates them are treated as suits.)

('35) 22 AIR 1935 Mad 373 (377) (DB). (A proceeding under S. 44 of the Madras Hindu Religious Endowments Act is not a suit.)

('29) 16 AIR 1929 Mad 480 (480). (Suit commences with presentation of a plaint.)

('90) 13 Mad 248 (249) (DB). (Proceeding under S. 27, Madras Rent Recovery Act, VIII of 1865, is not a suit.)

N.B.—Under the Code of 1877, there was no provision corresponding to S. 26 and every proceeding terminating in a decree was held to be a suit. *See* (1882) 6 Bom 54 (61, 62). This is now obsolete.)

('10) 8 Ind Cas 475 (476):(1910) 1 Upp Bur Rul 28. (Order rejecting or refusing application for permission to sue as pauper is not a decree.)

(1896) 1896 Probate 214 (217), Moran v. Place. (In English law until a writ is issued there is no action between the parties.)

[See however ('39) 26 AIR 1939 Mad 716 (716, 717). (Reference to Subordinate Judge under S. 30, Land Acquisition Act—*Held* that though proceedings were not 'suit' order of Subordinate Judge was appealable in view of the Privy Council case in AIR 1922 P C 80 : 45 Mad 320 (PC).)]

[But see ('18) 5 AIR 1918 All 346 (349) : 39 All 626 (632) (DB). (Application under S. 22 of the Provincial Insolvency Act held to be suit.)

('29) 16 AIR 1929 Mad 223 (225) (DB). (Decision on reference under S. 30, Land Acquisition Act is decree.)]

7. ✠ ('99) 21 All 133 (136) (FB). (Until application is granted there is no suit before the Court.)

('17) 4 AIR 1917 Cal 852 (853) (DB). (Do.)

✠ ('78) 1 All 745 (747) (FB).

('83) 7 Bom 373 (376 (DB). (An order rejecting the application is not a decree.)

[*See also* ('10) 8 Ind Cas 475 (476) : (1910) 1 Upp Bur Rul 28.]

See also O. 33, R 8, Note 1.

8. ('07) 34 Cal 584 (585) (DB).

('91) 18 Cal 382 (384) (DB).

('92) 19 Cal 275 (285) (DB). (Order under S. 18 of Act XX of 1863 granting leave is not a decree.)

('74) 21 Suth W R 368 (368) (DB). (Order refusing leave is not a decree.)

('87) 10 Mad 98 (99).

9. ('05) 27 All 380 (381) (DB).

10. ('76) 3 Ind App 221 (227) : 2 Cal 131 (138) (PC). (Registration Act, S. 76 — Order refusing registration is in the nature of a "decree" under the C. P. Code, VIII of 1859, but the present section is very different.)

('86) 14 Ind App 160 (166) : 11 Mad 26 (P C). (Order appointing new member to fill up vacancy in committee of trustees under the Religious Endowments Act is not a decree.)

('35) 22 AIR 1935 All 147 (148). (Order on application under S. 7, Charitable and Religious Trusts Act, cannot be treated as a decree.)

✠ ('13) 20 Ind Cas 497 (497) : 35 All 450 (DB). (Municipal election petition is not a suit.)

('96) 19 All 131 (132) (DB). (Trusts Act — Order refusing to remove trustee is not a decree.)

('95) 17 All 286 (288) (DB). (Order rejecting application that a suit might be declared to have abated.)

('95) 17 All 238 (241). (Companies Act, S. 214—Order under, is not a decree.)

('90) 12 All 129 (157) (FB). (Decision of taxing officer is not a decree—Reference under S. 28 of Act No. VII of 1870.)

('97) 21 Bom 63 (68) (DB). (Award under the Deccan Agriculturists' Relief Act is not a decree.)

('16) 3 AIR 1916 Cal 221 (222) (DB). (Application to set aside a sale is not a suit.)

('11) 9 Ind Cas 994 (994) (Cal). (Order under S. 4 of Bengal Regulation V of 1799, is not a decree.)

('04) 8 Cal W N 321 (324) (DB). (Order referring matter in a land acquisition case to a civil Court is not a decree.)

below[11] where a suit under S. 92 of the Code was purposely kept pending in order to enable the parties to apply for modification of the scheme, it was held that an order passed on an application for such modification was one passed in the suit.

An appeal from a decree is only the *continuation* of a suit and thus an appellate decree is covered by this clause. (See S. 96 Note 3.)

6. The decision must have been given on the rights of the parties with regard to all or any of the matters in controversy in the suit. — Under the old Code, it was enough that an adjudication, in order to be a decree, should have *decided the suit or appeal.*[1] Accordingly several decisions which had the effect of deciding the suit but which were not strictly between the *parties* were held to be

(1900) 4 Cal W N 403 (403, 404) (DB). (Order disallowing an application to be made party defendant as assignee of defendant.)
('99) 3 Cal W N 344 (345) (DB). (Order under S. 174 of the Bengal Tenancy Act is not a decree.)
('99) 3 Cal W N 184 (185) (DB). (Order under S. 173, Bengal Tenancy Act, is not a decree.)
('97) 2 Cal W N 351 (352) (DB). (Proceeding under S. 90 of the Bengal Tenancy Act is not a suit.)
('97) 1 Cal W N 30 (30) (DB). (Order setting aside sale under S. 174, Bengal Tenancy Act, is not a decree.)
('96) 23 Cal 723 (729) (FB). (Proceedings under S. 104 (2) of the Bengal Tenancy Act.)
('94) 21 Cal 825 (826) (DB). (Order under S. 173 of the Bengal Tenancy Act is not a decree.)
('92) 19 Cal 485 (487) (DB). (Proceeding under S. 84 of the Bengal Tenancy Act.)
('92) 19 Cal 275 (285) (DB). (Do.)
('91) 18 Cal 500 (504). ("Suit" as used in other Acts may include miscellaneous proceedings also. Thus "suit" in Part VII of Bengal Court of Wards Act, IX of 1879, embraces all contentious proceedings. It would not however be a suit within the Code.)
('91) 18 Cal 271 (277, 281, 282) (SB). (Proceeding under S. 84 of the Bengal Tenancy Act.)
('89) 16 Cal 457 (464). (Suit includes proceedings taken to execute the decree.)
('87) 14 Cal 312 (313) (DB). (Settlement case under Bengal Tenancy Act, S. 104 (2), is not a suit.)
('81) 7 Cal 406 (409) (DB). (Proceedings under Land Acquisition Acts are not suits.)
('80) 5 Cal 311 (314) (DB). (Order for levy of penalty under Stamp Act is not a decree.)
('78) 3 Cal 662 (662) (FB). (Act X of 1877—Decree does not include orders on matters arising in the course of the suit.)
('21) 67 Ind Cas 794 (794) (Lah). (Punjab Laws Act—Insolvency proceedings—Order raising attachment is not a decree.)
('20) 7 AIR 1920 Lah 51 (53) : 1 Lah 187 (DB). (Companies Act, S. 150—Payment order is not a decree.)
('08) 1908 Pun Re No. 144, p. 665. (Order staying or refusing stay of proceedings on an application under S. 19 of the Arbitration Act is not a decree.)
('34) 21 AIR 1934 Mad 103 (110, 112) : 57 Mad 271 (FB). (Order made by District Judge under S. 84 (2) of the Madras Hindu Religious Endowments Act II of 1927 is not a decree.)
('33) 20 AIR 1933 Mad 695 (696) : 56 Mad 984. (Application under S. 4 (2) of Madras Agency Tracts Interest and Land Transfer Act is not a suit and an order refusing it is not a decree.)
('29) 16 AIR 1929 Mad 69 (71) (DB). (Proceedings under Ss. 41 to 49 of the Presidency Small Cause Courts Act.)
('28) 15 AIR 1928 Mad 416 (418) : 51 Mad 664 (DB). (Order permitting withdrawal of a suit is not a decree.)
(1900) 24 Mad 95 (96) (DB). (Order under S. 16 of Madras Regulation III of 1802 is not a decree.)
('98) 22 Mad 256 (258) (DB). (Proceedings under S. 244 of Act XIV of 1882 is not a suit but only a proceeding in a suit—*Obiter*.)
('69) 4 Mad H C R 401 (403) (Do.)
('35) 22 AIR 1935 Oudh 72 (73) (DB). (Order on petition under S. 34, Trusts Act, is not a decree.)
('13) 18 Ind Cas 122 (124) : 16 Oudh Cas 36. (Municipal election petition is not a suit.)
('35) 22 AIR 1935 Pat 515 (518) : 15 Pat 69 (DB). (A proceeding before the manager who deals with a claim under the Chota Nagpur Encumbered Estates Act is not a suit, nor the order passed in such proceeding a "decree.")
('21) 8 AIR 1921 Pat 401 (402) : 5 Pat L Jour 415 (DB). (Application under S. 73 is not a suit and an order thereon is not a decree.)
('14) 1 AIR 1914 Sind 122 (123) : 14 Sind L R 123 (DB). (Order under Clause 19 of Sch. II of the Code is not a decree.)

11. ('41) 28 AIR 1941 Cal 618 (621) (DB).

Note 6

1. ('08) 10 Bom L R 514 (515) (DB). (Suit for partition : 29 Cal 758 (FB) followed.)
('02) 24 All 532 (536) (FB). (Overruling 22 All 380 and 19 All 142 and holding that order disallowing application under S. 372 (O. 22, R. 10) does not decide the suit and is not a decree.)
('66) 10 Moo Ind App 340 (359) (PC). (Order in mortgage suit to render accounts of receipts from property does not dispose of suit and is therefore an interlocutory order.)
('02) 24 All 342 (346) (DB). (Order rejecting application under S. 372 for being substituted as plaintiff is not a decree.)
(1900) 4 Cal W N 403 (404) (DB). (Application under S. 372 of 1882 Code to be made a party defendant refused—Not a decree.)
('94) 1894 Pun Re No. 43, p. 121. (Decision under the old Code — Orders discharging insolvent from further liability were held to be decrees.)

decrees.[2] Under the present definition, the adjudication must be one on the *rights* of the *parties* with regard to all or any of the matters in controversy in suit.[3]

The word "*rights*" in this section means *substantive* rights in regard to the subject-matter of the suit.[4] It does not include the following :

(1) *Rights in matters of procedure.* Interlocutory orders on matters of procedure which do not decide the substantive rights of the parties *inter se* in respect of the subject-matter of the suit are not decrees.[5] For illustrative cases, see the under-

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2. ('85) 7 All 914 (916) (DB). (Order rejecting application to be admitted as defendant under S. 3, Bengal Minor's Act (XI of 1858) was held to be a decree.)
('86) 10 Bom 220 (223) (DB). (Application by third person to add as legal representative.)

3. ✣('41) 28 A I R 1941 Cal 618 (621, 622) (DB). (An order of District Judge modifying a scheme framed in a suit under S. 92, C. P. Code, on an application made in that suit was held a decree. So also an order altering the scheme in a new suit under S. 92, C. P. Code.)
('16) 3 A I R 1916 Lah 245 (246, 247) : 1916 Pun Re. No. 128 (FB). (A formal order merely recording an abatement and not adjudicating upon the rights of parties is not a decree.)
†('10) 7 Ind Cas 966 (967) (DB) (Bom). (Suit for redemption — Plaintiff claimed to be an agriculturist—Determination that he was an agriculturist is a decree.)
('14) 1 AIR 1914 Cal 149 (149) : 41 Cal 160 (DB). (Order accepting security and staying execution is not a decree.)
('11) 10 Ind Cas 371 (371) (DB) (Cal). (Order under O. 21, R. 66 does not involve a judicial adjudication.)
✣('37) 24 AIR 1937 Mad 554 (554). (Order under O. 34, R. 12 not a decree where the alleged prior mortgagee was not a party to the suit)
('29) 16 AIR 1929 Mad 223 (225) (DB). (Reference under Land Acquisition Act — Decision is one in suit and on rights of parties.)
('38) 25 AIR 1938 Nag 233 (234). (Suit by lambardar for recovery of amount of revenue paid by him —Court discharging some defendants from suit— Order of discharge held to be a final adjudication of the most important point of issue and hence a decree within S. 2 (2).)

4. †('12) 13 Ind Cas 800 (801) : 1911 Pun Re No. 82 (DB). (Interlocutory order.)
('12) 16 Ind Cas 904 (906) (DB) (Cal). (Adjudication negativing a claim for rent is a decree.)
('28) 15 A I R 1928 All 234 (235) (DB). (Dismissal of suit against some of several defendants is a decree.)
('16) 3 A I R 1916 All 357 (358). (A decree passed under O. 34, R. 6, C. P. Code, 1908 is a decree within the meaning of S. 2 (2) of the Code.)
('01) 23 All 152 (156, 157) : 27 Ind App 209 (P C). (Decision determining period for which mesne profits are recoverable.)
('94) 16 All 51 (51, 53). (Decision as to amount of rent payable is a decree.)
('05) 29 Bom 13 (18) (DB).
('33) 20 A I R 1933 Cal 416 (416) (DB). (Order of remand giving directions containing determination of principle on which assessment is to be made is a decree.)
('23) 10 A I R 1923 Cal 308 (309). (Order finally declaring that a party is not liable for mesne profits. Relying on 23 All 152 (PC).)
('13) 19 Ind Cas 971 (973) (DB) (Cal). (An order under Section 90 of the Transfer of Property Act is a decree.)
('09) 36 Cal 493 (500) (DB). (Decision that defendants are not liable to perform contract claimed by plaintiff is a decree.)
('10) 6 Ind Cas 323 (324) (DB) (Cal). (Order granting or refusing application for order absolute was conceded to be a decree.)
('92) 19 Cal 463 (468) (FB). (Order declaring specific rights of parties in partition suit is a decree.)
('86) 12 Cal 173 (176) (DB). (Where Appellate Court remands case directing the lower Court to pass a decree in accordance with the award, it is a decision on the merits of the case.)
('82) 1882 Pun Re No. 185. (Order reversing decree of first Court for want of jurisdiction is a decree.)
('19) 6 AIR 1919 Mad 871 (872):42 Mad 219 (DB). (Striking out a defendant's name and dismissing suit against him is a decree.)
('19) 6 AIR 1919 Mad 709 (709) : 42 Mad 52 (DB). (An order of Court dismissing an application for a final decree for sale in a mortgage suit is a 'decree' within the meaning of S. 2 (2) of the Code.)
('08) 4 Nag L R 54 (56). (An order refusing to make a conditional decree for foreclosure absolute is a 'decree'.)
('02) 5 Oudh Cas 301 (303). (Order setting aside lower Appellate Court's order of remand is a decree.)
('33) 20 AIR 1933 Pat 207 (207) (DB). (Order refusing *pendente lite* interest is a decree.)
('17) 4 AIR 1917 Pat 100 (101) : 3 Pat L Jour 99 (DB). (Appellate Court holding that plaintiff was entitled to possession and sending case back for ascertaining mesne profits is a decree.)
('17) 4 AIR 1917 Pat 79 (79) : 3 Pat L Jour 67 (DB). (Determination of a right of a party to accounts.)
[*See* ('28) 15 AIR 1928 Lah 355 (356) (DB).
('93) 3 Mad L Jour 223 (224, 225) (DB). (Dismissal of suit against one of several defendants held not to be a decree.)]
[But see ('33) 20 AIR 1933 All 261 (262). (Conditional order of remand is not a decree.)]

5. ('43) 30 AIR 1943 Nag 94 (95). (Order referring question under S. 75 (3), C. P. Land Revenue Act, is not appealable as it is only an interlocutory order.)
('36) 23 AIR 1936 Cal 784 (785) (DB). (Order on preliminary issue as to court-fee that court-fee paid is sufficient is not decree.)

mentioned decisions.[6] See also Note 16.

('84) 8 Bom 287 (295) (DB).
('32) 19 AIR 1932 Oudh 282 (282) : 6 Luck 703. (Order filing an award made without intervention of Court.)
('66) 10 Moo Ind App 413 (423) (PC).
✠(1859) 7 Moo Ind App 283 (302) (PC).
('29) 16 AIR 1929 All 123 (123, 124) (DB). (Order striking off objection of judgment-debtor for default.)
('24) L R 5 All (Rev) 269 (270). (Order substituting names in the decree under S. 152.)
('13) 35 All 582 (586) (SB). (Order under S. 148, C.P.C., extending time for payment.)
('92) 14 All 226 (232) (FB). (Order under S. 206 of the old Code.)
('85) 7 All 876 (876) (FB). (Do.)
('84) 6 All 125 (127). (Order refusing amendment.)
('79) 2 All 904 (904) (DB). (Order refusing application to be made a party.)
('05) 29 Bom 71 (73) (DB). (Order under O. 41, R. 5 refusing stay.)
('14) 1 AIR 1914 Cal 149 (149) : 41 Cal 160 (163) (DB). (Order for security for stay of execution. It is not an order also under S. 47.)
✠('14) 20 Cal L Jour 478 (481). (Order not deciding liability of defendant or other right is not a decree.)
('11) 14 Cal L Jour 35 (36) (DB). (Order assessing value of judgment-debtor's property.)
('01) 28 Cal 177 (179) (DB).
('94) 21 Cal 539 (541) (DB). (Order refusing application to be made a party.)
('91) 18 Cal 469 (472) (DB). (Order determining incidental point of law.)
('86) 13 Cal 100 (101) (DB). (Order refusing application to be made a party.)
† ('86) 12 Cal 275 (278) (DB). (Declaratory orders in suit for partition without deciding rights of parties.)
('69) 3 Beng L R (O C) 113 (118) (DB). (Order making intervenor a party defendant to the suit.)
('32) 19 AIR 1932 Lah 120 (121). (Order accepting or refusing to accept security.)
('28) 106 Ind Cas 890 (891) (Lah).
('20) 7 AIR 1920 Lah 88 (89). (Order refusing to extend time under S. 148).
('11) 10 Ind Cas 850 (850) : 1911 Pun Re No. 24. (Order amending a decree.)
('11) 9 Ind Cas 1019 (1021) : 1911 Pun Re No. 41.
✠ ('09) 4 Ind Cas 852 (853) : 1909 Pun Re No. 98 (DB). (Order refusing to strike off name of co-respondent in divorce case.)
('22) 9 AIR 1922 Mad 332 (332) : 45 Mad 194 (DB). (Striking out names of defendants—If however the suit had been dismissed against them it would be a decree.)
('26) 13 AIR 1926 Nag 75 (75) . (Order under O. 1, R. 10 (2) discharging a defendant from suit.)
('21) 8 AIR 1921 Nag 108 (108) : 17 Nag L R 66. (A ruling on a point of evidence is not a decree though drawn up in the form of a decree.)
('15) 2 AIR 1915 Oudh 171 (172). (An order passed an an application for payment of pre-emptive money in compliance with a decree under O. 22, R. 14 (1).)
('18) 5 AIR 1918 Upp Bur 14 (14) : 3 Upp Bur Rul 61. (Order under S. 24 of the C. P. C. with costs.)
('93-1900) 1893-1900 Low Bur Rul 449. (Order amending a decree under S. 152.)
('20) 7 AIR 1920 Sind 1 (1, 5) : 14 Sind L R 26 (DB). (Order disallowing interrogatories.)
Also see Section 47, Note 86.

6. ('43) 30 AIR 1943 Lah 140 (144) (FB). (An order rejecting an application to raise a new plea or to amend or alter the plea already filed cannot be said to be a determination of the rights of the parties.)
('41) 28 AIR 1941 Nag 223 (224) : I L R (1941) Nag 428. (Plaintiff ordered to furnish certain particulars—Failure to do so—Order discharging defendant—Order held amounted to dismissal of suit or rejection of plaint — In either case it is decree.)
('40) 27 AIR 1940 Bom 210 (214) : I L R (1940) Bom 370 (DB). (Question whether purchase money is to be paid by decree-holder or his pleader—Order under O.21, R.93 directing decree-holder to do so does not in any way determine the rights of the parties with regard to any matter in controversy in the suit.)
('39) 26 AIR 1939 Bom 389 (390). (Order amending decree under Ss. 151 and 152 to correct an accidental omission not decree.)
('12) 13 Ind Cas 70 (71) (DB) (Cal). (Order as to who out of two contesting persons is the legal representative of a deceased plaintiff.)
('13) 20 Ind Cas 898 (899) : 16 Oudh Cas 350 (Order as to who is a legal representative.)
('33) 20 AIR 1933 All 261 (262). (Order of remand providing that if certain papers were not filed within a month, remand order would not take effect, does not amount to decree.)
('30) 17 AIR 1930 All 121 (121) (DB). (Refusing stay of execution.)
('14) 1 AIR 1914 All 402 (402). (Order directing abatement.)
('13) 18 Ind Cas 701 (701) : 35 All 159 (DB). (Order after preliminary decree that partition should be made as per certain directions.)
('11) 10 Ind Cas 414 (414, 415) (DB) (All). (Order rejecting application under Ss. 5 and 7 of the U. P. Regulation, V of 1799.)
('10) 6 Ind Cas 464 (465) (DB) (All). (Order refusing to restore suit dismissed for default.)
('09) 31 All 545 (548) (DB). (Order of remand under O. 41, R. 23.)
('08) 30 All 143 (146) (DB). (Order rejecting appeal for non-compliance with order for furnishing security.)
('02) 24 All 464 (465) (DB). (Order of re-admission of suit.)
('99) 21 All 133 (135) (FB). (Order rejecting application to appeal in forma pauperis — Dissenting from 9 All 129.)
('96) 1896 All W N 21 (21). (Dissenting from 8 All 82.)
('95) 17 All 172 (173) (DB). (Dissenting from 10 Bom 220.)
('95) 17 All 97 (99) (DB). (Dissenting from 8 All 82.)
('94) 16 All 19 (20). (Do.)
('93) 15 All 169 (170). (Do.)
('93) 13 All 214 (215, 216) (DB). (Order granting certificate under Act VII of 1889 on condition of giving security is not a decree.)

('90) 12 All 129 (156) (FB). (Decision under S. 5, Court-fees Act, is not a decision about the rights of the parties in controversy.)
('84) 6 All 211 (213) (DB). (An order permitting the withdrawal of a suit with liberty to bring a fresh suit does not amount to a decree.)
('84) 1884 All W N 28 (28):6 All 211 (213) (DB).
('81) 3 All 844 (845) (DB). (Order refusing application of legal representative to be added, as being barred.)
('75) 1 All 156 (158, 159) (DB). (Order overruling objection to filing of award.)
('95) 19 Bom 790 (793) (DB). (Order granting succession certificate on condition of security.)
('92) 16Bom243 (248) (DB). (Withdrawal of appeal.)
('91) 15 Bom 370 (373) (DB). (Do.)
('78) 3 Bom 161 (166). (A decree does not mean an interlocutory order.)
('77) 2 Bom 553 (557) (DB). (Order determining mesne profits subsequent to decree.)
('29) 16 AIR 1929 Cal 669 (670) (DB). (Order striking out name of defendant as not being represented in suit is not a decree — But an order striking him out on the ground that plaintiff has no cause of action against him will be a decree : See AIR 1919 Mad 871 : 42 Mad 219.)
('22) 9 AIR 1922 Cal 246 (246) : 49 Cal 355 (DB). (Order rejecting an appeal for failure to furnish security for costs.)
('15) 2 AIR 1915 Cal 815 (815, 816) (DB). (Order refusing permission to decree-holder to withdraw his bid at auction sale—Question left undecided.)
('14) 1 AIR 1914 Cal 149 (149) : 41 Cal 160 (DB). (The order accepting the security staying the proceedings is not a decree.)
('12) 15 Ind Cas 573 (574) (DB) (Mad). (Order directing application for mesne profits to be restored as execution case.)
('12) 13 Ind Cas 186 (186) (Cal). (Order determining principles upon which mesne profits are to be assessed and directing ascertainment by commission.)
('10) 6 Ind Cas 323 (324) (DB) (Cal). (Order for examination of accounts of receiver.)
('06) 3 Cal L Jour 181 (181, 182) (DB). (Order setting aside ex parte decree.)
(1900) 27 Cal 362 (363) (DB). (Order allowing withdrawal of suit with liberty to bring a fresh suit is not a decree—If however the order is reversed in appeal and the suit is dismissed, the appellate decision will be a decree.)
('97) 24 Cal 725 (735, 738) (FB). (Order appointing Commissioner after preliminary decree.)
('91) 18 Cal 322 (323) (DB). (Order allowing withdrawal of a suit with liberty to bring fresh suit.)
('80) 5 Cal 711 (712) (DB). (Order directing suit to be re-admitted)
('80) 5 Cal 311 (313) (DB). (Order directing penalty to be paid under the Stamp Act, the case being afterwards proceeded with.)
('29) 16 AIR 1929 Lah 699 (700) (DB). (Suit for dissolution of partnership—Directions for taking accounts up to a particular date.)
('22) 9 AIR 1922 Lah 267 (268) (DB). (An order granting permission to a plaintiff to withdraw a suit under O. 23, R. 1, is not a decree.)
('19) 6 AIR 1919 Lah 313 (314) (DB). (Order under O. 23, R. 1, permitting the plaintiff to withdraw his suit does not come under the definition of 'decree.')
('17) 4 AIR 1917 Lah 261 (265) : 1917 Pun Re No. 62 (DB). (Order disposing of claim to set-off, advanced by defendant, the suit itself remaining undecided.)
('11) 13 Ind Cas 800 (801) : 1911 Pun Re No. 82 (DB). (Order for security.)
('11) 11 Ind Cas 830 (831) (Lah). (An order sanctioning the withdrawal of suit against a defendant and allowing him costs is not a decree.)
('11) 11 Ind Cas 231 (232) : 1911 Pun Re No. 96 (DB). (Order returning plaint for amendment — But such an order after the suit has been admitted and the parties called on to produce evidence will be a decree.)
('11) 9 Ind Cas 385 (385) (Lah). (Order overruling objections to award passed on reference through Court.)
('11) 1911 Pun Re No. 24, p. 64. (Order holding portion of claim not sustainable and directing amendment of decree.)
('08) 1908 Pun Re No. 144, page 665. (Order or stay of proceedings under S. 19 of Act IX of 1899.)
('24) 11 AIR 1924 Mad 622 (623) (DB). (Order dismissing application of one person to be brought on record as legal representative of deceased plaintiff is not a decree if the application of another is allowed and the suit does not abate.)
('24) 11 AIR 1924 Mad 406 (407). (Order referring suit to Official Referee for determining shares and for taking accounts.)
('18) 5 AIR 1918 Mad 1055 (1055) (DB). (Order under O. 22, R. 5 bringing two rival claimants on record without deciding claims is not appealable.)
('16) 3 AIR 1916 Mad 694 (695) : 39 Mad 876 (DB). (Order extending time for payment under O. 34, R. 8.)
(1900) 24 Mad 62 (65) (DB). (Order awarding compensation under S. 95.)
('98) 21 Mad 152 (153). (Order refusing to re-admit appeal returned for supplying deficient court-fee.)
('95) 5 Mad L Jour 91 (92). (Order under S. 40 of Act II of 1864.)
('89) 12 Mad 120 (122). (Order to pay day costs.)
('87) 10 Mad 179 (184, 185) (FB). (Order refusing to appoint a receiver appealable as order; overruling 6 Mad 355.)
('16) 3 AIR 1916 Nag 89 (90) : 13 Nag L R 32. (Order that a person is not the legal representative of a party.)
('36) 23 AIR 1936 Oudh 81 (82) (DB). (Decision under S. 152, C. P. C., allowing amendment of preliminary decree is an order and not decree.)
('19) 6 AIR 1919 Oudh 116 (116). (An order under O. 23, R. 1 is not a decree.)
('03) 6 Oudh Cas 48 (50).
('34) 21 AIR 1934 Pat 97 (98). (Order of remand is not decree merely because it sets aside decree of trial Court.)
('26) 13 AIR 1926 Pat 457 (459) : 6 Pat 160 (DB). (Order of remand which does not itself decide any point raised.)
('25) 12 AIR 1925 Pat 433 (434) (DB). (Order dismissing suit after preliminary decree is without jurisdiction and is not a decree.)

(2) *Mere right to sue.* Such a right is not known to law and therefore decisions on questions of limitation, jurisdiction, *res judicata*, and maintainability of a suit which determine only the plaintiff's *right to sue* are not decrees.[7]

Illustration.

A files a suit against *B*. *B* contends that the suit is barred by limitation and by the doctrine of *res judicata*. The Court frames a preliminary issue on those points and decides that there is no such bar and orders the case to proceed. The decision is not a decree inasmuch as it decides merely the plaintiff's *right to sue*.[8]

(3) *Right to costs.* This is not a vested right and an order in respect thereof is not a decree.[9]

Where, however, the effect of an order is to *dismiss* the suit or appeal itself, it amounts to a denial of the *substantive rights* claimed by the plaintiff against the defendant and may amount to a decree if the other elements are present.[10]

('20) 7 AIR 1920 Pat 636 (638) (DB). (Order under O. 21, R. 66.)
('20) 7 AIR 1920 Pat 249 (250) : 5 Pat L Jour 270 (DB). (Order as to valuation of property in sale proclamation.)
('28) 15 AIR 1928 Sind 100 (101) : 23 Sind LR 87 (DB). (Directions to Commissioner in partnership suit.)
('14) 1 AIR 1914 Sind 122 (123) : 8 Sind L R 260 (263, 264) (DB). (Order under para. 19 of Sch. 2 setting aside award decides only processual rights and is not a decree.)
('36) 23 AIR 1936 Pesh 79 (80) (DB). (Where an order of remand merely sets aside the decree of the trial Court and does not itself decide any of the points raised for determination and does not determine the rights of the parties with regard to any of the matters in controversy in the suit, it is not a decree.)
[*See also* ('86) 8 All 82 (84, 86).]
[But see ('18) 5 AIR 1918 All 97 (97) : 40 All 553. (An order refusing to make a decree under O. 34, R. 6 of the Civil Procedure Code, is a decree.)
('86) 12 Cal 273 (275). (Partition suit — Order passed under S. 396 of 1882 Code defining the several rights of the parties interested in the property in dispute was held to be a decree.)]

7. ('43) 30 AIR 1943 Lah 140 (143) (FB). (Interlocutory order overruling the plea of want of jurisdiction and limitation would not be a decree.)
('41) 28 AIR 1941 Oudh 590 (592) (DB). (Finding on preliminary point as to maintainability of suit in plaintiffs' favour.)
('13) 18 Cal L Jour 78 (80) (DB). (Decision on question of limitation is not a decree.)
('12) 15 Ind Cas 566 (566) (DB) (All). (Decision on an issue framed on a plea of *res judicata*.)
('14) 1 AIR 1914 Bom 149 (152) : 39 Bom 339 (FB). (Decision in favour of plaintiff upon preliminary defence that the matters in dispute were caste questions outside the jurisdiction of Civil Courts is not preliminary decree.)
('17) 4 AIR 1917 Lah 153 (153) : 1917 Pun Re No. 7. (Finding on an issue of limitation alone is not a decree.)
† ('16) 3 AIR 1916 Low Bur 80 (81) : 8 Low Bur Rul 213 (DB). (Order overruling objections to maintainability of suit.)
('13) 19 Ind Cas 922 (923) : 6 Sind L R 287 (DB). (Decision on question of limitation not a decree.)

8. ('13) 21 Ind Cas 387 (389) (DB) (Cal). (Decision on issue as to limitation in favour of plaintiff is not a decree.)
('15) 2 AIR 1915 Bom 21 (21) : 39 Bom 421 (DB). (Decision that a matter is not *res judicata*.)
('14) 1 AIR 1914 Bom 149 (150) : 39 Bom 339 (FB). (Overruling 37 Bom 60 and AIR 1914 Bom 36=38 Bom 392, which held that the expression 'rights of parties' meant general rights such as rights relating to status or jurisdiction.)
[See contra ('15) 2 AIR 1915 Mad 1222 (1223) (DB). (The observation "matters in controversy cover all questions such as character and status of party suing and jurisdiction concerning a pending suit" is obiter and based upon AIR 1914 Bom 36=38 Bom 392 which was overruled by AIR 1914 Bom 149=39 Bom 339 (FB) referred to above.)]

9. ('20) 7 AIR 1920 Pat 622 (625) : 5 Pat L Jour 472 (FB).
('89) 12 Mad 120 (123).
('98) 21 Mad 421 (422) (DB).
[See contra ('32) 19 AIR 1932 Bom 378 (385).]

10. ('41) 28 AIR 1941 Pat 385 (387) : 20 Pat 417 (DB). (Order striking off some of defendants on ground that suit was not maintainable against them in absence of consent of Governor of Province under S. 270, Government of India Act, is decree. Substance and not form of order is to be regarded.)
('41) 28 AIR 1941 Pat 108 (109). (The rejection of a memorandum of appeal as being out of time amounts to a decree and is appealable.)
('41) 28 AIR 1941 Oudh 590 (592) (DB). (Dismissal of suit on finding on a preliminary point regarding maintainability of suit.)
('41) 28 AIR 1941 Nag 223 (224) : ILR (1941) Nag 428. (Failure of plaintiff to furnish particulars — Order discharging defendant is decree.)
('41) 28 AIR 1941 Nag 180 (181). (Where the lower Court considered that by the abandoning of the claim by one of the plaintiffs the others had no right of suit and dismissed the suit as withdrawn, held that the decision is on merits and amounted to a decree.)
('41) 28 AIR 1941 Nag 166 (167). (Order discharging some defendants from case on the ground of want of cause of action against them is decree.)
('40) 27 AIR 1940 All 525 (528). (Order dismissing application under O. 21, R. 97 as time-barred is a decree and is appealable.)

The word "parties" in this section, and, indeed, in very many other sections of the Code, is used to mean parties arrayed on the one side as *plaintiffs* and on the other as *defendants*.[11] Thus, an order on an application by a *third person* to be impleaded as the legal representative of a deceased plaintiff in the suit is not an order on the rights of the *parties* and is therefore not a "decree."[12] In interpleader suits, the opposing defendants

('39) 26 AIR 1939 Nag 39 (40) : ILR (1940) Nag 324 (DB). (Order that a suit or appeal abates is appealable as a decree—Therefore order that cross-objection abates is also a decree.)
† ('19) 6 AIR 1919 Mad 871 (872) : 42 Mad 219 (DB). (Order striking out name of defendant on the ground that there is no cause of action and dismissing suit against him for want of cause of action.)
('85) 9 Bom 452 (453) (DB). (Order dismissing appeal as barred.)
('33) 20 AIR 1933 All 429 (431) (DB). (Order on application under O. 34, R. 6.)
('32) 19 AIR 1932 All 614 (616) : 54 All 482 (DB). (Refusal to grant any relief to plaintiff is a decree.)
† ('31) 18 AIR 1931 All 333 (336):53 All 466 (DB). (But order striking off defendants on the ground that the plaintiff has not made out a case against them is to be treated as dismissing the case against them and therefore a decree against which an appeal will lie.)
('18) 5 AIR 1918 All 97 (97) : 40 All 533 (DB). (Order on application under O. 34, R. 6.)
('16) 3 AIR 1916 All 357 (358) (DB). (Do.)
('16) 3 AIR 1916 All 34 (35) : 38 All 111 (DB). (Order of abatement of the suit, passed in this case was held to be a decree.)
('86) 8 All 108 (111) (FB). (Order dismissing plaint on failure to furnish security.)
('11) 11 Ind Cas 986 (986) (DB) (Bom). (Dismissal of suit under O. 10, R. 4 (2). The decision was under S. 120 of the old Code. Now the dismissal is only an appealable order.)
('95) 19 Bom 307*n* (308*n*) (DB). (Dismissal of suit under S. 136 of the old Code—Now it will be an appealable order under the new Code.)
('37) 24 AIR 1937 Cal 732 (735, 739). (Order dismissing appeal as time-barred before it is admitted or registered is a decree.)
('26) 13 AIR 1926 Cal 638 (639). (Dismissal of appeal under O. 41, R. 11.)
('21) 8 AIR 1921 Cal 551 (552) (DB). (An order rejecting the application to make the mortgage-decree absolute is a decree.)
('19) 6 AIR 1919 Cal 1052 (1053) (DB). (Dismissal of suit for plaintiff's failure to produce evidence.)
('18) 5 AIR 1918 Cal 53 (54) (DB). (*Quære*—Whether an order refusing to admit an appeal presented out of time is a decree.)
✠ ('13) 19 Ind Cas 971 (973) (DB) (Cal). (Order on application under O. 34, R. 6.)
('13) 19 Ind Cas 931 (932) (DB) (Cal). (Dismissal of appeal as barred by time.)
('97) 24 Cal 759 (762) (DB). (Dismissal of appeal under O. 41, R. 11.)
('86) 13 Cal 189 (191) (DB). (Decision that plaintiffs are minors and so dismissing suit is a decree.)
('32) 19 AIR 1932 Lah 214 (215) (DB). (Order dismissing application for final decree is a decree.)
('28) 15 AIR 1928 Lah 359 (360) : 9 Lah 526 (DB).
('25) 12 AIR 1925 Lah 456 (457) (DB). (Abatement a decree.)
('20) 7 AIR 1920 Lah 338 (340):1 Lah 582 (DB). (Do.)
('20) 7 AIR 1920 Lah 8 (9):1 Lah 493 (DB). (Do.)
✠ ('16) 3 AIR 1916 Lah 245 (246) : 1916 Pun Re No. 146 (FB). (Order of abatement under various circumstances discussed.)
('84) 1884 Pun Re No. 115, page 324. (Dismissal of suit or appeal for insufficient court-fee.)
('82) 1882 Pun Re No. 158, page 475. (The order of the Court allowing the objection taken to the appeal to the lower Appellate Court that it was barred by limitation was an adjudication upon the question and was therefore a decree.)
✠ ('33) 20 A I R 1933 Mad 442 (446) : 56 Mad 520 (DB). (Withdrawal of appeal from preliminary decree and dismissal of appeal — Order is decree.)
('20) 7 AIR 1920 Mad 580 (581) (DB). (Abatement order is a decree.)
('20) 7 AIR 1920 Mad 143 (143) (DB). (Decision in appeal that the lower Court had no jurisdiction to decide the case.)
† ('19) 6 A I R 1919 Mad 709 (709) : 42 Mad 52 (DB). (Order dismissing application for final decree in mortgage suit.)
✠ ('17) 4 A I R 1917 Mad 285 (286) (DB). (Abatement order is a decree.)
('16) 3 AIR 1916 Mad 1068 (1069) (DB). (Do.)
('09) 4 Ind Cas 319 (320):33 Mad 220 (DB). (Order dismissing interpleader suit.)
('95) 18 Mad 496 (497) (DB). (Order dismissing the suit on the ground that it had abated amounts to a decree.)
('38) 25 A I R 1938 Nag 322 (323). (Appeal memo stamped after limitation under an extension of time—Dismissal as time-barred is a decree.)
('08) 4 Nag L R 54 (56). (Conditional decree for foreclosure—Refusal to make it absolute is a decree.)
('15) 2 A I R 1915 Oudh 122 (123) : 18 Oudh Cas 121. (Order on application under O. 34, R. 6.)
('14) 1 AIR 1914 Oudh 147 (148) : 17 Oudh Cas 14. (An order that suit shall stand dismissed on default of certain payment will become a decree on default.)
† (10) 8 Ind Cas 409 (409) (DB) (Oudh). (But order striking off defendants on the ground that the plaintiff has not made out a case against them is to be treated as dismissing the case against them and therefore a decree against which an appeal will lie.)
('31) 18 AIR 1931 Pat 353 (353) : 10 Pat 471 (DB). (Abatement order is a decree.)
('17) 4 AIR 1917 Pat 497 (498) (DB). (Suit disposed of on preliminary point—Disposal is a decree.)
('27) 14 AIR 1927 Rang 148 (148, 149) : 5 Rang 838 (DB). (Order refusing adjournment and dismissing suit.)

11. ✠ ('13) 20 Ind Cas 898 (899) : 16 Oudh Cas 350.
('29) 16 A I R 1929 Cal 669 (670) (DB). (Minor defendants who are not represented are not parties to the suit.)

12. † ('24) 11 AIR 1924 Mad 813 (815.)
('25) 12 AIR 1925 All 431 (432) : 47 All 741 (DB). (Order in an application to set aside decree bringing on record legal representative.)

will be deemed to be parties and the decision of their claims *inter se* will be a decree.[13]

It is not enough to constitute a decree that there is a determination or even a conclusive determination of the rights of the parties. It is necessary that such determination must be as to matters in controversy in the suit.[14] The expression "matters in controversy in the suit" refers to the subject-matter of the suit with reference to which some relief is sought.[15] It includes matters, which, though they are common ground, must have been actually decided if any question had arisen and which are the foundation of the whole determination.[16] It also includes matters which, though not arising on the face of the plaint as at first presented, arise at a subsequent stage of the suit and about which the parties are at controversy.[17] Section 2 (2) says that the decision must have been given on the rights of the parties with regard to *all or any* of the matters in controversy in the suit.[18] But a Full Bench of the Nagpur High Court has held that an adjudication which determines only some of the matters in controversy in the suit will not be a decree unless it is sufficient to dispose of the suit.[19] Thus, according to the Full Bench, where in a money suit, a set off is pleaded by the defendant and the Court tries as a preliminary matter, the issue as to set off and holds that the claim is not tenable the adjudication is not a decree as it is not sufficient to dispose of the suit in the sense of granting or refusing relief to the plaintiff. The Full Bench overruled a previous decision of the same High Court[20] in which it was held that where the plaintiff puts in two alternative grounds of claim based on different causes of action and the Court decides that one of those grounds is not sustainable, the order concludes one branch of the suit and is therefore a decree.

7. The decision must conclusively determine the rights of the parties. —The decision must be *conclusive*, so far as regards the Court expressing it is concerned.[1]

('06) 28 All 109 (111) (DB). (The appointment of a legal representative is not a determination of any issue which is properly raised in the suit.)
('21) 8 AIR 1921 Nag 23 (24) : 17 Nag L R 45.
[*See also* ('13) 20 Ind Cas 950 (951) (DB) (Mad).]
[But see ('35) 22 AIR 1935 Lah 47 (48).
('16) 3 A I R 1916 Lah 245 (247) : 1916 Pun Re No. 128 (FB). (In this case an order on an application by a third party was held to be a decree—But attention was not directed to the fact that the applicant was a third party—The actual decision is therefore not correct)]

13. † ('08) 30 All 22 (23).
('09) 4 Ind Cas 319 (320) : 33 Mad 220 (DB).
See also O. 35 R. 4, N. 3

14. ('39) 26 AIR 1939 Mad 897 (900): ILR (1940) Mad 394 (DB).

15. ('41) 28 AIR 1941 Nag 84 (85) : I L R (1941) Nag 90 (DB). (Two alternative modes of seeking remedy—Court holding that one is not available—Decision is appealable — Importance of all or any in S. 2 (2) pointed out.)
('15) 2 AIR 1915 Bom 42 (44) : 39 Bom 422 (DB).
✣ ('15) 2 AIR 1915 Cal 272 (274) (DB).
('27) 14 AIR 1927 Cal 850 (851): 55 Cal 219 (DB). (Remand after framing additional issue is not a decision on a matter of controversy.)
[*See* ('39) 26 AIR 1939 Mad 897 (900) : I L R (1940) Mad 394 (DB). (Order on application regarding allotment of properties kept out of controversy in partition suit after preliminary decree held not decree.)]

16. ('15) 2 AIR 1915 P C 116 (118) : 42 Cal 914 : 42 Ind App 91 (PC).
('27) 14 AIR 1927 Pat 296 (297) : 6 Pat 380 (DB).

17. ('39) 26 AIR 1939 Mad 897 (900): ILR (1940) Mad 394 (DB).
('28) 15 AIR 1928 Oudh 362(364): 3 Luck 628 (FB).

18. ('40) 27 AIR 1940 Nag 349 (353) : ILR (1940) Nag 538 (DB). (Lower Appellate Court conclusively determining some of the cardinal issues and remanding suit for fresh trial—Decision amounts to decree and is appealable—Order in the case held not one under O. 41 R. 23 and so was not appealable as an order.)

19. ('43) 30 AIR 1943 Nag 204 (208,209):ILR(1943) Nag 241 (FB). (Except in cases where the Code provides for preliminary decrees and under O. 12, R. 6 and O. 15, R. 2 a decision which is not sufficient for disposal of suit is not a decree.)

20. ('41) 28 AIR 1941 Nag 84 (85, 86):ILR (1941) Nag 90.

Note 7

1. ('28) 15 AIR 1928 Lah 841 (843) (DB). (Case not finally disposed of—No appeal lies.)
('85) 9 Bom 183 (195). (Order not deciding the suit not a decree.)
('33) 20 AIR 1933 All 261 (262). (An order remanding the suit for retrial with a proviso demanding the plaintiff to file certain papers within one month is not a decree.)
('31) 18 AIR 1931 Mad 471 (473, 474) : 54 Mad 337 (DB). (Decision finally disposing of matter between parties is decree though named as "order" in the proceedings.)
('12) 16 Ind Cas 45 (46) (DB) (Mad). (Order directing parties to put draft schemes is not decree.)
('37) 24 AIR 1937 Oudh 12 (13) : 12 Luck 586 (DB). (Suit under S. 33, U. P. Agriculturists Relief Act—Adjudication made therein is a decree.

Where, for instance, a suit is tried partly by one Judge and partly by another and in a preliminary order the first Judge comes to certain findings and directs that after evidence on certain points had been taken the final decree should take a certain shape, and the second Judge varies certain of his predecessor's findings in the final judgment, the order of the first Judge is not a decree.[2]

8. There must be a formal expression of the adjudication. — A decree is a necessary part of the ultimate procedure in all suits; without it a judicial record does not speak and the law could not be executed.[1]

It is essential for a decree that there should be a *formal expression* of the adjudication.[2] Such expression must be both deliberate and given in the manner provided by law.[3] But it need not be in any particular *form*.[4]

It has, however, been held by the Nagpur High Court in some cases[5] that the absence of a formal decree will not make an adjudication any the less a decree, if, in point of law, it operates as a decree. The Lahore High Court has also in some cases[6] held that if an order *could* be formally drawn up as a decree it may be taken to be a decree. This does not appear to be correct. According to the section itself and according to all the other High Courts, nothing will operate as a decree unless formally drawn up.[7]

Again, it has been held[8] that the omission to draw up a decree does not affect a party's *right of appeal*. This view also, it is submitted, is not based on sound principles. An appeal under S. 96 lies only against a *decree* and where there is in fact no decree (i. e.,

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('35) 22 AIR 1935 Pat 456 (456) (DB). (Order of remand conclusively determining the rights of parties with regard to matter in controversy.)
[*See* ('42) 29 AIR 1942 Mad 73 (74) : ILR (1942) Mad 236. (An order does not become a decree merely because it happens to be an order which is final so far as the Court passing it is concerned— Other conditions also should be satisfied.)]
[*See also* ('86) 8 All 108 (111).]

2. ('08) 4 Low Bur Rul 256 (258, 261) (DB).

Note 8

1.✣ ('83) 5 All 520 (526) (DB).

2.('43) 30 AIR 1943 Nag 204 (208, 209) : ILR (1943) Nag 241 (FB). (In view of this Full Bench decision in AIR 1930 Nag 122 : 26 Nag L R 24 ; AIR 1921 Nag 108 : 17 Nag L R 66 and AIR 1941 Nag 180 in so far as they hold the contrary view on this point should be deemed to have been overruled.)
('39) 26 AIR 1939 All 552 (554) : I L R (1939) All 557 (DB). (Declaration contemplated by cl. (2) of S. 33 of U. P. Agriculturists Relief Act amounts to decree and is appealable.)
('14) 1 AIR 1914 Sind 122 (123):8 Sind L R 260 (DB).
† ('24) 11 AIR 1924 Bom 33 (34) (DB). (Unless a decree is drawn up there is no appeal.)
('83) 5 All 520 (526) (DB).
('02) 29 Cal 758 (760) (FB). (Preliminary orders in partition and account suits, if they declare the rights of the parties, ought to be formally drawn up as decrees.)
✣ ('18) 5 AIR 1918 Upp Bur 28 (29) : 3 Upp Bur Rul 1. ('Adjudication,' meaning.)
(1912) 8 Nag L R 92 (95).

3. ('09) 4 Ind Cas 829 (830) : 34 Bom 182 (DB).
[See however ('42) 29 AIR 1942 Lah 260 (263, 264) : I L R (1942) Lah 307 (FB). (Decree in partition suit drawn without stamp — It cannot be said that there is no decree as it can be validated by subsequent addition of stamp.)]

4. ('12) 16 Ind Cas 45 (46) (DB) (Mad).

5. ('41) 28 AIR 1941 Nag 180 (181).
('21) 8 AIR 1921 Nag 108 (108) : 17 Nag L R 66.
('30) 17 AIR 1930 Nag 122 (123) : 26 Nag L R 24. (Following A I R 1915 Cal 272 and A I R 1923 Cal 308.)

6. ('11) 9 Ind Cas 1019 (1022) 1911 Pun Re No. 41.
('30) 17 AIR 1930 Lah 125 (126).

7. † ('24) 11 AIR 1924 Bom 33 (34, 35) (DB).
('10) 34 Bom 182 (188) (DB).
('16) 3 AIR 1916 All 34 (35) : 38 All 111 (DB).
('13) 19 Ind Cas 894 (895) : 37 Bom 480 (DB).
('92) 16 Bom 243 (248).
('91) 15 Bom 370 (375) (DB). (Withdrawal of appeal — No decree is drawn up—Therefore order is not a decree.)
('24) 11 AIR 1924 Cal 1006 (1007) (DB). (Time does not run for purposes of appeal until decree is drawn up.)
('92) 19 Cal 463 (467, 468) (FB). (In this case the decision was adjudicated on the rights of the parties — The order was treated as decree against which there could be an appeal for the benefit of suitors.)
† ('12) 16 Ind Cas 45 (46) (DB) (Mad).
('12) 15 Ind Cas 935 (936) : 8 Nag L R 92.

8. ('41) 28 AIR 1941 Nag 180 (181). (Decision amounting to decree—It cannot be said that it is non-appealable merely because decree is not drawn up so as to justify interference in revision.)
('19) 6 AIR 1919 Lah 53 (54) : 1919 Pun Re No. 66 (DB).
('15) 2 AIR 1915 Cal 272 (273) (DB). (Court refused to draw up decree.)

a formal expression of an adjudication) there can be no appeal.[9]

The mere drawing up of an *order* in the form used for decrees will not, however, make it a decree, if it does not, in itself, really fall within the definition of a decree.[10]

9. Classes of decrees. — The Code recognises the following classes of decrees :

(1) preliminary decree,
(2) final decree,
(3) decree partly preliminary and partly final,
(4) order rejecting plaint, and
(5) determination of a question within S. 47 or S. 144.

A decree passed in appeal is really a decree in the suit, for, an appeal is only a continuation of the suit. See S. 96 Note 3. A compromise or a consent decree is a decree within the meaning of this section.[1]

10. Preliminary decree. — Where an adjudication decides the rights of the parties with regard to all or any of the matters in controversy in the suit, but does not *completely* dispose of the suit, it will be a *preliminary* decree.[1] Where it completely disposes of the suit it is a *final* decree.[2] In other words, a preliminary decree is passed in those cases in which the Court has first to adjudicate upon the rights of the parties and has then to stay its hand, for the time being, until it is in a position to pass a final decree in the suit.[3]

It has been seen in Note 6 above, that interlocutory orders which do not decide the rights of the parties are not decrees.[4] Such orders cannot consequently be treated as preliminary decrees.[5] Thus, a finding that a defendant is an agriculturist within the

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('29) 16 AIR 1929 Sind 225 (227) : 24 Sind L R 167 (DB).
[*See also* ('13) 19 Ind Cas 894 (895) : 37 Bom 480.]

9. See the cases noted in foot-note 7 above.

10. ('42) 29 AIR 1942 Mad 73 (74) : I L R (1942) Mad 236. (The mere fact that an order is embodied in the form of a decree on account of certain practice of the Court does not make it a decree so as to confer a right of appeal where none exists.)
('26) 13 AIR 1926 Nag 75 (75).
('21) 8 AIR 1921 Nag 108 (108) : 17 Nag L R 66.
('26) 13 AIR 1926 Bom 237 (238) (DB).
('13) 20 Ind Cas 1 (1) (DB) (Cal).
('30) 17 AIR 1930 Nag 206 (207) : 26 Nag L R 166.
('34) 21 AIR 1934 Pat 13 (14).
Also see Section 97 Note 3.

Note 9

1. ('22) 9 AIR 1922 Cal 358 (361) : 49 Cal 220 (DB).

Note 10

1. ('24) 11 AIR 1924 Cal 160 (161).
('17) 4 AIR 1917 Lah 153 (153) : 1917 Pun Re No. 7.
('21) 8 AIR 1921 Bom 220 (223) : 45 Bom 627.
('09) 3 Ind Cas 999 (1000) Cal).
('21) 8 AIR 1921 Nag 108 (108) : 17 Nag L R 66.
('34) 21 AIR 1934 Oudh 307 (309). (Where in a suit for contribution the Court decided that the defendants were liable to contribute and also the extent of the liability and it only remained to work out the amount of the decree, it was held that the findings amounted to a preliminary decree from which an appeal was competent.)
2. ('42) 29 AIR 1942 Oudh 1 (5) : 17 Luck 249 (DB). (Suit for recovery of money—Decree declaring amount found due to plaintiff and laying down in what manner it would be paid is final decree and not merely preliminary decree.)
('24) 11 AIR 1924 Cal 160 (161).
3. ✠ ('11) 9 Ind Cas 1019 (1021) : 1911 Pun Re No. 41. (Followed in 1913 Pun Re No. 16.)
('13) 19 Ind Cas 922 (923) : 6 Sind L R 287.
('31) 18 AIR 1931 All 386 (386) : 53 All 283 (FB). (Preliminary decree conclusive as regards Court passing it.)
('16) 3 AIR 1916 Pat 370 (371) : 1 Pat L Jour 406 (FB). (Preliminary decree is given effect to by the final decree.)
4. See cases in foot-notes 4 to 9 in Note 6.
5. ('16) 3 AIR 1916 Low Bur 44 (45). (Decision on preliminary issue.)
('14) 1 AIR 1914 Bom 23 (24) : 38 Bom 331 (DB). (Do.)
('14) 1 AIR 1914 Bom 149 (152) : 39 Bom 389 (FB). (Decision on preliminary issue—Overruling practically 34 Bom 182; 36 Bom 536; 37 Bom 60.)
('14) 1 AIR 1914 Bom 36 (37) : 38 Bom 392 (DB). (Direction to Commissioner to take account.)
('15) 2 AIR 1915 Cal 272 (274). (Decision on preliminary issue.)
('97) 24 Cal 725 (738, 740) (FB). (Order subsequent to the preliminary decree appointing Commissioner.)
('67) 7 Suth W R 222 (223). (Decision on preliminary issue.)

meaning of the Dekkhan Agriculturists' Relief Act, or, that a plaintiff's suit is not barred by *res judicata*, is not a preliminary decree.[6] Similarly, an order on a preliminary issue regarding court-fees that the court-fee paid is sufficient is not a preliminary decree.[7]

The Code provides for the passing of preliminary decrees in the following classes of cases :

(1) O. 20, R. 12	. .	Suits for possession and for rent or mesne profits.[8]
(2) O. 20, R. 13	. .	Administration suits.
(3) O. 20, R. 14	. .	Suits for pre-emption.
(4) O. 20, R. 15	. .	Suits for dissolution of partnership.[9]
(5) O. 20, R. 16	. .	Suits for accounts between principal and agent.
(6) O. 20, R. 18	. .	Suits for partition and separate possession.[10]
(7) O. 34, Rr. 2, 3	. .	Suits for foreclosure of a mortgage.
(8) O. 34, Rr. 4, 5	. .	Suits for sale of mortgaged property.[11]
(9) O. 34, Rr. 7, 8	. .	Suits for redemption of mortgage.

There is a difference of opinion as to whether the list is exhaustive of the cases in which a preliminary decree can be passed. In an earlier case of the Calcutta High Court it was held that except in cases expressly provided for in the Code no preliminary decree can be passed.[12] A later case of the same High Court[13] held that the list is not exhaustive. The Bombay High Court has also held to the same effect.[14] There seems to be nothing in principle to show why, if an order satisfies all the conditions of a preliminary decree as defined, it should not be taken as such simply because it is not *expressly* provided for in the Code. There is also a conflict of views as to whether there can be *more than one*

† ('26) 13 AIR 1926 Lah 337 (337) (DB). (Suit for damages — Order for recovery of amount to be calculated is not a preliminary decree.)
('17) 4 AIR 1917 Lah 261 (265) : 1917 Pun Re No. 62 (DB). (Decision on preliminary issue.)
('17) 4 AIR 1917 Lah 153 (154) : 1917 Pun Re No. 7. (Do).
† ('12) 13 Ind Cas 800 (801) : 1911 Pun Re No. 82 (DB).
('12) 15 Ind Cas 935 (937) : 8 Nag L R 92. (Decision on preliminary issue.)

6. ('21) 8 AIR 1921 Bom 220 (222) : 45 Bom 627 (DB). (Finding that party is an agriculturist is not a decree.)
('22) 9 AIR 1922 Bom 336 (337) (DB). (Do.)
('12) 15 Ind Cas 566 (566) (DB) (All). (Preliminary issue of *res judicata*.)
('24) 11 AIR 1924 Bom 33 (34) (DB). (Finding that party is an agriculturist is not a decree.)
('15) 2 AIR 1915 Bom 42 (43) : 39 Bom 422 (DB). (Finding that party is an agriculturist is not a decree—But if the finding involves a direction to take an account between the parties as per S. 13 of the Dekkhan Agriculturists' Relief Act, it is a preliminary decree—7 Ind Cas 966 and 36 Bom 536, which hold a contrary view, are no longer good law.)
('15) 2 AIR 1915 Bom 21 (21) : 39 Bom 421 (DB). (Decision that a matter is not res judicata.)
('13) 21 Ind Cas 387 (388) (DB) (Cal). (Preliminary issue of res judicata.)
('12) 15 Ind Cas 563 (565) : 1913 Pun Re No. 16 (DB). (Do.)

7. ('36) 23 AIR 1936 Cal 784 (785) (DB).

8. ('42) 29 AIR 1942 Sind 60 (61, 62) : I L R (1941) Kar 563 (DB). (An order relating to mesne profits passed after preliminary decree is not appealable unless contained in a final decree—Until a final decree is drawn up, there is no right of appeal.)
('79) 4 Cal 629 (633). (Decree for possession reserving enquiry into mesne profits is a preliminary decree.)
('70) 14 Suth W R 92 (93) (DB).
† ('14) 1 AIR 1914 Cal 804 (804) (DB). (Formally expressed decision as to possession in suit for possession and mesne profits.)
('10) 6 Ind Cas 648 (648) (Lah). (Order declaring decree-holder entitled to mesne profits is a decree reserving ascertainment of amount later on.)

9. ('15) 2 AIR 1915 P C 116 (117) : 42 Cal 914 ; 42 Ind App 91 (P C). (Order declaring partnership dissolved from a particular date.)

10. ('98) 20 All 311 (312) (DB). (Decree for partition is a preliminary decree.)
('92) 19 Cal 463 (467, 469) (FB). (Order declaring rights of parties is a preliminary decree.)
('96) 23 Cal 279 (283) (DB).
('09) 3 Ind Cas 247 (252, 253) (DB) (Cal).
('02) 29 Cal 758 (760, 764) (FB). (Order declaring rights of the parties and the property to be partitioned is a preliminary decree.)
('86) 12 Cal 273 (275) (DB).
('86) 12 Cal 209 (212) (DB).
('95) 18 Mad 73 (87) (DB).
('38) 25 AIR 1938 Oudh 229 (230) : 14 Luck 223 (DB).

11. ('16) 3 AIR 1916 Bom 305 (307) : 40 Bom 321 (DB).

12. ('19) 6 AIR 1919 Cal 361 (362) (DB).

13. ('24) 11 AIR 1924 Cal 160 (162) (DB).

14. ('21) 8 AIR 1921 Bom 220 (222) : 45 Bom 627 (DB).

preliminary decree in the same suit. Ordinarily there can be only one such decree in a suit. The Calcutta High Court has held[15] that there may be exceptions to the rule. Thus, an order passed in supplemental proceedings after preliminary decree, with regard to the mode of accounting and the period for which the defendant is liable for mesne profits, amounts, according to the High Court of Calcutta,[16] to another preliminary decree. But according to the High Court of Allahabad[17] such an order amounts only to an interlocutory order in a pending suit. The Calcutta High Court in the undermentioned case[18] and the Madras High Court[19] have held that there cannot be more than one preliminary decree. The same view is taken by the Bombay High Court[20] and by the Oudh Judicial Commissioner's Court.[21] It has been held by the Patna High Court[22] that the definition of a decree in this section must be taken along with the provisions of the Code regarding the *stage* at which a decree may be prepared and that the order of an Appellate Court in an appeal from the preliminary decree in a suit for redemption, remanding the case to the lower Court and giving directions as to the mode of taking accounts, is not a preliminary decree. It is not competent for a Court to dismiss a suit after a preliminary decree is passed or to vacate the preliminary decree for default in subsequent stages of the proceeding; it can only be reversed in appeal.[23]

Under the Code of 1877, an order directing accounts was not within the definition of "decree;"[24] but, under the Code of 1882, it was so.[25] Such orders when they involve a decision of the rights of the parties will be preliminary decrees under the present Code.[26]

11. Final decree. — A decree may be said to become final in two ways :

(1) When the time for appeal has expired without any appeal being filed, or the matter has been decided by the decree of the highest Court.[1]

(2) When the decree, *so far as regards the Court passing it*, completely disposes of the suit.[2]

It is in the latter sense that the words "final decree" are used in S. 2, cl. (2). The appealability of a decree therefore will not affect its character as a "final decree."

A suit is completely disposed of when there is nothing further remaining to be decided in it. Thus, where in a suit for recovery of money, the amount found due to the decree-holder is declared and it is also laid down in the decree in what manner that amount is to be paid, the decree is a final decree.[3] Similarly, where a decree is passed

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15. ('24) 11 AIR 1924 Cal 160 (162) (DB).
16. ('24) 11 AIR 1924 Cal 160 (162) (DB).
('30) 17 AIR 1930 Cal 89 (91) : 56 Cal 550 (DB).
[But see ('12) 13 Ind Cas 186 (186) (DB) (Cal).]
17. ('25) 12 AIR 1925 All 588 (589) : 47 All 543 (DB).
18. ('15) 2 AIR 1915 Cal 272 (274) (DB).
19. ('19) 6 AIR 1919 Mad 998 (1000) : 42 Mad 296 (DB).
('30) 17 AIR 1930 Mad 528 (530) : 53 Mad 378.
20. ('24) 11 AIR 1924 Bom 33 (35) (DB).
21. (21) 8 AIR 1921 Oudh 224 (224) : 24 Oudh Cas 366 (DB).
22. ('34) 21 AIR 1934 Pat 97 (99) (DB).
23. ('32) 19 AIR 1932 Mad 519 (522) (DB).
Also see O. 9, R. 3 Note 3 and O. 9, R. 8 Note 3.
24. ('83) 9 Cal 773 (777) (DB).
25. ('91) 15 Bom 155 (159) : 18 Ind App 6 (P C).
('79) 3 Bom 161 (166).
('09) 2 Ind Cas 161 (163) (DB) (Bom).
('85) 9 Bom 183 (195) (DB).
('09) 2 Ind Cas 553 (555) : 36 Cal 493 (DB).
('96) 23 Cal 406 (409).
('01) 1901 Pun Re No. 13, page 47.
('95) 18 Mad 73 (87) (DB).
26. ('15) 2 AIR 1915 P C 116 (117) : 42 Cal 914: 42 Ind App 91 (P C).

Note 11

1. † ('17) 4 AIR 1917 All 323 (324).
('78) 1 All 132 (134) (DB). (Followed in 7 All 107.)
('27) 14 AIR 1927 All 848 (849) : 50 All 68 (DB).
('25) 12 AIR 1925 All 291 (292) : 47 All 533.
('90) 12 All 129 (155, 156) (FB).
('78) 1 All 293 (295) (DB).
('31) 18 A I R 1931 Cal 323 (324) (DB). (Decree as modified in review is the final decree.)
('09) 4 Ind Cas 167 (168) (DB) (Cal).
2. ('11) 10 Ind Cas 736 (736):7 Nag L R 41 (DB). (An absolute decree for redemption, sale or foreclosure is a final decree.)
3. ('42) 29 A I R 1942 Oudh 1 (5) : 17 Luck 249 (DB).

for a sum representing past mesne profits, and for subsequent mesne profits at a particular rate without directing any inquiry, the decree *completely* disposes of the suit and is therefore a *final* decree.[4] If the Court, however, had merely declared that a party is liable for mesne profits and directed an enquiry into the amount of mesne profits, the declaration, though a decree, does not completely dispose of the suit and is therefore only a *preliminary* decree and not a *final* one.[5]

A decree to which a condition is attached, upon the fulfilment of which the decree-holder is to enjoy the fruits of his decree, does not because of that become a preliminary decree; it is nevertheless a final decree.

Illustration.

A files a suit for pre-emption against *B*. A decree is passed in *A*'s favour but with the condition that unless the purchase-money is paid within two months from the date of the decree, the suit shall stand dismissed. The decree is a *final* one, inasmuch as the Court having passed such a decree has no further judicial function to perform in respect of the complete disposal of the suit.[6]

Ordinarily there will be only *one* final decree in a suit. But special circumstances may require the passing of more than one final decree in the same suit.

Illustration.

A obtains a preliminary decree against *B*. *B* appeals and obtains an order for stay of further proceedings in the lower Court in respect of a *portion* of the subject-matter. The trial Court passes a final decree in respect of the portion not affected by the stay order. The appeal is subsequently dismissed. *A* can apply for a supplementary or *second* final decree in respect of the portion about which no final decree was passed.[7]

See also Notes on O. 34, Rr. 3 and 5 under the heading 'Appeal'.

12. Decree partly preliminary and partly final. — A decree may be partly preliminary and partly final. Thus, where in a suit for possession of immovable property with mesne profits, the Court —

(a) decrees possession of the property, and

(b) directs an enquiry into the mesne profits,

the portion *(a)* is a *final* decree and the portion *(b)* is a *preliminary* one.[1]

Similarly, a direction in the final decree leaving distribution of assets undisposed of is in essence a preliminary decree and the decree is partly final and partly preliminary.[2]

13. Order rejecting plaint. — An order rejecting a plaint does not preclude the plaintiff from presenting a fresh plaint on the same cause of action.[1] Such an order, therefore, does not negative the rights of the plaintiff as in the case of *dismissal* of the

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4. ('25) 12 AIR 1925 Mad 1276 (1276) (DB).
('28) 15 AIR 1928 Cal 804 (804) (DB).
[*See also* ('98) 1898 All W N 99 (99). (Partition suit — Final decree can be passed only after perusing the amin's report.)]
Also see O. 20, R. 12, Note 2.

5. ('87) 14 Cal 50 (53, 54) (DB).

6. ('20) 7 A I R 1920 Oudh 25 (26) : 23 Oudh Cas 254.
[*See also* ('76) 1 All 132 (134).
('14) 1 A I R 1914 Oudh 221 (222). (Pre-emption suit—Following A I R 1914 Oudh 147 : 17 Oudh Cas 14.)]
[But see ('33) 20 AIR 1933 All 261 (262).]

7. ('18) 5 AIR 1918 Cal 9 (10).
✣[*See also* ('40) 27 A I R 1940 Lah 1 (3) : I L R (1940) Lah 171 (DB). (Suit disposed of as to some items and kept pending as to the rest — Decree final as to former items and cannot be questioned in subsequent stages.)]

Note 12

1. ('29) 16 AIR 1929 Cal 383 (383) (DB).
('14) 1 A I R 1914 Oudh 147 (148) : 17 Oudh Cas 14. (Decree declaring that on default of payment within fixed period suit would stand dismissed is a combined decree.)
Also see O. 20, R. 12, Note 2.
2. ('30) 17 AIR 1930 Mad 528 (530, 531) : 53 Mad 378.

Note 13

1. See O. 7, R. 13.

suit.[2] The section, however, specifically provides that the rejection of a plaint shall be deemed to be a decree.[3]

Is an order rejecting a *memorandum of appeal* a decree? There is a conflict of opinion on the point. On the one hand, it has been held that the words "shall be deemed to include the rejection of a plaint" show that but for the use of those words an order of rejection, even of a plaint, will not be a decree, that there is no provision corresponding to this provision applicable to the rejection of a memorandum of appeal, that S. 107 sub-s. (2), dealing with the powers of an appellate Court cannot enable a memorandum of appeal to be regarded as a plaint and that consequently, the rejection of a memorandum of appeal is not a decree.[4] On the other hand, it has been held in a number of cases that the rejection of a memorandum of appeal is a decree. But the reasoning on which this view is based differs in different cases. According to one view, it is a decree by virtue of this clause read with S. 107, sub-s. (2).[5] According to a second view, such a rejection is a decree independently of the application of S. 107 sub-s. (2), if it conclusively disposes of the appeal.[6] A third view is that a rejection which amounts to a *dismissal* of an appeal is a decree.[7] See also the undermentioned cases.[8]

As has been seen in Note 6, the *dismissal* of a suit or appeal will be a decree. The question whether an order is one of *rejection* or of *dismissal* of a suit or appeal must be determined with reference to the substance and not the form of the order.[9] An

2. See cases in Note 6, foot-note 10.
('71) 7 Beng L R 663 (668) (FB). (Rejection for undervaluation.)

3. ('41) 28 AIR 1941 Nag 223 (224) : I L R (1941) Nag 428. (Plaintiff ordered to furnish certain particulars—Plaintiff even after several opportunities failing to furnish particulars — Court thereupon passing order discharging defendant—Order held amounted to either rejection of plaint or dismissal of suit—In either case it is decree.)
('41) 28 AIR 1941 Pat 385 (389): 20 Pat 417 (DB). (Per Fazl Ali, J.— Order rejecting plaint for non-compliance with S. 270, Government of India Act, is decree.)
('38) 25 A I R 1938 All 150 (151). (Rejection of plaint on ground of deficiency of court-fee.)
('35) 22 AIR 1935 Cal 336 (337) : 62 Cal 61 (DB). (Rejection of plaint for non-payment of deficit court-fee.)
('36) 23 AIR 1936 Pesh 155 (156) (DB).

4. ('41) 28 A I R 1941 Mad 836 (837, 838) : I L R (1941) Mad 954 (FB). (Order directing dismissal of appeal for non-payment of court-fee and for failure to furnish security is not a decree.)
('32) 19 AIR 1932 Cal 482 (484) : 59 Cal 388 (DB).
('95) 18 All 101 (103) (FB).
('22) 9 AIR 1922 Cal 246 (246) : 49 Cal 355 (DB).
('08) 30 All 143 (146) (DB). (18 All 101 (FB), Foll.)
('98) 21 All 133 (136) (FB). (18 All 101 (FB), Ref.)
('36) 23 A I R 1936 Cal 804 (805) : I L R (1937) 1 Cal 103 (DB). (A I R 1932 Cal 482 : 59 Cal 388 followed.)
('22) 9 AIR 1922 Lah 87 (87) : 3 Lah 30 (DB).
('38) 25 AIR 1938 Nag 122 (124) : ILR (1938) Nag 106 (FB). (AIR 1932 Cal 482 : 59 Cal 388 Foll.)
('11) 9 Ind Cas 748 (748) : 14 Oudh Cas 49.
('36) 23 AIR 1936 Pesh 140 (141) (DB). (AIR 1932 Cal 482 : 59 Cal 388 followed.)
('10) 8 Ind Cas 436 (437) (DB) (Mad). (Following 18 All 101 (FB).)

5. ('42) 29 AIR 1942 Lah 64 (65). (AIR 1922 Pat 281 : 6 Pat L Jour 625 and AIR 1927 Nag 100 relied on.)
('93) 16 Mad 285 (285) (DB).
('85) 1885 All W N 323 (323) : 8 All 38 (DB).
('13) 19 I.C. 931 (932) (DB) (Cal). (12 Cal 30, Foll.)
('86) 12 Cal 30 (31) (DB).
('36) 23 AIR 1936 Mad 101 (101) : 59 Mad 805. (16 Mad 285 followed.)
('04) 27 Mad 21 (22) (DB). (Do.)
('99) 22 Mad 155 (157) (DB). (Do.)
('39) 26 AIR 1939 Pat 83 (84) : 17 Pat 687 (DB). (Do.)
('22) 9 AIR 1922 Pat 281 (283) : 6 Pat L Jour 625 (DB). (Do.)

6. ('85) 9 Bom 452 (453) (DB).
('38) 25 AIR 1938 Pat 461 (462) : 17 Pat 245 (DB). (It cannot be laid down as a universal proposition that an order rejecting a memorandum of appeal under O. 41, R. 3, C. P. C., is appealable. Only in those cases in which it finally disposes of the disputes between the parties it would be appealable as a "decree." O. 43, R. 1 does not provide for an appeal from an order rejecting the memorandum of appeal for non-compliance with O. 41, R. 1.)
('97) 21 Mad 152 (153) (DB). (Refusal to receive an appeal is not a decree.)
[But see ('37) 24 AIR 1937 All 280 (281) : I L R (1937) All 484. (Rejection without jurisdiction does not conclusively determine appeal — Not a decree.)]

7. ('03) 8 Cal W N 64 (65). (Rejection on the ground that no appeal lies.)
('84) 1884 Pun Re No. 115, page 324.
('22) 9 AIR 1922 Nag 62 (63, 64) : 18 Nag L R 15.

8. ('88) 1888 Bom P J 339. (Order dismissing an appeal as improperly stamped is appealable.)
('85) 7 All 887 (888) (DB).
('27) 14 AIR 1927 Nag 100 (100).

9. ('36) 23 AIR 1936 Cal 804 (805) : ILR (1937) 1 Cal 103 (DB).

order *dismissing* an appeal for deficient court-fee must be treated on the same footing as the *rejection* thereof.[10] An order refusing leave to join two causes of action and returning a plaint with directions to institute two different suits, is substantially an order *rejecting* a plaint and is a decree.[11]

A rejection of the plaint, in order to be a decree, need not be limited to the cases provided for in O. 7, R. 11.[12] It is, however, necessary that the rejection must be one authorised by the Code. If it is not authorised by some provision of the Code, the rejection will not amount to a decree.[13]

An order returning a plaint or memorandum of appeal to be presented to the proper Court or for amendment is not a decree.[14] The reason is that such order does not negative any rights of the plaintiff and is not a decision on the rights of the parties. An order returning a plaint to be presented to the proper Court was, however, appealable under the old Code[15] and is also appealable under this Code as an appealable order.[16]

14. Determination of a question within Section 47 or Section 144. — The determination of any question within S. 47 or S. 144 is expressly included in the definition of "decree" though such determination is neither made in a *suit*, nor is drawn up in the *form* of a decree.[1]

Every order, however, passed under S. 47 or S. 144 is not necessarily a decree. It is essential that the order must have decided *the rights of the parties* with regard to the

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10. ('32) 19 AIR 1932 Cal 482 (484):59 Cal 388(DB).
†('22) 9 AIR 1922 Nag 62 (63, 64):18 Nag L R 15.
('22) 9 AIR 1922 Pat 281 (282) : 6 Pat L Jour 625 (DB).
Also see S. 149 Note 13 and O. 41 R. 17 Note 14.

11. ('86) 8 All 191 (193, 194) (DB).
[*See also* ('84) 14 Cal 234 (235) (DB). (Order refusing to register claim as a suit amounts to rejection.)
('93) 16 Mad 127 (128, 130)(DB). (Do.; Following 14 Cal 234.)]

12. † ('86) 13 Cal 189 (191) (DB). (Rejection on the ground that suit was instituted by a minor.)
('93) 16 Mad 285 (285) (DB). (Rejection on the ground that the appeal was not legally presented.)
† ('89) 11 All 91 (92, 93) (FB).
('93) 17 Bom 56 (59) (DB).
('83) 12 Cal L R 148 (149) (DB).
('81) 6 Cal 249 (251) (DB). (Court-fees Act, S. 12, does not prohibit appeal where question is in respect of the class to which suit belongs.)
('21) 8 AIR 1921 Lah 43 (43) (DB).
('14) 1 AIR 1914 Lah 153 (153) : 1914 Pun Re No. 80 (DB).
('15) 2 AIR 1915 Mad 483 (484) (DB). (Following 13 Cal 189—Rejection is not confined to Ss. 53 and 54 of 1882 Code, i. e., O. 7 Rr. 11, 17 and O. 6, R. 18 of 1908 Code.)
('82) 4 Mad 204 (208) (DB). (Court-fees Act, S. 12, does not prohibit appeal where question is in respect of the class to which suit belongs.)
('29) 16 AIR 1929 Pat 615 (616) (DB).

13. ('37) 24 AIR 1937 All 280 (281) : I L R (1937) All 484.

14. ('05) 27 All 21 (22) (DB). (Order returning plaint.)
('91) 13 All 320 (321) (DB). (Do.)
('79) 2 All 357 (358) (DB). (Do.)
(1900) 1900 Pun L R page 137 (140) (DB). (Do.)
('35) 22 AIR 1935 Mad 574 (575).
('98) 21 Mad 234 (235)(DB). (Order returning plaint.)
[But see ('78) 1 All 620 (622) (DB).]

15. See S. 588 (6) of the old Code.

16. See O. 43, R. 1, cl. (a).

Note 14

1. ('42) 29 AIR 1942 Mad 406 (406) (DB). (Dispute between judgment-debtor and stranger purchaser regarding re-delivery of part delivered in excess to purchaser treated and decided as one under S. 47— Question held one within S. 47.)
('41) 28 AIR 1941 Nag 313 (313) : ILR (1941) Nag 662 (DB). (Per Bose, J., in Order of Reference to Division Bench.)
('01) 6 Cal W N 283 (284) (DB).
('81) 3 All 633 (635) (FB).
('37) 24 AIR 1937 All 48 (49) (DB).
('35) 22 AIR 1935 All 873 (874).
('36) 23 AIR 1936 Cal 812 (812). (Order rejecting application for restitution under S. 144 on ground of limitation amounts to decree and is appealable.)
('38) 25 AIR 1938 Lah 456 (456).
('38) 25 AIR 1938 Nag 212 (216): I L R (1938) Nag 583 (DB). (The case of a judgment-debtor when he is fighting with the decree-holder auction-purchaser falls under S. 47 and an order passed against the judgment-debtor is a decree under S. 2 (2).)
('37) 24 AIR 1937 Oudh 337 (338): 13 Luck 309(DB).
[*See* ('32) 19 AIR 1932 Pat 317 (319) : 11 Pat 553 (DB). (Though order does not arise under S. 144, but still as it was passed on the footing that it is covered by S. 144, it has been held appealabe.)
('40) 27 AIR 1940 Nag 349 (352) : I L R (1940) Nag 538 (DB). (Even if the order of restitution is passed under inherent powers of Court—Obiter.)

matter in controversy in the proceedings under those sections.[2] In other words, it must be a final decision either granting a relief or refusing an application.[3] The determination of a *mere issue* made prior to the passing of the final order,[4] or an order merely determining a point of law arising *incidentally* in the course of a proceeding for determining the rights of the parties,[5] is not a decree. Thus, a refusal to summon a witness in a proceeding under S. 47 is not a decree.[6] Similarly, a mere order that an objection

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2. ('42) 29 AIR 1942 Cal 423 (428). (Order under S. 4, Bengal Non-agricultural Tenancy Act, falls within S. 47 and is decree.)
('41) 28 AIR 1941 Cal 618 (621) (DB).
('41) 28 AIR 1941 Oudh 609 (610). (Order staying execution is not decree—Obiter).
('40) 27 AIR 1940 Bom 210 (211, 214) : I L R (1940) Bom 370 (DB). (Order under O. 21, R. 93 that auction purchaser is entitled to refund of purchase money from judgment-creditor and not latter's pleader to whom he had assigned decree —Order is not one under S. 47 or S. 144 and is not appealable — Auction purchaser is neither party nor representative of party within S. 47.)
('40) 27 AIR 1940 Cal 257 (258, 259): ILR (1940) 1 Cal 393 (DB). (Decision that judgment-debtors are not debtors within the meaning of Bengal Agricultural Debtors Act falls under S. 47 and is decree.)
†('11) 10 Ind Cas 371 (371) (DB) (Cal). (Assessment of the value of property in execution proceedings is not decree.)
('29) 16 AIR 1929 Mad 718 (720). (Order for arrest not a decree.)
('36) 23 AIR 1936 All 479 (480) (DB). (Decision that certain persons are representatives of judgment-debtor is one under S. 47 and is decree.)
('33) 20 AIR 1933 All 382 (383, 384) : 55 All 548. (Order on application by surety for cancellation of surety bond.)
('32) 19 AIR 1932 All 85 (89) : 53 All 391 (DB). (Order prescribing order of sale of mortgaged properties decides rights of parties.)
†('29) 16 AIR 1929 All 390 (391) (DB). (Order granting leave to apply for execution is not a determination of the rights of the parties.)
('27) 14 AIR 1927 All 208 (209).
('26) 13 AIR 1926 All 401 (401).
('01) 23 All 152 (156, 157) : 27 Ind App 209 (PC). (Order in execution fixing period for which mesne profits are recoverable.)
('39) 26 AIR 1939 Bom 65 (65). (Order by appellate Court under O. 41, R. 5, Civil. P. C., refusing to stay execution is not one within S. 47 and is not a decree.)
('86) 10 Bom 200 (202) (DB). (Refusal of execution on the ground of no jurisdiction.)
('30) 17 AIR 1930 Cal 89 (91) : 56 Cal 550 (DB). (Order for mesne profits by way of restitution is decree, though amount not fixed.)
('15) 2 AIR 1915 Cal 815 (816) (DB). (Order refusing decree-holder permission to withdraw his bid at auction sale does not adjudicate any rights and is not a decree.)
('14) 1 AIR 1914 Cal 149 (149) : 41 Cal 160 (DB.)
('12) 13 Ind Cas 365 (367) (DB) (Cal).
('11) 12 Ind Cas 745 (749, 750) (DB) (Cal). (Cases discussed—Tests suggested in 24 Cal 725 and 10 Ind Cas 371 (Cal).)
('01) 8 Cal W N 257 (261, 262) (DB). (Objection of the judgment-debtor to the valuation of property in execution proceedings overruled—It is a decree because it is a judgment-debtor's right to have the property properly valued.)
('83) 9 Cal 214 (215) (DB).
('39) 26 AIR 1939 Lah 177 (178) (DB). (Order that executing Court had jurisdiction to hear objection application of judgment-debtor under S. 47 is an order which determines a very important right and is a decree.)
('32) 19 AIR 1932 Lah 120 (121). (Order accepting or refusing security bond is not appealable.)
('20) 7 AIR 1920 Lah 443 (444). (Question whether decree-holder is entitled to the benefit of the provisions of S. 72 is a decree under S. 47.)
('14) 1 AIR 1914 Lah 415 (416) : 1913 Pun Re No. 110 (DB). (Decision on a question of limitation in a proceeding under S. 144 is not a decree.)
†('36) 23 AIR 1936 Mad 623 (624).
('33) 20 AIR 1933 Mad 152 (153) : 56 Mad 453 (DB). (Order staying or refusing stay of execution is not appealable as a decree.)
('04) 27 Mad 259 (261) (FB). (Overruling 23 Mad 568 and dissenting from 30 Cal 617.)
('33) 20 AIR 1933 Nag 84 (85) : 29 Nag L R 121. (Order staying or refusing stay of execution is not appealable as a decree.)
('27) 14 AIR 1927 Nag 112 (112) : 23 Nag L R 14 (DB). (Order under O. 21, R. 71 is a decree; following AIR 1922 All 200 : 44 All 266 (FB).)
('20) 7 AIR 1920 Pat 249 (250) : 5 Pat L Jour 270 (DB).
†('37) 24 AIR 1937 Rang 157 (158, 159) (DB).
('35) 22 AIR 1935 Rang 500 (501).
('31) 18 AIR 1931 Rang 221 (223) : 9 Rang 354. (Order staying or refusing to stay execution is not appealable as a decree.)
3. †('91) 18 Cal 469 (472) (DB).
('88) 1888 All W N 82 (82). (An order of adjournment in an execution application is not final—Not a decree.)
4. ('15) 2 AIR 1915 Mad 197 (198) : 37 Mad 29 (DB). (Obiter.)
5. ('43) 30 AIR 1943 Lah 140 (144, 145, 146) (FB).
('39) 26 AIR 1939 Lah 177 (177) (DB). (The actual decision in this case viz., that a mere order that an executing court has jurisdiction to hear an objection application of the judgment-debtor is a decree is not correct, as pointed out in AIR 1943 Lah 140 (FB).)
('14) 1 AIR 1914 Lah 415 (416) : 1913 Pun Re No. 110 (DB). (Point of limitation under S. 144 is incidental.)
('33) 20 AIR 1933 Pat 498 (499) (DB). (Do.)
('20) 7 AIR 1920 Lah 117 (118) (DB).
[But see ('91) 13 All 569 (571). (Order under O. 21, R. 71 is merely an "order"—No longer good law.)]
6. ('20) 7 AIR 1920 Lah 443 (444). (Obiter.)

by the judgment-debtor as to jurisdiction and limitation could not be allowed to be raised at that stage of the case is not a decree.[7] For orders under S. 47 and S. 144 which do not amount to decrees, see Notes 84 and 86 on S. 47 and Note 31 on S. 144.

There is no distinction between a decree in a suit and a decree in a proceeding under S. 47 or S. 144.[8]

15. "Decree" does not include appealable orders. — The definition expressly excludes an adjudication from which an appeal lies as an appeal from an order.[1] Orders which are so appealable are specified in S. 104 and O. 43 R. 1 of the Code. An order, therefore, which falls within the purview of S. 47 or S. 144 or is otherwise within the general definition of a decree, is nevertheless not a decree if an appeal lies therefrom under S. 104 and O. 43 R. 1.[2]

16. Decree does not include order of dismissal for default. — Under the old Code there was a conflict of decisions as to whether a dismissal for default of a suit or of an appeal was a decree.[1] The conflict has now been set at rest[2] by the following changes in the Code :

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7. ('43) 30 AIR 1943 Lah 140 (143) (FB). (Per Tek Chand and Bhide JJ.; Beckett J., *contra*—The expression "determination of any question" in the second sentence of the definition of S. 2 (2) is used *ejusdem generis* with the phrase 'conclusively determines' etc., in the first.)
('39) 26 AIR 1939 Lah 177 (178) (DB).

8. ('25) 12 AIR 1925 Cal 102 (103) (DB).

Note 15

1. ('28) 15 AIR 1928 Lah 137 (139): 9 Lah 380 (DB).
('29) 16 AIR 1929 Lah 367 (367) (DB).
†('36) 23 AIR 1936 All 763 (764) (DB). (An order passed on an application under O. 21, R. 90, Civil P. C. is not a decree, the order being one from which an appeal is provided under O. 43, R. 1 (j).)
('39) 26 AIR 1939 Oudh 101 (105) (DB). (Order under S. 104 (1) (f).)
[*See* ('40) 27 AIR 1940 Nag 349 (353): ILR (1940) Nag 538 (DB). (Order of remand not falling under O. 41, R. 23—Cardinal issues decided by lower appellate Court—Order is decree.)
[*See also* ('42) 29 AIR 1942 Mad 73 (74) : I L R (1942) Mad 236. (The Code makes a clear distinction between decrees and appealable orders. And where a decision of the first Court is only an order, the decision of the appellate Court on appeal from such order cannot be called a decree.)]

2. ('12) 17 Ind Cas 884 (885) : 8 Nag L R 177.
('06) 3 Cal L Jour 276 (279) (DB).
('11) 38 Cal 339 (341) (DB). (Order on application under O. 21, R. 89.)
('15) 2 AIR 1915 Lah 293 (295). (Order under O. 21, R. 92).
('38) 25 AIR 1938 Nag 107 (107, 108): ILR (1938) Nag 436 (DB). (Order refusing to set aside sale.)

Note 16

1. *The following cases held that dismissal of suit for default was a decree :*
('87) 9 All 427 (428) (DB). (Dismissal under S. 102, O. 9, R. 8.)
('83) 1883 All W N 171 (171) (DB). (Dismissal for non-production of evidence.)
('81) 3 All 292 (294) (DB).
('96) 20 Bom 736 (744).
('95) 19 Bom 307 (308) (DB). (Dismissal under O. 11, R. 21.)
('92) 16 Bom 23(25) (DB). (Dismissal under O.9, R.8.)
('10) 5 Ind Cas 493 (494) (DB) (Cal). (Section 102, O. 9, R. 8.)
('04) 8 Cal W N 313 (314) (Do.)
('98) 1898 Pun Re No. 43. (O. 11, R. 21.)
('97) 1897 Pun R. No. 60. (Section 102, O. 9, R. 8.)

The following cases held that dismissal of suit for default was not a decree :
('99) 22 Mad 221 (222) (DB).
('02) 12 Mad L Jour 473 (474) (DB).
('10) 5 Ind Cas 423 (423) : 32 All 373 (DB).
('06) 28 All 749 (752) (FB).
('93) 15 All 359 (362) (DB).
('02) 29 Cal 60 (62) (DB).
('83) 9 Cal 627 (628) (DB). (Section 97, O. 9, R. 2.)
('07) 1907 Pun Re No. 121, p. 550 (FB).
('02) 5 Oudh Cas 294 (297) (DB).
('08) 4 Low Bur Rul 17 (23) (FB). (Section 102.)

The following cases held that dismissal of appeal for default was a decree :
('92) 16 Bom 23 (25) (DB).
('03) 30 Cal 660 (664) (FB).

The following cases held that dismissal of appeal for default was not a decree :
('96) 23 Cal 115 (116, 117) (DB).
('96) 23 Cal 827 (828) (DB).
('93) 15 All 359 (361) (DB).
('92) 14 All 361 (361) (DB).
('81) 3 All 382 (383) (DB).
('80) 2 All 616 (617) (DB).
('83) 1883 Pun Re No. 9, page 32.
('79) 1879 Pun Re No. 113.
('08) 31 Mad 157 (159) (DB).
('03) 6 Oudh Cas 48 (50). (When appellant withdraws from appeal without permission and the appeal is dismissed it must be taken to be a dismissal for default.)
('97) 1897 Upp Bur Rul 206.

2. ('17) 4 AIR 1917 All 392 (393) : 39 All 393.

(1) By expressly providing in cl. (b) of S. 2 (2), that a dismissal for default is not a decree; and

(2) By substituting the words "the Court shall *make an order* that the suit be dismissed" and the words "the Court shall *make an order* that the appeal be dismissed" for the words "the Court shall dismiss the suit" and the words "the appeal shall be dismissed" in O. 9 R. 8 and O. 41 Rr. 11 (2) and 17 respectively, corresponding to Ss. 102, 551 and 556 of the old Code. The object of such substitution is to make it clear that the dismissal is to be regarded only as an *order*. See Note 2 above.

The words "dismissed for default" are not confined to dismissals for default in *suits* or *appeals*. They extend also to *applications* under S. 47 or S. 144 which are dismissed for default.[3]

There is a divergence of views as to the meaning of the expression "dismissal for default." In the undermentioned case[4] the Allahabad High Court proceeded on the view that a dismissal for default means a dismissal for *non-appearance* and held that where an appellant's pleader was present but expressed his unpreparedness to argue the appeal and the appeal was dismissed for non-prosecution, the dismissal was not one for "default" and constituted a decree. Similarly, the Calcutta High Court has held[5] that the expression "dismissal for default" does not include a dismissal for non-payment of deficit court-fee. But the Madras High Court has held that a dismissal for failure to pay deficit court-fee is a dismissal for default.[6] Similarly, the Oudh Chief Court has held that a dismissal for non-prosecution is a dismissal for default.[7] The Allahabad and Calcutta decisions seem to be opposed to the undermentioned decisions of the Privy Council[8] in which the Privy Council has taken the view that an order dismissing an appeal for want of prosecution is not a "judicial" order at all.

('12) 39 Cal 341 (343) (DB). (Dismissal of appeal for default.)

('24) 11 AIR 1924 All 144 (144) : 45 All 669 (DB). (Where an appeal is not dismissed for default as it could have been, but on the merits it is a decree.)

('10) 32 All 373 (376).

('17) 4 AIR 1917 Cal 728 (730) : 44 Cal 954 (DB).

('13) 20 Ind Cas 1 (2) (DB) (Cal). (The fact that a decree is drawn up in a case of dismissal for default cannot alter the nature of the order.)

('17) 4 AIR 1917 Mad 732 (734) (DB). (Part of the claim dismissed for default of plaintiff and part allowed on admission of defendant—Order should be considered as a decree.)

(12) 14 Ind Cas 823 (835) (DB) (Mad). (Dismissal under O. 41, R. 17.)

('20) 7 AIR 1920 Nag 216 (218).

('25) 12 AIR 1925 Oudh 485 (485) : 28 Oudh Cas 124 (DB).

('18) 5 AIR 1918 Oudh 446 (448).

('23) 10 A I R 1923 Pat 514 (515) : 2 Pat 739 (DB).

('18) 5 AIR 1918 Pat 376 (376) (DB). (One of the plaintiffs present—Dismissal for default of others is a decree.)

[*See* ('12) 15 Ind Cas 601 (602) (DB) (Cal). (But where a decree is passed under O. 9, R. 8 on defendant's admission, on the plaintiff's non-appearance it is not a dismissal for default.)]

3. ('26) 13 AIR 1926 All 401 (401).

('88) 11 Mad 319 (321) (DB). (Order dismissing application to set aside sale in execution; following 10 Bom 433.)

('07) 29 All 596 (598) (DB).

('36) 23 AIR 1936 Cal 267 (268) (DB). (Order directing an execution case to be dismissed for non-prosecution is not a decree.)

('04) 31 Cal 207 (209) (DB). (Followed in AIR 1915 Cal 539).

('99) 27 Cal 414 (415) (DB). (Dismissal for default of application to set aside a sale.)

('32) 19 AIR 1932 Nag 14 (15) : 27 Nag L R 339. [But see the observations in ('24) 11 AIR 1924 Cal 830 (834), which confines dismissal for default to cases treated as such by the Code itself.]

4. ('37) 24 AIR 1937 All 284 (285).

5. ('42) 29 AIR 1942 Cal 539 (541) : I L R (1942) 2 Cal 253. ("Dismissal for default" in S. 2 (2) refers only to dismissal under O. 9.)

6. ('41) 28 AIR 1941 Mad 836 (837, 838) : I L R (1941) Mad 954 (FB). (The word 'default' in S. 2 (2) is not confined to default of appearance but includes other defaults as well.)

7. ('42) 29 AIR 1942 Oudh 362 (364, 365) (DB). (Default does not necessarily mean default of appearance — It also includes default of prosecution.)

8. ('33) 20 AIR 1933 P C 68 (70) : 60 Cal 662 : 60 Ind App 83 (PC).

9. ('14) 1 AIR 1914 P C 66 (67) : 36 All 350 (PC).

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made:

Synopsis

1. Legislative changes.
2. Scope of the definition.
3. "Capable of execution." See Note 2.

1. Legislative changes. — The words "and includes any person to whom such decree or order is transferred" which occurred in the old Code, have now been omitted. For reasons, see Note 2.

2. Scope of the definition. — Under the old Code the transferee from the decree-holder was included in the definition of the term "decree-holder."[1] This was found too general as including even *oral* assignments whereas under S. 232 of the same Code an assignment, in order to be recognised, had to be in *writing*.[2] The words "and includes any person to whom such decree or order is transferred" have consequently been removed. The result is that a decree-holder under the present definition must be a person in *whose favour* a decree is passed and whose name is on the record in the suit.[3] But the rights of the transferee, however, are not affected by the change and remain practically the same as before.

Even where the person in whose favour a decree is passed is only a benamidar for another, it is only the former that can be called the decree-holder.[4]

Where a decree for specific performance is passed, such decree is capable of execution both by the plaintiff as well as by the defendant; consequently, even the defendant in such a case would be a "decree-holder."[5]

The term "decree-holder" does not include an attaching creditor.[6]

3. "Capable of execution." — See Note 2.

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(4) "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court:

Synopsis

1. Legislative changes.
2. "District Court," meaning of.
3. "District." See Note 2.

1. Legislative changes. — The latter half of the old definition declaring the subordination of the various civil Courts has now been transferred to S. 3.

Section 2 (3) — Note 2

1. ('07) 2 Mad L Tim 339 (340) (DB).
('07) 2 Mad L Tim 93 (93) (DB).
('98) 20 All 539 (542) (DB).
('87) 11 Bom 153 (158) (DB).
('99) 26 Cal 250 (253) (DB).
('80) 5 Cal 592 (593) (DB).
('04) 14 Mad L Jour 393 (393).
('03) 26 Mad 258 (259).
('80) 2 Mad 216 (217) (DB). (The transfer must however be by a person whose name is on the record as the decree-holder.)

2. ('07) 2 Mad L Tim 93 (93) (DB).
('91) 15 Bom 307 (309) (DB).
('85) 9 Bom 179 (181) (DB).

3. ('29) 16 AIR 1929 Bom 279 (281, 282).
('37) 24 AIR 1937 Mad 605 (606). ("Decree-holder" does not include transferee from him.)
('37) 24 AIR 1937 Nag 30 (30, 31) : I L R (1937) Nag 82.

4. ('40) 27 AIR 1940 Pat 472 (473) (DB).

5. ('23) 10 AIR 1923 Bom 26 (27) : 46 Bom 990 (DB).
('32) 19 AIR 1932 Cal 579 (583) : 59 Cal 501 (511) (DB).
Also see O. 21, R. 32 N. 3.

6. ('25) 12 AIR 1925 All 123 (124).

2. "District Court," meaning of. — The term "*district*" means :

(1) The local limits of the jurisdiction of a principal civil Court of original jurisdiction.[1]

(2) The local limits of the ordinary original civil jurisdiction of a High Court.[2]

The words "*District Court*," however, do not necessarily include a High Court in the exercise of its ordinary original civil jurisdiction, wherever the words occur,[3] but mean only the principal civil Court of original jurisdiction.[4]

The definition, as the opening of the section shows, applies only where nothing is *repugnant* in the subject or context. In construing the term therefore in any section the particular provisions thereof will have first to be considered.[5]

This section does not apply to the scheduled districts.[6]

3. "District." — See Note 2.

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(5) "foreign Court" means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by [a][the Central Government or the Crown Representative]:

a. Substituted for the words "the Governor-General in Council" by the Government of India (Adaptation of Indian Laws) Order, 1937.

Scope of the definition.—Three conditions must be satisfied in order to bring a Court within the definition of a "foreign Court" :

(1) It must be situate *outside British India*,[1]

(2) It must have *no authority in British India*, and

(3) It must not have been *established or continued* by the Central Government or the Crown Representative.[2]

It follows that the Privy Council is not a foreign Court as it *has authority in British India*.[3] The Courts in British Cantonments and Residency Bazaars are not foreign Courts as they are *established or continued* by the Central Government or the Crown Representative.[4] Courts in England and Scotland other than the Privy Council[5] and the Courts in the Native States (which do not form part of British India[6]) as well as the Courts in Ceylon[7] are foreign Courts. Courts in Berar which have been established or

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Section 2 (4) — Note 2

1. ('79) 4 Cal 222 (228) (DB). (Deputy Commissioner of Sonthal Pergunnahs has been vested with powers of District Judge. The effect of this is that the Sonthal Pergunnahs is a district.)
2. ('15) 2 AIR 1915 Mad 608 (609) (DB).
3. ('27) 14 AIR 1927 Cal 290 (290) (DB). (Explaining 12 Cal W N 446.)
4. ('89) 16 Cal 13 (15) (DB). (Chota Nagpur — Court of Judicial Commissioner is the District Court.)
('97) 21 Bom 45 (47) (DB). (Second Class Sub-Judge of Pandarpur invested with powers of District Court under the Provincial Insolvency Act— His Court for that purpose is a District Court.)
5. ('08) 12 Cal W N 446 (447). (In S. 29 (1) of the Inventions and Designs Act, V of 1888, "District Court" includes High Court in its ordinary original civil jurisdiction. "District Court" in S. 2 of the Indian Patents and Designs Act, II of 1911, has the same meaning as in the Code.)
6. ('95) 17 All 483 (484) (DB).

Section 2 (5)

1. ('02) 29 Cal 509 (516) (SB). (Supreme Court of Mauritius is a foreign Court.)
2. See Ss. 43 and 45 *post* as to Courts situate beyond British India and established by the Central Government or Crown Representative.
3. See the report in connexion with Act X of 1877.
4. See Ss. 43 and 45.
5. ('84) 8 Bom 571 (574).
('01) 28 Cal 641 (645) (DB).
('71) 8 Bom H C R (O C) 200 (203) (DB). (High Court of Chancery—Chancery Division.)
✠('13) 20 Ind Cas 704 (710, 712) (DB) (Mad).
('09) 3 Ind Cas 190 (192) : 32 Mad 469 (DB).
6. ('13) 20 Ind Cas 704 (712) (DB) (Mad). (State itself is however not foreign territory.)
✠('15) 2 AIR 1915 Mad 486 (489) : 39 Mad 24 (FB).
('88) 1888 Pun Re No. 191, p. 491.
7. ('97) 20 Mad 112 (114) (DB). (Court in Kandy.)
('09) 3 Ind Cas 190 (191) : 32 Mad 469 (DB).

continued by the authority of the Central Government or the Crown Representative are not foreign Courts within the meaning of this clause.[8]

Also see sections 13 & 14, Note 3.

The definition, however, is for the purpose of *this Code* only and does not affect the power of a Chartered High Court to restrain by injunction a person resident within its jurisdiction from filing or prosecuting a suit in a Court outside such jurisdiction, such Court being a "foreign Court" for this purpose.[9] In *Gummideli Anantapadmanabhaswami* v. *Official Receiver of Secunderabad*,[10] their Lordships of the Judicial Committee held that an order adjudicating a person insolvent passed by the District Court in the British Cantonment in Secunderabad was an order passed by a foregin Court inasmuch as the British Cantonment formed part of the Hyderabad State. The decision must be treated as being given with reference to the law of insolvency and will not affect the position as regards the definition in this clause.

The definition shows that the fact that for administrative purposes the various Courts in British India are given separate territorial jurisdiction, does not make them "foreign Courts" with regard to one another.[11]

For a definition of British India, see S. 1 Note 1.

After the separation of Burma from British India under the Government of India Act of 1935, a Court in British India would be a "foreign Court" in relation to a Court in Burma.[12]

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(6) "foreign judgment" means the judgment of a foreign Court:

"Foreign judgment." — See Section 13.

(7) "Government Pleader" includes any officer appointed by the [a](Provincial Government) to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader:

a. Substituted for the words "Local Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

"Government Pleader." — The words "and also any pleader acting under the directions of the Government Pleader" are new and have been introduced to avoid the difficulty felt whenever it was found necessary for the Government Pleader to appoint another pleader to conduct his case.

For the duties and functions of the Government Pleader in respect of Government suits and suits in *forma pauperis*, see O. 27, Rr. 4 to 6 and 8 and O. 33, Rr. 6 and 9.

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(8) "Judge" means the presiding officer of a Civil Court:

Synopsis

1. "Court," meaning of.
2. "Officer," includes 'officers.'
3. Disqualification of Judges.

NOTE to Synopsis. See the Notes indicated for the following topics:

Non-liability of Judges for acts done in good faith. See S. 9, Note 4.

Registering Officer—Whether a Court. See Note 1.

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8. ('41) 28 AIR 1941 Nag 36 (45, 52, 53): I L R (1941) Nag 1 (FB).
9. ('09) 1 Ind Cas 927 (928, 929): 36 Cal 233.
10. ('33) 20 AIR 1933 P C 134 (135): 60 Ind App 167: 56 Mad 405 (P C).
11. ('37) 24 AIR 1937 Cal 172 (173, 174) (DB).
12. ('38) 25 AIR 1938 Rang 385 (386): 1938 Rang L R 355 (DB).

1. "Court," meaning of. — The term "Court" has not been defined in the Code. But, for the purposes of this Code, it has been held to mean "a place where justice is judicially administered."[1] The definitions of "Court" in the Evidence Act[2] and of "Court of Justice" in the Penal Code[3] do not afford much assistance in construing the word "Court" for the purpose of this Code, as the said definitions were framed for the purposes of the said enactments only.[4] A Subordinate Judge does not exercise his powers in view of any authority delegated to him by the Provincial Government but in view of the statutory provisions embodied in the Civil Procedure Code.[5]

2. "Officer" includes "officers." — In accordance with the general rule of interpretation that words in the singular include the plural,[1] "officer" in this definition will include "officers" as in the case of two or more Judges constituting a Bench. Where a Court is composed of several officers each doing a separate work allotted to him, each officer individually is a Judge, and must be deemed to be a presiding officer of a separate Court.

3. Disqualification of Judges. — Judges should not try cases in which they have any personal or pecuniary interest[1] or any interest sufficient to create a bias.[2] In cases where any bias on the part of the Judge may be presumed, the party may show the grounds which raise the presumption. But where there is no such presumption, he cannot be allowed to question the impartiality of the Judge.[3]

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(9) "judgment" means the statement given by the Judge of the grounds of a decree or order :

"Judgment." — The essential element of a judgment is that there should be a *statement of the grounds* of the decision.[1] It need not, however, be a decision on *all* the issues in a case. An order deciding a preliminary issue in the case may be a judgment.[2] The shorthand notes dictated by the Judge cannot, until they have been approved by the Judge, be considered as part of his actual judgment.[3] In the undermentioned case[4] a note in the Judge's diary that no enlargement of time would be given to the judgment-debtor and that the final decree should be drawn up as applied for by the decree-holder was held to be a judgment.

Section 2 (8) — Note 1

1. ('07) 30 Mad 326 (327) (DB). (District Registrar—Not a Court within the meaning of S. 115, C. P. C.)
('81) 7 Cal 691 (696) (DB). (District Judge holding Court in precincts of Munsif's Court with consent of parties—Judgment is not vitiated.)
('34) 21 AIR 1934 Cal 725 (728) : 61 Cal 450. (Controller of patents is not a Court.)
('83) 9 Cal 341 (354) : 9 Ind App 152 (PC). (Officer commanding the Cantonment is not a Judicial Officer and he does not act judicially in the exercise of his powers.)
2. See S. 3 of the Evidence Act.
3. See S. 20, Indian Penal Code.
4. ('88) 11 Mad 3 (5) (DB).
As to whether a Registrar is a Court for the purposes of the Criminal Procedure Code, S. 195 or the Penal Code, see the following cases :
('93) 15 All 141 (143).
('88) 12 Bom 36 (42) (DB).
('92) 15 Mad 138 (145, 149, 150) (FB).
('89) 12 Mad 201 (202, 203) (DB).
('87) 10 Mad 154 (158) (DB).
('12) 15 Ind Cas 652 (653, 654) (FB) (Mad).
5. ('40) 27 AIR 1940 Pesh 41 (43).

Note 2

1. See Note 7 to Preamble. Also see S. 13 of the General Clauses Act, X of 1897.

Note 3

1. ('12) 14 Ind Case 458 (459) (DB) (Cal).
('95) 19 Bom 608 (610) (DB). (Judge having acted as executive officer on behalf of a body which subsequently becomes a litigant before him — Bias will be presumed. Reg v. Rand, (1866) 1 Q B 230 referred to.)
Also see S. 9, N. 3 and S. 24, N. 13.
2. ✣('84) 10 Cal 915 (918) (DB).
3. ('99) 22 Mad 155 (159, 160) (DB).

Section 2 (9)

1. ('12) 15 Ind Cas 212 (212) : 15 Oudh Cas 78.
('33) 20 AIR 1933 Oudh 385 (386) (DB). (Order setting aside ex parte decree is judgment.)
2. ('26) 13 AIR 1926 Lah 638 (638) (DB).
('12) 14 Ind Cas 371 (372) (Lah).
3. ✣('27) 14 AIR 1927 Bom 113 (115) : 51 Bom 267 (DB).
4. ('39) 26 AIR 1939 Rang 294 (295, 296) : 1940 Rang L R 72.

As to the meaning of "judgment" under the Letters Patent, see Notes on Clause 15 of the Letters Patent (Calcutta).

(10) "judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made :

"Judgment-debtor." — The definition does not include the judgment-debtor's assignee.[1] A person who has stood surety for costs and against whom a decree for costs has been passed, is a judgment-debtor within the clause.[2] A person who has not been impleaded in the suit as a defendant even on objection raised by the defendant and against whom the decree has not been passed is not a judgment-debtor within the meaning of O. 21, R. 98.[3] See also the undermentioned case.[4]

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued :

"Legal representative." — See Order 22 Rule 3.

(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession :

"Mesne profits." — See Order 20 Rule 12.

(13) "moveable property" includes growing crops :

"Moveable property." — This definition is new and negatives the view taken by the decisions under the old Code that growing crops are immovable property.[1] It is however confined to the purposes of this Code only.[2] Compare S. 3 (25) of the General Clauses Act (X of 1897). See also the undermentioned cases.[3]

(14) "order" means the formal expression of any decision of a Civil Court which is not a decree :

"Order."—The word 'order' as defined in the Code is analogous to a decree and does not imply what is popularly understood, namely the views expressed by a Judge on the merits of the case before him and his decision thereon.[1] An order written by a clerk

Section 2 (10)

1. ('12) 13 Ind Cas 659 (660) (DB) (Mad).
2. ('34) 21 AIR 1934 Bom 252 (254): 58 Bom 485 (DB).
3. ('40) I L R (1940) All 87 (89, 90).
4. ('40) 27 AIR 1940 Mad 944 (945) (DB). (Subsequent alienee of part of mortgaged property—Suit on mortgage impleading alienee—Final decree for sale—Alienee held judgment-debtor for purpose of application under S. 23, Madras Agriculturists Relief Act.)

Section 2 (13)

1. ('92) 14 All 30 (34) (DB).
('82) 6 Bom 592 (593) (DB).
('89) 13 Bom 87 (89) (SB).
('08) 7 Cal L Jour 152 (166) (DB).
('98) 25 Cal 692 (699) (FB).
('95) 22 Cal 877 (885) (DB).
('70) 5 Beng L R 194 (194) (DB).
('03) 26 Mad 438 (440) (DB). (Growing crops — Immovable property implied.)
('90) 13 Mad 15 (16). (Do.)
('88) 11 Mad 193 (196).
2. ✠('15) 2 AIR 1915 Nag 69 (69) : 11 Nag L R 18.
('16) 3 AIR 1916 Mad 1142 (1142). (The definition in the C. P. C. does not govern Limitation Act.)
3. ('31) 18 AIR 1931 All 392 (393) (FB). (Standing timber intended to be cut down and removed is moveable property.)
('32) 19 AIR 1932 Pat 314 (345).

Section 2 (14)

1. ✠('33) 20 AIR 1933 All 762 (763): 56 All 27 (DB).

and signed by the Court is a proper order as there is nothing in the Code which requires that the order should be in the Court's own handwriting.[2] See definition of 'judgment'.

See also section 2, clause (2).

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(15) "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court:

"Pleader." — See Order 3, Rule 4.

(16) "prescribed" means prescribed by rules:

Rules. — For the definition of "rules," see clause 18.

(17) "public officer" means a person falling under any of the following descriptions, namely :—

(*a*) every Judge;

(*b*) every member of the Indian Civil Service;

(*c*) every commissioned or gazetted officer in the military, [a](naval or air) forces of His Majesty [b][* * *] while serving under [c](the Crown);

(*d*) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorized by a Court of Justice to perform any of such duties;

(*e*) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

(*f*) every officer of [c](the Crown) whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

(*g*) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of [c](the Crown), or to make any survey, assessment or contract on behalf of [c](the Crown), or to execute any revenue-process, or to investigate, or to report on, any matter affecting the pecuniary interests of [c](the Crown), or to make, authenticate or keep any document relating to the pecuniary interests of [c](the Crown), or to prevent the infraction of any law for the protection of the pecuniary interests of [c](the Crown); and

(*h*) every officer in the service or pay of [c](the Crown), or remunerated by fees or commission for the performance of any public duty :

a. Substituted by Act XXXV of 1934, for "or naval."

b. Words "including His Majesty's Indian Marine Service" omitted by Act XXXV of 1934.

c. Substituted for the words "the Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

"Public officer."—Compare S. 21 of the Indian Penal Code. A public officer is a "person" falling within the description of sub-clauses *(a)* to *(h)* of this clause. Under the General Clauses Act (X of 1897), the word "person" includes "any body or association

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2. ('13) 1913 All W R (Rev) 33 (33).

of individuals".[1] A cantonment committee has accordingly been held to be a public officer.[2] The Nagpur Judicial Commissioner's Court has, however, taken a different view. According to it a committee cannot be described as an "officer" or as a person who "holds any office." It has accordingly held that a village sanitation panchayat is not a public officer.[3] It is submitted that the former view is the sounder of the two. The definition of "public officer" under this clause does not include a person who was once in the employ of Government but is so no longer.[4]

(a). For definition of "Judge," see clause (8) above.

(c). The words "while serving under the Government" mean "while still in the actual service of the Government." It therefore excludes persons placed in the retired list.[5]

An Assistant Surgeon in the Indian Medical Service,[6] a British Officer in the Indian Army,[7] a Major in the Indian Staff Corps[8] are all public officers, but not an officer of the Regular Corps.[9]

(d). A Receiver appointed under the Provincial Insolvency Act, V of 1920,[10] an Official Liquidator,[11] the Liquidator of a Co-operative Society,[12] the Official Receiver appointed by the Court to act as a receiver in any particular case,[13] a receiver appointed under O. 40, R. 1 of the Civil Procedure Code and on whom the powers referred to in the said rule have been conferred,[14] an Official Assignee or Official Trustee,[15] a common manager appointed under S. 95 of the Bengal Tenancy Act,[16] the bench clerk of a Civil Court[17] and the Sheriff of Bombay[18] are all Officers of Courts of Justice and are public officers.

(e). To place or keep a person in confinement connotes something more than mere arrest. Hence, the mere fact that a person holds an office which empowers him to arrest a person will not make him a public officer. Thus, the Agent of a Railway Company, although he has power under S. 131 of the Railways Act to arrest certain persons for offences committed on the railway, is not a public officer, merely by reason of such power.[19]

Section 2 (17)

1. See S. 3 (39) of Act X of 1897.
†('30) 17 AIR 1930 Mad 844 (852, 853). (But a body corporate must fall under any of the clauses of S. 2(17). A Municipality constituted under the District Municipalities Act is not a "public officer.")
2. ('10) 34 Bom 583 (587) (DB).
3. ('29) 16 AIR 1929 Nag 70 (70). (Dissenting from 34 Bom 583.)
4. ('42) 29 AIR 1942 Mad 288 (289).
5. ('14) 1 AIR 1914 Oudh 199 (199): 17 Oudh Cas 99 (DB). (Obiter.)
6. ('19) 6 AIR 1919 Bom 133 (134) : 43 Bom 368 (DB).
7. †('18) 5 AIR 1918 Bom 32 (35) : 43 Bom 716.
8. ('02) 25 Mad 402 (405) (DB).
('02) 1902 Pun L R No. 143, page 623 (625).
9. ('02) 1902 Pun L R No. 143, page 623 (625).
('97) 24 Cal 102 (106).
10. ('20) 7 AIR 1920 Bom 50 (50) : 44 Bom 895 (DB).
('25) 12 AIR 1925 All 241 (242) : 47 All 291. (Official Receiver.)
('30) 17 AIR 1930 Bom 11(15)(DB). (Per Patkar, J.)
11. ('34) 21 AIR 1934 Oudh 158 (161): 9 Luck 577.
12. ('31) 21 AIR 1934 Nag 201 (202): 30 Nag L R 240.
[But see ('42) 29 AIR 1942 Lah 287 (288) (DB). (The appointing authority not being a Court of justice, but Registrar, Liquidator does not come under this clause, even though he is a public officer under cl. (b) of S. 2 (17).]
13. ('31) 18 AIR 1931 Cal 61 (62) : 57 Cal 1127 (DB).
('30) 17 AIR 1930 Lah 708 (709) (DB).
14. † ('40) 27 AIR 1940 Cal 1 (2, 3) (DB).
('31) 18 AIR 1931 Cal 503 (503): 58 Cal 850 (DB).
('33) 20 AIR 1933 Mad 105 (106).
('31) 18 AIR 1931 Cal 175 (177). (Points left open.)
[*See also* ('30) 17 AIR 1930 Cal 737 (738).]
15. ('81) 7 Cal 499 (502).
('89) 12 Mad 250 (252).
('25) 12 AIR 1925 Bom 341 (344) : 49 Bom 638.
('02) 26 Bom 809 (811).
16. ('41) 28 AIR 1941 Cal 643 (651) (DB).
†('20) 7 AIR 1920 Cal 575 (579) (DB).
('13) 16 Ind Cas 193 (195, 196) : 40 Cal 150 (DB).
[*See also* ('32) 19 AIR 1932 Cal 275 (281, 282) : 59 Cal 961 (DB).]
17. ('18) 5 AIR 1918 Upp Bur 28 (30): 3 UBR 1.
18. ('27) 14 AIR 1927 Bom 521 (523, 524) : 51 Bom 749 (DB).
19. ('39) 26 AIR 1939 Cal 386 (387) : ILR (1939) 2 Cal 46 (DB).

(*f*). An Inspector of Police is a public officer.[20]

(*g*). A manager appointed under the Bengal Court of Wards Act is not a public officer within cl. (g) as his duties under the Act, viz., to take, receive, keep or expend property of the ward are not on behalf of the Government but on behalf of the disqualified proprietor.[21] But an adhikari who receives money towards arrears of public revenue is a public officer.[22]

(*h*). A village headman,[23] the Administrator-General,[24] a Collector acting as the manager of a minor's estate[25] are all public officers. An advocate engaged by the Government to conduct a civil suit on behalf of the Government and remunerated by daily fees is a public officer.[26] A manager of an estate under the Bengal Court of Wards Act is a public officer within this clause as the manager must be regarded as being in the service of the Government, the Court of Wards being a Government department,[27] though he cannot be said to be an officer in the *pay* of the Government as he is actually paid by the estate which he manages.[28] Similarly, a liquidator appointed under S. 42 of the Co-operative Societies Act is a public officer within the meaning of this clause.[29] Where a person performs a *public* duty, the fact that he is paid out of commission charged to a private person, does not take him out of the category of a public officer.[30]

It has been held that an assistant surgeon of a station hospital in military employ is not a public officer merely by reason of his serving, or receiving his pay from, the Government.[31] The reasoning of the decision is not clear and the decision cannot be accepted as good law in the face of the clear words of the section.

For cases under S. 21 of the Penal Code (defining "public servants"), see the undermentioned cases.[32]

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20. ('37) 24 AIR 1937 All 90 (94) : ILR (1937) All 390 (DB).

21. ('39) 26 AIR 1939 Cal 720 (721) : ILR (1940) 1 Cal 73. (But he is a public officer within cl. (h) as he is in the service of the Government.)

22. ('42) 29 AIR 1942 Mad 288 (288).

23. ('23) 10 AIR 1923 Rang 250 (251).

24. ('04) 8 Cal W N 913 (915).
('04) 28 Bom 529 (532) (DB).

25. ('88) 11 Mad 317 (318, 319) (DB).
('81) 3 All 20 (22, 23) (FB).
('14) 1 AIR 1914 Bom 125 (126) (DB).
('12) 16 Ind Cas 445 (446) (DB) (Bom).
('90) 14 Bom 395 (402) (DB). (Talukdari Settlement Officer acting as manager under Act XXI of 1881.)
('89) 13 Bom 343 (346) (DB).
('75) 1 Bom 318 (320) (DB).

26. ('39) 26 AIR 1939 Pat 77 (79, 80) : 17 Pat 706 (DB).

27. ('39) 26 AIR 1939 Cal 720 (721) : ILR (1940) 1 Cal 73.

28. ('39) 26 AIR 1939 Cal 720 (721) : ILR (1940) 1 Cal 73.

29. ('42) 26 AIR 1942 Lah 287 (288) (DB). (He is an officer remunerated by fees for performance of a public duty. AIR 1940 Mad 831: ILR (1940) Mad 929 explained.)

('39) 26 AIR 1939 Nag 232 (233). (The liquidator is appointed by Government and performs public duties and hence he is an officer in the service of Government.)
[See however ('40) 27 AIR 1940 Mad 831 (832, 833) : ILR (1940) Mad 929 (DB). (Liquidator appointed under S. 42, Co-operative Societies Act, to liquidate a private co-operative society is not a public officer.)]

30. ('28) 15 AIR 1928 Sind 76 (78): 22 Sind L R 63.
('28) 15 AIR 1928 Nag 33 (33). (Government school-master whose services are lent to municipality is a public officer.)

31. ('10) 5 Ind Cas 802 (803, 804) : 1910 Pun Re No. 10 (DB).

32. ('70) 2 N W P H C R 298 (299). (Naib Nazir.)
('69) 6 Bom H C R Cr C 64 (69) (DB). (Engineer who receives and pays other municipal moneys.)
('99) 21 All 127 (129). (Manager of estate under Court of Wards.)
('86) 8 All 201 (202). (Person who with or without pay chooses to take upon himself the position of a public servant.)
('05) 32 Cal 664 (667) (DB). (Clerk of Sub-Registrar paid out of an allowance given to the latter is not a public servant.)
('01) 28 Cal 344 (346) (DB). (Peon attached to Superintendent of Salt Department.)
('99) 26 Cal 158 (160) (DB). (Surveyor of khas mahal department employed by Collector.)
('95) 22 Cal 759 (761) (DB). (Peon delegated by Nazir to execute warrant of arrest.)
('91) 18 Cal 534 (537) (DB). (Patwari is not.)
('91) 18 Cal 518 (519) (DB). (Person appointed by Collector under S. 69 of the Bengal Tenancy Act is not a public servant.)
('77) 3 Cal 497 (497) (DB). (Person appointed by Government Solicitor with sanction of Government to act as Government Prosecutor.)
('71) 16 Suth W R Cr 27 (27) (DB).

(18) "rules" means rules and forms contained in the First Schedule or made under section 122 or section 125:

"Rules." — See Notes on Section 2 (1).

(19) "share in a corporation" shall be deemed to include stock, debenture stock, debentures or bonds: and

Stock. — For meaning thereof, see S. 2 of the Indian Trustees Act, XXVII of 1866.

Debenture. — No precise definition of this word is found anywhere.[1] It is a charge in writing on certain property, for the repayment, at a fixed time, of money lent by a person therein named at a given interest. It is frequently resorted to by public companies to raise money for the prosecution of their undertakings.[2]

Debenture stock. — This differs from debenture bonds in that it is usually irredeemable.[3]

Bonds. — For meaning thereof, see S. 2 (5) of the Indian Stamp Act, II of 1899, and S. 2 (3) of the Indian Limitation Act, IX of 1908.

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(20) "signed," save in the case of a judgment or decree, includes stamped.

"Signed" — Seal, mark, initials. — Under S. 3, cl. (52) of the General Clauses Act, the word "sign" includes in the case of a person who is unable to write, a "mark."[1] The present definition in this section is wider and the word "signed" includes "stamped" also.[2] A "mark" is different from a "stamp" inasmuch as the former is a mere symbol and does not convey any idea to the person who notices it, while a distinct idea is conveyed where a document is stamped, as for instance, with a facsimile stamp.[3] A mark will be a signature only in the case of a person who is *unable to write*, but a stamping by a person will be his signature even if he is not illiterate.[4]

Signing, in the ordinary acceptation, means signing the name at the *foot* of a document. But it may be done by writing the name in any other part of the document provided it be intended to operate as an acknowledgment by the party that it is his instrument.[5]

There is no direct authority as to whether the *initials* of a person constitute his signature. There is, however, no reason why the initials or other form of writing the name should not be signature, if it is clear as to who made it and if it is intended to operate as an acknowledgment by the party initialling that it is his instrument.[6]

('67) 7 Suth W R Cr 63 (63) (DB). (Convict warders.)
('84) 7 Mad 17 (17). (Peon appointed by the manager of Court of Wards is not a public servant.)

Section 2 (19)

1. (1881) 7 Q B D 165 (172), British India Steam Navigation Co. v. Commissioner of In. Rev.
2. Wharton's Law Lexicon.
3. Manual of Law Terms and Phrases by K. J. Aiyar.

Section 2 (20)

1. ('96) 6 Mad L Jour 209 (210).
('98) 2 Cal W N 603 (605) (DB). (Case under S. 59, Transfer of Property Act and S. 68 of the Evidence Act—Signature includes "mark".)
2. ('98) 25 Cal 911 (916) (DB). (Case under the Indian Succession Act, X of 1865, S. 50.)
3. ('98) 25 Cal 911 (915, 916) (DB).
4. ('81) 3 All 575 (576) (DB).
('28) 15 AIR 1928 Mad 175 (175, 176): 51 Mad 242 (DB).
5. ('81) 6 Cal 340 (352).
6. ('07) 29 All 145 (146) (DB). (Case under Regulation XVII of 1806, S. 8.)
('92-96) 1892-96 Upp Bur Rul 462. (Where there is no signature at all to a Burmese document, it cannot be taken to be signed on the ground that it is customary among Burmese to execute documents without signature.)
('86) 8 All 293 (294). (Mere fact that signature is confined to initials does not disentitle warrant officer to execute the warrant so initialled.)
('67) 8 Suth W R 395 (397) (DB). (Signature of Raja held valid even though it did not contain his actual name but only his title.)

As to the meaning of signature under other Acts, see the undermentioned cases.[7]

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3. [S. 2.] For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court.

Subordination of Courts.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. High Court.
4. District Court. See Section 2 (5).
5. Binding authority of rulings. See Preamble Note 15.

1. Legislative changes. — This section corresponds to the latter part of the definition of the word "district" in S. 2 of the Code of 1882 with slight modifications.

2. Scope of the section. — The section declares that —

(1) the District Court is subordinate to the High Court.[1]

(2) *(a)* Every Court of Small Causes[2] and *(b)* every Civil Court of a grade *inferior* to that of a District Court is subordinate to the High Court and the District Court.[3] Thus, a Collector's Court is not a Civil Court of a grade inferior to that of the District Court and is, therefore, not subordinate to the District Court[4] or High Court *by virtue of this section*. A Court of Subordinate Judge is subordinate to the District Court, no matter what the forum of appeal may be in any particular case.[5]

The enumeration of Subordinate Courts in the section is not, however, exhaustive and does not exclude all other Courts from being subordinate to the High Court. Thus, a Collector acting under the Bombay Mamlatdar's Courts Act is a Court subordinate to the High Court.[6] Similarly, a Collector's Court acting under the Orissa Tenancy Act is

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7. ('79) 3 Bom 382 (384) (DB). (Indian Succession Act, X of 1865, S. 50—Signature does not include mark.)
('81) 6 Cal 17 (18) (DB). (Do.)
('94) 16 All 59 (63). (Regulation XVII of 1806, S. 8—Initialling is not "official signature" within S. 8 of that Regulation.)
('96) 23 Cal 896 (898) (DB). (Criminal Procedure Code, S. 75 — Warrant merely initialled is not sufficient compliance with the section.)
('85) 11 Cal 429 (432) (DB) (Indian Succession Act, X of 1865, S. 50—Signature does not include mark.)
('85) 11 Cal 111 (120) : 11 Ind App 186 (PC.) (Regulation XVII of 1806, S. 8—Initialling is not "official signature" within S. 8 of that Regulation.)
('89) 1889 Pun Re No. 185 (FB).
('18) 5 AIR 1918 Pat 613 (614) : 3 Pat L Jour 493 (DB). (Criminal Procedure Code, S. 75—Warrant initialled—Irregularity is cured by S. 537—23 Cal 896 distinguished.)

Section 3 — Note 2

1. ('29) 16 AIR 1929 All 581 (582, 583) : 51 All 957 (DB) (District Judge acting under Charitable and Religious Trusts Act is subordinate to High Court.)
[But see ('29) 16 AIR 1929 Oudh 389 (390, (397): 4 Luck 539 (FB). (Where it is held that a District Court acting in its appellate authority over rent suits is not subordinate to the Chief Court.)]
2. These words do not include Presidency Small Cause Courts as this section is not extended by S. 8 to such Courts — Such Courts are therefore subordinate to the High Court and not to the District Court : *See* ('83) 8 Bom 105 (135, 147) (FB).
(1900) 23 All 56 (57) (DB).
('03) 27 Bom 604 (606) (DB).
('79) 5 Cal L Rep 170 (171). (Small Cause Courts in Presidency Towns are subject to the order and control of the High Court.)
3. ('94) 17 Mad 377 (378) (DB).
('09) 3 Ind Cas 539 (540) (DB) (Cal).
4. ('42) 29 AIR 1942 Pat 1 (18, 29) : 21 Pat 1 (FB). (Per majority of Full Bench—Meredith, J., dissenting—Collector's Court is a Civil Court of a grade inferior to District Court.)
('78) 3 Cal L Rep 508 (509) (DB). (Collector's Court not a Civil Court.)
('30) 17 AIR 1930 Nag 271 (271): 26 Nag L R 309. (Collector acting under S. 18 of the Land Acquisition Act is not subordinate to High Court for purposes of S. 115, C. P. C.)
[*See also* ('30) 17 AIR 1930 Pat 13 (14). (Revenue Courts are not subordinate to Civil Courts.)]
5. ('09) 3 Ind Cas 539 (540) (DB) (Cal).
6. ('12) 37 Bom 114 (116) (DB).

subordinate to the High Court within the meaning of S. 115 though the Collector's Court is not a *Civil* Court.[7]

3. High Court. — "High Court" used with reference to civil proceedings means the highest Civil Court of appeal (not including the Federal Court) in that part of British India in which the Act or Regulation containing the expression operates.[1] It thus includes the Chief Courts and the Courts of Judicial Commissioners.

4. District Court. — See Section 2 (5).

5. Binding authority of rulings. — See Preamble, Note 15.

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4. [S. 4.] (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

Savings.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Procedure prescribed by the Code is not applicable where a special procedure is provided for.
4. Sub-section (2).

1. Legislative changes. — This section is wider than the corresponding section of the old Code. While the latter saved certain Acts specifically mentioned therein, this section generally saves any special or local law or any special jurisdiction conferred or any special form of procedure prescribed by or under any other law.

2. Scope of the section. — It is only when anything in the Civil Procedure Code is in conflict with anything in the special or local law or with any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law, that the Code will not prevail so as to override such inconsistent provisions.[1]

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7. ('42) 29 AIR 1942 Pat 1 (19, 20): 21 Pat 1 (FB). (Per majority of Full Bench. Per Meredith, J.— Collector's Court is a Civil Court of grade inferior to District Court and hence subordinate to District Court and High Court.)

Note 3

1. See S. 3 cl. (24) of the General Clauses Act, X of 1897.

Section 4 — Note 2

1. ('86) 13 Cal 221 (223) (DB).
('86) 9 Mad 332 (333) (DB). (Madras Rent Recovery Act expressly providing that no revision shall lie on orders thereunder — S. 115 of the Code cannot be applied.)
('37) 24 AIR 1937 All 365 (366). (Special law overrides general jurisdiction of Civil Court — Suit in Civil Court to challenge election otherwise than on grounds in S. 19, U. P. Municipalities Act, is barred.)
('37) 24 AIR 1937 All 165 (166, 167) : ILR (1937) All 386 (DB). (Section 104 (2), C. P. Code, does not affect Cl. 10 of Letters Patent there being no specific provision affecting it as required by S. 4.)
('37) 24 A I R 1937 All 129 (138) : ILR (1937) All 350 (FB). (Provision in Army Act 1881, S. 136, granting exemption from attachment in respect of salary of certain officers not affected by C. P. Code.)
(1900) 27 Cal 508 (511 to 514) (FB). (Overruling 24 Cal 249 — Chota Nagpur Landlord and Tenant Procedure Act (I of 1879), barring expressly any second appeal from orders thereunder—S. 100 cannot be applied. See also the Partition Act, IV of 1893.)

Otherwise the Code will apply.[2]

3. **Procedure prescribed by the Code is not applicable where a special procedure is provided for.** — For example, under sub-s. (2) of S. 104 no appeal shall lie from any order passed in appeal under sub-s. (1) of that section. But if such an order is passed in appeal by a Single Judge of the High Court, an appeal from such an order is competent under Clause 15 of the Letters Patent. In such a case the appeal provided by Clause 15 of the Letters Patent is a special jurisdiction within the meaning of this section and is not affected by the provisions of S. 104.[1] For example, see the cases referred to in Note 2 of the Preamble.

4. **Sub-section (2).** — This sub-section *particularly* preserves the speedy remedies provided by the various Rent Regulations and Acts[3] for the benefit of the landlord to realise the arrears of rent due to him.

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5. [S. 4A.] (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the [a](Provincial Government) [b][* * *] may, by notification in the [c](Official Gazette), declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the [a](Provincial Government) [d][* * *] may prescribe.

Application of the Code to Revenue Courts.

(2) "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

a. Substituted for the words "Local Government" by Government of India (Adaptation of Indian Laws) Order, 1937.

b. The words "with the previous sanction of the Governor-General in Council" are repealed by the Devolution Act, XXXVIII of 1920.

c. Substituted by Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Official Gazette."

d. The words "with the sanction aforesaid" are repealed by the Devolution Act, XXXVIII of 1920.

Synopsis

1. Scope and object of the section.
2. Revenue Courts.
3. Mamlatdar's Courts.

('94) 17 Mad 298(299)(DB). (Following 16 Mad 451.)
('32) 19 AIR 1932 Oudh 163 (164) (DB).
('31) 18 A I R 1931 Oudh 385 (385). (Oudh Laws Act prevails over the C. P. Code.)
('30) 17 AIR 1930 Pat 130 (133) : 8 Pat 830 (DB). (S. 114 of the Code does not apply to Bengal Estates Partition Act.)
[*See also* ('38) 25 AIR 1938 Lah 658 (663) (DB). (Provision in Companies Act inconsistent with the Code—Former prevails.)]
[See however ('30) 17 AIR 1930 Cal 53 (54) : 56 Cal 704. (Local Acts have no effect beyond the local jurisdiction.)]

2. See Note 2 to the Preamble.
('32) 19 A I R 1932 Oudh 210 (213) : 7 Luck 601 (FB).

Note 3

1. ('40) 27 AIR 1940 Bom 216 (218) : ILR (1940) Bom 426 (DB). (Section 104 deals only with appeals to the High Court from subordinate Courts —A Judge of the High Court sitting singly is not a Court subordinate to the High Court.)

Note 4

1. See Bengal Regulation, XVII of 1793, Bengal Rent Recovery Act, X of 1859.

1. Scope and object of the section. — Under S. 4, the Code does not affect any special or local law, or any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force.[1] The various local Revenue and Rent Acts are some of such enactments.[2] It has also been seen that when such Acts are silent on any particular matter, the provisions of the Code would apply.[3]

This section provides that in cases where the Code so applies to Revenue Courts, the Provincial Government may declare that any portions of the Code so applicable, shall not apply to those Courts or shall apply to them with such modifications as the Provincial Government may prescribe. The object of the section is to preserve the *summary* character of rent litigation under local laws, and to avoid delay and difficulty in the easy realisation of rents, which are likely to be caused if the procedure of the Code should be followed *en bloc* by the Revenue Courts.[4] Where a rent suit is transferred by a Revenue Court to a Civil Court *for trial*, by reason of a question of title arising therein, the suit will be governed by the rules of this Code and not by the special law applicable to the Revenue Court.[5] See also Note 2.

2. Revenue Courts. — A Revenue Court means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or the profits of land used for agricultural purposes. It does not include a Court having jurisdiction under this Code to try such suits.

This does not mean that the Revenue Courts are therefore not Courts of Civil Judicature. The matters tried by them relate to civil rights and the Courts trying them are thus Civil Courts.[1] The Code is, therefore, applicable to the procedure of those Courts except where its operation is negatived by the special or local law governing such suits.[2]

Section 5 — Note 1

1. See Notes on S. 4 and Note 2 of Preamble.
2. See The U. P. Tenancy Act; The North-West Provinces Land Revenue Act; The Bengal Tenancy Act; The Bengal Rent Act; The Madras Estates Land Act; The Madras Revenue Recovery Act; The Punjab Tenancy Act, etc.
('32) 1932 Lah L Tim 108. (Throwing out appeal *in limine*.)
3. See Notes on S. 4 and Note 2 of the Preamble. Thus Revenue Court decree comes within S. 2 (2) of the Code.
[*See* ('25) 12 AIR 1925 All 264 (265) (DB).]
4. See Sir A. Scoat's remarks in presenting the Report of the Select Committee on the final draft of the Bill which was passed as Act VII of 1888.
('30) 17 AIR 1930 All 556 (556) (DB). (Order XXI of C. P. C. applicable to Revenue Courts.)
('29) 16 AIR 1929 Oudh 341 (347) : 4 Luck 573 (DB). (S. 17, C. P. Code not overridden by the Oudh Rent Act.)
[*See also* ('29) 16 AIR 1929 Cal 218 (221) (DB).]
5. ('39) 26 AIR 1939 Pat 369 (370).

Note 2

1. ✠('83) 9 Cal 295 (301, 303) : 9 Ind App 174 (PC).
('09) 1 Ind Cas 933 (934) : 36 Cal 252.
('03) 26 Mad 518 (520).
('35) 22 AIR 1935 Nag 125 (125) : 31 Nag L R 246. [*N.B.*—The observation in ('24) 11 AIR 1924 Pat 104 (106) : 3 Pat 67, that a Revenue Court is not a Civil Court is, it is submitted, not correct.]
[See however ('42) 29 AIR 1942 Pat 1 (20, 29) : 21 Pat 1 (FB). (The Court of the Deputy Collector and the Collector while trying cases or hearing appeals under the Orissa Tenancy Act are Revenue Courts and not Civil Courts even though they may be trying suits or proceedings of a civil nature — Per Dhavle and Manohar Lall, JJ.; Meredith, J., *Contra*. Order passed by such Court is revisable by the High Court under S. 115, C. P. C.)]
2. ('97) 19 All 510 (511).
✠('83) 5 All 406 (413, 418) (FB).
(1900) 22 All 182 (189). (Section 285 of 1882 Code applicable as between Revenue Courts and not between a Revenue Court and Civil Court.)
('92) 14 All 347 (347).
('91) 1891 All W N 47 (48).
('84) 6 All 170 (171). (N. W. P. Rent Act, 1881 — C. P. C. relating to awards not applicable.)
('13) 20 Ind Cas 420 (421) : 40 Cal 518. (Revenue Courts are subject to revisional jurisdiction of High Court.)
†('11) 11 Ind Cas 207 (210) : 38 Cal 832 (DB). (Cases discussed.)
('08) 35 Cal 799 (802, 805) (DB).
(1900) 27 Cal 508 (511, 514) (FB).
('98) 2 Cal W N 127 (127) (DB). (Section 310A of the old Code is excluded by Act X of 1859.)
('94) 21 Cal 514 (518) (DB). (Code excluded by provisions of Act X of 1859.)
('93) 21 Cal 428 (430) (Apparently the application of the Code was held impliedly excluded.)
('85) 12 Cal 50 (51).

Even where the trial of the suit is specially provided for by the special or local law, the procedure prescribed by the Code will apply where an appeal is taken to a Civil Court from the decree of the Revenue Court, or such decree is transferred for execution to the Civil Court.[3] See also Note 1.

3. Mamlatdar's Courts. — These are also Civil Courts but established under a special law with a special form of procedure prescribed for suits contemplated therein.[1] As in the case of Revenue Courts, the Code will not apply where such special provision has been made.[2] In fact the Code generally has been held to be inconsistent with the nature of the special Act and therefore not applicable.[3] The High Court, however, has exercised revisional jurisdiction over the Mamlatdar's Courts under S. 115.[4]

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6. [S. 6 last para.] Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

Pecuniary jurisdiction.

[1887, Ss. 6 and 7; 1859, Ss. 383 and 384.]

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Pecuniary limits of jurisdiction (General). See Section 15.
4. Valuation in plaint determines jurisdiction.
5. Court's power to pass decree in excess of its pecuniary jurisdiction.
6. Court's power to execute decrees for amounts in excess of its pecuniary limits of jurisdiction. See Section 38, Note 7.

1. Legislative changes. — The provisions of Ss. 6 and 7 of the old Code are mostly covered by S. 4 of this Code. Only the last paragraph of S. 6 of the old Code has been reproduced in this section.

2. Scope of the section. — This section does not apply to proceedings which are not suits or continuation of suits.[1] Thus, it does not operate to bar a Munsif with a pecuniary jurisdiction up to Rs. 2000, from entertaining an application to execute an award for Rs. 15,000 passed by the President of the Calcutta Improvement Tribunal in an apportionment case. The reason is that the proceeding before the Improvement Tribunal is not a *suit*.[2] Similarly, a Court can try incidentally an *issue* as to property the value of which is beyond its jurisdiction.[3]

3. Pecuniary limits of jurisdiction (General). — See Section 15.

('83) 9 Cal 295 (303) : 9 Ind App 174 (PC).
(1900) 10 Mad L Jour 398 (399). (Case under Act VIII of 1865.)
('97) 21 Mad 236 (237) (DB). (S. 43 of 1882 Code not applicable.)
('18) 5 AIR 1918 Oudh 217 (220) : 21 Oudh Cas 220.
See also S. 135 of the Oudh Rent Act XXII of 1886.
3. ('01) 28 Cal 532 (537).

Note 3

1. ('93) 17 Bom 645 (647) (DB).
2. See Section 4.
3. † ('88) 13 Bom 552 (553, 554) (DB).
('12) 16 Ind Cas 675 (676) : 6 Sind L R 67 (DB).
('92) 17 Bom 645 (647) (DB).
4. ('96) 21 Bom 775 (776) (DB).
('99) 23 Bom 761 (764, 767, 768)(DB). (Application under S. 622 of the old Code.)
(1900) 25 Bom 395 (406, 408) (FB). (S. 622 of the old Code applied.)
('94) 18 Bom 449 (452) (DB).

Section 6 — Note 2

1. ('26) 13 AIR 1926 Cal 853 (854) (DB).
[*See* ('40) 1940 Nag L Jour 244 (249). (The word 'suits' means not only all proceedings up to the stage of decree, but includes proceedings in execution.)]
2. ('26) 13 AIR 1926 Cal 853 (854) (DB).
3. ('37) 24 AIR 1937 Rang 219 (220).

4. Valuation in plaint determines jurisdiction. — The "value of a suit" for the purposes of jurisdiction is determined by the *valuation in the plaint*,[1] unless, by fraud or misrepresentation, the plaintiff deliberately *over-values* or *under-values* the claim for the purpose of choosing his forum.[2] In the latter case, it is the *true* value at which the plaint *ought* to have been valued that will represent the "value of the suit."[3] (See also S. 96 Note 18.) As it is only the valuation in the plaint that determines jurisdiction, it is not affected by the *defendant's plea* in the suit.[4] Thus, where in a mortgage suit a subsequent mortgagee is added as a defendant who wants his rights to be investigated and decided the suit for the purpose of jurisdiction has to be valued on the amount due on the plaintiff's prior mortgage; in such a case the jurisdiction is not lost if the amounts claimed on the prior and subsequent mortgages taken together exceed the pecuniary jurisdiction of the Court.[5]

As to the estoppel of the plaintiff from asserting that the suit ought to have been tried by a Court of a lower grade than that in which it was instituted, see the case cited below.[6]

Note 4

1. ('43) 30 AIR 1943 Sind 73 (74, 75) : I L R (1942) Kar 488 (DB). (Suit for accounts.)
('41) 28 AIR 1941 Nag 138 (139) : I L R (1941) Nag 194 (DB). (Mortgage suit.)
('84) 8 Bom 31 (33) (DB). (Plaintiff's share in partition suit.)
('29) 16 AIR 1929 Bom 337 (339) (DB). (Suit for accounts.)
† ('95) 17 All 69 (76) (DB). (Suit under S. 283 of Act XIV of 1882 — Value of property attached must be taken to be value of suit.)
† ('94) 16 All 286 (288) (DB).
('91) 13 All 320 (322, 323) (DB).
† ('88) 10 All 524 (528) (DB).
('11) 35 Bom 24 (27) (DB).
('90) 15 Bom 82 (83) (DB). (Larger of two reliefs determines stamp.)
('85) 10 Bom 370 (372) (DB).
('85) 7 Bom 448 (451) (DB).
('24) 11 AIR 1924 Cal 783 (785): 51 Cal 737 (DB). (*Held*, that jurisdiction continues unless different principle comes into operation to make the proceedings abortive.)
('96) 23 Cal 536 (542, 543) (DB).
('77) 25 Suth W R 76 (76) (DB). (Suit should not be dismissed for improper valuation.)
('71) 16 Suth W R 248 (248) (DB).
('34) 21 AIR 1934 Lah 803 (803).
('17) 4 AIR 1917 Mad 663 (663). (Court should confine to allegations contained in the plaint.)
('15) 2 AIR 1915 Mad 683 (684) (DB).
('01) 24 Mad 34 (36) (DB).
('83) 6 Mad 140 (141) (DB). (Properly treated as suits for land for purpose of valuation although it results in decree for redemption.)
('28) 15 AIR 1928 Nag 288 (288): 24 Nag L R 23.
('99) 2 Oudh Cas 103 (106, 107).
('35) 22 AIR 1935 Pat 160 (161) : 14 Pat 414 (DB).
('15) 2 AIR 1915 Sind 3 (3) : 9 Sind L R 164 (DB).
[*See also* ('96) 20 Bom 675 (676) (DB).]
[See however ('78) 2 Cal L Rep 134 (136, 137) (DB).]

2. ('91) 13 All 320 (322, 323) (DB). (Value of plaint must be value for appeal.)
('93) 15 All 363 (365) (DB) (Do.)
('11) 10 Ind Cas 746 (747) : 35 Bom 239 (DB). (Consent of parties cannot affect jurisdiction.)
† ('12) 16 Ind Cas 940 (941) (DB) (Cal). (For appeal in a suit for mesne profits the amount found in trial Court determines valuation.)
('11) 12 Ind Cas 464 (476) : 38 Cal 639 (DB).
† ('35) 22 AIR 1935 Oudh 296 (297) : 10 Luck 587 (DB).
[*See* ('37) 24 AIR 1937 Cal 643 (644, 645).]

3. ('90) 17 Cal 680 (683) (DB).
('83) 8 Bom 31 (33, 34) (DB).
[*See* ('43) 30 AIR 1943 Sind 73 (73, 74) : I L R (1942) Kar 498 (DB).]

4. ('39) 182 Ind Cas 178 (179) (Pat).
(1864) 1864 Suth W R Act X, 52 (DB).
(1864) 1864 Suth W R Act X, 25 (DB).
† ('88) 10 All 524 (528) (DB).
('81) 3 All 822 (823, 824) (DB).
('80) 2 All 778 (780) (DB).
† (89) 13 Bom 489 (491) (DB).
('68) 9 Suth W R 598 (598) (DB).
('89) 1889 Pun Re No. 69, p. 220. (Value of set-off by defendant does not control the value of the plaint.)
('88) 1888 Pun Re No. 169, page 447.
('88) 1888 Pun Re No. 44, page 112 (FB). (Suit by mortgagor for redemption—Value of suit is value of charge.)
('26) 13 AIR 1926 Mad 37 (38).
('98) 21 Mad 271 (273) (DB).
[*See also* ('10) 6 Ind Cas 131 (132, 133, 134) (DB) (Cal). (Suit for rent — Defendant claiming deductions in excess of Courts pecuniary jurisdiction—No bar to suit.)
('91) 15 Bom 400 (405) (DB).]

5. ('41) 28 AIR 1941 Nag 138 (140) : ILR (1941) Nag 194 (DB).

6. ('40) 27 AIR 1940 Bom 242 (243, 244) (DB). (Suit tried by First Class Sub-Judge — Decree passed by such Court — Appeal by defendant to High Court—Plaintiff held estopped from objecting to High Court's jurisdiction. A I R 1920 Bom 105 : 44 Bom 331 relied on.)

As to what is the "value of a suit" for the purpose of determining the *forum of appeal*, see Note 18 on section 96.

See also section 15.

5. Court's power to pass decree in excess of its pecuniary jurisdiction.—(1) A sues B in the Munsif's Court for recovery of Rs. 2,000 for *past* mesne profits (i. e., mesne profits up to date of suit) and for *future* mesne profits at the rate of Rs. 1,000 per annum. It is found at the time of the decree that the plaintiff is entitled to Rs. 4,500 for past and future mesne profits. Can the Munsif's Court pass a decree for that amount?

(2) A sues B in the Munsif's Court for accounts valuing the suit *tentatively* at Rs. 500. On the taking of accounts after the preliminary decree, the amount found due to plaintiff is Rs. 4,500. Can the Munsif's Court pass a decree for that amount?

The High Courts of Allahabad,[1] Bombay,[2] Calcutta,[3] Madras,[4] Patna[5] and Rangoon[6] and the Courts of the Judicial Commissioners in Sind, Nagpur and Oudh[7] have agreed in holding that it *can*. The reason is, that in every case when the Court is seized of jurisdiction, it cannot and does not lose it by any change in the value of the subject-matter of the suit after the institution of the suit, or by the precise ascertainment of its value in cases which do not admit of such ascertainment at the time of the institution, except when the plaint is allowed to be amended,[8] and also that otherwise there would be no certainty as to the Court in which a suit should be brought or, as to the Court in which an appeal should be brought.[9] In the Punjab,[10] however, a contrary view has been taken, based on the earlier decisions of the Bombay and Calcutta High Courts which have not been followed by the said Courts themselves in later cases. The said contrary view cannot be accepted as laying down sound principles.

The aforesaid principles do not apply to a suit for *damages* and a Court cannot award damages in excess of its pecuniary jurisdiction. The reason is that in suits for accounts and mesne profits the amount cannot be valued even approximately at the commencement of the suit, but in a case of damages, they have been incurred before the

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Note 5

1. ('94) 16 All 286 (290) (DB). (Accounts.)
('11) 33 All 97 (99) (DB). (Redemption.)
[*See also* ('25) 12 AIR 1925 All 376 (377) : 47 All 534 (DB). (Accounts.)
('91) 13 All 320 (322).]
2. ('27) 14 AIR 1927 Bom 83 (83) : 50 Bom 839 (DB). (Not following 15 Bom L R 1021.)
('32) 19 AIR 1932 Bom 111 (113) : 56 Bom 23 (DB).
('29) 16 AIR 1929 Bom 337 (339) (DB). (Suit for accounts.)
3. ('25) 12 AIR 1925 Cal 1076 (1081, 1082, 1083): 53 Cal 14 (FB). (Approving 21 Cal 550 and 40 Cal 56, overruling 43 Cal 650 : A I R 1915 Cal 352 and 24 Cal W N 342 : A I R 1920 Cal 517.)
4. ('18) 5 AIR 1918 Mad 998 (1002) : 40 Mad 1 (7) (FB). (Accounts.)
('15) 2 AIR 1915 Mad 683 (684) (DB).
('02) 25 Mad 543 (544) (DB). (Accounts.)
[*See also* ('86) 9 Mad 208 (212, 213) (DB).
('21) 8 AIR 1921 Mad 508 (509).]
5. ('21) 8 AIR 1921 Pat 118 (119, 120) : 6 Pat L Jour 54 (DB).
('17) 4 AIR 1917 Pat 334 (335) : 2 Pat L Jour 394 (DB). (Mesne profits.)
('34) 21 AIR 1934 Pat 204 (207): 13 Pat 344 (FB).
6. ('39) 26 AIR 1939 Rang 115 (117) : 1939 Rang L R 134 (DB).
('37) 24 AIR 1937 Rang 320 (322) : 1937 Rang L R 214 (FB). (A I R 1924 Rang 354 : 2 Rang 408 overruled.)
7. ('43) 30 AIR 1943 Sind 73 (74, 75): ILR (1942) Kar 488 (DB).
('25) 12 AIR 1925 Sind 324 (324, 328) : 18 Sind L R 286 (DB). (Partnership accounts.)
('13) 9 Nag L R 112 (115, 116) (DB). (Do.)
('95) 8 C P L R 86 (88). (Accounts.)
('11) 9 Ind Cas 414 (414) (Oudh).
[*cf.* ('26) 13 AIR 1926 Oudh 140 (141).]
8. ('43) 30 AIR 1943 Sind 73 (74, 75): ILR (1942) Kar 488 (DB). (The court-fee on valuation and the consequent fixing of jurisdiction is dependent upon the allegations in the plaint rather than upon the subsequent finding of the Court.)
('18) 5 AIR 1918 Mad 998 (1002) : 40 Mad 1 (FB).
9. ('94) 16 All 286 (290) (DB).
10. ('40) 27 AIR 1940 Lah 186 (189) (DB).
('06) 1906 Pun Re No. 46, page 165 (167). (Partnership accounts.)
('29) 16 AIR 1929 Lah 107 (109, 110). (Suit for accounts — Court can pass preliminary decree but not the final decree.)
('12) 15 Ind Cas 773 (774) : 1912 Pun Re No. 96.
('12) 13 Ind Cas 312 (313) (DB) (Lah). (Suit by vendee for possession.)
('08) 1908 Pun Re No. 16, page 88 (FB). (Pre-emption.)

institution and do not depend on events which may happen after that date.[11]

6. Court's power to execute decrees for amounts in excess of its pecuniary limits of jurisdiction. — See Section 38 Note 7.

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7. [S. 5.] The following provisions shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, [a](or under the Berar Small Cause Courts Law, 1905) or to Courts exercising the jurisdiction of a Court of Small Causes [b](under the said Act or law), that is to say,—

Provincial Small Cause Courts.

(a) so much of the body of the Code as relates to —
  (*i*) suits excepted from the cognizance of a Court of Small Causes;
  (*ii*) the execution of decrees in such suits;
  (*iii*) the execution of decrees against immoveable property; and

(*b*) the following sections, that is to say,—
  section 9,
  sections 91 and 92,
  sections 94 and 95 [c][so far as they authorize or relate to—
    (*i*) orders for the attachment of immoveable property,
    (*ii*) injunctions,
    (*iii*) the appointment of a receiver of immoveable property, or
    (*iv*) the interlocutory orders referred to in clause (e) of section 94]
  and
  sections 96 to 112, and 115.

[1877, S. 7; 1859, S. 384.]

a. Inserted by Berar Laws Act, IV of 1941.
b. Substituted by Berar Laws Act, IV of 1941, for the words "under that Act."
c. Substituted by the Small Cause Courts (Attachment of Immoveable Property) Act, I of 1926, for "so far as they relate to injunctions and interlocutory orders."

Synopsis

1. Changes introduced by the Code of 1908.
2. Amendments after 1908.
3. Scope and object of the section.
4. Suits excepted from the cognizance of a Court of Small Causes.
5. Execution of decrees against immovable property.
6. Attachment before judgment.

1. Changes introduced by the Code of 1908. — This section reproduces in a concise and convenient form the purport of S. 5 and Sch. II of the old Code.[1]

2. Amendments after 1908. — Clause *(b)* of the original section contained, after the words "sections 94 and 95" only the words "so far as they relate to injunctions and interlocutory orders." These words gave rise to the following constructions :

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11. ('26) 13 AIR 1926 Cal 596 (596) (DB).

Section 7 — Note 1

1. Section 5 and Sch. II of the Code of 1882 were themselves reproductions of S. 5 and Sch. II of the Code of 1877, with this difference that S. 360 which empowered the Local Government to extend insolvency provisions of the Code to Small Cause Courts was not mentioned in Sch. II of the Code of 1877. Under that Code the Government could not, therefore, invest Courts of Small Causes with powers under Chap. XX of that Code.
('86) 9 Mad 112 (113) (DB).
('78) 2 Bom 641 (642) (DB).

(1) that attachments *before* judgment of immovable property were not prohibited, as the said words referred only to clauses *(c)* and *(e)* of S. 94 and not to clause *(b)* also;[1]

(2) that the words "interlocutory orders" when read with "injunctions" meant only interlocutory orders on applications for *injunction* and that, therefore, an order for compensation under S. 95 for wrongful *attachment before judgment* was not prohibited.[2]

The section has, by Act I of 1926, been amended by omitting the words "so far as they relate to injunctions and interlocutory orders" and substituting the words within square brackets in the section, thus negativing both the constructions abovementioned.

A new rule, being Rule 13, has also been added to Order 38 to make the matter clearer still.

3. Scope and object of the section. — Section 17 of the Provincial Small Cause Courts Act (IX of 1887), provides that the procedure prescribed in the Code shall be the procedure followed in a Court of Small Causes, except —

(1) where it is otherwise provided in the Provincial Small Cause Courts Act itself, or

(2) where it is otherwise provided by this Code.

This section specifies the provisions of the *body of the Code*, which are not applicable to the Provincial Small Cause Courts and O. 50 specifies the provisions of the *Rules*, which are not applicable to such Courts.

4. Suits excepted from the cognizance of a Court of Small Causes. — See Sch. II of the Provincial Small Cause Courts Act (IX of 1887).

To see whether a particular suit is excepted from the cognizance of a Court of Small Causes, the nature of the plaint and the reliefs sought are to be considered.[1]

5. Execution of decrees against immovable property. — A Small Cause Court cannot, as such, execute its decrees against any immovable property, even though such Court is also an ordinary Court. But a Small Cause Court can transfer its decree under S. 39, for execution to an ordinary Court or to the same Court on its ordinary side and then, the latter can execute the decree against immovable property. (See section 39 Note 10.)

A Small Cause Court cannot also execute its decree against a share in joint property where part thereof is immovable property.[1]

A Small Cause Court can, however, create a charge on immovable property.[2]

For the meaning of "immovable property", see section 16, Note 4.

6. Attachment before judgment. — An attachment before judgment of *movable* property by a Small Cause Court is not prohibited by the section.[1] Such an order falls within S. 94 cl. (b), and is not an "interlocutory order" referred to in S. 94 cl. (e).[3]

Note 2

1. See Note 6 below.
2. ('15) 2 AIR 1915 Mad 1072 (1072).
('07) 1907 Pun Re No. 77, page 397.

Note 4

1. ('37) 24 AIR 1937 Pat 25 (27).

Note 5

1. ('14) 1 AIR 1914 Nag 13 (13) : 10 Nag L R 17.
2. ('37) 24 AIR 1937 All 194 (195) : I L R (1937) All 418.
[But see ('39) 26 AIR 1939 Nag 118 (120) : I L R (1941) Nag 356.]

Note 6

1. ('19) 6 AIR 1919 Cal 6 (7) : 46 Cal 717 (720, 721) (DB).
('25) 12 AIR 1925 Cal 1 (4) : 52 Cal 275 (FB). (*Held* that a Small Cause Court can pass an order for attachment of immovable property also but cannot actually attach.)
2. ('25) 12 AIR 1925 Cal 1 (6) : 52 Cal 275 (F B).

As for attachment before judgment of *immovable* property, it had been held before Act I of 1926 that that also was not prohibited by the section.[3] It is now clearly enacted that such an order cannot be passed by a Small Cause Court.[4]

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8. [S. 8.] Save as provided in sections 24, 38 to 41, 75, clauses (a), (b) and (c), 76, 77 and 155 to 158, and by the Presidency Small Cause Courts Act, 1882,[5] the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay:

Presidency Small Cause Courts.

Provided that —

(1) the High Courts of Judicature at Fort William, Madras and Bombay, as the case may be, may from time to time, by notification in the [a](Official Gazette), direct that any such provisions not inconsistent with the express provisions of the Presidency Small Cause Courts Act, 1882, and with such modifications and adaptations as may be specified in the notification, shall extend to suits or proceedings or any class of suits or proceedings in such Court;

(2) all rules heretofore made by any of the said High Courts under section 9 of the Presidency Small Cause Courts Act, 1882, shall be deemed to have been validly made.[b]

[1859, S. 382.]

a. Substituted by Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Official Gazette."

b. Proviso inserted by the Code of Civil Procedure (Amendment) Act, I of 1914.

Synopsis

1. Changes introduced by the Code of 1908.
2. Amendments after 1908.
3. Scope of the section.
4. Power of High Court to make rules for the procedure of the Presidency Small Cause Courts.
5. "Save as provided . . . . . by the Presidency Small Cause Courts Act, 1882."
6. Execution of foreign decrees. See Order 51, Rule 1.

1. Changes introduced by the Code of 1908. — The purport of S. 8 of the old Code has, in the main, been reproduced in the present section and O. 51, R. 1, but, with this difference, that, whereas under the old S. 8, provisions corresponding to the present S. 154, O. 22, R. 5 and O. 37, were made applicable to the Presidency Small Cause Courts, such provisions are not made applicable to the said Courts, by the present S. 8 and O. 51 R. 1.

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3. ('25) 12 AIR 1925 Mad 589 (591) : 48 Mad 488 (DB). (Distinguishing 6 Mad H C R 91 which was a decision under the Code of 1859.)
('25) 12 AIR 1925 Cal 1 (5) : 52 Cal 275 (F B). (Approving A I R 1924 Cal 193 and overruling A I R 1923 Cal 176 : 49 Cal 994.)

4. See Note 2.

2. Amendments after 1908. — The provisos (1) and (2) of the section were added by the Code of Civil Procedure Amendment Act (I of 1914), S. 2.

3. Scope of the section. — This section provides that, except the provisions mentioned in it, the *body of the Code* shall not apply to suits or proceedings in Presidency Small Cause Courts. The words "the provisions in the body of this Code shall not extend to any suit" mean that provisions shall not also extent to any *decree* passed in any suit in a Presidency Small Cause Court. Hence S. 48 does not apply to such a decree and it can be executed even after the expiry of the twelve years' period mentioned in that section.[1] Order 51 R. 1 provides that except the provisions specified therein, the *Rules* in Schedule I of the Code do not apply to such suits or proceedings.

4. Power of High Courts to make rules for the procedure of the Presidency Small Cause Courts. — Section 9 of the Presidency Small Cause Courts Act (XV of 1882)[1] provides that the High Court may *prescribe the procedure and practice* of such Courts. The first proviso to this section provides that the High Courts may *extend any of the provisions of the Code* not inconsistent with the express provisions of the Presidency Small Cause Courts Act, 1882, to suits or proceedings in such Courts. This proviso is intended to be supplementary to the rules of procedure prescribed by the High Court under S. 9 of the said Act.[2]

5. "Save as provided . . . by the Presidency Small Cause Courts Act, 1882." — As to the provisions of the Code, which have been made applicable by the Presidency Small Cause Courts Act itself, to Small Cause suits, see S. 48 of that Act and the undermentioned cases.[1]

6. Execution of foreign decrees. — See Order 51, Rule 1.

Section 8 — Note 3

1. ('42) 29 AIR 1942 Pat 128 (128) (DB). (Decree passed by Presidency Small Cause Court transferred for execution to Mofussil Court — S. 48 does not apply—36 Mad 108 relied on.)

Note 4

1. As amended by Act I of 1895, S. 5.
2. ('18) 5 AIR 1918 Mad 645 (646).

Note 5

1. ('21) 8 AIR 1921 Bom 180 (181) : 45 Bom 972 (DB). (S. 114 of the Code not made applicable by S. 48 of the Small Cause Courts Act to Small Cause Courts.)

('10) 6 Ind Cas 722 (722) (Mad). (S. 48 of the Presidency Small Cause Courts Act extends the Code to proceedings under Chap. VII of the Act.)

PART I.

SUITS IN GENERAL.

JURISDICTION OF THE COURTS AND RES JUDICATA

9. [S. 11.] The Courts shall (subject to the provisions herein contained)[15] have jurisdiction[3] to try all suits of a civil nature[16] excepting suits of which their cognizance is either expressly[50] or impliedly[55] barred.

Courts to try all civil suits unless barred.

Explanation —A suit in which the right to property[17] or to an office[35] is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.[48]

[1877, S. 11; 1859, S. 1.]

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Jurisdiction of Courts — General.
   4. Difference between absence of jurisdiction and error in the exercise of it.
   5. Consent cannot give or oust jurisdiction.
   6. Objection to jurisdiction. See Section 21.
   7. Jurisdiction with reference to subject-matter.
   8. High Court.
   9. Local jurisdiction. See Section 16.
   10. Personal jurisdiction. See Section 20.
   11. Pecuniary jurisdiction. See Sections 6 and 15.
   12. Valuation of plaint determines jurisdiction. See Section 15.
   13. Appellate jurisdiction. See Section 96.
   14. Jurisdiction of foreign Courts. See Section 13.
15. "Subject to the provisions herein contained."
16. Suits of a civil nature.
   17. Suits relating to rights in property — General.
      18. "Property", meaning of. See Note 17.
      19. Suits respecting temple and other religious property.
   20. Suits for damages for civil wrongs and for breaches of contract.
   21. Right to specific relief.
   22. Other common law rights.
      23. Right of worship.
      24. Right relating to religious and other processions.
      25. Right of burial.
      26. Right of person elected as director or chairman to act as such.
      27. Right of franchise.
      27a. Suit for dissolution of marriage.
      28. Restitution of conjugal rights.
      28a. Right of person as member of club.
   29. Rights under contract.
      30. Suit for, or on, accounts.
      31. Suits for contribution.
      32. Suits relating to partnership.
      33 & 34. Cosharers. See Note 31.
   35. Suit for office.
      36. Suit for secular office. See Note 35.
      37. Suit for religious office to which fees are appurtenant as of right. See Note 35.
      38. Suit for fees attached to religious office.
      39. Suit for religious office to which no fees are attached. See Note 35.
   40. Suits not of a civil nature. See Notes 41 to 49.
      41. No suit lies where there is no such right as that claimed.
      42. Right of privacy.
      43. Suits involving principally caste questions.
      44. Suits relating to caste property.
      45. Suits for inspection of accounts of caste property.
      46. Suits relating to expulsion from caste.
      47. Suits for upholding mere dignity or honour.
      48. Suits relating purely to religious rites or ceremonies.
      49. Suits for voluntary payments not based on agreement or prescription.
   50. Suits expressly barred.
      51. Exclusive jurisdiction of Revenue Courts.
      52. Bar by the Criminal Procedure Code.
      53. Matters dealt with by a special tribunal.
   54. *(Omitted.)*
   55. Suits impliedly barred — General.
      56. Political questions.

57. Acts of State.
58. Suits barred on the ground of public policy.
59. Barrister, if can sue for his fees.
60. Suits based on illegal and immoral customs. See Note 58.
61. Fraud.
62. Where a special remedy is provided, the general remedy of suits barred.
63. The rule does not apply in the case of summary and concurrent remedies.
64. Alternative Courts.
65. Acts of Legislature—Powers of Civil Court to question.

NOTE to the Synopsis : See the Notes indicated for the following topics :

Abuse of civil process. See Notes 20 and 41.
Costs—Separate suit for. See Note 62 and S. 35.
Cow killing. See Note 22.
Elections. See Note 53.
Foreign States and Government. See Note 56 and Ss. 84 to 87.
Hat, Market, Ferry and Fishery. See Note 17.
Idols and religious and charitable trusts. See Note 19.
Magistrate's order. See Note 52.
"Office." See Note 35.
Onus. See Note 2.
Recovery of gratuities. See Notes 35 and 49.
Religious marks, in a temple. See Note 19.
Removal of obstruction to public way. See Notes 21, 22 and 52.
Setting aside decrees. See Note 61.
Specific performance, to compel execution of deed. See Note 21.
Suits against Government, Public and Judicial Officers. See Notes 57 and 58; Note 3 on S. 79; Note 5 on S. 80.
Suits against Municipal Corporation. See Note 53.
Suit by defeated claimant in Insolvency Court. See Note 64.
Suit for possession of property. See Note 17.
Suits regarding partitions, sales or registration by Revenue authorities under Rent and Revenue Acts. See Note 51.
Thoroughfares. See Note 24.

1. Legislative changes. — The corresponding section (S. 11) of the Code of 1882 contained the words "barred by any enactment for the time being in force" instead of the words "either expressly or impliedly barred" which occur in the present section. The former words were held to mean "expressly barred."[1] The present section has altered the law and excludes the jurisdiction of Courts even in cases of which their cognizance is only *impliedly* barred.

2. Scope of the section. — It is a fundamental principle of law that where there is a right there is a remedy — *ubi jus ibi remedium*. Accordingly, a litigant having a grievance of a civil nature has, independently of any statute, a right to institute a suit in some Court or other unless its cognizance is either expressly or impliedly barred.[1]

Section 9 — Note 1

1. ('87) 14 Cal 644 (648) (DB). (Suit for possession by auction purchaser without seeking his remedy by way of application.)
('89) 11 All 224 (227).

Note 2

1. ('43) 30 AIR 1943 Cal 59 (61, 62) (DB). (Suit for a declaration that the removal of a person from the chairmanship of the District Board by the Provincial Government under the last part of S. 28 of the Bengal Local Self-Government Act was illegal and inoperative—Civil Court can try.)
('42) 29 AIR 1942 Oudh 93 (96) : 17 Luck 205 (DB).
('41) 28 AIR 1941 Cal 167 (172) : I L R (1940) 2 Cal 342 (DB). (The cancellation of certificate on the ground that the certificate has not been "duly filed" is not beyond the jurisdiction of the Civil Court under S. 35, Bengal Public Demands Recovery Act. Similarly under S. 37 of the Act the question whether the certificate has been duly filed under the Act is not excluded from the purview of the Civil Court.)
('41) 28 AIR 1941 Cal 115 (115). (There is no section in the Bengal Village Local Self Government Act which takes away the jurisdiction of the Civil Court to decide that certain person is not properly elected as a president of a union board.)
('41) 28 AIR 1941 Oudh 223 (224).
('35) 22 AIR 1935 Oudh 96 (106) (DB).
† ('35) 22 AIR 1935 Rang 376 (385) : 13 Rang 648 (FB). (After the British annexation of Burma, neither the Thathanabaring nor the Burmese Buddhist hierarchy retained or possessed any jurisdiction to decide civil disputes between members of Burmese Buddhist Priesthood.)
('06) 28 All 545 (549, 550) (FB). (Distinction between right of appeal and right to sue.)
† ('25) 12 AIR 1925 Bom 188 (192) : 49 Bom 291 (DB). (Where right to sue is in question, Court should lean in favour of its existence unless it is plainly shown to be barred.)
('21) 8 AIR 1921 Cal 85 (87) : 48 Cal 378 (DB).
('01) 6 Cal W N 246 (248) : 29 Cal 94*n* (DB).
† ('01) 28 Cal 28 (35) (DB).
✣ ('97) 24 Cal 107 (111, 113) (DB).
('81) 7 Cal 74 (75). (Suit lies upon a decree of a High Court.)
('27) 14 AIR 1927 Mad 1035 (1036): 51 Mad 76 (DB).
('18) 5 AIR 1918 Mad 1070 (1070) (DB). (Right of appeal does not exist unless expressly given by statute.)

In order that Courts may have jurisdiction to try a suit, two conditions are essential :

(1) The suit must be one of a *civil nature.*[2];

(2) Its cognizance should not have been expressly or impliedly barred.[3]

Every *presumption*, however, should be made in favour of the jurisdiction of a Civil Court[4] and the *onus* lies on the party seeking to oust the jurisdiction, to establish his right to do so.[5]

A liberal construction should be placed upon the section.[6] But the general power vested in Courts under this section to entertain all suits of a civil nature does not carry with it the general power of making declarations except in so far as such power is expressly conferred by statute.[7]

It is not the duty of the Court, however, to *initiate* any proceedings on behalf of the parties.[8]

3. Jurisdiction of Courts — General. — Section 9 deals with the Courts— not with the rights of parties—what the jurisdiction of the Court is and what civil suits the Court may try.[1]

"Jurisdiction," said West, J., in *Amritrav* v. *Balkrishna*,[2] ". . . . . consists in taking cognizance of a case involving the determination of some jural relation, in ascertaining the essential points of it and in pronouncing upon them." In other words, it means the *legal authority* to administer justice according to the means which the law has provided and subject to the limitations imposed by that law upon the judicial authority.[3]

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† ('16) 3 AIR 1916 Mad 1119 (1121) : 38 Mad 41 ('43) (DB).
('24) 11 AIR 1924 Nag 275 (277) : 20 Nag L R 145. (Initial forum depends upon plaintiff's suit as framed.)

2. See Notes 16 to 39.

3. See Notes 50 to 64.
('84) 6 All 110 (112) (DB). (Jurisdiction is not excluded unless the cognizance of the entire suit is barred.)

4. ('43) 30 AIR 1943 Lah 48 (49) (DB). (The jurisdiction of the Civil Courts cannot be taken away except by express provision or by necessary implication.)
('42) 29 AIR 1942 Lah 217 (227) : ILR (1943) Lah 191 (FB). (Act restricting Civil Court's jurisdiction ought to be construed strictly.)
('41) 28 AIR 1941 Mad 530 (532) : ILR (1941) Mad 850 (FB). (Do.—AIR 1940 P C 105 : I L R (1940) Mad 599 : I L R (1940) Kar P C 194 (PC) relied on.)
('41) 28 AIR 1941 Nag 226 (230) : I L R (1941) Nag 279 (DB). (Act restricting Civil Court's jurisdiction ought to be construed strictly.)
✠('40) 27 AIR 1940 P C 105 (110) : I L R (1940) Mad 599 : I L R (1940) Kar P C 194 (PC). (Civil Courts — Exclusion of jurisdiction must be explicitly expressed or clearly implied.)
('40) 27 AIR 1940 Cal 554 (555) (DB). (Exclusion of Civil Court's jurisdiction—Principle stated.)
† ('34) 21 AIR 1934 P C 84 (86) : 61 Ind App 177: 57 Mad 443 (PC).
('39) 26 AIR 1939 Lah 237 (238). (It is a settled rule of construction of statutes that provisions of the law which trench on the usual jurisdiction of a Civil Court must be very strictly construed.)
(1875) L R 6 P C 378 (380), Winter v. Attorney-General. (Construction which enables transfer of jurisdiction from Civil Courts to executive officers should be avoided.)
✠('28) 15 AIR 1928 All 511 (513) (DB).
('32) 19 AIR 1932 Bom 456 (458).
('12) 17 Cal W N 408 (412) (DB).
('38) 25 AIR 1938 Mad 505 (506) (DB).
('12) 8 Nag L R 169 (171). (Jurisdiction not ousted unless clearly expressed to be barred.)
† ('33) 20 AIR 1933 Rang 124 (127) : 11 Rang 125.
[*See* ('38) 25 AIR 1938 Lah 14 (15) (DB). (The provisions of law which bar the jurisdiction of the ordinary tribunals are to be strictly construed.)
('36) 23 AIR 1936 Mad 574 (575) : 59 Mad 895 (DB). (It is a cardinal principle of construction of statutes that an enactment which seeks to oust the jurisdiction of Civil Courts should be construed strictly.)]

5. ('43) 30 AIR 1943 Lah 48 (50) (DB).
('41) 28 AIR 1941 Mad 865 (865).
('15) 2 AIR 1915 Mad 738 (738) : 39 Mad 21 (22) (DB).
('36) 23 AIR 1936 Mad 522 (523).
† ('34) 21 AIR 1934 P C 84 (86) : 61 Ind App 177: 57 Mad 443 (PC).
('28) 15 AIR 1928 All 511 (513) (DB).
('35) 22 AIR 1935 Lah 613 (615) (DB).
† ('28) 15 AIR 1928 Lah 121 (121) : 9 Lah 504 (FB).
('30) 1930 Mad W N 945 (951) (DB).

6. † ('90) 12 All 409 (417) (FB). (Rent suits though of a civil nature are excluded by special statutes.)
('87) 14 Cal 644 (648) (DB). (Existence of concurrent remedies.)

7. † ('10) 34 Bom 676 (680) (DB).

8. ('26) 13 AIR 1926 Pat 62 (63) (DB).

Note 3

1. ✠('14) 1 AIR 1914 Cal 152 (153) : 41 Cal 384 (390).
2. ✠('87) 11 Bom 488 (490) (DB).
3. ✠('85) 7 All 345 (350).

There is no legal authority to administer justice where —

(1) the Judge has not been legally and validly appointed as such,[4] or

(2) the Judge, though validly appointed is *disqualified* from trying any particular case by reason of his personal or pecuniary interest therein,[5] or

(3) the Judge *acts outside the limitations* imposed by the law upon his judicial authority.[6] Such limitations may be *territorial* or *pecuniary* or may refer to the *subject-matter* of the litigation or the *nature* of the litigation or the *class or rank* to which the tribunal belongs.[7]

The disqualification of Judges to try cases in which they have any personal or pecuniary interest or bias is based upon the general principle of law enunciated by the maxim *nemo debet esse judex in propria causa*—no one can be judge in his own cause. And this principle has been adopted by express enactments in India, *e. g.*, S. 38 of the Bengal Civil Courts Act (XII of 1887), S. 17 of the Madras Civil Courts Act (III of 1873) and S. 45 of the Oudh Courts Act (U. P. Act IV of 1925).

As to the pecuniary and territorial limitations on the jurisdiction of a Court, see sections 15 to 21.

If a Court has no jurisdiction over the subject-matter of the litigation, its judgments and orders, however precisely certain and technically correct, are mere nullities and not only voidable; they are void and have no effect either as estoppel or otherwise and may not only be set aside at any time by the Court in which they are rendered but may be declared to be void by every Court in which they may be presented.[8]

(See also S. 11 Note 73.)

† ('27) 14 AIR 1927 Bom 272(275):51 Bom 416(DB).
✣('85) 7 All 230 (239) (FB). ("Competent" means "having jurisdiction" i.e., with reference to the pecuniary value and nature of the suits which the Court has power to try.)
('28) 15 AIR 1928 Cal 606 (608) (DB). (Do.)
† ('25) 12 AIR 1925 Cal 373 (375). (Authority which the Court has to decide matters that are litigated before it or to take cognizance of matters presented to it in a formal way for decision.)
('25) 12 AIR 1925 Cal 1258(1260)(DB). (The word may be used in two senses — (1) jurisdiction over subject-matter and (2) power to make an order.)
('21) 8 AIR 1921 Cal 34 (37) : 48 Cal 138 (FB). (Distinction between the existence of jurisdiction and error in the exercise of it. See also Note 4.)
✣('09) 13 Cal W N 493(498, 499)(DB).(Jurisdiction is authority to hear and determine a cause.)
('06) 33 Cal 68 (71) (FB). (Jurisdiction is the power to hear and determine a cause and adjudicate or exercise any judicial function in relation to it.)
† ('01) 28 Cal 324 (329) (DB). (The word may be used in two senses — (1) jurisdiction over subject-matter and (2) power to make an order.)
† ('22) 9 AIR 1922 Pat 322 (333) (DB).
See Halsbury's Laws of England, Vol. 9.

4. † ('94) 16 All 136(156)(FB).(But if a person has acted as a Judge that fact is presumptive proof of his authority until the contrary is shown.)
('98) 20 All 267 (293, 294) : 25 Ind App 54 (PC).
('83) 7 Bom 341(344)(FB).(By mere practice a Court cannot acquire jurisdiction not given to it by law.)
(1881) 6 App Cas 619 (628), Palmer v. Hutchinson. (Do.)
[*See also* (1883) 50 L T 97 R. v. Judge, Marylebone County Court. (Rule against Judge to show cause why he should not hear a case — Unless whole jurisdiction is in question it is not usual for the Judge to be represented in the rule.)
(1881) 6 App Cas 424 (431), Mac Konochie v. Pen Zance. (Do.)]

5. ✣('84) 10 Cal 915 (919, 920) (DB).
† ('95) 19 Bom 608 (611) (DB).
† (1841) L R 1 Q B 230 (233), Queen v. Rand. (Whenever Judge would have a bias it would be improper for him to act.)
[*See also* ('29) 16 AIR 1929 Lah 605 (607).]
Also See S. 2 (8) N. 3 and S. 24 N. 13.

6. ('12) 39 Cal 353 (362).
[*See* ('14) 1 AIR 1914 Oudh 115 (116) : 17 Oudh Cas 224 (DB).]

7. ('85) 7 All 345 (350) (DB).
(1879) 11 Ch D 798 (813), Robinson v. Dhuleep Singh. (Where a matter is not submitted to the Court for decision it cannot try it.)

8. ('42) 29 AIR 1942 Cal 496 (497, 498) : I L R (1942) 1 Cal 149. (Decree passed by a Court without territorial jurisdiction is nullity and incapable of execution. NOTE.—For fuller discussion of this question see S. 21 Note 6 and S. 38 Note 8.)
† ('11) 38 Cal 639 (668, 669) (DB).
('82) 4 Mad 220(226)(DB). (When Court ceases to have jurisdiction over subject-matter of the claim, it cannot try it.)
('13) 37 Bom 563 (571) (DB). (Leave not obtained under Cl. 12, Letters Patent—Court not competent delivering judgment — Judgment is not *res judicata*.)
('05) 28 Mad 26 (27) (DB). (Even a party to the proceeding can impeach as nullity a decree passed by a Court without jurisdiction.)
('10) 6 Ind Cas 939 (939) : 1910 Pun Re No. 52.

An enquiry, however, whether the Court *has* jurisdiction in any particular case, is not an *exercise of jurisdiction* over the case itself. It is really an investigation as to whether the conditions of cognizance are satisfied. Therefore, a Court is *always* clothed with jurisdiction to see whether it has jurisdiction to try the cause submitted to it.[9] Where the jurisdiction of the Court is challenged, it cannot refuse to enquire into questions on which its jurisdiction depends.[10] In fact a judicial investigation of all allegations and facts, sufficient to guide the Court, should precede the admission or negation of jurisdiction,[11] and no question of hardship and no consideration of technicality can be permitted to affect the judgment.[12] The presumption is in favour of giving jurisdiction to the highest Court[13] and it is the duty of the party alleging want of jurisdiction to prove his allegation.[14] As to the procedure to be followed where a Court finds that it has no jurisdiction to entertain a suit, see O. 7, R. 10 and the Notes thereon.

4. Difference between absence of jurisdiction and error in the exercise of it. — The *existence* of jurisdiction is very different from the *exercise* of jurisdiction.[1] The failure to comply with statutory requirements in the assumption of jurisdiction and in the exercise of that jurisdiction, entails very different consequences. The authority to decide a cause at all is what makes up jurisdiction. When there is jurisdiction over the person and the subject-matter, the decision of all other questions in the cause is only an *exercise* of that jurisdiction.[2]

Since jurisdiction is the power to hear and determine, it does not depend upon the *regularity of the exercise* of that power or upon the *correctness* of the decision

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(1879) 11 Ch D 798 (813), Robison v. Dhuleep Singh. (No Court has power to give judgment on a matter not submitted to it for decision.)

9. ('42) 29 AIR 1942 Mad 675 (677) (DB). (Erroneous decision in favour of jurisdiction—Court's order disposing of matter is not nullity.)
('40) 27 AIR 1940 Pat 406 (408) (DB).
✠('87) 11 Bom 488 (490) (DB).
(1900) 1 Low Bur Rul 16 (17) (DB).
('29) 16 AIR 1929 Bom 1 (7) : 53 Bom 75 (DB).
('01) 2 Upp Bur Rul 443.

10. † ('35) 22 AIR 1935 All 678 (682) : 58 All 98 (DB).

11. ('65) 3 Suth W R 215 (216) (DB). (Marsh, Vol. 1, p. 101 referred.)
('33) 20 AIR 1933 Oudh 191 (192):8 Luck 676(DB).
('17) 4 AIR 1917 Cal 481 (483).
('69) 11 Suth W R 276 (277) (DB).
† ('21) 8 AIR 1921 Pat 32 (32):5 Pat L Jour 397 (DB). (Valuation for purposes of jurisdiction if disputed should be decided by Court.)
Also see Section 21 Note 3.

12. † ('20) 7 AIR 1920 Cal 113 (114):47 Cal 555 (FB).
('38) 25 AIR 1938 Lah 129 (134) (DB). (A separate suit is maintainable for setting aside a decree on the ground that the Court passing it has no jurisdiction to pass it.)
† ('35) 22 AIR 1935 All 842 (842). (Court not having jurisdiction over subject-matter of plaint — It has no right to direct amendment of plaint.)
('36) 23 AIR 1936 Cal 138 (141) (DB). (Judgment can be impeached in collateral proceedings.)
('35) 22 AIR 1935 Pesh 174 (175).
('35) 22 AIR 1935 Rang 517 (518). (No action or inaction of parties can invest Court with authority so as to validate proceedings.)
[*See* ('35) 22 AIR 1935 All 92 (92, 93). (Appeal pending in Court having no jurisdiction—Question of abatement does not arise.)]

13. ('12) 17 Ind Cas 886 (887) : 8 Nag L R 179.
('35) 22 AIR 1935 Rang 174 (176). (Court can raise point of jurisdiction even at time of delivering judgment though not raised by either party.)
† ('29) 16 AIR 1929 Bom 471 (473):53 Bom 319.

14. † ('19) 6 AIR 1919 All 328 (328) (DB).
('35) 22 AIR 1937 Oudh 96 (107) (DB).

Note 4

1. ('41) 28 AIR 1941 Nag 364 (367) : ILR (1941) Nag 266 (DB).
('40) 27 AIR 1940 Pat 406 (408) (DB).

2. ('40) 27 AIR 1940 Pat 406 (408) (DB).
✠('21) 8 AIR 1921 Cal 34 (37) : 48 Cal 138 (FB).
('33) 20 AIR 1933 Nag 226 (229):29 Nag L R 315. (Issue of commission to examine a person amounts to an exercise of jurisdiction.)
('86) 8 All 111 (113) (FB).
† ('28) 15 AIR 1928 Cal 606 (608) (DB).
('29) 16 AIR 1929 Pat 568 (569) : 9 Pat 527 (FB).
✠('23) 10 AIR 1923 Pat 242 (245, 247):2 Pat 335 (DB).
For examples of irregular exercise of jurisdiction, see the following cases :
('87) 9 All 366 (382, 383) (DB). (Judicial act done on Sunday.)
('89) 15 Cal 152 (158) : 14 Ind App 154 (PC). (Both sides not heard.)
('82) 8 Cal 178 (191, 192) : 8 Ind App 197 (PC). (Local inquiry.)
('74) 22 Suth W R 301 (302) (DB). (Munsif's Court suit tried by Subordinate Judge.)

pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly.[3] As stated by Lord Hobhouse in *Malkarjun* v. *Narhari*,[4] "A Court has jurisdiction to decide wrong as well as right. If it decides wrong the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision, however wrong, cannot be disturbed."[5] The boundary between an error of judgment and the usurpation of power is that the former is reversible by an appellate Court and is, therefore, only voidable, while the latter, however precise and correct it may be is an absolute nullity.[6] It has recently been held by the Madras High Court that even an erroneous decision by a Court that it has *jurisdiction* over a matter falls within this principle so that where a Court decides that it has jurisdiction to entertain a matter and on the basis of that decision adjudicates on the matter, the adjudication is not a nullity.[7] (See also Note 53.)

See also the undermentioned case.[8]

5. Consent cannot give or oust jurisdiction. — The leading case on this subject is *Ledgard* v. *Bull*.[1] Lord Watson, in delivering the judgment of the Board, said :

> " When the Judge has *no inherent jurisdiction over the subject-matter* of a suit, the parties cannot, by their mutual consent, convert it into a *proper judicial process*, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is *competent to try*, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit."

Where, therefore, the Court has no inherent jurisdiction, no amount of consent or waiver can create it.[2] Nor, where the Court has jurisdiction, will the consent of parties

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3. ('43) 30 AIR 1943 Mad 449 (450,453) (DB). (Court having jurisdiction over subject-matter of execution petition but dealing with it in the absence of formal order of transfer of decree — Such absence is mere irregularity in assumption of jurisdiction by the Court.)
† ('28) 15 AIR 1928 Cal 606 (608) (DB).
✠('21) 8 AIR 1921 Cal 34 (37) : 48 Cal 138 (FB).
('05) 32 Cal 296 (315) : 32 Ind App 23 (PC).
('31) 18 AIR 1931 All 425 (426) (DB).
('24) 11 AIR 1924 Cal 154 (155) (DB).
('29) 16 AIR 1929 Pat 568 (569) : 9 Pat 527 (FB).
4. ✠(1900) 25 Bom 337 (347) : 27 Ind App 216 (PC). (Distinguishing 9 Bom 86, in which the Court had not the jurisdiction which it purported to exercise.)
[*See also* ('24) 11 AIR 1924 Pat 537 (544) (DB).]
5. ('40) 27 AIR 1940 Pat 406 (408) (DB).
† ('26) 13 AIR 1926 Cal 1101 (1103) (DB).
('85) 11 Cal 6 (8) : 11 Ind App 237 (PC).
('35) 22 AIR 1935 Mad 835 (838) : 59 Mad 62 (DB).
('35) 22 AIR 1935 Sind 62 (66) : 28 Sind L R 366 (DB).
[*See also* ('19) 6 AIR 1919 Cal 533 (534) : 46 Cal 70 (DB). (Propriety of order of Court having jurisdiction cannot be attacked collaterally.)]
6. ('41) 28 AIR 1941 Nag 364 (367) : I L R (1941) Nag 266 (DB).
✠('21) 8 AIR 1921 Cal 34 (37) : 48 Cal 138 (FB).
† ('37) 24 AIR 1937 Cal 211 (212) : ILR (1937) 1 Cal 781 (DB).
('20) 7 AIR 1920 Cal 131 (134) : 47 Cal 770 (DB). (Court without jurisdiction—Order is nullity.)
7. ✠('42) 29 AIR 1942 Mad 675 (677) (DB). (Debtor residing in Tanjore—False statement in affidavit and application as to residence in Madras—Madras High Court adjudicating debtor an insolvent — Order not nullity — Order held not vitiated by fraud.)
8. ('35) 22 AIR 1935 Pat 439 (442) : 14 Pat 356 (DB). (Under S. 5A of Bengal Sonthal Parganas Settlement Regulation, bar is to institution of suit in Civil Court — Suit instituted before settlement officer transferred to Civil Court — Irregularity in transfer—Defendant not objecting in time cannot subsequently object.)

Note 5

1. ✠('87) 9 All 191 (203) : 13 Ind App 134 (PC).
[*See also* ('17) 4 AIR 1917 Pat 161 (167) (DB).
('16) 3 AIR 1916 Lah 78 (79) : 1917 Pun Re No. 91.]
2. ('43) 30 AIR 1943 Mad 449 (452, 453) (DB).
('42) 29 AIR 1942 Cal 496 (498) : ILR (1942) 1 Cal 149. (Absence of leave under Cl. 12, Letters Patent (Calcutta), goes to root of Court's jurisdiction over subject-matter of suit — No consent or waiver by defendant can cure defect.)
('42) 29 AIR 1942 Oudh 50 (52). (Appellant can plead that Court in which he had filed appeal had no jurisdiction to entertain it.)
('41) 28 AIR 1941 Rang 199 (200). (An incompetent appeal is not rendered valid by being heard *ex parte*.)
('40) 27 AIR 1940 Oudh 245 (247, 248).
('40) 27 AIR 1940 Pat 406 (408) (DB).
('87) 14 Ind App 160 (167) : 11 Mad 26 (PC).

oust it.[3] Estoppel against a party cannot confer jurisdiction on a Court where it had none.[4] But a party may waive irregularities in the *exercise* of jurisdiction[5] or an enquiry into the *existence of facts* necessary to give jurisdiction.[6]

('37) 24 AIR 1937 Cal 565 (568) (DB). (Consent cannot confer jurisdiction.)
('85) 6 Moo Ind App 134 (161) (PC).
('31) 18 AIR 1931 All 332 (332) (DB).
('82) 4 All 478 (480) (DB). (Want of jurisdiction not cured by transfer of suit by consent of parties to the Court in which it ought to have been brought.)
('66) 1 Agra 129 (130) (DB). (Clause in bill of lading ousting jurisdiction of N. W. P. Court. No effect.)
('32) 19 AIR 1932 Bom 42 (46).
('11) 35 Bom 24 (27, 28) (DB). (Irregular exercise of jurisdiction can be cured by waiver.)
('89) 13 Bom 650 (652) (DB).
('87) 11 Bom 153 (159) (DB). (Irregular exercise of jurisdiction can be cured by waiver.)
('85) 9 Bom 266 (268) (DB).
† ('72) 9 Bom H C R 242 (246) (DB).
✠('37) 24 AIR 1937 Cal 427 (429). (Court cannot hear appeal unless expressly empowered by statute —Consent or waiver on part of parties cannot give jurisdiction where there is none.)
('32) 19 AIR 1932 Cal 629 (631) : 59 Cal 1092. (Absence of objection by parties cannot give jurisdiction.)
('31) 18 AIR 1931 Cal 651 (653) : 58 Cal 768.
('20) 7 AIR 1920 Cal 131 (133) : 47 Cal 770 (DB). (Question of *res judicata*.)
† ('12) 16 Ind Cas 940 (941, 942) (DB) (Cal).
('11) 12 Ind Cas 464 (476, 477) : 38 Cal 639 (DB).
✠('09) 36 Cal 193 (205, 206) (DB). (Irregular exercise of jurisdiction can be cured by waiver.)
('09) 1 Ind Cas 86 (89) (DB) (Cal). (Case of exceeding pecuniary jurisdiction.)
('08) 7 Cal L Jour 152 (167) (DB). (Want of jurisdiction due to limitation.)
('05) 2 Cal L Jour 384 (387) (DB).
('04) 31 Cal 849 (853, 855) (DB).
(1900) 4 Cal W N 470 (473) (SB). (Small Cause Court's jurisdiction over immovable property.)
('98) 25 Cal 146 (151) (DB). (Absence of objection by parties.)
('87) 14 Cal 18 (25) : 13 Ind App 106 (PC).
('84) 9 Cal 535 (556) (DB). (Foreign Prince—Submitting to jurisdiction in a series of cases does not amount to waiver of objection in subsequent cases.)
('80) 5 Cal 489 (493) (DB).
('70) 14 Suth W R 228 (230) (DB). (Absence of objection until the stage of special appeal.)
('38) 25 AIR 1938 Lah 129 (133) (DB).
('37) 24 AIR 1937 Lah 401 (401).
('30) 17 AIR 1930 Lah 240 (241).
('36) 23 AIR 1936 Mad 49 (50). (Adoption by party of order made without jurisdiction does not give Court competency to pass it.)
('35) 22 AIR 1935 Mad 723 (724).
('33) 20 AIR 1933 Mad 471 (474).
(1900) 23 Mad 314 (317) (DB) (Part-heard appeals transferred to Subordinate Judge.)
('90) 13 Mad 273 (274) (DB). (Objection as to jurisdiction taken in second appeal — Objection cannot be deemed to be waived.)
('90) 13 Mad 211 (213) (DB). (Irregular exercise of jurisdiction can be cured by waiver—9 All 191:13 Ind App 134 (PC) and 11 Mad 26 : 14 I A 160 (PC) referred to.)
('36) 23 AIR 1936 Nag 1 (3):31 Nag L R Sup 57(FB).
('35) 22 AIR 1935 Nag 250 (257):31 Nag L R Sup 43 (FB).
('35) 22 AIR 1935 Nag 212 (214):31 Nag L R 408.
('32) 19 AIR 1932 Oudh 313 (314):6 Luck 697(DB).
('31) 18 AIR 1931 Oudh 398 (400) (DB).
('36) 164 Ind Cas 811 (811) (Pat). (If the Court has not got jurisdiction, agreement between the parties does not give the Judge jurisdiction.)
('36) 23 AIR 1936 Pesh 57 (59) (DB).
(1900) 1 Low Bur Rul 16 (17) (DB).
[*See* ('08) 35 Cal 777 (788) (SB). (Question of title to a foreign throne.)]
[*See also* ('29) 16 AIR 1929 Lab 534 (535) (DB). (Remand order cannot create jurisdiction in Court to which it is remanded if it had no jurisdiction before.)]

Also see S. 21 N. 1 and S. 96 N. 4.

3. ('26) 13 AIR 1926 Oudh 272 (273).
('35) 22 AIR 1935 Nag 48 (49).
('30) 17 AIR 1930 Nag 189 (190):26 Nag L R 103.
('31) 18 AIR 1931 All 332 (332) (DB).
('08) 30 All 560 (566, 567) (FB).
('29) 16 AIR 1929 Lah 605 (607).
[*See also* ('30) 17 AIR 1930 Mad 782 (784).]

4. ('31) 18 AIR 1931 All 490 (494):54 All 25 (FB).

5. ('43) 30 AIR 1943 Mad 449 (453) (DB). (When a Court has jurisdiction over the subject-matter of an execution petition, the mere fact that the Court deals with the execution petition without a formal order of transfer of the decree by the Court which passed it, would not make the orders passed on such petition null and void. The absence of an order of transfer is merely an irregularity in the assumption of jurisdiction by the Court when proceedings are commenced in it; and if objection is not taken in the first instance it must be held to have been waived.)
('42) 29 AIR 1942 Cal 496 (498) : ILR (1942) 1 Cal 149.
('12) 16 Ind Cas 940 (942) (DB) (Cal).
('36) 23 AIR 1936 Lah 891 (894).
('19) 6 AIR 1919 Lah 27 (29) : 1 Lah 158. (Where a suit instead of being transferred by the District Court was transferred by the Sub-Judge to the Junior Judge and parties acquiesced.)
('33) 20 AIR 1933 Mad 753 (755).
✠('22) 9 AIR 1922 Mad 447 (451) : 45 Mad 90 (DB). (Departures from ordinary practice by consent will not nullify the proceedings or divorce therefrom the ordinary incidents of procedure.)
('34) 21 AIR 1934 Sind 1 (2) : 27 Sind LR 280.
('15) 2 AIR 1915 Sind 3 (3) : 9 Sind L R 164 (DB). (Trial by the higher Court in contravention of the provisions of S. 15, Civil Procedure Code.)

6. ('10) 7 Ind Cas 950 (952) : 35 Bom 24 (DB). (Where the market value of the property was not disputed in the beginning.)
('19) 6 AIR 1919 Mad 242 (244) (DB).
✠('26) 13 AIR 1926 All 650 (652).
('27) 14 AIR 1927 Bom 135 (138) (DB).

Where there are two Courts both of which would normally have jurisdiction to try the suit, the parties may agree among themselves that a suit should be brought in one of those Courts and not in the other. Such an agreement does not contravene the provisions of S. 28 of the Contract Act as the restraint is not absolute but only partial.[7]

6. Objection to jurisdiction. — See Section 21.

7. Jurisdiction with reference to subject-matter. — Jurisdiction with reference to the *subject-matter* of the dispute, as distinguished from *local*, *personal* and *pecuniary* jurisdiction, means jurisdiction with reference to the *nature of the claim* made.[1] Thus, a Presidency Small Cause Court has no jurisdiction to entertain suits for the specific performance of a contract or for an injunction, even though the suits may be within its local, personal and pecuniary jurisdiction.

The jurisdiction with reference to subject-matter of a claim, as in the case of other kinds of jurisdiction, depends upon the allegations in the plaint and not upon those which may ultimately be found true.[2] Such allegations may, after the trial, be held to

('10) 6 Ind Cas 384 (385) (Cal). (Transfer by District Judge to Sub-Judge, of case remanded by High Court — Trial by Sub-Judge not objected to — Objection in second appeal cannot be raised — But submission in other previous suits is no estoppel in respect of a subsequent suit.)
('08) 35 Cal 394 (399). (Where there is no want of jurisdiction but only leave under Cl. 12 of Letters Patent has to be obtained, if defendant appears, files written statement and applies to examine witnesses on commission, he waives objection to jurisdiction.)
('32) 19 AIR 1932 Lah 538 (539). (Objection as to valuation made for the first time in appeal.)
('29) 16 AIR 1929 Lah 173 (177).
('83) 6 Mad 344 (349) (DB). (Submission to jurisdiction of Court by appearance—Court is invested with jurisdiction.)
('23) 10 AIR 1923 Pat 562 (563) (DB). (Absence to ask leave under Cl. 12, Letters Patent, would not render judgment null.)
('23) 10 AIR 1923 Pat 209 (211) (DB). (The defendants submitted to the jurisdiction by appearing in the suit of the plaintiffs and by so doing they gave the Court jurisdiction.)
('22) 9 AIR 1922 Pat 34 (35) : 1 Pat 356 (DB). (Do.) [*See* ('83) 9 Cal 535 (556). (Case of foreign sovereign.)]

7. ('40) 27 AIR 1940 All 241 (242) : I L R (1940) All 232 (DB). (Injunction restraining breach of contract may be granted.)
('37) 24 AIR 1937 Nag 334 (335) : I L R (1939) Nag 641. (A I R 1923 Lah 425 ; A I R 1929 Lah 605 ; A I R 1935 Nag 48 not followed.)
('36) 23 AIR 1936 All 514 (515).
('35) 22 AIR 1935 Bom 198 (199)
('31) 18 AIR 1931 Cal 279 (279) : 57 Cal 1280.
('30) 17 AIR 1930 Lah 611 (612).
('28) 15 AIR 1928 Bom 175 (176) (DB). (Injunction may be granted restraining a breach of the agreement.)
('25) 12 AIR 1925 Mad 1145 (1146).
('24) 11 AIR 1924 Bom 381 (382) (DB). (Doubted whether such agreement will come under S. 28 of the Contract Act.)
[*See also* ('30) 17 AIR 1930 Mad 782 (784). (If one party objects to the jurisdiction and another party agrees to the objection practically it is in the power of parties to get away from the jurisdiction.)]

Note 7

1. †('28) 15 AIR 1928 Nag 221 (222).
('90) 15 Bom 400 (403, 404, 405) (DB). (Jurisdiction of Small Cause Court — Plea as to title— Nature of the suit brought by the plaintiff and not the nature of the defence must be looked to.)
[*See* ('13) 37 Bom 675 (680) (FB). (Decision of Small Cause Court involving incidental decision on question of title—No *res judicata*.)
('01) 25 Bom 625 (628) (DB). (Do.)
('77) 2 Cal 470 (471) (FB). (Do.)
('81) 3 Mad 192 (199, 200) (FB). (The nature of the claim is not changed because a question of title is incidentally raised in it.)
('81) 3 Mad 127 (129) (F B). (Do.)]
2. ('43) 30 AIR 1943 Oudh 268 (269). (Jurisdiction of Civil and Revenue Courts — Case under U. P. Tenancy Act—Suit for ejectment by demolition of buildings erected by defendant — No allegation in plaint to make buildings "improvements" so as to make the subject-matter, "land" within the meaning of S. 3 (10), U. P. Tenancy Act — Suit is not within exclusive jurisdiction of revenue Court.)
('42) 29 AIR 1942 Pat 493 (505) : 21 Pat 397 (DB).
('42) 29 AIR 1942 Lah 217 (223) : ILR (1943) Lah 191 (FB). (For determining question of jurisdiction nature of suit must be decided on basis of averments in plaint and not on basis of defence.)
('40) 27 AIR 1940 Nag 402 (403) : I L R (1941) Nag 107. (The nature, and not the merits, of the claim determines the question of jurisdiction.)
('36) 23 AIR 1936 Sind 179 (182) : 30 Sind L R 104. (Do.)
†('22) 9 AIR 1922 Nag 10 (11,12) : 18 Nag L R 121.
('35) 22 AIR 1935 All 422 (423).
('33) 20 AIR 1933 All 298 (298, 299).
('32) 19 AIR 1932 All 473 (474) (DB).
('32) 19 AIR 1932 All 460 (460) (DB).
('31) 18 AIR 1931 All 664 (665).
('31) 18 AIR 1931 All 663 (663) : 53 All 532.
†('30) 17 AIR 1930 All 193 (198) : 52 All 501 (FB).
†('24) 11 AIR 1924 All 652 (654) : 46 All 553 (DB). (In determining jurisdiction it is the substance of the relief sought and not the mere form in the plaint that must be looked to.)
('16) 3 AIR 1916 All 343 (343).
('13) 20 Ind Cas 421 (422) (All).

be unfounded and in that case, the suit will be dismissed, not because the Court has no jurisdiction, but because the allegations on which it was based are found to be untrue.[3] The question of *maintainability* of a suit is also governed by the same principles and must be dealt with on the footing of the allegations in the plaint being correct. If afterwards, the allegations are found to be not correct the suit is liable to be dismissed not on the ground that it is *not maintainable* but on its *merits*.[4]

The illegality of the claim made in the plaint cannot take away the jurisdiction of the Court to entertain the suit, though it may be a ground of defence to the suit.[5]

See for further Notes, section 6, section 15 and Note 18 on section 96.

8. High Court. — The High Courts of Allahabad, Lahore, Patna and Nagpur have no ordinary original jurisdiction while the other High Courts have both original and appellate jurisdiction.

9. Local jurisdiction. — See Section 16.

10. Personal jurisdiction. — See Section 20.

11. Pecuniary jurisdiction. — See Sections 6 and 15.

12. Valuation of plaint determines jurisdiction. — See Section 15.

13. Appellate jurisdiction. — See Section 96.

14. Jurisdiction of foreign Courts. — See Section 13.

15. "Subject to the provisions herein contained." — The following provisions of the Code may be referred to in this connection : —

Provisions absolutely barring suit. — Sections 10, 11 and 47 and O. 9, R. 9.

Provisions operating as a provisional or conditional bar. — Sections 83, 84 and 86.

Special limitations as to suits against Government, minors, lunatics and charities. — Sections 79, 80, 92, 93 and Order 32.

16. Suits of a civil nature. — In *Sheo Narain* v. *Town Area Panchayat*,[1] the Allahabad High Court observed that a suit between a subject and a branch of Local Self-Government is not a suit which deals with civil rights. Civil suits were defined as suits between subject and subject dealing with civil rights. Exception was taken to this

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✱('88) 10 All 524 (528) (DB). (Valuation in the plaint governs the jurisdiction.)
('81) 3 All 822 (824) (DB).
('80) 2 All 778 (780) (DB).
('12) 17 Ind Cas 779 (780) (DB) (Bom).
('85) 10 Bom 200 (202) (DB). (Jurisdiction does not depend upon result of the suit.)
('24) 11 AIR 1924 Cal 783 (785): 51 Cal 737 (DB).
('17) 4 AIR 1917 Cal 637 (637): 43 Cal 144.
('70) 13 Suth W R 105 (105) (DB).
('32) 19 AIR 1932 Lah 67 (68).
('30) 17 AIR 1930 Lah 599 (599).
('23) 10 AIR 1923 Lah 284 (284) (DB).
('12) 16 Ind Cas 865 (866) (DB) (Lah).
('90) 1890 Pun Re No. 52, p. 136 (137). (Mere change of nomenclature as to relief claimed cannot alter jurisdiction.)
('88) 1888 Pun Re No. 169, p. 447 (448).
('37) 24 AIR 1937 Mad 91 (91).
('26) 13 AIR 1926 Mad 37 (38). (The venue of a case is decided by the nature of the claim and not by the nature of the defence set up).
('22) 9 AIR 1922 Mad 344 (347): 44 Mad 965 (DB). (Unless it is made fraudulently in order to give jurisdiction.)
('13) 20 Ind Cas 928 (930) : 9 Nag L R 112 (DB).
('26) 13 AIR 1926 Nag 71 (72) (DB).
('24) 11 AIR 1924 Nag 275 (277, 278) : 20 Nag L R 145. (Jurisdiction does not depend upon what the defendant states in the written statement.)
('17) 4 AIR 1917 Nag 25 (26). (The venue of a case is decided by the nature of the claim and not by the nature of the defence set up.)
('13) 19 Ind Cas 759 (763) : 9 Nag L R 54.
('22) 9 AIR 1922 Oudh 161 (161).
('22) 9 AIR 1922 Oudh 45 (46) : 26 Oudh Cas 297.
('25) 12 AIR 1925 Rang 278 (278) (DB).
('25) 12 AIR 1925 Sind 324 (328): 18 Sind LR 286 (DB). (Jurisdiction is not ousted because decree is for amount exceeding pecuniary jurisdiction.)

3. ('22) 9 AIR 1922 Nag 10 (11, 12): 18 Nag LR 121.
4. ('36) 23 AIR 1936 Pat 572 (575) (DB).
5. ('33) 20 AIR 1933 Sind 29 (32): 26 Sind LR 395.

Note 16

1. ('36) 23 AIR 1936 All 117 (117, 118) (DB).

observation in a later decision of the same High Court[2] in which it was held that this definition of a suit of a civil nature was neither exhaustive nor satisfactory. It was pointed out that there are many suits which a subject may maintain against the State which cannot be regarded as anything but civil suits within the meaning of S. 9. According to their Lordships it was not the status of the parties to the suit but the subject-matter of the suit which determines whether or not the suit is one of a civil nature. It is submitted with respect that this view is correct.

And now, what is the characteristic of the subject-matter that will make a suit one of a civil nature? A suit of a civil nature may be defined as a suit the object of which is the enforcement of a civil right or civil obligation. The word "civil" simply means "of or becoming a citizen."[3] So a suit brought for the enforcement of the rights or obligations of a person as a citizen of the State is a suit of a civil nature. The right or obligation may relate to another citizen or to the State itself. Hence a suit by or against the Government or a local authority like a municipality can be one of a civil nature.[4] But the rights and obligations must relate to the private lives of citizens. Political questions cannot be held to be covered by the expression "civil rights". See Note 56.

The distinction between a criminal proceeding and a civil suit is that while in the former the object of the proceeding is the *punishment* of a wrong, in the latter the object is the *enforcement* of a right.[5]

Rights which do not inhere in a person as a citizen of the State but exist only by virtue of his being a member of a caste or religious community are not civil rights. In other words, questions relating to caste or to religious rites or ceremonies or to social matters, are not questions relating to civil rights;[6] and a suit in which the principal question is one relating to caste or to religious rites and ceremonies, is not a suit of a civil nature.[7]

But, where the principal question in a suit is one of a civil nature and the adjudication on such question necessarily involves the determination of a caste question or a question relating to religious rites and ceremonies, the jurisdiction of the civil Court is not barred and the Courts have power to decide the caste question or questions relating to religious rites and ceremonies *for the purpose* of deciding the principal question of civil nature.[8]

17. Suits relating to rights in property—General.—The word "property" refers to all objects which can be *owned* by a person. The object owned may be a

2. ('39) 26 AIR 1939 All 394 (397) : ILR (1939) All 345 (DB).

3. See Concise Oxford Dictionary.

4. ('40) 27 AIR 1940 Lah 451 (454). (Suit for injunction restraining Municipality from demolishing building on ground that land under building is plaintiff's land and not that of Municipality—Civil Court's jurisdiction is not barred.)

5. Salmond on *Torts*, 6th Edition, 1924, Page 1.

6. ('10) 34 Bom 455 (458) (DB).
('69) 6 Bom H C R (AC) 19*n* (20*n*) (DB).
See also Note 43
[But see (92) 16 Bom 281 (283) (DB).]

7. ('39) 26 AIR 1939 Mad 102 (105) (Suit, in which plaintiffs ask Court to prescribe set of rubrics to be followed at the time of worship is not maintainable in Civil Courts.)
('39) 26 AIR 1939 Mad 757 (758) (DB). (Whether a particular deity is adorned with a particular ornament on a particular day is a matter of ritual and has nothing to do with a civil right.)
('35) 22 AIR 1935 Nag 156 (162). (The right of conscience, i e., the right of individual members of a community to hold certain religious beliefs and opinions is of course a religious one and one that cannot be called in question or adjudicated upon in the Civil Court.)
See also Notes 43, 48.

8. ('77) 2 Mad 62 (65) : 6 Ind App 120 (PC). (6 Mad H C R 449 referred to.)
('95) 19 Bom 507 (522).
('87) 11 Bom 534 (535).
('19) 6 AIR 1919 Low Bur 81 (91) : 9 Low Bur Rul 220 (FB). (In Lower Burma, Civil Courts have power to decide suits of a civil nature in which points of Buddhist Ecclesiastical law arise.)
Also see Notes 43, 44 and 46.

tangible one, whether moveable or immovable or may be an *intangible* one, as for instance, patents, copyrights, trademarks, or rights of franchise, rights of fishery, rights of ferry, *hats* and the like.[1] Suits relating to such property are suits of a civil nature.[2] For suits of this nature, see the undermentioned cases.[3] Where the plaintiff has no interest in any property but simply claims to perform certain *duties*, as where a joint trustee of a temple claims to enjoy the management and superintendence of a temple, the Civil Court cannot take cognizance of it.[4]

18. "Property," meaning of. — See Note 17.

19. Suits respecting temple and other religious property. — In the eye of law idols are *property* and the right to deal with such property must, in the event of dispute, be determined by a Civil Court.[1] The removal or alteration of *namams* (religious marks) in a temple is an interference with property in respect of which a suit will lie in a Civil Court.[2] So also a suit will lie in regard to land on which a monastery stands,[3] or to recover possession of lands and religious manuscripts,[4] or to set aside a sale or mortgage of endowed property.[5]

Note 17

1. Holland's *Jurisprudence*, 3rd Edition, pp. 168, 169.

2. ('24) 11 AIR 1924 Pat 795 (796) (DB).
('72) 4 N W P H C R 146 (151) (DB).
('85) 7 All 140 (144, 145) (DB). (Suit to establish that the land is a part of the permanently settled estate.)
('73) 5 N W P H C R 8 (9) (DB).
('74) 6 N W P H C R 104 (112) (DB).
('02) 26 Bom 353 (358, 359) (DB). (Section 9 of the Specific Relief Act.)
('32) 19 AIR 1932 Cal 117 (117) (DB). (Suit for passing a scheme in respect of a private debutter estate.)
('05) 32 Cal 479 (481) (DB). (Suit for maintenance of an illegitimate child notwithstandig an order of the Magistrate refusing to grant maintenance lies.)
('97) 1 Cal W N 447 (448) (DB).
('90) 17 Cal 590 (602, 604) : 17 Ind App 40 (PC).
('81) 7 Cal 437 (441) (DB). (Suit for declaration of title to rent-bearing land.)
('29) 16 AIR 1929 Lah 85 (85).
('23) 10 AIR 1923 Lah 500 (501) : 4 Lah 195 (DB). (Suit to establish the plaintiff's right to a share in an occupancy tenure.)
('21) 8 AIR 1921 Lah 157 (159) : 2 Lah 73 (DB). (Suit for partition of abadi land.)
('17) 4 AIR 1917 Lah 231 (231) : 1917 Pun Re No. 74. (Suit by water carrier for dues under the condition of wajib-ul-arz.)
('15) 2 AIR 1915 Lah 295 (296) : 1915 Pun Re No. 44. (Suit for joint possession of shamilat.)
('07) 1907 Pun Re No. 41, p. 175. (Suit on bond given for arrears of rent.)
('83) 1883 Pun Re No. 26, p. 80. (Suit for value of ornaments alleged to have been stolen by defendant.)

3. *Suits relating to rights of fishery* :
('14) 1 AIR 1914 P C 48 : 41 Ind App 221 : 42 Cal 489 (PC).
('92) 19 Cal 544 (FB).
Suits relating to rights of ferry :
('92) 19 Cal 253 : 19 Ind App 48 (PC).
Suits relating to hats or markets :
('07) 29 All 683 (685) (DB). (Suit for declaration of right to receive fees as "choudhris" of certain bazar—Suit held not maintainable.)
('97) 29 All 740 (DB).
('20) 7 AIR 1920 Cal 255 : 47 Cal 1079 (DB).
('90) 17 Cal 458 (DB).
('80) 5 Cal 7 (FB).
Suits relating to pre-emption :
('86) 8 All 102 (FB).
('85) 7 All 720.
('84) 6 All 455 (DB).
('84) 6 All 423 (DB).
('16) 3 AIR 1916 Oudh 320.
Suits respecting liability to land revenue :
('85) 7 All 140 (145) (DB).
('93) 16 Mad 479 (DB).
Miscellaneous :
('42) 29 AIR 1942 All 320 (323) : I L R (1942) All 821 (DB). (Suit for declaration and injunction regarding birt jajmani is suit of civil nature.)
('03) 30 Cal 619 (622). (Suit to set aside sale under Public Demands Recovery Act lies in Civil Court.)
('84) 7 Mad 301 (301) (DB). (Suit to recover money lent for gambling lies, if the gambling is not prohibited by law.)
('21) 8 AIR 1921 All 316 (318) : 43 All 20 (DB). (Pragwal's flag — Imitation of — Diversion of pilgrim's custom thereby — Actionable.)
('83) 9 Cal 75 (79) (DB). (Suit to restrain defendant from using bathing ghat for purposes of trade.)

4. ('97) 19 All 428 (433).

Note 19

1. † ('82) 4 Mad 315 (316) (DB).
('11) 21 Mad L Jour 1027 (1030) (DB). (Right of worship is a civil right.)
('89) 13 Bom 548 (550) (DB).
*('94) 21 Cal 463 (469) (DB).
('77) 3 Cal 390 (391). (Suit for damages for refusing to deliver an idol.)
(1865) 4 Suth W R 79 (80) (DB). (Suit for removal of idol.)

2. † ('07) 30 Mad 158 (166) (DB).

3. ('14) 1 AIR 1914 Upp Bur 6 (7) : 1 Upp Bur Rul 183.

4. (14) 1 AIR 1914 Low Bur 178 (178) : 8 Low Bur Rul 145 (DB).

5. ('83) 5 All 497 (500) (DB).

20. Suits for damages for civil wrongs and for breaches of contract. —Such suits are clearly suits of a civil nature and cognizable by Civil Courts.

21. Right to specific relief. — A right to specific relief such as a right to a declaration or injunction or to the specific performance of a contract, is a civil right and a suit for such relief is a suit of a civil nature entertainable by a civil Court. British Indian Courts have no power under the Code, apart from S. 42 of the Specific Relief Act, to grant a *merely* declaratory decree without any further relief.[1]

22. Other common law rights. — A suit in respect of a right given by the common law is also a suit in respect of a civil right and is therefore of a civil nature. Thus, the right of franchise is a common law right.[1] Similarly, the right to lawfully use a public highway,[2] or to kill one's own cattle,[3] or to hoist the flag of a saint,[4] is a right of a civil nature. See Notes 23 to 28 below.

23. Right of worship. — A right of worship is a civil right[1] and a suit to establish such a right[2] and to restrain persons from interfering therewith[3] is a suit of a

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Note 21

1. ('43) 47 Cal W N 408 (412) (DB). (But where a decree has the effect of giving present relief a well, the power to make it will be governed by the general provisions of C. P. Code, (e. g.) S. 9 or O. 7, R. 7, of the Code and not by S. 42 of the Specific Relief Act.)
('31) 18 AIR 1931 All 83 (84) : 53 All 316 (DB).

Note 22

1. See Note 27 below.
2. ('97) 24 Cal 524 (526) (DB).
('95) 22 Cal 551 (558) (DB).
('04) 31 Cal 839 (846) (DB).
† ('88) 15 Cal 460 (467) (FB).
(1871) 7 Q B 47 (52, 55), Vestry of St. Mary Newington v. Jacobs.
3. ✣('08) 30 All 181 (187, 188) (DB).
('29) 16 AIR 1929 All 339 (340) (DB).
✣('30) 17 AIR 1930 All 753 (756) (DB).
('14) 1 A I R 1914 Oudh 286 (288) : 17 Oudh Cas 354.
4. ('10) 7 All L Jour 830 (832).

Note 23

1. ('01) 11 Mad L Jour 215 (226) (DB).
('39) 26 AIR 1939 Mad 102 (106).
('83) 7 Bom 323 (329) (DB).
('91) 21 Cal 463 (469) (DB). (Suit by some of the members of a religious fraternity to establish the right to enter the prayer hall and perform their prayers and other rights and also for possession of the prayer hall.)
('81) 7 Cal 694 (697) (DB). (People can erect on their own property places of worship and perform worship.)
('33) 20 AIR 1933 Mad 726 (727).
✣('17) 4 AIR 1917 Mad 868 (869).
('10) 5 Ind Cas 57 (57) (DB) (Mad). (Right of entry in a temple for worship is a civil right.)
('07) 30 Mad 158 (165) (DB).
('09) 19 Mad L Jour 743 (746) (DB). (But that right can be exercised during hours of public worship.)
✣('90) 13 Mad 293 (297) (DB).
('83) 6 Mad 203 (214) (FB).
('82) 5 Mad 304 (308, 309) (DB). (People can erect on their on property places of worship and perform worship.)
('78) 2 Mad 143 (145) (DB). (Do.)
[*See* ('39) 26 AIR 1939 Mad 757 (760) (DB). (Claim by temple archakas to prostrate twice before deity during service—Trustees forbidding archakas to prostrate more than once on pain of dismissal—Suit by archakas maintainable.)]
2. † ('17) 4 AIR 1917 Mad 903 (904) (DB).
✣('09) 33 Bom 387 (391). (Right to have worship performed by others.)
('91) 13 All 419 (422, 429, 430) (FB).
('90) 12 All 494 (501, 505) (FB).
('85) 7 All 461 (474) (FB). (Right of Mahomedan to use mosque.)
✣('20) 7 AIR 1920 Bom 15 (18) : 44 Bom 410 (DB).
('77) 3 Cal 390 (391). (Suit for damages for refusing to deliver idol for worship.)
('10) 20 Mad L Jour 530 (533) (DB). (Suit for a declaration of a right to recite stotrams in a temple.)
('83) 6 Mad 151 (153) (DB).
('92) 15 Mad 355 (356) (DB). (Suit will not lie for an injunction to restrain certain Mahomedans from reading the kutbah in their mosque.)
3. † ('25) 12 AIR 1925 Bom 209 (209, 210) (DB).
✣('85) 7 All 178 (182, 184) (FB). (Right to enter mosque.)
('80) 3 All 636 (641).
('81) 7 Cal 767 (770) (DB). (Object of worship may be prevented from being removed.)
(1900) 23 Mad 298 (304) (DB).
('88) 11 Mad 450 (452) (DB). (Right to give a crown and water at a religious festival.)
('97) S A No. 1811 of 1877, cited in 30 Mad 158 (165) (Courts will also prevent the introduction of idol or other objects which would interfere with the form of worship for which the temple is dedicated.)
('87) S A No. 773 of 1887, cited in 30 Mad 158 (165). (Do.)
('58) S A No. 94 of 1858, cited in 30 Mad 158 (165). (Do.)

civil nature. There may be an exclusive right of worship in a class of persons in a particular temple or in a particular part of a temple and a suit will lie to restrain a rival class of persons from joining in such worship.[4] Thus, where a temple is reserved for worshippers of a particular caste of persons, the Courts will protect their right by restraining persons of inferior or rival caste from being allowed into the temple.[5] But a sect of Christians cannot sue for partition of a church building for purposes of exclusive worship by the sect.[6] Nor will a suit lie to compel the hereditary priests of a temple to take out certain ornaments from the temple treasury and to adorn the image on festive days,[7] or to compel the custodians of the idol to locate it in a certain temple instead of in another temple.[8] So also, a suit will not lie to declare the rights of persons to stand in a particular row of the congregation, or to prescribe the modes of worship, prayers and religious precedence where no question of civil rights really arises.[9]

24. Right relating to religious and other processions. — Persons of whatever sect are entitled to conduct religious processions through public streets so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrates may lawfully give to prevent obstructions of the thoroughfare or breach of the public peace.[1] A suit for a declaration of right to such a procession lies in a Civil Court.[2] This view has been upheld by the Privy Council in *Saiyid Manzur Hasan* v. *Saiyid Muhammad Zaman*,[3] in which their Lordships have held that persons have a right to conduct a religious procession with *its appropriate observances* along a highway. The worshippers in a mosque or temple which abuts on a high road cannot compel the processionists to intermit their worship while passing the mosque or temple on the ground that there was continuous worship there.[4] But a permanent arrangement validly come to between rival communities regulating their method of taking out religious processions will be upheld and enforced by Court of law.[5]

25. Right of burial. — The right of burial is a civil right and an interference with the right of reciting prayers in connection with such burial is an invasion of the civil right, in respect of which a civil suit would lie.[1]

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4. ('82) 5 Mad 313 (319) (DB).
('83) 7 Bom 323 (328) (DB).
5. ('02) 12 Mad L Jour 355 (357) (DB).
('20) 7 AIR 1920 Low Bur 151 (153) (DB). (Exclusive right of persons of the Zoroastrian faith.)
6. ✠('17) 4 AIR 1917 Mad 431 (440): 39 Mad 1056 (1071, 1078) (DB).
7. ✠('80) 5 Bom 80 (82) (DB).
8. See Note 48.
9. ('39) 26 AIR 1939 Mad 102 (106).

Note 24

1. ✠('25) 12 AIR 1925 P C 36 (38) (PC).
† ('82) 5 Mad 304 (309) (DB).
('03) 26 Mad 376 (382) (DB).
('31) 18 AIR 1931 All 674 (676) : 53 All 836 (DB).
('21) 8 AIR 1921 All 146 (148) : 43 All 692 (DB). (But a religious procession is not entitled by frequent stops in a public street to block passage in an unreasonable manner.)
('20) 7 AIR 1920 Bom 15 (18) : 44 Bom 410 (DB).
('18) 5 AIR 1918 Bom 162 (163) : 42 Bom 438 (DB). (No suit lies for declaration of right to pass along public street accompanied by music.)
('10) 34 Bom 571 (574) (DB).
('30) 17 AIR 1930 Mad 701 (703) : 53 Mad 761 (DB).
('19) 6 AIR 1919 Mad 674 (675) : 42 Mad 271 (280, 281, 282) (FB).
('16) 3 AIR 1916 Mad 593 (594) (DB).
('10) 20 Mad L Jour 119 (120) (DB).
('94) 17 Mad 37 (40, 41) (DB). (Suit for damages for obstructing procession with banners.)
('25) 12 AIR 1925 Oudh 656 (657).
Also see Section 91 Note 3.
2. ('97) 24 Cal 524 (526) (DB).
✠('31) 18 AIR 1931 All 341 (346) : 53 All 484 (DB).
3. ('25) 12 AIR 1925 P C 36 (36, 38) : 52 Ind App 61 : 47 All 151 (PC). (Overruling 2 Bom 457 and 18 Bom 693.)
4. ✠('83) 6 Mad 203 (217) (FB).
5. ('29) 16 AIR 1929 All 519 (520) (DB).

Note 25

1. † ('07) 30 Mad 15 (16) (DB).
('02) 26 Bom 198 (200) (DB).
('94) 18 Bom 699 (702) (DB).
('30) 17 AIR 1930 Oudh 54 (54) : 5 Luck 489.
[But see ('30) 17 AIR 1930 Rang 143 (144) : 7 Rang 603 (DB). (Co-religionists—Rival claims to possession and burial of corpse.)]

26. Right of person elected as director or chairman to act as such. — The right of a person elected as a director of a company to act in that capacity is a civil right and a suit will lie for an injunction restraining other directors from wrongfully excluding him from acting as a director.[1] Similarly, a suit will lie for a declaration that the removal by the Provincial Government of a person from the chairmanship of the District Board was illegal and for an injunction restraining interference with his work as a chairman.[2]

27. Right of franchise. — A right to vote is a civil right. A suit, therefore, for a declaration that the plaintiff is a qualified voter,[1] or for an injunction against the Chairman of a Municipality for his refusal to insert his name in the register of voters will lie.[2] Similarly, a suit for a declaration that the plaintiff has been duly elected[3] or that the election of the defendant is void[4] or that the votes obtained by the majority at a corporation meeting are invalid votes[5] is a suit of a civil nature.

27a. Suit for dissolution of marriage. — A suit for dissolution of marriage is a suit of a civil nature. Where the parties are Hindus, a rule of Hindu law forbidding dissolution of marriage may be pleaded as bar to such a suit. But that itself is matter which has got to be decided by a Court and it is this authority to decide the point that really makes up the jurisdiction of the Court. Again whether the prohibition applies to the facts of a case is also a matter for investigation by the Court.[1]

28. Restitution of conjugal rights.—A suit for the enforcement of conjugal rights and duties is one of a civil nature and is entertainable by the Civil Courts.[1] In *Moonshee Buzloor Rahim* v. *Shumsoonissa*,[2] their Lordships of the Privy Council said as follows :

Note 26

1. ('24) 11 AIR 1924 Cal 982 (983): 51 Cal 916 (DB).
2. ('43) 30 AIR 1943 Cal 59 (61, 62) (DB).

Note 27

1. ('21) 8 AIR 1921 Cal 85 (87) : 48 Cal 378 (DB).
   [*See also* ('32) 19 AIR 1932 Mad 100 (104, 105) (DB). (The Court has jurisdiction to entertain a suit by shareholders against the company in respect of an infringement of their individual rights as shareholders when the interest of justice so requires; and a suit in substance to establish and enforce the right of a shareholder to exercise his votes is therefore maintainable at the instance of single shareholder.)]
2. ('21) 8 AIR 1921 Cal 85 (87) : 48 Cal 378 (DB).
3. (97) 24 Cal 107 (111) (DB).
   [*See also* ('36) 23 AIR 1936 Cal 424 (428) (DB). (A suit for declaration that a person's nomination paper had been illegally rejected and that defendants had not been elected as members of the Municipal Board can be entertained by the Civil Court.)]
4. ('26) 13 AIR 1926 Mad 319 (320).
5. ('23) 10 AIR 1923 Bom 305 (316) : 47 Bom 809. (Questions as to the validity of votes is not a question of internal management.)

Note 27a

1. (39) 26 AIR 1939 Cal 430 (432) (DB).

Note 28

1. †('91) 13 All 126 (139) (DB).
   †('67) 11 Moo Ind App 551 (610, 615, 616) (PC). (Mahomedan parties—Court may impose terms on husband; cruelty rendering it unsafe for the wife or husband's gross failure to perform marriage obligations would disentitle husband to a decree.)
   ('97) 19 All 515 (516, 517) (DB).
   ('86) 8 All 78 (81) (DB). (Where husband is out of caste, Court may order wife's return to husband conditionally on the latter's obtaining restoration to caste.)
   ('72) 4 N W P H C R 109 (110) (DB). (Where Hindu husband and wife have been separate for 13 years with mutual consent, husband is not entitled to restitution of conjugal rights.)
   ('93) 17 Bom 400 (406) (DB).
   †('86) 10 Bom 301 (310, 313) (DB). (Civil Courts have jurisdiction over conjugal rights as determined by Hindu law and cannot recognize any plea of justification other than a marital offence by complaining party.)
   ('76) 1 Bom 164 (167) (DB).
   †('01) 28 Cal 37 (44) (DB). (Suitable terms may however be imposed.)
   ('80) 5 Cal 500 (506) (DB). (Wife's condonation of husband's act of cruelty restores husband to his former conjugal rights.)
   ('24) 11 AIR 1924 Mad 49 (51) ; 46 Mad 791 (DB).
   See also the following cases:
   ('98) 20 All 96 (97) (DB). (Jactitation of marriage.)
   ('92) 19 Cal 84 (91) (DB). (Wife justified in leaving husband when he so illtreats her as to endanger her personal safety.)
   ('26) 13 AIR 1926 Nag 488 (489) : 22 Nag L R 134. (*Pat* marriage is not a simple contract that it can be declared invalid on the ground of fraud by one of the parties.)
2. ('67) 11 Moo Ind App 551 (606) (PC).

"If the law which regulates the relation of the parties gives to one of them a right and that right be denied, the denial is a wrong; and unless the contrary be shown by authority or by strong arguments, it must be presumed that there must be a remedy in a Court of justice."

The cause of action, in a suit for restitution of conjugal rights, consists in the wife's absenting herself from her husband's house without his consent.[3]

28a. Right of person as member of club. — A suit lies in respect of the wrongful expulsion of a member from a social club. But a club is an autonomous institution and a Court of law will not lightly interfere with its action in expelling a member unless it has violated the recognized rules of procedure in that connection or those of natural justice.[1]

29. Rights under contract. — Such rights are civil rights enforceable by suits in Civil Courts. See Notes 30 to 34 below.

30. Suit for, or on, accounts. — A suit for an account is a special form of suit. It does not mean every case in which accounts have to be looked into in order to ascertain the correctness or otherwise of the amount claimed by the plaintiff.[1] A suit for an account only lies when the defendant is *liable to account* to the plaintiff. There must be something more than a mere relationship of debtor and creditor. The defendant must stand in some other relation to the plaintiff, such as that of agent or bailee or receiver or trustee or partner or mortgagee.[2]

31. Suits for contribution. — The right of contribution is founded on and is controlled by the principles of justice, equity and good conscience. It does not arise from contract. Every joint debtor who has been compelled to pay more than his share of the common debt has the right of contribution from each of his co-debtors.[1] This principle has been embodied in S. 43 of the Contract Act. As to suits for contribution between joint tort-feasors, see the undermentioned cases.[2]

32. Suits relating to partnership. — As to the rights and liabilities of partners and the suits based thereon, see the Indian Partnership Act (IX of 1932).

33 & 34. Cosharers. — See Note 31.

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3. ('94) 18 Bom 316 (318) (DB). (Jurisdiction in the Court in which the husband's house is situate from where the wife absents herself.)
('94) 18 Bom 327 (331) (DB). (Decree for restitution of conjugal rights against wife—Wife applying for satisfaction — Desertion second time will give a fresh cause of action.)

Note 28a

1. ('39) 26 AIR 1939 Bom 35 (37).

Note 30

1. ('05) 28 Mad 394 (395) (DB).
2. ('81) 1881 Pun Re No. 122, page 294 (295).

Note 31

1. ('39) 26 AIR 1939 Mad 508 (508). (One partner paying whole decretal amount can claim contribution by suit against others.)
('15) 2 AIR 1915 Cal 278 (279) (DB). (Payment by person not liable to pay the debt—Cannot file a suit for contribution against debtors.)
✠('15) 2 AIR 1915 Cal 334 (336) (DB).
('06) 4 Cal L Jour 555 (557) (DB).
('04) 31 Cal 95 (104) (DB).
('02) 6 Cal W N 583 (584, 585) (DB).
('33) 20 AIR 1933 Mad 755 (756).
('01) 24 Mad 85 (93) (DB).
Also see Section 102 Note 6.
2. † ('94) 17 Mad 78 (79) (DB). (One tort-feasor cannot recover contribution from another.)
('10) 32 All 585 (588) (DB). (Contribution for costs against co-defendant.)
('97) 19 All 462 (464) (DB). (Contribution for costs against co-defendant—Co-defendant being independent in his defence from that of the other.)
('87) 9 All 221 (224) (DB).
('10) 37 Cal 559 (572) (DB).
† ('01) 5 Cal W N 393 (398) (DB).
('97) 24 Cal 330 (334) (DB).
('94) 21 Cal 496 (504) : 21 Ind App 26 (PC).
('86) 13 Cal 300 (303, 304) (DB).
('80) 5 Cal 720 (725) (DB).
('70) 14 Suth W R 70 (71) (DB). (Contribution for costs against co-defendant.)
('67) 7 Suth W R 384 (385) (FB).

35. Suit for office. — An office is a position which has some *duties* attached to it.[1] The existence of an office therefore involves the existence of some duties *to be performed by the holder of the office*[2] and which are *enforceable* by law, custom or usage.[3] In the absence of any such duties there can be no office for which a suit will lie in a civil Court.[4] Thus, where a Muhammadan sued for possession of an alleged hereditary religious office, the functions of which were the digging up and burying a pot, distributing *sherbet*, collecting money and distributing a small portion thereof, it was held that the duties or functions referred to were not recognized by Muhammadan law as necessary or proper to be performed in connection with the religion of Islam and that the suit was not one for any religious office.[5] Similarly, a *Gayawal Gaddi* is not an office inasmuch as the *Gayawal* (person who ministers to pilgrims visiting Gaya) has no *duties* which any one can compel him to perform.[6]

The explanation to the section enacts that a suit in which a right to an *office* is in question is a suit of a civil nature.[7] And this is so notwithstanding that such right may depend entirely on a decision of questions as to religious rites or ceremonies or as to the tenets of the followers of a creed and the usage they have accepted as established for the regulation of their rights *inter se*.[8]

Where the secular and religious duties of a mahant are interdependent and inseparably blended and the two capacities are closely intermingled so that a proper and efficient discharge of the one depends on the control of the other, the Civil Court has, in a fit case and if need be, jurisdiction to remove the mahant not only from his

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Note 35

1. See the Concise Oxford Dictionary.

2. ✠('16) 3 AIR 1916 Mad 379 (380) (DB).
('09) 32 Mad 291 (297, 298) (DB).
('31) 18 AIR 1931 Bom 273 (274, 275)(DB). (Kulkarni receiving voluntary payments at village fairs —No functions to perform—There is no office.)
('28) 15 AIR 1928 Mad 377 (378) (DB).
('27) 14 AIR 1927 Mad 131 (136).
† ('19) 6 AIR 1919 Mad 1026 (1028) (DB).
('17) 4 AIR 1917 Pat 37 (40): 2 Pat L Jour 705(DB).

3. ('39) 26 AIR 1939 Mad 886 (886, 887) : ILR (1940) Mad 40 (DB).
('17) 4 AIR 1917 Pat 37(39,40):2 PatLJour705(DB).

4. ('39) 26 AIR 1939 Mad 886 (887): ILR (1940) Mad 40 (DB). (A right to lead a horse on a particular festival in a temple whenever that festival is performed, cannot be held to be a right to an office, when there is no compellable duty on the part of the claimant.)
('10) 32 All 527 (538, 540) (DB). (Right to hold Ramlila pageant in the streets of Benares—No obligation to organise or carry it on—Not an office.)
('05) 28 Mad 23 (25) (DB). (Claim in respect of religious ceremonies without any claim to any office or emolument.)
('96) 19 Mad 62 (64) (DB). (The duty must be enforceable at law.)
('99) 9 Mad L Jour 355 (358) (DB). (Right to recite prabandhams during worship in a temple held not "office" as there was no duty.)

5. ('16) 3 AIR 1916 Mad 379 (381) (DB).

6. ('17) 4 AIR 1917 Pat 37 (39) : 2 Pat L Jour 705 (DB).

7. ('84) 8 Bom 25 (26,27) (DB). (Vatandar office under Bombay Vatandars Act.)
('39) 26 AIR 1939 Mad 102 (106). (Right to perform religious office to which obligations and emoluments are attached is a civil right.)
('21) 8 AIR 1921 Bom 209 (210): 45 Bom 234 (DB).
('20) 7 AIR 1920 Bom 98 (99): 44 Bom 733 (DB). (Vatandar barber's office.)
('12) 36 Bom 94 (103) (DB).
('94) 18 Bom 516 (519) (DB). (Vatandar office under Bombay Vatandars Act.)
('92) 16 Bom 281 (283) (DB). (Whether plaintiff is "Ayya" of a math.)
('89) 13 Bom 548 (550, 551) (DB).
('85) 9 Bom 25 (26) (DB). (Vatandar office under Bombay Vatandars Act.)
('77) 1 Bom 531 (536) (DB). (Office of Patil under Bombay Act XI of 1843.)
('74) 11 Bom H C R 232 (237) (DB) (Do).
('70) 7 Bom H C R (A C) 72 (74) (DB) (Do.)
('65) 1 Bom H C R 12 (13).
('21) 8 AIR 1921 Cal 328 (329) (DB). (There is nothing to prevent Civil Courts from determining the question, whether a pujari has been removed from his office on valid grounds.)
('09) 4 Ind Cas 894 (895) (DB) (Lah).
('88) 11 Mad 450 (452) (DB).
('76) 1 Mad 356 (358) (DB). (Office of mirasi of dancing girls.)
('16) 3 AIR 1916 Pat 215 (215) : 1 Pat L Jour 381 (DB).

8. † ('82) 5 Mad 313 (318, 319) (DB).
('11) 21 Mad L Jour 730 (734, 738, 739) (DB). ("Dharmakarta," meaning — Declaration as to performance of duties of office.)
('09) 33 Bom 387 (391).
('09) 4 Ind Cas 894 (894) (DB) (Lah). (Right to pujarishp of temple.)
('09) 3 Ind Cas 881 (883) : 32 Mad 291 (DB).
('99) 9 Mad L Jour 355 (361) (DB).

secular but also from the religious office.[9] Thus, where a mahant of a temple acting in two distinct capacities, as the spiritual head of the endowment and as the trustee and manager of the properties and temporal affairs of the temple, contended that the Civil Court had jurisdiction over his latter capacity only and that it had no power to pass any orders affecting his spiritual position, their Lordships of the Privy Council,[10] while overruling the contention, observed as follows :

> "The office in this case . . . . . is connected with an endowment which has valuable properties and is associated with the control of extensive funds. Even if the two capacities of the office can be separated and the mahantship on its spiritual side regarded as purely an office or dignity, there is no doubt that the office is of such a nature that a suit relating to it must fall within the purview of the Explanation to S. 9, Civil Procedure Code, as being a suit of a civil nature lying within the competence of a Civil Court, notwithstanding that the functions of such office are associated with religious rites or ceremonies."

It is not essential that the office need be one which brings in any profit to those claiming it[11] or one to which any *fees* or *emoluments* are attached as of right,[12] and this is so whether the office is a secular or a religious one. Thus, a suit will lie for the establishment of the hereditary office of a musician to a *satra* even if no emoluments are attached to it.[13] Similarly, a suit for a declaration of a right to be a *shebait* of a particular worship,[14] or a suit to determine who are fit or proper persons to be *dharmakartas* or trustees of a temple,[15] or a suit for a share in the management of an endowment,[16] will lie, though no fees or emoluments are attached to the office as of right. But, though a right to an honorary office to which no remuneration is attached, such as that of a secretary of an association, is a civil right, a suit for a *declaration* that the plaintiff's dismissal from such office is not justified will not lie where his continuance in office depends upon rules which the society has power to alter at any moment. The reason is that the plaintiff in such a case cannot be said to have any *legal character* within the meaning of S. 42 of the Specific Relief Act, so as to maintain a suit for a declaration of his right in a Civil Court.[17]

There is no conflict of opinion on the question whether a suit for an office to which no fees or emoluments are attached is a suit of a civil nature. An examination of the cases in which claims to such an office have been held not to be maintainable will show that the claims are not for any *office* at all, there being no *duties* attached thereto which the plaintiff was under an enforceable obligation to perform.[18] The decisions, therefore, are in accordance with principle and there is no necessity to make a distinction for the purpose of reconciling the supposed conflict, between an office attached to a *place* and a merely *personal* office.[19] Further, the adoption of such a distinction would introduce a limitation into the words of the section by making the word "office" mean

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9. ('40) 27 AIR 1940 P C 24 (29): 67 Ind App 32: ILR (1940) 1 Cal 266 : ILR (1940) Kar PC 47 (PC).

10. ('40) 27 AIR 1940 P C 24 (29): 67 Ind App 32: ILR (1940) 1 Cal 266 : ILR (1940) Kar PC 47 (PC).

11. ('88) 15 Cal 159 (162) (DB).

12. ('89) 13 Bom 429 (433) (DB).
('37) 24 AIR 1937 Mad 403 (404). (Claim to lead horse and hold kalasam—Emoluments not attached—Still it is an office.)
('27) 14 AIR 1927 Cal 783 (785): 54 Cal 614 (DB).

13. ('88) 15 Cal 159 (162) (DB).

14. (1900) 27 Cal 30 (32) (DB).

15. (1863) 1 Mad H C R 301 (307, 308) (DB).
('11) 21 Mad L Jour 730 (736, 738) (DB). (Declaration as to right to perform the duties of an office.)

16. ('87) 11 Bom 185 (194).

17. ('15) 2 AIR 1915 All 197 (197, 198) : 37 All 313 (316) (DB).

18. See cases under foot-note (4).

19. *See the following cases in which the supposed conflict is assumed to exist* :
('10) 6 Ind Cas 864 (866) (DB) (Cal).
('26) 13 AIR 1926 Bom 161 (162, 163) : 50 Bom 148 (DB).
('27) 14 AIR 1927 Cal 783 (785): 54 Cal 614(DB).

"office to which fees or emoluments are attached as of right or which is attached to a place." It is submitted, therefore, that the distinction sought to be drawn as furnishing a test for the maintainability of a suit for a religious office cannot be accepted as correct.

There is a conflict of opinion as to whether a hereditary priest of a family or class of persons can, by suit, compel such persons to accept his ministrations. The Bombay High Court held in the undermentioned cases[20] that he can do so, the reason being that, by Hindu law, such a right is regarded as a *vritti* ranking among hereditary rights of immovable property. The Allahabad,[21] Calcutta,[22] Madras[23] and Patna[24] High Courts have, on the other hand, held that there is no such right in law and that in the absence of proof of a custom establishing such right, it is not enforceable in a Court of law. The basis of their view is that Courts can exercise no control over the faith and conscience of a *yajman* who refuses to resort to a particular priest, that it is the personal right of every person to choose his own priest and that there is no law to limit the exercise of this right.[25] There being no *legal obligation* on a person to resort only to a particular priest, there is no corresponding *legal right* in the priest which he can enforce by suit. The Bombay decisions referred to above were pronounced before the enactment of the Invalidation of Hindu Ceremonial Emoluments Act (Bombay Act No. XI of 1926), under S. 4 of which it is now expressly provided that no person shall be entitled to claim, as a matter of right, any ceremonial emoluments from any Hindu who does not call in the services of the person claiming those emoluments. So, the law is now settled in all the Provinces that a suit of the kind in question here is not cognizable by Civil Courts.

36. Suit for secular office. — See Note 35.

37. Suit for religious office to which fees are appurtenant as of right. — See Note 35.

38. Suit for fees attached to religious office. — *Fees* or *emoluments* attached to an office are sums of money which, by stipulation, or by custom, the holder of an office is entitled to claim as of *right* on the performance of the services. Such fees or emoluments can be recovered by suit in the following cases :

(1) When the services are actually performed, from the *yajman* or the person for whom they are performed.[1]

(2) Where the services are not performed, from an *usurper* of the office who has received such fees,[2]

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20. † ('12) 36 Bom 94 (100, 103) (DB). (Civil Court is competent to entertain a claim for a hereditary office of a family priest.)
('21) 8 AIR 1921 Bom 209 (210) : 45 Bom 234 (DB). (Injunction claimed was however refused on the ground of long delay.)
('80) 3 Bom 9 (11) (DB). (Village priest.)
[*See* ('80) 3 Bom 232 (234) (DB). (Village Joshi can sue intruder in office for fees.)]
[*See also* ('07) 3 Nag L R 47 (48, 49) (Do.)]

21. ('67) 2 Agra 80 (80) (DB).

22. ✣('10) 6 Ind Cas 864 (867, 868) (DB) (Cal).
(1852) Beng S D A 398 (399, 400) (FB). (Cited in 6 Ind Cas 861 (Cal).)
('71) 15 Suth W R 531 (533) (DB).
('68) 10 Suth W R 114 (114) (DB).
('66) 5 Suth W R 224 (225) (DB).
(1862) 1 Hay 365.

23. ('84) 7 Mad 424 (427, 428) (DB).

24. ('16) 3 AIR 1916 Pat 215 (216) : 1 Pat L Jour 381 (DB).
('19) 6 AIR 1919 Pat 312 (313) (DB).

25. ('29) 16 AIR 1929 Pat 103 (107) : 8 Pat 677 (DB).

Note 38

1. ('71) 6 Mad H C R 449 (451) (DB).
('97) 7 Mad L Jour 23 (25) (DB).

2. ('42) 1942 Nag L Jour 443 (444). (Correctness of decision in 8 N L R 133 that the yajman is equally liable with the intruder himself doubted.)
✣('79) 2 Mad 62 (65) : 6 Ind App 120 (PC).
('90) 17 Cal 906 (909, 910) (DB). (Claim for offerings made out of temple funds.)
('20) 7 AIR 1920 Bom 98 (99) : 44 Bom 733 (DB). (Claim by vatandar barbers against usurper.)
('97) 21 Bom 821 (822) (DB). (Village Joshi.)
('79) 3 Bom 232 (233) (DB). (Right of Vatandar Joshi to recover pecuniary damages from usurper.)
('74) 11 Bom H C R 6 (8, 9, 10) (DB).
('69) 6 Bom H C R (A C) 250 (253) (DB).
† ('28) 15 AIR 1928 Nag 150 (151). (Vatandar Joshi in Central Provinces proper can sue for his dues.)
('07) 3 Nag L R 47 (48).

Such fees would have been recoverable from the *yajman* also according to certain old Bombay decisions.[3] As seen in Note 35 these decisions are now no longer law and it is settled law in every Province that a *yajman* is not compellable to accept the ministrations of any priest.[4]

A right to offer ministrations to pilgrims visiting a particular place and to receive the offerings that they may make is a right in property and a suit for declaration of such right or for an injunction restraining another person from interfering with such right will lie.[5] But no suit will lie for the *recovery* of a *gratuity* or *voluntary* offering,[6] or for damages against any person for failing to make an offering where there is no *duty* to make it.[7] Nor can a person lay a claim to the *voluntary* offerings made to a usurper of his office under circumstances showing that the offerings were made to him in his personal capacity.[8] Where, however, voluntary offerings have been contributed to a temple or a fund, they become part of the temple property or fund and any person entitled to share in it either in right of property in the place or of an office attached to it can maintain a suit in respect thereof.[9] Again, where there is a long and uninterrupted *usage* or an *agreement* between the sharers to share the voluntary offerings in a particular manner, such usage or agreement can be enforced between them.[10] Similarly, where several persons have a

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3. ('92) 16 Bom 281 (283) (DB). (Suit by Ayya of math for fees from member of caste for failing to invite him for marriage.)
† ('79) 3 Bom 9 (10, 11) (DB).

4. ('42) 1942 Nag L Jour 443 (444). (Correctness of decision in 8 N L R 133 that the yajman is equally liable with the intruder himself doubted.)
('13) 35 All 412 (418) (FB).
('08) 11 Oudh Cas 212 (216) (DB).
('17) 4 AIR 1917 All 115 (116) : 39 All 196 (DB).
† ('29) 16 AIR 1929 Pat 103 (106, 107) : 8 Pat 677 (DB).

5. ('42) 29 AIR 1942 All 320 (323) : ILR (1942) All 821 (DB). (Birt Jajmani right and manbrit — Distinction — Right to Birt Jajmani is right in property. AIR 1921 All 374 : 43 All 159 distinguished.)
('89) 13 Bom 548 (550) (DB).
('21) 8 AIR 1921 All 316 (317, 318) : 43 All 20 (DB).
('25) 12 AIR 1925 Bom 209 (209, 210) (DB).
[*See also* ('17) 4 AIR 1917 All 115 (116) : 39 All 196 (DB). (Right to receive dues from funerals is an existing right in immovable property.)
('84) 10 Cal 73 (73) (DB). (Funeral ceremonies.)
('24) 11 AIR 1924 Oudh 252 (255) : 27 Oudh Cas 114 (DB).

6. ('07) 29 All 683 (684, 685) (DB). (Dues paid by baqqals and shopkeepers to chowdhries of bazars.)
✠ ('09) 33 Bom 278 (292) (DB).
('21) 8 AIR 1921 All 374 (376, 377) : 43 All 159 (DB).
('69) 1 N W P H C R 291 (292) (DB).
('86) 10 Bom 661 (663) (DB).
† ('78) 2 Bom 470 (473) (DB).
('10) 6 Ind Cas 175 (176) (DB) (Cal).
('68) 10 Suth W R 457 (458) (DB).
('28) 15 AIR 1928 Mad 851 (852) (DB).
✠ (82) 5 Mad 313 (319) (DB).
('02) 5 Oudh Cas 225 (226)

7. ('19) 6 AIR 1919 Mad 396 (397) (DB).
('82) 6 Bom 122 (123) (DB).

8. ('11) 10 Ind Cas 41 (43) (DB) (Cal).
('16) 3 AIR 1916 Pat 215 (216) : 1 Pat L Jour 381 (DB).
('13) 35 All 412 (418) (FB). (Offerings made individually to a member of Maha Brahman family are not divisible among other members.)
('69) 6 Bom H C R 250 (253) (DB).
('99) 26 Cal 356 (358) (DB).
('29) 16 AIR 1929 Pat 103, (107, 108) : 8 Pat 677 (DB).

9. ('65) 3 Suth W R 33 (33) (DB).
('10) 20 Mad L Jour 530 (533) (DB).
('23) 10 AIR 1923 All 425 (426) : 45 All 437 (DB). (Suit to share in the offerings of the temple will lie.)
('61) S D A N W P 1861, 30th September cited in 5 Mad 313 (319). (Suit for damages for refusing to a person his right to participate in voluntary offerings contributed to a fund will lie.)
('61) S D A N W P, page 720. (Cited in 5 Mad 313) —(Do.)
† ('26) 13 AIR 1926 Bom 161 (163) : 50 Bom 148 (DB).
('21) 8 AIR 1921 Bom 297 (298) : 45 Bom 683 (DB). (Offerings placed by devotees before the idol.)
('19) 6 AIR 1919 Lah 372 (372) : 1919 Pun Re No. 26 (DB). (Suit held maintainable as a cosharer.)
('20) 7 AIR 1920 Mad 137 (141) (DB).
[*See also* ('72) 9 Bom H C R 413 (415) (DB). (Suit to establish exclusive right to perform Dahihandi and for damages will lie.)]

10. ('72) 9 Bom H C R 413 (415) (DB). (So assumed.)
('63) 9 Moo Ind App 344 (384) (P C). (No usage or agreement proved.)
('83) 13 Cal L Rep 49 (50) (DB). (Jajamankee right and fees for priestly services.)
('71) 15 Suth W R 531 (533) (DB).
('28) 15 AIR 1928 Lah 730 (731). (Right of Acharjee against yajman not enforceable but between Acharjees *inter se* is enforceable.)
('07) 17 Mad L Jour 493 (494) (DB).
('65) 2 Mad H C R 330 (331) (DB).
('18) 5 AIR 1918 Oudh 462 (463) : 20 Oudh Cas 265. (Agreement.)

joint right of performance of ceremonies, or joint right to share in the profits, one of them is entitled to sue the others for a share of such offerings got by them.[11]

39. Suit for religious office to which no fees are attached. — See Note 35.

40. Suit not of a civil nature. — See Notes 41 to 49.

41. No suit lies where there is no such right as that claimed. — The section assumes that a right recognised by law has been infringed. Where there is no such right at all as that claimed, a suit in respect thereof does not lie. Thus, the invasion of privacy by opening windows is not a wrong for which an action would lie[1] unless such a right is recognised by local custom (see Note 42). So also is the filing of a civil action whether with or without malice or reasonable and probable cause.[2]

The non-existence in law, of a right such as that claimed, is to be distinguished from the non-existence, *in a particular individual*, of a right which is *recognised by law*. A suit brought by the individual on the latter right is not barred from the jurisdiction of Civil Courts, but it will have to be dismissed on the ground that the plaintiff has not established that *he* has got such right. And, in fact, in almost all the cases filed in Courts, the only question that arises is whether the party has the right claimed.

42. Right of privacy. — Generally speaking, a suit for the enforcement of a right of privacy is not maintainable. This is because such a right is not recognised by law.[1] A right of that kind may, however, be recognised by local *custom*,[2] in which case the principle enunciated by the maxim *sic utere tuo ut alienum non laedas*—use your own property so as not to injure the rights of others—will apply.[3] Such a custom has

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('05) 8 Oudh Cas 339 (342, 343) (DB).
('16) 3 AIR 1916 Pat 215 (216) : 1 Pat L Jour 381 (DB). (Suit if based on custom does not lie.)

11. ('24) 11 AIR 1924 Oudh 252 (255) : 27 Oudh Cas 114 (DB).
('06) 4 Cal L Jour 469 (471) (DB). (Joint right to share in the offerings.)
('65) 1 Bom H C R 12 (13) (DB). (An action will lie to obtain a binding declaration of a person's right to perform duties of pujaris and to receive proceeds of Mandir.)
† (1900) 27 Cal 30 (33) (DB).
('68) 10 Suth W R 114 (114) (DB).
('66) 5 Suth W R 222 (222) (DB).
('19) 6 AIR 1919 Sind 35 (40): 13 Sind L R 56(DB).

Note 41

1. ('94) 18 Mad 163 (164) (DB).

2. ('75) 1 Bom 467 (468)(DB). (But see the qualification in the following passage from Arnold on Damages, p. 213—In certain cases an action may also lie where the defendant has merely instituted civil proceedings, e. g., presentation of bankruptcy or company winding up petition : see Quartz Hill v. Fyre, (1883) 11 Q B D 674 (682, 685); Wyall v. Palmer, (1899) 2 Q B 106 (110) or institution of civil proceedings which affect the plaintiff's reputation or credit : see Craig v. Hasell, (1843) 4 Q B 481 (491, 492).)

Note 42

1. ('95) 18 Mad 163(164)(DB). (Invasion of privacy by opening window — Suit for injunction to close the window.)
('70) 14 Suth W R 103 (104) (DB).
('71) 3 N W P H C R 311 (312) (DB).
('72) 9 Bom H C R 266 (269) (DB).
('01) 5 Cal W N 147 (149, 150) (DB). (Fact that defendant's wall was standing for 50 years without window does not give a right of privacy to plaintiff.)
('72) 18 Suth W R 14 (15) (DB). (Right of privacy is not inherent right of property.)
('71) 6 Beng L R App 76 (77) (DB).
('70) 5 Beng L R 677 (Note).
†('86) 3 Mad H C R 141 (143, 144) (DB).

2. †('70) 14 Suth W R 103 (104) (DB).
('72) 18 Suth W R 14 (15) (DB).
('07) 29 All 582 (584). (In Meerut right of privacy is recognized.)
†('88) 10 All 358 (387, 388) (DB).
('88) 10 All 162 (164, 166) (DB).
(1900) 2 Bom L R 454 (459) (DB). (In Gujrat, right of privacy is affirmed by decisions.)
('72) 9 Bom H C R A C 266 (269) (DB).
('71) 8 Bom H C R A C 87 (88) (DB). (Window commanding view, not of private apartments, but of an open courtyard—There is no invasion of right of privacy.)
('69) 6 Bom H C R A C 143 (145) (DB). (In Gujrat, right of privacy is affirmed by decisions.)
† ('69) 5 Bom H C R A C 42 (44, 45) (DB). (Do.)
[*See also* ('07) 29 All 64 (65).
('70) 6 Beng L R App 76 (77) (DB).]
See also S. 18, Illustration (b) of the Indian Easements Act (V of 1882).

3. †(88) 10 All 358 (386) (DB).
('66) 5 Suth W R 208 (209) (DB). (Defendant is justified in putting up a wall hiding the view of his private apartments from view from the plaintiff's upper storey.)

been recognised in various parts of India where the *purdah* system prevails,[4] and any infringement of the right of privacy in those places will give rise to a cause of action.[5] The burden of proof lies on the person setting up the right to prove that it exists and is enjoyed in respect of the specific premises on behalf of which it is claimed.[6] Where the owner of certain premises has a right of privacy, a lessee or a person in lawful enjoyment thereof has also the same right.[7] As to the *extent* of the right that can be claimed, see the undermentioned cases.[8]

43. Suits involving principally caste questions. — It has already been stated in Note 16 that a suit in which the principal question is one relating to caste, is not a suit of a civil nature. In the Bombay Presidency this principle has been specifically expressed by the Legislature in S. 21 of Regn. II of 1827 by which 'no interference on the part of the Courts in *caste questions* is hereby warranted beyond the admission and trial of any suit instituted for the recovery of damages on account of an alleged injury to the caste and character of the plaintiff, arising from some illegal act or unjustifiable conduct of the other party.' In *Abdul Kadir* v. *Dharma*,[1] which was a case under that section, Sir Charles Sargent, C. J., defined a "caste" as comprising any well-defined native community governed for certain internal purposes by its own rules and regulations, "A caste," said Sankaran Nair, J., in *Muthuswami* v. *Masilamani*,[2] "may be taken to be a combination of a number of persons governed by a body of usages which differentiate them from others. These usages may refer to social or religious observances, to drink, food, ceremonial pollution, occupation and marriage. . . . . The caste is, so far as I know, invariably known by a distinctive name for identification; it has its own rules for internal management and has also got the power of expulsion."

As to whether any particular question is a caste question or not, the test as laid down by Sir Charles Sargent, C. J., in *Murari* v. *Suba*[3] is whether the taking cognizance of the matter in dispute would be an interference with the autonomy of the caste. If it would be, then the Civil Courts have no jurisdiction.[4] The autonomy of the

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4. ('69) 6 Bom H C R 143 (145) (DB). (It exists in Gujrat.)
(1900) 2 Bom L R 454 (458) (DB). (Do.)
('94) 16 All 69 (71, 72) (DB). (Recognized in the United Provinces. Right attaches to property and is not dependent on the religion of the owner thereof.)
†('88) 10 All 358 (387) (DB). (Recognized in the United Provinces.)

5. ('68) 3 Agra 253 (253). (Invasion of the right is not a sentimental grievance but a substantial injury.)
('88) 10 All 358 (387) (DB).
('07) 29 All 582 (584). (Opening of apertures towards plaintiff's house is material invasion of right.)
('94) 16 All 69 (71) (DB).

6. ('82) 1882 Pun Re No. 19, p. 72 (73).
('92) 1892 All W N 159 (159, 160).
('72) 9 Bom H C R A C 266 (269) (DB). (Most satisfactory proof is necessary to establish custom where it is not recognized locally.)

7. ('07) 29 All 64 (65).

8. ('71) 3 N W P H C R 311 (312). (Alteration consistent with legal right of enjoyment but giving a wider range of vision is not an invasion of the right.)
('71) 8 Bom H C R A C 87 (88) (DB). (Right is confined to apartments and is not extended to court-yards and outside of houses.)
('92) 1892 All W N 159 (159). (Room used by males —No right of privacy exists in respect of it.)
('88) 10 All 358 (386) (DB). (It may exist in respect of the court-yards or the verandas where the pardhanashin women used to sleep in the hot weather.)
(1900) 2 Bom L R 454 (459) (DB). (Right is limited to the particular apartments secluded from general observation.)

Note 43

1. ('96) 20 Bom 190 (192) (DB). (The term "caste" is not necessarily confined to Hindus.)
[*See also* ('09) 3 Ind Cas 955 (957) : 33 Mad 67 (DB). (A caste is a voluntary association of persons for certain purposes.)]

2. ('10) 5 Ind Cas 42 (45) : 33 Mad 342 (DB).

3. ('82) 6 Bom 725 (727) (DB).
[*See also* ('10) 34 Bom 467 (481, 483) (DB). ("Autonomy" must mean at least as much as this, that where rights to property are not involved all matters must be left to the decision of the caste.)]
('95) 19 Bom 507 (522).

4. ('99) 23 Bom 122 (130) (DB). (A caste question is one which relates to matters affecting the internal autonomy of the caste and its social relations.)
† ('32) 19 AIR 1932 Bom 122 (126) : 56 Bom 212 (FB). (Do.)

caste will, however, be recognised only in those *social* or *religious* observances such as precedence and privilege, by which the caste is governed, and does not extend to dealing with the rights in *property* or other *civil* rights of its members. The jurisdiction of the Courts in respect of these latter rights is not barred.[5] Thus, a claim to be invited to a dinner given by a particular fraternity[6] or to be invited for certain ceremonies[7] or to have social intercourse with others[8] are all matters exclusively within the power of the caste to deal with and cannot form the subject-matter of a suit in a Civil Court. Similarly, no suit will lie to compel the members of a caste to attend the funerals in the plaintiff's family[9] or to compel certain barbers to shave and pare the nails of certain parties as per custom of the caste[10] or to enforce an agreement to remain for ever in a particular community.[11]

But, where the membership and *character* of a member of the caste are injuriously affected by what has been done, his *civil* rights are affected and the Civil Courts may discuss the act done even though a caste question is involved in it.[12]

44. Suits relating to caste property. — It has been observed in Note 17 above that a right to *property* is a civil right, and where a plaintiff claims a right to property, the Civil Courts will have jurisdiction to decide the claim though a caste question is incidentally raised in the suit.[1] Where a property, however, belongs *to a caste as a whole*, no one member or a particular faction thereof has a right to any portion of the property as against the others unless the caste has decided to give such member or faction any right in it.[2] The giving or withholding of such rights is solely with the caste itself and

('24) 11 AIR 1924 Bom 522 (522, 523) (DB). (A particular mode of user as to caste property is for the caste to decide and not the Court.)
('96) 20 Bom 784 (788) (DB).
('95) 19 Bom 507 (525).
('94) 18 Bom 115 (118, 119). (Courts cannot take cognizance of suits involving questions purely relating to the social rules of some particular caste.)
('81) 5 Bom 83 (84) (DB). (Claim to recover vessels belonging to the caste is a caste question.)
('77) 2 Bom 470 (473) (DB). (Claim to office of chelvadi of the caste is a caste question as it does not carry any emolument.)
('69) 6 Bom H C R A C 17 (19) (DB). (Claim to fee as mehatars of a caste is a caste question.)
('94) 17 Mad 222 (224). (A guru as head of a caste, has jurisdiction to deal with all matters relating to the autonomy of caste according to recognized caste custom.)
('83) 6 Mad 381 (388, 394) (DB). (Criminal case.)
('29) 16 AIR 1929 Sind 1 (3, 4): 23 Sind L R 299. (Member of panchayat, breaking its rule not to marry second wife during lifetime of first—Dispute referred to arbitration and award made—Member consenting to award — Dispute involves purely caste question and no suit would lie.)

5. ('88) 12 Bom 225 (228) (DB). (Claim to property.)
('35) 22 AIR 1935 Bom 367 (371). (Where the act of ex-communication amounts to a deprivation of the rights and privileges of a member of the community and of his civil rights in the properties of the caste or jamat, a Civil Court has jurisdiction to entertain a suit and award damages in respect of such expulsion.)
('26) 13 AIR 1926 Bom 69 (70) : 50 Bom 124 (DB). (Court has jurisdiction over a matter not relating to internal administration of caste, but to the property of the caste though there has been a division of opinion in the caste.)
('89) 13 Bom 429 (433). (Suit for office of khatib—Not a caste question.)
('83) 7 Bom 323 (329). (Exclusive right to perform worship in a temple is not a caste question.)
('17) 4 AIR 1917 Mad 431 (435, 436, 438): 39 Mad 1056 (1061) (DB).

6. ('91) 15 Bom 599 (610, 611).
('69) 11 Suth W R 457 (459, 460) (DB).
('66) 6 Suth W R 325 (325).

7. (1863) 1 Mad H C R 301 (308) (DB).
('84) 7 Mad 91 (92) (DB). (Claim to receive first honours at certain pagodas on festivals.)
('12) 17 Ind Cas 527 (528) (DB) (Mad). (Marriage ceremony.)

8. ('74) 22 Suth W R 517 (518) (DB).

9. ('94) 18 Bom 115 (118).
[*See also* ('86) 10 Bom 661 (663) (DB). (Suit for damages on account of withholding funeral presents from plaintiff—Suit held not maintainable.)]

10. (1864) 1 Suth W R 351 (352) (DB).

11. ('68) 10 Suth W R 349 (349) (DB). (Social agreement to remain for ever in particular society.)

12. † (15) 2 AIR 1915 Mad 908 (909) (DB).
(87) 11 Bom 534 (536) (DB).
[*See also* ('83) 6 Mad 381 (387) (DB).]

Also see Notes 16, 44 and 46.

Note 44

1. ('02) 26 Bom 174 (178, 185) (DB).
('87) 11 Bom 534 (535) (DB).
('88) 12 Bom 225 (228) (DB).
[*See also* ('95) 19 Bom 507 (522).
('79) 2 Mad 62 (65) : 6 Ind App 120 (PC).]

2. ('81) 5 Bom 84*n* (84*n*) (FB).

a suit, therefore, by one faction of a caste against another faction thereof for a share of the property belonging to the *caste as a whole is not maintainable* in Civil Court.[3] But where, by a resolution passed by a majority at a meeting of the caste, a *wadi* belonging to the caste is to be managed by the plaintiff, the latter can maintain a suit against the members, who are in wrongful possession thereof for its recovery.[4] Similarly, a right to *use* caste property *in accordance with the rules and usages of the caste* is a civil right and a suit will lie for declaration of such right as against persons obstructing the plaintiff in such user. But the *mode* of user is a question solely for the caste itself to decide and no suit will lie for regulating the user.[5] Where the majority of a caste has by resolution prescribed the mode of user, the minority will be bound by it and a suit will lie to restrain the minority from using it in any but the prescribed mode.[6]

45. Suits for inspection of accounts of caste property. — The privilege in regard to inspection of caste documents such as the minute book and the correspondence file of the caste committee must be determined solely by reference to the rules of the caste and in order to enforce such privilege, the proper tribunal to approach is the caste and not the Civil Court.[1] But where persons in the position of beneficiaries seek to obtain discovery of accounts of the management of the *trust properties* of a caste, the right claimed is a civil right and a suit therefor lies in a Civil Court.[2]

46. Suits relating to expulsion from caste. — The *expulsion* or *excommunication* of a person from a caste, unlike deprivation of merely social privileges, affects the *status* and *character* of that person in the eyes of others. As such, it affects his *civil rights* and the Courts are therefore competent to question the validity or otherwise of such expulsion.[1] The caste can validly excommunicate or otherwise punish a member thereof for a caste offence,[2] but that jurisdiction must be exercised with due care and caution and in conformity with the usage of the caste.[3] If so exercised, the Courts will not interfere with the decision.[4] But the Courts will award relief to the injured party

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3. ('81) 5 Bom 84*n* (85*n*) (FB).
('81) 5 Bom 83 (84) (DB).
4. ('26) 13 AIR 1926 Bom 69(70): 50 Bom 124 (DB).
5. ('24) 11 AIR 1924 Bom 522 (522, 523) (DB).
('29) 16 AIR 1929 Rang 77 (78, 79) : 6 Rang 783 (DB). (User and occupation of monastic lands in Upper Burma.)
[*See also* ('10) 1 Upp Bur Rul 35 (39).]
6. ('95) 19 Bom 507 (522, 523).

Note 45

1. † ('09) 4 Ind Cas 108(111, 115): 34 Bom 467 (DB).
2. ('09) 4 Ind Cas 569 (573) (Bom).
✠ ('32) 19 AIR 1932 Bom 122 (125) : 56 Bom 242 (FB).

Note 46

1. ('94) 21 Cal 463 (470, 471) (DB).
('35) 22 AIR 1935 Bom 367 (370). (Suit for declaration that resolution of caste tribunal excommunicating a person is void — Civil Court has jurisdiction.)
('34) 21 AIR 1934 Bom 431 (433) (DB). (Membership of caste involving rights to property — Civil Court has jurisdiction to enquire into wrongful expulsion.)
('02) 26 Bom 174 (189) (DB).
('87) 11 Bom 534 (536) (DB).
† ('99) 23 Bom 122 (125, 126) (DB).
('67) 7 Suth W R 299 (300) (DB).
('35) 22 AIR 1935 Nag 156 (162). (Right to remain in community or to exercise certain rights is a civil one.)
(1859) S D A 535 (538).
Also see Notes 16, 43 and 44.
2. *See* ('35) 22 AIR 1935 Nag 156 (163). (Members openly defying authority of chief priest — Chief priest has power to excommunicate them.)
3. ('10) 33 Mad 67 (69, 70) (DB).
('35) 22 AIR 1935 Bom 367 (371).
('14) 1 AIR 1914 All 27 (39, 41) (DB).
('30) 17 AIR 1930 Sind 204 (206).
[*See* ('10) 5 Ind Cas 57 (57) (DB) (Mad). (Order of spiritual head restoring a person to caste gives no right of civil action.)]
4. (1900) 24 Bom 13 (22, 23) (DB).
† ('94) 17 Mad 222 (225) (DB).
('35) 22 AIR 1935 Bom 268 (280).
('35) 22 AIR 1935 Bom 361 (364) (DB).
('35) 22 AIR 1935 Bom 367 (370). (If requirements of natural justice are complied with, Court of law will not act as Court of Appeal on decision of domestic tribunal.)
✠ ('91) 15 Bom 599 (611).
('69) 3 Beng L R (A C) 91 (95, 99) (DB).
('30) 17 AIR 1930 Mad 100 (101, 102) (DB). (No negation of natural justice.)
[*See* ('87) 11 Bom 185 (195). (Beni-Israelite community in Bombay — Dismissal of officers of community by resolutions passed at a meeting.)
('66) 6 Suth W R 325 (325) (DB).]

where the expulsion is subversive of the principles of *natural justice*, as for instance, where the party expelled has not been given an opportunity of being heard,[5] or where the expulsion is not in conformity with the usage and rules of the caste.[6] In such cases, the Court may —

(1) grant a declaration that the plaintiff is entitled to be re-admitted to the caste.[7] In the mofussil of Bombay, however, a suit for restoration to caste is expressly barred by S. 21 of Bombay Regulation II of 1827;

(2) award damages for the wrongful expulsion,[8] or

(3) where the excommunication proceedings amount to defamation of the plaintiff, award damages for the injury caused to the character of the plaintiff.[9]

47. Suits for upholding mere dignity or honour. — A claim to establish a *mere dignity* or *honour* even though connected with an office is not cognizable by the Civil Court.[1] The reason is that the duty of individuals to submit to and perform certain religious and social observances in accordance with the ritual and usages of the sect, is, in the absence of legal recognition and provision, an imperfect obligation of a moral and not of civil nature.[2] Thus, a claim for certain temple honours to be shown to plaintiff as first *Gurukar* of a certain caste, he having no duties to perform,[3] or a claim to precedence of worship at religious festivals,[4] or a claim to *man-pan*,[5] or a claim to

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5. ('89) 12 Mad 495 (499) (DB).
† ('87) 10 Mad 133 (144, 145) (DB). (A custom or usage of a caste to expel a member in his absence without notice given or opportunity of explanation offered, is no valid custom — Per Kernan, J.)
('20) 7 AIR 1920 Cal 223 (228, 229) : 47 Cal 623 (629, 630) (DB). (Association.)
('32) 19 AIR 1932 Mad 445 (451, 453) : 55 Mad 727 (DB).
(1905) 1905 App Cas 73 (81), Andrews v. Mitchell. (Clubs.)
(1881) 17 Ch D 615 (629), Dawkins v. Antrobus. (Do.)

6. ('87) 10 Mad 133 (143) (DB). (Expulsion for alleged breach of caste rules which in fact he had not broken.)
See also cases under foot-note (5).

7. ('67) 7 Suth W R 299 (300) (DB).

8. ('89) 12 Mad 495 (500) (DB).

9. ('91) 15 Bom 599 (610, 611).
('02) 26 Bom 174 (178, 179) (DB).
('09) 3 Ind Cas 955 (958) : 33 Mad 67 (DB).
('83) 6 Mad 381 (391) (DB). (Criminally liable.)
[*See* ('17) 4 AIR 1917 P C 203 (207) : 44 Ind App 192 : 39 All 561 (PC).
(1900) 24 Bom 13 (16) (DB). (Defendant held not guilty of defamation.)]

Note 47

1. ('12) 16 Ind Cas 338 (339) (DB) (Bom).
('29) 16 AIR 1929 Mad 493 (494) (DB).
† ('31) 18 AIR 1931 Bom 273 (274, 276) (DB). (Village fairs — Voluntary payments to Kulkarni for no functions to be performed are mere dignities and not emoluments.)
('78) 2 Bom 470 (473) (DB). (Claim to be chelvadi is a caste question and no suit lies.)
‡ ('78) 2 Bom 476 (478) (DB).
('66) 5 Suth W R 224 (225) (DB). (Claim for sum of money as Murjada (or respect money) on the ground of custom.)
('19) 6 AIR 1919 Lah 193 (194) (DB).
('38) 25 AIR 1938 Mad 334 (335) (DB). (A claim to first honours at a festival in a temple is only a right to a dignity or precedence and cannot be regarded as a right of civil nature, whether it is in a temple or elsewhere, so long as it is not attached to an office — A suit in respect of such a right is not maintainable.)
('35) 22 AIR 1935 Mad 621 (623) (DB).
('35) 22 AIR 1935 Mad 679 (680) (DB). (AIR 1917 Mad 903 dissented from.)
('19) 6 AIR 1919 Mad 1026 (1027) (DB). (Receiving teertham and prasadam in a Hindu temple in a certain order.)
('11) 10 Ind Cas 110 (110) (DB) (Mad). (Suit for right to a stanam.)
('07) 17 Mad L Jour 421 (422) (DB). (Exclusive right to act as khatib, i. e., reader of khootba in a Masjid.)
[But see ('72) 9 Bom H C R 413 (416). (Suit to establish exclusive right of breaking curd pot in temple and for damages.)]

2. (1863) 1 Mad H C R 301 (308).
('88) 1888 Pun Re No. 141, p. 379 (380).

3. ('21) 63 Ind Cas 115 (116) (Mad).
('33) 20 AIR 1933 Mad 264 (265). (No mutuality of obligations — Hence the suit is one for mere honours.)

4. ('84) 7 Mad 91 (92).
('86) 10 Bom 233 (237).
('09) 33 Bom 278 (292).
('78) 2 Bom 476 (478). (Right to offer the first cocoanut to an idol at an annual festival.)

5. ('82) 6 Bom 116 (121).
('07) 3 Nag L R 131 (133).
('13) 37 Bom 442 (446). (But a private award in a *manpan* dispute may by filed in Court under Sch. 2, para. 20, C. P. C.)

"*neota*,"[6] or a claim for *adavi palki*, i. e., riding in a palanquin crosswise along the streets,[7] are all claims for *mere dignity* or *honour* not cognizable by Civil Courts. Similarly, the right to obtain *theertham* or honours in a particular order of precedence in a temple is not a civil right which can be enforced or declared in a Civil Court.[8] Where, however, the honours are claimed as attached inseparably to an office as part of its emoluments and not simply as accorded to its holder as a mark of respect, a civil suit for such honours will lie,[9] and the Court can protect, by injunction, persons having a right to such honours from such right being infringed by others.[10]

48. Suits relating purely to religious rites or ceremonies. — Suits as to purely social matters or as to purely religious rites or ceremonies which involve no question of the right to property or to any office are, as has been seen in Notes 16 and 43 above, not suits of a civil nature.[1] It is not the province or duty of the Court to pronounce on the truth of religious tenets nor to regulate religious rites or ceremonies.[2]

"The protection of the law in religious matters," said Marten, J., in *The Advocate-General of Bombay* v. *Yusuf Ali*,[3] "is confined to the protection of religious *property* or a religious *office*. The Court will not decide questions of religious rites or ceremonies, nor will it, I think, pronounce any religious doctrine unless it is necessary to do so in order to determine rights to property." And Melvill, J., said in *Vasudev* v. *Vamnaji*,[4] "It is the policy of the State to *protect* all religions but to *interfere* with none."

Thus, a suit by the worshipper of an idol, not based on any right to the property in the idol or to an office, against its custodians to locate it in a particular temple instead of another,[5] or to adorn it at certain seasons,[6] or a suit to establish a right to recite sacred texts in a temple without a claim to any office or emoluments,[7] are all suits relating merely to religious rites and ceremonies and are not cognizable by Civil Courts. But where a right to *property*, office or other civil right is in question, the suit is cognizable by the Court even though it has to decide incidentally questions relating to religious rites or ceremonies.[8]

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6. ('33) 20 AIR 1933 Lah 317 (317).
7. ('21) 8 AIR 1921 Bom 140 (142) : 45 Bom 590. [*See* ('43) 3 Moo Ind App 198 (217) (PC). (*Quære.*)]
8. ('36) 23 AIR 1936 Mad 973 (975).
9. ('09) 32 Mad 291 (297, 298).
('13) 19 Ind Cas 257 (265) (Mad).
('37) 24 AIR 1937 Mad 403 (404). (A claim to a right to lead a horse and a right of holding a Kalasam at the time of an Amman festival, by persons who are not temple servants and to receive as reward for these religious offices the honours such as ceremonial gifts of pan-supari before any other worshippers received them is a claim to an office within the meaning of Expl. 2 to S. 9.)
('17) 4 AIR 1917 Mad 903 (904).
10. ('12) 15 Ind Cas 409 (411) (Mad).

Note 48

1. † ('82) 6 Bom 116 (121) (DB). (Right to parade bullocks on certain days.)
('05) 32 Cal 1072 (1076) (DB). (Location of the idol.)
('10) 6 Ind Cas 864 (866) (DB) (Cal).
('39) 26 AIR 1939 Mad 757 (759) (DB). (A question as to whether a particular namam or mark should be placed on the God's head is at best one pertaining to religious ritual and as such is excluded from the cognizance of a Civil Court.)
2. ('29) 16 AIR 1929 Mad 526 (527).
('84) 7 Mad 91 (92) (DB).
('35) 22 AIR 1935 Bom 361 (362) (DB). (Whether particular cult is within Vedic religion or not, Civil Court is not competent to decide.)
† ('39) 26 AIR 1939 Mad 494 (495).
('15) 2 AIR 1915 Mad 877 (882) (DB). (Whether an individual may repeat any particular mantram or portion of the prabandham.)
('06) 16 Mad L Jour 150 (157) (DB).
('92) 15 Mad 355 (356) (DB).
(1863) 1 Mad H C R 301 (308).
('17) 4 AIR 1917 Low Bur 43 (51) (DB). (Determining question of orthodoxy by the Civil Court would be an invidious task.)
('92-96) 1892-1896 Upp Bur Rul 59. (Order passed by Buddhist Ecclesiastical authorities.)
[*See* (1845) 3 Moo Ind App 359 (382) (PC). (*Quære.*)]
3. ('21) 8 AIR 1921 Bom 338 (355).
4. ✣('81) 5 Bom 80 (82) (DB).
5. ('05) 32 Cal 1072 (1076) (DB).
6. ('81) 5 Bom 80 (82) (DB).
7. ('05) 28 Mad 23 (25) (DB).
('77) 2 Mad 62 (65) : 6 Ind App 120 (PC).
See also Note 16, foot-note (8).
8. ('83) 7 Bom 323 (329) (DB).

49. Suits for voluntary payments not based on agreement or prescription. — As has been observed in Note 38 above, a suit to recover a *gratuity* or a *voluntary* offering is not maintainable. As to when a voluntary payment made on behalf of another can be recovered back, see Ss. 69, 70 and 72 of the Contract Act. As to when a suit lies for recovery of subscriptions promised, see the undermentioned cases.[1]

50. Suits expressly barred. — As has been seen in Note 2, an infringement of an existing legal right is always actionable in a Civil Court unless its cognizance is expressly or impliedly barred. A suit is said to be "expressly" barred when it is barred by any enactment for the time being in force.[1] This section itself postulates the barring of jurisdiction of Civil Courts by a competent Legislature with respect to a particular class of suits of a civil nature. Hence, it is open even to a *Provincial* Legislature to bar the jurisdiction of Civil Courts with respect to a particular class of suits of a civil nature, provided that in doing so it keeps itself within the field of legislation confided to its charge and does not contravene any provision of the Constitution Act.[2] The mere fact that an enactment provides another remedy or a summary remedy will not constitute a

('89) 13 Bom 548 (550, 551) (DB). (Right to officiate as priest in a temple and receive offerings.)
† ('90) 17 Cal 906 (909, 910) (DB). (Right to regular offerings out of the funds of a temple.)
('83) 9 Cal 75 (76, 77) (DB). (Right of easement over ghat used for religious purposes.)
('07) 30 Mad 15 (16) (DB). (Interference with reciting burial prayers is, however, invasion of civil right.)
('71) 6 Mad H C R 449 (451) (DB).
('14) 1 AIR 1914 Upp Bur 6 (7) : 1 Upp Bur Rul 183. (Dispute between layman and monk regarding monastery land is within Civil Court's jurisdiction.)
('14) 1 AIR 1914 Low Bur 178 (178) : 8 Low Bur Rul 145 (DB). (Civil Courts in Lower Burma have jurisdiction to entertain and try suits of ecclesiastical nature.)

Note 49

1. ('87) 14 Cal 64 (67). (On the faith of promised subscription obligations incurred in favour of third parties—Suit lies as on a contract.)
('81) 10 Cal L Rep 197 (198). (No suit if payment voluntary — Whether payment is voluntary is a question of fact in each case.)

Note 50

1. ('43) 30 AIR 1943 Cal 189 (192) (DB). (Bengal Village Self-Government Act, S. 17A bars a suit for injunction in respect of disputed appointments as well as disputed elections.)
('41) 28 AIR 1941 Oudh 355 (358) : 16 Luck 421. (Remedy for recovery of amount paid under Government Notification under Police Act, as compensation to injured in riot is by way of revision to Commissioner or Local Government and not by suit in Civil Court.)
('15) 2 AIR 1915 Cal 621 (622) : 42 Cal 151 (158) (DB). (e. g., S. 39, Income-tax Act, bars a suit in Civil Court to set aside assessment made under that Act.)
('32) 19 AIR 1932 Mad 724 (727) : 56 Mad 134 (DB).
('35) 22 AIR 1935 PC 5 (7) (PC). (If statute law says there shall be no jurisdiction in a certain event, and that event has occurred, it is impossible for the Court to have jurisdiction.)
('36) 23 AIR 1936 Bom 250 (252, 253) : 60 Bom 645.
† ('35) 22 AIR 1935 Bom 91 (93) (DB). (Civil Courts have no jurisdiction to set aside an award under the Bombay Co-operative Societies Act — S. 57 of that Act read with S. 9 of C. P. C., bars the maintainability of the suit for that purpose.)
† ('36) 23 AIR 1936 Oudh 67 (70) : 11 Luck 486 (DB). (No Court in British India has jurisdiction to grant a declaratory decree to the effect that a decree passed by their Lordships of the Judicial Committee is illegal and void—S. 23 of Act (1833, 3 & 4, Will. IV, Ch.41) conclusively bars not only the challenging of any order of His Majesty in Council in execution proceedings, but also bars the jurisdiction of a Court in India to declare the order illegal and void.)
('35) 22 AIR 1935 Oudh 96 (106) (DB).
('35) 22 AIR 1935 Oudh 234 (236) : 10 Luck 670. (S. 11, U. P. Court of Wards Act, precludes Civil Court from questioning validity of declaration by Local Government under S. 8.)

[*See* ('35) 22 AIR 1935 All 271 (272) : 57 All 852 (DB). (Suit for profits by one cosharer of an occupancy holding against another not barred under S. 230 or the Fourth Schedule of the Agra Tenancy Act.)]

[*See also* ('33) 20 AIR 1933 Rang 229 (233) : 11 Rang 380.]

2. ('40) 27 AIR 1940 All 272 (277) : 1 L R (1940) All 455 (FB).
('42) 29 AIR 1942 F C 27 (30) : ILR (1942) Kar FC 40 : ILR (1942) Lah 623 (FC). (Case relating to Punjab Restitution of Mortgaged Lands Act, IV of 1938.)
('41) 28 AIR 1941 FC 16 (26, 29) : ILR (1941) Kar F C 72 : 1940 F C R 110 (FC). (U. P. Regularization of Remissions Act, XIV of 1938 not *ultra vires* though it cuts down a civil remedy otherwise open.)

bar to a suit in a Civil Court.[3] Nor will the jurisdiction of a Civil Court be ousted unless the *entire* suit, as brought, is barred. The mere fact that a portion of the claim is excluded from the jurisdiction of Civil Court, is no bar to the trial, by them, of another portion of the same suit which is not so excluded.[4]

Where an authority is, by statute, vested in another tribunal with *exclusive* powers over any subject-matter, a Civil Court, of course, cannot interfere with it. But, if the authority purports to exercise these powers on what is not that subject-matter,[5] or illegally,[6] or in excess of the powers conferred upon it by that statute,[7] then the Civil Court has jurisdiction to question the said proceedings. If the Civil Court has been given some special supervising power, as for instance, by way of appeal, an interference by the Civil Court within the limits of such power is, of course, authorised.[8] (See also Notes 51 and 53.)

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3. ('40) 27 AIR 1940 Rang 145 (145, 146) : 1940 Rang L R 77. (Fact that R. 15 of rules framed under Burma Co-operative Societies Act provides for a dispute to be referred to the Registrar does not bar jurisdiction of Civil Court.)
† ('87) 14 Cal 644 (648) (DB).
('32) 19 AIR 1932 Mad 724 (726, 729) : 56 Mad 134 (DB). (Case under Madras Hereditary Village Officer's Act.)
✠('90) 12 All 409 (418) (FB). (Sections 83, 85 and 93 of the N. W. P. Rent Act do not bar a civil suit.)
('35) 22 AIR 1935 Bom 321 (323). (Suit for recovery of tax by Municipality — Civil Court has jurisdiction.)
('17) 4 AIR 1917 Bom 44 (45): 42 Bom 49. (Section 85 of the Bombay Land Revenue Code provides a special remedy of a limited character and does not bar civil suit for superior holders for recovering their dues from inferior holders.)
('11) 12 Ind Cas 391 (392) : 35 Bom 473 (DB). (Remedy provided by Ss. 7 and 86 of Presidency Towns Insolvency Act, III of 1909, does not take away the common law right of suit.)
† ('17) 4 AIR 1917 Lah 75 (76, 77): 1917 Pun Re No. 22 (DB). (Remedy under S. 46 (1) of the Provincial Insolvency Act, 1907, does not bar common law right of suit.)
Also see Note 63.

4. ('97) 1897 All W N 205 (205): 20 All 98 (DB).
('73) 5 N W P H C R 42 (44) (DB).
✠('35) 22 AIR 1935 All 594 (597) : 57 All 949 (DB). (Suit based on cause of action with respect to which relief can be granted by Civil Court—Merely because one of reliefs prayed is cognizable exclusively by Revenue Court does not oust jurisdiction of Civil Court.)
('84) 6 All 110 (112) (DB).
('35) 22 AIR 1935 Oudh 96 (106) (DB).

5. ('22) 9 AIR 1922 Pat 361 (361). (Civil Court has no jurisdiction to rectify Income-tax Collector's assessment.)

6. ('42) 29 AIR 1942 Lah 179 (186). (It is for the Civil Courts to determine whether the tribunal has acted in accordance with the elementary principles of natural justice and fair play.)
('13) 37 Bom 542 (550) (DB). (Bombay Revenue Jurisdiction Act, S. 4 (c)—Suit not barred where proceedings taken for realisation of revenue are illegal—Illegality in imposing tax under cover of statutory powers—Suit is not barred.)
('95) 19 Bom 581 (590) (DB).
('81) 5 Bom 135 (136) (DB). (Broach Talukdar's Relief Act, XV of 1871—Rent illegally levied for rent-free land—Suit not barred.)
('26) 13 AIR 1926 Cal 1061 (1061, 1065) : 53 Cal 561 (DB). (Fundamental irregularity in Revenue Court proceedings — Civil Courts can quash them.)

7. ('41) 28 AIR 1941 Lah 225 (227, 228) (DB). (Punjab Debtors Protection Act—Objections under S. 9 of the Act must be decided by executing Court—Collector has no jurisdiction.)
('90) 17 Cal 590 (604): 17 Ind App 40 (PC). (Act IX of 1847—Assessment of permanently settled land is beyond the powers of the revenue authorities—Civil suit not barred.)
† ('26) 13 AIR 1926 Lah 461 (461). (Punjab Municipal Act, S. 152—Action of municipality *ultra vires*—Civil Court can interfere.)
('28) 15 AIR 1928 All 511 (514) (DB). (Collector acting in contravention of Bundelkhand Alienation of Land Act.)
('22) 9 AIR 1922 All 294 (296) (DB). (Revenue Court decree fraudulently obtained—Civil Court cannot set it aside but can declare it void.)
('30) 17 AIR 1930 Bom 378 (379) (DB). (Bombay District Municipalities Act—Chairman of School Board is not competent to decide a person's disqualification for the School Board.)
('08) 35 Cal 859 (861) (DB). (Action of Municipality *ultra vires*—Suit not barred.)
† ('27) 14 AIR 1927 Lah 358 (361). (Do.)
('21) 8 AIR 1921 Mad 92 (93): 44 Mad 156 (DB). (Abuse of powers by Local Board—Civil Court can interfere.)
[*See* ('36) 23 AIR 1936 Lah 972 (975): ILR (1937) Lah 567 (DB). (Where tax and assessment are *ultra vires* of Act, jurisdiction of Civil Court is not barred.)]

8. ('41) 28 A I R 1941 Nag 226 (230): I L R (1941) Nag 279 (DB).

51. Exclusive jurisdiction of Revenue Courts.

Under various Provincial Rent and Revenue Laws in the different provinces,[1] exclusive jurisdiction has been given to the revenue authorities in matters such as those relating to rent,[2] revenue,[3] tenancy of agricultural holdings,[4]

Note 51

1. Provincial Acts dealing with tenancies and recoveries of land revenue may be consulted. See Agra Tenancy Act (Act III of 1926), S. 230. U. P. Land Revenue Act, S. 233. Oudh Rent Act (Act XXII of 1886), S. 108. C. P. Land Revenue Act (Act XVIII of 1888), S. 152. C. P. Tenancy Act (Act I of 1920), S. 105. Bombay Revenue Jurisdiction Act, S. 4. Madras Revenue Recovery Act (Act II of 1864), Ss. 58 and 59. Madras Estates Land Act (Act I of 1908), S. 189. N.W.P. Rent Act, Ss. 93, 95 and 241. Punjab Land Revenue Act (Act XVII of 1887), S. 158, Punjab Tenancy Act (Act XVI of 1887), Ss. 76 and 77. Bengal Tenancy Act (Act VIII of 1885.)
[*See* ('32) 19 AIR 1932 Oudh 199 (204, 208) : 7 Luck 716 (FB). (Case under S. 233 of the U. P. Land Revenue Act.)]

2. ('97) 21 Bom 244 (247, 248) (DB). (Determination of amount of rent—No suit lies for contesting legality.)
('97) 21 Bom 235 (241, 243) (DB). (Entries of rent payable final—Bombay Act I of 1889.)
('35) 22 AIR 1935 All 526 (527). (Suit for share of profits against defendant on allegation that defendant has realized profits from tenants—Suit is not cognizable by Civil Court.)
(1900) 22 All 139 (141). (Affirmed in 25 All 527 (533) (PC). U. P. Land Revenue Act XIX of 1873—Act VIII of 1873 (UP)—Recovery of irrigation dues paid in excess.)
('98) 20 All 296 (298) (DB). (Act XII of 1881—suit for damages against evicted tenant.)
('06) 3 Cal L Jour 143 (153) (DB). (Suit for abatement of rent—Civil Court has no jurisdiction.)
('69) 3 Beng L R Appendix 114 (115) (DB). (Recovery of rent paid to zamindar—Suit not cognizable by Civil Court.)
('36) 23 AIR 1936 Oudh 71 (74) : 11 Luck 597. (Weighment dues do not come under definition of rent—Civil Court has jurisdiction to try suit for recovery of weighment dues.)
[*See* ('36) 23 AIR 1936 Pat 511 (511).]

3. ('29) 16 AIR 1929 Pat 22 (27) : 8 Pat 93 (DB). (Question of distribution of Government revenue is duty of Collector—Civil Court cannot deal with it.)
('74) 11 Bom H C R 39 (40) (DB). (Claims for exemption of revenue.)
('05) 1905 All W N 237 (237) (DB). (Wrong person's cattle sold in execution of Revenue Court's decree—Remedy is only in Revenue Court.)
('97) 19 All 127 (128, 129) (DB). (Do.)
('93) 15 All 137 (139) (DB). (Claim by lambardar for arrears of land revenue payable by proprietors.)
('88) 10 All 5 (8). (Suit for partition and possession of a share in a particular plot of land — Suit not maintainable in Civil Court.)
('98) 22 Bom 377 (382, 383) (DB). (Levy of water rate under S. 48 of the Bombay Irrigation Act, VII of 1879.)
('92) 16 Bom 528 (532) (DB). (Partition of revenue-paying estates cannot be effected in a civil suit.)
('92) 16 Bom 649 (651) (DB). (Claims for exemption of revenue.)
('97) 24 Cal 751 (754) (DB). (Suit for partition of lands in different estates without division of revenue—Suit not cognizable by Civil Court—Assam Land and Revenue Regulation, S. 154.)
('96) 23 Cal 514 (515) (DB). (Do.)
('96) 23 Cal 641 (644, 645) (DB). (Act VII of 1880 (Bengal)—Sale for arrears of cesses—No suit lies to set aside sale.)
('93) 20 Cal 285 (295) (DB). (Partition of revenue-paying estates cannot be effected in a civil suit.)
('82) 8 Cal 537 (545) (DB). (Do.)
('82) 8 Cal 649 (651) (DB). (Do.)
('79) 4 Cal 510 (512) (DB). (Partition of revenue-paying estates cannot be effected in a civil suit—Civil Court has no jurisdiction to alter partition effected by Revenue Court.)
('74) 22 Suth W R 11 (12). (Partition of revenue-paying estates cannot be effected in a civil suit.)
('74) 22 Suth W R 333 (333) (DB). (Do.)
('72) 18 Suth W R 64 (65) (DB). (Act IX of 1847, S. 6—Lands added to revenue-paying estates—Suit for possession is barred.)
('71) 15 Suth W R 242 (243) (DB). (Partition of revenue-paying estates cannot be effected in a civil suit.)
('31) 18 AIR 1931 Lah 652 (653) (DB).
('75) 1875 Pun Re No. 10, page 16 (17). (Suit by recorded muafidar of land swept away, to revive his rights against re-formed land.)
('27) 14 AIR 1927 Pat 286 (287) (DB). (Bengal Estates Partition Act, 1897.)

4. ('93) 15 All 115 (116) (DB). (Class of tenancy.)
('85) 7 All 112 (113) (DB). (Do.)
('34) 21 AIR 1934 All 37 (37) (DB). (Grove leased—Lessee holding even after expiry of lease—Suit for ejectment lies only in Revenue Court — Agra Tenancy Act.)
('31) 18 AIR 1931 All 406 (407).
('29) 16 AIR 1929 All 613 (614) (DB). (Suit to obtain a declaration as to tenancy.)
('21) 8 AIR 1921 All 80 (80). (Claim under Agriculturists Loan Act, 1884.)
('14) 1 AIR 1914 All 225 (226) : 36 All 48 (DB). (Agra Tenancy Act, Ss. 95 and 167—Suit for declaration is cognizable by Revenue Court alone.)
('14) 1 AIR 1914 All 26 (27) : 36 All 55 (DB). (Suit for possession under S. 79, Agra Tenancy Act, is cognizable by Revenue Court alone.)
† ('01) 23 All 486 (493) (FB). (Suit by zamindar against tenant for removal of trees and injunction.)
('97) 19 All 101 (104) (FB). (Title to possession of occupancy holdings.)
('96) 18 All 340 (343, 344) (FB). (Class of tenancy.)
('93) 15 All 387 (392) (FB). (Dispossession of tenant of holding coming under Act XII of 1881.)

or even title to them,[5] or State lands.[6] It has been so given by reason of the better acquaintance of the revenue authorities with such matters and of the necessity of applying to them a more elastic and summary procedure than that of the ordinary Civil Courts.[7] We have seen under S. 4 that such jurisdiction is not affected by the provisions of the Code and the various Provincial Rent and Revenue Acts themselves expressly provide that the Civil Courts shall not have jurisdiction in such matters.[8] It follows that a Civil Court is not competent to set aside a decree of a Revenue Court on a matter exclusively within its jurisdiction,[9] or to grant a declaration that particular rights passed to the

('93) 20 Cal 609 (629) (DB). (Chota-Nagpur—Suit against landlords in respect of debts to which they were subject.)
('84) 10 Cal 350 (352) (DB). (Registration of name of person under Land Registration Act.)
('94) 17 Mad 140 (141) (DB). (A mere denial by defendant of the relationship of landlord and tenant does not oust the jurisdiction of the Revenue Court.)
('92) 15 Mad 484 (485) (DB). (Do.)
('92) 15 Mad 223 (224) (DB). (Do.)
('26) 13 AIR 1926 Oudh 484 (485). (Suit in Civil Court for possession against tenant is barred.)

5. † ('32) 19 AIR 1932 Oudh 199 (204) : 7 Luck 716 (FB).
('35) 22 AIR 1935 All 966 (966) (DB). (Suit for declaration of title of plaintiff to grove land—Cognizance by Civil Court barred under Section 230, Agra Tenancy Act.)
('34) 21 AIR 1934 All 680 (681). (Do.)

6. ('02-03) (1902-03) Upp Bur Rul, Vol. II, Civ. Pro., page 1. (Suit for rent of State land.)
('01) 2 Upp Bur Rul 207. (Suit for redemption of mortgage of State land.)
('97) 21 Bom 684 (693, 694) (DB). (Bombay Act X of 1876, S. 4 — Claim respecting occupation of Government waste land.)

7. ('13) 17 Cal W N 1201 (1203) (FB).

8. ('41) 28 AIR 1941 Mad 857 (857). (Madras Hereditary Village Offices Act, 1895—Ss. 13, 21 — Suit for mere declaration that defendant is illegally appointed Karnam ignoring plaintiff's claim—Civil Court cannot entertain such suit.)
('40) 27 AIR 1940 Pat 161 (162) : 18 Pat 854 (DB). (Bengal Cess Act, S. 45—Revenue Court deciding that cess was recoverable and claim made for its recovery was within limitation—Decision whether right or wrong cannot be set aside by Civil Court.)
('38) 25 AIR 1938 Cal 229 (233) : I L R (1938) 2 Cal 1 (DB). (Claim for abatement of revenue under S. 52, Bengal Tenancy Act, 1885, does not lie in Civil Court.)
('09) 5 Nag L R 176 (180, 181). (Order under S. 36 of the C. P. Tenancy Act is not liable to be overridden by an action in Civil Court.)
('94) 1894 Pun Re No. 96, page 314 (315). (S. 3 of Punjab Tenancy Act.)
('39) 26 AIR 1939 All 301 (302).
('36) 23 AIR 1936 All 265 (267) (DB). (Civil Court can declare document fraudulent and not binding, but it cannot treat tenant as trespasser in view of Agra Tenancy Act, S. 230.)
('35) 22 AIR 1935 All 544 (545) (DB). (Agra Tenancy Act, Ss. 121 and 230.)
† ('35) 22 AIR 1935 All 594 (596) : 57 All 949 (DB).
('07) 29 All 604 (607) (DB). (Section 233 (K) of Act III of 1901 (U. P.).)
('06) 28 All 432 (434) (DB). (Do.)
('06) 28 All 394 (399) (DB). (Section 241 (6) of Act XIX of 1873 (N. W. P.).)
('01) 23 All 291 (296) (FB). (Do.)
('35) 22 AIR 1935 Cal 634 (635) : 63 Cal 379.
('12) 16 Cal L Jour 67 (70) (DB). (Section 109 of Bengal Tenancy Act.)
('08) 35 Cal 1013 (1015) (DB). (Section 106, Bengal Tenancy Act, impliedly ousts the jurisdiction of Civil Courts.)
('79) 4 Cal 547 (549, 550) (DB). (Express jurisdiction must have been given to Revenue Court.)
('72) 17 Suth W R 470 (470) (DB). (Suit for security for amount of jumma barred by Ss. 5 and 7 of Regulation VIII of 1819.)
('37) 24 A I R 1937 Mad 159 (161). (S. 21, Madras Hereditary Village offices Act III of 1895.)
('37) 24 AIR 1937 Mad 282 (283). (Do.)
('36) 23 A I R 1936 Mad 852 (852, 853). (Suit by person deprived of office, for declaration that order of cancellation is *ultra vires* and for delivering office to him, is cognizable by Revenue Court only —Jurisdiction of Civil Court is barred by S. 21, Madras Hereditary Village Offices Act.)
('36) 23 A I R 1936 Nag 18 (18, 19) : 31 Nag L R Sup. 96.
('35) 22 AIR 1935 Oudh 253 (254) : 11 Luck 28.
('35) 22 AIR 1935 Oudh 325 (326) : 11 Luck 106.
('36) 23 A I R 1936 Pesh 74 (76). (S. 60, Punjab Minor Canals Act.)
('36) 23 AIR 1936 Pesh 136 (137). (Do.)
('05) 3 Low Bur Rul 50 (51). (Cl. 15 of the Lower Burma Town and Village Lands Act, IV of 1898.)
[*See also* ('41) 28 A I R 1941 Mad 405 (406). (S. 21 of Madras Hereditary Village Offices Act, 1895, excludes the jurisdiction of Civil Courts only where the suit is cognizable by Collector under S. 13 of that Act. It does not exclude a suit for declaration that the successor of the holder of the office is not the adopted son of the previous holder from the cognizance of the Civil Court.)]

See also Notes on Section 4.

9. ('43) 30 AIR 1943 Oudh 106 (109).
('41) 28 AIR 1941 Oudh 223 (224).
('26) 13 AIR 1926 Oudh 205 (205, 206).
('26) 13 AIR 1926 Oudh 506 (507).
('09) 31 All 41 (43). (Proceedings of Partition Court not challengeable in Civil Court.)
('96) 18 All 270 (282, 283) (FB). (Suit in a Civil Court for declaration on a question of title decided by Revenue Court is barred.)

parties under such a decree,[10] or that a rent sale is or is not valid,[11] or to execute the decree or order of such Court,[12] or to question the action of revenue authorities falling within their jurisdiction.[13]

Where, however, the proceedings are tainted by fraud, irregularity illegality or other fundamental defects, the jurisdiction of the Civil Court to question them remains.[14] (See also Note 50.) It, of course, remains in all matters not falling within the exclusive jurisdiction of the Rent and Revenue Courts under the various Provincial Acts referred to above.[15] Further, the jurisdiction of the High Court to issue a writ of certiorari in order

('85) 7 All 894 (896). (Proceedings of partition Court not challengeable in Civil Court.)
('09) 13 Cal W N 111 (114).
('99) 3 Cal W N 311 (313).
('91) 18 Cal 481 (483). (Right to have a sale under the Bengal Tenancy Act set aside.)
('86) 9 Mad 39 (41, 42).
('37) 170 Ind Cas 639 (640) (Oudh).
('35) 22 AIR 1935 Oudh 229 (230) : 10 Luck 682.
('32) 19 AIR 1932 Oudh 273 (274).
('25) 12 A I R 1925 Oudh 671 (672). (Proceedings of Partition Court not challengeable in Civil Court.)
('24) 11 AIR 1924 Oudh 245 (246, 247). (Decision of Revenue Court in redemption proceedings of State land.)
('97-01) 1897-01 Upp Bur Rul 211. (Civil Court is to be guided by the decision of Revenue authorities in deciding whether land is State land.)
[*See* ('38) 25 A I R 1938 Mad 318 (319). (Civil Courts cannot exercise revisional jurisdiction in respect of any order of the Collector which is within his revisional jurisdiction and cannot consider whether such order is right or wrong on the merits.)]

10. ('24) 11 AIR 1924 Oudh 69 (75) (DB).
11. ('33) 20 AIR 1933 Mad 384 (385).
12. ('02-03) 1902-03 Upp Bur Rul 13.
13. ('35) 22 A I R 1935 Mad 725 (725). (Resumption of Inam land — Tahsildar granting patta to person found to be in possession—Civil Court cannot question validity of grant.)
14. ('43) 47 Cal W N 408 (417) (DB). (A Civil Court has power to declare an order by the Board of Revenue to be *ultra vires* when the Board acts without jurisdiction.)
'41) 28 A I R 1941 Oudh 223 (224). (Civil Court can entertain suit by a minor for declaration that decree of Revenue Court is not binding on him on the ground that he was not properly represented.)
('40) 27 AIR 1940 Pat 161 (162, 163) :18 Pat 851 (DB). (Civil Court can entertain suit only if order of Revenue Court is without jurisdiction not because it is incorrect.)
† ('03) 25 All 19 (23) (DB) (Fraud—Civil Court can declare revenue proceedings as fraudulent and give relief.)
('03) 30 Cal 619 (622) (DB). (Material irregularity.)
† ('90) 12 All 409 (414, 415, 418) (FB). (Illegal sale of trees by zamindar for arrears of rent.)
('13) 37 Bom 542 (550) (DB). (Illegality in proceedings taken for realization of land revenue.)
('36) 23 AIR 1936 Cal 138 (141, 142) (DB). (Civil Court can entertain suit to set aside order passed by Revenue Court beyond its jurisdiction.)
† ('36) 23 AIR 1936 Cal 629 (639) (DB).
('10) 37 Cal 107 (112) (DB). (Sale for supposed arrears of revenue—Suit to set aside is not barred by S. 33 of Act XI of 1859.)
('06) 33 Cal 451 (458) (DB). (Material irregularity.)
('05) 32 Cal 509 (514) (DB). (Do.)
('05) 32 Cal 953 (954, 955) (DB). (Irregularity in publishing notice of putni sale.)
('02) 6 Cal W N 411 (413) (DB).
† ('98) 25 Cal 833 (842): 25 Ind App 151 (PC). (Sale for supposed arrears of revenue—Suit to set aside is not barred by S. 33 of Act XI of 1859.)
('98) 25 Cal 876 (879) (DB). (Do.)
('83) 9 Cal 619 (621): 10 Ind App 19 (PC). (Irregularity in publishing notice of putni sale.)
('92) 19 Cal 703 (712) (SB) (Do.)
('74) 22 Suth W R 361 (362) (DB). (Want of jurisdiction in Revenue Court.)
('15) 2 AIR 1915 Mad 460 (460) : 38 Mad 1042 (1044). (Invalidity of sale of holding under S. 111 of Madras Estates Land Act, I of 1908.)
† ('38) 25 AIR 1938 Oudh 62 (64) (DB). (U. P. Manual of Revenue Department, Vol. I, Rr. 998 and 1011 — Commissioner setting aside sale on grounds not provided for in R. 998—Civil Court has jurisdiction to entertain suit against such order.)
[See however ('39) 26 AIR 1939 All 446 (447) (DB). (Civil suit for declaration that decree of Revenue Court was without jurisdiction does not lie — Reason given is that the Revenue Court in the particular matter had the sole jurisdiction to decide that matter.)
('29) 16 AIR 1929 Bom 267 (268) (DB). (Plaintiff seeking to avoid the proceedings of Mamlatdar by basing his cause of action on fraud—*Held*, Civil Court had no jurisdiction.)]

15. ('43) 30 AIR 1943 All 84 (85) (DB). (Where adequate relief cannot be obtained from Revenue Courts suit must lie in Civil Court.)
('43) 30 AIR 1943 Oudh 36 (37) (DB). (Oudh Rent Act, S. 108 (10) — Suit by tenant against one of landlords even if he be lambardar for possession is cognizable by Civil Court.)
('43) 30 AIR 1943 Lah 48 (50) (DB). (Punjab Pre-emption Act (I of 1913), S. 14 — Civil Court has jurisdiction to decide under S. 14 whether vendor belongs to same agricultural group as vendee — Jurisdiction is not ousted by Punjab Alienation of Land Act.)
('42) 29 AIR 1942 Lah 217 (219, 223) : ILR (1943) Lah 191 (FB). (Case relating to Punjab Tenancy Act, S. 77 (3) (d) and S. 77 (3) Proviso (1).)
('42) 29 AIR 1942 Oudh 93 (96): 17 Luck 205 (DB). ("Land" in S. 127, Oudh Rent Act does not include produce of land—Suit to recover value of fish taken out of river against trespasser does not fall

under S. 108 (2) and S. 127, Oudh Rent Act—Civil Court has jurisdiction by reason of S. 9, C. P. C.)

('41) 28 AIR 1941 All 61 (63, 64) : ILR (1941) All 250 (FB). (Suit against fixed-rate tenant for a mandatory and prohibitory injunction—Revenue Courts not competent to entertain suit; suit lies in Civil Court.)

('41) 28 AIR 1941 Mad 405 (406). (Defendant's adoption standing in way of plaintiff's succession to village office — Suit for declaration that defendant is not the adopted son is one under S. 42, Specific Relief Act, and as such cognizable by Civil Court—Revenue Court has no jurisdiction to entertain such suit.)

('41) 28 AIR 1941 Oudh 223 (224). (Minor—Decree against, obtained in Revenue Court—Suit by minor for declaration that decree is not binding on him on ground that he was not properly represented is cognizable by Civil Court.)

('41) 28 AIR 1941 Pat 50 (50). (Estates Partition Act, S. 119 (Bengal Act V of 1897). Suit by a person claiming interest in land not barred.)

('40) 27 AIR 1940 Nag 402 (403) : ILR (1941) Nag 107. (Berar Land Revenue Code (1928), S. 192 (1) (e), Proviso expressly confers jurisdiction on Civil Courts where interpretation of sanad is involved.)

('40) 27 AIR 1940 Rang 240 (241) : 1940 Rang L R 230. (Sections 55 and 56, Burma Land and Revenue Act do not bar jurisdiction of Civil Court where question is whether Revenue Officer had any legal authority to act as he did and no question arises as to legality of any process issued under S. 45 of that Act.)

('40) 27 AIR 1940 Cal 572 (576, 577) (DB). (Case relating to Bengal Regulation II of 1819, S. 30 and Bengal Act VII of 1862, S. 2.)

('40) 27 AIR 1940 Cal 39 (41, 46) (DB). (Case relating to S. 33 of Bengal Revenue Sales Law, Act XI of 1859.)

('40) 27 AIR 1940 All 389 (392) : ILR (1940) All 351 (DB). (Suit for injunction or compensation against a fixed-rate tenant.)

('39) 26 AIR 1939 Pat 497 (499) (DB). (Case under C. P. Land Revenue Act (XVIII of 1881), S. 152.)

('39) 26 AIR 1939 Nag 5 (6, 7): ILR (1940) Nag 16 (DB). (Letters Patent Appeal from AIR 1937 Nag 163 confirming the same —Perfect partition proceedings under C. P. Land Revenue Act, II of 1917 — Jurisdiction of Civil Court not barred for the purpose of declaring titles of parties although such Court has no power to interfere with the partition made by Revenue Officer.)

('39) 26 AIR 1939 All 385 (387). (Tenant alleging that his co-tenants had illegally built certain constructions on joint plots bringing suit for mandatory injunction for removal of constructions and for prohibitory injunction restraining any act which may alter character of plots — Suit is cognizable by Civil Court.)

('39) 26 AIR 1939 All 442 (443) : ILR (1939) All 594 (DB). (Three sisters succeeding to residue of father's zemindari under will — Eldest appointed manager for collecting accounts and profits and distributing them between sisters and also for controlling household and paying household expenses—Suit by one sister against her for accounts of profits received during certain period — Suit cognizable by Civil Court.)

† ('29) 16 AIR 1929 Pat 22 (26, 27) : 8 Pat 95 (DB). (Bengal Act XI of 1859—Question of title—Civil suit lies.)

† ('36) 23 AIR 1936 All 661 (662) (DB). (Mortgagee of share in mauza, obtaining decree on his mortgage and purchasing mortgaged property—Entire mauza leased out by mortgagor and his cosharers prior to sale in favour of mortgagee — Civil Court can grant declaration that lease is not binding on mortgagee under S. 52, T. P. Act—For possession mortgagee should go to Revenue Court.)

('36) 23 AIR 1936 All 220 (220) (DB). (Suit for partition of houses and surrounding lands in abadi is not barred from Civil Court's jurisdiction.)

('35) 22 AIR 1935 All 422 (423).

† ('35) 22 AIR 1935 All 271 (272) : 57 All 852 (DB). (Claim for profits by one cosharer of occupancy holding against another is of civil nature.)

('34) 21 AIR 1934 All 685 (686). (Suit by sub-tenant against the original landlord through whom the sub-tenant's own landholder claims, cannot be maintained in the Revenue Court.)

('30) 17 AIR 1930 All 304 (304) (DB). (Suit by landlord against trespasser lies in Civil Court.)

('29) 16 AIR 1929 All 669 (671): 51 All 926 (DB). (Suit for compensation for injury sustained in consequence of the non-withdrawal of distraint.)

('23) 10 AIR 1923 All 134 (134): 45 All 191 (DB). (Claim of ownership of grove and damages.)

('13) 35 All 14 (17, 18). (Suit between rival claimants to tenancy.)

('06) 28 All 563 (567, 569) (DB). (Plaintiff paying arrears of Government revenue to save his property from being sold for arrears due from defendant can maintain civil suit.)

('04) 26 All 591 (593) (DB). (Suit for possession of usufructuarily mortgaged occupancy holding.)

('97) 19 All 456 (457, 458). (Suit for damages for dispossession through Court.)

('97) 19 All 452 (454, 455) (DB). (Suit to eject as trespassers persons claiming to hold as successors of deceased occupancy tenant.)

('97) 19 All 496 (499) (DB). (Lease of mortgaged property by mortgagee to mortgagor for realization of interest—Rent not paid—Suit lies in Civil Court.)

('94) 16 All 325 (328) (DB). (Suit to eject as trespassers persons claiming to be mortgagees of occupancy tenant.)

('92) 14 All 223 (225) (DB). (Suit to eject mortgagee of occupancy holding lies.)

† ('90) 12 All 419 (422) (FB). (Do).

('89) 11 All 224 (227). (Suit by plaintiff against cosharers for share of rent wrongfully received by them.)

('85) 7 All 338 (339) (DB). (Suit for declaration of title to lands.)

('84) 6 All 110 (112) (DB). (Suit for declaration that the defendant is only a tenant-at-will.)

('36) 23 AIR 1936 Bom 301 (306). (Suit for declaration that the defendant is not watandar of village is *prima facie* barred under S. 4, Bombay Revenue Jurisdiction Act.)

('01) 25 Bom 312 (314) (DB). (Determination is final under S. 121 of the Land Revenue Code (Bombay Act V of 1879) only where boundary dispute arises.)
('98) 22 Bom 173 (175) (DB).
('98) 22 Bom 579 (582) (DB).
('97) 21 Bom 773 (774) (DB). (Suit against defendants in their private capacity not barred by S. 4 of Act X of 1876 (Bombay).)
('96) 20 Bom 803 (806). (Suit against forest officer is not barred by Act X of 1876.)
('96) 20 Bom 747 (750). (Bombay Act X of 1876, S. 4 (c)—Suit between private parties for establishing a private right.)
('96) 20 Bom 764 (767). (Section 11, Act X of 1876 (Bom) does not bar jurisdiction when Collector moves under S. 81 of Act VII of 1878 to recover price of timber sold by forest officer.)
('94) 18 Bom 525 (532) (DB). (Liability of khot to Inamdar for assessment—Civil suit not barred by Bombay Act, X of 1876, S. 4.)
('93) 17 Bom 681 (683) (DB). (Act X of 1876 (Bom) —Government not concerned in proceeding for realisation of revenue—Civil suit not barred.)
('36) 23 AIR 1936 Cal 786 (787, 788). (Landlord's right to recover transfer fee under S. 26E, Ben. Ten. Act—Bengal Tenancy Act not providing remedy to recover—Civil suit is maintainable.)
('22) 9 AIR 1922 Cal 345 (347) : 49 Cal 37 (DB). (Title with plaintiff — Settlement with defendant by revenue authorities — Civil Court can decree partition.)
('14) 1 AIR 1914 Cal 197 (198) (DB). (Civil suit on question of title not barred by Bengal Act VI of 1870.)
('10) 37 Cal 662 (668) (DB). (Title in partition proceedings, S. 149 of the Estates Partition Act.)
('10) 11 Cal L Jour 63*n*. (Rent of tank—Civil suit maintainable.)
('10) 6 Ind Cas 217 (218) (DB) (Cal). (Suit to establish plaintiff's right not barred by failure to sue under S. 106, Ben. Ten. Act.)
('09) 36 Cal 726 (732). (Title in partition proceedings.)
('05) 2 Cal L Jour 306 (310). (Civil suit on question of title not barred by Bengal Act VI of 1870.)
('05) 2 Cal L Jour 351 (353, 359). (Title in partition proceedings.)
('04) 31 Cal 937 (942, 943). (Rent of tank — Civil suit maintainable.)
('03) 7 Cal W N 111 (112) (DB). (Suit for deficiency for which defaulting purchaser is answerable under S. 9 of Regulation VIII of 1819.)
('02) 29 Cal 367 (369) (DB). (Civil suit to set aside decision of revenue authorities under Bengal Act VIII of 1876 lies under S. 150 which specially gives such right — The suit should be filed within one year.)
('02) 29 Cal 94*n* (97*n*). (Suit to set aside sale for arrears of road and public cess will lie — Bengal Act VII of 1880.)
('01) 28 Cal 485 (486, 487) (DB). (Prohibition is only to rent of agricultural or horticultural lands.)
('98) 25 Cal 85 (86) (DB). (Suit to set aside sale for arrears of road and public cess will lie.)
('97) 24 Cal 239 (240, 241) (DB). (Right to obtain a settlement.)
('97) 2 Cal W N cclxiv. (S. 65 of Assam Land Revenue Regulation—Order under, without notice to party — Latter can sue for declaration that his rights are not affected by the order.)
('93) 20 Cal 51 (56) (FB). (Suit for surplus sale proceeds of revenue sale lies—18 Cal 234 overruled.)
('89) 16 Cal 117 (119) (DB). (Suit to stay partition proceedings in Revenue Court.)
('88) 15 Cal 198 (200, 201) (DB), (Partition of revenue paying estate.)
('83) 9 Cal 925 (929) (DB). (Right to registration in revenue records.)
('82) 8 Cal 126 (130) (DB). (Suit to stay partition proceedings in Revenue Court.)
('81) 7 Cal 153 (155, 157) (DB). (Suit by cosharer for partition of land without seeking for annulment of his joint responsibility for revenue.)
('81) 6 Cal 453 (457) (DB). (Suit to set aside order in survey proceedings under Bengal Act V of 1875 relating to private property, is not barred.)
('79) 4 Cal L Rep 38 (39) (DB). (Suit for partition of land excluded by Collector in former partition.)
('68) 1 Beng L R A C 175 (177) (DB). (Suit by transferee of tenure to have his name entered in sherista of zamindar. Both Courts have concurrent jurisdiction.)
('35) 22 AIR 1935 Lah 613 (615). (S. 36, Punjab Colonization of Government Lands Act, does not bar Civil Courts from questioning mutation order passed by Collector.)
('35) 22 AIR 1935 Lah 739 (740) : 17 Lah 38 (DB). (Suit in Revenue Court for ejecting tenant —Decision does not prevent Civil Court from entertaining subsequent suit involving question of title.)
('35) 22 AIR 1935 Lah 976 (977).
('26) 13 AIR 1926 Lah 178 (179) (DB). (Suit to declare as divided an estate shown as joint in the revenue papers.)
('26) 13 AIR 1926 Lah 578 (579) : 7 Lah 479 (DB). (Landlord and tenant—Suit based on relationship of debtor and creditor lies in a Civil Court.)
('37) 24 AIR 1937 Mad 303 (306).
('36) 23 AIR 1936 Mad 522 (523). (Question whether the melwaram belongs to one person or another is not a matter within the exclusive jurisdiction of Revenue Court.)
('15) 2 AIR 1915 Mad 781 (784) : 38 Mad 738 (742) (DB). (Suit for ejectment and for pasture rent.)
('94) 17 Mad 1 (7) (DB). (Suit to enforce acceptance of pattas and execution of muchulkas.)
('91) 14 Mad 441 (447, (450) (FB). (Do.)
('90) 13 Mad 361 (363, 364) (DB). (Do.)
('89) 12 Mad 404 (405). (Cancellation of a subsequent patta for waste land.)
('37) 24 AIR 1937 Nag 163 (164, 165). (Perfect partition proceedings under Chap. XI of C. P. Land Revenue Act, II of 1917 — Jurisdiction of Civil Court in respect to questions of title is not ousted — But Civil Courts are precluded from considering the mode of partition.)
('26) 13 AIR 1926 Nag 432 (432). (Suit by transferee of an occupancy holding who is illegally dispossessed by his transferor or his heirs.)
('24) 11 AIR 1924 Nag 275 (277) : 20 Nag L R 145. (Question of liability of estate to partition.)

to ascertain if the proceedings of Revenue Officers and Courts have been conducted in due compliance with the provisions of the statute is not affected by the exclusive jurisdiction conferred on Revenue Courts by such statutes.[16] The reason is that wherever any person or body of persons is invested with legal authority to determine questions affecting the rights of subjects and has the duty, in exercising that authority, to act judicially, he or they are subject to the controlling jurisdiction of the High Court of Justice exercised in the writ of certiorari.

Where a plaint partly cognizable by a Civil Court and partly by a Revenue Court is presented to either Court, it should be ordered to be amended so as to bring it within the jurisdiction of the Court of presentation.[17]

The defendant, in a suit for possession in the Mamlatdar's Court, cannot oust the jurisdiction of the Mamlatdar by merely filing a suit in the Civil Court. Under S. 26 of the Bombay Mamlatdar's Courts Act, it is for the Mamlatdar to decide if he is to proceed with the suit or not.[18]

52. Bar by the Criminal Procedure Code. — Section 133 of the Criminal Procedure Code provides that no order duly made by a Magistrate under that section shall be called in question by the Civil Court. Similar provisions have been made as to orders under Ss. 136, 137, 139 and 142. A suit, therefore, will not lie to *set aside* the orders passed under any of those sections.[1] But the orders are not conclusive on the question of *title* to property vested in a person and do not exclude the jurisdiction of Civil Courts to enquire into such matters.[2] Nor, it is conceived, will the Civil Court's jurisdiction be barred if the order passed is *without jurisdiction*.[3] See also the Authors' Commentaries on the Criminal Procedure Code, 2nd (1941) Edn., S. 140 Note 11.

('30) 17 AIR 1930 Oudh 218 (219). (Suit by landlord against a trespasser or a person asserting proprietary title.)
('29) 16 AIR 1929 Oudh 529 (534) : 2 Luck 649 (DB). (Dispute between two rival tenants, cognizable by Civil Court.)
('28) 15 AIR 1928 Oudh 95 (97) : 3 Luck 273 (DB). (Suit between rival claimants of quabzadi lands.)
('25) 12 AIR 1925 Oudh 442 (443) : 28 Oudh Cas 325. (Suit to eject as trespasser a tenant claiming adverse possession.)
('27) 14 AIR 1927 Oudh 215 (216). (Partition of house in Abadi—Civil suit lies.)
('26) 13 AIR 1926 Oudh 181 (181). (Rent decision not final on question of title — Civil Court can try it.)
('21) 8 AIR 1921 Oudh 125 (126): 24 Oudh Cas 15. (Rival title to tenancy.)
('20) 7 AIR 1920 Oudh 231 (233) : 23 Oudh Cas 281. (Suit for partition of dwelling house and a chabutra.)
('04) 7 Oudh Cas 372 (379) (DB). (Civil Court competent to decide if a decree created an under-proprietary right.)
('29) 16 AIR 1929 Pat 332 (333) : 8 Pat 763 (DB). (Collector's order for partition under S. 29, Bengal Estates Partition Act—S. 119 of the said Act, no bar to civil suit.)
('25) 12 AIR 1925 Pat 517 (519, 520) (DB). (Suit for settlement of fair rent when not barred by S. 158, Ben. Ten. Act.)
('24) 11 AIR 1924 Pat 795 (796) (DB). (Suit for fixing the liability of defendants inter se for Government revenue.)

16. ('40) 27 AIR 1940 Rang 84 (86, 88) : 1940 Rang L R 325 (SB). (Case relating to S. 40 of Burma Tenancy Act.)
17. ('43) 30 AIR 1943 Oudh 307 (307, 308) (DB).
('04) 1904 Pun Re No. 81, p. 299 (302).
†('92) 1892 Pun Re No. 19, p. 91 (92).
('32) 19 AIR 1932 Lah 595 (596).
('04) 2 Low Bur Rul 243 (244).
18. ('30) 17 AIR 1930 Bom 184 (185) (DB).

Note 52

1. ('09) 31 All 371 (373) (DB). (Case under U. P. District Municipalities Act, S. 183. Civil Court has no power to disturb the order of the District Magistrate.)
('69) 11 Suth W R 434 (435) (DB). (Civil Court cannot direct a public road to be closed by the assistants of the officers of the Court.)
('72) 18 Suth W R 284 (285) (DB).
2. ✣('88) 15 Cal 460 (470) (FB).
('93) 17 Bom 293 (299) (DB). (Where *bona fide* question of title is raised, the Magistrate should ordinarily refer parties to a Civil Court.)
[*See* ('90) 17 Cal 562 (565) (DB). (Where there is a *bona fide* dispute Magistrate has no power to make an order under S. 133, Cr. P. C.)
('88) 15 Cal 564 (571).]
3. ('67) 8 Suth W R 239 (240) (DB).
✣('74) 6 N W P H C R 104 (112) (DB). (Case under S. 518 of Act X of 1872.)
✣('80) 5 Cal 7 (20) (FB). (Do.)
[*See* ('1865) 2 Suth W R 287 (287) (DB). (Suit lies from the proceedings of a Magistrate ordering removal of encroachment not treated as a local nuisance.)]

An order under S. 145 of the Criminal Procedure Code as to the possession is conclusive as to the fact of possession of a party on *the date of the order*,[4] but is not conclusive as to such possession *before* the date of the order. A suit, therefore, under S. 9 of the Specific Relief Act on the ground of dispossession within six months but *before* the date of the order is not barred.[5] No suit will, however, lie on the basis of dispossession as a result of the Magistrate's order itself. The reason is that such dispossession is one *in due course of law* and S. 9 of the Specific Relief Act has therefore no application.[6]

An order refusing to grant maintenance under S. 488 of the Criminal Procedure Code is no bar to a civil suit for maintenance.[7] For further discussion of the question of the jurisdiction of Civil Courts in regard to maintenance proceedings under S. 488 of the Criminal Procedure Code, see the Authors' commentary on that section in 2nd (1941) Edition of the Code.

As to whether a suit will lie for restoration of property attached and sold under Ss. 87 and 88 of the Criminal Procedure Code, see the Authors' Commentaries on the Code of Criminal Procedure, 2nd (1911) Edition, S. 88 Note 10. An order of disposal passed by a Magistrate under S. 524 of the Criminal Procedure Code cannot be taken to be conclusive as regards the owner's title, and a civil suit to contest the order,[8] or for recovery of the proceeds of the sale of the property attached and sold under that section[9] is not barred. Similarly, a suit to recover the expenses ordered by a Criminal Court to be paid to a witness will lie in a civil Court.[10]

Where a civil suit and a criminal complaint raise the same issues between the same parties, the judgment of one Court is not binding on the other and there is the unavoidable risk of conflict of decisions.[11]

53. Matters dealt with by a special tribunal. — Where a special tribunal or a public body is created by or under the authority of an Act of Legislature for the purpose of determining questions as to rights which are the *creation* of the Act, then the jurisdiction of that tribunal or of that body is, unless provided otherwise, exclusive and the civil Courts cannot take cognizance of such matters.[1] Where, in the exercise of such

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4. † ('02) 26 Bom 353 (358, 360) (DB).
('74) 21 Suth W R 79 (79) (DB). (A Civil Court cannot set aside the order of a Magistrate giving possession.)
5. † ('02) 26 Bom 353 (358, 360) (DB).
('73) 20 Suth W R 12 (12) (DB).
6. ('08) 12 Cal W N 696 (699) (DB). (20 Suth W R 12 distinguished.)
7. ('05) 32 Cal 479 (481) (DB). (*Quære*—Whether a suit lies when a Magistrate orders maintenance under S. 488 to have the order set aside.)
8. ('20) 7 AIR 1920 Pat 182 (183, 185) : 5 Pat L Jour 321.
('85) 9 Bom 131 (135).
9. ('15) 2 AIR 1915 Bom 227 (227) : 40 Bom 200 (206).
10. ('26) 13 AIR 1926 Cal 289 (289, 290).
11. ('32) 19 AIR 1932 Mad 254 (255, 256) : 55 Mad 346.

Note 53

1. ('42) 29 AIR 1942 Lah 179 (185). (Case under the Royal Calcutta Turf Club Rules.)
('41) 28 AIR 1941 Nag 226 (230) : I L R (1941) Nag 279 (DB).
('40) 27 AIR 1940 Cal 236 (240) : I L R (1940) 1 Cal 14 (DB). (The jurisdiction to revoke a probate is limited to Probate Courts—Civil Courts have no jurisdiction.)
('40) 27 AIR 1940 Lah 401 (407) : I L R (1941) Lah 71 (FB).
('39) 26 AIR 1939 Lah 372 (373). (Punjab Village Panchayat Act, S. 39—Jurisdiction of Civil Courts to challenge Panchayat's order is barred.)
('36) 23 AIR 1936 Mad 269 (271, 272) (DB). (Suit for declaration that the Collector had proceeded on wrong basis in calculating the cess payable by the plaintiff under Madras Local Boards Acts, S. 79 and a claim for refund thereof — Question whether the suit was maintainable in Civil Court.)
('26) 13 AIR 1926 Mad 798 (798).
('37) 24 AIR 1937 All 365 (366, 367).
('35) 1935 All L Jour 1111 (1112).
('33) 20 AIR 1933 All 163 (165). (Taxation by Cantonment Board — Civil Court's jurisdiction ousted—Doubted in AIR 1934 All 609 : 57 All 1).
('33) 20 AIR 1933 All 358 (361, 363) : 55 All 406. (U. P. District Boards Act, S 35 (3)—Jurisdiction of Civil Court to try suit challenging election of chairman of District Board is impliedly barred.)
†('25) 12 AIR 1925 All 253 (261) : 47 All 434. (Suit against university to declare candidate to have passed in an examination does not lie.)
('37) 24 AIR 1937 Bom 231 (235).

jurisdiction, an individual may receive an injury and a party actually receives such injury, still the jurisdiction of the civil Courts is ousted if the method of redressing it is pointed out by the statute creating the jurisdiction.[2] Thus, the Chief Judge of the Small Cause Court at Bombay is the tribunal to determine questions as to disputed elections.[3] Similarly, several Municipal Boards have been constituted as special tribunals in election and other matters.[4] In all such cases where the tribunal or the body has acted within its jurisdiction, the jurisdiction of the civil Courts is barred in the absence of *mala fides* or fraud.[5]

✠('07) 31 Bom 604 (610). (Jurisdiction of Civil Court barred by implication.)

('38) 25 AIR 1938 Cal 359 (361). (Tribunal created by Bengal Local Self-Government Act to try questions as to rights created by that Act — Jurisdiction of the Tribunal is exclusive.)

('36) 23 AIR 1936 Cal 64 (65). (The Circle Officer is the special tribunal constituted under the Bengal Village Self-Government Act, to decide the question of a person's eligibility to vote—Civil Court's jurisdiction to try the question is barred.)

('35) 22 AIR 1935 Cal 10 (12) : 61 Cal 980.

('35) 22 AIR 1935 Lah 947 (948). (Dispute concerning business of Co-operative Society—Aggrieved member can only appeal to the arbitrator — Civil Court has no jurisdiction to impugn the award.)

('31) 18 AIR 1931 Mad 574 (575) : 54 Mad 928. (Madras Hindu Religious Endowments Act, S. 84 — Person aggrieved by Religious Endowments Board's decision is debarred from proceeding by suit.)

('26) 13 AIR 1926 Mad 246 (247) : 50 Mad 91. (Civil Courts cannot restrain a member of panchayat from entering his duties as panchayatdar.)

('38) 25 AIR 1938 Nag 119 (121) : I L R (1938) Nag 482.

('33) 20 AIR 1933 Oudh 100 (102) : 8 Luck 295.

('38) 25 AIR 1938 Rang 392 (393) : 1939 Rang L R 50 (FB). (Case under Burma Co-operative Societies Act, VI of 1927.)

✠('29) 16 AIR 1929 Sind 69 (82) : 26 Sind L R 435. (Municipality dismissing servant in lawful exercise of powers—No suit lies to question it.)

[*See* ('16) 3 AIR 1916 Mad 1119 (1120) : 38 Mad 41 (43, 44). (The Standing Committee of the Madras Corporation is not a Special Tribunal and hence suit lies from an order of the Standing Committee.)

('41) 28 AIR 1941 Lah 225 (227) (DB). (Special jurisdiction conferred — It must be taken to be strictly limited to terms in which it is created.)]

Also see Preamble Note 7.

2. ('43) 30 AIR 1943 All 123 (150) (FB).

('40) 27 AIR 1940 Bom 294 (304). (If a special tribunal under the Sea Customs Act after a fair hearing upholds the penalty imposed under S. 167 (17), and the same is confirmed by the Central Government under S. 191 of the Act, a suit in the Civil Court is not maintainable.)

('39) 26 AIR 1939 Mad 967 (968). (Case under Madras Co operative Societies Act, VI of 1932.)

('39) 26 AIR 1939 Mad 17 (20). (Suit by candidate involving declaration that interpretation by Collector of certain Madras Electoral Rule framed under Government of India Act, S. 72A (4), is wrong—Remedy provided by Rules—Jurisdiction of Civil Court is ousted.)

('38) 25 AIR 1938 Mad 972 (974) : I L R (1939) Mad 81. (Madras Hindu Religious Endowments Act, 1927, S. 43 provides a special remedy—Civil suit is barred.)

† ('25) 12 AIR 1925 Sind 130 (132) : 18 Sind L R 68 (DB). (Income-tax Act creates a special jurisdiction and provides special remedy.)

('39) 26 AIR 1939 Cal 178 (180) (DB). (Municipal Act providing remedy for nonfeasance of duty by municipality—Suit by rate-payer against municipality for nonfeasance of duty and not for any wrongful act, does not lie.)

('22) 9 AIR 1922 Cal 4 (5, 8) (DB). (Land Acquisition Act creates a special jurisdiction and provides a special remedy.)

('66) 5 Suth W R S C 6 (7) (DB) (Witness cannot sue for expenses as Code provides a special method to recover it.)

('70) 7 Bom H C R A C 33 (36) (DB).

† ('36) 23 AIR 1936 Lah 901 (903) : ILR (1937) Lah 92 (DB).

('28) 15 AIR 1928 Lah 562 (564) : 10 Lah 338 (DB).

('11) 9 Ind Cas 1000 (1001) : 1911 Pun Re No. 38 (DB).

† ('89) 12 Mad 105 (108). (Suit to cancel decision of forest officer and to recover certain land is not maintainable in Civil Court.)

† ('37) 24 AIR 1937 Sind 305 (306) (DB).

(1880) 14 Ch D 111 (117), West v. Downman.

(1848) 11 Q B 731 (742), Stevens v. Jeacoke.

Also see Note 62.

3. ('07) 31 Bom 604 (608) (DB).

4. See the Municipal Acts of the various provinces.

5. ('41) 28 AIR 1941 Lah 234 (236) : 1LR (1941) Lah 524 (FB).

('40) 27 AIR 1940 Nag 174 (175). (Suit against municipality for refund of tax wrongly recovered —Wrong decision of Municipality does not render its action *ultra vires* and therefore suit is not maintainable.)

('39) 26 AIR 1939 Nag 312 (312).

('38) 25 AIR 1938 All 520 (522).

('35) 22 AIR 1935 All 106 (108, 109) (DB). (See S. 29, U. P. Municipal Act.)

('05) 1905 All W N 79 (80) (DB). (Municipal Board closing up drain by which water used to flow away from plaintiff's premises on ground of public health — *Held*, plaintiff had no cause of action.)

† ('02) 26 Bom 294 (297) (DB). (Suit against municipality to recover overcharged house-tax — Suit held not maintainable in the absence of proof of *mala fides*.)

Where the special tribunal acts *ultra vires* or refuses to exercise its jurisdiction,[6]

(1900) 24 Bom 607 (609) (DB). (Civil Court cannot interfere in the matter of municipal valuation of houses.)
('98) 22 Bom 230 (233) (DB). (Order passed within its jurisdiction—Civil Court cannot interfere.)
('10) 37 Cal 374 (376) (DB). (Bengal Municipal Act, S. 116 — Civil Court has no jurisdiction to interfere with the decision of the Objection Committee in matters regarding the amount of assessment.)
† ('99) 26 Cal 811 (815, 817) (DB). (Construction of road by demolition of huts and privy by municipality is within its jurisdiction.)
('39) 26 AIR 1939 Lah 147 (148). (Suit for refund of tax levied under Cantonment Act — If tax is *ultra vires* of the Act, Civil Court has jurisdiction — If tax is *intra vires* Civil Court cannot decide whether tax is excessive or rightly levied.)
('35) 22 AIR 1935 Lah 330 (331).
('11) 12 Ind Cas 311 (315) : 36 Mad 120 (DB). (Validity of a Collector's order passed in substantial conformity with the requirements of rules for election of Municipal Councillors cannot be questioned in Civil Court.)
('12) 15 Ind Cas 321 (325) (Oudh). (Agreement to refer to arbitration — Arbitrator giving award — Court cannot interfere in the award made.)
('25) 12 AIR 1925 Sind 130 (132) : 18 Sind L R 68 (DB). (Income-tax Act — Civil Court has no jurisdiction where income only is taxed.)
[*See* ('37) 24 AIR 1937 Mad 481 (483) : I L R (1937) Mad 1023. (Suit to set aside order of the Hindu Religious Endowments Board rejecting a petition under S. 62, Madras Hindu Religious Endowments Act, does not lie in the Civil Court.)]
[*See also* (1900) 22 All 143 (148) (DB). (Suit for declaration of right to be entered in electoral list against Municipal Board—*Held*, revising authority, in its individual capacity was the proper defendant if such suit might at all lie.)]

6. ('43) 30 AIR 1943 All 123 (152, 153) (FB).
('43) 30 AIR 1943 All 204 (207) (DB). (Sale held by Collector under the U. P. Regulation of Sales Act though in fact the Act was not applicable—Suit for possession lies in Civil Court.)
('42) 29 AIR 1942 Peah 55 (56) (DB). (Civil Court can declare that the Village Council had no jurisdiction to entertain suit under S. 23, N. W. F. P. Village Council Act (VII of 1935).)
('42) 29 AIR 1942 Lah 87 (88) (DB). (The Civil Court has full power to hold that the order of the Debt Conciliation Board was without jurisdiction and, if it does so hold, should ignore it : AIR 1941 Lah 234 : I L R (1941) Lah 524 (FB) followed.)
†('41) 28 AIR 1941 Lah 234 (236) : ILR (1941) Lah 524 (FB).
('40) 27 AIR 1940 Rang 157 (159). (Arbitrator ignoring law of limitation—Civil Court has jurisdiction to set aside such award.)
†('40) 1940 Nag L Jour 256 (259). (Though, if the Conciliation Board exceeds its jurisdiction and such action is questioned, the Civil Court will enquire into the question of jurisdiction, it will not interfere with the proceedings of the Board, if they are within jurisdiction.)
('40) 27 AIR 1940 Mad 902 (903). (Disputes between members and management—Suit in Civil Court — Maintainable only when Society acts *ultra vires*.)
('40) 27 AIR 1940 Lah 451 (454).
('40) 27 AIR 1940 Lah 401 (407) : I L R (1941) Lah 71 (FB). (Punjab Relief of Indebtedness Act —Usufructuary mortgage—Order by Board treating amount secured as "debt" and declaring it to have been discharged under S. 13 (2) of the Act is *ultra vires* — Civil Court can question validity of order.)
('40) 27 AIR 1940 Cal 198 (201) : I L R (1940) 1 Cal 82 (DB). (If special tribunal acts without jurisdiction the Civil Court will interfere.)
('40) 27 AIR 1940 Cal 305 (305, (306). (Civil Court has jurisdiction to grant declaration that action of District Board under Bengal Village Self-Government Act is *ultra vires*.)
('40) 27 AIR 1940 Cal 554 (555) (DB). (Certificate officer holding sale without authority—Assuming of jurisdiction which he did not possess under Bengal Public Demands Recovery Act — Civil Court has jurisdiction to set aside sale.)
('40) 27 AIR 1940 All 482 (484). (Co-operative Societies Act—Passing of personal decree against representative of a deceased member—Civil Court can set aside such a decree.)
†('40) 27 AIR 1940 P C 105 (110) : 67 Ind App 222 : I L R (1940) Mad 599: I L R (1940) Kar P C 194 (PC). (Not complying with the provisions of the Act or with the fundamental principles of judicial procedure.)
('39) 26 AIR 1939 Lah 372 (373). (Panchayat passing resolution ordering demolition of certain chabutra—Suit to determine whether resolution of panchayat was *ultra vires* of its statutory powers can be entertained by Civil Court.)
('39) 26 AIR 1939 All 383 (385) : I L R (1939) All 500 (DB). (Municipality acting *ultra vires* — Civil Court has jurisdiction to entertain suit.)
† ('26) 13 AIR 1926 Mad 798 (798).
† ('35) 39 Cal W N 118 (119).
('20) 7 AIR 1920 P C 51 (53) : 47 Cal 500 (506) : 47 Ind App 45 (P C). (Misuse of powers of statutory body—Civil suit will lie.)
('16) 3 AIR 1916 P C 123 (125) : 44 Cal 87 (94) : 43 Ind App 243 (P C). (Calcutta Municipal Act, III of 1899.)
('29) 16 AIR 1929 All 756 (757). (Act of municipality can be questioned by Civil Court if power not given by law is assumed.)
('27) 14 AIR 1927 All 432 (434). (Assumption of powers—Civil suit would lie.)
('14) 1 AIR 1914 Bom 33 (35) : 38 Bom 293 (DB). (Tax levied without shadow of right—Suit would lie.)
† ('32) 19 AIR 1932 Cal 177 (178): 58 Cal 1356. (Action levying license-fee, if *ultra vires*, can be impeached in Civil Court.)
† ('29) 16 AIR 1929 Cal 33 (34) : 56 Cal 230 (DB). (Municipality acting *ultra vires*—Civil Court can interfere.)

or acts *mala fide* or *arbitrarily*[7] in the exercise of its jurisdiction, the Civil Court has

('21) 8 AIR 1921 Cal 85 (87) : 48 Cal 378 (DB). (Order in contravention of rules.)
('12) 39 Cal 141 (145) (DB). (Municipality acting *ultra vires*—Civil Court can interfere.)
('08) 35 Cal 859 (865) (DB). (Substantial disregard of the provisions which create jurisdiction.)
('08) 35 Cal 82 (89, 93, 101) (FB). (Assessment *ultra vires*.)
† (1900) 27 Cal 849 (857) (DB). (Assessment *ultra vires*—Civil Court can interfere.)
('99) 3 Cal W N 73 (75) (DB). (Do.)
('98) 2 Cal W N 689 (691) (DB). (Assessment *ultra vires*—Suit will lie.)
('94) 21 Cal 319 (327) (DB). (Do.)
('69) 11 Suth W R 425 (425) (DB). (Income-tax illegally assessed.)
† ('36) 23 AIR 1936 Lah 901 (903) : ILR (1937) Lah 92 (DB). (But that principle will have no application where there was no matter in existence with which the person empowered was authorised to deal. In such cases the Civil Court could give relief either before the aggrieved person had exhausted the remedies provided by the Act against the action of the tribunal or after it.)
('31) 18 AIR 1931 Lah 315 (316.) (Civil Court is competent to adjudicate on question of *ultra vires* or otherwise of an action of municipality.)
('27) 14 AIR 1927 Lah 358 (361). (Municipality acting *ultra vires*—Civil Court can interfere.)
('26) 13 AIR 1926 Lah 461 (461, 462). (Do.)
('24) 11 AIR 1924 Lah 619 (621). (Illegal levy of tax—Suit will lie.)
† ('19) 6 AIR 1919 Lah 68 (69) (Do.)
✠ ('38) 25 AIR 1938 Mad 608 (611) : ILR (1938) Mad 1040 (DB). (When executive authority in the exercise or under colour of statutory powers interfers with the person or property of the subject improperly or in excess of the limits authorised by law, the subject has the right to resort to the Civil Court, unless its jurisdiction has been taken away by express words or by implication.)
('38) 25 AIR 1938 Mad 972 (974) : I L R (1939) Mad 81 (DB). (Do.)
('36) 23 AIR 1936 Mad 269 (271) (DB). (Do.)
† ('23) 10 AIR 1923 Mad 475 (478) : 47 Mad 585 (DB).
('13) 36 Mad 113 (115). (Powers of statutory corporation to be exercised strictly — What is not expressly permitted is forbidden.)
('04) 27 Mad 547 (549, 551) (DB). (Tax illegally levied on gross income.)
('98) 21 Mad 367 (368) (DB). (Charitable buldings exempted from tax—Tax on such buildings is illegal.)
('92) 15 Mad 153 (154) (DB). (Tax levied twice — Suit would lie.)
('90) 13 Mad 78 (81). (Substantial disregard of the provisions which create jurisdiction.)
('38) 25 AIR 1938 Nag 373 (374). (The Civil Court has power to enquire into the question whether a special tribunal created for a special purpose by a special Act has acted within the limits prescribed and defined by the Act creating that tribunal.)
('35) 22 AIR 1935 Nag 224 (225).
('22) 9 AIR 1922 Nag 10 (11) : 18 Nag L R 121. (Illegal levy of tax—Suit will lie.)
('09) 12 Oudh Cas 191 (193) (DB). (Action within its powers—Civil Courts cannot interfere.)
('34) 21 AIR 1934 Pat 83 (85).
('29) 16 AIR 1929 Sind 69 (82) : 26 Sind L R 435. (Substantial disregard of the provisions which create jurisdiction.)
[*See also* ('36) 23 AIR 1936 Cal 225 (226) (DB).]
[But see ('76) 1 Cal 409 (411) (DB). (Decision of Municipal Commissioners regarding rate of assessment is absolutely final.)
('34) 21 AIR 1934 Pat 670 (675) : 14 Pat 24 (FB). (Per Courtney-Terrell, C. J.)]

7. ('41) 28 AIR 1941 Lah 200 (208, 209) : ILR (1941) Lah 278 (DB). (Discretionary orders of Municipality under S. 193 (2), Punjab Municipal Act, constituting abuse of power vested in it—Civil Courts can interfere in spite of S. 225 of same Act.)
('39) 26 AIR 1939 All 394 (396, 397) : ILR (1939) All 345 (DB). (Municipal Board acting in utter disregard of mandatory provisions relating to assessment.)
✠ ('39) 26 AIR 1939 Lah 372 (373).
('19) 6 AIR 1919 Bom 30 (31) : 43 Bom 221 (DB). (Decision, if arrived at without any enquiry or without giving opportunity to parties to be heard, jurisdiction of Civil Courts is not barred.)
('38) 25 AIR 1938 All 110 (112).
('11) 11 Ind Cas 509 (510, 511) (PC). (Discretion given by statute—Arbitrary exercise of—Court has power to interfere.)
† ('02) 26 Bom 294 (297) (DB). (No *mala fides* in exercise of powers—Civil Courts cannot interfere.)
('88) 12 Bom 490 (494, 495). (Discretion exercised reasonably by Municipality — Civil Courts cannot interfere.)
† ('99) 26 Cal 811 (815) (DB). (No *mala fides*—Civil Courts cannot interfere.)
✠ ('73) 19 Suth W R 309 (314, 315) (DB). (Arbitrary use of powers without inquiry — Civil Court can interfere.)
('37) 24 AIR 1937 Lah 252 (253). (By statute Municipal Committee vested with power to improve drainage—Its act can be questioned in Civil Court only if it is not *bona fide* or is oppressive, wanton or capricious.)
('24) 11 AIR 1924 Lah 699 (700) (DB). (Civil Court cannot interfere with honest and fair exercise of discretion of a Municipal Committee.)
† ('07) 1907 Pun Re No. 58, page 270 (273). (Order of the municipality without inquiry—Civil Court can interfere.)
('26) 13 AIR 1926 Mad 204 (205). (Special tribunal in election matter acting in good faith—Civil Court cannot interfere.)
† ('21) 8 AIR 1921 Mad 92 (93) : 44 Mad 156 (DB). (Exercise of powers arbitrarily—Civil Court can interfere.)
('19) 6 AIR 1919 Mad 159 (159) : 42 Mad 668 (669, 672) (DB). (Temple committee acting *mala fide* in appointing trustee.)
('11) 10 Ind Cas 548 (549) : 35 Mad 631 (DB). (Dismissal of Archaka.)
('10) 6 Nag L R 53 (64). (Abuse of powers—Person injured has a cause of action.)

power to interfere and set matters right. (See also Note 50). Thus, where a condition precedent to the vesting of jurisdiction in a special tribunal has not been fulfilled, the proceedings before the tribunal are null and void.[8] Similarly, where under the Bengal Municipal rules the District Magistrate had no jurisdiction to declare an election void on the ground of corrupt practice but nevertheless he passed an order to that effect, it was held that the Civil Court could entertain a suit to declare the election valid.[9]

Whenever the question arises whether the special tribunal has or has not jurisdiction, the Court of general jurisdiction, i. e., the Civil Court, is the final authority as to whether the cause is or is not within the jurisdiction of the special tribunal. This principle applies to all special tribunals or departmental authorities set up to try particular cases or to decide particular matters.[10]

54. *(Omitted.)*

55. Suits impliedly barred—General.— A suit is said to be *impliedly* barred when it is barred by *general principles of law* or on grounds of *public policy*.[1] Thus, where the Legislature has acted within its powers, it is not open to the Municipal Courts to question the legality of the provisions of the enactment passed by the Legislature.[2] Similarly, where a special tribunal or a public body is created by or under the authority of an Act of the Legislature for the purpose of determining rights which are the *creation* of the Act, then the jurisdiction of that tribunal or of that body is unless provided otherwise, exclusive, and Civil Courts cannot take cognizance of such matters.[3] (See Note 53.) Again, it is an ordinary principle of law that the Court will not interfere with the internal management of companies acting within their powers and in fact has no jurisdiction to do so.[4]

56. Political questions. — As has been seen in Note 16, civil rights are private legal rights of the citizens of a State. Political questions, on the other hand, belong to the domain of public administrative law,[1] and are outside the jurisdiction of Civil Courts. Thus, the question to whom a *jaghir* shall be granted upon the death of its holder,[2] or the question of succession to a *raj*,[3] belong exclusively to the Government to be determined upon *political* considerations. The decision of the Government on such questions cannot be canvassed by Municipal Courts.[4] Where, however, a civil right is in question —

('16) 3 AIR 1916 Sind 17 (19) : 9 Sind L R 126 (130)(DB). (Statutory powers of public functionaries must be exercised reasonably and in consonance with the Act.)
[*See* ('37) 167 Ind Cas 843 (844) (Nag). (Civil Court, if can inquire as to whether special tribunal acted within its power.)]
[*See also* ('94) 18 Bom 547 (550).
('88) 12 Bom 474 (478) (DB). (Powers given by Legislature to interfere with private property are to be exercised strictly.)]

8. ('33) 20 AIR 1933 Rang 124 (127) : 11 Rang 125.
9. ('33) 20 AIR 1933 Cal 492 (493) : 60 Cal 438 (DB)
10. ('42) 29 AIR 1942 Lah 179 (186). (It is for the Civil Court to determine whether a certain matter in dispute is within the jurisdiction of the stewards.)
✠('41) 28 AIR 1941 Lah 234 (236) : ILR (1941) Lah 524 (FB).
See also cases cited above for the point that Civil Court can interfere where the special tribunal has acted without jurisdiction.

Note 55

1. ('36) 23 AIR 1936 Bom 250 (252) : 60 Bom 645. (Suit to set aside award under Arbitration Act is not incompetent.)
2. ('25) 12 AIR 1925 Mad 837 (838) : 49 Mad 237. (Land Acquisition Act.)
3. See Note 53.
4. ✠(1916) 1 Ch 532 (547, 552), Foster v. Foster.
✝('24) 11 AIR 1924 Cal 598 (599) (DB).
('23) 10 AIR 1923 Bom 305 (316) : 47 Bom 809.
('26) 13 AIR 1926 Sind 295 (296).

Note 56

1. (1864) 1 Suth W R 16 (16) (DB).
('71) 7 Beng L R 452*n* (459*n*). (No suit will lie against a political agent acting within jurisdiction.)
Salmond's *Jurisprudence*, 3rd Edn., pp. 304-305.
2. ('93) 17 Bom 431 (456) (PC).
3. ('08) 35 Cal 777 (789, 794) (SB).
4. ('93) 17 Bom 431 (456) : 20 Ind App 50 (PC).
✠('06) 33 Cal 219 (253) : 33 Ind App 1 (PC). (There is no appeal to the King in Council from the political jurisdiction of Agency Courts in Kathiawar.)

e. g., a right to the property of a native prince within the jurisdiction of the Court — the Civil Courts do not lose their jurisdiction to try such questions merely because a political question is involved.[5]

57. Acts of State. — An act of State may generally be defined as an act done or adopted by a State in its sovereign capacity and injurious to the person or property of some person who is not, at the time of that act, a subject of that State.[1] As between the sovereign and his subjects there can be no such thing as an act of State.[2] An act of State, therefore, is not a matter dealing with civil rights at all and the Municipal Courts have no jurisdiction to deal with such questions.[3] As expressed by the Judicial Committee of the Privy Council in *Secretary of State* v. *Kamachee Boye Saheba*[4]: "The transac-

('23) 10 AIR 1923 P C 6 (8) : 50 Ind App 49 : 47 Bom 327 (PC). (Saranjam grant for political services—Resumption.)
('03) 27 Bom 189 (211, 220). (Dismissal of public servant by Government resolution—Defamation—No suit for damages lies against Government.)
('28) 15 AIR 1928 Cal 74 (81) : 54 Cal 969. (Commandeering order is an act of the sovereign on political grounds.)
('15) 2 AIR 1915 Cal 59 (59) (DB). (Dismissal of Garhwal by police authorities.)
('14) 1 AIR 1914 Cal 508 (513).
('13) 17 Cal L Jour 75 (83) (DB). (Action on dismissal of Government servant does not lie.)
('12) 39 Cal 615 (661, 662) : 39 Ind App 31 (PC). (Act of the Executive Government for the establishment and maintenance of cattle pounds, necessary for the maintenance of law and order.)
('12) 15 Cal W N 486*n* (488*n*). (Action on dismissal by Government does not lie.)
('06) 33 Cal 669 (675). (Action on dismissal of Government servant does not lie.)
('75) 1 Cal 11 (26) (DB). (Laws of taxation in exercise of powers cannot be enforced.)
('94) 1894 Pun Re No. 21, p. 48 (52). (A suit as regards legality of executive orders of foreign states is not maintainable in a Court in British territory.)
('16) 3 AIR 1916 Mad 1157 (1159) : 39 Mad 781 (788, 792) (DB). (Defamation in Government order.)
('29) 16 AIR 1929 Pat 22 (27) : 8 Pat 95 (DB). (Question of distribution of Government revenue.)
('24) 11 AIR 1924 Pat 616 (623) : 3 Pat 673 (DB). (Dismissal of Garhwal—Civil Court cannot adjudicate on propriety of.)
[*See* ('03) 26 Mad 268 (273) (DB). (But Civil Courts can determine whether grant of land under Darkhast rule is binding on the Crown.)

5. ('69) 12 Moo Ind App 523 (535) (PC).
†('76) 25 Suth W R 404 (405, 407) (DB). (Title of Rajah of Tipperah to a zamindari within British India.)

Note 57

1. History of the Criminal Law by Sir James Stephen, Vol. II, page 61.
2. ('87) 11 Bom 235 (239) (DB).
('93) 17 Bom 600 (611, 618). (Act of State of foreign power cannot be made the basis of an action in British India.)
('93) 17 Bom 620 (624). (Do.)
('72) 18 Suth W R 349 (359) (PC).
✠('69) 13 Suth W R P C 4 (6) (PC). (Auction sale of confiscated property of rebels is not an act of State. It is like an individual selling his property and purchaser can sue the Government for possession.)
('08) 1908 Pun Re No. 105, page 487 (490).
History of the Criminal Law by Sir James Stephen, Vol. II, page 65.
3. ('41) 28 AIR 1941 P C 64 (67, 68) : I L R (1941) Kar (PC) 94 : 68 Ind App 109 (PC). (Acquisition of territory by Sovereign State—Rights of inhabitants under old regime are affected.)
('41) 28 AIR 1941 P C 109 (113) (PC). (Rights conferred by a treaty of cession cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law.)
(1859) 7 Moo Ind App 555 (578) (PC).
(1830) 1 Knapp P C C 316 (360, 361). (Seizure of property of a native of conquered country.)
('05) 32 Cal 1 (4, 5) : 31 Ind App 239 (PC). (Deposition of a Ruler of a Native State.)
('72) 18 Suth W R 389 (392) : 1872 Pun Re No. 2 (PC). (Confiscation of property of deposed king.)
('72) 2 Ind App 38 (47) : 1875 Pun Re No. 1 (PC). (Seizure of estate by right of conquest.)
✠(1859) 7 Moo Ind App 476 (530) (PC). (Do.)
('32) 19 AIR 1932 Bom 206 (207) : 56 Bom 349. (British Court cannot question an act of the Indore State.)
('71) 7 Beng L R 452*n* (459*n*). (No suit lies in respect of acts done by political agent as such.)
('16) 3 AIR 1916 Mad 116 (117) (DB). (Inam granted by Nawab of Arcot—British Government assuming sovereign powers and resuming inam is an act of State—Civil Courts have no jurisdiction.)
('15) 2 AIR 1915 Mad 993 (998) : 39 Mad 351 (354, 355) (DB). (Maintenance of roads is a function of the Government.)
('30) 17 AIR 1930 Pat 357 (368) (DB). (Appointment of political agent to a State is an act of State. But for embezzlement by the political agent respecting property in British India, suit lies.)
('26) 13 AIR 1926 Pat 305 (311) : 5 Pat 595 (FB). (Appropriation of revenue by Local Government is an act of State.)
('08) 1908 Pun Re No. 105, p. 487 (490).
4. (1859) 7 Moo Ind App 476 (529) (PC).
('15) 2 AIR 1915 P C 59 (62) : 39 Bom 625 : 42 Ind App 229 (PC). (Annexation of territory is an act of State and any obligation assumed under a treaty either to the ceding sovereign or to individuals is not one which Municipal Courts are authorised to enforce.)

tions of independent States between each other are governed by other laws than those which Municipal Courts administer: such Courts have neither the means of deciding what is right nor the power of enforcing any decision which they may make." But a Court has always power to decide whether a particular act is an act of State or not.[5]

Where Government does anything under *colour of a legal title* and a claim is made in derogation of such title, that claim, like any other, arising between the Government and its subjects would *prima facie* be cognizable by Municipal Courts.[6]

An act of State is distinct from an executive act.[7]

58. Suits barred on the ground of public policy. — Certain suits, though of a civil nature, are barred from the cognizance of Courts on grounds of public policy. The principle is that Courts ought not to countenance matters which are injurious to, and against the public weal.[1] Thus, a suit for costs incurred in a criminal prosecution,[2] or a suit based upon a contract which is opposed to S. 23 or other provision of the Contract Act, will not lie. Similarly, no suit will lie in respect of a *privileged* statement,[3] or

('24) 11 AIR 1924 P C 216 (218, 220) : 48 Bom 613 : 57 Ind App 357 (PC). (Cession of territory —Treaty, conditions in—Municipal Courts cannot adjudicate upon rights existing before cession.) [*See also* (1906) 1 K B 613 (633, 634,) Salamon v. Secretary of State.)]

5. ('11) 38 Cal 754 (766, 767) (DB). (Guarantee given by Secretary of State for due performance of a decree obtained by one private individual against another is not an act of State.)

6. ('71) 1871 Ind App Sup Vol. 10 (17, 18) : 1872 Pun Re No. 1 (PC).
('04) 28 Bom 314 (325) (DB). (Act done in performance of a statutory duty and not in obedience to an order of Executive Government is not an act of State.)
('71) 6 Bom L R 131 (139) (DB). (Affirming 27 Bom 189.)
('70) 6 Beng L R 392 (444, 456).
('84) 7 Mad 466 (472) (FB).
('83) 6 Mad 361 (364) (DB). (Suit by grantee of inam to contest right of Government to resume it.)
† ('72) 5 Mad 273 (279, 283) (DB). (Acts done professedly under Municipal law can be examined by Courts.)

7. ('35) 22 AIR 1935 Bom 439 (443) (DB).

Note 58

1. ('73) 17 Suth W R 283 (284) (PC).
See also the cases cited in the foot-notes below.

2. † ('90) 12 All 166 (168) (SB).
('07) 32 Cal 429 (430) (DB).
('87) 1887 All W N 104 (104) (DB).
('90) 14 Bom 100 (101) (DB).
[But see ('82) 4 All 97 (99) (DB). (Suit for costs for prosecuting the accused for abduction and seduction of plaintiff's daughter.)]

3. *Statements privileged* :
† ('88) 10 All 425 (434) (DB). (No action for damages against witness.)
(1900) 22 All 234 (237). (Statement of accused in application to Court for protection of his interest.)
('66) 1 Agra 33 (35). (The privilege only extends to statements made in judicial proceedings.)
('70) 2 N W P H C R 473 (474, 475). (Pleader not liable, if on instruction he in good faith introduced defamatory matter in the pleadings.)
('01) 25 Bom 230 (239, 242) (DB). (No action for damages against witness.)
('95) 19 Bom 340 (349) (DB). (Words spoken by pleader.)
('90) 14 Bom 97 (99, 100) (DB). (No action for damages against witness.)
('01) 28 Cal 794 (797) (DB). (Words spoken in answer to question put by investigating police officer.)
('88) 15 Cal 264 (268) (DB). (No action for damages against witness.)
('73) 17 Suth W R 283 (284) (P C). (No suit for damages against witness for defamatory statement.)
(1865) 5 Suth W R 134 (135, 136) (DB).
('08) 31 Mad 400 (401 402) (DB). (Accused's question to witness in good faith privileged.)
† ('87) 10 Mad 28 (35, 36) (FB). (Counsel is absolutely privileged for words spoken.)
('87) 10 Mad 87 (89) (DB). (No action for damages against witness.)
('78) 2 Mad 13 (14, 15) (DB).
† (1876) 1 C P D 545 (546, 547), Seaman v. Netherclift. (Witness is privileged as to anything he may say as witness.)
(1772) 1772 Lofft 55 (56), Rex v. Skinner. (No civil or criminal liability for words spoken in office.)
Statements not privileged :
('95) 19 Bom 717 (725, 726) (DB). (Suit for damages by one whose house is searched on false information to police lies.)
('96) 23 Cal 867 (872, 873) (DB). (Statement in pleading affecting caste of the person of whom it is made.)
('11) 15 Cal W N 995 (997, 998) (DB). (Defamatory statements in wirtten statements of party.)
† ('05) 32 Cal 1060 (1063) (DB). (Voluntary and unwanted defamatory statement is not privileged.)
('01) 5 Cal W N 293 (294) (DB). (Perfectly unwarrantable and irrelevant insult in plaint against opposite party.)
(1865) 3 Suth W R 198 (198) (DB). (Unnecessary defamatory statement in petition for transfer.)
('92) 15 Mad 414 (416) (DB). (Accused making unwarranted defamatory statement against witness.)

privileged communication.[4] Government servants acting within their authority are not liable for their acts done within such authority.[5] Judges are also protected for acts done in the course of their duties.[6] In respect of such acts, therefore, no suit will lie. As to suits against the Secretary of State, see section 79.

59. Barrister, if can sue for his fees. — Under the English Common law, the fees of a barrister are not *merces* but *honoraria* and a barrister cannot sue for his fees, the rule being based on public policy.[1] The leading case on the point is *Kennedy* v. *Brown*[2] where it was laid down that "the relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation." There was a difference of opinion as to whether this principle applied in the case of barristers practising in India,[3] though where there was no subsisting

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4. ('03) 27 Bom 585 (590) (DB). (Report by subordinate to superior—Libel against defendant—Report is privileged.)
('99) 26 Cal 53 (71) (SB). (S. 127 of the Evidence Act extends to communication to pleader's clerk.)

5. † ('97) 21 Bom 754 (772) (FB). (Acts done by Mamlatdar.)
('03) 27 Bom 590 (596) (DB). (Police officer acting in discharge of his duties.)
('07) 30 Mad 270 (273) (DB).

When they act illegally and in excess of their authority, they will be liable :
('03) 27 Bom 189 (211). (NOTE :—The Governor-General in Council and the Governors of Madras and Bombay are by statute exempted from the jurisdiction of Municipal Courts so far as acts done in the public capacity are concerned.)
('67) 8 Suth W R 372 (373) (DB). (Revenue sale of estate to other than the highest bidder.)
('68) 3 Agra 409 (427). (Cantonment Commanding Officer is liable for acts done without legal authority.)
('04) 31 Cal 829 (832, 833). (Omission by chairman of municipality to pay adequate compensation for property demolished under the Epidemic Diseases Act.)
('97) 24 Cal 691 (696, 699) (DB). (Illegal search of house.)
('82) 9 Cal 341 (354) (PC). (Cantonment Commanding Officer is liable for acts done without legal authority.)
('66) 3 Mad H C R 35 (37) (DB). (Failure to perform duty.)

6. ('71) 6 Mad H C R 423 (439, 441, 448) (DB).
('70) 5 Mad H C R 345 (354, 357) (DB).
(1900) 10 Mad L Jour 232 (234) (DB). (Magistrate acting in good faith—No suit lies. See the Judicial Officers' Protection Act (18 of 1850).)

See also the following cases.

Judicial Officer protected when acting judicially in good faith within jurisdiction :
('78) 1 All 280 (281) (DB).
(1841) 2 Moo Ind App 293 (310) (P C).
('90) 12 All 115 (127) (DB).
('06) 30 Bom 241 (245) (DB).
('73) 10 Bom H C R 346 (350) (DB).
('12) 39 Cal 953 (967) : 39 Ind App 163 (PC).
('05) 9 Cal W N 495 (497, 498) (DB).
('99) 26 Cal 852 (862) (DB). (Judge not liable for words spoken in office.)
('71) 7 Beng L R 449 (485) (DB).
('70) 13 Suth W R 340 (341) (DB).
('94) 17 Mad 87 (88) (DB). (Judge not liable for words spoken in office.)
(1865) 2 Mad H C R 396 (397) (DB).
1 Boulnois 1. (Statement of Judge in letter which he was bound to forward to High Court.)
(1875) 1 C P D 540 (544), Seaman v. Netherclift. (Judge not liable for words spoken in office.)

But wilful abuse of authority and acting without jurisdiction wilfully and maliciously takes away the protection :
('06) 30 Bom 241 (245) (DB).
('66) 2 Bom H C R 384 (389) (DB).
('67) 4 Bom H C R 150 (152) (DB). (Magistrate attempting to make illegal order can be restrained by injunction.)
(1865) 3 Bom H C R A C 36 (46) (SB).
(1865) 3 Bom H C R A C 47 (48) (SB). (Where *prima facie* act complained of is wrongful, it is for Magistrate to show that he is protected by Act XVIII of 1850.)
('97) 24 Cal 691 (696) (DB).
('83) 9 Cal 341 (354) : 9 Ind App 152 (PC).
('74) 21 Suth W R 391 (394) (SB). (Protection does not extend to execution and ministerial acts of Magistrate.)
('74) 21 Suth W R 126 (128) (DB). (Do.)
('70) 13 Suth W R 13 (19) (DB).
('69) 11 Suth W R Cr 19 (20) (DB). (Wilful delay by Magistrate of trial of persons in remand finally acquitted.)
('76) 1 Mad 89 (106, 118) (FB).
('71) 6 Mad H C R 423 (436, 437) (DB).
(1865) 2 Mad H C R 443 (444) (DB).
('08) 1908 Pun W R No. 59, p. 222.

Note 59

1. (1896) 2 Ch D 487 (491), In re Le Brassour and Oakley. (But see Act XXI of 1926.)

2. † (1862) 32 L J C P 137 (143), Kennedy v. Brown.
[*See also* (1860) 5 H & N 890 (918), Swinfen v. Lord Chelmsford.]

3. ('03) 25 All 509 (522) (FB). (Yes.)
('71) 3 N W P H C R 83 (85) (DB). (Yes.)
('06) 1906 Pun Re No 49, p. 189 (191 (FB). (Yes.)
('95) 1895 Pun Re No. 51, p. 219 (222, 223) (FB). (Yes.)
('83) 1883 Pun Re No. 194. (Overruled.)
('81) 3 Mad 138 (140) (FB). (Yes.)

relationship of advocate and client, as where a barrister had not been admitted as an advocate at the time of the receipt of the fees, the above bar was held not to apply.[4] The Legal Practitioners Fees Act (XXI of 1926) now expressly provides that every legal practitioner (which includes a barrister enrolled as an advocate in India) shall be entitled to institute legal proceedings for the recovery of any fee due to him. In *Nihal Chand Shastri* v. *Dilawar Khan*,[5] Mukherji, Ag. C. J., has expressed the opinion that even apart from the abovementioned Act, a barrister is entitled to sue for any fee due to him, inasmuch as the right of a barrister to appear in Courts in India arises only from his enrolment as an advocate, and that the peculiar position of a barrister-at-law in England disappears on his being admitted as an advocate of a High Court in India. King, J., however, preferred to rest his decision on Act XXI of 1926. A barrister will not be exempt from liability to the client for injury caused to the client by reason of his negligence.[6]

60. Suit based on illegal and immoral customs. — See Note 58.

61. Fraud. — Fraud vitiates the most solemn transactions.[1] A suit will, therefore, lie to set them aside. Thus, a suit will lie to set aside a contract or a conveyance or even a *decree* obtained by fraud.[2] Wherever, therefore, fraud is alleged and one

[But see ('06) 4 Low Bur Rul 55 (60 62, 65) (FB). (No. A barrister practising in India does not do so as such but as an advocate and so is governed by rules governing advocates.)]

4. ('69) 4 Mad H C R 244 (250, 251) (DB).

5. ('33) 20 AIR 1933 All 417 (419, 424) : 55 All 570 (FB).

6. ('15) 2 AIR 1915 All 34 (35) : 37 All 267 (DB).

Note 61

1. ('90) 17 Cal 769 (784) (FB).

2. ('94) 21 Cal 612 (617) (DB). (Fraud must be actual fraud which can be explained and defined upon the face of a decree and not a mere irregularity.)
('10) 32 All 145 (147) (DB).
('15) 2 AIR 1915 P C 99 (101) : 37 All 485 : 42 Ind App 171 (PC).
('85) 11 Ind App 211 (216, 217) : 11 Cal 61 (P C). (Mortgage—Condition as to repayment of moneys received when mortgage deed is cancelled for fraud between creditor and debtor's manager.)
('29) 16 AIR 1929 All 232 (233). (Revenue decree obtained by fraud—Suit lies in Civil Courts to set it aside on ground of fraud.)
('15) 2 AIR 1915 All 400 (401) : 37 All 535 (DB). (No suit to set aside decree lies on ground that it was obtained by suppression of evidence.)
('07) 29 All 212 (213) (DB). (Mere non-service of summons will not constitute fraud but non-service coupled with other circumstances may constitute fraud.)
('01) 26 All 272 (282) (DB). (Court can treat as nullity decree obtained by fraud.)
('03) 25 All 48 (53) (DB). (Any Court, whether superior or inferior, can treat as a nullity any judgment shown to have been obtained by manifest fraud.)
('03) 25 All 347 (350) (DB). (*Ex parte* decree.)
('95) 19 Bom 821 (826) (DB).
('91) 15 Bom 594 (598) (DB).
('89) 13 Bom 137 (141).
('82) 6 Bom 703 (711).
('82) 6 Bom 148 (150) (DB). (Compromise decree.)
('26) 13 AIR 1926 Cal 1 (37) (DB). (Mere non-service of summons will not constitute fraud but non-service coupled with other circumstances may constitute fraud.)
('26) 13 A I R 1926 Cal 167 (168) (DB). (Decree obtained by fraud is only voidable.)
('26) 13 AIR 1926 Cal 426 (426) (DB). (No suit to set aside decree passed after due service of summons on the plea of false claims and false evidence.)
('16) 3 AIR 1916 Cal 816 (817) : 43 Cal 217 (224) (DB).
('14) 1 AIR 1914 Cal 232 (232) : 41 Cal 990 (998) (DB). (Fraud must be actual and positive.)
('15) 2 AIR 1915 Cal 69 (70) (DB). (Suit to set aside decree on ground of false case.)
('12) 16 Cal W N 1002 (1005) (DB). (No suit to set aside decree passed after due service of summons on the plea of false claims and false evidence.)
('11) 38 Cal 936 (940, 941) (DB).
('10) 14 Cal W N 695 (697) (DB). (Decree of superior Court can be declared a nullity though not set aside by an inferior Court on the ground of fraud.)
('08) 13 Cal W N 300 (302) (DB).
('07) 5 Cal L Jour 328 (332) (DB). (*Ex parte* decree.)
('07) 37 Cal 197 (203) (DB). (Non-service of summons is not fraud and decree cannot be set aside by suit.)
('07) 11 Cal W N 579 (580) (DB). (Decree of superior Court can be declared a nullity though not set aside by an inferior Court on the ground of fraud.)
('06) 10 Cal W N 286 (286) (DB). (Compromise decree.)
('02) 29 Cal 395 (400) (PC). (*Ex parte* decree.)
('01) 28 Cal 475 (478) (PC). (Do.)
('01) 5 Cal W N 559 (562) (DB). (Do.)
(1900) 27 Cal 11 (17, 24) (DB). (Defendant is entitled to show that compromise decree relied on by plaintiff was obtained by fraud.)

person has derived benefit by his fraud and another has lost, the jurisdiction of the Civil Court arises.[3]

But it is a rule of public policy that a party will not be allowed to plead *his own fraud* in order to avoid his own deed.[4] Thus, a suit by parties to a *collusive* decree to set it aside will not lie.[5] Similarly, a party to a fraudulent document cannot sue to set it aside where the fraudulent purpose has been carried out.[6] Where, however, the fraud has not been carried out, there is no such prohibition.[7] The representative of a party, who has benefited by the fraudulent transaction, is in no better position than the party himself.[8] A defendant may set up by way of defence that the plaintiff is guilty of fraud. But he must himself be free from the taint.[9]

(1900) 27 Cal 197 (200) (DB).
† ('99) 26 Cal 891 (907, 918, 919).
('97) 24 Cal 546 (549, 550) (DB).
('97) 1 Cal W N cc (cci) (DB). (No suit if not tainted by fraud.)
('94) 21 Cal 605 (609) (DB).
('93) 20 Suth W R 86 (88) (DB).
('92) 19 Cal 341 (345) (DB).
('90) 17 Cal 769 (772) (FB).
('86) 12 Cal 156 (159) (DB).
('84) 10 Cal 357 (367) (DB). (Fraudulent withdrawal of suit by minor entitles minor to sue to set aside judgment founded upon withdrawal.)
('84) 10 Cal 612 (615) (DB). (Consent decree.)
('83) 9 Cal 810 (812, 813) (DB). (Do.)
('81) 6 Cal 687 (707) (DB).
('74) 22 Suth W R 213 (214) (DB).
('28) 15 AIR 1928 Lah 766 (768). (Where decree is passed by competent Court and remedies open for getting it corrected are not availed of, a separate suit for declaration to set aside proceedings in execution of such decree is not maintainable.)
† ('25) 12 AIR 1925 Mad 640 (643). (No suit lies on the ground that the case of the plaintiff in a previous suit was false to his own knowledge.)
('19) 6 AIR 1919 Mad 1044 (1046) : 41 Mad 743 (FB). (No suit lies on the ground that decree was obtained by perjured evidence—Overruling 29 Mad 179.)
('12) 23 Mad L Jour 187 (188, 189). (Every fraud by means of which a decree is procured is a fraud both upon the Court and upon the party unless the decree be one obtained by a compromise between the parties.)
✠ ('16) 3 AIR 1916 Mad 364 (365) : 38 Mad 203 (DB).
('07) 30 Mad 295 (297) (DB). (Decree obtained by fraud is only voidable.)
('93) 16 Mad 198 (200) (DB).
('94) 17 Mad 384 (389) : 21 Ind App 93 (PC). (Suit that a sanad was obtained by fraud will not lie after a long lapse of time.)
(1877) 6 Ch D 297 (299, 300, 301, 302), Flower v. Lloyd.
[*See* ('68) 1868 Pun Re No. 31. (No suit lies for reversal of a former decree on the allegation of falseness of a fact which that decree establishes as true.)]
[*See also* ('39) 26 AIR 1939 Nag 312 (312). (If fraud is practised on the Debt Conciliation Board without the knowledge of the Board the Civil Courts can set matters right but where the decree-holder does allege to the Board that other debt was bogus and in spite of that the Board accepted it as genuine, he is not entitled to have the question of fraud reagitated in Civil Court.)]

Also see Section 11 Note 98, Section 21 Note 92 and S. 47 Note 52.

3. ('29) 16 AIR 1929 All 845 (845).
4. May on "*Fraudulent Conveyances*", p. 432.
('07) 31 Bom 405 (412) (DB).
5. ('97) 20 Mad 333 (338) (DB).
('96) 23 Cal 962 (966) (DB).
† ('87) 11 Bom 708 (713, 714, 715, 716) (DB).
† ('82) 6 Bom 703 (712).
('86) 23 Cal 460 (475, 476) (DB).
('97) 20 Mad 323 (325, 326) (DB).
† ('97) 20 Mad 326 (328, 329) (DB).
† ('94) 18 Mad 378 (387, 388, 389).
('87) 10 Mad 17 (20) (DB).
('06) 3 Low Bur Rul 245 (247, 248) (DB).
[*See* ('75) 24 Suth W R 391 (392).
('74) 21 Suth W R 422 (424) (DB).]
6. (1900) 27 Cal 231 (238) (DB).
('96) 23 Cal 962 (966) (DB).
† ('96) 23 Bom 406 (409, 412) (DB).
('01) 28 Cal 370 (379, 380) (DB).
('96) 23 Cal 962*n* (DB).
('75) 24 Suth W R 391 (392).
('66) 6 Suth W R 287 (287) (DB).
('06) 3 Low Bur Rul 245 (248) (DB). (Every hindrance possible should be placed on the fraudulent disposal of property in order to cheat creditors.)
[But see ('74) 21 Suth W R 422 (423, 424) (DB).]
7. ('05) 8 Oudh Cas 278 (280).
† ('06) 33 Cal 967 (969, 984) (DB).
('78) 1 All 403 (412) (DB).
('06) 1906 Pun L R No. 109, p. 355 (356) : 1906 Pun Re No. 3 (FB). (Benami sale.)
(1858) 27 L J Ex 262 (263, 264), Bowes v. Foster.
8. ('04) 26 All 272 (282, 284) (DB). (Predecessor obtaining a collusive decree to defraud his collateral heirs of the right of succession — Latter can sue to set aside the decree.)
9. (1900) 27 Cal 11 (20) (DB).
† ('82) 6 Bom 703 (713).
(1878) 3 App Cas 831 (838), Urquhart v. Macpherson.
(1875) L R 10 C P 166 (167, 168), Dawes v. Harness.
(1835) 3 Cl & F 479 (510), The Earal of Bandon v. Becher.

A *consent* decree, unlike other decrees, can be set aside not only on the ground of *fraud* but on any ground which would be a sufficient reason for invalidating the *agreement* upon which the decree was based.[10] See also Note 98 on section 11.

62. Where a special remedy is provided, the general remedy of suits barred. — The general principle is that every right has a remedy.[1] It is also a general principle that where two proceedings or two remedies are available under the law, one of them must not be taken as operating in derogation of the other.[2] Thus, where a right of action exists, a suit is maintainable to enforce that right independently of the *special* remedies provided by the law.[3] There is, however, one qualification for this rule. Where a right is *created* by statute *and* a method of enforcing the right or of redressing grievance caused in the exercise or enforcement of the right is *pointed out by the statute* creating such right, then the general remedy of suit will be *impliedly barred.*[4]

Illustrations.

1. In execution of a decree obtained by *A* against *B*, *C's* property is attached. *C* can *either* prefer a claim petition under O. 21, R. 58 of the Code or file a suit for a declaration of his title to the property and the non-liability thereof for *A's* decree.

2. *A* obtains an *ex parte* decree against *B*. *B* can apply under O. 9, R. 13 to set it aside or he can prefer an appeal from the decree under Section 96.[5]

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10. ('28) 15 AIR 1928 Oudh 418 (421, 422, 423) : 4 Luck 76 (DB).

Note 62

1. (1863) 3 Mad H C R 35 (37) (DB).

2. ('40) 27 AIR 1940 Pat 668 (670) (DB).
('86) 8 All 354 (361, 362) (FB).
[*See also* ('15) 2 AIR 1915 Mad 197 (199) : 37 Mad 29 (DB).)]
Also see Section 95 Note 13 and Section 96 Note 12.

3. ('40) 27 AIR 1940 Bom 188 (190). (Suit with regard to liability to municipal taxes lies, notwithstanding remedy under Ss. 110 and 111, Bombay Municipal Boroughs Act is not exhausted.)
('40) 27 AIR 1940 Cal 67 (72) (DB). (Selection of place for disposal of rubbish—Duty of Corporation —Interference by Civil Court.)
('36) 33 AIR 1936 Mad 421 (422).

4. ('42) 29 AIR 1942 Mad 127 (128). (A village headman who has been dismissed has under S. 23 of the Madras Hereditary Village Officers Act a right of appeal to the District Collector and a further appeal to the Board of Revenue—Therefore he has no right of separate suit in a Civil Court that the order of dismissal is *ultra vires* on the ground that the rules have not been strictly followed.)
('41) 28 AIR 1941 Mad 530 (531) : I L R (1941) Mad 850 (FB). (Madras Local Boards Act, XIV of 1920, S. 199 (2) (o) and Rules under, R. 6 — R. 6 impliedly excludes right to file suit in respect of improper surcharge imposed thereunder — Power to surcharge arises not under common law but under statutory rules—Remedy provided by rules alone is open.)
('41) 28 AIR 1941 Mad 506 (507). (Jurisdiction of Civil Courts in regard to election disputes.)
('41) 28 AIR 1941 Mad 857 (857).
('41) 28 AIR 1941 Oudh 355 (358) : 16 Luck 421.
('40) 27 AIR 1940 Cal 572 (574) (DB).
*('36) 23 AIR 1936 Pat 87 (91) : 15 Pat 246 (DB).
('35) 22 AIR 1935 Lah 406 (407) : 16 Lah 975 (DB).
(Suit for removal of executor impliedly barred by S. 301 of the Succession Act.)
('33) 20 AIR 1933 All 358 (361, 363) : 55 All 406 (DB).
('89) 12 All 166 (168) (SB). (Cost of criminal proceedings.)
('87) 9 All 474 (476) (DB).
('86) 8 All 452 (461) (DB). (Costs—No separate suit lies.)
*('22) 9 AIR 1922 Cal 4 (5) (DB).
('66) 5 Suth W R (SCC Ref.) 6 (7) (DB). (No action for expenses of witness will lie.)
('30) 17 AIR 1930 Bom 431 (437) : 54 Bom 696. (Arbitration — Award — Remedy provided for in Sch. II of the Code.)
('07) 31 Bom 604 (609, 610) (DB).
('89) 14 Bom 100 (101) (DB). (Costs of criminal proceedings.)
('71) 8 Bom H C R (A C) 29 (30) (DB).
† ('90) 14 Mad 441 (444, 445) (FB).
('89) 12 Mad 105 (108) (DB).
('80) 2 Mad 362 (389) (FB).
('67) 3 Mad H C R 341 (342) (DB).
('28) 15 AIR 1928 Lah 562 (564) : 10 Lah 338 (DB).
(1896) Sm L C 285, Ashby v. White.
(1884) 13 Q B D 109 (111, 112), Vallance v. Falle.
(1879) 4 C P D A C 118 (119), London and Brighton v. Watson.
(1878) 9 Ch D 275 (285, 286). Anglo-Italian Bank v. Davies. (Only new mode of procedure given for pre-existing right—General right of action not taken away.)
Ref. Case No. 5 of 1867.
(1859) 28 L J C P 242 (246), Wolverhampton Water Works Co. v. Hawkesford.
(1848) 11 Q B 731 (741, 742), Stevens v. Jeacocke.
(1798) 7 T R 620 (628), Beckford v. Hood.
(1831) 1 B & Ad 846 (859), Doe v. Bridges.
Also see Notes 53 and 55.

5. See Note 9 on Section 96.

3. *A* filed a suit under S. 33 of the City of Bombay Municipal Act against the Municipal Commissioner of Bombay to have it declared that the general elections of Councillors by the Justices on a particular date were invalid and that by virtue of S. 34 (1) of the Act he may be deemed to be re-elected ; it was held that no such suit lay as the right claimed by the plaintiff was the creation of the Municipal Act, that a special remedy was provided by the Act, namely, an application under S. 33, to the Chief Judge of the Small Cause Court, and that the jurisdiction of the Civil Courts was excluded by implication.[6]

63. The rule does not apply in the case of summary and concurrent remedies. — The last rule mentioned in Note 62 above does not apply where a *summary* and *concurrent* remedy is provided for the enforcement of the right.[1] In other words, a regular suit is not barred by the fact that a summary and concurrent remedy is also provided for. It has been seen in Illustration 1 given in Note 62, that where a property of a third person is attached in execution of a decree, he is not bound to proceed under O. 21 R. 58 but may file a regular suit. Similarly, a stranger purchaser at an auction sale in execution of a decree is not bound to *apply* for possession of the property purchased but may institute a *regular suit* for possession.[2] For other examples of such cases, see the undermentioned decisions.[3] See also S. 145, Note 11.

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6. ('07) 31 Bom 604 (610) (DB).

Note 63

1. ('87) 14 Cal 644 (648) (DB).
('90) 12 All 409 (418) (FB).

2. † ('87) 14 Cal 644 (648) (DB).
('07) 29 All 463 (466).
('12) 36 Bom 373 (378) (FB). (Symbolical possession is, however, not real possession and does not save limitation.)
† ('84) 8 Bom 602 (608) (DB).
('91) 18 Cal 520 (525) (DB).
('89) 16 Cal 530 (534) (FB). (Where symbolical possession is obtained, fresh suit lies.)
† ('83) 9 Cal 602 (603) (DB).
('86) 10 Mad 53 (56) (DB).
† ('31) 18 A I R 1931 Pat 241 (246) : 10 Pat 670 (FB). (O. 21, Rr. 95 and 96 — No bar to suit for possession by decree-holder auction purchaser.)
Also see S. 9 N. 50, O. 21 R. 95 N. 8 and O. 21 R. 97 N. 4.

3. ('22) 9 A I R 1922 Lah 869 (378) : 3 Lah 296 (DB). (Award—Right to set aside—Remedy under Act (IX of 1899) no bar to a suit.)
('20) 7 A I R 1920 Cal 150 (154) (DB). (Award—Arbitration Act, S. 14 — Suit to set aside not barred.)
('87) 9 All 602 (604) (DB). (Sale set aside by the Court—Suit for confirmation of execution sale not barred.)
('81) 3 All 554 (558, 561) (FB). (Do.)
('11) 35 Bom 473 (477) (DB). (If Official Assignee takes possession of insolvent's property which third party claims as his, suit by third party to establish right lies.)
(1900) 25 Bom 10 (23) (SB).
('87) 11 Bom 519 (523) (DB). (Money unduly collected under Bombay Abkari Act—Aggrieved person can either apply under S. 29 of that Act or file a suit.)
('20) 7 A I R 1920 Cal 820 (820) : 47 Cal 806 (808) (DB).
('04) 31 Cal 667 (674). (If Official Assignee takes possession of insolvent's property which third party claims as his, suit by third party to establish right lies.)
('04) 8 Cal W N 473 (475, 476) (DB). (Rectifying mistake in judgment and decree by separate suit not barred.)
('01) 5 Cal W N 240 (241) (DB). (O. 21, R. 93—No bar to a suit for refund of purchase money.)
('89) 16 Cal 159 (160) (DB). (Wrongful seizure of cattle — Provisions of Act I of 1871 do not bar regular suit.)
('71) 15 Suth W R 279 (280) (DB). (Do.)
('17) 4 A I R 1917 Lah 75 (76, 77) : 1917 Pun Re No. 22 (DB). (If Official Assignee takes possession of insolvent's property which third party claims as his, suit by third party to establish right lies.)
('86) 9 Mad 31 (36) (DB). (Under Act IX of 1861, application will lie for custody of minor—But suit was not barred.)
('17) 4 AIR 1917 Nag 149 (151) : 13 Nag L R 210. (If Official Assignee takes possession of insolvent's property which third party claims as his, suit by third party to establish right lies.)
('18) 5 A I R 1918 Low Bur 59 (60). (Act VIII of 1890 — Suit for custody of minor is not barred as there is no section in that Act under which the application can be made.)
('15) 2 AIR 1915 Low Bur 35 (36) (DB). (S. 22 of the Provincial Insolvency Act does not deprive person of his ordinary remedy by suit.)
('05) 3 Low Bur Rul 4 (5).
('97) 2 Upp Bur Rul 10.
('24) 11 A I R 1924 Sind 105 (109, 110) : 17 Sind L R 15. (Award — Arbitration Act, Section 14—Suit to set aside not barred.)
('17) 4 A I R 1917 Sind 22 (23) : 10 Sind L R 179 (181, 182) (DB). (Third party claiming property adversely to insolvent can sue Official Receiver without obtaining leave of Insolvency Court.)
See also cases under S. 95, Note 13.
[See contra ('78) 2 Cal L Rep 341 (345) (DB).]

Where, however, a person has *elected to pursue* his remedy under one provision, he is bound by his election and cannot, on his failing therein, proceed under the other provision.[4]

64. Alternative Courts. — Where a person may proceed to seek his remedy in one of two alternative Courts, he can proceed in either of them, but once he has invited the decision of one such Court, he cannot again litigate the same matter in the other Court. Thus, a stranger to the bankruptcy whose property has been wrongfully seized by the receiver in bankruptcy is not confined to the remedy under the Insolvency Act but may sue in the Civil Court. But if he chooses to avail himself of the remedy under the Insolvency Act, he cannot begin again and raise the same question in a civil suit.[1]

65. Acts of Legislature — Powers of Civil Court to question. — The Courts can consider and determine whether an Act passed by the Legislature is within their powers, but, if an Act so passed is within the powers of the Legislature the Courts cannot consider the propriety of such legislation.[1]

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10. [S. 12.] No Court shall proceed with the trial[3] of any suit[7] in which the matter in issue[4] is also directly and substantially in issue in a previously instituted suit[5] between the same parties,[9] or between parties under whom they or any of them claim litigating under the same title[10] where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief[11] claimed, or in any Court beyond the limits of British India established or continued by the [a](Central Government or the Crown Representative) and having like jurisdiction, or before His Majesty in Council.

Stay of suit.

Explanation. — The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.[6]

[1877, S. 12.]

a. Substituted for the words "Governor-General in Council" by the Government of India (Adaptation of Indian Laws) Order, 1937.

[But see ('12) 17 Cal W N 82 (84) (DB). (8 Cal W N 473 distinguished. Suit to rectify decree passed by Court having jurisdiction is not maintainable.)]

4. † ('19) 6 AIR 1919 All 274 (275) (DB).

✠ ('18) 5 AIR 1918 All 346 (347): 39 All 626 (629, 631) (DB).

('19) 6 A I R 1919 Mad 648 (649) : 40 Mad 1173*n*.

[*See also* ('18) 5 A I R 1918 Mad 489 (490) : 40 Mad 1173 (DB).]

Note 64

1. † ('19) 6 A I R 1919 All 229 (230) : 41 All 378 (DB).

('18) 5 A I R 1918 Mad 489 (490) : 40 Mad 1173 (1174) (DB).

('18) 5 AIR 1918 All 346 (347) : 39 All 626 (DB).

[But see ('17) 4 A I R 1917 Lah 75 (78) : 1917 Pun Re No, 22 (DB). (In view of the change introduced by Section 4 of the Provincial Insolvency Act (V of 1920) this decision is no longer law.)

('21) 8 A I R 1921 Lah 58 (58, 59) : 2 Lah 147 (DB). (Do.)]

Note 65

1. † ('32) 19 A I R 1932 Cal 753 (755) : 60 Cal 364 (DB).

[*See also* ('28) 15 AIR 1928 Mad 1272 (1275).]

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. Section only bars the trial and not the institution of suits.
4. The matter directly and substantially in issue in both the suits must be the same.
4a. Previously instituted suit.
5. Previously instituted suit must be pending.
6. Pendency of suit in foreign Court does not preclude trial of suit on same cause of action.
7. Suit, meaning of.
8. Cross-suits.
9. Same parties.
10. Litigating under the same title. See Notes on S. 11.
11. "Court having jurisdiction to grant the relief."
12. Interlocutory orders, pending stay, are not barred.
13. Decree, contrary to the provisions of the section, is not a nullity.
14. Inherent power to grant stay. See Note 2 on Section 151.
14a. Court to which application for stay is to be made.
15. Revision.
16. Letters Patent appeal.

NOTE to the Synopsis. See the Notes indicated for the following Topics:

Applicability to appeals, miscellaneous proceedings, arbitration proceedings. See Note 7.

'Before His Majesty in Council.' See Note 11.

Contract providing for place of suing. See Note 2.

Discretion of Court. See Note 2.

Established or continued by the Central Government or the Crown representative. See Notes 2 and 6.

Evidence of pendency of prior suit — Onus. See Note 5.

Lis pendens not co-extensive with that of *res judicata*. See Note 2.

Same cause of action. See Note 4.

Same plea. See Note 4.

Same relief. See Note 4.

Whether subject-matter of both suits must be the same. See Note 4.

1. Legislative changes.

(a) The words "except where suit has been stayed under S. 20" and the words "whether superior or inferior" occurring in the Code of 1882 have been omitted.

(b) The words "for the same relief" which occurred in the old section have been omitted. The omission does not effect any substantial alteration in the law. See Note 4.

(c) The words "litigating under the same title" are new. See Notes on S. 11.

(d) The words "proceed with the trial" have been substituted for the word "try" in the old section. See Note 2.

2. Scope and object of the section. — "The object of the rule contained in section 12 of the Code (now S. 10) is to prevent Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject-matter and the same relief. The policy of the law is to confine the plaintiff to one litigation, thus obviating the possibility of contradictory verdicts by two or more Courts in respect of *the same relief*."[1]

The rule in this section forms no part of the rule of *res judicata* though the reason upon which it is based is in some respects similar in principle to the doctrine of

Section 10 — Note 2

1. ✠ ('88) 11 All 148 (155) (SB).
('17) 4 AIR 1917 Cal 248 (249) (DB). (The mere fact that the decision of the subsequent suit will largely be affected by the decision in the previous suit still pending is not sufficient for the application of this section.)
('27) 14 AIR 1927 Bom 245 (246).
('17) 4 AIR 1917 Cal 637 (637) : 43 Cal 141 (147) (DB).
('79) 4 Cal L Rep 282 (284).
('19) 6 AIR 1919 Oudh 178 (179) (DB).
[*See* ('34) 21 AIR 1934 All 131 (132). (Principle of this section applied to criminal cases.)]

res judicata.[2] The distinction between the two rules however is vast. The rule in this section relates to matters *sub judice* whilst the rule in S. 11 relates to matters which have passed into *rem judicatum*. The former bars the trial of a *suit* : the latter bars both the trial of a *suit* and of an *issue*, subject to their respective conditions. (See S. 11 Note 27.)

In order that the section may apply, the following conditions must be satisfied :

(1) The matter in issue in both suits must be substantially the same.[3]

(2) The previously instituted suit must be *pending* in the same Court in which the subsequent suit is brought, or in a different Court in British India having jurisdiction to grant the relief claimed, or in a Court established or continued by the Governor-General in Council (now the Central Government or the Crown Representative) and having like jurisdiction, or, before His Majesty in Council.[4]

(3) Both the suits must be between the *same parties* or their representatives.[5]

(4) Such parties must be litigating in both the suits under the same title.[6]

It is not however necessary that the subject-matter and the causes of action in the two suits should be the same.[7]

One test of the applicability of S. 10 to a particular case is whether, on the final decision being reached in the previous suit, such decision would operate as *res judicata* in the subsequent suit.[8]

Where the above conditions are satisfied the Court has no discretion in the application of the section as the provisions of this section are mandatory.[9] The previously instituted suit alone should be proceeded with and the subsequent suit must be stayed.[10] The fact that an application for stay is delayed is no ground for refusing stay.[11] (See also Note 3.)

Independent of this section, the Court has power to stay a second suit pending the disposal of a prior one between the same parties. (See S. 151, Note 2 and O. 39, R. 1, Note 23.) It has been held that in spite of the provisions of this section the earlier instituted suit may be stayed and the later one proceeded with in some cases. Thus, where the parties have agreed that any suit as to a particular matter must be brought in Court x but one of them files a suit in Court y and then the other party sues in Court x, the suit in y, though earlier, may be stayed and the suit in x may be proceeded with.[12]

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2. ✠('89) 11 All 148 (154) (SB). (Per Mahmood, J.)
('06) 16 Mad L Jour 526 (528).

3. ('19) 6 AIR 1919 Oudh 178 (179) (DB). (Mere fact that the result in the subsequent suit will be largely affected by decision in previous suit is not enough.)
('33) 20 AIR 1933 Cal 887 (888) : 60 Cal 1096 (DB).
('21) 61 Ind Cas 830 (831) (Lah). (S. 10 does not apply unless every matter in dispute is directly and substantially in issue in the two suits.)
('31) 18 AIR 1931 Oudh 313 (314) (DB). (Subject-matter different—Suit need not be stayed.)
('31) 21 AIR 1934 Sind 38 (39).
('28) 110 Ind Cas 418 (419) (Nag).
('30) 123 Ind Cas 50 (50) (DB) (Oudh).
Also see Note 4.

4. See Note 5.

5. See Note 9.
('21) 61 Ind Cas 830 (831) (Lah).
('90) 1890 Bom P J 486 (486).
('33) 20 AIR 1933 Cal 887 (888) : 60 Cal 1096 (DB).
('16) 3 AIR 1916 Mad 1101 (1101) (DB).

6. See Notes on Section 11.
('22) 9 AIR 1922 Mad 321 (324).

7. ('32) 19 AIR 1932 Cal 751 (752).

8. ('42) 29 AIR 1942 Bom 314 (315).
('35) 22 AIR 1935 Cal 1 (7) : 61 Cal 670 (DB).
('32) 19 AIR 1932 Cal 751 (752).

9. ('42) 29 AIR 1942 Bom 314 (315).
('40) 27 AIR 1940 Mad 7 (7).
('32) 19 AIR 1932 Cal 751 (752).
('33) 20 AIR 1933 Sind 117 (117) (DB).
Also see Note 3.

10. *See* ('34) 21 AIR 1934 All 131 (132). (Principle applied to criminal proceeding — *Held* that subsequent civil suit should not be made ground for staying previously instituted criminal proceeding.)

11. ('42) 29 AIR 1942 Bom 314 (315).

12. ('40) 27 AIR 1940 All 241 (241) : I L R (1940) All 232 (DB).
('28) 15 AIR 1928 Bom 175 (176) (DB).

See also S. 9 Note 5. A similar procedure may be followed also on grounds of convenience and avoidance of an abuse of the process of the Court, apart from the question of any agreement between the parties.[13] It is not clear how such decisions are to be reconciled with the express language of this section. Perhaps they may be justified in this way. The section only says that the later suit should not be proceeded with. It does not prevent the earlier suit being stayed by appropriate proceedings. As soon as it is stayed it ceases to be pending in a Court which has "jurisdiction to grant the relief claimed." The stay under this section is one imposed by a Court upon itself; it is not imposed by any outside authority.[14]

3. Section only bars the trial and not the institution of suits. — Under the old Code there was a difference of opinion as to whether the words "no Court shall try" meant merely that the suit should be stayed or whether they barred the institution itself of the second suit.[1] The words now substituted, namely, "No Court shall proceed with the trial," make it clear that the *institution* of the second suit is not barred though the *trial* thereof may not be proceeded with.[2] The second suit is therefore not to be *dismissed* as barred.[3] The reason is that the failure to institute a suit (such as a suit under O. 21 R. 63) within a fixed period may debar a party from setting up his rights in any other suit or proceeding.[4]

When the conditions in the section are satisfied, the later suit *must* be stayed.[5] Such order can be made at any stage, whether before[6] or after the commencement of the hearing of the subsequent suit.[7] (See also Note 2.)

4. The matter directly and substantially in issue in both the suits must be the same. — It was essential under S. 12 of the old Code that both the suits should have prayed "*for the same relief.*"[1] The omission of these words from the present section shows that the *identity* of the *reliefs* claimed is not now necessary.[2]

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13. ('43) 30 AIR 1943 Bom 206 (208, 209). (The High Court of Bombay restrained by injunction defendant from proceeding with the earlier suit filed in Banda (U. P.) on ground of convenience and to prevent abuse of process of Court.)
('41) 28 AIR 1941 Cal 670 (671, 672) : I L R (1941) 1 Cal 490. (34 Cal 101, discussed and followed—Other cases also discussed.)
[*See also* ('41) 28 AIR 1941 Cal 434 (435) : I L R (1941) 1 Cal 373. (Jurisdiction of High Court—Injunction restraining defendant from litigating in another Court on ground of convenience.)]
14. ('39) 26 AIR 1939 Cal 435 (449) : ILR (1939) 2 Cal 93 (FB).

Note 3

1. (1900) 1900 Pun L R No. 19 (DB). (Institution not barred.)
('97) 20 Mad 418 (420) (DB). (Do.)
('98) 22 Bom 640 (645) (DB). (Do.)
('03) 7 Cal W N 720 (722) (DB). (Do.)
('79) 4 Cal L Rep 282 (284). (Do.)
('06) 16 Mad L Jour 526 (528). (*Held*, institution barred.)
2. ('25) 12 AIR 1925 Pat 201 (206, 207) (DB).
('36) 23 AIR 1936 All 485 (486) (DB).
('31) 18 AIR 1931 P C 263 (264) (PC). (Case under Ceylon C. P. Code.)
('12) 16 Cal W N 897 (902) (DB). (Principle recognized though decided on other grounds.)
('35) 22 AIR 1935 Lah 76 (78) (DB).
('15) 2 AIR 1915 Mad 461 (463).
('37) 24 AIR 1937 Nag 132 (132) : I L R (1937) Nag 6.
3. ('25) 12 AIR 1925 Pat 201 (207) (DB).
4. ('98) 22 Bom 640 (645) (DB).
5. ('17) 4 AIR 1917 Cal 637 (637) : 43 Cal 144. (The jurisdiction under this section does not depend upon actual facts but upon the allegations made concerning them.)
('35) 22 AIR 1935 Sind 225 (226).
('16) 3 AIR 1916 Nag 70 (71) : 12 Nag L R 174. (Section leaves no discretion.)
('19) 6 AIR 1919 Low Bur 10 (11) : 10 Low Bur Rul 154 (DB).
Also see Note 2.
6. ✣ ('35) 22 AIR 1935 Cal 1 (10) : 61 Cal 670 (DB). (Court has power to stay a suit generally at any stage at which it seems expedient to do so.)
7. ('20) 7 AIR 1920 All 70 (72) : 42 All 290 (DB).

Note 4

1. ('89) 11 All 148 (155) (SB).
('97) 20 Mad 418 (420) (DB).
('29) 16 AIR 1929 All 805 (806): 51 All 1017 (DB).
('79) 4 Cal L Rep 282 (284).
('08) 8 Cal L Jour 303 (304) (DB).
(1900) 28 Cal 28 (34) (DB).
(1900) 7 Cal W N 720 (722) (DB).
('83) 8 Cal L Rep 113 (114) (DB).
2. ('42) 29 AIR 1942 Bom 314 (315).
('19) 6 AIR 1919 Pat 491 (492) : 4 Pat L Jour 557 (DB). (Absence of identity of reliefs does not prevent operation of section.)

But it is still necessary that *the* "matter in issue," i.e., the entire *subject-matter* of the two suits should be the same. In other words, it is necessary that every *matter in dispute* should be directly and substantially in issue in the two suits.[3] Where the subject-matter of the two suits is not the same the section will not apply merely because the main issue in both the suits is common.[4]

Illustration.

A sues *B* for arrears of pension due to him under an Ikrarnamah, for the period 1910 to 1912. While the suit is pending *A* files another suit for arrears of pension under the same deed for the period 1913 to 1918. The trial of the second suit cannot be stayed under this section. The reason is that the *matter in dispute* in the two suits is different being the arrears due for *different periods* though the main issue in both suits is the liability of *B* to *A* under the Ikrarnamah.[5] Similarly, where the suits are on two different promissory notes though practically against the same defendants, stay of the trial of the subsequent suit is not fair to the plaintiff especially where the contest in the subsequent suit is by only one of the defendants to the previous suit.[6]

It is not, however, necessary for the applicability of the section that all the *issues* in the prior instituted suit should also be issues in the later suit.[7]

For the meaning of the words 'directly and substantially in issue,' see Notes on section 11.

('35) 22 AIR 1935 Cal 1 (6) : 61 Cal 670 (DB). (Application in subsequent suit for declaration that attachment in previous suit is illegal and for injunction does not change identity of suits.)
('27) 14 AIR 1927 Bom 245 (246).
('27) 14 AIR 1927 Mad 1132 (1133).
('20) 7 AIR 1920 Oudh 222 (223):23 Oudh Cas 214.
('20) 7 AIR 1920 Low Bur 24 (26) : 10 Low Bur Rul 150 (DB).

3. ('41) 28 AIR 1941 Cal 434 (435) : ILR (1941) 1 Cal 373.
('40) 27 AIR 1940 Mad 7 (7). (Rent suits—Amount claimed in both suits not for same period—Section does not apply.)
✣('29) 16 AIR 1929 Oudh 341(345): 4 Luck 573(DB).
('38) 25 AIR 1938 Lah 502 (502). (Section does not bar trial of suit for rent for a period subsequent to that included in the previously instituted suit which is pending, although the same question may be involved in both the suits.)
('27) 14 AIR 1927 Bom 245 (246). (The cause of action as disclosed in the pleadings, the matter directly and substantially in issue and the relief claimed are the three connected parts.)
('20) 7 AIR 1920 Bom 296 (297) : 44 Bom 283(DB).
✣('17) 4 AIR 1917 Cal 248 (249) (DB).
('16) 3 AIR 1916 Cal 318 (318) : 42 Cal 926. (Where the issues are different, section does not apply.)
('12) 16 Cal W N 897 (900) (DB). (Matter directly and substantially in issue in both same—Trial of later suit stayed.)
('78) 4 Cal L Rep 282 (284).
('35) 22 AIR 1935 Lah 816 (818) (DB). ("Matter in issue" means entire matter in controversy and not one of several issues.)
('21) 61 Ind Cas 830 (831) (Lah).
('35) 22 AIR 1935 Mad 24 (25). (The section will not apply when only "a matter in issue is common".)
('35) 22 AIR 1935 Mad 112 (112). (It is not sufficient that there should be one matter in issue in common in both the suits.)
('27) 14 AIR 1927 Mad 1199 (1200). (Subject-matter of the suits different.)
('25) 12 AIR 1925 Mad 574 (574).
('22) 9 AIR 1922 Mad 304 (305).
('20) 7 AIR 1920 Oudh 222 (223) : 23 Oudh Cas 214. (Mesne profits suit stayed owing to ejectment suit pending before Privy Council.)
('19) 6 AIR 1919 Pat 491 (493) : 4 Pat L Jour 557 (DB).
('24) 82 Ind Cas 539 (540) (Sind).
Also See Note 2.

4. ('40) 27 AIR 1940 Mad 7 (7, 8).
✣('29) 16 AIR 1929 Oudh 341 (345) : 4 Luck 573 (DB).
('25) 12 AIR 1925 Mad 574 (574).
✝('29) 16 AIR 1929 All 805 (806) : 51 All 1017 (DB).
('17) 4 AIR 1917 Cal 248 (249) (DB).
('22) 9 AIR 1922 Mad 304 (305).
('19) 6 AIR 1919 Oudh 178 (179) (DB).

5. ('19) 6 AIR 1919 Pat 491 (492) : 4 Pat L Jour 557 (DB).
('23) 10 AIR 1923 Cal 716 (717). (Section does not apply to claims for rent or for cesses falling due after the institution of the first suit.)
✣('89) 11 All 148 (155) (FB). (Suit for rent for one year does not bar suit for rent for subsequent year.)
('08) 8 Cal L Jour 303 (304) (DB). (Suit for rent for different periods.)
('81) 8 Cal L Rep 113 (114) (DB). (Second suit for the recovery of produce of crop of the next year is not barred.)
('29) 16 AIR 1929 Mad 785 (786) (DB). (First suit—No prayer for future mesne profits—Second suit for such profits not barred even though first decree directs inquiry.)
('29) 16 AIR 1929 Rang 67 (69) : 6 Rang 775 (DB). (Suit for mesne profits accruing subsequent to institution of prior suit.)

6. ('33) 20 AIR 1933 Lah 34 (34).

7. ('20) 7 AIR 1920 All 70 (71,72): 42 All 290 (DB).

The section does not contemplate the giving of any security before a stay is granted in the later suit.[8]

Even where the matter in issue in the two suits is not the same, the Court has *inherent power* to stay the hearing of a suit pending the disposal of another suit in the same Court.[9] (see section 151, Note 2.)

4a. "Previously instituted suit." — Under S. 26, a suit is instituted by the presentation of a plaint or in such other manner as may be prescribed by the rules in the first schedule. For further discussion of the subject, see Notes on S. 26.

Probate proceedings.—Contentious probate proceedings are required under S. 295 of the Succession Act of 1925, to take the form of a regular *suit*. But in applying the principle of this section to rival probate proceedings, they must be taken to be instituted on the dates on which the applications are *made* and not on the dates on which they become *contentious*.[1]

5. Previously instituted suit must be pending. — The trial of the second suit is barred only where the previously instituted suit is *pending*[1] and the *onus* is on the defendant in the later suit to establish this.[2]

A suit allowed to be withdrawn with liberty to bring a fresh suit on payment of defendant's costs must be regarded as pending until the costs are paid.[3] But a mere application for, or obtaining, *leave to appeal* to Privy Council cannot, of itself, amount to the pendency of an appeal till such appeal is *actually* filed, for it may happen that parties who obtain such leave may never appeal at all against such decree or order.[4] Where a judgment is delivered but a decree is not drawn up, the suit must be deemed to be pending.[5]

Where stay of a subsequently instituted suit was directed by the High Court, till the disposal of the previously instituted suit pending disposal in first appeal, it was held that the stay should be extended till the disposal of the previously instituted suit in second appeal in the High Court.[6]

A suit filed in a Court which had no jurisdiction to entertain it cannot be considered a previously instituted suit when it is later on presented in the right Court, as against a cross-suit filed after the presentation of the former suit in the wrong Court, but before its re-presentation in the right Court.[7]

6. Pendency of suit in foreign Court does not preclude trial of suit on same cause of action. — The power of the British Indian Court to try a suit is not

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8. ('26) 13 AIR 1926 Lah 304 (305).
9. ('35) 22 AIR 1935 Rang 355 (356). (Suit for possession under S. 9 Specific Relief Act—Suit for declaration of title filed by defendant in the same Court—Former suit must be stayed pending disposal of title suit.)

Note 4a

1. ('40) 27 AIR 1940 Oudh 113 (116) : 15 Luck 290.
[*See also* ('41) 28 AIR 1941 Cal 417 (423). (Court not to rely automatically on the dates on which the affidavit in support of the caveat is filed.)]

Note 5

1. ('36) 23 AIR 1936 Lah 589 (591).
2. ('17) 4 AIR 1917 Pat 196 (198) (DB).
3. † ('14) 1 AIR 1914 Cal 207 (208) (DB).
('25) 12 AIR 1925 Oudh 696 (697) : 28 Oudh Cas 212 (DB). (Decree for redemption not executed must be deemed to be pending—S. 10 will apply—Case law discussed.)
('83) 1883 Pun Re No. 104. (Suit dismissed for default cannot be deemed to be pending and is no bar to a fresh suit.)
4. ✱(98) 21 Mad 18 (22, 26) (DB). (Followed in AIR 1929 Rang 67 : 6 Rang 775.)
5. ('40) 71 Cal L Jour 190 (191). (Suit was referred to arbitration and arbitrators submitted award—Court directed that the award would be made part of decree— No decree, however, was drawn up as the necessary stamps were not filed —*Held*, that suit was still pending.)
6. ('32) 19 AIR 1932 Cal 751 (752).
[*See also* ('31) 18 AIR 1931 P C 263 (264) (PC).]
7. ('33) 20 AIR 1933 Sind 117 (117) (DB).

ousted under this section, by reason of a prior suit pending in a foreign Court.[1] It follows from this principle that the jurisdiction of a British Indian Court to *execute* its decree is not affected by a judgment of a foreign Court even though the cause of action in both the suits is the same. (See sections 13 & 14, Note 21.)

Where, however, a suit is pending in British Indian Court and a party who is within its jurisdiction is prosecuting a suit on the same cause of action in a foreign Court, the High Court has power to restrain him from continuing the action in the foreign Court, if the prosecution of such action is opposed to equity. The principle is that the Court acts *in personam* and will not suffer anyone within its reach to do what is contrary to its notions of equity, merely because the act to be done may be in point of locality, beyond its jurisdiction.[2] The Madras High Court has in the undermentioned case[3] held that a subordinate Court has no similar power to restrain a party from proceeding with a case in a foreign Court.

7. Suit, meaning of. — This section applies only to *suits* and cannot apply where one of the two proceedings is not a suit.[1] An appeal is only a continuation of a suit and is included in the word 'suit.'[2] Though the section does not, of its own force, apply to proceedings other than suits, the procedure prescribed thereby should be applied to all proceedings to which the provisions of S. 141 may be applied.[3] The proceedings spoken of in S. 141 however include only *original* matters *in the nature of a suit* such as proceedings in probate, guardianships and so forth.[4] (See Note 2 on S. 141.) In the case of such proceedings the procedure prescribed by S. 10 will become applicable by virtue of S. 141.[5] It will not apply to execution proceedings[6] and other miscellaneous proceedings both of which are not in the nature of original proceedings.[7] The Lahore High Court, however, held that the section would not be applicable to a proceeding under Para. 20 of Sch. II (now repealed by the Arbitration Act of 1940) of the Code. The reason given was that such a proceeding was not a *suit*.[8] The judgment did not advert to the applicability of S. 141 to the case and does not appear to be correct.

Note 6

1. ('07) 1 Sind L R 166 (167). (Court of Political Agent at Muscat is a foreign Court.)
[*See* ('38) 25 AIR 1938 Rang 130 (134) : 1938 Rang L R 176 (FB). (According to S. 10, as amended by the Government of Burma (Adaptation of Laws) Order, 1937, the Courts in British Burma have no power to stay suits before them by reason of the pendency of suits founded on the same cause of action in British India. The amendment to S. 10 being an alteration in the form of procedure, has retrospective effect.)]
2. ✣('20) 7 AIR 1920 Bom 309 (310) : 44 Bom 272 (DB). (Per Pratt, J.—Followed in AIR 1921 Bom 128 : 45 Bom 550.)
('27) 14 AIR 1927 Bom 135 (137, 138) (DB).
('28) 15 AIR 1928 Nag 56 (57, 58) : 23 Nag L R 170.
Also see O. 39 R. 1 N. 23.
3. ('28) 15 AIR 1928 Mad 491 (492) (DB).

Note 7

1. ('29) 16 AIR 1929 Lah 533 (533).
('35) 22 AIR 1935 Sind 228 (231). (Where objections to an award are preferred in a Court, no application under S. 10, C. P C., for stay of proceeding lies on the ground that a suit in respect of the same subject-matter has been instituted in another Court by the applicant.)
('29) 16 AIR 1929 Lah 694 (695).
2. ('39) 26 AIR 1939 Sind 329 (330) : ILR (1940) Kar 15 (DB). (Suit includes appeal—*Obiter*.)
('23) 10 AIR 1923 Cal 716 (717).
✣ '16) 3 AIR 1916 Mad 732 (732).
('31) 18 AIR 1931 Cal 779 (779) (DB).
('22) 9 AIR 1922 Sind 6 (7) : 16 Sind L R 79.
[*See* ('31) 18 AIR 1931 P C 263 (264) (PC). (Case under Ceylon C. P. Code.)]
[*See also* ('29) 16 AIR 1929 Lah 1 (4) : 10 Lah 447 (DB).]
Also see Section 96 Note 3.
3. See Section 141.
4. ✣('94) 17 All 106 (111) : 22 Ind App 44 (PC).
5. ('43) 30 AIR 1943 Cal 19 (20) : ILR (1942) 2 Cal 194. (Section 10 is applicable to an application for letters of administration.)
('22) 9 AIR 1922 Sind 6 (8) : 16 Sind L R 79. (Proceedings under S. 11 (2) of the Arbitration Act —Doubted in AIR 1928 Sind 169 : 23 Sind L R 427.)
[*See also* ('40) 27 AIR 1940 Oudh 113 (116) : 15 Luck 290. (Contentious probate proceedings whether "suit.")]
6. ('29) 16 AIR 1929 Lah 694 (695).
('99) 22 Mad 256 (258) (DB). (Application under S. 47 was included in "suit.")
7. ('88) 21 Mad 18 (22, 26) (DB). (Application for leave to appeal is not a "suit.")
8. ('29) 16 AIR 1929 Lah 533 (533).

As has been remarked in Note 3, the Court, of course, has power, apart from S. 10, to stay *any* proceeding if the *ends of justice* require it.

See also Notes on section 11.

8. Cross-suits. — Cross-suits are suits in which the reliefs claimed must necessarily be different. As seen in Note 4 above, the old S. 12 did not apply to such suits for the reason that that section required *identity of reliefs*.[1] This is no longer necessary under the present section. See Note 4.

A brought a suit against B under S. 9 of the Specific Relief Act for recovery of possession of immovable property. Upon this, B brought a suit against A in the same Court, for declaration of his title to the land. It was held that the Court should, in the exercise of its *inherent power*, stay the hearing of the suit for possession until the question of title to the land in suit was decided in the other suit.[2] It will be noted that the question of title being irrelevant (under the provisions of S. 9, Specific Relief Act), in the suit for possession, the matter in issue in the two suits was not the same and so section 10 did not apply.

9. Same parties. — For exhaustive treatment, see Notes 41 and 42 on S. 11. It is not necessary for the application of the section that *all* the parties on either side should be the same in both the suits. It is enough if there is a substantial identity of the parties.[1] Thus, where A and B first sue C, D and E, and then C brings a suit against A, B and X, it will be seen that A and B on the one side and C on the other, are parties to both the suits. If the other conditions of the section apply, the fact that some parties are not parties in both the suits will not stand in the way of the application of the section.[2]

10. Litigating under the same title. — See Notes on Section 11.

11. "Court having jurisdiction to grant the relief." — These words have no reference to territorial jurisdiction. If the other conditions of the section apply the later suit must be stayed even though the Court in which the previously instituted suit is pending has no *territorial jurisdiction* over the subject-matter of the later one.[1]

But it is essential that the Court in which the first suit is pending must be competent to grant —

(1) the relief claimed in that suit,[2] and *also*

(2) the relief claimed in the *subsequent* suit.[3]

Note 8

1. ('97) 20 Mad 418 (420) (DB).
('79) 4 Cal L Rep 282 (284).
2. ('35) 22 AIR 1935 Rang 355 (356).

Note 9

1. ('20) 7 AIR 1920 Bom 296 (297): 44 Bom 283 (DB).
('29) 114 Ind Cas 209 (209) (Pat).
2. ('20) 7 AIR 1920 All 70 (72) : 42 All 290 (DB).

Note 11

1. ('20) 7 AIR 1920 Low Bur 24 (25, 26) : 10 Low Bur Rul 150 (DB).
('19) 6 AIR 1919 Low Bur 10 (10) : 10 Low Bur Rul 154 (DB).
[*See also* ('43) 30 AIR 1943 Bom 206 (208). (There is nothing in law to prevent a judge on the original side of a chartered High Court from granting an injunction to restrain a defendant from proceeding with a suit in another Court in a different province, provided it is shown on the face of the plaint that the High Court has jurisdiction to try the suit before it. It is no objection to the Court granting an injunction because the defendant does not reside within the jurisdiction or carry on business within the jurisdiction of the Court.)]
2. ('14) 1 AIR 1914 Lah 47 (48).
('17) 4 AIR 1917 Cal 637 (637) : 43 Cal 141 (147). (Jurisdiction depends upon allegations in plaint and not on actual facts.)
3. ('43) 30 AIR 1943 Cal 19 (21) : I L R (1942) 2 Cal 191. (Application for letters of administration filed in High Court while similar application pending in District Court—Property outside limits of latter Court exceeding Rs. 10,000 in value — S. 10 is inapplicable.)
('40) 27 AIR 1940 Oudh 440 (441) : 16 Luck 188 (DB). (Suit by a debtor under S. 33 of the U.P. Agriculturists' Relief Act — Subsequent suit by mortgagee on mortgage—S. 10 is inapplicable.)
('23) 10 AIR 1923 Cal 716 (717).
('38) 25 AIR 1938 Mad 602 (603).
('25) 12 AIR 1925 All 677 (678): 47 All 915 (DB).

In other words, the suits must be pending in Courts of *concurrent* jurisdiction.[4] However, where the previously instituted suit is pending before the Privy Council, the later suit must be stayed if the other conditions are fulfilled. The phrase 'having jurisdiction to grant the relief claimed' does not govern the words 'before His Majesty in Council'.[5]

12. Interlocutory orders, pending stay, are not barred. — An order of stay under S. 10 does not operate so as to prevent the Court from passing *interlocutory orders* in it, such as for a receiver or an injunction or an attachment before judgment.[1] It has, however, no jurisdiction to fix a further date for appearance unless moved by either party to do so.[2]

13. Decree, contrary to the provisions of the section, is not a nullity.— A decree passed contrary to the provision of this section is not a nullity and cannot be disregarded in execution proceedings.[1]

Further, as seen in Note 3, the institution of a second suit is not barred by this section. It only provides that the trial of the suit cannot be proceeded with. It is, consequently, a rule of *procedure* pure and simple.[2] Rules of procedure in civil cases can be waived by the consent of the parties. Hence, when the parties expressly asked the Court to proceed with the subsequent suit, neither side can afterwards turn round and challenge the validity of the proceedings.[3]

14. Inherent power to grant stay. — See Note 2 on Section 151.

14a. Court to which application for stay is to be made. — Where a suit is pending disposal in Court *x*, an application for stay of a suit subsequently instituted in Court *y* must in the first instance be made to Court *y*.[1]

15. Revision. — As to the power of the High Court to revise an order staying or refusing to stay a suit pending a prior instituted suit, see Note 5 on section 115.

16. Letters Patent appeal. — It has been held by the High Courts of Bombay[1]

('16) 3 AIR 1916 Nag 70 (71) : 12 Nag L R 174.
4. ('29) 16 AIR 1929 Oudh 341 (346) : 4 Luck 573 (DB). (Suit for profits which is solely cognizable by a Revenue Court cannot be stayed by prior suit for declaration of title pending in Civil Court.)
('28) 15 AIR 1928 Sind 169 (170):23 Sind LR 427.
4. † ('19) 6 AIR 1919 Lah 3 (3) : 1919 Pun Re No. 114.
† ('16) 3 AIR 1916 Nag 70 (71) : 12 Nag L R 174.
('25) 12 AIR 1925 Mad 1051 (1052) : 48 Mad 750 (DB). (District Court exercising insolvency jurisdiction under the Provincial Insolvency Act cannot stay suit pending against the insolvent in the sub-Court.)
5. ('20) 7 AIR 1920 Oudh 222 (223):23 Oudh Cas 214.
[*See also* ('28) 15 AIR 1928 All 366 (367).]

Note 12

1. ('22) 9 AIR 1922 Bom 276 (276) : 46 Bom 431 (DB).
2. ('28) 15 AIR 1928 Lah 751 (752).

Note 13

1. ('19) 6 AIR 1919 Lah 294 (295) : 1919 Pun Re No. 22.
2. ✣('37) 24 AIR 1937 Nag 132 (132) : ILR (1937) Nag 6.
[*See also* ('38) 25 AIR 1938 Rang 130 (134) : 1938 Rang L R 176 (FB). (Amendment of S. 10, by Government of Burma (Adaptation of Laws) Order, 1937, is an alteration in the form of procedure.)]
[But see ('33) 20 AIR 1933 Bom 85 (87):57 Bom 364 (DB). (Per Beaumont, C. J.—Decision granting or refusing stay goes to jurisdiction of Court.)]
3. ('37) 24 AIR 1937 Nag 132 (132) : ILR (1937) Nag 6.

Note 14a

1. ('41) 28 AIR 1941 All 27 (28) : I L R (1940) All 737 (DB).
('41) 28 AIR 1941 Bom 160 (160) : I L R (1941) Bom 325 (DB). (An application for stay of a suit pending on the Original Side of the High Court until the decision of a previously instituted suit in a moffussal Court has to be made on the Original Side to the Judge trying the suit and not on the Appellate Side of the High Court.)
('31) 18 AIR 1931 Cal 779 (779) (DB). (Suit pending disposal in second appeal — Application for stay of subsequent suit to be made to the Court in which it is instituted, failing which, application may be made to High Court.)

Note 16

1. ('41) 28 AIR 1941 Bom 160 (160) : ILR (1941) Bom 325. (*Obiter*—AIR 1933 Bom 85 : 57 Bom 364 followed.)
('33) 20 AIR 1933 Bom 85 (87): 57 Bom 364 (DB).

and Calcutta[2] that an order *refusing* to stay a suit under this section is a judgment within the meaning of Cl. 15 of the Letters Patent and hence is appealable under that clause. But, it has been held by the Rangoon High Court that an order *staying* a suit under this section is not a judgment and that a Letters Patent appeal does not lie from such an order.[3] (See also Letters Patent (Cal.) Cl. 15 Note 2.)

Res judicata.

11. [S. 13.] No Court[74] shall try any suit[21] or issue in which the matter directly and substantially[7] in issue has been directly and substantially in issue[8] in a former suit[20] between the same parties,[43] or between parties under whom they or any of them claim,[48] litigating under the same title,[70] in a Court competent[73] to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided[100] by such Court.

Explanation I. — The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II. — For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.[96]

Explanation III. — The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.[18]

Explanation IV. — Any matter which might[36] and ought[37] to have been made ground of defence[39] or attack[38] in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.[33]

Explanation V. — Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.[123]

Explanation VI. — Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.[59]

[1877, S. 13; 1859, S. 2.]

Synopsis

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2. ('35) 22 AIR 1935 Cal 1 (9) : 61 Cal 670 (DB). (A I R 1933 Bom 85 : 57 Bom 364 followed.)
3. ('35) 22 AIR 1935 Rang 73 (73) : 12 Rang 687 (DB). (Clause 13 of the Letters Patent of the Rangoon High Court.)

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86. Proceedings under the Companies Act. See Note 28.
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89. Proceedings under the Probate and Administration Act (now the Indian Succession Act). See Note 28.
90. Proceedings under the Oaths Act. See Note 28.
91. Proceedings under the Small Cause Courts Act. See Notes 75 and 83.
92. Proceedings under the Insolvency Acts. See Note 28.
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NOTE to the Synopsis. See the Notes indicated for the following topics :

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Agra Tenancy Act. See Note 58.
Alternative findings. See Note 7.
Alternative remedies—Election of one is a bar. See Note 35.
Applicability to appeals. See Notes 21, 29 and 30.
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Conflicting decrees—Later to prevail. See Note 100.
Decision by Court of incompetent jurisdiction—Effect. See Note 73.
Decision of liquidating Court. See Notes 28 and 67.
Decree incapable of execution. See Note 23.
Decree for possession — Conditional on payment of dower. See Note 113.
Decree not based on finding. See Notes 7 and 108.
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Two grounds of attack. See Note 38.
Waiver of plea of *res judicata*. See Note 6.
Whether judgment or findings and *grounds are res judicata*. See Note 2.
When *plea may be taken*. See Note 6.

1. Legislative changes.

(1) Explanations I and II are new.

(2) Explanation IV to S. 13 of the old Code has been omitted as being unnecessary and liable to lead to misconstruction.

(3) Explanation VI to S. 13 of the old Code has been removed from this section and re-enacted as S. 14 of the present Code.

(4) The expression "public right" in the present Explanation VI is new and has been added in view of the provisions of S. 91 newly added.

2. Scope, object and principle of the section. — This section embodies the doctrine of *res judicata* or the rule of conclusiveness of judgments, as to the points decided, in every subsequent suit between the same parties.[1] It is aimed at superfluous suits[2] and is really one of convenience and rest and not of absolute justice.[3] It is based partly on the maxim of Roman Jurisprudence *Interest reipublicæ utsit finis litium* — it concerns the state that there be an end to law suits—and partly on the maxim *Nemo debet bis vexari pro una et eadem causa*—no man should be vexed twice over for the same cause.[4] As was observed by Sir Lawrence Jenkins in *Sheoparsad Singh* v. *Ramnandan Prasad Singh*,[5] "the rule ..... while founded on ancient precedent, is dictated by a wisdom which is for all time." But for this rule there would be no end to litigation and no security for any person : the rights of persons would be involved in endless confusion and great injustice done under cover of the law.[6] The rule is intended not only to prevent a new decision but also to prevent a new investigation so that the same person cannot be harassed again and again in various proceedings upon the same question.[7]

This section as well as the corresponding sections of the former Codes were not introducing any new law in this country but were only putting into the form of a Code that which was the general doctrine of *res judicata* at the time.[8]

The general principles of *res judicata* do not, however, qualify in any way the provisions of S. 11.[9] When a case falls within the terms of the section it is that section that must be applied and not any general principles of *res judicata*.[10] Nor can the section itself be extended to cases not strictly covered by it.[11]

Stated in a simple form, where there has been an executable judgment between the parties, the rule of *res judicata* will prevent a fresh suit between them for the same relief.[12] The bar is not merely confined to the judgment but extends to all facts involved

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Section 11 — Note 2

1. ('43) 30 AIR 1943 Cal 76 (84) : I L R (1942) 2 Cal 299 (DB). (A judicial decision is conclusive evidence *inter partes* of the the matter decided.) [*See* ('02) 24 All 138 (141).]
2. ('06) 16 Mad L Jour 526 (528).
('89) 11 All 148 (162) (FB).
('83) 7 Bom 467 (470) (SB).
3. ('10) 5 Ind Cas 198 (199) : 37 Cal 197 (DB).
4. ('12) 6 Low Bur Rul 93 (97) (DB).
('02) 24 All 112 (115, 116) (DB).
('10) 8 Ind Cas 9 (11, 16) (All).
('16) 3 AIR 1916 Mad 157 (161) (DB).
('25) 12 AIR 1925 Oudh 118 (119).
('05) 8 Oudh Cas 389 (390) (DB).
('22) 9 AIR 1922 Pat 44 (46) : 1 Pat 90 (FB). [*See* ('26) 13 AIR 1926 Cal 650 (651).]
5. ('16) 3 AIR 1916 P C 78 (80) : 43 Cal 694 : 43 Ind App 91 (PC).
6. (1572-1616) 6 Co Rep 7a (9a) : 77 E R 263 (266), Ferrer's case. (Quoted in A I R 1916 P C 78 : 43 Cal 694 : 43 Ind App 91 (PC).)
7. ('42) 29 AIR 1942 All 302 (305) (DB).
8. ('03) 26 Mad 760 (770) (DB).
('78) 3 Bom 3 (6) (DB).
† ('93) 20 Cal 79 (86) (PC).
('85) 11 Cal 301 (309) : 12 Ind App 23 (PC).
('71) 15 Suth W R 30 (31) (PC).
9. † ('26) 13 AIR 1926 Cal 568 (573, 574) (DB).
('33) 20 AIR 1933 Lah 614(614). (General principles cannot override express provisions of this section.)
10. ('41) 28 AIR 1941 Cal 104 (105). (Where S. 11 is applicable, its provisions cannot be overridden by reference to general principles—Hence the general principles cannot be invoked where the Court which tried the first suit had no jurisdiction to try the second suit.)
('29) 117 Ind Cas 68 (69) (DB) (Lah.)
('02) 24 All 112 (118) (DB).
('26) 13 AIR 1926 Cal 568 (573) (DB).
('38) 25 AIR 1938 Lah 811 (812) : I L R (1939) Lah 183.
('26) 13 AIR 1926 Lah 670 (671) (DB).
('28) 15 AIR 1928 Mad 840 (845) (DB).
Also see Note 3.
11. ('07) 1907 Pun Re No. 57, p. 238 (FB).
('03) 25 All 138 (141) (DB).
12. ('25) 12 AIR 1925 P C 34 (35) : 52 Ind App 79 : 52 Cal 314 (PC).
('84) 6 All 269 (274) : 11 Ind App 37 (PC).
('16) 3 AIR 1916 All 261 (264).
('01) 23 All 465 (466) (DB).
('91) 13 All 98 (100) (DB).
('86) 1886 All W N 100 (100) (DB).
('84) 6 All 448 (449) (DB).
('70) 2 N W P H C R 382 (390) (DB).
('39) 26 AIR 1939 Bom 261 (264) (DB).
('80) 4 Bom 247 (252, 253) (DB).
✣ ('23) 10 AIR 1923 Cal 252 (255) (DB).
('22) 9 AIR 1922 Cal 73 (74, 75) (DB).
('06) 33 Cal 679 (681) (DB).
('74) 1 Cal 144 (146) : 2 Ind App 283 (PC).

in it as necessary steps or groundwork for the decision: in other words, a judgment operates as a bar as regards all findings which are essential to sustain the judgment.[13] And it is really the *ground* of the decision that operates as *res judicata*,[14] so that if there is merely a decree without a judgment it will not operate as *res judicata*.[15] It is the substantial effect of previous decisions that must be considered.[16] So, where a decree is passed on the footing of facts admitted, *res judicata* extends not merely to the actual decision in the case but to the common facts admitted by both the parties and made the foundation of the decree.[17] The section does not create any right or interest in property but only operates as a *personal* bar.[18] Nor does the section compel the Court trying the later case to hold that the previous decision is correct.[19] In fact, an erroneous decision will be as much *res judicata* as a correct decision.[20] The rule merely estops the parties

('68) 10 Suth W R 396 (397) (DB).
('14) 1 AIR 1914 Lah 24 (26) : 1914 Pun Re No. 12.
('71) 1871 Pun Re No. 48.
('18) 5 AIR 1918 Mad 1159 (1161, 1162) (DB).
('33) 20 AIR 1933 Oudh 104 (107) (DB).
('29) 16 AIR 1929 Oudh 172 (178) : 4 Luck 603 (FB).
('27) 14 AIR 1927 Oudh 60 (62).
[*See also* ('35) 22 AIR 1935 Pesh 150 (151). (Matter which is *res judicata* cannot be agitated afresh merely by reason of suggestion in judgment that party may bring another suit.)]
[But see ('40) 45 Cal W N 420 (426). (It is not essential that the first decree must be executable in order that it may operate as *res judicata*.)]
Also see Section 47 Note 2.

13. ('40) 27 AIR 1940 P C 116 (123) : 67 Ind App 251 : ILR (1940) Kar P C 251 : ILR (1940) Lah 193 (PC). (Suit by mutawalli for possession of mosque for purposes of wakf dismissed on the ground of adverse possession—Demolition of mosque — Subsequent suit for declaration that building is mosque and for mandatory injunction for restoration of building is barred by *res judicata*. AIR 1938 Lah 369 (FB) affirmed.)
✠ ('24) 11 AIR 1924 Cal 600 (605) (DB).
('26) 13 AIR 1926 Cal 1003 (1004, 1005) (DB).
('32) 19 AIR 1932 Cal 385 (387) (DB).
† ('10) 6 Ind Cas 554 (558) (DB) (Cal).
('09) 1 Ind Cas 808 (810) (Cal.)
† ('07) 6 Cal L Jour 621 (630) (DB).
('97) 24 Cal 900 (902, 907) (DB).
('05) 15 Mad L Jour 7 (9) (DB).
('14) 1 AIR 1914 Nag 58 (59, 60) : 10 Nag L R 28. (*Res judicata* applied to orders.)
('37) 24 A I R 1937 Rang 214 (218) : 14 Rang 652 (DB).
('35) 22 AIR 1935 Rang 118 (119).
[But see ('24) 11 AIR 1924 All 927 (928).]
See also Notes 7 and 108.

14. ('30) 17 AIR 1930 Mad 471 (473).
('25) 12 AIR 1925 Oudh 303 (304) : 28 Oudh Cas 2.
('25) 12 AIR 1925 Cal 530 (531) (DB).
('06) 29 Mad 42 (43, 44) (DB).
('25) 12 AIR 1925 Oudh 390 (391) : 29 Oudh Cas 93.

15. ('25) 12 AIR 1925 Cal 1116 (1118).

16. ('33) 20 AIR 1933 Cal 222 (230) (DB).

17. ('42) 29 AIR 1942 Oudh 354 (356) (DB). (Suit by reversioners contesting sale deed executed by two widows *A* and *B* — Both parties treating *A* alone as having title as Hindu widow in property sold — No plea based on title of *B* raised—Subsequent suit for possession of property on death of widow —Defence based on title of *B* as co-vendor, held barred.)
('32) 19 AIR 1932 Mad 519 (521) (DB).
[*See also* ('36) 63 Cal 550 (558). (Consent decree.)]

18. ('21) 8 AIR 1921 Mad 306 (308) : 44 Mad 514 (DB).

19. ('11) 9 Ind Cas 686 (687) (DB) (Mad).

20. ('43) 22 Pat 220 (253) (DB).
('43) 76 Cal L Jour 183 (188) (DB). (Correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as *res judicata*.)
('41) 28 AIR 1941 Mad 861 (862).
('26) 13 AIR 1926 Nag 476 (478).
('34) 21 AIR 1934 Cal 282 (283) : 61 Cal 234 (DB).
('31) 18 AIR 1931 All 425 (426) (DB).
('27) 14 AIR 1927 All 206 (207).
('15) 2 AIR 1915 All 400 (401) : 37 All 535 (539) (DB).
('02) 24 All 138 (141) (DB).
('99) 21 All 505 (513, 514) : 26 Ind App 175 (PC). (The question is not whether that judgment was right but whether it did or did not finally decide the matter in issue.)
('89) 11 All 187 (190) (FB).
† ('36) 23 AIR 1936 Bom 402 (404) : 60 Bom 1008 (DB). (Decision is *res judicata* as between parties, though it has been overruled.)
('32) 19 AIR 1932 Bom 257 (259) (DB).
('30) 17 A I R 1930 Bom 135 (138) : 53 Bom 676 (DB).
✠ ('28) 15 AIR 1928 Cal 717 (718) (DB).
('25) 12 AIR 1925 Cal 187 (189) (DB). (A judgment of a competent Court cannot be assailed in subsequent suit on ground of mistake.)
('23) 10 AIR 1923 Cal 629 (630) (DB). (Subsequent change in the view of law taken in prior decision will not take away its effect.)
('15) 2 AIR 1915 Cal 629 (631) (DB).
('37) 24 AIR 1937 Lah 649 (651). (Where a decision between the parties was considered by the Court and declared not to be *res judicata* the latter decision, even if erroneous in law, operates as *res judicata*.)
('26) 13 AIR 1926 Lah 24 (25). (A wrong order is final unless set aside in accordance with law.)
('79) 1879 Pun Re No. 45, p. 123 (124). (Prior suit for possession—Occupancy rights set up by defendants—Defendants referred to separate suit—*Res judicata*.)

from proving that it is not correct.[21]

The doctrine of *res judicata* is different from the rule laid down in O. 2 R. 2 of the Code in that, *firstly*, the former refers to the plaintiff's duty to bring forward all the grounds of attack in support of his claim while the latter only requires the plaintiffs to claim all reliefs flowing from the *same cause of action*,[22] and *secondly*, the former rule refers to *both* parties and precludes a *suit* as well as a *defence*, while the latter refers only to the plaintiff.[23] The rule of *res judicata* differs from the rule in S. 47 in that the former bars the trial of an issue which was, or which might and ought to have been, raised and decided in a previous suit, while S. 47 bars a suit for the determination of certain questions specified therein but not the *trial of an issue* involved in those questions.[24] The rule of *res judicata* differs also from S. 10 in that, *firstly*, S. 10 bars the trial of a *suit* while S. 11 bars the trial of both the *suit* and of the *issue* involved in the suit[25] and *secondly*, S. 10 relates to matters *sub judice* while S. 11 relates to matters which have passed into *rem judicatum*.[26]

The term *res judicata* is used in different senses in England and in India. What the English lawyers call *res judicata*, namely, the rule which prevents a party from suing again on the same cause of action is dealt with in India by O. 2, R. 2 (2) whereas what is known as *res judicata* in India is dealt with in England under the branch of law of estoppel by record which relates to judgments *inter partes*. But though the classification is different, the content and form are essentially the same, and the consequences which follow are the same. The limitations of the doctrine are as strict in England as they are here. It is not any and every expression of opinion in a judgment which gives rise to the estoppel, nor can the actual decision be carried further than the circumstances warrant. The decision must be a final one : the matter must have been distinctly put in issue; and then only the precise point which was so put in issue and solemnly found against a party is deemed to have been finally decided for this rule. This is so in India as well under this section. Again, under both systems the doctrine of conclusiveness of judgment applies to all matters which existed at the time of giving of judgment and which the party had an opportunity of bringing before the Court. But if there be matter subsequent which could not be brought before the Court at the time, the party is not precluded from raising it.[27]

The section must be construed as it stands[28] but, as in the case of all legislative enactments, if possible, so as to avoid an anomalous result.[29] In interpreting the language of the section, the fundamental principles of the rule to which the section gives expression must not be ignored unless the words of the statute clearly contradict those principles.[30]

† ('37) 24 AIR 1937 Mad 254 (257) : I L R (1937) Mad 364 (FB). (Interpretation of statute held to be erroneous in later decisions — Still it is *res judicata* between the parties.)
('23) 10 A I R 1923 Mad 545 (550) (DB). (Wrong decision on a mistake of fact.)
('21) 8 AIR 1921 Mad 315 (317) (DB).
('20) 7 A I R 1920 Oudh 302 (304) : 23 Oudh Cas 269 (DB).
('39) 26 AIR 1939 Pat 230 (231) : 18 Pat 378 (DB).
† ('30) 17 AIR 1930 Pat 585 (587):9 Pat 674 (DB).
('30) 17 AIR 1930 Pat 71 (74) (DB).
('24) 11 AIR 1924 Pat 362 (366) (DB). (Accepting a decision under protest does not prevent its being *res judicata*.)
('30) 17 AIR 1930 Rang 294 (295).

21. ('11) 9 Ind Cas 686 (687) (DB) (Mad).
('25) 12 AIR 1925 Cal 785 (787, 788) (DB).

22. *See* ('23) 10 AIR 1923 Mad 257 (260) : 46 Mad 135.

23. *See* ('21) 8 AIR 1921 P C 231 (233) (PC).

24. ('97) 24 Cal 355 (357) (DB).

25. ('41) 45 Cal W N 420 (425).
✠ ('29) 16 AIR 1929 Oudh 341 (345) : 4 Luck 573.
✠ ('89) 11 All 148 (154).

26. † ('89) 11 All 148 (154) (SB).

27. ('40) 27 AIR 1940 Nag 163 (168) : ILR (1941) Nag 513 (DB).

28. † ('04) 6 Bom L R 98 (103) (DB).

29. ('85) 9 Bom 75 (81) (DB).

30. ✠ ('86) 8 All 324 (334) (DB).
('89) 11 All 148 (153, 154).
✠ ('27) 14 AIR 1927 Lah 289 (294) : 8 Lah 384 (FB).

In view of the fact that the doctrine is in no way opposed to the spirit of the law as expounded by Hindu and Mohamedan commentators, its application by the Courts in India should be influenced by no technical considerations of form, but by matter of *substance* within the limits allowed by law.[31]

The bar of *res judicata* is reciprocal and *mutual* to the parties in the later action : a judgment is conclusive upon *both* the parties and not merely as against the person who is *defeated* in the suit : in other words, a party will be concluded against his contention by a former judgment if he could have used it as a protection, had the judgment been the other way : and a person can claim the benefit of a judgment as an estoppel upon his adversary, if he would have been prejudiced by a contrary decision of the case.[32] Thus, a suit was brought by the adopted son of a Hindu widow, for possession against an alienee from the widow. The suit was dismissed on the ground that the alienation would be valid during the lifetime of the widow. A second suit for possession was brought after the death of the widow. It was held that the alienee could not plead that the cause of action had arisen during the lifetime of the widow and that the suit was barred by limitation.[33]

This section does not deal with the question of *jurisdiction* as it does not affect the *cognizability* of suits but only bars their *trial*.[34] A decision, although, it may not be *res judicata*, may still be a binding precedent.[35] A judgment *inter partes* may also be admitted in evidence in a subsequent suit between the same parties, where the existence of such judgment is relevant under the provisions of the Evidence Act.[36] See also the undermentioned case.[37]

3. Section is not exhaustive. — Section 11 is not exhaustive of the general doctrine of *res judicata*.[1] The principle of conclusiveness of judgments is much wider than the terms of the section[2] and remains apart from the provisions of the Code.[3] Where

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31. ('16) 3 AIR 1916 P C 78 (81) : 43 Cal 694 : 43 Ind App 91 (PC).
✣ ('30) 17 AIR 1930 PC 22(23) : 57 Ind App 24 (PC).
('31) 18 AIR 1931 Bom 507 (508) (DB).
('13) 37 Bom 224 (230, 231) (DB).
('13) 20 Ind Cas 700 (700) (DB) (Cal).
[But see † ('07) 1907 Pun Re No. 57, p. 238(252).]

32. ('07) 6 Cal L Jour 621 (628).

33. † ('36) 23 AIR 1936 Bom 402 (404) : 60 Bom 1008 (DB).

34. ('21) 8 AIR 1921 Mad 306 (309) : 44 Mad 514 (DB).

35. ('39) 26 AIR 1939 Cal 192 (196) (DB).

36. ('38) 173 Ind Cas 447 (448) (PC).
('36) 23 AIR 1936 Oudh 189 (191). (Certain issue decided against successful party in prior suit—Such issue arising between same parties in subsequent suit—Finding though not *res judicata* still throws heavy onus on such party in subsequent suit to prove that finding in prior suit is wrong —Judgment in prior suit is admissible.)

37. ('38) 25 AIR 1938 Cal 34 (35) : ILR (1937) 1 Cal 400 (DB). (Construction of will—Decision by High Court—Same matter cannot again be raised in same High Court in subsequent suit though parties are different.)

Note 3

1. ('42) 29 AIR 1942 Nag 107 (108) : ILR (1942) Nag 779.
('41) 28 AIR 1941 Nag 346 (350) (DB).
('41) 28 AIR 1941 Cal 104 (105).
('40) 27 AIR 1940 Mad 957 (958).
† ('32) 19 AIR 1932 P C 161 (164) : 10 Rang 322 : 59 Ind App 247 (PC).
('13) 19 Ind Cas 656 (658) : 36 Mad 141.
✣ ('31) 18 AIR 1931 P C 114 (117) : 53 All 103 : 58 Ind App 158 (PC).
('37) 24 AIR 1937 All 251 (253) (DB).
('24) 11 AIR 1924 All 815 (816).
('94) 16 All 464 (472) (DB).
✣ ('84) 6 All 269 (274) : 11 Ind App 37 (PC).
('31) 18 AIR 1931 Bom 507 (508) (DB).
('08) 32 Bom 391 (393) (DB).
('94) 19 Bom 821 (826) (DB).
('82) 6 Bom 703 (715).
('39) 26 AIR 1939 Cal 169 (174) : I L R (1938) 2 Cal 418 (DB).
('30) 17 AIR 1930 Cal 5 (8) : 56 Cal 639.
('24) 11 AIR 1924 Cal 600 (605) (DB).
('38) 25 AIR 1938 Lah 571 (574) (DB).
('30) 17 AIR 1930 Lah 487 (488).
('29) 16 AIR 1929 Lah 781 (782) (DB).
('26) 13 AIR 1926 Lah 603 (604) : 8 Lah 15 (DB).
('92) 15 Mad 111 (119).
('25) 12 AIR 1925 Oudh 118 (119).
('26) 13 AIR 1926 Sind 236 (237) : 21 Sind LR 23.

2. ('41) 28 AIR 1941 Cal 104 (105). (Section 11 deals with some of the circumstances under which a previous decision will operate as *res judicata*.)
('28) 15 AIR 1928 Oudh 359(361) : 3 Luck 487 (DB).

3. ✣ ('21) 8 AIR 1921 P C 11 (13) : 48 Cal 499 : 48 Ind App 187 (PC).

circumstances other than those provided for in this section exist, the principle underlying the rule of *res judicata* may be invoked in a proper case without recourse to the provisions of this section.[4] Therefore, recourse may properly be had to the decisions of the English Courts, for the purpose of ascertaining the general principles governing the application of the doctrine.[5] But the section is exhaustive in respect of all cases which fall within its terms and in such cases the Court cannot travel outside the section and apply the general principles of law.[6] The following are some of the classes of cases which do not fall within the terms of the section and to which the general doctrine of *res judicata* will be applicable :

(1) A previous order in a proceeding finally adjudicating a matter cannot be canvassed by the parties thereto in *subsequent stages of the same proceeding*.[7]

(2) A final order in a previous *proceeding*, not a *suit*, *will* bar a subsequent *suit* between the same parties on the same matter.[8]

(3) An order in an execution proceeding will be binding in subsequent execution proceedings.[9]

For a fuller discussion of the matter, see Notes 22 to 32. The general principles of *res judicata* cannot be used in such a way as to practically render the provisions of S. 11 nugatory.[10]

('34) 21 AIR 1934 Cal 430 (432) : 61 Cal 1 (DB).
('31) 18 AIR 1931 Bom 507 (508) (DB).
('24) 11 AIR 1924 Mad 578 (580) DB).
('25) 12 AIR 1925 Oudh 118 (119).

4. ('42) 29 AIR 1942 All 19 (35) : ILR (1942) All 45 (FB).
('41) 28 AIR 1941 Mad 861 (862).
('41) 28 AIR 1941 Cal 104 (105).
('40) 27 AIR 1940 Cal 225 (226). (The plea of *res judicata* may successfully be raised in circumstances which do not fall within the purview of the section.)

5. ('32) 19 AIR 1932 P C 161 (164):10 Rang 322: 59 Ind App 247 (PC).

6. ('40) 45 Cal W N 420 (425).
('41) 28 AIR 1941 Cal 104 (106).
✠ ('02) 29 Cal 707 (716) : 29 Ind App 196 (PC).
('28) 15 AIR 1928 Mad 840 (845) (DB).
('33) 20 AIR 1933 Lah 646 (647):14 Lah 437 (DB).
('35) 22 AIR 1935 Cal 792 (798) (DB).
('25) 12 AIR 1925 Cal 1046 (1046, 1047).
('33) 20 AIR 1933 Lah 551 (552):14 Lah 369 (DB).
('26) 13 AIR 1926 Lah 670 (671) (DB).
('29) 117 Ind Cas 68 (69) (Lah).
('28) 108 Ind Cas 623 (624) (Lah).
('34) 21 AIR 1934 Sind 112 (113).
Also see Note 2.

7. ('40) 27 AIR 1940 Mad 957 (958). (Issue in proceeding decided by final order—Power of succeeding Judge to reopen issue in same proceeding at later stage.)
('24) 11 AIR 1924 Mad 406 (410, 411).
✠ ('21) 8 AIR 1921 P C 11 (12, 13) : 48 Cal 499 : 48 Ind App 187 (PC).
('25) 12 AIR 1925 All 503 (504) : 47 All 637 (FB).
('17) 4 AIR 1917 All 144 (145) (DB).
✠ ('84) 6 All 269 (274) : 11 Ind App 37 (PC).
('81) 3 All 755 (757) (DB).
(1864) 1 Bom H C R 173 (176).
('06) 10 Cal W N 529 (532) (DB). (Review—Application for, on the ground that vakil was not authorised—Dismissal—Fresh suit for same purpose is barred.)
('30) 17 AIR 1930 Lah 836 (837):11 Lah 470 (DB).
('26) 13 AIR 1926 Lah 37 (38) (DB).
✝ ('25) 12 AIR 1925 Lah 507 (508).
('10) 8 Ind Cas 779 (779) (Lah).
('29) 16 AIR 1929 Mad 404 (406) (DB).
('21) 62 Ind Cas 703 (704) (DB) (Mad).
('26) 13 AIR 1926 Oudh 420 (422) (DB).
('36) 23 AIR 1936 Pat 447 (449).

8. ('40) 27 AIR 1940 Bom 284 (285) : ILR (1940) Bom 519. (Sale in execution—Review application to set aside sale decided by Court of competent jurisdiction against plaintiff—Decision held operated as *res judicata* between parties.)
('26) 13 AIR 1926 All 439 (439) : 48 All 422 (DB). (Previous decision under O. 22, R. 5.)
('22) 9 AIR 1922 P C 80 (81) : 45 Mad 320 : 49 Ind App 129 (P C).
('25) 12 AIR 1935 All 503 (504) : 47 All 637 (FB).
('24) 11 AIR 1924 All 225 (227) : 46 All 32 (DB). (Previous application under O. 34, R 6)
('07) 29 All 608 (612) (DB). (Dismissal of application under O. 9, R. 13, bars subsequent suit to set aside decree apart from proof of fraud.)
('30) 17 AIR 1930 Bom 431 (433) : 54 Bom 696 (DB). (Award and decree passed—Subsequent suit impeaching validity of reference.)
('07) 9 Bom L R 259 (263, 264) (DB). (Previous decision in proceeding under S. 525 of the old Code.)
('17) 4 AIR 1917 Nag 127 (128):14 Nag LR 25 (26).
('24) 11 AIR 1924 Pat 769 (770) (DB). (Dismissal of application under O. 9, R. 13, bars subsequent suit to set aside decree apart from proof of fraud.)
('24) 11 AIR 1924 Pat 238 (239) : 2 Pat 833 (DB). (Do.)
[*See* ('10) 5 Ind Cas 198 (200) : 37 Cal 197.]

9. See Note 23.

10. ('41) 28 AIR 1941 Cal 104 (106). (General principles cannot be invoked where Court which tried first suit had no jurisdiction to try the next.)

4. Distinction between res judicata and estoppel. — The doctrine of *res judicata* really differs in essential particulars from the doctrine of estoppel, though the former is very often treated as a branch of the law of estoppel.[1] *Firstly*, the doctrine of *res judicata* results from a *decision of the Court* while estoppel results from the *acts of parties* themselves. *Secondly*, the rule of *res judicata* proceeds, as has been seen already in Note 2, on grounds of *public policy*, viz., that there should be an end to litigation, while the rule of estoppel proceeds upon the doctrine of *equity* that he who, by his conduct, has induced another to alter his position to his disadvantage, cannot turn round and take advantage of such alteration of the other's position.[2] *Thirdly*, the rule of *res judicata* prohibits an inquiry *in limine* and ousts the jurisdiction of the Court to try the case while an estoppel is only a *rule of evidence*.[3] *Lastly*, the theory of *res judicata* is to *presume conclusively the truth* of the former decision while the rule of estoppel prevents a person from setting up what he calls the truth.[4]

The above relates to estoppel by *conduct*. Under English law there is what is known as estoppel by *record*. This corresponds to the rule contained in this section, while what is known as *res judicata* in English law is embodied in O. 2 R. 2. (See Note 2.)

5. Essentials of res judicata. — The essentials for the applicability of the general principles of *res judicata* are well brought out in the following observations of Sir William DeGrey in the leading case of the *Duchess of Kingstone*[1]:

"From the variety of cases relative to judgment being given in evidence in civil suits, these two deductions seem to follow as generally true: *first* that a judgment of a Court of concurrent jurisdiction, directly speaking on the point, is, as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another Court; *secondly*, that the judgment of a Court of exclusive jurisdiction, directly on the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a Court of concurrent or exclusive jurisdiction is evidence of any matter which came *collaterally* in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

Thus, it is clear that it is essential that the former judgment must be —

(1) that of a Court of *competent jurisdiction*,

(2) *directly speaking upon* the matter in question in the subsequent suit, and

(3) between the *same parties*.[2]

Otherwise even the general principles of *res judicata* will not apply.[3]

In order that section 11 may apply to any particular case, the following conditions are necessary[4]:

('29) 16 AIR 1929 Lah 781 (782) (DB).

Note 4

1. † ('42) 29 AIR 1942 Cal 92 (98) : ILR (1942) 1 Cal 169 (DB).
('22) 9 AIR 1922 Pat 63 (65) : 1 Pat 174 (DB).
See however ('39) 26 AIR 1939 Pat 633 (636). (*Res judicata* is a form of estoppel — There can be no estoppel against statute — Recovery of amount prohibited by statute — Defendant can plead statute though plaintiff is entitled to recover under previous judgment.)]
2. † ('42) 29 AIR 1942 Cal 92 (98) : ILR (1942) 1 Cal 169 (DB).
('22) 9 AIR 1922 Pat 63 (65) : 1 Pat 174 (DB).
[*See* ('12) 36 Bom 214 (245).]
3. † ('42) 29 AIR 1942 Cal 92 (98) : ILR (1942) 1 Cal 169 (DB).
('11) 12 Ind Cas 535 (536) : 36 Bom 283.
† ('86) 8 All 324 (333) (DB).
('36) 23 AIR 1936 Sind 99 (102) : 29 Sind L R 455 (DB).
4. ('42) 29 AIR 1942 Cal 92 (98) : ILR (1942) 1 Cal 169 (DB).
('86) 8 All 324 (332, 333) (DB).

Note 5

1. 2 Smith's Leading Cases, 11th Edition, p. 731 (732).
2. ('42) 29 AIR 1942 Nag 107 (108) : ILR (1942) Nag 779.
3. ('28) 107 Ind Cas 149 (149) (DB) (Pat).
(1864) 1 Suth W R 121 (122).
4. † ('42) 29 AIR 1942 Cal 1 (15) : ILR (1941) 2 Cal 434 (DB).

(1) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit.[5]
(2) The former suit must have been between the *same parties* or between parties under whom they or any of them claim.[6]
(3) Such parties must have been *litigating under the same title* in the former suit.[7]
(4) The Court trying the former suit must have been a Court *competent to try the subsequent suit* or the suit in which such issue is subsequently raised.[8]
(5) Such matter in issue in the subsequent suit must have been *heard and finally decided* in the first suit.[9]

To constitute *res judicata* it is, however, not necessary that the suit need be one which the plaintiff was bound to institute. The usefulness or otherwise of a suit is a question which is entirely beside the point.[10]

6. Plea of res judicata. — As has already been seen in Note 3 above, the plea of *res judicata* is not confined to the provisions of S. 11 of the Code but may be invoked under the general principles of law in appropriate cases[1] and such a plea will prevail even where the result of giving effect to it will be to sanction what is illegal or prohibited by law:[2] if the legality of an act is a point in dispute, it can become *res judicata*: if it is abandoned or not put forward by a party, it will be deemed to be decided against him.[3] But the plea being one in restraint of the right of a litigant to have his case fully tried and determined, the plea must be clearly established and the judgment which is pleaded in bar strictly construed.[4] The party pleading it must show from the record that the Court had found in his favour in another proceeding[5] and must produce all the relevant documents for that purpose.[6] The party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contentions against such a plea.[7] A suit cannot be said to be barred by *res judicata on the face of the plaint* unless all the conditions requisite are stated in the plaint itself.[8]

The plea of *res judicata* is not one of *jurisdiction* of the Court[9] but is one

('99) 3 Cal W N 517 (524) : 21 All 505:26 Ind App 175 (PC).
(1864) 1 Suth W R 121 (122).
('74) 21 Suth W R 109 (109) (DB).
[*See also* ('33) 20 AIR 1933 Lah 534 (535, 536).]
5. See Note 7.
6. See Note 41.
7. See Note 70.
8. See Note 73.
9. See Note 100.
10. ('25) 12 AIR 1925 Lah 160 (162, 163) (DB).

Note 6

1. ('26) 13 AIR 1926 Lah 603 (604) : 8 Lah 15 (DB).
('35) 22 AIR 1935 Cal 596 (602): 62 Cal 28 (DB). (Reversed on another point in AIR 1937 PC 256 : 1LR (1938) 1 Cal 66 : 31 Sind LR 637 : 64 Ind App 302 (PC).)
2. ('30) 17 AIR 1930 Bom 135 (138) : 53 Bom 676 (DB).
[See however ('39) 26 AIR 1939 Pat 636 (636). (*Res judicata* is a form of estoppel — There can be no estoppel against a statute.)]
3. ('09) 33 Bom 479 (482) (DB).
4. ('17) 4 AIR 1917 Mad 689 (689) (DB).
5. ('17) 4 AIR 1917 Pat 50 (52) (DB).
('09) 6 All L Jour 527 (535, 536):2 Ind Cas 587 (591).
6. ('17) 4 AIR 1917 Pat 196 (198) (DB).
('20) 7 AIR 1920 P C 81 (83) : 47 Cal 662 : 47 Ind App 11 (PC).
7. ('41) 28 AIR 1941 Pat 83 (89) : 19 Pat 669 (DB).
('24) 11 AIR 1924 Mad 1 (5, 6) : 46 Mad 768 (FB).
('36) 23 AIR 1936 PC 258 (259) (PC). (Party cannot raise plea in Appellate Court unless it has been raised in pleadings or issues.)
[*See also* ('38) 25 AIR 1938 Bom 23 (30). (An issue of *res judicata* is not only an issue of law, but also an issue of fact, and a party who failed to plead this defence is not entitled to take advantage of evidence which happens to be on the record for a different purpose to establish such a claim.)]
8. ('13) 1913 Pun L R No. 194, p. 666 : 18 Ind Cas 1007 (1007).
9. † ('29) 16 AIR 1929 Cal 163 (164) (DB).
('17) 4 AIR 1917 Mad 950 (950) (DB).
[*See* ('96) 20 Bom 86 (96).]
[But see ('73) 1873 Bom P J 504 (504).]

which a party may waive.[10] If a party does not raise the plea when he ought to have done so, it will be deemed to have been directly and substantially in issue and will be deemed to have been heard and finally decided against him or the party will be taken to have waived it.[11] A party cannot be considered to have given up a plea of *res judicata* where all the facts and papers necessary for ascertaining the point were before the Court and the parties had admitted the fact of the previous suit.[12] Nor will a party be prevented from raising the plea before the Privy Council merely because it has not been pressed in the Courts below, if it was raised in the first Court and evidence was let in on the point. Even a party who has waived the plea in the lower Court may revive it in the appellate stage of the same case where the other party has appealed from the decree.[13] A wrong decision on the question of *res judicata* is a wrong *exercise* of jurisdiction but is not without jurisdiction.[14] Where, at the appellate stage of one suit, a former suit is decided, the plea of *res judicata* can be raised at that stage.[15] As to whether the plea can be raised in second appeal, see Ss. 100 and 101 Note 60. See also the undermentioned decisions.[16]

7. Matter must be directly and substantially in issue. — This is the first condition for the applicability of the rule of *res judicata*.[1] The phraseology used in the Code of 1859 was as follows: — "The Civil Courts shall not take cognizance of any suit brought on a *cause of action* which shall have been heard," etc. It was held by the Privy Council in *Krishna Behari Roy* v. *Bunwari Lall Roy*,[2] that the expression "cause of action" cannot be taken in its literal sense and that, in any view, under the general law, when a *material* issue has been tried and determined between the same parties in a proper suit and in a competent Court, it cannot again be tried in another suit between them. The words "matter directly and substantially in issue" were thereafter introduced in S. 13 of the Code of 1877 and subsequently in the corresponding sections of the Codes of 1882 and 1908.

In order that a matter decided in a previous suit may operate as *res judicata* in a subsequent suit, it must be *directly* and *substantially* in issue therein.[3] If it is not in

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10. ('29) 16 AIR 1929 Cal 163 (164) (DB).
('17) 4 AIR 1917 Mad 950 (950) (DB).
('35) 22 AIR 1935 All 645 (647).
11. ('41) 28 AIR 1941 Cal 493 (494).
('29) 16 AIR 1929 Cal 163 (164).
('33) 20 AIR 1933 Cal 69 (71) : 59 Cal 513.
('36) 23 AIR 1936 Cal 454 (455) (DB). (Where in an appeal by the plaintiffs from a suit which has been dismissed although it is open to the defendants to support the order of dismissal on the ground of *res judicata* they do not do so and the suit is remanded to be heard on merits, they are precluded from raising the plea of *res judicata* subsequently.)
12. ('29) 16 AIR 1929 All 724 (725) (DB).
13. (1865) 3 Suth W R (Act X) 146 (147) (DB).
('32) 19 AIR 1932 Bom 15 (18) (DB).
('33) 20 AIR 1933 Oudh 104 (106) (DB).
14. ('85) 9 Bom 432 (434) (DB).
('35) 22 AIR 1935 Rang 158 (158). (Interlocutory order on question of *res judicata*—No revision lies.)
Also see section 115 Note 13.
15. ('41) 28 AIR 1941 Mad 815 (816).
('29) 16 AIR 1929 Pat 173 (175, 176) : 8 Pat 107 (DB).
16. ('42) 29 AIR 1942 Cal 445 (446) : ILR (1942) 1 Cal 510. (Remand of suit by Appellate Court—Plea of *res judicata* (already considered) allowed to be raised again in the hearing after remand.)
('38) 42 Cal W N 560 (562, 563, 565). (Mere observation in the prior judgment that a party would be prevented from pleading *res judicata* on the basis of such judgment is no bar to the raising of the plea.)

Note 7

1. † ('25) 12 AIR 1925 Cal 985 (988).
('04) 1 All L Jour 466 (467).
2. ('75) 1 Cal 144 (146) : 2 Ind App 283 (PC).
3. ('43) 30 AIR 1943 Sind 17 (22) : ILR (1942) Kar 306. (*Held* in this case that the matter was directly and substantially in issue.)
('40) 27 AIR 1940 Nag 163 (168) : ILR (1941) Nag 513 (DB).
('20) 7 AIR 1920 Mad 246 (249) (DB).
('14) 1 AIR 1914 Cal 896 (898) (DB).
('30) 130 Ind Cas 194 (196) (DB) (All). (Decision on an issue not unnecessary for decision.)
('15) 2 AIR 1915 All 265 (267) (DB).
('12) 10 All L Jour 106 (107).
('05) 27 All 37 (52, 53) : 32 Ind App 17 (PC).
('01) 23 All 465 (466) (DB).
('82) 4 All 65 (68) (DB).
('78) 1 All 560 (562) (DB).
('34) 21 AIR 1934 Bom 248 (251) (DB).

issue either directly or substantially, it will not be *res judicata* in the subsequent suit.[4]

† ('30) 17 AIR 1930 Bom 135 (137) : 53 Bom 676 (DB). (Where in the prior suit the mortgagees were given a decree for possession on the ground of their title under a sale deed, subsequent suit for possession on the ground that the sale-deed was invalid is barred.)
('24) 11 AIR 1924 Bom 118 (119) (DB).
('13) 19 Ind Cas 558 (560) : 37 Bom 224 (DB).
('99) 23 Bom 536 (538) (DB).
('35) 22 AIR 1935 Cal 725 (725) (DB). (Suit for enhancement of rent—Decision on question as to whether Transfer of Property Act or Bengal Tenancy Act applied to tenancy *held* operated as *res judicata* on such question in subsequent suit for possession.)
('35) 22 AIR 1935 Cal 256 (257).
('32) 19 AIR 1932 Cal 385 (386) (DB). (Previous suit for rent dismissed ; subsequent suit for assessment of rent barred.)
('31) 18 AIR 1931 Cal 397 (400) (DB).
('29) 16 AIR 1929 Cal 449 (449) (DB). (Suit for declaration of title and possession—Title found and declared but relief for possession refused—Second suit for possession—Question of title is *res judicata*.)
✻ ('28) 15 AIR 1928 Cal 777 (781): 56 Cal 723 (FB).
('28) 15 AIR 1928 Cal 459 (461) (DB).
† ('26) 13 AIR 1926 Cal 80 (82) (DB).
('19) 6 AIR 1919 Cal 782 (795) (SB).
† ('15) 2 AIR 1915 Cal 629 (631) (DB).
† ('13) 16 Ind Cas 22 (24) (DB) (Cal).
('11) 10 Ind Cas 382 (384) (DB) (Cal).
('07) 34 Cal 922 (925) (DB).
('05) 9 Cal W N 469 (472).
('96) 23 Cal 415 (418) (DB).
('88) 15 Cal 800 (807) : 15 Ind App 106 (PC).
† ('86) 12 Cal 484 (493) : 12 Ind App 188 (PC).
('84) 10 Cal 697 (706) (DB).
† ('81) 6 Cal 715 (717) (DB).
('25) 12 AIR 1925 Lah 596 (597). (Suit by principal against agent relating to certain transaction decided—Cross suit by agent in respect of the same matter is barred.)
('24) 11 AIR 1924 Lah 702 (706) (DB). (Suit on pronote for interest due on mortgage—Validity of mortgage is directly and substantially in issue and finding thereon operates as *res judicata*.)
('15) 2 AIR 1915 Lah 92 (93) (DB).
('14) 1 AIR 1914 Lah 24 (26): 1914 Pun Re No. 12 (DB). (Puisne mortgagee's suit against prior mortgagee for redemption and against mortgagor for possession — Subsequent suit for possession against mortgagor alone)
('12) 17 Ind Cas 365 (366) (Lah).
('09) 4 Ind Cas 1017 (1018) (DB) (Lah).
('89) 1889 Pun Re No. 157, p. 551 (555) (FB).
('29) 16 AIR 1929 Mad 404 (408) (DB).
('27) 14 AIR 1927 Mad 1131 (1132).
('02) 12 Mad L Jour 445 (447) (DB).
('36) 160 Ind Cas 632 (633) (Nag).
('35) 22 AIR 1935 Nag 156 (161). (Two suits different in form — But question directly in issue same — Decision in prior suit operates as *res judicata*.)
('99) 2 Oudh Cas 250 (251).
('34) 21 AIR 1934 Pat 350 (351). (Suit for rent by one cosharer under S. 148A, Bengal Tenancy Act, impleading other cosharers — Subsequent suit for rent by any other cosharers is barred.)
('17) 4 AIR 1917 Pat 364 (365) (DB).
† ('17) 4 AIR 1917 Pat 47 (49) (DB).
[But see ('12) 36 Bom 548 (550) (DB). (The first suit was under the ordinary law in which a certain amount was held to be the principal due to the mortgagee plaintiff—The second suit was under the Dekkhan Agriculturists' Relief Act in which the whole transaction could be re-opened.)]

4. ('42) 29 AIR 1942 Oudh 286 (287, 288) (DB). (Claim to certain land in previous suit based on dhardura custom negatived — Decision does not operate as *res judicata* in subsequent suit in which the basis of title is different as the matter cannot be said to be directly and substantially in issue in the previous suit.)
('41) 28 AIR 1941 Cal 449 (451). (The finding in the former suit for possession did not operate as *res judicata* in the mortgage suit, inasmuch as the question was not really in issue in the mortgage suit.)
('41) 28 AIR 1941 All 217 (218). (If the facts to be proved in each case are different then subsequent suit is not barred under O. 2 R. 2 or S. 11.)
('41) 28 AIR 1941 Cal 289 (291). (Partition suit by cosharer—Defendant cosharer alleging that he had right of way over property in suit which may be taken into account at the time of allotment of shares—Right of way neither challenged nor issue framed as to its existence—Decision in partition suit is not *res judicata* on question as to existence of right of way.)
('39) 26 AIR 1939 Pat 633 (636). (Judgment deciding merely party's liability to pay is not *res judicata* in subsequent suit regarding nature of the imposition.)
('28) 15 AIR 1928 Nag 169 (171).
('18) 5 AIR 1918 Mad 794 (796) : 40 Mad 846.
('37) 24 AIR 1937 P C 256 (259) : I L R (1938) 1 Cal 66 : 31 Sind L R 637 : 64 Ind App 302 (PC).
('25) 12 AIR 1925 P C 63 (69, 70) : 47 All 250 : 52 Ind App 145 (PC). (Suit by heirs against widow for possession dismissed for non-payment of dower debt ordered by Court to be paid by plaintiffs to widow—Second suit for possession by the heirs is not barred)
('23) 10 AIR 1923 P C 175 (176, 177) : 46 Mad 751 : 50 Ind App 295 (PC). (Suit for declaration that property belongs to trust—Person in adverse possession made party — Declaration is not *res judicata* on the question of adverse possession.)
('14) 1 AIR 1914 P C 72 (74) : 42 Cal 244 : 41 Ind App 267 (PC).
('66) 10 Moo Ind App 203 (211) (PC).
('30) 17 AIR 1930 All 305 (306, 307).
('29) 16 AIR 1929 All 696 (697).
('29) 16 AIR 1929 All 463 (464).
('29) 16 AIR 1929 All 17 (18) : 50 All 733.
('26) 13 AIR 1926 All 77 (78).
('25) 12 AIR 1925 All 794 (795).
('25) 12 AIR 1925 All 200 (201). (Previous proceedings confined to question of possession—Question of title is not barred.)

('24) 11 AIR 1924 All 922 (923).
('24) 11 AIR 1924 All 910 (911).
('24) 11 AIR 1924 All 163 (164). (Decision that *A* is tenant does not preclude the plea that *B* sowed the land.)
('22) 9 AIR 1922 All 401 (401). (Suit by the reversioner for a declaration that he was the next reversioner during the lifetime of the widow is no bar to a subsequent suit for possession of the property.)
('20) 7 AIR 1920 All 21 (21) : 42 All 309 (311).
('19) 6 AIR 1919 All 128 (134) : 41 All 538 (549).
('17) 4 AIR 1917 All 292 (294) : 39 All 379 (DB).
('12) 16 Ind Cas 431 (432) (All). (Previous proceedings confined to question of possession—Question of title is not barred.)
('12) 14 Ind Cas 745 (746) (All).
('12) 13 Ind Cas 634 (636) All).
('11) 11 Ind Cas 936 (938) (All).
('10) 6 Ind Cas 696 (697) (All).
('10) 5 Ind Cas 294 (295) (All).
('09) 1 Ind Cas 529 (530) (All).
('07) 29 All 331 (338, 339) : 34 Ind App 72 : 10 Oudh Cas 177 (PC).
('06) 28 All 288 (291) (DB). (Suit on note by father —Sons made parties but exempted on the ground that they were not parties to the note — Order exempting them is not *res judicata* in proceeding by creditor to enforce pious obligation of son.)
('99) 21 All 301 (308) (DB). (Do.)
† (1900) 23 All 5 (9) (DB).
('91) 13 All 53 (62) : 17 Ind App 150 (PC).
('90) 1890 All W N 21 (22) (DB).
('86) 8 All 396 (401) (DB).
('83) 5 All 118 (121) (DB). (Personal decree against mortgagor for interest—A subsequent suit to recover principal and interest by sale of the mortgaged property not barred.)
('67) 2 Agra A C 93 (94).
('32) 19 AIR 1932 Bom 3 (7, 8) (DB).
('30) 17 AIR 1930 Bom 132 (135) : 54 Bom 162.
('28) 15 AIR 1928 Bom 365 (366) (DB). (Partition suit — Decree passed — Acquisition of house subsequently out of joint family funds — Subsequent suit for partition of house—No *res judicata*.)
('25) 12 AIR 1925 Bom 418 (418) (DB). (Application to file award registered as suit, abated for non-joinder of representatives — Second suit to recover money due is not barred.)
('25) 12 AIR 1925 Bom 311 (313) (DB).
('11) 36 Bom 127 (131) (DB).
('11) 35 Bom 507 (510, 511) (DB).
✠ ('90) 14 Bom 31 (46) (DB).
('81) 5 Bom 27 (29) (DB).
('80) 5 Bom L R 742 (743) (DB). (Issue not raised with sufficient precision in previous suit.)
('29) 16 AIR 1929 Cal 445 (446, 447) (DB).
('25) 12 AIR 1925 Cal 225 (232) (DB).
('23) 10 AIR 1923 Cal 379 (380) : 50 Cal 475 (DB). (First suit for title — Second suit for fixing boundaries.)
('23) 10 AIR 1923 Cal 333 (335) (DB). (Suit for payment of rent in respect of seven Jotes dismissed — Subsequent suit for fixing fair and equitable rent in respect of 1 Jote and 111 bighas not barred.)
('22) 9 AIR 1922 Cal 311 (312) (DB).
('20) 7 AIR 1920 Cal 373 (373) (DB).
('19) 6 AIR 1919 Cal 123 (124) (DB).
('19) 6 AIR 1919 Cal 40 (42) (DB).
('16) 3 AIR 1916 Cal 673 (674) (DB).
('06) 33 Cal 116 (130, 131) : 32 Ind App 244 (PC).
('97) 24 Cal 546 (550) (DB).
('92) 19 Cal 159 (172) : 18 Ind App 165 (PC).
('88) 15 Cal 800 (807) : 15 Ind App 106 (PC).
('87) 15 Cal 70 (81) (PC).
† ('85) 11 Cal 301 (310) : 12 Ind App 23 (PC).
('81) 7 Cal 169 (171, 172) (DB).
('75) 23 Suth W R 253 (253) (DB). (Suit for khas possession is not a bar to a later suit for rent of the same land.)
('70) 13 Suth W R 343 (343) (DB). (First suit was to recover possession — Second suit to get rid of a sale in execution, *held* not barred.)
('70) 13 Suth W R 317 (318, 319) (DB).
('69) 11 Suth W R 407 (407, 408) (DB).
('69) 11 Suth W R 83 (83, 84) (SB). (Decree for possession made under S. 9, Specific Relief Act, is not *res judicata* in a subsequent suit for mesne profits.)
('68) 9 Suth W R 557 (558) (DB).
('67) 8 Suth W R 428 (432, 433) (FB).
('67) 7 Suth W R 423 (424, 425) (DB).
('66) 6 Suth W R (Act X) 93 (93) (DB). (First suit for rent — Second suit for abatement of rent on the ground of decrease of area—Not barred.)
(1864) 1864 Suth W R 167 (169) (DB). (First suit—Question as to the use of water in a watercourse—Second suit —Question as to the right of throwing up an embankment—No *res judicata*.)
('29) 16 AIR 1929 Lah 833 (833, 834) (DB). (Suit for ejectment dismissed — Suit for redemption brought is not *res judicata*.)
('29) 16 AIR 1929 Lah 596 (597) (DB). (Dismissal of declaratory suit under S. 42, Specific Relief Act, cannot be *res judicata* in subsequent suit for possession.)
('23) 10 AIR 1923 Lah 8 (9) (DB). (Connected suits—Decision in one not affecting decision in the other — Failure to appeal from one is no bar to appeal from the other.)
† ('21) 8 AIR 1921 Lah 20 (23) : 2 Lah 207 (DB).
('19) 6 AIR 1919 Lah 130 (130).
('18) 5 AIR 1918 Lah 114 (116) : 1918 Pun Re No. 49 (DB).
('09) 3 Ind Cas 271 (272) (DB) (Lah). (Suit for possession as owner of a certain common way does not bar the unsuccessful party from claiming a right of way over the same.)
('04) 1904 Pun L R No. 41, p. 154 (155) : 1904 Pun Re No. 1 (DB).
('94) 1894 Pun Re No. 77, p. 267 (268).
('91) 1891 Pun Re No. 41, p. 224 (226).
('36) 23 AIR 1936 Mad 988 (989).
† ('32) 19 AIR 1932 Mad 207 (212) : 55 Mad 483 (DB).
('25) 12 AIR 1925 Mad 1070 (1072) (SB). (Charges in prior suit for removal and scheme not pressed — Charges in subsequent suit for misconduct subsequently to prior suit.)
('22) 9 AIR 1922 Mad 413 (415) (DB).
('15) 2 AIR 1915 Mad 55 (56) (DB).
† ('13) 21 Ind Cas 984 (985) (DB) (Mad).
('12) 15 Ind Cas 357 (358) (DB) (Mad).

Explanation III to the section makes it clear that a matter cannot be "directly in issue" unless it has been—

(1) *alleged* by one party, and

(2) either *denied* or *admitted* expressly or impliedly by the other,[6]

though it is not necessary that a distinct issue should have actually been framed.[6]

It follows that a matter alleged on one side and *not* denied or admitted on the other cannot be said to be directly in issue.[7] Such a matter may however be *collaterally* or *incidentally* in issue for the purpose of deciding the matter which is directly in issue in the case. In fact the words "directly in issue" have been used in the section in contradistinction to the expression "collaterally or incidentally in issue."[8]

A matter directly in issue in the previous suit will not operate as *res judicata* in the subsequent suit unless it was also *substantially* in issue in such former suit.[9] The word "substantial" means "of importance and value" and a matter is substantially in issue if it is of *importance and value* for the decision of the case.[10] For example, an unnecessary or irrelevant issue, the decision of which *either way* will not affect the decision of the suit, cannot be of any importance or value for the decision of the suit, and is therefore not substantially in issue.[11] See also Note 108. Similarly, if the Court

('10) 5 Ind Cas 758 (759) : 23 Mad 162 (DB). (First suit for revocation of agency—Second suit for dismissal of agent.)
('09) 1 Ind Cas 644 (645) (DB) (Mad). (Suit for possession not barred by previous suit by the same plaintiffs for mesne profits.)
('05) 28 Mad 406 (413) (DB). (First suit to redeem kanom—Second suit based on kanom and title.)
(1900) 23 Mad 629 (632) (DB).
('90) 13 Mad 44 (45) (DB).
('86) 9 Mad 251 (252) (DB).
('84) 7 Mad 295 (297) (FB).
('82) 5 Mad 9 (10) (DB).
('82) 4 Mad 296 (297) (FB).
(1862) 1 Mad H C R 312 (318) (DB).
('36) 23 AIR 1936 Nag 71 (73) : 31 Nag L R Sup 202 (DB).
('18) 5 AIR 1918 Nag 96 (96).
('94) 7 C P L R 63 (66). (Suit for possession of certain trees—No bar to suit for damages for loss of fruits or for declaration of title to such trees.)
✻ ('31) 18 AIR 1931 Oudh 263 (266, 270) : 7 Luck 73 (SB).
('29) 16 AIR 1929 Oudh 15 (16) (DB).
('26) 13 AIR 1926 Oudh 139 (140).
('22) 9 AIR 1922 Oudh 251 (254):25 Oudh Cas 157.
('17) 4 AIR 1917 Oudh 66 (68, 69).
('11) 12 Ind Cas 331 (332) (Oudh).
('04) 7 Oudh Cas 108 (112).
† ('29) 16 AIR 1929 Pat 173 (176):8 Pat 107 (DB).
('25) 12 AIR 1925 Pat 625 (673) : 4 Pat 510 (SB).
('24) 11 AIR 1924 Pat 371 (371). (Previous decision that holding was bhauli does not bar later suit for cash rent.)
('23) 10 AIR 1923 Pat 65 (68) : 2 Pat 110 (DB).
('12) 6 Low Bur Rul 93 (98):17 Ind Cas 860 (863) (DB). (Not substantially in issue.)
('01) 2 Upp Bur Rul 213. (Do.)
('33) 20 AIR 1933 Sind 112 (113) : 26 Sind L R 506 (DB).
('13) 6 Sind L R 140 (142) : 19 Ind Cas 393 (394) (DB). (Suit by mortgagor in possession for a declaration that the mortgage had been satisfied—Subsequent suit for redemption.)
[*See* ('11) 11 Ind Cas 161 (163) (DB) (Cal).
('10) 6 Ind Cas 268 (269) (DB) (Mad).]
[*See also* ('15) 2 AIR 1915 All 126 (127) : 37 All 214 (DB).]
Also see Notes 12 and 101.

5. ('80) 5 Cal L Rep 251 (252, 253).
('84) 6 All 358 (362) (DB).
† ('01) 26 Bom 25 (32) (DB).
('18) 5 AIR 1918 Mad 751 (753) (DB).
('01) 4 Oudh Cas 408 (418) (DB).
6. ('26) 13 AIR 1926 Cal 1022 (1027) (DB).
† ('94) 21 Cal 430 (433) (DB).
('07) 6 Cal L Jour 621 (629) (DB).
7. ('84) 6 All 358 (362).
✻ ('35) 22 AIR 1935 Cal 792 (798) (DB).
('35) 22 AIR 1935 Cal 766 (769) (DB).
('35) 22 AIR 1935 Oudh 121 (128) : 10 Luck 361.
8. ('98) 25 Cal 136 (139, 140) (DB).
[*See* ('25) 12 AIR 1925 Cal 985 (986).]
9. ('27) 14 AIR 1927 Mad 643 (644) (DB).
10. ('27) 14 AIR 1927 Mad 643 (644) (DB).
11. ('41) 28 AIR 1941 Cal 574 (578).
('31) 18 AIR 1931 Cal 353 (356) (DB).
('33) 20 AIR 1933 Oudh 415 (420) : 9 Luck 97 (DB). (Previous partition proceedings initiated by third person—Determination of shares of parties to subsequent suit not necessary—Subsequent suit to determine rights *inter se* not barred.)
('30) 130 Ind Cas 194 (195, 196) (DB) (All).
('23) 10 AIR 1923 All 586 (590) : 45 All 581 (DB).
† ('19) 6 AIR 1919 Bom 81 (82, 83):43 Bom 568 (DB).
('34) 21 AIR 1934 Cal 430 (432) : 61 Cal 1 (DB).
('09) 1 Ind Cas 523 (524) : 36 Cal 75.
('33) 20 AIR 1933 Lah 218 (219).
('32) 19 AIR 1932 Lah 179 (180):13 Lah 524 (DB).
('23) 10 AIR 1923 Lah 523 (523) (DB).
('21) 8 AIR 1921 Lah 337 (339) : 1 Lah 540 (DB).
('35) 22 AIR 1935 Mad 551 (552).
('35) 22 AIR 1935 Mad 456 (458).

cannot go into a question at a particular stage, it cannot be said that the matter is then substantially in issue.[12]

Illustrations.

1. *A* sues *B* for maintenance for certain years on the basis of a maintenance deed in his favour. The suit is dismissed on the ground that the document is ineffectual as between the parties and did not bind the estate in dispute. *A* again sues *B* for maintenance for *other years* based on *the same document.* The suit is barred as the issue as to the binding nature of the document as between the parties was directly as well as substantially in issue in the previous suit.[13]

2. *A* executes four bonds in favour of *B*. *B* sues on two of these bonds and *A* contends that the said bonds as well as two other bonds were all satisfied by payment. The suit is decreed on the ground that *none of the four bonds* were satisfied. *A* subsequently sues *B* for recovery of all the four documents alleging satisfaction of the debt. The suit is barred by *res judicata* in respect of the two bonds sued on in the former suit, but is not so barred in respect of the other two bonds as the satisfaction thereof was not directly and substantially in issue in the first suit : *Sheoraj Rai* v. *Kashi Nath.*[14]

3. *A*, a minor sued *B* to set aside a mortgage decree obtained by *B* against *A* and his father on a bond executed by the father, and alleged in the plaint, *firstly*, that the mortgage itself was not binding on *A*, and *secondly*, that he was not properly represented in the suit. The Court held that the mortgage was not binding on *A* and also that he was not properly represented in the suit and the decree was set aside. *B* thereupon sued *A* on the mortgage getting a proper guardian *ad litem* appointed for him, and *A* contended that the binding nature was found against *B* in the former suit and was therefore *res judicata.* It was held that the issue as to the binding nature of the mortgage was irrelevant in the former suit inasmuch as a finding thereon *either way* would not have affected the decision, and was not therefore *substantially* in issue though it was *directly* in issue.[15]

4. *A* files a suit against *B* under S. 23 of the Bengal Rent Act (X of 1859) for delivery of a *kabuliat* and alleged that a fair and equitable rent would be Rs. 49. The Court finds that the plaintiff is not entitled to such a high rent which finding is sufficient to dismiss the suit and the suit is dismissed. For the purpose of assessing the costs awardable to the plaintiff the Court, however, goes into the question of rent and finds that a reasonable rent is Rs. 30. In a subsequent suit by *A* claiming rent at Rs. 30, the plaintiff contends that the question of the amount of rent payable is *res judicata* by virtue of the former decision. The contention is bad inasmuch as the decision as to the amount of rent payable was only *incidentally* in issue in the former suit.[16]

The question whether a matter has been directly and substantially in issue in the former suit is one of fact to be decided with reference to the circumstances of each particular case.[17] (See also Note 14.) If the parties and the Court have dealt with the matter as if it formed a direct and principal issue, it must be taken to have been directly and substantially in issue though in the first instance it was not raised properly or was raised only as an ancillary or incidental issue.[18] The same principle will apply to questions

† ('27) 14 AIR 1927 Mad 643 (645).
('23) 10 AIR 1923 Oudh 139 (141) (DB).
('17) 4 AIR 1917 Oudh 66 (68). (Irrelevant issue in the case.)
[*See* ('38) 173 Ind Cas 447 (448) (PC).]
Also see Note 108.

12. ('35) 22 AIR 1935 Cal 641 (642) (DB).
✣ ('32) 19 AIR 1932 Mad 233 (233, 234). (At the time of adjudicating a person insolvent Court has no power to annul a transfer by insolvent — The question is not then substantially in issue.)

13. † ('12) 14 Ind Cas 463 (466) (PC).
('89) 16 Cal 103 (115, 116) : 15 Ind App 159 (PC). (Question not discussed.)
('10) 5 Ind Cas 278 (280) (All).
('98) 1898 Pun Re No. 100, p. 353 (356) (FB).
('28) 15 AIR 1928 Nag 112 (112).
Also see Note 16.

14. ('85) 7 All 247 (251, 252, 253).

15. ('27) 14 AIR 1927 Mad 643 (644).

16. ('17) 4 AIR 1917 Pat 653 (654) : 2 Pat L Jour 159 (DB).

17. ('41) 45 Cal W N 854 (856). (Partition suit including certain land — Defendant opposing on ground that it was debuttar and they were shebaits —Court holding that it was debuttar and dismissing suit on ground of non-joinder of the deity—Another suit by plaintiff for declaration of title to the land held barred as question whether the property was debuttar was not merely incidental but directly and substantially in issue.)
† ('19) 6 AIR 1919 Bom 81 (82): 43 Bom 568 (DB).
('38) 25 AIR 1938 Bom 291 (294). (Not necessary that the matter should form the subject of a definite issue.)

18. ✣('24) 11 AIR 1924 P C 144 (149) : 51 Cal 631 : 51 Ind App 293 (PC). (Affirming AIR 1921 Cal 368.)

raised and decided at the *express request* of the parties.[19] A practical test for determining whether a matter has been directly and substantially in issue in a previous suit is furnished by effecting a separation of the discussions and findings on the various groups of issues dealt with in the judgment. If, after the elimination of all but one such group the judgment still remains intelligible and, in itself, sufficient for the adjudication of the suit and the decree is in *entire harmony* with it, then the matter so dealt with has been directly and substantially in issue.[20] To constitute a matter directly and substantially in issue it is not necessary that a distinct issue should have been raised upon it; it is sufficient if the matter was in issue in substance.[21]

A finding which is the real ground of the decision will operate as *res judicata* even though there may have been other issues on which the case might equally well have been decided.[22] In other words, where the judgment is based on the findings on two issues one of which by itself is sufficient to sustain the judgment, the decision on *both* the issues will be *res judicata*[23] inasmuch as the decision of the suit in such cases must be taken to have rested on the findings on both the issues, each being an *additional* or *supplemental* ground to the other for the disposal of the suit.[24] A different view was expressed by the High Court of Allahabad[25] to the effect that in such cases, one of two such findings which should, in the *logical sequence of necessary issues*, have been first found, and the finding of which would have rendered the other of such two findings unnecessary for the making of the decree which was made, is the finding which would operate as *res judicata*. And

('32) 19 AIR 1932 P C 50 (51) (PC).
('27) 14 AIR 1927 All 803 (804) (DB).
('06) 28 All 727 (740) : 33 Ind App 156 : 9 Oudh Cas 377 (PC).
† ('29) 118 Ind Cas 168 (170) (All).
('33) 20 AIR 1933 Cal 923 (923) : 60 Cal 1171 (DB).
('26) 13 AIR 1926 Cal 887 (889) (DB).
('21) 8 AIR 1921 Cal 750 (753) (DB).
('16) 3 AIR 1916 Cal 504 (505) (DB).
('30) 17 AIR 1930 Lah 690 (691).
† ('37) 24 AIR 1937 Mad 709 (710).
('37) 24 AIR 1937 Mad 114 (115).
('27) 14 AIR 1927 Mad 643 (644).
('15) 2 AIR 1915 Mad 1107 (1110)(DB). (The word "substantial" has no such stringent signification as the word "essential" or the word "necessary.")
† ('13) 18 Ind Cas 102 (104) (DB) (Mad.)
('38) 25 AIR 1938 Nag 401 (405) : I L R (1938) Nag 496. (Point not properly raised by plaint — Parties choosing to join issue upon it—Decision is *res judicata*.)
('34) 21 AIR 1934 Oudh 50 (54) : 9 Luck 291.
('29) 16 AIR 1929 Oudh 275 (277) : 4 Luck 713.
('27) 14 AIR 1927 Oudh 625 (626).
('34) 21 AIR 1934 Pat 282 (283).
('30) 17 AIR 1930 Pat 71 (75, 76).
('33) 20 AIR 1933 Rang 383 (384). (A I R 1932 P C 50 followed.)

19. ('32) 19 AIR 1932 Cal 894 (896) : 59 Cal 1250 (DB).
('32) 19 AIR 1932 P C 50 (51) (PC). (Issue though not properly raised by plaint both parties without protest chose to join issues.)
('28) 15 AIR 1928 Bom 349 (351, 352).
('30) 17 AIR 1930 Cal 810 (813) : 57 Cal 872 (DB). See the cases cited in foot-note (18) above.

20. ('99) 1899 Pun Re No. 41, p. 197 (200).

21. ('34) 21 AIR 1934 Cal 179 (185) (DB).
✣('74) 20 Suth W R 377 (380) : Ind App (Sup) Vol 212 (PC).

22. ('25) 12 AIR 1925 Oudh 390 (391) : 29 Oudh Cas 93.
('28) 15 AIR 1928 All 62 (64) (DB).

23. ('42) 29 AIR 1942 Cal 1 (13) : I L R (1941) 2 Cal 434 (DB).
('42) 29 AIR 1942 Oudh 309 (310). (Previous suit by mortgagee for possession of mortgaged property —Decision that mortgage had been foreclosed in favour of mortgagee held barred subsequent suit to redeem mortgage.)
('32) 19 AIR 1932 Cal 385 (387) (DB).
('15) 2 AIR 1915 Mad 864 (864) : 38 Mad 158.
('23) 10 AIR 1923 All 554 (555).
† ('85) 7 All 606 (616, 617) (FB). (Principle of *res judicata* applies both to trial of suits and to trial of issues.)
('78) 1 All 480 (482) (DB).
('28) 15 AIR 1928 Bom 349 (351, 352).
('26) 13 AIR 1926 Cal 1003 (1004) (DB).
✣('24) 11 AIR 1924 Cal 600 (605, 606) (DB).
† ('13) 21 Ind Cas 979 (982) (DB) (Cal).
('97) 24 Cal 900 (902, 903) (DB).
('31) 18 AIR 1931 Lah 335 (337) (DB).
('30) 17 AIR 1930 Lah 690 (691).
('99) 1899 Pun Re No. 41, p. 197 (200).
('35) 22 AIR 1935 Mad 977 (982) (DB).
('17) 4 AIR 1917 Mad 299 (305) (DB).
('97) 7 Mad L Jour 274 (275) (DB).
('26) 13 AIR 1926 Pat 87 (89) (DB).
('37) 24 AIR 1937 Sind 157 (158) : 31 Sind L R 5 (DB).
Also see Note 2.

24. ('97) 24 Cal 900 (907) (DB). (17 All 174 dissented.)

25. ✣('95) 17 All 174 (195) (DB).

this view was followed in the cases noted below.[26] The observations of the Allahabad High Court in the case above referred to were, however, *obiter* and numerous other cases have held to the contrary.[27] But an *adverse finding* against the successful party in the suit which is not in entire harmony with the decree in suit is not *res judicata* in a subsequent suit between the parties.[28] (See also Note 109.) The reason is that such a finding must be taken to have been *superseded* by the decree in favour of the party and thus not to have been heard and *finally* decided.[29] See also Notes 109 and 110.

A matter directly and substantially in issue in a suit may be so either *actually* or *constructively*.[30] Under Explanation IV to this section, a matter which *might and ought* to have been made a ground of attack or defence in the previous suit will be *deemed* to be directly and substantially in issue in that suit. Such a matter therefore cannot be *actually* in issue but only *constructively* so.[31]

A sues B for possession of certain properties on the basis of a sale deed in his favour. B impugns the deed as fictitious. It is held that the deed is fictitious and the suit is dismissed. A subsequently brings another suit against B for certain other properties on the basis of the *same* sale deed. The suit is barred, as the issue about the character of the deed was *actually* in issue in the former suit directly and substantially.[32] For examples of cases where a matter is directly and substantially in issue *constructively*, see Note 35. A decision as to whether a particular issue *arises* in a suit is as much *res judicata* as the decision of the issue on the merits.[33]

The section does not require that the *entire* subject-matter of the two suits should be identical. The doctrine of *res judicata* contained in the section applies not only to a whole suit but also to individual issues in the suit. Hence, even if *one* of the issues is common to both the suits the rule of *res judicata* may apply so far as that issue is concerned.[34] In this respect, the section differs from S. 10 which will not apply unless the *entire* subject-matter is common to both the suits. (See section 10 Note 4.)

8. "In issue," meaning of. — See Note 7.

9. Issue of fact. — Issues are of two kinds : *(a)* issues of *fact*, and *(b)* issues of *law*. A decision on an issue of fact, however erroneous it may be, constitutes *res judicata* between the parties to the previous suit[1] and cannot be re-agitated in a collateral proceeding except on review.[2] As to what is a question of fact, see Ss. 100 & 101 Note 28.

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26. ('11) 8 All L Jour 409 (410, 411).
(1900) 1900 All W N 89 (90).
('25) 12 AIR 1925 Oudh 386 (387).
('13) 16 Oudh Cas 178 (183, 185) (DB).

27. ('97) 24 Cal 900 (907) (DB).
† ('15) 2 AIR 1915 Mad 1107 (1110) (DB). (17 All 174 not referred to.)
('30) 17 AIR 1930 Lah 690 (691). (Do.)
See also cases cited in foot-notes (23) and (24).

28. ('42) 29 AIR 1942 Cal 1 (13) : I L R (1941) 2 Cal 434 (DB).
('95) 17 All 174 (196) (DB).
('85) 11 Cal 301 (306, 318) (PC). (Point not discussed)
✣ ('35) 22 AIR 1935 Cal 733 (735).
('86) 13 Cal 17 (19) (DB).
('91) 18 Cal 647 (650, 651) (DB).
('14) 1 AIR 1914 Lah 289 (290) : 1914 Pun Re No. 102 (DB).
('37) 24 AIR 1937 Pat 56 (57) (DB).

29. ✣ ('95) 17 All 174 (194) (DB). (Superseded by the decree.)
('30) 17 AIR 1930 Cal 5 (7) : 56 Cal 639. (*Held* not to have been finally decided.)

30. ('98) 25 Cal 136 (139) (DB).

31. ('03) 26 Mad 760 (769) (DB).

32. ('23) 10 AIR 1923 All 613 (615) : 45 All 515 (DB).
[*See also* ('24) 5 L R Oudh 31 (31).]
[But see ('35) 22 AIR 1935 Bom 144 (149).]
See also cases in foot-note (13).

33. ('21) 8 AIR 1921 Cal 868 (875) (DB).

34. ('41) 45 Cal W N 420 (424).

Note 9

1. † ('28) 15 AIR 1928 Cal 717 (719) (DB).
('19) 6 AIR 1919 Mad 359 (360, 361) (DB).
('18) 5 AIR 1918 Lah 350 (351) : 1918 Pun Re No. 82 (DB). (Existence of custom.)
('09) 12 Oudh Cas 124 (127) (DB).
('35) 22 AIR 1935 Pat 526 (527).
('35) 22 AIR 1935 Sind 62 (66) : 28 Sind L R 366 (DB).

2. ('29) 16 AIR 1929 Mad 404 (406) (DB).

10. Mixed question of law and fact. — As to what are mixed questions of law and fact, see Ss. 100 and 101 Note 28. When the existence of certain facts and the legal effect of such facts are both to be found before a question is answered, it is a mixed question of law and fact. Thus, whether a tenancy is a permanent one or not is a mixed question of law and fact.[1] Similarly, the question whether a document is an award or not, is not a mere question of law.[2] Likewise the questions whether or not a decree is capable of execution,[3] and whether or not a certain custom is opposed to public policy, are not pure questions of law.[4] A decision on a mixed question of law and fact is as much *res judicata* as one on a question of fact.[5]

11. Issue of law. — There is an apparent conflict of views as to whether and how far a decision on an issue of law is *res judicata* as between the same parties in a subsequent suit. Five different views at least have been expressed thereon —

(1) The *first* view is that there is nothing in S. 11 to limit the "matter in issue" to issue of *fact* only and that therefore a finding on an issue of law which was *directly and substantially* in issue in the former suit would be *res judicata* between the same parties in a subsequent suit however erroneous it may be[1] and that this is so whether the

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Note 10

1. ('22) 9 AIR 1922 Lah 329 (334) (DB).
Also see Sections 100 and 101 Note 35.
2. ('33) 20 AIR 1933 Lah 274 (277) : 14 Lah 31 (DB).
3. ('33) 20 AIR 1933 Lah 594 (595) : 14 Lah 409.
4. ('33) 20 AIR 1933 Lah 606 (608).
5. † ('26) 13 AIR 1926 Cal 80 (81) (DB).
('06) 29 Mad 225 (231) (DB).
('24) L R 6 All 226 (227) (Rev).
† ('28) 15 AIR 1928 Cal 777 (780) : 56 Cal 723 (FB).
('12) 15 Ind Cas 911 (912) (DB) (Cal).
('10) 6 Ind Cas 554 (559) (DB) (Cal).
('01) 28 Cal 318 (323) (DB).
('26) 13 AIR 1926 Lah 251 (252).
('13) 19 Ind Cas 399 (400) (Lah).
('08) 1908 Pun Re No. 44, p. 221 (223, 224).
('31) 18 AIR 1931 Sind 170 (173):25 Sind L R 493 (DB).

Note 11

1. ('42) 29 AIR 1942 Pat 477 (478) (DB). (Question as to right of decree-holder to execute decree after obtaining succession certificate even if wrongly decided is final and cannot be raised in subsequent execution.)
('42) 76 Cal L Jour 183 (188) (DB).
✠ ('21) 8 AIR 1921 Bom 87 (91) : 45 Bom 1260 (FB).
('32) 19 AIR 1932 Bom 257 (258, 259) (DB).
('36) 23 AIR 1936 P C 46 (48, 49) : 15 Pat 203 : 63 Ind App 53 (PC). (Decision on construction of a section of a statute.)
('27) 14 AIR 1927 All 297 (297) : 49 All 543 (DB).
('20) 54 Ind Cas 303 (304) (U P B R).
('13) 19 Ind Cas 244 (245) (All). *(Obiter.)*
('05) 27 All 148 (151) (DB). (Question of jurisdiction.)
('30) 17 AIR 1930 Bom 135 (138) : 53 Bom 676 (DB).
† ('26) 13 AIR 1926 Bom 481 (488, 489). (Question of jurisdiction wrongly decided in previous suit.)
('12) 36 Bom 617 (621, 622) (DB).
('07) 31 Bom 128 (137) (DB).
('09) 2 Ind Cas 530 (530, 531) : 33 Bom 479 (DB).
('36) 23 AIR 1936 Cal 200 (202).
('29) 16 AIR 1929 Cal 156 (157) (DB).
✠ ('28) 15 AIR 1928 Cal 777 (781, 782) : 56 Cal 723 (FB). (Overruling 32 Cal 749 and A I R 1925 Cal 1193 and approving 10 Cal 1087.)
('13) 21 Ind Cas 979 (983) (DB) (Cal).
('09) 3 Ind Cas 351 (352) (DB) (Cal).
('97) 1 Cal W N 687 (689, 690) (DB).
† ('37) 24 AIR 1937 Lah 393 (394). (Execution proceedings—Even wrong decision on issue of law operates as *res judicata*.)
('33) 20 AIR 1933 Lah 325 (326) : 14 Lah 442 (DB).
('30) 17 AIR 1930 Lah 654 (655) (DB).
('17) 1917 Pun L R No. 89, p. 255.
('35) 22 AIR 1935 Mad 835 (837):59 Mad 62 (DB).
† ('33) 20 AIR 1933 Mad 925 (927) : 57 Mad 73 (DB).
('11) 9 Ind Cas 875 (881) : 35 Mad 75 (DB). (Rule that estoppel by *res judicata* does not apply to a question of law has no force in the case of consent decree.)
('26) 13 AIR 1926 Mad 695 (697).
✠ ('18) 5 AIR 1918 Mad 1309 (1313) (DB).
('17) 4 AIR 1917 Mad 946 (947).
('10) 5 Ind Cas 756 (756) (DB) (Mad).
('05) 28 Mad 517 (519) (DB).
('03) 26 Mad 104 (109) (SB).
('98) 21 Mad 18 (25) (DB).
† ('38) 25 AIR 1938 Nag 195 (196) : I L R (1940) Nag 181.
('24) 11 AIR 1924 Nag 422 (423). (Although the decisions in rent suits do not operate as *res judicata*.)
('20) 7 AIR 1920 Nag 274 (274).
('01) 14 C P L R 109 (111).
('18) 5 AIR 1918 Oudh 15 (16).
('06) 9 Oudh Cas 243 (245) (DB).
('02) 5 Oudh Cas 181 (182).
('99) 2 Oudh Cas 261 (268, 269).
('36) 23 AIR 1936 Pat 198 (199) : 14 Pat 633.
('26) 13 AIR 1926 Pat 288 (288) (DB).

cause of action in the first suit is the same as that in the second suit or a different one.[2] A, in 1915, files a suit against B, for rent in accordance with a *kabuliat* and claims interest on the rent claimed at 75 per cent. *per annum* as stipulated in the *kabuliat*. B contends that the stipulation for interest is a penalty but the contention is rejected and a decree is passed in favour of A. In 1924, A again sues B for rent for a subsequent period and for interest and B again contends that the stipulation for interest is a penalty. It was held by a Full Bench of the Calcutta High Court that the question whether the stipulation was a penalty was *res judicata* in the subsequent suit.[3] Similarly, it has been held that the construction placed on a document or decree by a competent Court before which the question is directly and substantially in issue is conclusive between the parties.[4] In some cases it has been held that while ordinarily a decision on a pure question of law would operate as *res judicata*, yet the doctrine should not be applied so as to nullify a statutory prohibition.[5]

(2) The *second* view is that a decision on a point of law is *res judicata* if the *cause of action* is the same in the two suits but not otherwise.[6]

(3) The *third* view is that an erroneous decision on a question of law cannot operate as *res judicata*.[7]

(4) The *fourth* view is that a question of *jurisdiction* stands on a different footing from other questions of law and cannot operate as *res judicata*.[8] The reason

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✣('24) 11 AIR 1924 Pat 265 (265, 266) : 2 Pat 771 (DB). (Principle applies to proceedings in execution of decrees.)
('17) 4 AIR 1917 Pat 581 (582) (DB).
('33) 20 AIR 1933 Rang 383 (384).
[*See* ('41) 28 AIR 1941 Lah 169 (171) (DB). (Decision in previous suit holding suit as framed under Mahomedan law barred by O. 22, R. 9 (1), C. P. C.—Question whether subsequent suit based on customary law is barred is not *res judicata* because the question of customary law was not directly and substantially in issue in former suit.)]
[*See also* ('32) 19 AIR 1932 Nag 90 (91).]

2. ('27) 14 AIR 1927 All 206 (207).
('32) 19 AIR 1932 Nag 90 (91).

✣('28) 15 AIR 1928 Cal 777 (782) : 56 Cal 723 (FB). (Overruling 32 Cal 749 and AIR 1925 Cal 1193 and approving 10 Cal 1087.)
('30) 17 AIR 1930 Pat 585 (587) : 9 Pat 674 (DB).
[But see ('29) 16 AIR 1929 Cal 445 (447) (DB). (Per Jack, J.)]

3. ('28) 15 AIR 1928 Cal 777 (780): 56 Cal 723 (FB).

4. † ('37) 1937 Mad W N 465 (468) (DB). (It is immaterial that the property involved in the subsequent suit is not the same as that which formed the subject-matter of the first suit.)
Also see Note 23.

5. ('32) 19 AIR 1932 Pat 337 (342): 12 Pat 147 (DB).
[*See also* ('27) 14 AIR 1927 All 505 (506) : 49 All 918 (DB).
('28) 15 AIR 1928 Cal 777 (779): 56 Cal 723 (FB).]

6. † ('42) 29 AIR 1942 Bom 322 (325) : I L R (1942) Bom 798 (DB). (Different cause of action —No *res judicata*.)
('20) 7 AIR 1920 Mad 246 (249) (DB).
('34) 21 AIR 1934 Cal 60 (62) : 60 Cal 1307 (DB). (Decision in rent suit on the question of genuineness of kabuliyat is not conclusive in subsequent suit on title.)
('32) 19 AIR 1932 All 169 (172) (DB).
('32) 19 AIR 1932 Bom 257 (258) (DB).

✣('31) 18 AIR 1931 Bom 570 (574) (DB).
('21) 8 AIR 1921 Bom 87 (93) : 45 Bom 1260 (FB). (Per Fawcett, J.)

† ('28) 15 AIR 1928 Cal 717 (718, 719) (DB).
† ('11) 9 Ind Cas 568 (569, 570) (DB) (Cal).
('88) 11 Mad 393 (395, 396) (DB). (Question of title is not *res judicata*.)

7. ('98) 22 Bom 669 (671) (DB).
('33) 20 AIR 1933 Mad 59 (61).
('27) 14 AIR 1927 All 505 (506) : 49 All 918 (DB).
('25) 12 AIR 1925 All 761 (762). (Cause of action different—Decision is not *res judicata*.)
('23) 10 AIR 1923 All 586 (590) : 45 All 581 (DB).
('12) 14 Ind Cas 124 (125) : 39 Cal 948 (DB).

✣('30) 17 AIR 1930 Lah 907(910): 12 Lah 52 (DB).
('23) 10 AIR 1923 Lah 16 (17). (Conceded.)
('22) 9 AIR 1922 Lah 329 (334) (DB).
('18) 5 AIR 1918 Mad 1187 (1189) : 40 Mad 989 (FB). (The right established by the decision in the former suit cannot be questioned in subsequent suit.)
('16) 3 AIR 1916 Mad 845 (846) (DB).
('10) 7 Ind Cas 418 (419, 420) : 34 Mad 450 (DB). (Decision in one proceeding that no appeal lies is not *res judicata*.)
('09) 3 Ind Cas 701 (705) : 33 Mad 102 (DB).
('08) 18 Mad L Jour 548 (549) (DB).
† ('07) 30 Mad 461 (463) (DB).
('82) 5 Mad 304 (310) (DB).
[*See also* ('39) 26 AIR 1939 Pat 633 (636). (*Res judicata* is a form of estoppel — As there can be no estoppel against a statute, previous judgment awarding certain illegal dues will not preclude contention in subsequent suit that the exactions are illegal.)]

8. ('37) 24 AIR 1937 Pesh 62 (63). (The question whether the decree is declaratory in nature and cannot be executed cannot be governed by the principle of *res judicata* as it involves a question of jurisdiction.)

given is that when closely looked into, the question of jurisdiction is not one between the "same parties" but is between the *Court* and the *plaintiff*.[9] A contrary view has been taken in the undermentioned cases.[10] It is submitted that the latter view is correct : see below and also Note 73.

(5) The *fifth* view is that there is a distinction between an *abstract* and a *concrete* question of law such as exists between the interpretation of a statute and the construction of a document, and that while the decision on the former will not be *res judicata*, a decision on the latter will be.[11]

In order to understand and solve this apparent conflict of views, it is necessary to see what exactly is meant by saying that a *point of law was in issue* in a previous suit. It is submitted, with respect, that what is meant is only that the *applicability or non-applicability of a rule of law to a given set of circumstances* was in question in the previous suit. Parties to a litigation have absolutely no concern in raising questions as to the existence of a particular rule of law or as to the nature thereof, except so far as such questions *affect the rights claimed or denied* in such litigation. An abstract question of law dissociated from and unconnected with such rights in litigation can never be of any *importance or value* to the parties and to the decision of the case and cannot therefore be deemed to have been *substantially in issue*. An examination of the decided cases in the light of the above observations will clearly show that there is really no conflict among them. The cases given as supporting the first view will show that the circumstances in the subsequent suit fell within the purview of the circumstances for which the applicability of a rule of law was in question in the former suit. The issue directly and substantially in issue in the two suits, namely, the *applicability of a rule of law to a set of facts*, is the same, and the former suit will therefore bar the latter. The ruling cited in support of the second and third views above are all really cases where the issue in the former suit was the *applicability of a rule of law to one set of facts*, and the issue in the subsequent suit, the *applicabitity of the same to another set of facts*. The issues therefore were different and the decision in the former suit was rightly held not to be *res judicata* in the subsequent suit. The forth and fifth views were found necessary to explain the conflict of decisions. It is submitted that they are not correct. The facts of those cases will show that the question of the applicability of the rule of law in the former suit was to a set of facts *different* from that in the subsequent suit and thus the issues were not the same.

The solution set forth above is also borne out by the observations of their Lordships of the Privy Council in a case from New South Wales.[12] The question for decision there was as *to the correct method* of ascertaining the value of a certain mine for the purpose of rating for the years 1919, 1920 and 1921 and this depended on the interpretation of an Act of the New South Wales Legislature. In a previous suit for

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9. ('41) 28 AIR 1941 Cal 493 (494, 495).
✻('29) 16 AIR 1929 All 132 (132).
('30) 17 AIR 1930 All 254 (255) (DB).
('36) 23 AIR 1936 Pat 198 (200) : 14 Pat 633.
[But see ('32) 19 AIR 1932 All 288 (288) : 54 All 444 (DB). (Order interpreting a decree as to costs cannot be *res judicata* in regard to the interpretation of a subsequent decree passed by the High Court.)]

10. † ('41) 28 AIR 1941 Lah 327 (331) (DB). (Decision of executing Court that it had no jurisdiction to deal with the case under S. 47, C. P. C. can be *res judicata*.)
✻('26) 13 AIR 1926 Bom 481 (484, 485, 487).
('37) 24 AIR 1937 Lah 649 (652).
('35) 22 AIR 1935 Mad 835 (838):59 Mad 62 (DB).
('36) 23 AIR 1936 Rang 87 (89) : 14 Rang 94 (SB). (Suit for declaring decree void for want of inherent jurisdiction — Suit dismissed—Dismissal operates as *res judicata*.)

11. ('21) 8 AIR 1921 Bom 87 (90) : 45 Bom 1260 (FB). (Per Macleod, J.)
[*See also* ('32) 19 AIR 1932 Bom 257 (258, 259.)]

12. (1926) 1926 A C 94 (100), Broken Hill Proprietary Co. v. Broken Hill Municipal Council.
[*See* ('37) 1937 Mad W N 465 (468) (DB).]

valuing the mine for the purpose of rating for the years 1917, 1918 and 1919 a particular construction had been put upon the Act. In the subsequent suit for the years 1919, 1920 and 1921, it was contended that the question as *to the method of valuation* was *res judicata*. Their Lordships said:

> "There is no substance, however, in this contention. The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision should not be disputed. The present case relates *to a new question*, namely, the valuation for a different year and the liability for that year. It is not *eadem questio* and therefore the principle of *res judicata* cannot apply."

In *M. Muhammad Bahadur* v. *Ram Prasad*,[13] Chamier, A. J. C., observed as follows:

> "It appears to me that the rule to be deduced from the authorities, other than the decisions of the Madras High Court, is that it is not every decision of a question of law between the parties which is binding upon them in a subsequent suit, but that a previous decision of a question of law *which affects the subject-matter of the subsequent suit* or creates a *legal relation* between the parties or *defines the status* of either of them is as binding upon them as a previous decision of a question of fact."

So also, in a recent Full Bench decision of the Madras High Court,[14] it was observed as follows: "There can be no *res judicata* laying down a wrong rule of law between parties for future guidance also. The decision must be confined to the matter to which it has been applied at the time of the former decision."

It was held by the Rangoon High Court that a decision based on an admission due to an erroneous conception of law is not *res judicata* inasmuch as the matter of law could not be said to have been *heard and decided*.[15]

Previous decisions as to the existence of a particular custom or law among a certain community of persons will not be binding on Courts as *res judicata* in cases between persons belonging to that community. But a long line of decisions will be taken judicial notice of by Courts and to that extent the law will be regarded as settled; but if any party so chooses, the question can always be re-agitated.[16]

12. Matter, if not in issue at all, is not res judicata. — It follows from what has been said in Note 7, that, if the matter in issue in the subsequent suit was not in issue at all in the former suit, there is no question of *res judicata*.[1] Thus, a mere

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13. † ('05) 8 Oudh Cas 37 (43).
[*See also* ('24) 11 Oudh L Jour 66 (67).
14. ✣ ('37) 24 AIR 1937 Mad 254 (257) : I L R (1937) Mad 364 (FB). (Suit for rent — Erroneous interpretation of statute concerning liability for rent is not *res judicata* with reference to areas not actually in question in the previous suit.)
15. ('29) 16 AIR 1929 Rang 55 (58) : 6 Rang 691 (DB).
16. ('41) 28 AIR 1941 Rang 66 (68) : 1940 Rang L. R. 685 (DB).

Note 12

1. ('41) 28 AIR 1941 Cal 289 (291).
('41) 28 AIR 1941 Oudh 331 (334, 335): 16 Luck 708 (DB). (Previous decision that family was not joint at particular time is not *res judicata* in subsequent suit where question is whether family was joint before that time.)
('40) 27 AIR 1940 Pat 438 (443) (DB).
('13) 20 Ind Cas 17 (20) (DB) (Oudh).
('12) 14 Ind Cas 161 (161) (DB) (All).
('25) 12 AIR 1925 P C 184 (187) : 52 Ind App 294 : 52 Cal 971 (PC).
('34) 21 AIR 1934 All 1038 (1039) (DB).
('27) 14 AIR 1927 All 39 (40) : 48 All 803 (DB).
('25) 12 AIR 1925 All 200 (201).
('23) 10 AIR 1923 All 495 (496, 497) : 45 All 466 (DB).
('22) 9 AIR 1922 All 401 (401).
('22) 9 AIR 1922 All 397 (398) (DB).
('13) 35 All 227 (234) : 40 Ind App 74 (PC).
('10) 7 Ind Cas 388 (389) (DB) (All).
† ('36) 23 AIR 1936 Bom 402 (403): 60 Bom 1008 (DB).
('90) 14 Bom 176 (179) (DB).
('37) 24 AIR 1937 Cal 237 (239) (DB).
('29) 16 AIR 1929 Cal 672 (675) (DB).
('25) 12 AIR 1925 Cal 225 (232) (DB).
('09) 4 Ind Cas 92 (94) (Cal).
('08) 7 Cal L Jour 251 (255) (DB).
('05) 2 Cal L Jour 144 (145) (DB).
('99) 26 Cal 946 (949) (DB).
('76) 25 Suth W R 416 (417) (DB).
('70) 13 Suth W R 461 (461) (DB).
('68) 10 Suth W R 403 (405) (DB).
('27) 14 AIR 1927 Lah 505 (506): 8 Lah 308 (DB).

statement of an alleged *rate of rent* (see Note 19) or the inclusion of certain plots in stating the land belonging to the tenant[2] in the plaint in a rent suit in which an *ex parte* decree is made, is not a statement as to which it might be held that *an issue* was raised between the parties.

A mere opinion of the Court on a matter not necessary for the decision of the case and not arising out of the issues before it is an *obiter dictum* and cannot be said to be a decision on any *issue*, and is therefore not *res judicata*.[3]

A person made a party to a suit but in which no relief is asked for against him is called a *pro forma defendant*. There can be no issue between such a party and the other parties to the suit. A finding therefore in such a suit is not binding on him as *res judicata* in a subsequent suit between him and the other parties.[4]

('18) 5 AIR 1918 Lah 234 (235). (Issue did not arise.)
('13) 1913 Pun L R No. 194, page 665.
('06) 1906 Pun Re No. 107 (DB).
('07) 1907 Pun W R No. 66, page 387 (403) : 1907 Pun Re No. 57 (FB).
(1900) 1900 Pun L R No. 105 page, 431 (435) : 1900 Pun Re No. 20. (Old Code.)
('82) 1882 Pun Re No. 108, page 310 (311).
('38) 25 AIR 1938 Mad 581 (582) (DB).
('38) 25 AIR 1938 Mad 287 (288) (DB). (Decree in partition suit not given effect to by agreement of parties and parties continuing to be joint—Second suit for partition not barred.)
('38) 25 AIR 1938 Mad 193 (195) (DB). (Suit by inam holder for declaration that he was owner of whole village excluding communal porombokes—Decree in terms asked for granted but tank beds whether communal porombokes not decided — Decree does not make title to tank beds *res judicata*.)
('26) 13 AIR 1926 Mad 683 (686) : 49 Mad 596 (DB).
('26) 13 AIR 1926 Mad 1128 (1129) (DB). (Prior suit for possession based on exclusive title — Subsequent suit for partition and possession is not barred.)
('12) 13 Ind Cas 649 (650) (Mad).
('10) 8 Ind Cas 427 (427) (Mad).
('10) 5 Ind Cas 478 (479) (DB) (Mad).
('09) 1 Ind Cas 193 (194) (DB) (Mad).
('98) 11 Mad L Jour 10 (17) (FB).
('91) 14 Mad 301 (311) (FB).
('24) 11 AIR 1924 Nag 124 (124, 125).
('37) 24 AIR 1937 Oudh 322 (323) : 13 Luck 190. (Prior suit for share of profits under S. 108 (15), Oudh Rent Act, and also for canal dues — No question raised as to jurisdiction of Civil Court —Subsequent suit for canal dues — Jurisdiction of Civil Court to try subsequent suit can be questioned.)
('37) 24 AIR 1937 Oudh 116 (119): 12 Luck 697. (Question in issue in subsequent suit not raised in prior suit though mentioned in judgment in prior suit while giving narrative does not debar parties from agitating it again in subsequent suit.)
('37) 24 AIR 1937 Oudh 43 (45).
('27) 14 AIR 1927 Oudh 15 (16).
('26) 13 AIR 1926 Oudh 139 (139, 140).
('38) 25 AIR 1938 Pat 321 (323) (DB).
('26) 13 AIR 1926 Rang 191 (191, 192) (DB).
[*See* ('35) 22 AIR 1935 All 268 (269). (An issue neither decided nor raised before lower Court—No ground of appeal on that point either—Appellate Court's decision on the point is without jurisdiction and is not *res judicata*.)
('24) 11 AIR 1924 All 163 (164).]
[But see ('28) 15 AIR 1928 Oudh 359 (361) : 3 Luck 487 (DB).]
Also see Notes 7 and 101.
2. ('41) 28 AIR 1941 Cal 574 (576).
3. ('42) 29 AIR 1942 Cal 486 (488).
('36) 23 AIR 1936 Lah 18 (21).
('36) 23 AIR 1936 Nag 148 (150) : ILR (1936) Nag 138.
('35) 22 AIR 1935 Lah 96 (97).
('35) 22 AIR 1935 Mad 923 (925).
('33) 20 AIR 1933 Lah 404 (405).
('33) 20 AIR 1933 Lah 593 (593) : 14 Lah 365.
('32) 19 AIR 1932 Lah 232 (234). (Casual remark.)
('24) 11 Oudh L Jour 395 (399).
('66) 5 Suth W R 227 (228).
('24) 11 AIR 1924 All 884 (890) : 47 All 17 (DB).
('16) 3 AIR 1916 Lah 369 (370) : 1916 Pun Re No. 56 (DB). (Chance remark in judgment.)
† ('29) 16 AIR 1929 All 521 (525) (DB). (Stray remark not incorporated in the operative portion of the award.)
('23) 10 AIR 1923 All 15 (16) (DB).
('80) 2 All 843 (847, 848) (FB).
('09) 11 Bom L R 545 (567).
('92) 1892 Bom P J 339 (DB).
('74) 21 Suth W R 30 (30) (DB).
('30) 17 AIR 1930 Lah 634 (634, 635).
('10) 8 Ind Cas 495 (496) (DB) (Lah).
('29) 16 AIR 1929 Lah 225 (226).
('15) 2 AIR 1915 Lah 164 (164) : 1915 Pun Re No. 73 (DB).
('99) 1899 Pun Re No. 50, p. 233 (235).
('91) 14 Mad 312 (315) (DB).
('28) 15 AIR 1928 Oudh 296 (297). (Where a Court decides an issue which it is not competent to decide, its decision must be regarded as an *obiter dictum*.)
('15) 2 AIR 1915 Oudh 128 (131).
('19) 6 AIR 1919 Pat 561 (562) : 4 Pat L Jour 682 (DB). (Matter left undecided.)
4. ('42) 29 AIR 1942 Pat 120 (125).
† ('28) 15 AIR 1928 Lah 493 (494).
('93) 17 Bom 341 (348) : 20 Ind App 1 (PC).
('04) 27 All 59 (61) (DB).

A plaintiff, unlike a defendant, comes voluntarily on the record and although the law knows of a *pro forma* defendant, the idea of a *pro forma* plaintiff is repugnant to it.[5] But where there are two plaintiffs in a case, A and B, but in the circumstances of the case there is no issue to be tried between A and the defendant, the decision as to a matter between B and the defendant will not be *res judicata* in regard to A.[6]

The addition of a *pro forma defendant* in the subsequent suit would not take it out of the applicability of the rule of *res judicata*. Thus, where in a previous suit by A against B it was held that B was a tenant of A, a subsequent suit by B against A and C, a *pro forma defendant*, for a declaration that B is not a tenant of A, but of C, is barred by *res judicata*.[7] If the person made a party is interested in the relief claimed, as where the plaintiff sues on his behalf as well as *on behalf of a person who refuses to join him* as a plaintiff, such party is not really a *pro forma* party and the decree passed will be binding on him.[8]

A matter cannot be said to be not in issue merely because it has been *admitted* by the party affected.[9] This is in accordance with Explanation III which enacts that the matter referred to in the section must have been alleged by one party and either denied or *admitted* expressly or impliedly by the other.

13. Matter collaterally and incidentally in issue — General. — As has been seen in Note 7, the words "directly in issue" have been used in the section in contradistinction to the words "collaterally and incidentally in issue." Decisions, therefore, on matters not alleged and denied or admitted within the meaning of Explanation III are decisions, on matters incidental and collateral to the main issues in the case and will not operate as *res judicata*.[1] Thus, the incidental decision on a question of title in Small

('01) 25 Bom 589 (592) (DB).
† ('36) 165 Ind Cas 662 (663) (Cal).
('36) 164 Ind Cas 561 (565) : 62 Cal 642.
('74) 21 Suth W R 189 (189) (DB).
('35) 22 AIR 1935 Lah 942 (943).
('33) 20 AIR 1933 Lah 109 (110) : 14 Lah 380 (DB).
('16) 3 AIR 1916 Lah 13 (13) : 1916 Pun Re No. 65.
(1900) 1900 Pun Re No. 70, page 317 (319).
('99) 1899 Pun Re No. 41, page 197 (202).
('94) 1894 Pun Re No. 60, p. 191 (193, 194).
('38) 25 AIR 1938 Mad 581 (582) (DB). (*Held* that the idea of a *pro forma* plaintiff was repugnant to law though, if there is an issue between the plaintiff and the defendant, the decision might be *res judicata*.)
('04) 14 Mad L Jour 281 (285) (DB).
('30) 17 AIR 1930 Pat 355 (356) (DB).
('18) 5 AIR 1918 Pat 263 (264).
('15) 31 Ind Cas 861 (862) (U P B R).
[But see ('42) 29 AIR 1942 Cal 1 (17) : I L R (1941) 2 Cal 434 (DB). (A decision in a former suit, which affects the interests of a *pro forma* defendant against whom no relief had been claimed can operate as *res judicata* in a subsequent suit between the same parties.)
('67) 8 Suth W R 366 (367) (DB).
('18) 5 AIR 1918 Mad 967 (968) (DB).]
Also see Note 46.
5. ('38) 25 AIR 1938 Mad 581 (582) (DB).
6. ('38) 25 AIR 1938 Mad 581 (582) (DB).
7. ('13) 20 Ind Cas 344 (345) (DB) (Cal).
('41) 28 AIR 1941 Cal 512 (514).
8. ('98) 21 Mad 373 (383) (DB).
('14) 1 AIR 1914 All 414 (415).
('25) 12 AIR 1925 Mad 319 (320) (DB).
9. ('25) 12 AIR 1925 Mad 319 (319) (DB).

Note 13

1. ('42) 29 AIR 1942 All 405 (407).
('21) 8 AIR 1921 Mad 694 (695) (DB).
('78) 2 Cal L Rep 23 (25) (DB).
('93) 15 All 3 (6) (DB).
('82) 4 All 11 (13) (DB).
† ('80) 2 All 843 (846) (FB).
✣ ('31) 18 AIR 1931 Cal 353 (356) (DB).
† ('25) 12 AIR 1925 Cal 985 (989) (DB).
('93) 20 Cal 888 (895) (DB). (Decision in probate proceedings.)
('93) 20 Cal 249 (253) (DB).
('76) 25 Suth W R 393 (393) (DB).
('74) 21 Suth W R 189 (189) (DB).
† ('71) 15 Suth W R 527 (528) (DB).
('70) 14 Suth W R 412 (413) (DB).
('68) 9 Suth W R 592 (593) (DB).
('21) 8 AIR 1921 Lah 296 (296, 297) (DB).
('21) 8 AIR 1921 Lah 17 (19). (Suit for possession under a lease — Subsequent suit on title not *res judicata*.)
('35) 22 AIR 1935 Mad 634 (636). (Application for adjudication by creditor—Alienations alleged to be acts of insolvency — Question as to whether they are fraudulent cannot be considered before adjudication—Incidental determination of such question for deciding adjudication application does not operate as *res judicata* when such question is raised in subsequent suit.)
('92) 2 Mad L Jour 36 (38).

Cause suits is not *res judicata* in a subsequent suit in which the question of title is directly raised.[2] Similarly, an incidental decision on a question of title in a suit for damages does not bar a subsequent suit for recovery of possession after declaration of title.[3] Similarly, where a *shebait* of a deity files a suit against his *co-shebait* for the better management of *debutter* properties, the decision on the question of the *debutter* character of the properties in only an incidental issue in the suit.[4] An order under O. 22, R. 5, determining that a particular person is or is not the legal representative of a deceased party, does not operate as *res judicata*. The reason is that such an order decides only a matter which is collateral to the decision of the suit.[5] See also Note 7 generally and Notes 14 to 17.

14. Suit for rent — Question of title in. — It is not possible to frame any hard and fast rule whether a previous decision in a suit for rent does or does not operate as *res judicata* in a subsequent suit on title.[1] The question depends upon the fact whether the issue as to title raised in the subsequent suit was *directly and substantially in issue* in the former suit and this again depends, as has been seen already in Note 7, on the circumstances of each case.[2] If it *was* directly and substantially in issue in the former suit, the finding on it would operate as *res judicata*;[3] but if it was not in issue at all or was only collaterally and incidentally in issue, it would not so operate.[4] Thus, where, for the

('31) 18 AIR 1931 Oudh 263 (266, 267) : 7 Luck 73 (DB). (Question of validity of gift indirectly in issue.)
('23) 10 AIR 1923 Oudh 93 (97) : 26 Oudh Cas 24 (DB).
('37) 24 AIR 1937 Pat 141 (144) (DB).
('17) 4 AIR 1917 Pat 653 (654) : 2 Pat L Jour 159 (DB).
('27) 14 AIR 1927 Rang 319 (320, 321) : 5 Rang 527 (DB).
('09) 3 Sind L R 93 (94) (DB).
2. ('07) 4 All L Jour 517 (518).
('74) 22 Suth W R 349 (350) (DB).
('86) 1886 All W N 44 (44) (DB).
('71) 8 Bom H C R A C 23 (24) (DB).
Also see Note 83.
3. ('68) 10 Suth W R 22 (23) (DB).
4. ('25) 12 AIR 1925 Cal 996 (1000) (DB).
5. ('41) 28 AIR 1941 Lah 142 (143).
('40) 27 AIR 1940 Nag 99 (100) : ILR (1941) Nag 735. (Order that a certain person shall be brought on record as the legal representative of a decree-holder, is not a decree and does not operate as *res judicata*.)
✣('37) 24 AIR 1937 Oudh 220 (222) : 13 Luck 20 (FB). (Overruling 8 Luck 477 : A I R 1933 Oudh 207).
('13) 20 Ind Cas 950 (951) (DB) (Mad). (Order appointing legal representative of deceased plaintiff.)
('05) 28 All 109 (111) (DB). (Legal representative of plaintiff.)
† ('36) 23 AIR 1936 All 412 (422):58 All 734 (DB). (Dissenting from AIR 1926 All 439 : 48 All 422.)
† ('34) 21 AIR 1934 Lah 465 (466) (DB).
† ('39) 26 AIR 1939 Nag 147 (148) : I L R (1939) Nag 165 (DB).
† ('21) 8 AIR 1921 Nag 23 (25) : 17 Nag L R 45.
('16) 3 AIR 1916 Nag 89 (90) : 13 Nag L R 32. (Obiter.)
[*See also* ('02) 27 Bom 162 (169) (DB).
('11) 9 Ind Cas 603 (604) (DB) (Mad). (Suit under S. 367 of the Code of 1882—Decision in such suit will be *res judicata*.)]

Note 14

1. ('26) 13 AIR 1926 Cal 369 (369) (DB).
('23) 10 AIR 1923 Cal 333 (335) (DB). (Not decided.)
2. See cases in Note 7, foot-note (15).
3. ('41) 28 AIR 1941 Cal 512 (513). (Rent suit — Tenant's defence that he held land under third person overruled — Suit by tenant for declaration that third person and not plaintiff in rent suit was his landlord is barred by *res judicata*.)
† ('30) 17 AIR 1930 P C 224 (225) : 57 Ind App 208 : 8 Rang 326 (PC).
('18) 5 AIR 1918 Cal 552 (552) (DB).
† ('38) 25 AIR 1938 Bom 291 (294).
('26) 13 AIR 1926 Cal 1228 (1228) (DB). (Execution of certain kabuliyat by defendant, a material issue in prior suit — Plaintiff failing to prove — Admission in kabuliyat cannot be proved in subsequent suit.)
† ('24) 11 AIR 1924 Cal 128 (131) (DB). (Landlord if a party cannot dispute title of a tenant decided between his tenants.)
('19) 6 AIR 1919 Cal 1013 (1013) (DB).
('19) 6 AIR 1919 Cal 316 (317) (DB).
('13) 19 Ind Cas 632 (634) (DB) (Cal).
('98) 25 Cal 136 (140) (DB).
('83) 12 Cal L Rep 38 (39) (DB). (*A* suing *B* for rent — *B* denying *A's* title — Suit dismissed on ground that *A* has no title—Again *A* suing *B* for possession—Suit is barred.)
('77) 3 Cal 145 (147, 148) (FB).
('35) 22 AIR 1935 Pat 526 (527).
('18) 5 AIR 1918 Pat 377 (379).
4. ('40) 27 AIR 1940 Cal 347 (350). (In a rent suit, it is not absolutely necessary to decide the question of title as between the plaintiffs on the one hand and the *pro forma* defendants on the other in order to give the plaintiffs any relief against the tenants defendants.)
('39) 26 AIR 1939 Pat 633 (634). (Previous decision on question of title—No *res judicata* in later suit as to nature or rate of amount payable by tenant.)
('39) 26 AIR 1939 Pat 519 (519) (DB).
('21) 63 Ind Cas 762 (763) (DB) (Cal).

purpose of *settling the rent*, or of *determining the share of the rent*, to which the plaintiff is entitled, the question of the extent of the plaintiff's title is raised directly and decided, the decision will operate as *res judicata* between the parties.[5] Similarly, where A sues B for rent and B contends that C and not A is entitled to the property and C is thereupon impleaded as a party or C himself intervenes as a person claiming title and the question of title as between A and C is clearly raised and decided, the decision will operate as *res judicata* between the parties.[6] Similarly, if, in the above case, B claims title in himself as against A, the issue as to title will be directly and substantially in issue so as to make the finding thereon *res judicata* between them.[7] Of course, in every suit for rent, or for settling the rent, the question of the *existence or non-existence of relationship of landlord and tenant* or of the *nature of the tenancy* is directly and substantially in issue and the decision in such suit will be *res judicata* in subsequent proceedings between the parties.[8]

('02) 6 Cal W N 66 (67) (DB).
('24) 11 AIR 1924 All 479 (479). (Decision by the Revenue Court that defendant was not plaintiff's tenant does not bar a plea that the defendant was a rent-free grantee.)
('24) 11 AIR 1924 All 270 (270) (DB).
('16) 3 AIR 1916 All 26 (27).
('15) 29 Ind Cas 678 (679) (U P B R).
† ('38) 25 AIR 1938 Bom 291 (294).
('29) 16 AIR 1929 Bom 32 (32) (DB). (Ejectment suit—Rent decree only passed—Finding as to title need not be incorporated in the decree.)
('35) 22 AIR 1935 Cal 607 (608). (Notice to quit and suit for ejectment—Tenancy not proved and suit dismissed—Subsequent suit for rent — Relationship then also not proved and suit dismissed—Subsequent suit for declaration of title and possession on allegation of tenancy and forfeiture held not barred by prior suit.)
✣('30) 17 AIR 1930 Cal 579(581): 57 Cal 371(DB).
('26) 13 AIR 1926 Cal 887 (889) (DB).
('24) 11 AIR 1924 Cal 460 (461) (DB). (Decision in a prior rent suit that defendants are not tenants of plaintiff is no bar to a second suit to eject defendants as trespassers.)
('23) 10 AIR 1923 Cal 327 (329) (DB).
('21) 8 AIR 1921 Cal 355 (355) (DB).
('20) 7 AIR 1920 Cal 729 (730) (DB).
('20) 7 AIR 1920 Cal 601 (603) (DB).
('19) 6 AIR 1919 Cal 131 (132) (DB).
('16) 3 AIR 1916 Cal 154 (155) (DB).
('14) 1 AIR 1914 Cal 741 (742).
('11) 9 Ind Cas 2 (3) (Cal). (Previous decision as to tenancy no bar to a defence in a subsequent suit that a particular plot is not included in the tenancy.)
('10) 8 Ind Cas 715 (716) (Cal).
('09) 4 Ind Cas 175 (176) (DB) (Cal).
✣('99) 26 Cal 428 (431, 433) (FB).
('83) 9 Cal 426 (429) (DB).
† ('75) 24 Suth W R 111 (112) (DB).
('71) 16 Suth W R 85 (86) (DB).
('71) 15 Suth W R 415 (416) (DB).
('69) 11 Suth W R 216 (216) (DB).
('04) 1904 Pun Re No. 54, p. 161 (162).
('96) 1896 Pun Re No. 55.
† ('21) 8 AIR 1921 Mad 306(308):44 Mad 514(DB).
('19) 6 AIR 1919 Mad 743 (745) (DB).
('99) 22 Mad 323 (325) (DB).
('28) 15 AIR 1928 Nag 169 (171). (Previous suit for enhancement of rent — Question of status of tenant not raised—Subsequent suit for ejectment not barred.)
('06) 2 Nag L R 94 (97).
('12) 15 Oudh Cas 45 (47, 48).
('35) 22 AIR 1935 Pat 306 (324) : 14 Pat 70 (DB). (Question whether plaintiff had the status of a proprietor not raised.)
('17) 4 AIR 1917 Pat 471 (471) (DB).
[*See* ('40) 27 AIR 1940 Pat 21 (24).
('36) 23 AIR 1936 Cal 772 (774). (Rent suit — Issue as to whether all the plots covered by the jamas are included in the suit is only collateral.)]

Also see Note 108.

5. ('25) 12 AIR 1925 Cal 1004 (1006) (DB).
† ('32) 19 AIR 1932 Cal 385 (386) (DB).
('36) 23 AIR 1936 Pat 511 (511) (DB).

6. † ('78) 3 Cal 145 (147) (FB).
('80) 5 Cal 832 (837) (DB).
('86) 12 Cal 563 (565) (DB).
[But see ('25) 12 AIR 1925 All 574(575). (Where, however, it could not be said on the facts that the point was raised clearly and decided in the former suit.)]

Also see Note 44.

7 † ('88) 15 Cal 756 (761) : 15 Ind App 97 (PC).
✣('06) 10 Cal W N 820 (822) (DB).
('17) 4 AIR 1917 Low Bur 94 (96).
✣('11) 12 Ind Cas 9 (10) (Cal).
('10) 7 Ind Cas 15 (17) (Cal).

8. ('06) 10 Cal W N 820 (822, 823, 824) (DB).
('11) 10 Ind Cas 363 (364) (DB) (Cal).
('21) 8 AIR 1921 All 348 (349) : 43 All 191 (FB).
('27) 14 AIR 1927 Cal 431 (432) (DB).
('26) 13 AIR 1926 Cal 114 (115) (DB).
† ('25) 12 AIR 1925 Cal 427 (430) (DB). (When defendants have been defeated in a previous suit as regards their contention that they are tenants in severalty, the question is *res judicata* in a subsequent suit.)
('24) 11 AIR 1924 Cal 460 (461) (DB).
('16) 3 AIR 1916 Cal 357 (357) : 43 Cal 170 (DB).
('14) 1 AIR 1914 Cal 592 (595) (DB).
('10) 8 Ind Cas 660 (661) (DB) (Cal).
('10) 5 Ind Cas 708 (708) (DB) (Cal).
('02) 6 Cal W N 238 (240) : 29 Cal 252 (DB). (Decision settling the rent implies a decision as to the nature of the tenancy.)

In *Run Bahadur* v. *Lucho Koer*,[9] a Hindu widow sued X for rent of certain property belonging to the estate of her husband. B, a brother of the husband, intervened in the suit claiming that he was joint with his deceased brother and that he was entitled to the rent by survivorship. B was thereupon impleaded as a party to the suit, and an issue was framed in the following terms : "Did the plaintiff (the widow) or her deceased husband realise the rent separately and in a state of separation before this, or did the plaintiff's husband, during his lifetime, realise the rent with B jointly, and after him did B alone receive the rent of the entire sixteen annas?" The issue was found against B and in favour of the widow. Thereupon B filed a suit against the Hindu widow for possession of the properties of the deceased brother on the ground that they were joint in estate and that B was entitled to the properties by survivorship. In regard to the question of *res judicata* raised by the defendant, their Lordships of the Privy Council said :

> "*Having regard to the subject-matter of the suit, to the form of the issue* (which has been above set out) and *to some expressions of the learned Judge*, their Lordships are further of opinion that the question of title was no more than incidental and subsidiary to the main question, *viz.* whether any and what rent was due from the tenant, and that on this ground also the judgment was not conclusive."

In *Srihari* v. *Khitish Chandra*,[10] A sued B and others for rent and the issue raised was as to *what the share was for which* A *was entitled to the rent*. The Court decreed the suit in favour of A for the whole rent and thereupon B and others sued A for declaration of their title to the property. It was held that the issue in the rent suit was 'for what share is the plaintiff entitled to rent' and not 'to what share of the property is the plaintiff entitled as owner' and that though the share of the rent of a tenure to which a party is entitled depends generally upon the extent of his share in the property in which the tenure is included or, in other words, upon the extent of his title, yet, *having regard to the frame of the issue and to the judgment of the original and appellate Courts in the former suit*, the question could be said to have been in issue in that suit only incidentally and not directly.

15. Suits for rent for successive periods or for other recurring liability. — A suit for rent may involve an issue as to the plaintiff's right to receive rent for a particular period or it may involve an issue as to his *title*, i. e., his recurring right to receive rent *generally for the whole period of the tenancy* and not alone for the particular period for which rent is claimed. In the former case the decision on the plaintiff's right to receive rent will be *res judicata* so far as the period actually sued for is concerned but will not be *res judicata* in a suit for rent for a *subsequent* period.[1]

† ('38) 25 AIR 1938 Nag 195 (197) : ILR (1940) Nag 181.
('30) 17 AIR 1930 Oudh 335 (335) (DB). (Decision as to status of tenant and rate of rent.)
(1900) 3 Oudh Cas 65 (67).
('19) 6 AIR 1919 Pat 371 (372).
(*See also* ('41) 28 AIR 1941 Cal 574 (576). (Rent suit—Main question to determine is whether relation of landlord and tenant exists—Determination of number of dags constituting tenancy or exact boundaries or extent of tenancy is not necessary.)

9. ('85) 11 Cal 301 (310) : 12 Ind App 23 (PC).
10. ('97) 24 Cal 569 (573, 574).

Note 15

1. ('42) 29 AIR 1942 Pat 323 (324) (DB).
† ('30) 17 AIR 1930 Pat 585 (586, 587) : 9 Pat 674 (DB).
('27) 14 AIR 1927 All 145 (145, 146).
('14) 1 AIR 1914 All 1 (2).
('32) 19 AIR 1932 Bom 222 (223) : 56 Bom 292 (DB). (Second suit for future mesne profits not covered by first suit.)
('03) 27 Bom 418 (423) (DB).
† ('02) 26 Bom 25 (31, (32) (DB).
('31) 18 AIR 1931 Cal 788 (789) : 58 Cal 1040 (DB). (Second suit for future mesne profits not covered by first suit.)
† (1900) 4 Cal W N 43 (44) (DB).
('97) 24 Cal 711 (712) (DB).
('31) 1931 Mad W N 813 (814) (DB). (Claim for deductions against claim for mesne profits for a subsequent period.)
('22) 9 AIR 1922 Pat 303 (307) : 1 Pat 218 (DB). (Cess under Bengal Act IX of 1890.)
† ('22) 9 AIR 1922 Pat 213 (214).

In the latter case, it will be *res judicata* in suits for rent for all successive periods.[2] But if the general question was gone into and decided merely *for the purpose of deciding the right or liability for the period involved* in the suit, then the issue must be taken to have been raised only *incidentally*. Where issues have been framed, the non-existence of a direct issue of this character has to be seriously taken into account in determining the question whether the question of right or liability for all times was directly and substantially in issue.[3]

A decision in a suit in which the issue was with reference to the plaintiff's right to receive rent for a particular period only, may, however, be *presumptive* evidence of the rent of future years though such evidence may be rebutted by other evidence showing change of circumstances, etc.[4] Thus, a decision in a suit for *melwaram* of one fasli would not estop the defendant, when sued for the *melwaram* for subsequent years, from contending that he was not in possession of the lands in respect of which the *melwaram* is claimed.[5]

A decree in previous suit awarding mesne profits up to the date of that suit cannot be *res judicata* upon the question of mesne profits for the subsequent period.[6]

The right to sue for ejectment of an annual tenant accrues every year and so the withdrawal of a previous suit for ejectment does not bar a subsequent suit for ejectment against the same party on a subsequent cause of action.[7] Similarly, a dismissal of a suit for enhancement of rent is no bar to the filing of a fresh suit for enhancement of rent in a subsequent year.[8]

Where a suit for ejectment is dismissed for failure to serve a proper notice to quit on the tenant, it will be *res judicata* on the question of the landlord's title in a subsequent suit for ejectment, if the first suit decided the question of title.[9]

16. Suits for maintenance at different rates. — A suit for arrears of maintenance for a particular period will of course bar a subsequent suit for arrears of maintenance for the same period but not a suit for arrears of maintenance for a *different* period.[1] Again, where the *right to* maintenance is in issue in the former suit, a subsequent suit as to such right will also be barred,[2] but the maintenance decree is not final as to the *rate* of maintenance fixed and is no bar to a suit for maintenance at an *enhanced rate* for a different period under altered circumstances,[3] or to a suit to declare that the maintenance was a *charge* on the property.[4] It is not necessary that the decree should

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('17) 4 AIR 1917 Pat 615 (616) (DB).
('17) 4 AIR 1917 Pat 54 (54, 55) (DB).
2. † ('30) 17 AIR 1930 Pat 585 (587) : 9 Pat 674 (DB).
† ('29) 16 AIR 1929 All 29 (30, 31).
† ('01) 23 All 5 (12) (DB).
† ('89) 11 All 148 (156) (SB).
('25) 12 AIR 1925 Cal 427 (430) (DB). (Suit for rent—Whether *ex parte* or *inter partes*.)
('76) 1 Cal 202 (205, 206) (DB).
('34) 21 AIR 1934 Mad 563 (564).
('11) 12 Ind Cas 329 (330) (Oudh). (Decree for rent involves the question of the right of the plaintiff to recover and of the defendant's liability to pay rent to the plaintiff—It becomes *res judicata* in subsequent suit for rent.)
[*See also* ('25) 12 AIR 1925 Mad 378 (379).]
3. † ('26) 13 AIR 1926 Cal 650 (652) (DB).
4. ('42) 29 AIR 1942 Pat 323 (324) (DB).
('07) 5 Cal L Jour 92 (93) (DB).
† ('22) 9 AIR 1922 Pat 213 (214)
('27) 14 AIR 1927 Mad 842 (843, 844) (DB). (Order that a particular application for the recovery of mesne profits awarded by a decree is not barred by the 12 years rule under S. 48, C. P. Code, is no bar to a plea that subsequent application for the same purpose is barred.)
('24) 11 AIR 1924 Pat 371 (371).
5. ('04) 14 Mad L Jour 379 (392) (DB).
6. ('39) 26 AIR 1939 All 52 (54).
7. ('26) 13 AIR 1926 All 34 (34).
8. ('15) 31 Ind Cas 866 (866) (DB) (U P B R).
9. ('32) 19 AIR 1932 Bom 484 (486).

Note 16

1. † ('03) 27 Bom 418 (424).
('29) 16 AIR 1929 Mad 545 (561) (DB).
2. ('12) 14 Ind Cas 463 (465) (PC).
Also see Note 7.
3. ('14) 1 AIR 1914 Sind 22(23) : 8 Sind L R 306 (308). (Or to have the rate decreased.)
† ('99) 22 Mad 175 (178) (DB).
4. ('63) 12 Cal L Rep 473 (475).

provide for any such modification.[5] Where there is a decree merely declaring an annual right to maintenance, a suit to enforce such right will lie.[6]

17. Suits relating to the rate of rent or the area for which rent is payable. — A decree for rent for a particular period will be conclusive as to the *amount* payable by the defendant *for the years* for which the rent was claimed in the suit;[1] but it may not be conclusive as to *the rate of rent* payable for successive periods of the same tenancy.[2] Where, however, the issue in the former suit is as to the *rate of rent* for the whole period of the lease, then the decision as to such rate is *res judicata* in a subsequent suit for rent.[3] Thus, if rent is claimed at a certain annual rate *on the ground of the rent having been paid at a certain rate in the preceding year, an issue as to the annual rate of rent* is generally not a direct issue, but if the rent is claimed at an annual rate alleged to have been settled by a binding *contract* and the Court tries the question "what is the yearly rate of rent payable according to the contract set up," that question is directly and substantially in issue and will operate as *res judicata* in a suit for rent for a subsequent period.[4]

Similarly, where the former decision determines the issue 'what is the proper area for which the rent is payable under the contract of tenancy,' then the decision is *res judicata* in a subsequent suit for rent for the remaining period of the lease.[5] Similarly, a decision as to the right of the plaintiff to enhance the rent of the defendant's holding,[6] or the right to claim *jodi*[7] under the contract of tenancy will be conclusive on the point in

5. ('78) 1 All 594 (596) (DB).
6. ('84) 7 Mad 80 (82).

Note 17

1. † ('10) 6 Ind Cas 860 (861) (DB) (Cal).
('23) 10 AIR 1923 Cal 282 (283).
('31) 18 A I R 1931 Pat 215 (216) : 10 Pat 337 (DB). (Decision under the Bengal Tenancy Act, VIII of 1885.)
('22) 9 AIR 1922 Pat 213 (214).
2. ('41) 28 AIR 1941 Oudh 259 (260).
† ('10) 6 Ind Cas 860 (861) (Cal).
('23) 10 AIR 1923 Cal 282 (283).
('35) 22 AIR 1935 Cal 554 (555) (DB). (Suspension of rent allowed in former suit on account of dispossession — Subsequent publication of Record of Rights showing tenant to be in full possession—No *res judicata* in subsequent suit.)
† ('26) 13 AIR 1926 Cal 767 (771) (DB).
† ('26) 13 AIR 1926 Cal 698 (700, 701) (DB).
('25) 12 AIR 1925 Cal 1011 (1012) (DB).
('19) 6 AIR 1919 Cal 981 (982) (DB). (But it is good evidence as to the rate of rent.)
('18) 5 AIR 1918 Cal 984 (985) (DB).
('17) 4 AIR 1917 Cal 113 (114) (DB).
('14) 1 AIR 1914 Cal 826 (827) (DB).
('09) 2 Ind Cas 828 (830) : 36 Cal 604 (DB).
('09) 2 Ind Cas 160 (161) (Cal).
† ('09) 2 Ind Cas 11 (12, 13) (Cal).
('02) 28 Cal 109 (111) (DB). (Decrees as to road cess payable by tenant and varying from time to time.)
† ('02) 6 Cal W N 589 (591) (DB).
† ('29) 16 A I R 1929 Mad 673 (674, 675). (No direct issue raised as to rate of rent—No *res judicata*.)
('27) 14 AIR 1927 Oudh 32 (32).
('18) 5 AIR 1918 Oudh 98 (99). (The finding in a previous suit as to the amount of mesne profits will not operate as *res judicata* in a subsequent suit for mesne profits.)
('27) 14 AIR 1927 Pat 58 (59).
('22) 9 AIR 1922 Pat 303 (307) : 1 Pat 213 (DB).
('22) 9 AIR 1922 Pat 213 (214).
('19) 6 AIR 1919 Pat 526 (526) (DB).
('18) 5 AIR 1918 Pat 647 (649) : 3 Pat L Jour 372. (DB).
[But see ('32) 1932 Mad W N 639 (640).]
3. † ('41) 28 AIR 1941 Oudh 259 (260).
('12) 15 Ind Cas 837 (838, 839) (DB) (Cal).
† ('26) 13 AIR 1926 Cal 698 (700, 701) (DB).
('18) 5 AIR 1918 Cal 684 (684) (DB).
('18) 5 AIR 1918 Cal 489 (490) (DB).
('17) 4 AIR 1917 Cal 38 (38) (DB).
† ('12) 16 Ind Cas 590 (591) (Cal).
✣ ('12) 16 Ind Cas 447 (447, 448) (DB) (Cal).
('12) 16 Ind Cas 22 (24) (DB) (Cal).
('93) 20 Cal 505 (507, 508) (DB).
† ('92) 19 Cal 656 (660) (DB).
('75) 1 Cal 202 (206) (DB).
('20) 7 AIR 1920 Pat 584 (585, 586). (*Res judicata* so far as existence of contract to pay is concerned.)
4. ('40) 27 AIR 1940 Cal 588 (589).
✣ ('05) 1 Cal L Jour 248 (255).
('23) 10 AIR 1923 Cal 361 (361, 362) (DB).
5. † ('79) 4 Cal 686 (690).
('07) 34 Cal 1020 (1024) (DB).
† ('26) 13 AIR 1926 Cal 672 (676) (DB).
('26) 13 AIR 1926 Cal 513 (515) (DB).
('24) 11 AIR 1924 Cal 128 (131) (DB).
('08) 12 Cal W N 904 (907).
✣ ('14) 1 AIR 1914 Mad 399 (414): 37 Mad 70 (FB).
('38) 25 AIR 1938 Pat 306 (307) : 17 Pat 451 (SB).
6. ('73) 5 N W P H C R 163 (164) (DB).
7. ('25) 12 AIR 1925 Mad 378 (379).

subsequent proceedings. But the rejection of a defence that a portion of the holding was in the possession of the landlord does not preclude the trial, in a subsequent suit for rent for a later period, of the question as to the rate of rent, on the ground of diminished holding.[8]

18. Matter must have been alleged on one side and denied or admitted on the other— Explanation III. — See Note 7.

19. Ex parte decree. — In considering whether an *ex parte* decree is *res judicata* in a subsequent suit and to what extent, it is necessary to ascertain precisely what matters were involved in such decision.[1] An issue can be said to be directly and substantially in issue in an *ex parte* case, only *constructively*. All grounds of attack *in respect of the actual claim made* and all matters inconsistent with the plaintiff's claim which might and ought to have been raised by the defendant, will be deemed to be directly and substantially in issue in the suit and to have been heard and finally decided.[2] An *ex parte* decree will therefore operate as *res judicata* on all such points.[3] Thus, where A sues B for rent for a particular period and mentions the rate at which it is claimed and B remains *ex parte*, the decision will operate as *res judicata* on the following questions:

(1) the liability of B to pay rent for the period claimed,

(2) the existence of the relationship of landlord and tenant during the period,[4] and

(3) the amount of rent claimed for that period.

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8. ('94) 21 Cal 236 (241) (DB).

Note 19

1. ('11) 12 Ind Cas 329 (330) (Oudh).
[*See also* ('34) 21 A I R 1934 Cal 467 (468) (DB). (*Ex parte* decision of Settlement Officer under S. 105, Ben. Ten. Act, as to fair and equitable rent does not operate as *res judicata* in subsequent suit for establishing Nishkar rights.)]
2. ('14) 1 AIR 1914 Lah 390 (392) : 1915 Pun Re No. 12 (DB).
('11) 9 Ind Cas 363 (364) (DB) (Cal).
† ('09) 2 Ind Cas 11 (12, 13) (Cal).
('04) 31 Cal 79 (82) (DB).
('20) 7 AIR 1920 Cal 814 (815). (Suit for enhancement of rent—Rate of rent is necessarily in issue and will operate as *res judicata*.)
('34) 21 AIR 1934 Nag 33 (34). (Mortgage suit—Some defendants *ex parte* — Such defendants can plead paramount title in subsequent suit.)
[*See* ('41) 28 AIR 1941 Cal 574 (576).]
3. ('41) 28 AIR 1941 Cal 574 (576).
† ('29) 16 AIR 1929 All 346 (346).
('37) 24 AIR 1937 All 251 (253) (DB). (*Ex parte* decree—Subsequent suit to declare decree void on ground of want of jurisdiction is barred by *res judicata*.)
† ('29) 16 AIR 1929 All 761 (763).
('29) 16 AIR 1929 All 29 (31).
('28) 15 AIR 1928 All 721 (723) : 50 All 394 (DB).
† ('14) 1 AIR 1914 All 386 (388).
('02) 24 All 429 (437) : 29 Ind App 116 (PC).
('02) 24 All 138 (141) (DB).
('82) 1882 All W N 4 (4) : 4 All 184 (DB).
('09) 33 Bom 479 (482) (DB).
('28) 15 AIR 1928 Cal 717 (720) (DB).
('26) 13 AIR 1926 Cal 114 (115) (DB). (*Ex parte* decree for rent satisfied—Decree is *res judicata* as to parties being landlord and tenant.)
† ('08) 12 Cal W N 862 (864) : 35 Cal 979 (DB).
('33) 20 AIR 1933 Lah 606 (609).
('10) 1910 Pun L R No. 47, page 114.
('26) 13 AIR 1926 Mad 1144 (1144).
('24) 11 AIR 1924 Oudh 419 (420).
('13) 7 Low Bur Rul 56 (59). (*Ex parte* foreign judgment.)
('24) 11 AIR 1924 Sind 60 (61).
('14) 1 AIR 1914 Sind 24 (25) : 8 Sind L R 218 (DB).
[*See* ('41) 28 AIR 1941 Cal 574 (576).]
[*See also* ('42) 29 AIR 1942 Pesh 9 (10). (It makes no difference for the purposes of the application of the doctrine of *res judicata* whether a suit is decided *ex parte* or after contest.)
('34) 21 AIR 1934 Cal 384 (387). (Mortgage by two Hindu brothers *A* and *B* of undivided share of all three brothers, *A*, *B* and *C* — Suit by mortgagee—*C* impleaded only as *pro forma* defendant — No averment as to authorization by *C*— *Ex parte* decree — Suit by *C*'s sons after *C*'s death for declaration—Suit not barred by doctrine of constructive *res judicata*.)
('17) 4 AIR 1917 Pat 585 (586, 587) (DB). (Point not necessary to be determined — Not *res judicata*)]
[See however observations by way of obiter in ('20) 7 AIR 1920 Pat 584 (586).]
4. ('27) 14 AIR 1927 All 552 (553) : 49 All 658 (DB).
† ('36) 23 AIR 1936 Pat 556 (557) (DB).
[But see ('14) 1 A I R 1914 Cal 849 (850) (DB). (An *ex parte* decree in a rent suit wherein the relationship of landlord and tenant was neither raised nor decided is not *res judicata* in a subsequent suit for rent upon the question of relationship.)]

But the *rate of rent* cannot ordinarily be said to be a material question which was necessary in that case to give relief to the plaintiff and which had to be attacked by way of defence. The question of the *rate* therefore cannot be ordinarily *res judicata* in such cases.[5] Where, however, it was necessary to decide the *rate of rent also* in a suit for rent, the decision as to the rate will operate as *res judicata*.[6] The question whether it was necessary or material to decide it must be determined with reference to the special facts of each case.[7]

Under Explanation IV to S. 13 of the old Code, a decision was not *final* unless it was such that the Court making it could not alter it (except on review) on the application of either party or reconsider it of its own motion. In the undermentioned cases[8] it was held that an *ex parte* decision which could be set aside by the Court on the application of the parties, could not be final and therefore could not be *res judicata*. The said Explanation has now been omitted in this Code and the said decisions are consequently no longer law.

The section does not bar a *suit* to set aside an *ex parte* decree on the ground that it was obtained by *fraud*,[9] and this is so even though the defendant was unsuccessful in his application under O. 9, R. 13 to set aside the decree and even though he did not appeal from the order rejecting his application.[10] If, however, the plea of fraud is set up in the application and is adjudicated upon, a suit on the same would, of course, be barred.[11] If the points raised in the subsequent suit *could* not have been raised in the previous application, the suit will not be barred.[12] See also the undermentioned decision.[13]

20. Former suit—Explanation I—General. — There was nothing under the old Code corresponding to Explanation I of this section but the words 'former suit' were

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5. ('43) 47 Cal W N 362 (364).
† ('89) 16 Cal 300 (306) (FB). (Overruling 3 Cal 383 (FB).)
('12) 16 Ind Cas 911 (912) (DB) (Cal).
('25) 12 AIR 1925 Cal 427 (430) (DB).
('99) 4 Cal W N 161 (162) (DB). (Not substantially in issue, hence no *res judicata*.)
('25) 12 A I R 1925 Mad 378 (379). (Liability to pay jodi.)
('16) 3 AIR 1916 Mad 147 (150) (DB). (Points left open—Not *res judicata*.)
('11) 12 Ind Cas 329 (330) (Oudh). (No dispute as to rate of rent.)
[*See* ('20) 7 AIR 1920 Cal 77 (78).]

6. ('43) 47 Cal W N 362 (364).
*('26) 13 AIR 1926 Cal 767 (769) (DB). (Rate of rent—Substantially in issue—Hence *res judicata*.)
('30) 17 AIR 1930 Oudh 335 (335) (DB). (Do.)
† ('29) 16 AIR 1929 All 29 (30). (Rate of rent — Substantially in issue—Hence *res judicata*—Case of interest on arrears of rent.)

7. ('29) 16 AIR 1929 Mad 673 (674).

8. ('81) 7 Cal 23 (25) (DB).
('82) 8 Cal 275 (276) (DB).
('75) 23 Suth W R 149 (149) (DB).
('67) 7 Suth W R 236 (237) (DB).
('83) 1883 Pun Re No. 78.
('99) 9 Mad L Jour 60 (61) (DB).

9. ('94) 21 Cal 605 (609) (DB).
('70) 7 Bom H C R (O C) 150 (163, 164).

10. † ('02) 29 Cal 395 (399, 400) : 29 Ind App 99 (PC).
† ('01) 28 Cal 475 (478) (PC).
('99) 21 All 289 (290).
*('97) 24 Cal 546 (549, 550) (DB).
† ('27) 14 AIR 1927 Rang 281 (281) : 5 Rang 471 (DB).
Also see O. 9, R. 13, N. 12.

11. ('42) 29 AIR 1942 Pat 357 (359, 360) (DB). (Question as to fraudulent suppression of summons decided in a proceeding under O. 9, R. 13—Subsequent suit to set aside decree on same ground is barred by *res judicata*.)
('07) 29 All 212 (212) (DB).
† ('07) 29 All 608 (612) (DB).
('37) 24 AIR 1937 Lah 614 (615).
('35) 22 AIR 1935 Pat 458 (458): 14 Pat 439 (DB). (Application deciding that summons was duly served—Point that it was fraudulently suppressed cannot be raised in suit.)
† ('24) 11 AIR 1924 Pat 238 (239): 2 Pat 833 (DB).
† ('21) 8 AIR 1921 Pat 12 (13): 6 Pat L Jour 1 (DB).
*('24) 11 AIR 1924 Rang 119 (122) : 1 Rang 500. (Plea of non-service of summons raised and decided in application—Suit on that point is barred.)
Also see O. 9, R. 13, N. 12.

12. ('25) 12 AIR 1925 Cal 663 (664) (DB). (It is not clear, however, from the facts how the question of non-service of summons was not and could not have been raised in the previous application.)

13. ('36) 23 AIR 1936 Pesh 1 (2). (Defendant trying to set aside *ex parte* decree under O. 9, R. 13 — Failure to prove want of due service of summons — Defendant is barred from agitating same question in appeal or revision against the *ex parte* decree.)

interpreted by judicial decisions to mean a *previously decided suit*.[1] Explanation I gives effect to the view so laid down and it does not matter now if the previously decided suit was in fact *instituted* subsequently.[2] The same rule will apply to appeals and revisions also.[3] Thus, if a suit is decided between the same parties by a Court establishing the title of one of them to the property in dispute, and such decision has become final, the decision constitutes the question of title *res judicata*, even for the purpose of an appeal or revision from a decree in another suit between the same parties in another Court, though the decision relied on as *res judicata* has been given only after the decision appealed against or sought to be revised.[4] The expression 'former suit,' however, distinctly shows that there must be *two suits* or *proceedings* and that the section has no application to orders passed at different stages of the *same or single* proceeding, though such orders are binding in all subsequent stages of the same matter on general principles of *res judicata*.[5]

21. "Suit," meaning of. — See also Note 5 on S. 2 (2), and Note 80.

The word 'suit' in this section means proceedings in action in *Courts of the first instance* as distinguished from proceedings in Appellate Courts, though the general principles of *res judicata* may apply to appellate proceedings.[1] It must also be understood to mean such a matter *as might have formed the subject of a separate suit* independently of the provisions of the Code which enable a person to unite several causes of action in one and the same suit.[2]

Hence, if it is possible to treat the entire cause of action upon which the later suit is founded as divisible and if in the earlier suit one of the component parts of the cause of action was relied on, then the previous decision will stand as a bar to the extent of the matter involved in the earlier suit.[3]

Note 20

1. ✣('89) 11 All 148 (162).
† ('01) 24 Mad 350 (355) (DB).
('37) 24 AIR 1937 All 108 (110) (DB).
('10) 32 All 67 (69) (DB).
('90) 1890 Pun Re No. 153.
[But see ('95) 1895 Pun Re No. 57.]
2. ('42) 46 Cal W N 702 (703) (DB).
('40) 27 AIR 1940 All 171 (173) (DB). (Assuming that out of two suits decided on the same date the suit which bears the earlier number must be deemed to have been decided first, there can be no doubt that it can be proved that the subsequent suit was decided earlier.)
('29) 16 AIR 1929 Pat 173 (176) : 8 Pat 107 (DB).
† ('23) 10 AIR 1923 Cal 496 (499) (DB).
('27) 14 AIR 1927 All 189 (189).
† ('08) 1908 All W N 211 (212).
('14) 1 AIR 1914 Cal 693 (694) (DB).
('28) 15 AIR 1928 Lah 710 (712).
('33) 20 AIR 1933 Pat 78 (79): 12 Pat 139 (DB).
('11) 6 Low Bur Rul 93 (97) (DB).
('26) 96 Ind Cas 694 (695) (All).
3. † ('23) 10 AIR 1923 Cal 496 (499) (DB).
('90) 12 All 578 (579).
('37) 24 AIR 1937 Mad 544 (545, 546). (Final decision in suit pending appeal in another suit operates as *res judicata*.)
('36) 23 AIR 1936 Mad 190 (191) : 59 Mad 777.
4. ('42) 29 AIR 1942 Mad 421 (422) : ILR (1942) Mad 677.
('36) 23 AIR 1936 Mad 190 (191) : 59 Mad 777.
5. ('43) 30 AIR 1943 Cal 1 (9) : ILR (1942) 2 Cal 268 (DB). (Decree for mesne profits up to date of suit cannot be attacked in appeal against decree — Suit for subsequent mesne profits passed in same suit.)
† ('84) 6 All 269 (274) : 11 Ind App 37 (PC).
('81) 3 All 173 (175) (DB).

Note 21

1. ('42) 29 AIR 1942 Mad 421 (422) : ILR (1942) Mad 677 (DB). (Final judgment in another case on same point pronounced pending appeal operates as *res judicata*.)
(1939) 26 AIR 1939 Sind 329 (331) : ILR (1940) Kar 15 (DB). (The rule of *res judicata* contained in S. 11 applies to appeals as well as to trials in original Courts.)
✣('27) 14 AIR 1927 Lah 289 (294, 310) : 8 Lah 384 (FB).
('34) 21 AIR 1934 Lah 416 (416). (Suit by *A* against *B* for accounts partly decreed—Decision in appeal by *A* against the decree is *res judicata* in *B*'s appeal even though his appeal is decreed by another Court.)
('89) 11 All 148 (159) (FB). (Principle applies to appeals.)
('96) 23 Cal 415 (419) (DB).
2. ('99) 12 C P L R 91 (95).
('19) 6 AIR 1919 Nag 25 (26) : 16 Nag L R 91.
[*See also* ('23) 10 AIR 1923 All 176 (177) : 45 All 59 (DB). (First suit for possession—Second suit for possession and mesne profits.)]
3. ('42) 29 AIR 1942 Nag 119 (121) : ILR (1942) Nag 721.
† ('35) 22 AIR 1935 Cal 792 (797) (DB).
('38) 25 AIR 1938 Nag 401 (405) : I L R (1939) Nag 496 (DB).

Illustration.

K sues *S* on two bonds. *S* contends that the two bonds *as well as two other bonds* were satisfied. The contention is found against *S* and a decree is passed in favour of *K*. *S* subsequently sues *K* for return of the *four* bonds alleging that the same had been satisfied. The Court which tried the former suit had no pecuniary jurisdiction to try the subsequent suit on the four bonds. Is the suit barred so far as the two bonds in *K*'s suit are concerned ? Yes. The reason is that the suit in respect of *each of the bonds* must be regarded as a *separate suit* inasmuch as they could have each formed the subject-matter of a separate suit. The subsequent suit, therefore, may be taken to consist of really two suits for the purposes of section 11, one of which, namely, that in respect of the two bonds in *K*'s suit, was competent to be tried by the Court in the former suit and therefore the suit, so far as the two bonds are concerned, is clearly barred by *res judicata*.[4]

The word 'suit' means a *valid* suit. A suit against a dead man is not a valid suit at all and cannot be regarded as a suit for purposes of section 11.[5]

22. Interlocutory orders. — Interlocutory applications in a suit cannot themselves be regarded as *suits* for the purposes of S 11 and orders thereon cannot, at a subsequent stage of the same suit, be regarded as decisions in 'former suit.' Section 11 will not therefore in terms apply to such cases. But as has been seen in Note 3, the section is not exhaustive of all cases of estoppel by judgment and the general principles of *res judicata* will still apply. In *Ram Kirpal Shukal* v. *Mt. Rup Kuari*,[1] their Lordships of the Privy Council observed as follows:

> "The question, if the term '*res judicata*' was intended, as it doubtless was, and was understood by the Full Bench, to refer to a matter decided by a Court of competent jurisdiction *in a former suit*, was irrelevant and inapplicable to the case. The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application, in which the orders reversed by the High Court were made, was merely continuation. It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment is binding upon them in carrying the judgment into execution.
>
> "The binding force of such a judgment depends not upon Section 13, Act X of 1877, but upon general principles of law. If it were not binding, there would be no end to litigation."

An order on an interlocutory application at one stage of the case is therefore binding in all subsequent stages of the same proceeding under general principles of law.[2]

4. ('85) 7 All 247 (252, 253) (FB). (Per Mahmood, J.) ('13) 21 Ind Cas 15 (16, 17) (DB) (Mad).
Also see Note 81.

5. ('07) 9 Bom L R 274 (279).
[See however ('42) 29 AIR 1942 Pat 226 (230) : 20 Pat 841 (DB). (Decision in a suit irregularly constituted is still a decision of a Court with jurisdiction.)]

Note 22

1. ('84) 6 All 269 (274).

2. ('43) 30 AIR 1943 Oudh 231 (232) (DB).
('24) 11 AIR 1924 P C 202 (206) (PC). (Order for appointment of receiver—Terms of consent adhered to by one side—Other side cannot seek to upset order.)
('29) 16 AIR 1929 Rang 228 (229).
('25) 12 AIR 1925 P C 280 (287) : 52 Ind App 418 : 5 Pat 135 (PC). (Successor of Judge cannot modify mortgage decree passed by his predecessor while taking accounts as directed in the decree.)
('08) 1908 All W N 68 (68) (DB).
('24) 11 AIR 1924 Bom 495 (497) : 48 Bom 638 (DB).
(1864) 1 Bom H C R (A C) 173 (175, 176) (DB).
('27) 14 AIR 1927 Cal 616 (617) (DB).
('24) 11 AIR 1924 Cal 1006 (1007) (DB).
† ('21) 8 AIR 1921 Cal 699 (701) (DB).
('18) 5 AIR 1918 Cal 742 (743) (DB). (Assessment of mesne profits.)
('30) 17 AIR 1930 Lah 836 (837) : 11 Lah 470 (DB). (Decision as to jurisdiction by Judge—Succeeding Judge cannot go behind the order.)
('29) 16 AIR 1929 Mad 121 (134) (DB).
('28) 15 AIR 1928 Mad 58 (59). (Appeal partly heard by another High Court Judge—Judge subsequently hearing the appeal is bound by previous finding.)
('21) 8 AIR 1921 Mad 461 (462) (DB).
('15) 2 AIR 1915 Mad 407 (410) (DB).
('26) 13 AIR 1926 Oudh 420 (422) (DB).
('30) 17 AIR 1930 Pat 260 (264) (DB).
('23) 10 AIR 1923 Pat 134 (135) (DB). (Settlement of sale proclamation after notice—Court cannot go behind in subsequent proceedings.)
('21) 8 AIR 1921 Pat 430 (432) (DB).
('21) 8 AIR 1921 Pat 131 (134) : 6 Pat L Jour 208 (DB). (Consent order raises an estoppel as much as a decree passed *in invitum*.)
[But see ('24) 11 AIR 1924 All 804 (805) (DB). (Same application—Objections at different stages not barred.)]

unless the order leaves the matter open for re-consideration at a later stage,[3] or unless the order is really not an *adjudication* but a mere expression of opinion not necessary for the disposal of the application.[4]

As to whether an order under O. 22, R. 5 is *res judicata*, see Note 13.

23. Execution proceedings. — Section 11 does not in terms apply to execution proceedings in a suit[1] inasmuch as each of such proceedings is not a *separate suit*, but is only a proceeding in the *same suit*.[2] But, as in the case of interlocutory orders referred to in Note 22 above, the *general principles* of *res judicata* will be applicable to such proceedings.[3] When, therefore, a matter, which directly and substantially arises for decision in an execution proceeding, is heard and decided either actually or constructively by a competent Court in that proceeding, such decision is final between the parties and operates as *res judicata* in a subsequent suit[4]

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3. ('25) 12 AIR 1925 Cal 1010 (1011) (DB).
† ('86) 8 All 172 (176, 177) (FB).
('29) 16 AIR 1929 Oudh 398 (399) (DB). (Lower Appellate Court remanding case ordering one of several documents to be admitted—Case coming up before successor of Judge making that order — He passing another order of remand ordering all documents in question to be admitted — Second order of remand is proper.)
4. ('26) 13 AIR 1926 Mad 162 (163) : 48 Mad 688 (DB).

Note 23

1. ('41) 28 AIR 1941 Mad 861 (862).
('39) 26 AIR 1939 Lah 556 (557).
✣('84) 6 All 269 (274): 11 Ind App 37 (PC).
† ('24) 11 AIR 1924 Pat 265 (265) : 2 Pat 771 (DB). (Execution case is not a suit.)
('38) 25 AIR 1938 All 377 (379) (DB).
† ('26) 13 AIR 1926 All 71 (73) : 48 All 201 (DB).
('25) 12 AIR 1925 All 117 (117, 118) : 47 All 86 (DB).
('15) 2 AIR 1915 All 344 (345) : 37 All 589 (DB).
('23) 10 AIR 1923 Bom 36 (37) (DB).
† ('37) 24 AIR 1937 Mad 511 (514) (DB).
('23) 10 AIR 1923 Nag 236 (237).
('23) 10 AIR 1923 Rang 119 (120) : 4 Upp Bur Rul 132.
2. ('26) 13 AIR 1926 All 71 (73) : 48 All 201 (DB).
✣('31) 18 AIR 1931 Mad 381 (396) (DB).
('90) 12 All 581 (584).
('89) 16 Cal 457 (464) (DB).
('83) 9 Cal 446 (448) (DB).
('82) 8 Cal 51 (61) : 8 Ind App 123 (PC).
('07) 1907 Upp Bur Rul C. P. C., p. 1.
3. ('43) 30 AIR 1943 Sind 11 (12) : I L R (1942) Kar 326 (DB).
('42) 29 AIR 1942 Lah 153 (158): ILR (1942) Lah 559 (FB).
† ('41) 28 AIR 1941 Mad 440 (441) (DB).
('39) 26 AIR 1939 Lah 556 (557).
✣('84) 6 All 269 (271, 274) : 11 Ind App 37 (PC).
('12) 16 Ind Cas 238 (239) (DB) (Cal).
✣('36) 23 AIR 1936 All 21 (23) : 58 All 313 (FB). (Not S. 11 but principle of estoppel by judgment applies to execution proceedings.)
('28) 15 AIR 1928 All 527 (530) : 51 All 346 (DB).
('02) 24 All 138 (141) (DB).
('91) 14 All 64 (66) (DB).
('91) 1891 All W N 33 (34) (DB).
('34) 21 AIR 1934 Cal 472 (473) (DB).
('32) 36 Cal W N 367 (370) (DB).
✣('09) 3 Ind Cas 47 (50) (DB) (Cal).
('83) 9 Cal 65 (67) (DB).
('37) 24 AIR 1937 Lah 21 (22).
('29) 16 AIR 1929 Lah 121 (122).
('27) 14 AIR 1927 Lah 179 (181).
('25) 12 AIR 1925 Lah 507 (508).
('13) 1913 Pun Re No. 100.
✣('37) 24 AIR 1937 Mad 511 (514) (DB).
('33) 20 AIR 1933 Mad 466 (469).
('01) 24 Mad 669 (671).
('23) 10 AIR 1923 Nag 236 (237).
('30) 17 AIR 1930 Oudh 305 (310) (DB).
('39) 26 AIR 1939 Pat 19 (19).
('24) 11 AIR 1924 Pat 265 (265) : 2 Pat 771 (DB).
('29) 16 AIR 1929 Rang 182 (183).
[*See also* ('32) 19 AIR 1932 Cal 569 (571).]
[But see ('32) 19 AIR 1932 All 392 (393) (DB).]
4. ('42) 29 AIR 1942 All 260 (260). (Question of liability of surety under S. 145, C. P. Code, arising in execution—Decision on this question amounts to decree and operates as *res judicata* in subsequent suit.)
('42) 29 AIR 1942 Nag 107 (108) : ILR (1942) Nag 779. (Do.)
('42) 29 AIR 1942 All 104 (107) (DB). (Security bond in penal sum—Execution proceedings under S. 386, Cr. P. C., against executant — Objection under S. 386, Cr. P. C., read with O. 21, R. 90 that charge created was for larger amount than notified—Decision as to extent of charge created operates as *res judicata* in a subsequent suit.)
('42) 29 AIR 1942 Bom 309 (310) : I L R (1942) Bom 822. (Although the subject-matter in later suit may relate to a different property.)
('35) 22 AIR 1935 Cal 396 (397) (DB). (Award under Co-operative Societies Act — Execution — Objection to validity and executability—Decision — Separate suit not maintainable.)
('09) 4 Ind Cas 818 (819) : 1907-09 Upp Bur Rul C. P. Code, p. 31.
('22) 9 AIR 1922 P C 341 (344) (PC).
('11) 10 Ind Cas 453 (454) All).
('04) 26 All 152 (154).
('35) 22 AIR 1935 Bom 174 (176) (DB).
('37) 24 AIR 1937 Cal 226 (229).
('80) 6 Cal L Rep 215 (218).

or in subsequent execution proceedings[5] or at a subsequent stage of the same execution

('36) 23 AIR 1936 Lah 891 (894). (Order allowing claim to rateable distribution not challenged by way of appeal or any other proceeding — Order is final and cannot be attacked in subsequent suit.)
('27) 14 AIR 1927 Lah 112 (112).
† ('15) 2 AIR 1915 Lah 179 (181) (DB).
('12) 14 Ind Cas 751 (752) : 1912 Pun Re No. 91.
('35) 22 AIR 1935 Mad 615 (616). (In proceeding under S. 47, held remedy was by way of suit—In suit defendant contended that remedy was in execution and that the prior decision was erroneous—*Held* that the order in execution was conclusive.)
('35) 22 AIR 1935 Rang 174 (177) (DB). (Proceeding between assignee of decree-holder and judgment-debtor — Objection filed by judgment-debtor—Execution proceeded with by assignee substituted as decree-holder — *Held* assignment was impliedly regarded valid.)
('10) 1 Upp Bur Rul 66 (68).
† ('09) 3 Sind L R 133 (134) (DB).
[*See also* ('35) 22 AIR 1935 Rang 399 (400) (FB). (Declaration in prior execution that only half interest in certain property was attachable — In execution of another decree against same judgment-debtor, decree-holder cannot claim to attach whole interest in same property.)]

5. † ('42) 29 AIR 1942 Bom 134 (136): ILR (1942) Bom 190.
('42) 29 AIR 1942 Lah 87 (88) (DB).
('42) 29 AIR 1942 Lah 71 (72). (Order on point allowed to become final operates as *res judicata* even if it has not been decided on merits.)
('42) 29 AIR 1942 Oudh 183 (186) : 17 Luck 366.
('41) 28 AIR 1941 Bom 395 (397) : ILR (1941) Bom 652.
('40) 1940-2 Mad L Jour 487 (487).
('40) 27 AIR 1940 Pat 251 (252) (DB). (Objection not taken previously in execution—*Held*, barred in subsequent execution proceeding by constructive *res judicata*.)
('32) 19 AIR 1932 Mad 86 (90) : 55 Mad 495 (DB). (Effect of prior decision cannot be avoided by alleging that full facts were not placed before Court.)
('22) 9 AIR 1922 P C 341 (345) (PC).
('35) 22 AIR 1935 All 364 (365). (Several minor decrees in the same suit—Order in execution of one of them is *res judicata* in execution of another such decree.)
('31) 18 AIR 1931 All 746 (747) (DB).
('31) 18 AIR 1931 All 218 (219) (DB). (Order as to nature of property.)
('26) 93 Ind Cas 31 (32) (DB). (All).
† ('24) 11 AIR 1924 All 34 (37) : 45 All 735 (DB).
('06) 3 All L Jour 198 (199, 200) (DB).
('05) 27 All 148 (151) (DB). (Rejection for want of jurisdiction.)
('04) 26 All 361 (364) (DB).
('84) 6 All 269 (274) : 11 Ind App 37 (PC).
('84) 1884 All W N 39 (40) (DB).
('83) 1883 All W N 139 (139) (DB).
('82) 1882 All W N 128 (129) (DB).
('81) 3 All 173 (175) (DB).
('31) 18 AIR 1931 Bom 451 (453) (DB). (It will not cease to be *res judicata* if the execution was stayed pending an appeal and the decree of the lower Court was confirmed on appeal.)
† ('24) 11 AIR 1924 Bom 495 (497) : 48 Bom 638 (DB).
('07) 31 Bom 128 (137) (DB).
('91) 15 Bom 242 (244) (DB).
('77) 11 Bom 537 (539) (DB). (Question as to the personal liability of the judgment-debtor to satisfy the decree raised and decided.)
('82) 6 Bom 586 (587, 588) (DB). (Certificate of sale granted by Presiding Judge cannot be questioned by his successor in office.)
('37) 24 AIR 1937 Cal 481 (481).
('26) 13 AIR 1926 Cal 1019 (1021) : 53 Cal 582 (DB). (Order allowing amendment of execution application.)
('21) 64 Ind Cas 724 (725) (DB) (Cal).
('20) 7 AIR 1920 Cal 354 (356) : 47 Cal 446 (DB).
('19) 6 AIR 1919 Cal 1082 (1083) (DB).
† ('18) 5 AIR 1918 Cal 51 (52) (DB). (Decision as to mesne profits at one stage.)
('17) 4 AIR 1917 Cal 198 (199) (DB). (Fraud.)
('17) 4 AIR 1917 Cal 84 (85) (DB).
('10) 5 Ind Cas 387 (388) (DB) (Cal).
('09) 1 Ind Cas 124 (125) : 36 Cal 336 : 36 Ind App 27 (PC).
('09) 9 Cal L Jour 356 (357) (DB).
('05) 2 Cal L Jour 584 (588) (DB).
('01) 5 Cal W N 80 (82) : 28 Cal 122 (DB).
('93) 20 Cal 755 (757, 758) (DB).
('92) 20 Cal 551 (560) (DB).
('87) 14 Cal 640 (643, 644) (FB).
('38) 25 AIR 1938 Lah 608 (609) (DB). (Decision that house of judgment-debtor is exempt from attachment.)
('34) 21 AIR 1934 Lah 637 (640).
('28) 110 Ind Cas 337 (337) (Lah).
('27) 14 AIR 1927 Lah 852 (853). (Order releasing property from attachment.)
('27) 14 AIR 1927 Lah 179 (181).
('26) 13 AIR 1926 Lah 518 (518). (Order of satisfaction of decree bars fresh execution application unless set aside.)
('26) 13 AIR 1926 Lah 35 (37).
('22) 9 AIR 1922 Lah 361 (361).
('10) 6 Ind Cas 665 (666) (DB) (Lah).
('05) 1905 Pun L R No. 139, p. 492.
('33) 20 AIR 1933 Mad 745 (746). (Dismissal on merits without notice to judgment-debtor is *res judicata*.)
† ('33) 20 AIR 1933 Mad 130 (132).
('31) 18 AIR 1931 Mad 303 (308) (DB). (Failure to appeal against order bringing legal representative on record.)
('30) 17 AIR 1930 Mad 303 (304) (DB). (Order for sale on execution is final and cannot be questioned in the course of the same execution proceedings.)
('21) 8 AIR 1921 Mad 461 (462) (DB). (Finding that execution could not issue.)
('21) 8 AIR 1921 Mad 315 (317) (DB). (Decision that certain former execution petition was invalid.)
('19) 6 AIR 1919 Mad 929 (930) (DB).
('19) 6 AIR 1919 Mad 888 (888) (DB).
('14) 1 AIR 1914 Mad 162 (168): 37 Mad 462 (DB). (Order passed by the Court *ex parte* after holding that the notice was duly served.)

proceedings.[6] Thus, a decision *construing a decree* in a particular way,[7] or a decision allowing or disallowing a claim under O. 21 R. 58,[8] will be conclusive in all subsequent applications for execution. Similarly, a decision that an application is or is not *barred by limitation* is conclusive in subsequent execution proceedings.[9] Where it is held expressly or impliedly that an application for execution is maintainable and execution is directed to proceed, the decision will be *res judicata* although the application is subsequently dismissed for non-prosecution.[10]

The general trend of decisions in the High Courts in India is to the effect that the doctrine of constructive *res judicata* is also applicable to execution proceedings in

('02) 12 Mad L Jour 97 (98) (DB). (Order determining rate of interest payable.)
('02) 12 Mad L Jour 24 (27, 28) (DB).
('32) 19 AIR 1932 Oudh 246 (247) (DB).
('30) 17 AIR 1930 Oudh 305 (310) (DB). (Whether certain property belonged to the judgment-debtor.)
('30) 17 AIR 1930 Oudh 65 (67) : 5 Luck 458.
('21) 8 AIR 1921 Oudh 54 (54) : 24 Oudh Cas 213. (The conclusive character of the adjudication in a former execution proceeding as to a party's right to execute the decree cannot be affected by the subsequent dismissal of that application for default.)
('08) 11 Oudh Cas 220 (221) (DB).
('39) 26 AIR 1939 Pat 230 (231) : 18 Pat 378 (DB).
('24) 11 AIR 1924 Pat 628 (629) (DB). (Decision that a party was not entitled to notice under O. 21, R. 66.)
('24) 11 AIR 1924 Pat 576 (579) : 3 Pat 596 (DB).
('24) 11 AIR 1924 Pat 362 (366) (DB).
('18) 5 AIR 1918 Pat 457 (458) (DB). (Decision that no property of the judgment-debtor can be attached.)
('38) 25 AIR 1938 Pesh 77 (78) (DB).
[But see ('31) 18 AIR 1931 Oudh 62 (63) (DB).
('30) 17 AIR 1930 Pat 330 (331) : 9 Pat 306 (DB). (If the same proceeding is pending objections can be raised at any stage thereof.)]
Also see O. 21, R. 66, Note 22.

6. ('42) 29 AIR 1942 Lah 153 (153) : I L R (1942) Lah 559 (FB).
('41) 28 AIR 1941 Mad 861 (862).
('32) 19 AIR 1932 Cal 569 (571) (DB).
[*See* ('41) 28 AIR 1941 Nag 152 (153). (Order that an application was not made in accordance with law—The matter cannot be reagitated at a subsequent stage of the execution.)]

7. ('41) 28 AIR 1941 Mad 861 (863).
† ('85) 7 All 102 (106) (PC). (Decree construed as granting a particular relief.)
(1900) 1900 Pun L R page (415) (419). (Do.)
('01) 32 All 210 (213) (DB).
('01) 1901 All W N 32 (33) (DB). (Decree treated as bearing interest.)
('20) 7 AIR 1920 Mad 546 (547) (DB). (Decree treated as not executable.)
('18) 5 AIR 1918 Mad 607 (608) (DB). (Executability of decree.)
('15) 2 AIR 1915 Mad 613 (613) (DB).
('01) 24 Mad 683 (685) (DB). (Decree held executable.)
('96) 19 Mad 54 (56) (DB).
('05) 15 Mad L Jour 418 (418) (DB). (Decree construed as containing a direction.)
('18) 5 AIR 1918 Pat 67 (69) : 4 Pat L Jour 330 (DB). (Executability of decree.)
('26) 95 Ind Cas 31 (32) (DB). (All)
[*See* ('37) 1937 Mad W N 465 (468) (DB). (Construction of document or decree by competent Court is *res judicata*.)]
Also see Note 11.

8. ('27) 14 AIR 1927 Lah 872 (872).
('23) 10 AIR 1923 Mad 562 (562) (DB).
('31) 18 AIR 1931 Lah 6 (7).
('29) 16 AIR 1929 Lah 470 (470).

9. † ('21) 8 AIR 1921 PC 23 (24) : 48 Ind App 45 (PC).
('85) 7 All 439 (441) (DB).
† ('05) 1905 All W N 237 (238).
† ('86) 8 All 492 (493) (DB).
† ('81) 6 Bom 54 (63, 64) (DB).
('99) 26 Cal 888 (890) (DB).
('98) 25 Cal 789 (795) (DB).
('93) 20 Cal 551 (560) (DB).
('85) 11 Cal 376 (378) (DB).
† ('83) 9 Cal 65 (67) (DB).
✠ ('82) 8 Cal 51 (59, 60) : 8 Ind App 123 (PC).
('22) 67 Ind Cas 56 (57) (Lah).
('07) 1907 Pun L R No. 86, p. 300, new edition; page 447, old edition.
('06) 1906 Pun Re No. 47.
('94) 1894 Pun Re No. 89.
('29) 16 AIR 1929 Mad 826 (826) (DB).
('01) 24 Mad 669 (671) (DB).
('25) 12 AIR 1925 Nag 82 (89) : 22 Nag LR 67. (Ordering execution to proceed after limitation period.)
('23) 10 AIR 1923 Nag 236 (237).
('30) 17 AIR 1930 Oudh 65 (67) : 5 Luck 458 (DB).
† ('26) 13 AIR 1926 Oudh 291 (293) : 1 Luck 171 (DB).
† ('32) 19 AIR 1932 Sind 116 (119) : 26 Sind L R 91 (DB).
[But see ('22) 9 A I R 1922 Bom 238 (239) : 46 Bom 467 (DB). (Which was however decided on the point that there was no *adjudication* as to limitation in the prior proceeding.)]

10. ('43) 30 AIR 1943 Mad 449 (451) (DB). (Order directing sale papers to be filed amounts to decision that decree is executable and operates as *res judicata*.)
('23) 10 AIR 1923 Pat 180 (182) (DB).
('23) 10 AIR 1923 Nag 1 (2).
✠ ('13) 10 Ind Cas 359 (360, 361) (DB) (Cal).
† ('28) 15 AIR 1928 Mad 1052 (1053, 1054) (DB).
('17) 4 AIR 1917 Mad 334 (334) (DB).
[*See also* ('36) 23 AIR 1936 All 21 (24) : 58 All 313 (FB). (Express adjudication against decree-holder operates as *res judicata* although the decree-holder ultimately allows the execution application to be dismissed or struck off.)
('28) 15 AIR 1928 Cal 804 (804, 805) (DB).]
[But see ('98) 22 Bom 83 (85) DB).]

the sense that where a judgment-debtor fails to raise all his objections to the application in execution made by the decree-holder, which he might and ought to have raised, and the application is allowed, all such objections would be deemed to have been impliedly decided against him.[11] But no objection would be held to have been impliedly decided against the judgment-debtor unless it was such that without an implied decision thereon the execution would not have been ordered.[12] Thus, if the judgment debtor, after notice of the application for execution, fails to show cause against its being allowed on the ground that the decree is not executable,[13] or that the application is barred by limitation,[14] or

11. ('43) 30 AIR 1943 Lah 129 (137) (DB). (Execution application — Objection as to limitation not raised at early stage cannot be raised later.)
('43) 30 AIR 1943 Sind 11 (12) : I L R (1942) Kar 326 (DB).
('42) 29 AIR 1942 Bom 134 (136):ILR (1942) Bom 190.
('42) 29 AIR 1942 Lah 153 (158) : ILR (1942) Lah 559 (FB).
('41) 28 A I R 1941 Lah 171 (173). (The failure of the judgment-debtor to object at the proper time to the proceedings for attachment and sale of his properties other than those mortgaged on the ground of the absence of a personal decree under O. 34, R. 6, C. P. Code, estops him from taking the objection at a later stage.)
('40) 27 AIR 1940 Lah 394 (397). (Plea of limitation not taken in the earlier stages of the case.)
('40) 27 A I R 1940 Lah 161 (162, 163). (The circumstance that the omission to take the objection was not in a previous application for execution but only at an earlier stage of the same execution application makes no difference — AIR 1940 Lah 27, distinguished on facts.)
('40) 27 AIR 1940 Lah 7 (8).
† ('40) 27 AIR 1940 Pat 251 (251) (DB).
('25) 12 AIR 1925 All 117 (118) : 47 All 86 (DB).
('23) 10 AIR 1923 Bom 36 (37) (DB).
† ('26) 13 AIR 1926 All 71 (74) : 48 All 201 (DB).
('24) 11 AIR 1924 All 804 (805) (DB). (On remand in appeal fresh objections may, however, be taken.)
('31) 18 AIR 1931 Bom 446 (447) (DB).
('34) 21 AIR 1934 Cal 472 (473) (DB).
('09) 1 Ind Cas 284 (285) (DB) (Cal).
† ('37) 24 AIR 1937 Lah 772 (775, 776).
('37) 24 AIR 1937 Lah 404 (407).
('36) 23 AIR 1936 Lah 942 (943).
('36) 23 AIR 1936 Lah 696 (698) (DB).
('36) 23 AIR 1936 Lah 167 (168). (Point taken but given up can be constructive *res judicata*.)
('35) 22 AIR 1935 Lah 966 (966).
('35) 22 AIR 1935 Lah 949 (951) (DB).
('35) 22 AIR 1935 Lah 200 (201):15 Lah 869 (DB).
('33) 20 AIR 1933 Lah 697 (701) (DB).
† ('33) 20 AIR 1933 Lah 594 (595) : 14 Lah 409.
† ('33) 20 AIR 1933 Lah 3 (5) : 15 Lah 208.
† ('37) 24 AIR 1937 Mad 511 (514) (DB).
✠ ('31) 18 AIR 1931 Mad 381 (395).
('29) 16 AIR 1929 Mad 404 (407) (DB).
('28) 15 AIR 1928 Mad 1052 (1053, 1054) (DB).
('28) 15 AIR 1928 Mad 746 (758).
('24) 11 AIR 1924 Mad 673 (675): 47 Mad 641 (DB).
('36) 23 AIR 1936 Nag 123 (125) : I L R (1936) Nag 30.
('35) 22 AIR 1935 Nag 80 (81). (Suit by judgment-debtor for damages for loss occasioned by fraud of decree-holder in getting property sold falsely representing it to be encumbered—Suit is barred as matter could have been raised by an application to set aside sale under O. 21, R. 90.)
('26) 13 AIR 1926 Nag 164 (168).
('30) 17 AIR 1930 Oudh 305 (310) (DB).
('38) 25 AIR 1938 Pat 427 (428) (DB).
('35) 22 AIR 1935 Pat 409 (411): 14 Pat 857 (DB).
('36) 23 AIR 1936 Rang 218 (219) (DB).
('30) 17 AIR 1930 Rang 213 (216): 8 Rang 302 (DB).
('29) 16 AIR 1929 Rang 182 (183).
[*See also* ('33) 20 AIR 1933 All 579 (581): 55 All 735 (DB).
('24) 11 AIR 1924 Bom 495 (497) : 48 Bom 636 (DB).]
Also see O. 21, R. 16, N. 15.

12. ('37) 24 AIR 1937 Mad 511 (514) (DB).
[*See also* ('31) 18 AIR 1931 All 689 (692): 53 All 747 (DB).
('29) 16 AIR 1929 Mad 903 (906) (DB). (Objection as to the valuation of the property proclaimed to be sold.)
('17) 4 AIR 1917 Mad 185 (185) : 40 Mad 780 (DB).]

13. ('43) 30 AIR 1943 Mad 449 (451) (DB).
('28) 15 AIR 1928 Mad 203 (204) (DB).
('27) 14 AIR 1927 Mad 813 (814).
('22) 9 AIR 1922 All 27 (28) : 44 All 350 (DB).
('04) 31 Cal 822 (828) (DB).
('37) 24 AIR 1937 Lah 18 (19).
('35) 22 AIR 1935 Lah 844 (846).
('33) 20 AIR 1933 Lah 697 (701) (DB). (Assignee decree-holder's application to execute.)
('27) 14 AIR 1927 Lah 780 (780).
('25) 12 AIR 1925 Lah 640 (641) (DB). (Mortgage decree not made final—Decree-holder applying for execution and judgment-debtor not objecting — Judgment-debtor cannot object at a subsequent stage.)
('27) 14 AIR 1927 Mad 149 (151).
('26) 13 AIR 1926 Mad 177 (177).
† ('24) 11 AIR 1924 Mad 673 (675): 47 Mad 641 (DB).
✠ ('23) 10 AIR 1923 Mad 619 (651) (DB).
('14) 1 AIR 1914 Mad 365 (365) (DB).
('04) 14 Mad L Jour 103 (104) (DB).
('25) 12 AIR 1925 Nag 82 (89) : 22 Nag L R 67.
('20) 7 AIR 1920 Nag 40 (41).
('18) 5 AIR 1918 Pat 41 (46) (DB).
('28) 113 Ind Cas 92 (93) (DB) (Mad).
[But see ('35) 22 AIR 1935 Pesh 119 (121) (DB). (Decree partly executed — No objection as to its non-executability raised — Such objection can be raised in subsequent application.)]

14. ('12) 29 AIR 1942 Pat 477 (478) (DB). (Plea of limitation raised but abandoned in previous stage of execution cannot be raised in subsequent stage of the execution.)

that the properties attempted to be sold are not saleable in execution,[15] or that the application is not in accordance with law,[16] or that the application is otherwise not maintainable,[17] the objections being such that he might and ought to have taken, those objections cannot be raised again by him in subsequent proceedings for execution, if there is a final decision passed in the prior proceedings which is inconsistent with such

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✣('41) 28 AIR 1941 Mad 440 (443) (DB).
('22) 9 AIR 1922 All 100 (100) (DB).
('02) 24 All 282 (287) (DB).
('85) 7 All 282 (283, 284) (DB).
('21) 8 AIR 1921 Bom 256 (257): 45 Bom 453 (DB).
('20) 7 AIR 1920 Bom 264 (264): 44 Bom 227 (230) (DB).
('12) 14 Ind Cas 977 (977) (DB) (Bom).
('95) 19 Bom 261 (268) (DB).
('34) 21 AIR 1934 Cal 465 (467) (DB).
† ('33) 20 AIR 1933 Cal 855 (856, 857) (DB). (Objection cannot be taken even in the same execution proceedings when notice under O. 21, R. 66 is served.)
('28) 15 AIR 1928 Cal 861 (862) (DB).
('21) 8 AIR 1921 Cal 606 (608) (DB).
('13) 19 Ind Cas 377 (378) (DB) (Cal).
('96) 23 Cal 374 (387) (DB).
('22) 67 Ind Cas 56 (57) (Lah).
('04) 14 Mad L Jour 359 (374) (DB).
('01) 24 Mad 669 (671) (DB).
('83) 6 Mad 237 (238) (DB).
('27) 14 AIR 1927 Oudh 488 (489): 1 Luck 543 (DB).
('27) 14 AIR 1927 Oudh 216 (217) (DB). (Obiter.)
('26) 13 AIR 1926 Oudh 291 (293) : 1 Luck 171 (DB).
('22) 9 AIR 1922 Oudh 117 (118): 25 Oudh Cas 13.
('33) 20 AIR 1933 Pat 658 (662) : 13 Pat 86 (DB).
('31) 18 AIR 1931 Pat 422 (424): 11 Pat 430 (DB).
('24) 11 AIR 1924 Pat 122 (125) : 2 Pat 759 (DB). (Objection as to limitation dismissed for default.)
('23) 10 AIR 1923 Pat 180 (182) (DB).
('20) 7 AIR 1920 Pat 570 (574) (DB). (But so long as an application for execution is pending, the judgment-debtor can at any time show that it is barred and the Court has to dismiss it under S. 3 of the Limitation Act.)
('17) 4 AIR 1917 Pat 414 (416) (DB).
('17) 4 AIR 1917 Pat 158 (159) (DB).
('36) 23 AIR 1936 Pesh 9 (10).
[But see ('95) 1895 All W N 15 (16).]
Also see O. 21, R. 23, N. 1.

15. ('42) 29 AIR 1942 Lah 153 (158, 160) : I L R (1942) Lah 559 (FB). (Notice under O. 21, R. 54 and R. 66 duly served on judgment-debtor—Objection to saleability of property under S. 60 not raised—Judgment-debtor is barred from raising it later by principle of constructive *res judicata*.)
✣('40) 1940-2 Mad L Jour 487 (487). (49 Mad L Jour 40) : AIR 1926 Mad 12 followed.)
('30) 27 All 684 (686) (FB).
('16) 3 AIR 1916 Bom 138 (139) : 40 Bom 675 (678) (DB).
('33) 20 AIR 1933 All 192 (195). (Decision that property is ancestral is *res judicata*.)
('31) 18 AIR 1931 Bom 446 (448) (DB).
('07) 34 Cal 199 (206) (DB).
✣('26) 13 AIR 1926 Mad 12 (14) (DB).
('11) 10 Ind Cas 652 (653) (DB) (Mad).
('25) 12 AIR 1925 Nag 320 (320) : 21 Nag L R 23.
('18) 5 AIR 1918 Pat 533 (534) (DB).
[*See also* ('39) 26 AIR 1939 All 399 (400) : ILR (1939) All 602 (FB). (Execution of decree against Hindu father — Ancestral house sold—Father's objection that he being agriculturist, his house was not liable to be sold, dismissed for default—Suit by minor sons against decree-holder to restrain him from interfering with their possession of the house, held not maintainable.)]

16. † ('28) 15 AIR 1928 Cal 861 (862) (DB).
('99) 26 Cal 888 (890) (DB).
('85) 7 All 282 (283) (DB).
('21) 8 AIR 1921 Bom 260 (261): 45 Bom 952 (DB).
† ('91) 15 Bom 242 (244) (DB).
[But see ('37) 24 AIR 1937 Mad 760 (762). (Execution application not in accordance with law—Judgment-debtor ignorant of defect and not raising objection—Objection subsequently on discovery of defect is not barred.)]

17. ('42) 29 AIR 1942 Cal 369 (369) (DB).
('42) 29 AIR 1942 Pat 68 (69) (DB). (Failure to object to maintainability of application or jurisdiction of executing Court—Disposal on footing that it is a proper application—Plea that later application is barred by limitation as former one was not according to law is not maintainable.)
('05) 2 Cal L Jour 499 (503, 504) (DB).
('30) 17 AIR 1930 Mad 414 (418). (Objection on the ground of absence of attachment.)
('16) 3 AIR 1916 All 219 (219) : 38 All 289 (291) (DB). (Application to recognise assignment — Objection not raised.)
('14) 1 AIR 1914 All 329 (330). (Right to execute decree not objected to.)
('03) 1 All L Jour 80 (84): 26 All 361 (DB). (Do.)
† ('91) 13 All 564 (566, 568) (DB). (Bar under O. 23, R. 1 not pleaded.)
† ('29) 16 AIR 1929 Bom 279 (281) (DB). (No point was taken in a previous darkhast that a Receiver was appointed in respect of the decree.)
('05) 29 Bom 96 (100) (DB).
† ('34) 21 AIR 1934 Cal 472 (473) (DB).
('30) 17 AIR 1930 Lah 80 (80). (Warrant against surety—Surety asking time for settlement—Surety ultimately denying his liability—Surety held liable to decree holder, his liability having become *res judicata*.)
† ('26) 13 AIR 1926 Nag 476 (478). (Decree against person holding deceased debtor's property—Rightful heir obtaining possession of the debtor's property—Executing Court substituting the names of rightful heirs as legal representatives—Substitution not contested — Question whether decree can be executed against the property in the hands of rightful heirs is *res judicata*.)
('20) 7 AIR 1920 Pat 146 (147) : 5 Pat L Jour 639 (641) (DB). (Non-service of notice on the transferor under O. 21, R. 16 of the Civil Procedure Code not objected to.)

objections. The trend of the recent decisions of the Allahabad High Court is to the effect that an objection by the judgment-debtor would not be *res judicata* unless there is an express or implied decision overruling the objection or unless the prior execution proceeding had fructified in partial satisfaction of the decree.[18] The Rangoon High Court[19] and the Oudh Chief Court[20] also have adopted this view. A contrary view has been taken by the High Court of Madras.[21] But, although in a given case, an objection not raised by the judgment-debtor at a prior stage of the proceedings or in prior execution proceedings may not be barred by *res judicata*, the judgment-debtor may be precluded by *estoppel* from raising such objection.[22] Where the judgment-debtor in response to a notice under O. 21, R. 22 shows cause against the decree-holder's right to execute the decree and such objection is overruled, he is not precluded from subsequently objecting to the *mode* in which execution is sought as he was not bound to raise such objection at that stage.[23] But, where on the judgment-debtor failing to avail himself of an opportunity allowed to show cause why he is not liable to be arrested, an *ex parte* decision adverse to him is given by the executing Court, the matter of the liability to arrest is heard and finally decided and a subsequent objection in the same proceedings by the judgment-debtor is barred.[24]

But, in order to apply the doctrine of constructive *res judicata* to execution proceedings, it must be shown that the party affected has had clear *notice of the nature of the claim made* against him[25] and has had an opportunity of contesting the claim.[26]

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18. ✻('36) 23 AIR 1936 All 21 (29) : 58 All 313 (FB).
† ('37) 24 AIR 1937 All 446 (448) (DB).
('38) 25 AIR 1938 All 89 (90) (DB).

19. ('39) 26 AIR 1939 Rang 245 (247): 1939 Rang L R 152.
[*See also* ('41) 28 AIR 1941 Rang 56 (58) : 1940 Rang L R 725 (DB). (Decree transferred by *X* Court for execution to *Y* Court and execution proceeding in latter Court — Decree then recalled to *X* Court — Judgment-debtor's failure to raise objection as to limitation in Court *Y* is no bar to raise point in Court *X* — The point could have been raised in Court *Y* at any time — 13 Cal 257 relied on).]

20. † ('42) 29 AIR 1942 Oudh 219 (220) : 17 Luck 449 (DB).

21. ✻('41) 28 AIR 1941 Mad 440 (443) (DB).

22. ('36) 23 AIR 1936 All 21 (32) : 58 All 313 (FB). (Per Niamatullah, J.)

23. ('33) 20 AIR 1933 Lah 826 (826).

24. ('40) 42 Pun L R 374 (377).

25. † ('10) 5 Ind Cas 89 (91, 92) (DB) (Cal).
('21) 8 AIR 1921 Mad 532 (532).
('30) 17 AIR 1930 All 699 (700) : 52 All 1021.
('34) 21 AIR 1934 Bom 113 (116). (No notice to defendant of previous execution application — No *res judicata*.)
('83) 7 Bom 316 (318) (DB).
('35) 22 AIR 1935 Cal 713 (715) (DB).
('20) 7 AIR 1920 Cal 533 (534) (DB).
('15) 2 AIR 1915 Cal 130 (131) (DB).
✻('10) 8 Ind Cas 22 (24, 25) (DB) (Cal). (Notice irregularly issued under O. 21, R. 22.)
('29) 16 AIR 1929 Lah 334 (334, 335).
('37) 1937 Mad W N 361 (362). (It would unduly stretch the application of the principle of *res judicata* to execution proceedings, if it were applied to the non-appearance of a judgment-debtor when no relief is claimed against him or against his property.)
('36) 23 AIR 1936 Mad 812 (813).
† ('33) 20 AIR 1933 Mad 844 (846).
('33) 20 AIR 1933 Mad 466 (469) (DB).
('33) 20 AIR 1933 Mad 406 (406). (Declaration by Court that the notice was duly served held necessary.)
('31) 18 AIR 1931 Mad 192 (193) (DB).
† ('18) 5 AIR 1918 Mad 1167 (1172) : 40 Mad 1016 (DB).
('14) 1 AIR 1914 Mad 312 (317) (DB).
('14) 1 AIR 1914 Mad 532 (533): 37 Mad 314 (DB).
('05) 15 Mad L Jour 243 (244) (DB).
('16) 3 AIR 1916 Oudh 278 (279) : 18 Oudh Cas 374.
('10) 13 Oudh Cas 90 (93) (DB).
('28) 15 AIR 1928 Pat 471 (472) : 7 Pat 465 (DB). (Defective service — Proper service not taken as ordered.)
('20) 7 AIR 1920 Pat 615 (616).
[*See also* ('40) 1940 Nag L Jour 562 (565) (DB). (Execution stayed under S. 21, C. P. Debt Conciliation Act — Decree-holder's objection that judgment debtor not a "debtor" not barred in the absence of proof that decree-holder had knowledge on the date of stay that judgment debtor was not a "debtor".)
('33) 1933 Mad W N 127 (131).]

26. ('29) 16 AIR 1929 Lah 334 (334, 335).
† ('06) 10 Cal W N 209 (212) (DB).
† ('16) 3 AIR 1916 All 42 (43).
('12) 36 Bom 368 (372) (DB).
('85) 9 Bom 328 (332) (DB).
('83) 7 Bom 316 (318) (DB).
† ('39) 43 Cal W N 374 (378) (DB).
✻('11) 9 Ind Cas 213 (214) (DB) (Cal).
('01) 28 Cal 122 (126) (DB).

Where notice of an execution application is not served on the judgment-debtor personally and the Court does not make an order declaring that the service is sufficient, it cannot be held that the judgment-debtor has had an opportunity of contesting the claim.[27] Where the application is not one for execution of something which has been directed to be done by any decree or order so as *ipso facto* to carry information as to what the claim made or the relief prayed for is, notice to the judgment-debtor *must specify* the claim made.[28] A notice without such specification is not 'due notice' and failure to object to the points mentioned in the application will not make the rule of constructive *res judicata* applicable.[29] Thus, a notice of an execution application filed by the transferee of the decree without any indication that the Court was going to decide any question regarding the settlement of the *amount* for which the decrees were executable and the *properties* liable to be sold in execution,[30] or a notice of an application for execution without apprising the judgment-debtor of the fact that interest *not granted by the decree* was claimed,[31] is not a proper notice sufficient to make the decision on those points binding on the judgment-debtor. Similarly, where a notice is for the settlement of the terms of the proclamation of sale, the judgment-debtor cannot be deemed, by absenting himself, to have attended and raised the question whether the *property* is that of the judgment-debtor.[32] It has been held by the High Court of Madras[33] that where a decree-holder applies for a transfer of the decree for execution to another Court or the assignee of the decree applies for the recognition of his assignment under O. 21, R. 16 and for transfer of the decree for execution to another Court, the judgment-debtor on receiving notice is bound to prefer his objections, if any, to the executability of the decree and, if he fails to do so, cannot raise it in the Court to which the decree is transferred. The Patna High Court,[34] following a decision of the High Court of Madras,[35] which, however, has not been followed in later decisions of that Court, has held a contrary view. The High Court of Allahabad[36] has held that though the judgment-debtor's failure to object might operate as *res judicata* in subsequent *execution proceedings*, it will not prevent him from agitating the question in a *regular suit* subsequently brought.

The applicability of the rule of constructive *res judicata* implies that the party affected *might* have raised the contention in question. If he could not have done so, as where the decree itself is contended to be not binding on him—a plea which could not be allowed to be raised in execution proceedings — he will not be prevented from raising it in a subsequent suit.[37] Similarly, where at the time when the judgment-debtor receives

('94) 21 Cal 784 (788) : 21 Ind App 89 (PC).
('86) 13 Cal 257 (261) (DB).
('35) 22 AIR 1935 Lah 966 (966). (Execution petition dismissed before objections by defendant could be pressed—No *res judicata*.)
('14) 1 AIR 1914 Mad 663 (664) (DB).
('10) 13 Oudh Cas 90 (93) (DB).

27. ('42) 29 AIR 1942 Lah 153 (159) : ILR (1942) Lah 559 (FB).
† ('27) 14 AIR 1927 Mad 813 (814, 815).
† ('37) 24 AIR 1937 Mad 84 (87) (DB).
('36) 23 AIR 1936 Mad 812 (814).
NOTE:— Regarding the manner of determination of due service, see O. 5, R. 19, Note 2.

28. ('07) 30 Mad 255 (263) (DB).
('09) 4 Ind Cas 1141 (1142) (DB) (Mad).

29. ('07) 30 Mad 255 (263) (DB).

30. ('24) 11 AIR 1924 Mad 518 (520) (DB).
('28) 15 AIR 1928 Mad 746 (758, 759) (DB). (Notice to legal representatives to show cause why the decree should not be executed. Objection that the property does not belong to judgment-debtor is not barred.)
('07) 4 All L Jour 400 (402, 403). (Notice not showing that certain properties were to be proceeded against.)
[*See also* ('29) 16 AIR 1929 Mad 903 (906) (DB). ('29) 16 AIR 1929 Rang 172 (173).]

31. ('06) 17 Mad L Jour 311 (312) (DB).
('05) 28 Mad 355 (357) (DB).

32. † ('24) 11 AIR 1924 Mad 1 (5, 6) : 46 Mad 768 (FB).

33. † ('29) 16 AIR 1929 Mad 199 (200) (DB).
† ('24) 11 AIR 1924 Mad 673 (675) : 47 Mad 641 (DB).

34. ('27) 14 AIR 1927 Pat 170 (171) (DB).

35. ('23) 10 AIR 1923 Mad 487 (487) (DB).

36. ('30) 17 AIR 1930 All 628 (630) : 52 All 217 (DB).

37. ('07) 30 Mad 402 (405) (DB).
('83) 1883 Pun Re No. 143.

the notice as to the execution application he is not aware of the facts entitling him to object, he will not be precluded from raising the objection subsequently.[38]

An opinion has been expressed in the undermentioned cases[39] that the principle of constructive *res judicata* cannot be extended to execution proceedings. This view is not in consonance with the general trend of decisions referred to above, and, it is submitted, is not correct. The general principles of the law of *res judicata* include the rule of constructive *res judicata* as well,[40] and it has further been decided by their Lordships of the Privy Council that where *it was incumbent on the judgment-debtor to raise an objection* to the execution and he does not do so, he cannot challenge the decision afterwards.[41] In that case their Lordships remarked as follows: "It was not only competent to the present respondents to bring the plea forward, but it was *incumbent on them to do so* if they proposed to rely on it."

A previous order deciding a point must, in order to be conclusive in subsequent proceedings, be *in force* at the time of the subsequent proceedings.[42] It must not be a collusive order or an order fraudulently obtained.[43] It must also satisfy the fundamental essentials of the general principles of *res judicata*.[44]

Firstly : — The decision in the former proceeding must have been between the *same parties* as in the subsequent proceeding. If the parties are different, the rule does not apply.[45]

Secondly : — The matter in issue in the subsequent proceeding must have been directly and substantially in issue in the former proceeding either expressly or impliedly.[46] Where the previous decision was only an *incidental* one or was on a matter *different*

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38. ('38) 25 AIR 1938 Oudh 106 (106) (DB).
[*See also* ('40) 27 AIR 1940 Lah 27 (30). (Judgment-debtor entitled to new defence by virtue of an Act coming into force during pendency of execution proceedings.)]

39. ('23) 10 AIR 1923 Mad 212 (214) (DB).
('08) 35 Cal 1060 (1064) (DB).
('35) 22 AIR 1935 All 727 (729) : 57 All 965 (DB).
† ('33) 20 AIR 1933 All 922 (923) (DB).
('30) 17 AIR 1930 All 628 (629, 630) : 52 All 217 (DB).
('22) 9 AIR 1922 All 413 (414, 415) : 44 All 159 (DB).
('22) 9 AIR 1922 All 247 (249, 252) : 44 All 130 (DB).
('15) 2 AIR 1915 All 344 (345) : 37 All 589 (590, 591) (DB).
('15) 2 AIR 1915 All 105 (106).
† ('81) 3 All 141 (143) (FB).
† ('19) 6 AIR 1919 Bom 75 (77).
('09) 3 Ind Cas 47 (49) (DB) (Cal).
('35) 22 AIR 1935 Lah 942 (943). (Objection to attachment may be raised at any stage.)
('07) 30 Mad 504 (505) (DB).
('07) 17 Mad L Jour 311 (312) (DB).
('33) 20 AIR 1933 Nag 287 (289).
('16) 3 AIR 1916 Oudh 338 (339).
('25) 12 AIR 1925 Pat 588 (590) (DB).
('22) 9 AIR 1922 Pat 289 (290) : 1 Pat 593 (DB).
[*See also* ('17) 4 AIR 1917 Nag 118 (119).
('36) 23 AIR 1936 Pat 496 (498) (DB).]

40. † ('31) 18 AIR 1931 Mad 381 (394) (DB).
† ('37) 24 AIR 1937 Lah 772 (776).

41. ('21) 8 AIR 1921 P C 23 (24) : 48 Ind App 45 (PC).
[*See also* ('36) 23 AIR 1936 Rang 218 (219) (DB).]

42. ('16) 3 AIR 1916 Mad 886 (886). (Order vacated by subsequent proceeding is not in force.)
[*See also* ('11) 35 Bom 245 (247) (DB).]

43. ('24) 11 AIR 1924 Mad 189 (191) (DB). (Proceedings for recognizing assignment of decree — Executability of decree not raised—No question of *res judicata* arises.)

44. ('21) 8 AIR 1921 Mad 248 (254) : 44 Mad 77 (FB).

45. † (1900) 27 Cal 210 (213, 215) (DB).
† ('23) 10 AIR 1923 Cal 322 (323) (DB).
('36) 23 AIR 1936 All 467 (468) (DB).
('12) 34 All 518 (521) (DB).
('33) 20 AIR 1933 Mad 508 (509, 510).
('21) 8 AIR 1921 Mad 30 (36) : 44 Mad 232 (DB).
('12) 16 Ind Cas 529 (529) (DB) (Mad).
† ('38) 25 AIR 1938 Nag 273 (274) : I L R (1939) Nag 104. (Orders in execution will affect only parties and their privies—Order against decree-holder after auction sale to which auction purchaser is not party is not *res judicata* against auction purchaser.)
('39) 26 AIR 1939 Pat 41 (42) (DB).

46. ('90) 14 Bom 206 (212) (DB).
('29) 16 AIR 1929 Rang 182 (183). (Intentional omission to claim interest — Amount paid up—Subsequent application claiming interest.)
('32) 19 AIR 1932 Mad 327 (327, 328).
[*See* ('34) 21 AIR 1934 Lah 153 (154, 155). (Question of legality of attachment before judgment not raised in suit but in execution—*Held* not barred on the ground that it did not arise in the prior stage.)]

from that in issue in the subsequent proceeding, it would not operate as a bar.[47] Thus, when an application for execution, in which the question of limitation is raised by the judgment-debtor, is *dismissed for default* of the decree-holder, a decision at the same time, also on the question of limitation, will not operate as *res judicata* as it was not necessary to be decided and was therefore not a substantial issue.[48] Similarly, where a decree of a trial Court has become merged in an appellate decree, an order of the executing Court passed in execution of the original decree construing certain words in the decree in a particular way cannot operate as *res judicata* in construing the same words in proceedings in execution of the appellate decree.[49]

Thirdly :— The litigation in the subsequent proceeding must have been under the *same title* as in the former proceeding.[50] Thus, a decision against a person in a representative capacity will not operate as *res judicata* in a subsequent proceeding by or against him in his individual capacity.[51]

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47. ('40) 27 AIR 1940 Oudh 226 (227). (Previous order of a formal ministerial character — No adjudication—No *res judicata*.)
('39) 26 AIR 1939 Lah 556 (557). (A decision in a previous execution proceeding that the judgment-debtor was not proved to be an agriculturist is not *res judicata* in a subsequent execution proceeding, when the properties attached in both the proceedings are different.)
('38) 1938 Nag L Jour 229 (232). (Stay of execution under S. 21, Debt Conciliation Act, not being order under S. 47, C. P. C., did not affect rights of the parties.)
('95) 19 Bom 258 (260) (DB). (Dismissal of application for execution of original decree does not bar execution of appellate decree.)
('95) 18 Mad 482 (483) (DB). (Relief claimed in respect of distinct periods—No *res judicata*.)
† ('26) 13 AIR 1926 All 220 (222) : 48 All 245. (Different properties in question.)
('11) 33 All 264 (271): 38 Ind App 37 (PC).
('09) 31 All 590 (591)(DB). (Plea of part payment, though rejected, as not proved, in an application for execution of one decree may again be put in in an application for execution of another decree against the same person.)
† ('95) 1895 All W N 119 (120) (DB). (Order that further execution should not issue not made on any issue before the Court.)
('88) 10 All 51 (53).
('27) 14 AIR 1927 Bom 234 (236) (DB). (A debt due to judgment-debtor attached—Debtor pleading but the amount due by him was smaller than what was claimed—Court ordering sale—Order is not one under O. 21, R. 63—Suit by purchaser of the debt to recover full amount of the debt—Same plea was held to be open to defendant.)
('08) 32 Bom 391 (393)(DB). (Incidentally in issue.)
('93) 18 Bom 203 (205) (DB). (Dismissal of an application for the execution of the original decree, no bar to an application for execution of the appellate decree.)
('02) 28 Cal 122 (126) (DB).
† ('98) 25 Cal 262 (271) (SB). (Decision that a judgment-creditor cannot sell certain properties does not bar his attaching them in execution.)
('93) 20 Cal 755 (758) (DB). (Relief asked for, [illegible])
('84) 10 Cal 196 (206) : 10 Ind App 119 (PC).
('37) 24 AIR 1937 Lah 638 (639). (Finding on issue not necessary for decision—No *res judicata*.)
('29) 16 AIR 1929 Lah 437 (438). (Interpretation of decree not necessary for disposal of execution—Opinion expressed by executing Court will not be binding on parties.)
('35) 22 AIR 1935 Mad 935 (935). (Judgment-debtor not objecting to jurisdiction — No notice to him of subsequent application — Objection that subsequent applications were not to the proper Court is not barred.)
('29) 16 AIR 1929 Mad 404 (408) (DB). (Subsequent execution petition for different relief but based on same question of fact as prior execution petition not maintainable.)
('27) 14 AIR 1927 Mad 842 (844) (DB).
('27) 14 AIR 1927 Mad 327 (328). (Party not debarred from defending his action under O. 21, R. 89 because he desisted from his action under R. 58 of O. 21.)
('24) 11 AIR 1924 Mad 509 (510)(DB). (Incidental finding.)
('21) 11 AIR 1924 Mad 1 (6) : 46 Mad 768 (FB). (Failure to attend at the settlement of sale proclamation—Effect — Liability of property to attachment can be agitated.)
('25) 12 AIR 1925 Oudh 417 (417) : 29 Oudh Cas 98 (DB). (Substitution under O. 22 applied for in execution—Refusal does not bar application under O. 21, R. 16.)
('25) 12 AIR 1925 Pat 822 (823) (DB). (Dismissal of application by judgment-debtor under O. 21, R. 2 does not bar decree-holder from applying for certifying payment.)
Also see Note 108.

48. ('01) 28 Cal 122 (126) (DB).
('43) 30 AIR 1943 Pesh 52 (54) (DB).
† ('36) 40 Cal W N 510 (511) (DB).
† ('32) 19 AIR 1932 Pat 357 (358) : 11 Pat 607 (DB). (Default of both parties — Execution proceedings and judgment-debtor's objection both dismissed—No *res judicata*.)

49. † ('32) 19 AIR 1932 All 288 (288) : 54 All 444 (DB).
† ('33) 20 AIR 1933 Lah 352 (353) : 14 Lah 591.

50. ('90) 17 Cal 57 (63) (DB).

51. ('06) 28 All 614 (616).

Fourthly : — The Court, in the former proceeding must have been *competent* to decide the matter in dispute.[52]

Fifthly : — The point raised in the subsequent proceeding must have been heard and decided in the former proceeding either expressly or constructively.[53] Where, therefore, an application is dismissed for default of appearance,[54] or for non-prosecution,[55] or as being premature,[56] or as being "too late,"[57] or the application is struck off "for the present,"[58] or is allowed to be withdrawn with liberty to bring a fresh application,[59] or is

52. ('25) 12 AIR 1925 Pat 807 (810) : 4 Pat 440 (DB). (Order *ultra vires*—Does not operate as *res judicata* in same proceeding.)
† ('07) 11 Cal W N 236 (238) (DB).
('06) 1906 All W N 251 (251) : 29 All 12 (DB).
✣ ('05) 2 Cal L Jour 384 (388) (DB).
† ('77) 2 Cal 327 (335) : 4 Ind App 66 (PC).
('17) 4 AIR 1917 Oudh 92 (96) (DB).

53. ('43) 30 AIR 1943 Sind 11 (12) : ILR (1942) Kar 326 (DB). (Previous execution applications never made subject of proper contest and decision hence no *res judicata*.)
('40) 44 Cal W N 749 (752) (DB). (Point raised but not decided.)
('99) 26 Cal 946 (949) (DB). (Point not raised and decided—No bar.)
† ('12) 14 Ind Cas 977 (977) (DB) (Bom).
('34) 21 AIR 1934 All 465 (469) (DB).
('31) 18 AIR 1931 All 65 (68) : 52 All 964 (DB).
('11) 8 All Jour 844 (848).
† ('07) 4 All Jour 400 (402).
('05) 2 All L Jour 67 (68) (DB).
† ('30) 17 AIR 1930 Bom 132 (134) : 54 Bom 162. (No issue and no decision.)
('19) 6 AIR 1919 Cal 466 (467) (DB). (Objection not decided.)
('18) 5 AIR 1918 Cal 705 (706) : 45 Cal 530 (DB).
✣ ('10) 7 Ind Cas 55 (57) (DB) (Cal).
✣ ('09) 3 Ind Cas 47 (49) (DB) (Cal). (Mere issue of a notice under O. 21, R. 22 not followed by any order for execution or by any act of the Court, cannot be construed as an adjudication.)
('68) 10 Suth W R 8 (9, 10) (DB).
('39) 26 AIR 1939 Lah 168 (169). (Order dismissing objection by judgment-debtor to attachability of land—Continuation of proceedings—Order dismissing objection not final and could be reversed.)
('26) 13 AIR 1926 Mad 692 (693, 694) (DB).
('24) 11 AIR 1924 Mad 518 (519) (DB). (Application for execution by transferee of decree — Judgment-debtor absent — Executability of decree for particular amount not in question then — Subsequent objection as to executability not barred.)
† ('24) 11 AIR 1924 Mad 145 (146) (DB). (Earlier order not deciding the point raised in the later application.)
('01) 24 Mad 681 (682, 683) (DB). (Question of mesne profits not decided.)
('36) 23 AIR 1936 Pat 616 (619) (DB).
[*See also* ('35) 22 AIR 1935 Pat 485 (486) (DB). (Order for sending decree to another Court for execution is not an order for execution so as to give rise to bar of constructive *res judicata*.)]

54. † ('41) 28 AIR 1941 Nag 152 (153).
† ('29) 16 AIR 1929 Bom 217 (219) (DB).
('35) 22 AIR 1935 All 238 (239).
('34) 18 Bom 429 (431) (DB).
† ('35) 22 AIR 1935 Cal 664 (665, 666) (DB). (Notice of execution served on defendant —On the date fixed both parties not appearing — Case dismissed for default—No constructive *res judicata* unless Court had ordered issue of any further process in execution.)
('37) 24 AIR 1937 Mad 289 (290).
('36) 23 AIR 1936 Pesh 41 (43).
[*See also* ('35) 22 AIR 1935 Cal 230 (231) (DB). (Execution application—*Ex parte* finding that it is not barred by limitation and notice ordered—Judgment-debtor served— Both parties absent and execution case dismissed — Judgment-debtor can raise plea of limitation in a later execution petition.)
('32) 19 AIR 1932 Cal 569 (571) (DB). (Objections of judgment-debtor dismissed for default—Same objection can be taken again in a subsequent stage of the same execution proceeding.)
('32) 19 AIR 1932 Lah 643 (643). (Do.)]

55. ('23) 10 AIR 1923 Cal 287 (288) (DB). (Dismissal of objection by judgment-debtor.)
('90) 12 All 539 (541) (DB).
[*See also* ('37) 24 AIR 1937 Mad 289 (290). (Application dismissed as being "not pressed"—No *res judicata*.)]

56. ('28) 15 AIR 1928 Oudh 38 (39) (DB). (Dismissal of objection to execution.)
('38) 25 AIR 1938 All 377 (379) (DB). (Objection by judgment-debtor dismissed as being premature and misconceived.)

57. ('21) 8 AIR 1921 Mad 279 (280) (DB).
('38) 25 AIR 1938 Pat 216 (220) (DB). (Where a party instead of applying under S. 47 applies under O. 21, R. 58 and such application is dismissed as having been filed late and as being under O. 21, R. 58, he is not barred by the rule of constructive *res judicata* from afterwards filing proper application under S. 47.)

58. ('95) 17 All 106 (111, 112) : 22 Ind App 44 (PC).
('89) 1889 All W N 163 (163) (DB).
† ('93) 15 All 198 (205) (DB).
† ('93) 15 All 84 (101) (FB). (Overruling 15 All 49.)
† ('06) 3 Cal L Jour 240 (244).
('03) 1903 Pun L R No. 20, p. 70 : 1902 Pun Re No. 90.

59. ('42) 29 AIR 1942 Nag 1 (3) : ILR (1942) Nag 118 (DB). (Where a previous application for the appointment of a receiver has been made and not pressed but withdrawn because the opposite party undertakes to observe certain conditions which are not observed, the matter is not *res judicata* and a second application for the appointment of a receiver is not barred: AIR 1924 P C 202, explained and distinguished.)
('97) 23 Bom 35 (38, 39) (DB).

rejected on preliminary grounds,[60] the merits of the application cannot be said to have been heard and decided and the decision therefore cannot be conclusive. It has been held that the same principle will apply to an objection raised by the judgment-debtor to the execution of a decree as to an application for execution[61] and that where such objection is dismissed for default or for some other reason without going into the merits, the dismissal cannot operate as *res judicata*.[62]

The general principle of *res judicata* applicable to execution proceedings is, however, confined to the decision of *substantive* rights so decided in the former proceedings; where the decision was on a question of *procedure* as it then stood, it will not operate as *res judicata* in a subsequent proceeding when the procedure itself has been changed subsequently by statute law.[63] In the undermentioned case,[64] the executing Court decided that a certain property of the judgment-debtor was not saleable under the law. Subsequently, the law was amended so as to make the property saleable. It was held that the order of the executing Court did not operate as *res judicata* inasmuch as that order was only tantamount to a decision that the property was not saleable under the law as it stood at the time of the order, whereas the question that was then in issue was whether the property was saleable under the law as altered. But, it was held that under the prior decision of the executing Court the judgment-debtor had acquired a substantive right and that the change in the law could not affect such right. The failure of the judgment-debtor to object in previous execution proceedings to the amount for which execution is taken out, will not preclude him from taking objection to it in subsequent execution proceedings.[65] The reason is that the principle of constructive *res judicata* can, as already seen above, only apply to points which, if successfully taken by the judgment-debtor would have modified the orders of the Court. As the mere fact that the sum for which the decree is sought to be executed is not the correct sum which is due by the judgment-debtor would not prevent the execution from proceeding, the

('95) 17 All 106 (111, 112) : 22 Ind App 44 (PC).
('35) 22 AIR 1935 Mad 786 (787). (In order that plea of constructive *res judicata* may be raised, it must be shown that the Court passed an order adverse to the party whom it is now sought to bind.)

60. ('81) 6 Cal 203 (205, 206) (DB).
('78) 3 Cal 47 (58) : 1878 Pun Re No. 7 : 4 Ind App 127 (PC).
('37) 24 AIR 1937 Cal 226 (229). (Execution application dismissed as not maintainable in form in which it was brought.)

61. ('98) 20 All 428 (430) (DB).

62. ('40) 27 AIR 1940 Lah 67 (67). (Objection under O. 21, R. 58 dismissed as collusive not on merits but summarily without inquiry — Subsequent objection under S. 47 not barred by *res judicata*.)
('98) 20 All 428 (430) (DB).
('23) 10 AIR 1923 Cal 287 (288) (DB).
('36) 23 AIR 1936 Lah 930 (931). (Objection dismissed for failure to deposit money as undertaken.)
† [But see ('36) 23 AIR 1936 All 21 (29) : 58 All 313 (FB). (Per Sulaiman, C. J. — Objection taken but dismissed or struck off—Dismissal or striking off though not on merits, will be *res judicata* if the application for execution has become fructuous.)
('42) 29 AIR 1942 Lah 71 (72). (If a matter has once been allowed to be finally decided, there is no reason why the matter should be allowed to be re-opened whether it has been decided on the merits or not.)
('35) 22 AIR 1935 Lah 966 (966). (The view of Lahore High Court is that the rule of constructive *res judicata* may be applied to objections in execution whether those have been decided on merits or not. In this case, however, the objection dismissed for default was held to be not *res judicata* as the assignee (decree-holder) had ceased to prosecute execution before the objection was so dismissed.)
('35) 22 AIR 1935 Cal 816 (817) (DB). (Objection by judgment-debtor allowed to be dismissed in default—Matter cannot be re-agitated.)]

63. † ('16) 3 AIR 1916 Mad 728 (730): 39 Mad 923 (DB).
('95) 18 Mad 131 (133).

64. ('37) 24 AIR 1937 All 48 (50) (DB).

65. † ('33) 20 AIR 1933 Mad 844 (847).
('33) 20 AIR 1933 Nag 182 (184) : 29 Nag L R 193.
('15) 2 AIR 1915 All 344 (345) : 37 All 589 (DB).
† ('37) 24 AIR 1937 Mad 511 (514) (DB). (Mere fact that the sum for which decree is sought to be executed is not the correct amount due by the judgment-debtor would not prevent execution from proceeding and hence failure to object on this point will not be *res judicata*.)
† ('29) 16 AIR 1929 Mad 903 (906) (DB).

failure to raise objection in regard to the amount will not preclude the objection being taken subsequently.[66]

A proceeding under O. 21, R. 66 of the Code, in so far as it embodies an order which merely settles the details to be entered in a sale proclamation is a non-judicial of *quasi*-judicial proceeding and the enquiry is a summary one. A decision in such a proceeding has been held not to operate as *res judicata* in subsequent proceedings.[67] The principle of constructive *res judicata* does not prevent a decree-holder who has applied for execution of a portion of a decree from making a fresh application for the balance.[68] Similarly, a person who is entitled to restitution of two sums paid by him but who only applies in respect of one such sum is not precluded from applying afresh in respect of the other sum.[69]

24. Application for amendment of decree. — The same principles as are discussed in Note 23 apply to applications for amendment of decrees. Although the applications are not "suits," a decision on an application on the merits will operate as *res judicata* in a subsequent application for amendment[1] or in a subsequent suit[2] upon general principles of *res judicata*. But, where the subsequent application is materially different from the previous application it is not barred.[3]

25. Order rejecting memorandum of appeal. — An order rejecting a memorandum of appeal presented by an unauthorised person cannot operate as *res judicata* in a subsequent proceeding in which an appeal has been filed in proper form.[1]

26. Application for review. — On general principles of *res judicata*, the dismissal on merits of an application for review will bar a suit to set aside the decree on the same *grounds*.[1] A contrary view has, however, been taken in the undermentioned cases[2] on the ground that an application for review is not a "suit" and that S. 11, or the doctrine of constructive *res judicata*, therefore, does not apply. It is submitted that the latter view is not correct inasmuch as the plea of *res judicata* still remains apart from the limited provisions of the Code.[3]

27. Arbitration proceedings.[1] — A private award, if valid, is entitled to that respect which is due to the judgment of the Court of last resort. It is, in fact, a final adjudication by a Court of the parties' own choice, and, until impeached upon sufficient grounds in an appropriate proceeding, is conclusive upon the merits of the controversy submitted ; in other words, an award operates to merge and extinguish all claims embraced in the submission, and, after it is made, the submission and award furnish the only basis by which the rights of the parties can be determined and constitute a bar to any action on the original demand.[1a]

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66. † ('37) 24 AIR 1937 Mad 511 (514) (DB).
67. ('24) 11 AIR 1924 All 480 (480).
† ('25) 12 AIR 1925 Pat 500 (502) : 4 Pat 731 (DB).
68. ('36) 23 AIR 1936 Lah 246 (247).
69. ('36) 23 AIR 1936 Lah 246 (247).

Note 24

1. ('37) 24 AIR 1937 Oudh 246 (247) : 13 Luck 186 (DB). (But where the application is not decided on merits subsequent application is not barred.)
('28) 15 AIR 1928 Lah 244 (245).
✠('11) 12 Ind Cas 151 (153) : 39 Cal 265 (DB).
('15) 2 AIR 1915 Cal 696 (697) (DB).
2. ('10) 5 Ind Cas 119 (120) (DB) (Mad).
3. ('27) 14 AIR 1927 Rang 57 (57): 4 Rang 347 (DB).

Note 25

1. ('30) 17 AIR 1930 All 112 (113) (DB.)

Note 26

1. ('15) 2 AIR 1915 Cal 161 (161) (DB).
† ('05) 2 Cal L Jour 508 (510) (DB).
2. ('13) 18 Ind Cas 444 (444) : 40 Cal 541 (DB).
('30) 17 AIR 1930 Oudh 112 (112).
✠('09) 2 Ind Cas 129 (134) (DB) (Cal).
3. ('21) 8 AIR 1921 P C 11 (13) : 48 Cal 499 : 48 Ind App 187 (PC).

Note 27

1. The discussion in this Note is based on cases dealing with the provisions of Schedule II of the Code. The schedule has now been repealed by the Arbitration Act of 1940. But the discussion is retained as being useful for illustrating the principles of *res judicata*.
1a. ✠('06) 33 Cal 881 (888) (DB).

The award may be oral or written and its binding effect in either case is the same[2] whether an application has been made under Sch. II, paras. 20 and 21 to file the award or not[3] and whether a decree has been passed thereon or not.[4] But the award must have been made *before* a suit is filed on the same matter; when a private reference is made to arbitrators, but before any award is given, one of the parties to the reference files a suit in respect of the subject-matter of the reference, the arbitrators become *functus officio* and any award passed thereafter is a nullity and will not operate as a bar to the suit.[5]

An award on a private reference[6] or on a reference through Court[7] in a pending suit on which a decree is passed will, of course, operate as *res judicata* in any subsequent suit on the same matter, unless the arbitrators had acted without jurisdiction.[8] A suit is always maintainable to *set aside* an award on the ground of want of *jurisdiction* of the arbitrators, or on the ground that there was no contract of reference or that it was cancelled or that it was obtained by fraud.[9] But where objection is taken under S. 14 of the Arbitration Act to the *jurisdiction* of the arbitrator to make the award and such objection is decided by the Court, a subsequent suit to set aside the award on the ground of want of jurisdiction of the arbitrator will be barred by the rule of *res judicata*.[10] The mere fact, however, that an award in an arbitration through Court is not strictly in accordance with the terms of the reference,[11] or that the arbitrators had decided a mixed question of law and fact which had arisen before them,[12] does not render the decree void for want of jurisdiction.

An application to file a private award in Court is required by para. 20 of Sch. II of the Code to be numbered and registered as a suit. The question has arisen whether this makes such application a "suit" within the meaning of the Code and on this question there is a conflict of decisions.[13] But, even on the assumption that such a proceeding is not a suit, it is settled law that the general principle of *res judicata* will apply to such cases.[14] Where an award in a private arbitration is sought to be

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† ('20) 7 AIR 1920 Sind 124 (125, 126) : 13 Sind L R 193. (Kemp, A. J. C.)
('23) 10 AIR 1923 All 518 (519) : 45 All 472 (DB).
('38) 42 Cal W N 367 (370).
('09) 2 Ind Cas 414 (415) : 37 Cal 63 (DB).
† ('85) 11 Cal 386 (393) : 12 Ind App 67 (PC).
('96) 19 Mad 290 (291) (DB).
('30) 17 AIR 1930 Oudh 389 (392).
('16) 3 AIR 1916 Low Bur 101 (102).
2. ('24) 11 AIR 1924 Rang 60 (61) (DB).
3. ('06) 33 Cal 881 (887) (DB).
4. ('20) 7 AIR 1920 Mad 615 (617) (DB).
5. ✣(1912) 3 K B 257 (272, 274), Doleman and sons v. Osseti Corporation.
('18) 5 AIR 1918 Mad 719 (719)): 41 Mad 115 (DB). [*See also* ('30) 17 AIR 1930 All 584 (586) (DB). (The Court however proceeded on the ground that where a preliminary award is set aside the final award also falls with it.)]
6. ('21) 26 Cal W N 940 (942) (DB).
7. ('40) 27 AIR 1940 Lah 107 (109).
('81) 7 Cal 727 (729) (DB).
('22) 26 Cal W N 940 (942, 943) (DB).
8. ('07) 34 Ind App 125 (131) : 29 All 519 : 10 Oudh Cas 343 (PC).
9. ('24) 11 AIR 1924 Sind 60 (61).
† ('34) 21 A I R 1934 Lah 794 (796) : 16 Lah 340 (DB). (Suit to set aside decree based on award on the ground of fraud.)
10. † ('32) 19 AIR 1932 Lah 378 (380).
✣('32) 19 AIR 1932 Sind 20 (22).
('36) 23 AIR 1936 Lah 865 (870) (DB).
('37) 24 AIR 1937 Sind 110 (112) : 31 Sind L R 55 (DB). (Objection under Arbitration Act, S. 14—Objection to validity of submission.)
11. ('20) 7 AIR 1920 Cal 647 (647).
12. ('29) 16 AIR 1929 All 521 (524) (DB).
13. ('27) 14 AIR 1927 Bom 259 (259) (DB). (Proceeding is a suit.)
('28) 15 AIR 1928 Mad 969 (971) (DB). (Do.)
† ('21) 8 A I R 1921 Bom 389 (390) : 45 Bom 239 (DB). (Proceeding is not suit.)
† ('32) 19 A I R 1932 Lah 374 (375) : 13 Lah 672 (DB). (Do.)
('29) 16 AIR 1929 Lah 533 (533). (Do.)
('21) 8 AIR 1921 Pat 161 (161) : 6 Pat L Jour 287 (DB). (Do.)
('10) 32 All 484 (488) (DB). (Do.)
('11) 33 All 490 (493) (DB). (Do.)
('37) 169 Ind Cas 788 (792) (Cal). (The word 'suit' in S. 11, C. P. Code, includes arbitration proceedings, and matters which have been fully dealt with in those proceedings could not be reopened in a subsequent suit.)
14. ('21) 8 AIR 1921 Bom 389 (391): 45 Bom 329. (Assumes that the general principles of *res judicata* apply in certain cases.)
† ('25) 12 AIR 1925 Sind 42 (46):10 Sind L R 360.

filed in Court under paras. 20 and 21 of the Second Schedule, the Court has to consider whether any of the grounds mentioned in paras. 14 and 15 thereof are proved and, if not, then to file the award.[15] The refusal to file the award, therefore, will be *res judicata* in so far as it is based on a finding *as to the existence of such grounds on an issue raised in respect thereof*.[16] Where the particular ground on which the validity of the award is assailed in the suit was not raised or put in issue or could not be decided by the Court, the refusal to file the award cannot operate as *res judicata* in respect of such ground.[17] Thus, it has been held that a refusal to file an award cannot be *res judicata* in a suit questioning the validity of the award.[18]

The Allahabad High Court has, however, in the undermentioned cases[19] held that a refusal to file the award cannot operate as *res judicata* in any case, in a subsequent suit, the reason given being that the proceedings are not *suits* and that S. 11 does not, therefore, apply. The decision that simply because the former proceeding is not a suit there can be no *res judicata* on points directly and substantially in issue and decided, cannot be accepted as correct. The Privy Council decision in *Muhammad Newaz Khan* v. *Alam Khan*[19a] does not really support such a decision but only observes as follows :

> "In order to make the refusal to file an award a binding judgment against its validity on the ground of partiality of the arbitrator, it would be at least necessary to shew that the point was definitely raised and put in issue and made the subject of trial.[20]

In the undermentioned case,[21] the Nagpur High Court has held that where an award is compulsorily registrable but has not been registered and no objection is taken on this ground to the filing of the award and the award is filed, the matter will become *res judicata* and the objection cannot be raised in a subsequent suit. Where there is no *adjudication* on the application to file an award as, for example, where abatement is ordered on the ground of non-joinder of representatives[22] or where the question was never before the arbitrator and was not included in the reference,[23] there can be no question of *res judicata*. Similarly, where an award does not *replace* but merely *ascertains and defines* the original rights of the parties, it does not bar a suit on the original rights.[24]

28. Miscellaneous proceedings.

Probate proceedings. — It has been held by the High Court of Bombay, that contentious probate proceedings, being required to be in the form of suits, under S. 83 of the Probate and Administration Act, constitute "suits" under S. 11 of the Code and a finding by a Probate Court in such proceedings operates as *res judicata* under S. 11 as between the parties thereto.[1] The undermentioned cases,[2] however, seem to doubt whether

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('97) 21 Bom 465 (467) (DB).
('37) 24 AIR 1937 Nag 132 (134):ILR(1937) Nag 6.
('32) 19 AIR 1932 Pat 105 (111) : 11 Pat 50 (DB).
(Decree on award in Small Cause Court — Competence of Court for *res judicata* not altered by reason of decree being on award.)

15. ('21) 8 AIR 1921 All 384(387):43 All 108(DB).

16. † ('91) 18 Ind App 73 (77) : 18 Cal 414 : 1891 Pun Re No. 70 (PC)
('30) 17 AIR 1930 Sind 195 (196, 197).

17. † ('91) 18 Ind App 73 (77) : 18 Cal 414 : 1891 Pun Re No. 70 (PC).
('21) 8 AIR 1921 Bom 389 (391):45 Bom 329 (DB).
('34) 21 AIR 1934 Mad 68 (69).
('95) 18 Mad 423 (433) (FB).

18. ('91) 18 Ind App 73 (77) : 18 Cal 414 : 1891 Pun Re No. 70 (PC).
('06) 28 All 21 (23) (DB).
('21) 8 AIR 1921 All 384 (386) : 43 All 108 (DB).

19. ('10) 6 Ind Cas 127 (129) : 32 All 484 (DB).
('11) 33 All 490 (493) (DB).

19a. ('91) 18 Ind App 73 (76) : 18 Cal 414 : 1891 Pun Re No. 70 (PC).

20. *See* ('21) 8 AIR 1921 Bom 389 (390) : 45 Bom 329 (DB).
[*See also* ('07) 9 Bom L R 259 (263) (DB).]

21. ('37) 24 AIR 1937 Nag 132 (134) : ILR (1937) Nag 6.

22. ('25) 12 AIR 1925 Bom 418 (418) (DB).

23. ('20) 7 AIR 1920 P C 121 (123) (PC).
('19) 6 AIR 1919 Lah 49(50):1919 Pun Re No.68(DB).

24. ('27) 14 AIR 1927 Bom 237 (238) (DB).

Note 28

1. † ('14) 1 AIR 1914 Bom 8 (15):38 Bom 309 (FB).
('14) 1 AIR 1914 Bom 181 (184) : 38 Bom 272 (DB).

2. † ('24) 11 AIR 1924 Mad 578 (580) (DB).

such proceedings are "suits" for the purposes of S. 11 but hold that a subsequent suit on the same question will be barred, in any view, on general principles of law. In *Kalipada De* v. *Dwijapada Das*,[3] their Lordships of the Privy Council have held that the general principles of *res judicata* apply to probate proceedings, from which it may be inferred that such proceedings are not suits to which S. 11 is directly applicable. See also the undermentioned cases.[4]

Insolvency proceedings. — A decision on the merits in an insolvency proceeding is final and binding on the parties as *res judicata*.[5] Conversely, the decision in a *suit* between the parties will operate as *res judicata* in a subsequent insolvency proceeding.[6] But the dismissal of an application for insolvency for *default* is not an adjudication on the merits and will not bar a second application for insolvency.[7] Nor can a decision in insolvency proceedings between a creditor and the insolvent operate as *res judicata* in a subsequent suit between the insolvent and his surety.[8] Where a petition for adjudication as an insolvent is dismissed, a subsequent petition alleging a change of circumstances will not be barred by the principle of *res judicata*.[9] See also the undermentioned cases.[10]

('25) 12 AIR 1925 Mad 861 (869, 870).
† ('16) 3 AIR 1916 P C 78 (80) : 43 Cal 694 : 43 Ind App 91 (PC). (Affirming on appeal 11 Cal L Jour 623.)
('14) 1 AIR 1914 Bom 114 (115) : 38 Bom 427 (434) (DB). (Genuineness of will.)
('14) 1 AIR 1914 Bom 8 (15) : 38 Bom 309 (FB). (Validity of a will.)
('79) 4 Cal 360 (362) (DB). (Do.)
('18) 5 AIR 1918 Lah 250 (257) : 1918 Pun Re No. 13 (DB). (Do.)
('30) 17 AIR 1930 Oudh 29 (31) : 5 Luck 186 (DB).
† ('23) 10 AIR 1923 Rang 257 (258) : 1 Rang 258 (DB).

3. †('30) 17 AIR 1930 P C 22 (23) : 57 Ind App 24 (PC). (Affirming on appeal AIR 1927 Cal 421.)

4. ('93) 20 Cal 888 (894, 895) (DB).
('11) 8 All L Jour 1063 (1069) (DB).
('10) 34 Bom 589 (592) (DB).
('06) 4 Cal L Jour 492 (494, 495) (DB). (The question, whether a proceeding for the revocation of probate is a suit or not, raised but not decided.)
('18) 5 AIR 1918 Lah 114 (116) : 1918 Pun Re No. 49 (DB).
('93) 16 Mad 380 (383) (DB).
('23) 10 AIR 1923 Rang 9 (10) : 11 Low Bur Rul 331 (DB).
('10) 1 Upp Bur Rul 61 (62).
('09) 5 Low Bur Rul 78 (79).
('93-1900) 1893-1900 Low Bur Rul 653.
('11) 10 Ind Cas 434 (436, 437) (DB) (Cal).
('03) 31 Cal 186 (193) (DB).
('35) 39 Cal W N 1071 (1072). (Probate — Application for revocation — Dismissal operates as *res judicata* — Subsequent revocation of probate at instance of another party does not remove bar of *res judicata*.)
('36) 23 AIR 1936 Pesh 39 (40). (Finding of a Court under the Succession Act with regard to the genuineness or otherwise of a will is conclusive and operates as *res judicata* against the parties affected. A I R 1914 Bom 8 : 38 Bom 309 (FB) followed. Question whether the proceedings constitute a suit not adverted to.)
('36) 23 AIR 1936 Rang 401 (402) (DB). (Where in contentious proceedings for letters of administration it has been found that a certain person is the nearest heir of the deceased, that decision is binding in a subsequent suit upon the parties to the earlier proceedings, and those claiming under them.)

5. † ('29) 16 AIR 1929 Lah 761 (762) (DB).
('05) 1905 Pun Re No. 75 (FB). (Overruling 1884 Pun Re No. 145 and 1886 Pun Re No. 62.)
('19) 6 AIR 1919 All 229 (230) : 41 All 378 (381) (DB).
† ('18) 5 AIR 1918 All 346 (349) : 39 All 626 (DB).
('39) 26 AIR 1939 Lah 145 (145). (Decision of insolvency Court setting aside insolvent's transfer on ground of want of valuable consideration is *res judicata*.)
('37) 39 Pun L R 744 (746).
('99) 1899 Pun Re No. 76. (Notes of judgment.)
('33) 20 AIR 1933 Mad 9 (10) : 56 Mad 395 (DB).
('21) 8 AIR 1921 Mad 456 (457) (DB).
('36) 23 AIR 1936 Nag 112 (112) : I L R (1936) Nag 28.
('33) 20 AIR 1933 Nag 373 (374) : 30 Nag L R 112. (Principle of constructive *res judicata* also applies.)
('20) 7 AIR 1920 Nag 97 (98) : 16 Nag L R 201 (203). (Judgment *in rem*.)
('36) 23 AIR 1936 Rang 393 (394) : 14 Rang 529 (DB).
[But see ('21) 8 AIR 1921 Lah 58 (58, 59) : 2 Lah 147 (DB).
('17) 4 AIR 1917 Lah 75 (76) : 1917 Pun Re No. 22 (DB).]

6. † ('37) 24 AIR 1937 Lah 4 (5).

7. ('21) 8 AIR 1921 Pat 472 (472) (DB).
('12) 10 All L Jour 51 (51) (DB).
† ('28) 15 AIR 1928 Pat 116 (117) (DB). (Dismissal under O. 9. R. 2—Follows AIR 1919 Cal 108.)
Also see O. 9. R. 4 Note 6.

8. ('32) 19 AIR 1932 All 610 (613) : 54 All 1007 (DB).

9. ('35) 22 AIR 1935 Pesh 25 (25).

10. ('36) 23 AIR 1936 All 102 (103) : 58 All 655 (DB). (Rejection of application under S. 35, Provincial Insolvency Act, is no bar to application under S. 38 of the same Act.)

It has been held by the High Courts of Patna and Allahabad that an insolvency proceeding is a suit.[11] But the Lahore High Court has held that such a proceeding is not a suit but that the general principles of *res judicata* apply to it.[12]

Proceedings under O. 22, R. 5.— As to whether an order under O. 22, R. 5 will be *res judicata*, see Note 13.

Proceedings under the Land Acquisition Act. — A proceeding under the Land Acquisition Act is not a "suit",[13] but whether it is so or not, a decision in such a proceeding by a competent Court will be *res judicata* in a subsequent litigation, on general principles of law[14] unless the property involved in the later litigation is different from that involved in the former,[15] or the person sought to be bound by the decision was no party to it.[16]

Proceedings under the Income-tax Act. — The principle of *res judicata* is not applicable to orders under S. 33 of the Income-tax Act so as to prevent that decision from being re-opened in assessments made for subsequent years.[17]

Proceedings under the Indian Companies Act. — A judgment in a Civil Court will bar a remedy by way of an application under the Indian Companies Act in respect of the same matter,[18] and *vice versa*[19] under general principles of law. Similarly, an order in the course of liquidation proceedings settling the list of contributories will become *res judicata* if not appealed against and cannot be re-opened at a subsequent stage of the same proceedings.[20] But a liquidator in the winding-up of a company or a trustee in bankruptcy is entitled to ask the Court sitting in the respective jurisdiction to go behind the judgment obtained by a creditor in an ordinary Civil Court against the company or the insolvent.[21]

('38) 25 AIR 1938 Lah 490 (491) : I L R (1938) Lah 535 (DB). (Decision in summary inquiry under S. 24, Provincial Insolvency Act, as to whether debtor is entitled to present petition for adjudication is not covered by S. 4 and does not operate as *res judicata*.)

11. †('30) 17 AIR 1930 Pat 588 (592) : 9 Pat 664 (DB).
('18) 5 AIR 1918 All 346 (349) : 39 All 626 (DB).

12. ('37) 24 AIR 1937 Lah 4 (5).
[*See* ('40) 27 AIR 1940 Cal 225 (226). (Point conceded.)]

13. ('09) 2 Ind Cas 853 (853) (All). (Land acquisition proceedings.)

14. *('22) 9 AIR 1922 P C 80 (84) : 45 Mad 320 : 49 Ind App 129 (PC).
('39) 26 AIR 1939 P C 133 (136) : ILR (1939) All 460 : ILR (1939) Kar P C 199 : 66 Ind App 145 (PC). (Where a dispute as to the title to receive the compensation under the Land Acquisition Act has been referred to a Court, and it has been determined, the matter is *res judicata* and binds the parties in any later suit involving that issue. AIR 1922 P C 80 : 45 Mad 320 : 49 Ind App 129 (PC) followed.)
('32) 19 AIR 1932 Bom 386 (389) : 56 Bom 501 (DB). (Land acquisition officer was party in acquisition proceedings — *Held*, decision not *res judicata* against Secretary of State as he was not a party.)
† ('24) 11 AIR 1924 Cal 757 (759) (DB).
('17) 4 AIR 1917 Cal 442 (443) (DB).
† ('06) 2 Cal L Jour 359 (364,365,366,367,368) (DB).
('03) 7 Cal W N 588 (541) (DB). (The decision must have been given by a Court.)
('86) 12 Cal 33 (36) (DB). (Notice necessary to party affected.)
('81) 7 Cal 388 (393) : 8 Ind App 90 (PC).
('79) 4 Cal 757 (762) (DB).
('38) 25 AIR 1938 Mad 955 (956).
('06) 29 Mad 173 (174) (DB).
('39) 26 AIR 1939 Sind 66 (68) : ILR (1939) Kar 152 (DB).
[But see ('97) 20 Mad 269 (272) (DB). (This is no longer law.)

15. ('09) 2 Ind Cas 853 (853) (All).
('07) 34 Cal 466 (469) (DB).
('28) 15 AIR 1928 Lah 263 (266) (DB).

16. ('36) 23 AIR 1936 Pesh 29 (31).

17. ('43) 30 AIR 1943 Pat 169 (173) : 22 Pat 55 (DB).
('29) 16 AIR 1929 Mad 453 (456) (FB).
*('30) 17 AIR 1930 Mad 209 (213) : 53 Mad 420 (FB).
('38) 25 AIR 1938 Mad 148 (151) : ILR (1938) Mad 183 (SB). (Income-tax Officer is not a Court and hence doctrine of *res judicata* does not apply. His assessments are, however, final unless they can be re-opened under some provisions of the Income tax Act.)

18. ('18) 5 AIR 1918 Lah 371 (371) : 1918 Pun Re No. 66.

19. ('18) 5 AIR 1918 Lah 45 (47) : 1918 Pun Re No. 40 (DB).
('38) 25 AIR 1938 Lah 577 (578) (DB). (Proceedings against directors under S. 235, Companies Act, for misfeasance — Subsequent suit against them for compensation for misfeasance and fraud is incompetent on principle of *res judicata*.)

20. ('15) 2 AIR 1915 Lah 227 (227).

21. †('32) 19 AIR 1932 Bom 253 (254) (DB).
*('27) 14 AIR 1927 All 426 (429) : 49 All 728.

Administration proceedings. — Where in an administration suit the Court determines the nature of the interest of the persons interested in the estate,[22] or the relationship of any of the parties to the deceased,[23] such decision is final and conclusive in a subsequent suit between the same parties and their representatives.

Proceedings under the Oaths Act. — A determination of a matter in issue otherwise than by the Court is not a *judicium* and will not operate as *res judicata*. Therefore, the decision of a question of title in accordance with the Oaths Act is not an adjudication which can operate as an estoppel when the same question of title is again raised in another suit regarding another property. This is because the terms of the Act indicate that the party consents to be bound only in respect of the subject-matter of the pending proceedings.[24] But a decree arrived at after taking of an oath on a question of fact in the case is nonetheless a final adjudication and binding as regards the precise question raised in the former suit.[25]

For other miscellaneous proceedings, see the undermentioned cases.[26]

22. ('22) 9 AIR 1922 PC 253 (256) : 49 Cal 459 : 49 Ind App 100 (PC).
('78) 3 Cal 340 (345) (DB).

23. ('32) 19 AIR 1932 Cal 634 (635) (DB).

24. ('82) 5 Mad 259 (264) (DB).

25. ('01) 24 Mad 444 (447) (DB).
† ('13) 18 Ind Cas 835 (837) : 36 Mad 287 (DB).
† ('38) 25 AIR 1938 Bom 465 (467). (Hindu father suing or being sued in a representative capacity can bind his major and minor sons by special oath.)

26. ('43) 206 Ind Cas 343 (344) (DB) (Oudh). (U. P. Encumbered Estates Act (25 of 1934), Ss. 4, 11 and 12—Gift deed in favour of wife prior to application under S. 4 — Claim of wife allowed under S. 11, in spite of creditor's objection—Subsequent application under S. 12 to annul gift deed held barred by *res judicata*. A I R 1942 Oudh 252, distinguished.)
('42) 29 A I R 1942 All 425 (428). (S. 233k of U. P. Land Revenue Act, may bar claim which is not barred under S. 11, C. P. C. — Two bars though may overlap are independent — Question of *res judicata* in revenue Court partition must be determined under principles of S. 11, C. P. C. —Bar of S. 233k when comes into play explained.)
('42) 29 AIR 1942 All 19 (35) : ILR (1942) All 45 (FB). (Rule of *res judicata* does not apply to matters arising between a creditor and an agriculturist under the Agriculturists' Relief Act.)
('42) 29 AIR 1942 Cal 445 (447) : ILR (1942) 1 Cal 510. (Subject of adjudication in an application under S. 26J, Bengal Tenancy Act, is whether landlord is entitled to transfer fees on a particular transfer—Matter about the nature of the tenancy being outside the jurisdiction of the Court dealing with such application would be incidentally cognizable and therefore cannot operate as *res judicata*—43 C.W.N. 1046 Foll.; AIR 1939 Cal 169 : ILR (1938) 2 Cal 418 dissented from.)
('41) 28 AIR 1941 Pat 50 (50). (Bengal Estates Partition Act, S. 119 — S. 119 does not bar suit claiming interest in land.)
('40) 27 AIR 1940 Pat 552 (555) (DB). (There is no section in the Act which makes S. 11 of the C. P. Code applicable to the Co operative Societies Act. Therefore the fact that an award was made by the Registrar in respect of a debt under the Act of 1912 does not deprive the Registrar of jurisdiction to make a second or subsequent award in respect of the same debt under the provisions of the new Act of 1935. The second award cannot on that ground be held to be a nullity as being without jurisdiction.)
('40) 27 AIR 1940 Pat 438 (444) (DB). (Decree for cess under Bengal Cess Act — If final on question of defendant's status—*Res judicata* in subsequent suit for ejectment.)
('40) 27 AIR 1940 PC 7 (9) : 67 Ind App 1 : ILR (1940) Kar PC 25 : 15 Luck 1 (PC). (The decision of the District Judge under the Charitable and Religious Trusts Act does not operate as *res judicata*.)
('34) 21 AIR 1934 Bom 343 (345) : 58 Bom 623 (DB) (Do.)
('34) 21 AIR 1934 Lah 771 (773): 16 Lah 85 (Do).
('29) 16 AIR 1929 All 506 (508, 509) : 51 All 805 (DB). (Do.—Per Niamatullah, J.)
('39) 43 Cal W N 1046 (1052, 1053) (DB). (An order passed on an application under S. 28J of the B. T. Act for payment of the landlord's transfer fee is final and cannot be challenged in subsequent suit. But the determination of the status of the tenant in a proceeding under S. 28J, of the Bengal Tenancy Act for payment of the balance of landlord's transfer fee, is a matter only 'incidentally cognizable' and would not operate as *res judicata* in the subsequent suit.)
('39) 26 AIR 1939 Cal 169 (174, 175) : ILR (1938) 2 Cal 418 (DB). (Bengal Tenancy Act (VIII of 1885) S. 26J—Proceedings under—Decision as to status of tenant operates as *res judicata* : AIR 1938 Cal 246 reversed.)
('39) 26 AIR 1939 Mad 901 (902). (Application under S. 20A of the Madras Estates Land Act — Doctrine of *res judicata* does not apply.)
('33) 20 AIR 1933 Cal 24 (24). (Application under S. 26J, B. T. Act — Landlord has only to show in summary proceedings that holding is a raiyati holding — Subsequent suit by tenant that the tenure is permanent or rent-free is not barred.)
('24) 11 AIR 1924 Rang 119 (122) : 1 Rang 500. (Application to set aside *ex parte* decree — Non-service of summons—Separate suit does not lie.)
('34) 21 AIR 1934 All 823 (823). (Decision in a proceeding for dispaupering will not operate as *res judicata* in the suit.)

29. Two suits or appeals tried together — Appeal from decision in one only, if and when barred.

(1) A sues B for adjustment of accounts and for recovery of sums found due. A decree is passed in favour of A for Rs. 680. A and B both appeal, A on the ground that

('24) 11 AIR 1924 P C 202 (206) (P C). (Application for receiver's discharge dismissed — Second application is barred.)
('38) 25 AIR 1938 All 477 (479) (DB). (Judgment-debtor's application under S. 30, U. P. Agriculturists' Relief Act, rejected on ground that decree was satisfied — Order of Board of Revenue, effect of which was to take away force of order, rejecting application—Subsequent application under S. 30 is not barred by *res judicata*.)
('38) 25 AIR 1938 All 153 (156) : ILR (1938) All 305 (DB). (Principle of *res judicata* does not apply to applications for reduction of interest under S. 30, U. P. Agriculturists' Relief Act.)
('36) 23 AIR 1936 All 179 (184) : 58 All 721 (DB). (Interlocutory order for accounts against guardian in proceedings under Guardians and Wards Act — Final order after taking accounts— In appeal against such order, interlocutory order can be attacked as no appeal or revision lay against such former order.)
('33) 20 AIR 1933 All 481 (482). (Garnishee proceedings — Liability of garnishee not decided — Question can be agitated by garnishee in execution proceedings.)
('16) 3 AIR 1916 All 238 (239). (Order passed by a settlement officer in a jamabandi amendment case is not a decision in a suit to operate as *res judicata*.)
('05) 2 All L Jour 379 (384) (DB). (Application under S. 90, Transfer of Property Act.)
('04) 28 Bom 601 (615) (FB). (Orders of Mamlatdar's Court.)
('04) 28 Bom 215 (226) (FB). (Do.)
(1900) 24 Bom 251 (256, 257) (FB). (Do.)
('36) 64 Cal L Jour 545 (546). (Decision in proceeding under S. 26-J of the Bengal Tenancy Act.)
('30) 17 AIR 1930 Cal 533 (533). (Bengal Tenancy Act (VIII of 1885), S. 105—Two plots held under one landlord — Decree with regard to one operates as *res judicata* with regard to other if parties to suits under S. 105 same and sued in same capacities.)
('29) 16 AIR 1929 Cal 385 (386) (DB). (Bengal Tenancy Act, S. 106—Suit under, for correction of entry in record of rights — Decision in, is *res judicata*.)
('28) 15 AIR 1928 Cal 706 (708) (DB). (Per Page, J. —Application under S. 105A of the Bengal Tenancy Act—Custom of suspension of rent held not to exist — Decision not having been appealed against by tenant operates as *res judicata* in subsequent rent suit between the parties—Cuming. J., *contra*.)
('28) 15 AIR 1928 Cal 479 (480, 481) : 57 Cal 464 (DB). (Bengal Tenancy Act, S. 107 — Decree in proceedings under S. 105 fixing the area and the rent of the holding — Landlord suing the tenants on that basis—The decree was held to be conclusive between the parties and the tenants were held to be bound to pay the rent fixed by the Settlement Officer.)
('19) 6 AIR 1919 Cal 71 (72) (DB). (Rejection of application for assessment of mesne profits awarded by the decree in a suit for possession of lands debars a further application for assessment.)
('13) 18 Ind Cas 130 (130) : 40 Cal 428 (DB). (Withdrawal of application for enhancement of rent under S. 105 of the Bengal Tenancy Act without leave to file fresh application does not bar a fresh suit for enhancement on the same ground.)
('72) 18 Suth W R 208 (209) (DB). (Collector's decision under S. 25 of Act X of 1859 is not a decree.)
('69) 11 Suth W R 145 (146) (DB). (Do.)
('68) 10 Suth W R 295 (295) (DB). (Application under S. 25, Act X of 1859, is not equivalent to a suit—The Collector does not adjudicate between the parties.)
('37) 24 AIR 1937 Lah 19 (21) : 17 Lah 787 (DB). (In Cis-Sutlej and Trans-Sutlej territories, during the period between 1849 and 1865, Settlement Officer was the only judicial authority competent to decide the question of title relating to agricultural land. So the Settlement Officer's decision of the year 1853 on a question of title operates as *res judicata* and that question cannot be re-agitated in Civil Courts.)
('30) 17 AIR 1930 Lah 501 (503) (DB). (Application to file appeal in *forma pauperis* set aside —Decision cannot operate as *res judicata*.)
('24) 11 AIR 1924 Lah 493 (494): 5 Lah 105 (DB). (Decisions under Succession Certificate Act are not *res judicata*.)
('25) 12 AIR 1925 Mad 497 (525): 48 Mad 1 (DB). (Do.—It was also held that there was no final adjudication.)
('17) 4 AIR 1917 Mad 242 (242) (DB). (Proceedings under Ss. 74 and 75 of the Madras Estates Land Act.)
('38) 1938 Nag L Jour 171 (172). (Berar Patels and Patwaris Law — Proceedings in respect of appointment of Patel — Finding not based on full and fair enquiry — Subsequent vacancy — Prior finding not *res judicata*.)
('36) 23 AIR 1936 Oudh 225 (229) : 11 Luck 642 (DB). (The decision of a Settlement Officer construing a grant by the Crown and declaring the nature of the grant and the status and rights of the grantee in accordance with Settlement Circular No. 20 of 1863, is not *ultra vires*, and clearly operates as *res judicata* in a subsequent civil suit between the parties or their representatives.)
('02) 5 Oudh Cas 97 (99). (Proceeding under S. 53 of the Oudh Land Revenue Act (1876) is a suit, and question decided in it is *res judicata*.)
('38) 25 AIR 1938 Pat 359 (360). (A decision in a rent suit in which the constitution of the holding is expressly put in question and pronounced upon would operate as *res judicata* in a subsequent suit between the parties on the question of the actual holding of the tenants.)
('23) 10 AIR 1923 Pat 174 (176). (Doctrine of constructive *res judicata* does not apply to proceedings under Bengal Tenancy Act, Ss. 109 and 105.)

more is due and B on the ground that nothing is due to plaintiff but that money is due to him. Both the appeals are tried together and a single judgment is passed, whereby B is granted a decree for Rs. 1,400. A's appeal being dismissed, A prefers a second appeal from the decree in B's appeal but not from the decree in his own appeal. Is the second appeal barred by *res judicata* by reason of not appealing from the decree in his own appeal? No; by the dismissal of his appeal, the decree of the lower Court in *his favour* for Rs. 680 was simply confirmed and his not appealing from such a decree will not on any ground disentitle him to appeal against the grant of any relief to B in his appeal. If he succeeds in his second appeal, there is nothing to conflict with the decision in his favour for Rs. 680.[1]

(2) A sues B on a mortgage. B contends that the interest claimed is excessive. The suit is decreed in favour of A as claimed but costs are disallowed. A appeals against the disallowance of costs and B against the award of interest. In a single judgment both appeals are disposed of by which A is given the disallowed costs in his appeal and interest also is reduced in B's appeal. A then prefers a second appeal against the decree in B's appeal. Is the second appeal barred by *res judicata* by reason of no appeal having been preferred against the decree for costs in his own appeal? Obviously not. The decree *unappealed* was in his favour and there was nothing prejudicial to him therein that would conflict with the decision in the second appeal if he succeeded in it. In fact he could not have appealed from the decree passed in his favour.[2]

(3) Where two suits or two appeals between the same parties and raising the same questions are tried together but *separate and independent* judgments are given in each or where the two suits or appeals are tried by two different Courts and separate judgments are delivered, and a party appeals from one leaving the other to become final *against* him, the rule of *res judicata* will apply and the appeal preferred by him will be barred.[3]

(4) Where two suits or appeals in which the plaintiffs or appellants raise inconsistent titles are tried together and a *single judgment* or *two judgments, one incorporating or dependent on the other* are given (whether a single decree or two decrees are drawn up), there is a conflict of opinion as to whether an appeal against the decree in one suit or appeal will be barred by not appealing against the decree in the other suit or appeal.

On the one hand, it has been held by the High Courts of Allahabad,[4] Patna[5] and Rangoon[6] and by the Chief Court of Oudh[7] and by the Judicial Commissioner's Court of

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Note 29

1. ('07) 29 All 730 (732) (DB).
† ('28) 15 AIR 1928 All 274 (275) : 50 All 517 (DB).
('18) 5 AIR 1918 All 52 (52) : 41 All 54 (DB).
('11) 8 All L Jour 605 (607).
† ('27) 14 AIR 1927 Oudh 575 (575) (DB).
('13) 21 Ind Cas 264 (266) (Oudh).

2. ✣('23) 10 AIR 1923 All 490 (492) : 45 All 506 (FB). (Overruling 33 All 151.)
('27) 14 AIR 1927 Oudh 106 (107) (DB).
('31) 18 AIR 1931 All 660 (661).
('25) 12 AIR 1925 All 488 (489, 491).

3. ('39) 26 AIR 1939 Sind 329 (331) : ILR (1940) Kar 15 (DB). (Suits separately tried by different Court.)
† ('21) 8 AIR 1921 Cal 291 (292) (DB).
('35) 62 Cal 642 (652). (Obiter.)
('90) 12 All 578 (579) (DB).
('21) L R 5 All (Rev) 124 (124).

4. ('41) 28 AIR 1941 All 277 (278) : I L R (1941) All 360 (DB). (33 All 51 (FB) followed.)
✣('10) 33 All 51 (60)(FB). (Following 10 All 123 and approving 1893 All W N 190 and 1893 All WN 221.)
('13) 35 All 187 (190) (DB).
('20) 18 All L Jour 40 (40) (DB).
('13) 18 Ind Cas 867 (867, 868) (All).
('10) 7 All L Jour 995 (997) : 33 All 151 (DB).
[But see ('94) 1894 All W N 88 (89). (Where however the proceedings were considered as really one which by wrong procedure were numbered as two.)]

5. † ('24) 11 AIR 1924 Pat 823 (824).
('33) 20 AIR 1933 Pat 78 (81) : 12 Pat 139 (DB).
('35) 156 Ind Cas 998 (1000) (DB) (Pat).

6. † ('25) 12 AIR 1925 Rang 104 (105) : 2 Rang 633 (DB).
('12) 6 Low Bur Rul 93 (97) (DB).

7. ('25) 12 AIR 1925 Oudh 598 (599).
† ('24) 11 AIR 1924 Oudh 311 (313).

Peshawar,[8] that it is barred. In *Zaheria* v. *Debia*,[9] Stanley, C. J., observed :

> "It was suggested during the argument that if the appeal of Zaheria be heard and a decision be obtained in his favour, the appellate decree in his favour will have the effect of *superseding* the former decree (obtained by the respondent against him) *but this cannot be*. A decree, unless it be a decree which is a nullity . . . . . cannot be superseded except it be on appeal in the regular course. This being so, if we acceded to the arguments addressed to us we should have two inconsistent decrees on the files of the Court. This would be a serious anomaly and, in execution proceedings, would cause a complete impasse."

On the other hand, it has been held by the High Courts of Calcutta,[10] Lahore,[11] Madras,[12] and Nagpur[13] that such an appeal is not barred. The basis of these decisions is that S. 11 does not in terms apply to appeals but that the general principles of *res judicata* apply, that in applying such general principles, the *substance and not the form* of the appeal should be considered, that so considering it, the object of the appeal against one of the decrees is really and in substance to get rid of the *adjudication or conclusion* which gives rise to both the decrees, and that if the appeal succeeds it would have the effect of *superseding* the decree in the other. It was further observed in *Mt. Lachhmi* v. *Bhulli*:[14]

> "The foundation of the rule of *res judicata* as understood by ancient and modern lawyers is that a question must be *once* fairly and finally tried by a competent Court and *after* this has been done all further litigation about it should be concluded for ever between the parties. The maxim is . . . . . 'no one shall be vexed *twice* over the same matter.' This . . . . . pre-supposes that the issue has been *once* fairly and finally tried in a former litigation which was independent of the proceedings in which the same matter is again in dispute. The essence of the rule seems to be that the two proceedings should be so *independent* of each other that the trial of one cannot be confused with the trial of the other."

('33) 20 AIR 1933 Oudh 531 (533).
('12) 14 Ind Cas 321 (322) (Oudh).
('12) 13 Ind Cas 984 (985) : 15 Oudh Cas 22.
('02) 5 Oudh Cas 384 (390).
('02) 5 Oudh Cas 146 (147).
[*See* ('17) 4 AIR 1917 Oudh 220 (221). (Consolidated appeal against two cross decrees is maintainable but the appellant will have to elect which decree he will confine himself to. Then and then alone the entire appeal can be dismissed by the rule of *res judicata*.)]

8. ('34) 21 AIR 1934 Pesh 116 (117) (DB). (75 Ind Cas 479, Overruled.)
9. ('11) 33 All 51 (60) (FB).
10. ('88) 16 Cal 233 (237) (DB).
† ('06) 33 Cal 1101 (1116, 1117) (SB),
('36) 40 Cal W N 1176 (1177, 1178) (DB).
† ('31) 18 AIR 1931 Cal 353 (354) (DB).

11. ‡('27) 14 AIR 1927 Lah 289 (306, 328): 8 Lah 384 (FB). (This decision must be taken to overrule AIR 1927 Lah 98; AIR 1922 Lah 390: 3 Lah 215; AIR 1921 Lah 316: 1 Lah 368 and AIR 1919 Lah 42: 1 Lah 83; also AIR 1921 Lah 255 and AIR 1921 Lah 271.)
('27) 14 AIR 1927 Lah 821 (822).
('38) 25 AIR 1938 Lah 114 (115).
('18) 5 AIR 1918 Lah 142 (143) (DB).
('16) 3 AIR 1916 Lah 166 (167). 1916 Pun Re No. 84 (DB).
('05) 1905 Pun Re No. 85 (FB). (The following case, namely, 1904 Pun Re No. 8 must be taken to have been overruled by the Full Bench.)
('98) 1898 Pun Re No. 31.
('97) 1897 Pun Re No. 23.
† ('28) 109 Ind Cas 564 (566) (Lah).

12. ('43) 30 AIR 1943 Mad 139 (142): ILR (1943) Mad 235 (FB). (Per Division Bench in the Order of Reference—Whether the suits were cross suits is immaterial.)
('43) 1943-1 M.L.J. 325 (327). (Suit for redemption of kanom — Application by tenant for renewal—Both disposed of by common judgment — Appeal by tenant in application only without appeal in suit is not barred.)
('42) 29 AIR 1942 Mad 226 (227) (DB). (AIR 1940 Mad 564 Reversed.)
('41) 28 AIR 1941 Mad 524 (525) (DB). (Matter in issue in two suits same—Finding in one suit followed in other suit — Appeal against one of those decrees is not barred by *res judicata* on ground that decree in other suit is not appealed against. 29 Mad 333 and AIR 1916 Mad 1133 followed.)
† ('05) 29 Mad 333 (335) (FB).
('26) 13 AIR 1926 Mad 378 (378).
('35) 22 AIR 1935 Mad 214 (215).
('16) 3 AIR 1916 Mad 1133 (1134) (DB).
[*See* ('36) 23 AIR 1936 Mad 10 (11). (Application under S. 42 (2) of the Madras Estates Land Act of 1908 by defendant in suit for rent and suit, both disposed of by same judgment. Order on application does not bar appeal from decision in suit.)]
[*See also* ('17) 4 AIR 1917 Mad 597 (598) (DB).]

13. ('41) 28 AIR 1941 Nag 199 (200): ILR (1942) Nag 325 (DB).
14. ('27) 14 AIR 1927 Lah 289 (294, 295): 8 Lah 384 (FB).

Where two suits having a common issue are tried together and disposed of by a single judgment or by two judgments one incorporating the other, there is in *substance* only *one* trial and one verdict and there is no question of a party being vexed *twice* over the same matter.[15]

(5) A sues B and C; B alone sues A. A's suit is dismissed and B's decreed. A appeals against B's decree only impleading B. *Or* A sues B. B and C sue A. A's suit is dismissed and B and C's suit is decreed and A appeals only against B. *Or* A sues B, C and D. It is decreed subject to the payment to B by A of a certain sum. C and D appeal making A and B parties. B appeals making A alone a party. Both appeals are accepted and A's suit is dismissed. A files a second appeal against the decree in favour of B only. The judgments in all the cases are either single or incorporating one another. The appeal in each of the cases is barred inasmuch as *the parties in both suits or appeals are not the same* and the result of not appealing is to make the decree in favour of the party not appealed against final.[16]

Where the matter litigated in the two suits is *not the same*, an appeal in one suit only will not be barred by non-appeal in the other.[17] Similarly, suppose A sues B for Rs. 1000. A decree is passed in A's favour for Rs. 600. Both A and B appeal from the decree. Both the appeals are heard together and disposed of by the same judgment. A's appeal succeeds partially and the amount decreed in his favour by the trial Court is enhanced to Rs. 800. Let us call this decision x. B's appeal is dismissed. Let us call this decision y. B appeals from x but not from y. Is the appeal from x barred by *res judicata*? No. The reason is that the appeal from x is in no way inconsistent with the continuation in force of y. y merely confirms the trial Court's decree for Rs. 600 in A's favour. It does not *increase* the amount. The appeal from x is directed against the *enhancement* of this amount. It is not aimed at depriving A of the whole or any part of the Rs. 600 decreed in his favour by the trial Court. In other words, the question sought to be re-opened by B's appeal from x is altogether different from the question concluded by y. Thus, even where the two appeals arise out of the same suit and are disposed of by the same judgment, the decision in one of them will not bar, as *res judicata*, a second appeal from the decision in the other where the question raised in such appeal is distinct from that involved in the decision not appealed from. This is the principle underlying the decision mentioned below.[18] It is also the principle underlying the examples *numbered* as 1 and 2 above.

Suppose, in the illustration discussed above, B appeals from the decree and A files cross-objections in such appeal. B's appeal is allowed and A's cross-objections are dismissed with the result that A's suit is dismissed. A files a second appeal. This second appeal is not barred by A's failure to file a separate appeal from the dismissal of his cross-objections by the lower appellate Court. The reason is that the second appeal is from the *entire* decree inclusive of the dismissal of the cross-objections.[19]

30. Two suits tried together — Separate judgments — Appeal from one alone, if barred. — See Note 29.

31. Two appellate decrees in similar terms — Appeal from one, if barred. — See Note 29.

32. General principles apply to appeals. — See Note 29.

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15. *See also* ('32) 19 AIR 1932 Mad 125 (126, 127): 55 Mad 106 (DB). (When two judgments incorporate each other, they must be regarded as the same judgment.)

16. ('23) 10 AIR 1923 Cal 496 (498, 499) (DB). ('22) 9 AIR 1922 Lah 390 (391): 3 Lah 215 (DB). (Distinguishing 16 Cal 233.) 32) 16 Rev Dec 75 (76).

17. ('23) 10 AIR 1923 Lah 8 (9) (DB). ('27) 14 AIR 1927 All 540 (541) (DB).

18. ('40) 27 AIR 1940 Oudh 45 (46): 15 Luck 126 (DB). (It cannot be said that in every case where two connected appeals are disposed of by a common judgment and an appeal is preferred against only one of the decrees, the other becomes final and operates as *res judicata*. AIR 1933 Oudh 531 criticised as stating the proposition too broadly.)

19. ('42) 29 AIR 1942 Oudh 335 (336, 337) (DB).

33. Matter directly and substantially in issue "constructively" — Explanation IV — General. — It has been seen in Note 7, that a matter directly and substantially in issue may be so either actually or constructively.[1] A matter is directly in issue constructively when it ought to be put in issue for the determination of the suit. The rule of constructive *res judicata* is embodied in Explanation IV to the section, but as has been seen already in Note 23 above, the rule is part of the *general principles* of the law of *res judicata* and therefore, the explanation cannot be said to have introduced any innovation in the law of *res judicata*.[2]

An adjudication is conclusive and final not only as to the *actual* matter determined but as to every other matter which the parties *might have* litigated and have had decided as incident to, or essentially connected with, the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of matters of claim or defence.[3] The principle underlying Explanation IV, in fact, is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided.[4]

The explanation must be distinguished from the rule enacted in O. 2, R. 2; the latter rule requires that the *whole claim* which has arisen at the date of the suit out of the *cause of action* should be included in the suit so as to avoid the splitting up of the claim arising out of one and the *same cause of action*; while Explanation IV enacts that every *ground* which could and ought to have been advanced in support of *the claim* shall be deemed to have been adjudicated upon, whether it was *actually* urged or not.[5]

Where a matter is constructively in issue it cannot, of course, be said to have been *actually* heard and decided. It could only be *deemed* to be heard and decided.[6] If the effect of the decision in the former suit is necessarily inconsistent with the defence that ought to have been, but not raised, that defence must be *deemed* to have been finally decided against the person who ought to have raised it.[7] But a matter construc-

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Note 33

1. *See also* ('98) 25 Cal 136 (139) (DB).
2. ('03) 26 Mad 760 (767) (DB).
3. ('02) 26 Bom 661 (667, 668) (DB).
('17) 4 AIR 1917 Sind 93 (93) : 10 Sind L R 29 (31) (DB).
('32) 19 AIR 1932 Cal 889 (892, 893) : 59 Cal 985.
('39) 26 AIR 1939 Mad 94 (95).
4. ('39) 26 AIR 1939 Mad 818 (824) (DB). (The explanation imports a fiction that the matter has been raised and decided.)
(1870) L R 5 C P 607 (613), Newington v. Levy. (Affirmed in (1871) 6 C P 180 and cited in 26 Bom 661 and AIR 1917 Sind 93=10 Sind L R 29.)
5. ('03) 26 Mad 760 (766) (DB).
('35) 157 Ind Cas 368 (370) (DB) (Lah).
6. ('39) 26 AIR 1939 Mad 818 (824) (DB). (Explanation 4 to S. 11 imports a fiction that the matter has been heard and decided.)
('08) 35 Cal 979 (987, 988). (Dissenting from the dictum of Banerjee, J., in 24 Cal 711 and 28 Cal 17.)
† ('09) 1 Ind Cas 66 (67) (DB) (Cal).
† ('98) 20 All 110 (113). (Confirmed in 29 All 429.)
('23) 10 AIR 1923 Bom 36 (37) (DB).
('22) 9 AIR 1922 Bom 119 (120, 121): 46 Bom 327 (DB).
('04) 6 Bom L R 288 (290) (DB).
† ('01) 25 Bom 189 (192, 197, 201) (DB).
† ('35) 157 Ind Cas 381 (382) (Cal).
('26) 13 AIR 1926 Cal 511 (511) (DB).
† ('25) 12 AIR 1925 Cal 427 (429, 430) (DB).
('11) 11 Ind Cas 127 (128) (Cal).
('05) 1 Cal L Jour 248 (254).
('04) 31 Cal 79 (82) (DB).
('29) 16 AIR 1929 Lah 872 (874): 11 Lah 99 (DB).
('16) 3 AIR 1916 Lah 315 (315) (DB).
('03) 1903 Pun Re No. 4.
('81) 1881 Pun Re No. 96.
('29) 117 Ind Cas 805 (805) (Lah).
('18) 5 AIR 1918 Mad 147 (148) (DB).
† ('14) 1 AIR 1914 Mad 399 (416): 37 Mad 70 (FB).
('98) 21 Mad 91 (99) (DB).
('21) 62 Ind Cas 501 (502) (DB) (Mad).
† ('28) 15 AIR 1928 Oudh 155 (179, 181).
('23) 10 AIR 1923 Oudh 242 (244) (DB).
('11) 14 Oudh Cas 117 (119).
('29) 16 AIR 1929 Rang 162 (163) : 7 Rang 80.
('23) 10 AIR 1923 Rang 239 (240) : 1 Rang 363.
('25) 12 AIR 1925 Sind 86 (87) : 19 Sind L R 247.
[*See also* ('25) 12 AIR 1925 P C 55 (57) : 47 All 158.]
7. ('42) 29 AIR 1942 All 410 (421) : I L R (1942) All 624 (DB). (In questions of *res judicata* identity of the issues and not identity of the subject-matter is relevant.)

tively in issue will not be deemed to have been decided where the case has not been tried upon the *merits*, as where the prior suit was dismissed for non-joinder of parties.[8]

Though the applicability of the rule of constructive *res judicata* does not and cannot require that the matter should have been *actually* heard and decided in the former suit, it does not dispense with the other essential requirements of the section such as the sameness of the parties, the competency of the Court, and litigation under the same title.[9]

The explanation does not apply where the ground of attack or defence has *actually been raised* but is not decided by the Court.[10] Nor can it be applied against a person who has been *successful* in the previous suit.[11] A plea raised at a late stage and rejected on that ground must be taken as not having been raised at all, and, if it should have been raised at the proper time, will be deemed to have been constructively in issue and will be barred in a subsequent suit.[12] If a party desires to win by such a plea as constructive *res judicata* he must found his plea firmly by proving the facts from which a Court can infer that at the critical time the person sought to be barred might and ought to have raised the plea.[13]

The explanation applies to the plaintiff to the same extent as it applies to the defendant.[14]

The doctrine of constructive *res judicata* applies wherever the *issues* involved in the two litigations are identical. It is not necessary that the *property* concerned must be the same.[15]

Section 21 of the Code and S. 11 of the Suits Valuation Act which preclude an objection as to territorial jurisdiction or the valuation of the suit, being raised in a Court of appeal or revision for the first time, are only instances of the application of the general doctrine of constructive *res judicata*. Hence, though the above sections refer only to subsequent stages of the *same* suit and not a *separate* suit, the question as to territorial jurisdiction or valuation impliedly decided in a prior suit cannot be re-agitated in a subsequent suit between the same parties.[16] (See also S. 21, Note 8.)

34. Where relief claimed in later suit is same though under different capacities and vice versa. — See Note 38.

('23) 10 AIR 1923 Rang 239 (240) : 1 Rang 363.
('27) 14 AIR 1927 Rang 333 (334) (DB).
† ('35) 157 Ind Cas 381 (382) (Cal).
† ('35) 61 Cal L Jour 301 (302) (DB).
('09) 1 Ind Cas 66 (67) (DB) (Cal).
† ('12) 10 Ind Cas 75 (77) : 35 Mad 216 (DB).

8. ('22) 9 AIR 1922 Mad 259 (262) (DB).

9. † ('30) 17 AIR 1930 Mad 264 (267) (DB).
('27) 14 AIR 1927 Oudh 341 (344) (DB).
('08) 1908 Pun L R No. 65, p. 171 (173).
('98) 1 Oudh Cas 22 (26) (DB).

10. ('39) 26 AIR 1939 Mad 818 (824) (DB). (Matter left open by express order of Court—Explanation does not apply.)
('35) 39 Cal W N 538 (540). (In prior suit there was a decision that the suit as laid was not maintainable — Second suit properly framed held not barred.)
('31) 18 AIR 1931 Oudh 157 (158) (DB).
('99) 2 Oudh Cas 51 (54).
('33) 20 AIR 1933 All 481 (482).
('29) 16 AIR 1929 Bom 323 (325).
('39) 26 AIR 1939 Cal 1 (3) (DB). (Point raised in pleading but not argued.)
('37) 24 AIR 1937 Mad 709 (710). (It is not necessary that an issue should have been framed.)
('21) 8 AIR 1921 Mad 21 (22, 23) (FB).
[But see ('38) 25 AIR 1938 Pat 427 (428) (DB). (Point raised but not decided held to be *res judicata*—View submitted to be wrong.)]
See also Note 103.

11. ('43) 30 AIR 1943 Oudh 231 (233) (DB).
('98) 1 Oudh Cas 22 (26, 27) (DB).

12. ('26) 13 AIR 1926 Cal 511 (511) (DB).

13. ('40) 1940 Nag L Jour 562 (565) (DB).

14. ('92) 1892 All W N 224 (225) (DB).
('04) 6 Bom L R 594 (597, 598, 599) (DB).

15. ('42) 29 AIR 1942 All 410 (421) : ILR (1942) All 624 (DB).
('42) 29 AIR 1942 All 267 (287) : I L R (1942) All 518 (DB). (A I R 1922 P C 80 : 45 Mad 820 : 49 Ind App 129 (PC) relied on.)

16. ('38) 25 AIR 1938 Mad 257 (262) (DB).

35. Grounds of attack or defence in subsequent suit which might and ought to have been alleged as grounds of attack or defence in former suit. — The object of Explanation IV is to compel the plaintiff or defendant to rely upon all grounds of attack or defence which were open to them.[1] A party is bound to bring forward his *whole case* in respect of the matter in litigation, which was open to him upon the points for decision in the suit. He cannot abstain from relying upon, or abandon, a ground of claim which is in question and proper for consideration, and afterwards make it a cause of fresh suit in respect of the same subject-matter.[2] Thus, where a plaintiff might and ought to have urged a question in a former litigation, he would be estopped from raising the same question in a subsequent suit.[3] Similarly, a defendant, who does not raise all the objections which he might and ought to have raised in answer to the plaint claim, will be barred from raising those defences in a subsequent suit between the same parties.[4]

Note 35

1. ('94) 18 Bom 537 (542).
('37) 24 AIR 1937 Lah 872 (874) : I L R (1937) Lah 496.

2. (1864) 2 Mad H C R 131 (142) (DB).
('23) 10 AIR 1923 Lah 560 (563).
('31) 18 AIR 1931 All 462 (466) : 53 All 568 (DB).
† ('34) 21 AIR 1934 Mad 68 (70). (Burden of proof on defendant—Defendant giving up issue and not letting in evidence in view of pendency of another suit by him involving the same question—Decision in former suit is *res judicata*.)
('94) 2 Upp Bur Rul 242.
Also see Note 38.

3. ('43) 30 AIR 1943 Cal 1 (9) : ILR (1942) 2 Cal 268 (DB).
('41) 28 AIR 1941 Rang 159 (160) : 1941 Rang L R 204 (DB).
('39) 26 AIR 1939 All 500 (502) (DB). (Rent of exproprietary tenant if fixed by collector additional rent not claimed before collector cannot be claimed in suit for arrears being barred by *res judicata* — Principle of Explanation 4 to S. 11 applied.)
† ('87) 11 Bom 708 (723) (DB).
('32) 19 AIR 1932 Nag 36 (37, 38).
('67) 11 Moo Ind App 551 (606) (PC).
('28) 15 AIR 1928 All 721 (723): 50 All 394 (DB).
('28) 15 AIR 1928 All 714 (715) : 50 All 306 (DB).
('23) 10 AIR 1923 All 231 (232) (DB).
('22) 9 AIR 1922 Bom 119 (120, 121) : 46 Bom 327 (DB).
('19) 6 AIR 1919 Cal 411 (413) (DB).
('18) 5 AIR 1918 Cal 535 (536) (DB).
† ('93) 20 Cal 79 (85) : 19 Ind App 234 (PC).
(70) 14 Suth W R 272 (273) (DB).
('70) 14 Suth W R 195 (195) (DB).
('68) 10 Suth W R 1 (3) (PC).
('67) 8 Suth W R 307 (308) (DB).
('90) 1890 Pun Re No. 146.
('27) 14 AIR 1927 Mad 120 (121) (DB).
('32) 19 AIR 1932 Nag 90 (91, 92). (Former suit on mortgage — Failure to take plea of invalidity of mortgage—Subsequent suit by mortgagor's son to declare invalidity of mortgage is barred.)
('22) 9 AIR 1922 Nag 174 (175).
('24) 5 L R Oudh 137 (139).
('07) 10 Oudh Cas 145 (150, 158) (SB).
('33) 20 AIR 1933 Pat 526 (528) (DB).
[*See* ('33) 20 AIR 1933 Pat 457 (459).]
[*See also* ('18) 5 AIR 1918 Cal 223 (224) (DB).]

4. ('42) 29 AIR 1942 Oudh 354 (356). (Suit by reversioners contesting sale-deed executed by two widows, *A* and *B* — Both parties treating *A* alone as having title as Hindu widow in property sold— No plea based on title of *B* raised — Subsequent suit for possession of property on death of widow — Defence based on title of *B* as co-vendor held barred.)
('42) 29 AIR 1942 All 267 (287) : I L R (1942) All 518 (DB). (The fact that it was not in the personal interest of the defendant in the former suit (which had been brought against him and certain transferees from him) to have contested it will not avoid the bar of *res judicata*.)
('40) 27 AIR 1940 Lah 172 (175). (Declaratory decree in favour of reversioner that alienations by widow of last male holder do not bind him raises presumption that decree-holder had *locus standi* — Question of *locus standi* as heir held decided by implication and operates as *res judicata*.)
('40) 27 AIR 1940 Nag 396 (398). (Transferee from Hindu widow admitted by lumbardar in suit for profits by transferee—Subsequent suit by lumbardar as reversioner of estate, against transferee, for possession is barred.)
('39) 26 AIR 1939 All 449 (449) (DB).
('02) 15 C P L R 167 (170).
('33) 20 AIR 1933 Pat 104 (107): 12 Pat 117 (DB). (Question of bar under S. 109, B.T.Act, not raised in prior suit—Question must be deemed to have been decided.)
('30) 17 AIR 1930 P C 177 (178): 57 Ind App 181: 52 All 272 (PC). (Mahomedan widow in possession in lieu of dower sued for recovery of share by other heirs — Interest on dower not claimed by widow — In a subsequent suit against her representative, claim to such interest is barred.)
('15) 2 AIR 1915 P C 103 (104, 105) (PC).
† ('66) 11 Moo Ind App 50 (73, 74) (PC).
('38) 25 AIR 1938 All 542 (544) (DB).
('31) 18 AIR 1931 All 38 (40) (DB).
('31) 18 AIR 1931 All 29 (31) (DB).
('30) 1930 All L Jour 601 (606) (DB). (Suit for pre-emption — Plea as to validity of sale not raised— Subsequent suit to recover possession from vendee —Barred.)

('30) 130 Ind Cas 495 (496) (DB) (All). (Mahomedan law — Suit by husband for restitution of conjugal rights — Omission to plead charge of adultery in defence — Subsequent suit by wife for divorce on the ground of charge of adultery.)
† ('28) AIR 1928 All 714 (715) : 50 All 306.
('27) 14 AIR 1927 All 799 (799) : 50 All 28 (DB). (Prior suit on mutual account for a certain period —Subsequent suit by the defendant in earlier suit to recover a sum of money due during the same period.)
('27) 14 AIR 1927 All 206 (207). (Objection not taken to maintainability of suit.)
('27) 14 AIR 1927 All 39 (41) : 48 All 803 (DB). (Affirmed in AIR 1930 P C 177 : 51 Ind App 181 : 52 All 272 (PC).)
('25) 12 AIR 1925 All 417 (418).
('24) 5 L R All (Rev) 119 (120).
('23) 10 AIR 1923 All 115 (116).
('22) 9 AIR 1922 All 463 (464, 465) (DB). (Purchaser in execution of money decree who is also heir of mortgagor impleaded—Latter not pleading his purchase cannot subsequently claim to redeem.)
('18) 5 AIR 1918 All 278 (279) (DB). (Sale in execution of mortgagor's claim as proprietor—Revenue Court—Mutation—Rejection — Mortgagor cannot plead non-saleable interest.)
('15) 2 AIR 1915 All 194 (195, 196).
('14) 1 AIR 1914 All 414 (415).
('11) 8 All L Jour 936 (939) (DB). (Three mortgages in favour of same person—Mortgage decree on one mortgage subject to charge — Mortgagee auction purchaser — Suit by mortgagor's sons — Mortgagee not setting up his mortgage.)
('11) 9 Ind Cas 813 (815) (All).
('11) 8 All L Jour 358 (361) (DB).
('10) 6 Ind Cas 375 (376) (DB) (All).
('09) 3 Ind Cas 117 (121) (All).
('07) 4 All L Jour 117 (118, 119) (DB).
('07) 4 All L Jour 675 (677).
('05) 27 All 37 (53) : 32 Ind App 17 (PC).
('05) 2 All L Jour 278 (282) (DB).
('03) 1903 All W N 97 (98). (First suit for possession on the allegation of division—Second suit for declaration of title to possession by partition.)
† ('98) 20 All 81 (86) (DB).
('92) 14 All 64 (66) (DB). (Principle of *res judicata* applies to execution proceedings also.)
('89) 1889 All W N 4 (6, 7).
('82) 4 All 65 (68) (DB).
('82) 4 All 21 (22) (DB).
('81) 1881 All W N 47 (48) (DB).
('30) 17 AIR 1930 Bom 431 (435) : 54 Bom 696 (DB).
('23) 10 AIR 1923 Bom 145 (145, 146) (DB). (Standard rent—Defendant not pleading for standard rent in his counter-claim in a High Court suit.)
('83) 7 Bom 272 (278, 279) (DB).
('74) 10 Bom H C R 293 (294) (DB).
('25) 12 AIR 1925 Cal 663 (663) (DB). (Plea that decree was based on fraudulent claim cannot be raised.)
† ('12) 16 Ind Cas 70 (73) : 40 Cal 1 : 39 Ind App 237 : 6 Low Bur Rul 119 (PC).
† ('09) 4 Ind Cas 442 (445) (DB) (Cal).
† ('08) 35 Cal 979 (986, 987) (DB).
† ('89) 16 Cal 682 (691) : 16 Ind App 107 (PC).
('79) 4 Cal 190 (196) : 5 Ind App 149 (PC).
('79) 4 Cal L Rep 599 (601, 602) (DB).
('78) 3 Cal 705 (707, 708) (DB).
('67) 8 Suth W R 307 (308) (DB). (Similar suit — Widow not claiming lien for dower.)
† ('37) 24 AIR 1937 Lah 537 (541) : I L R (1937) Lah 209 (DB). (Pre-decree compromise not presented to Court in previous suit cannot be pleaded in subsequent suit.)
('30) 17 AIR 1930 Lah 654 (655) (DB). (Plea that mortgage is void not raised in previous suit—Subsequent suit is barred and plea cannot be raised.)
('26) 13 AIR 1926 Lah 162 (163) : 7 Lah 40 (DB).
('24) 11 AIR 1924 Lah 26 (27) (DB).
('84) 1884 Pun Re No. 142.
('81) 1881 Pun Re No. 95.
('81) 1881 Pun Re No. 89.
('38) 25 AIR 1938 Mad 257 (262) (DB). (Objection as to pecuniary or territorial jurisdiction.)
† ('34) 21 AIR 1934 Mad 68 (70).
('29) 16 AIR 1929 Mad 404 (408) (DB). (Execution of mortgage decree pending — Purchaser of equity of redemption joined as judgment-debtor without objection from judgment-debtor—Judgment-debtor then has no status to object on ground that purchase was benami for decree-holder.)
('26) 13 A I R 1926 Mad 1144 (1144). (Party who is not entitled to appeal but who could file cross-objections and does not so file is barred.)
('26) 13 A I R 1926 Mad 536 (537). (Objection to jurisdiction not raised.)
('25) 12 A I R 1925 Mad 1148 (1149). (Property wrongly included—Suit for recovery of possession of properties delivered.)
† ('24) 11 A I R 1924 Mad 608 (609) : 47 Mad 476 (DB). (Plea that minor was not properly represented in a previous suit though not taken by guardian is *res judicata* where it might and ought to have been taken.)
('23) 10 A I R 1923 Mad 551 (552). (Suit by *A* against *B* — Plea of discharge by payment to *C*, *A's* agent, not raised in former suit — Subsequent suit by *B* against *C* for return of money paid is barred.)
('21) 62 Ind Cas 501 (502) (DB) (Mad). (Omission to set up special contract.)
('20) 7 A I R 1920 Mad 197 (198) (DB). (Representatives of mortgagor—Omission to set up non-liability.)
('17) 4 AIR 1917 Mad 987 (988).
('12) 15 Ind Cas 186 (187) (Mad).
('07) 30 Mad 498 (499) (DB).
('06) 29 Mad 353 (355) (DB).
('22) 9 AIR 1922 Nag 81 (82).
('19) 6 AIR 1919 Nag 29 (30) : 16 Nag L R 64 (DB). (Suit against father—Omission to plead invalidity under Sch. III, Para. 2, C. P. Code—Sons bound.)
('35) 22 AIR 1935 Oudh 15 (16). (Suit for actual proprietary possession of land — Defendant claiming some kind of interest in it must put forward his claim as defence.)
('27) 14 A I R 1927 Oudh 234 (235). (Prior suit for possession on basis of gift decreed — Subsequent suit questioning donor's right to make gift is barred.)
('26) 13 A I R 1926 Oudh 509 (510, 511) : 1 Luck 210. (Plea of irredeemable mortgage not raised in partition proceeding.)

The explanation refers to grounds of defence which would have been *good and proper grounds of defence.*[5] It refers to the condition of things at the time the former suit was instituted and does not refer to grounds which may come into existence by some act of the plaintiff.[6] Where the relief prayed for is not dependent on the adjudication of a particular matter it cannot be said that that matter must be *deemed* to have been decided by the judgment although the judgment does not deal with it.[7]

36. "Might." — Where a party *could* not have raised a ground of attack or defence, the rule of constructive *res judicata* will not apply.[1]

Pleas not permitted by law.—A plea which is not permitted by law to be raised in a suit cannot be said to be one which *might* have been raised.[2] Thus, where, in a suit to establish title under a certain transfer, the defendant could not, under the law, as it then stood, raise the plea that the transfer was fraudulent under S. 53 of the Transfer of Property Act, it was held that a subsequent suit to set aside the sale on that ground is not bad.[3] Similarly, in a suit for a declaration that a decree is null and void, the plaintiff could not ask for the relief of restitution as such relief by way of *suit* is barred by section 144, sub-clause (2).[4]

Pleas based on facts not within the knowledge of the party at the time of the former suit. — Where the facts on which a plea might have been raised by a party were not within his knowledge at the time of the former suit, it could not be said that he might have raised it.[5] Thus, where A filed against B succession certificate proceedings in

† ('26) 13 AIR 1926 Oudh 101 (107) (DB). (Partition proceeding—Title to a share—Omission to raise.)
('25) 12 A I R 1925 Oudh 719 (720). (Reduction from plaintiff's claim not claimed in prior suit bars subsequent suit thereof.)
† ('11) 10 Ind Cas 29 (30, 31) (DB) (Oudh).
('09) 12 Oudh Cas 347 (368) (DB).
('27) 14 AIR 1927 Rang 333 (334) (DB).
('36) 23 AIR 1936 Sind 34 (38). (Omission to raise question of jurisdiction.)
[*See* ('71) 7 Mad H C R 263 (266) (DB).]
[*See also* ('05) 27 All 684 (686) (FB).
('65) 2 Suth W R (Act X of 1859) 57 (58) (DB).]
Also see Note 39.

5. ('01) 4 Oudh Cas 408 (418) (DB).
('06) 8 Bom L R 296 (308, 309):30 Bom 395 (DB).
† ('04) 26 All 61 (65, 67, 68) (FB).
('28) 15 AIR 1928 Lah 967 (969) : 10 Lah 389.
('04) 14 Mad L Jour 281 (285) (DB).
('29) 16 AIR 1929 Rang 162 (163) : 7 Rang 80.

6. ('07) 10 Oudh Cas 145 (153) (SB).

7. ('41) 28 AIR 1941 Mad 753 (759).

Note 36

1. ('25) 12 AIR 1925 Oudh 719 (720).
('25) 12 AIR 1925 Cal 663 (664) (DB). (Matters in subsequent suit to set aside decree outside scope of O. 9, R. 13.)
('36) 164 Ind Cas 457 (458) (Cal).
('37) 24 AIR 1937 Mad 804 (805).

2. ('42) 29 AIR 1942 Cal 586 (587) (DB). (Proceeding for pre-emption by landlord under S. 26F Bengal Tenancy Act — Purchaser not entitled to raise question as to whether holding is occupancy holding or raiyati holding at fixed rent — Hence order for pre-emption no bar to suit by purchaser for declaration that holding is raiyati holding at fixed rent.)

See cases in foot-notes (3) and (4) and also the following cases :
('20) 7 AIR 1920 Cal 888 (889) (SB).
('17) 4 AIR 1917 P C 111 (114) (PC).
('29) 16 AIR 1929 All 252 (253) (DB). (Legal representative brought on record after preliminary decree on mortgage cannot challenge the validity of the mortgage — Final decree will not bar suit for declaration that mortgage was not binding.)
('26) 13 AIR 1926 Mad 774 (777) : 50 Mad 320 (DB). (Suit for declaration as to invalidity of alienation — Partition and allotment of alienor's share cannot be granted by the Court.)
('23) 10 AIR 1923 Mad 212 (214) (DB). (Point not competent to be discussed in previous proceeding such as the validity of decree in execution proceedings—Such point not raised in execution proceedings — Subsequent suit raising the point not barred.)
('15) 2 AIR 1915 Nag 111 (112) : 11 Nag L R 31. (Question of title in suit under S. 9, Specific Relief Act.)
('12) 17 Ind Cas 318 (320) (Oudh).
[*See also* ('34) 21 AIR 1934 All 68 (69, 70).]

3. ('25) 12 AIR 1925 Mad 1107 (1107).

4. ('19) 6 AIR 1919 Sind 79 (79) : 13 Sind L R 153 (DB).

5. ('97) 24 Cal 711 (713) (DB).
† ('07) 9 Bom L R 1020 (1023) (DB).
† ('38) 42 Cal W N 560 (564, 565).
† ('88) 15 Cal 800 (808) : 15 Ind App 106 (PC).
† ('17) 4 AIR 1917 Lah 19 (21):1916 Pun Re 94.
('27) 14 AIR 1927 Nag 83 (84). (Prior mortgage renewed by subsequent mortgage — Suit on the latter without knowledge of flaw therein—Subsequent suit on former is not barred.)

respect of a deceased person's estate and obtained a certificate, but B was not aware at the time that a will had been executed by the deceased person by which he (B) had been appointed executor, a subsequent application for revocation of the certificate granted to A is not barred under Explanation IV to S. 11.[6] But the want of knowledge or mistake must be one of *fact*. A plea not raised owing to a wrong view of the *law* cannot be said to be one which could not have been raised. Thus, where a person who was a sub-mortgagee wrongly sued as an *assignee* of the mortgage and the suit was dismissed, a subsequent suit as a *sub-mortgagee* is barred inasmuch as the previous suit was based not on the want of knowledge of any *fact* but on a wrong view of the *law*.[7] Similarly, where the facts are such that the party could have known them had he acted with due diligence, he cannot plead ignorance as an excuse for not raising the point.[8]

Pleas based on facts not in existence at the time of the former suit. — A plea based on facts which did not exist at the time of the former suit but which came into existence subsequently, cannot be said to be one which might have been raised in the former suit.[9] Thus, A brings a suit against B for declaration of his title as owner of certain lands. The suit is dismissed on the ground that A is not the owner. At the time of the suit A is in adverse possession of the land but has not perfected his title by adverse possession. After the dismissal of the suit, he perfects his title by adverse possession and subsequently sues B again on the basis of his title by adverse possession. The suit is not barred as the cause of action for the suit is based on facts not in existence at the time of

('09) 5 Nag L R 189 (192, 193).
('10) 1 Upp Bur Rul 66 (68, 69).
('31) 18 AIR 1931 Sind 27 (27) (DB).
[*See* ('34) 21 AIR 1934 Mad 563 (564). (Where however the party could have with due diligence obtained such knowledge it will be *res judicata*.)]
Also see O. 2, R. 2 Notes 5 and 10.

6. ('11) 11 Ind Cas 261 (262) (Sind).
7. ('29) 16 AIR 1929 All 400 (402).
8. [*See* ('41) 28 AIR 1941 Nag 346 (349) (DB). (Plea not raised for want of knowledge — Fact with due diligence could have been discovered — Plea is barred by *res judicata*.)]
9. ('42) 29 AIR 1942 Lah 153 (159) : ILR (1942) Lah 559 (FB). (Plea that property is not saleable not available under the existing law at the time of former suit — Change of law subsequently makes property *not* saleable—No *res judicata*.)
('40) 27 AIR 1940 Lah 27 (30). (New defence becoming available by passing of a new Act—Such defence can be taken at subsequent stage of the execution proceedings.)
('66) 3 Mad H C R 207 (208) (DB).
('04) 1904 Pun Re No. 1. (Agreement which was not in existence before the former suit could not form a ground of attack and the rule does not apply to anything that transpires after the institution of it.)
('32) 19 AIR 1932 All 416 (417):54 All 777 (DB).
('32) 19 AIR 1932 All 5 (15) : 53 All 815 (DB). (Dismissal of suit for restitution of conjugal rights —Subsequent suit for the same relief at the proper time is not barred.)
('31) 18 AIR 1931 All 635 (639) : 54 All 299 (FB). (Statutory right by new Act can be raised as defence.)
('27) 14 AIR 1927 All 421 (421, 422) (DB). (In the suit by the sons to set aside the sale by their father, the vendee could not have claimed refund of purchase money unless and until the sale was set aside.)
('16) 3 AIR 1916 All 163 (163, 164) : 38 All 509 (515) (DB).
('06) 3 All L Jour 541 (543).
('05) 27 All 136 (137, 138).
† ('04) 26 All 61 (65, 67, 68) (FB).
('86) 1886 All W N 69 (69, 70) (DB).
('81) 3 All 334 (337) (DB). (Dismissal of suit by assignee of mortgage bond, on ground of sale deed being unregistered does not bar subsequent suit on the bond after registration.)
('34) 21 AIR 1934 Bom 36 (37) : 58 Bom 119.
('27) 14 AIR 1927 Bom 87 (88) (DB). (Heirship not in existence at the date of former suit.)
('16) 3 AIR 1916 Bom 318 (319) : 40 Bom 614 (620) (DB).
('36) 40 Cal W N 166 (171) (DB). (Suit for rent by landlord against tenant—Plea of partial dispossession and suspension of rent—Decision negativing plea—Subsequent plea in later suit not barred when there is eviction from same land subsequent to prior suit—But where plea in later suit is that dispossession pleaded in prior suit is still continuing, the plea will be barred.)
('34) 21 AIR 1934 Cal 82 (83, 84) (DB).
('26) 13 AIR 1926 Cal 178 (178) (DB). (Suit for redemption—Subsequent suit for mesne profits from date of deposit of redemption amount and date of delivery of possession.)
† ('10) 8 Ind Cas 28 (29) (DB) (Cal).
('08) 8 Cal L Jour 303 (304) (DB). (Claim for mesne profits for period subsequent to the period in question in the first suit.)
('87) 14 Cal 401 (411) (DB). (Later suit on subsequent cause of action.)
('81) 7 Cal 169 (171, 172) (DB).

the former suit.[10] Similarly, a right to partition of properties is a *continuous* right and therefore a right to a partition at a *particular time* claimed in the previous suit does not, where the former decree has not been executed, bar a fresh suit for partition on a right to partition arising *subsequently* to the first suit; as to all points, however, which were or ought to have been decided in the first suit, they will, of course, be barred.[11] Similarly, the mere fact that in a prior suit, a prayer for the settlement of a scheme was not granted, will not prevent a renewed attempt by way of suit to have a scheme framed when the occasion arises *at a later date*.[12] A obtains a decree against B, his wife, for restitution of conjugal rights. The decree is not executed, but the wife returns to his house, stays with him for two months and again deserts him. A brings a second suit for restitution of conjugal rights. The suit is not barred inasmuch as it is based on a *subsequent* cause of action, not in existence at the time of the first suit.[13]

Suppose a decree for maintenance is passed declaring such maintenance to be a charge on certain property. An attempt to execute the decree fails on the ground that the decree is only a declaratory one. Then a *suit* is brought to enforce the charge. Persons who became transferees of the property subsequent to the previous decree are impleaded as parties to the suit. They raised the contention that they are not bound by the charge as they are transferees for consideration without notice. The contention is not barred by constructive *res judicata* as the matters on which the contention is based occurred subsequently. As transferees of the charged property they are only debarred from questioning the existence of the charge as at the date of the previous decree. They are not prevented from questioning its consequences on *future* transactions.[14]

37. "Ought." — In order that a plea might be barred by Expln. IV to S. 11, it must be one which, not only *might* have been raised in the former suit but *ought* to have been raised therein.[1] It depends upon the facts of each particular case whether a matter

('28) 15 AIR 1928 Oudh 411 (413). (Previous suit by reversioner for possession based on the alleged unchastity of a widow, resulting in a forfeiture of her rights, will not bar a subsequent suit for possession on the death of the widow.)]
[*See also* ('32) L R 13 Oudh (Rev) 315 (316, 317). (Statutory rights by new Act.)]

10. ('26) 13 AIR 1926 Lah 668 (669) (DB).
('11) 9 Ind Cas 572 (574) : 33 All 463 (DB).
('84) 1884 Pun Re No. 54.

11. † ('15) 2 AIR 1915 All 1 (2) : 37 All 155 (158) (DB).
('20) 7 AIR 1920 Cal 108 (109) (DB).
('24) 11 AIR 1924 All 905 (906) : 46 All 820 (DB).
('06) 28 All 627 (629) (DB).
† ('91) 13 All 309 (313) (DB).
('23) 10 AIR 1923 Bom 467 (468) (DB). (Suit to recover share as per deed of partition made by the father—Suit dismissed on the ground that the partition was unequal and unfair—Second suit for partition not barred.)
('12) 37 Bom 307 (312) (DB).
('28) 15 AIR 1928 Cal 459 (461) (DB). (Decree directing some of the properties to remain joint —Second suit for partition of such properties barred.)
('06) 10 Cal W N 839 (840) (DB).
('84) 10 Cal 97 (101, 102) (DB). (Subsequent suit by transferee from cosharer.)
('90) 13 Mad 313 (315) (DB).
('21) 8 AIR 1921 Low Bur 13 (15) : 11 Low Bur Rul 1 (DB).
Also see O. 9, R. 9, N. 5.

12. ('22) 9 AIR 1922 Mad 413 (414, 415) (DB).

13. ('94) 18 Bom 327 (329) (DB).

14. ('40) 27 AIR 1940 Nag 163 (168) : ILR (1941) Nag 513 (DB).

Note 37

1. ('41) 28 AIR 1941 Lah 139 (142) (DB).
('39) 26 AIR 1939 Cal 692 (694) : I L R (1939) 2 Cal 551 (DB).
('93) 16 Mad 117 (120) (DB).
('21) 8 AIR 1921 Pat 326 (327) (DB).
('31) 18 AIR 1931 P C 5 (9) : 10 Pat 284 : 58 Ind App 17 (PC). (Relief which plaintiff was not bound to ask for is not *res judicata*.)
† ('28) 15 AIR 1928 All 721 (723) : 50 All 394 (DB).
('06) 28 All 644 (646).
('05) 2 All L Jour 265 (267, 268).
('81) 5 Bom 589 (594) (DB).
('81) 1881 Bom P J 204 (204, 205) (DB).
('33) 20 AIR 1933 Cal 793 (794).
('13) 18 Ind Cas 764 (765) (Cal). (Suit for maintenance is not barred by *res judicata* by a previous one for partition.)
('11) 10 Ind Cas 305 (307) : 38 Cal 448.
('38) 25 AIR 1938 Lah 671 (673) (DB). (Plea which it was the duty of the plaintiff in the previous suit to raise, not raised—Plea barred by *res judicata*.)

ought to have been made a ground of attack or defence in the previous suit,[2] and various tests have been applied to determine, in individual instances, whether a plea which might have been raised is also one which *ought* to have been raised.[3] One of the most important tests is to see *whether the matters raised in the two suits are so dissimilar that their union might lead to confusion.*[4] In this view the following pleas cannot be said to be such as ought to have been raised in the former suit :

(1) Pleas that will make the suit bad for *multifariousness* or will embarrass the trial thereof.[5]

(2) Pleas *irrelevant* to the suit,[6] i. e., pleas which are not necessary, either solely or in the alternative to sustain the claim made,[7] or pleas which, if proved, would not have affected the result of the suit.[8]

('35) 22 AIR 1935 Lah 825 (826) (DB). (Suit against two defendants decreed as against defendant 2 only and plaintiff ordered to pay costs of defendant 1 — Plaintiff appealed against this, impleading defendant 2 also and Court ordered defendants 2 to pay costs of the other defendant—Appeal by defendant 2 against the decree of trial Court passed against him is not barred by the other appeal.)

✠('35) 22 AIR 1935 Lah 753 (756) (DB).

('33) 20 AIR 1933 Lah 279 (282).

('29) 16 AIR 1929 Lah 872 (874) : 11 Lah 99 (DB).

('27) 14 AIR 1927 Lah 505 (506) : 8 Lah 308 (DB).

('22) 9 AIR 1922 Lah 358 (360) (DB). (*Held* on the facts that he need not.)

('17) 4 AIR 1917 Lah 139 (141).

('12) 1912 Pun L R No. 134, p. 415 (DB).

('30) 17 AIR 1930 Mad 539 (540) (DB).

('27) 14 AIR 1927 Mad 61 (62) (DB).

('15) 2 AIR 1915 Mad 420 (420) (DB).

('03) 13 Mad L Jour 359 (362) (DB). (On the facts held not bound to raise it.)

('38) 25 AIR 1938 Nag 193 (195) : ILR (1939) Nag 521.

('37) 24 AIR 1937 Oudh 394 (395) : 13 Luck 323.

('17) 4 AIR 1917 Oudh 410 (414) : 19 Oudh Cas 171.

('30) 17 AIR 1930 Rang 197 (198) (DB). (It was impossible to say that the matter ought to have been raised in the previous suit.)

('37) 24 AIR 1937 Sind 155 (156).

[*See also* ('05) 28 Mad 406 (412).]

2. ('40) 27 AIR 1940 Cal 550 (552) : ILR (1940) 1 Cal 544.

('39) 26 AIR 1939 Cal 692 (694) : I L R (1939) 2 Cal 551 (DB).

† ('93) 20 Cal 79 (85).

('30) 17 AIR 1930 Mad 701 (701, 702) : 53 Mad 761 (DB). (Previous suit confined to a particular right only—Plea claiming general right in subsequent suit is not barred by constructive *res judicata*.)

('11) 35 Bom 507 (510) (DB).

('20) 7 AIR 1920 Nag 177 (179).

('37) 24 AIR 1937 Oudh 159 (163) : 12 Luck 540 (DB).

('28) 15 AIR 1928 Oudh 411 (413).

('12) 17 Ind Cas 334 (337) (DB) (Oudh).

3. ('21) 8 AIR 1921 Cal 321 (324) (DB).

4. ('40) 27 AIR 1940 Cal 550 (552) : ILR (1940) 1 Cal 544.

('93) 20 Cal 79 (85) : 10 Ind App 234 (PC).

('30) 17 AIR 1930 Lah 487 (488).

('33) 20 AIR 1933 Cal 900 (903) : 60 Cal 1158 (DB).

('30) 17 AIR 1930 Cal 588 (590) (DB).

('09) 1 Ind Cas 808 (810) (Cal).

('08) 7 Cal L Jour 504 (510, 511) (DB).

† ('38) 25 AIR 1938 Lah 443 (444) : ILR (1938) Lah 729.

('21) 8 AIR 1921 Lah 17 (19).

('35) 22 AIR 1935 Mad 90 (90). (The fact that the two claims have to be supported by different evidence is not a satisfactory test.)

('31) 18 AIR 1931 Mad 268 (269).

('26) 13 AIR 1926 Mad 1128 (1129) (DB). (First suit for possession on ground of possession and dispossession — Second suit for partition on basis of joint title.)

† ('28) 15 AIR 1928 Rang 9 (10, 11) : 5 Rang 565 (DB).

('23) 10 AIR 1923 Rang 122 (123) : 11 Low Bur Rul 451.

5. ('15) 2 AIR 1915 Lah 122 (123) : 1915 Pun Re No. 68 (DB).

('25) 12 AIR 1925 All 486 (487) : 47 All 561 (DB).

('35) 22 AIR 1935 Bom 131 (133) (DB).

✠('90) 14 Bom 31 (52) (DB).

† ('35) 22 AIR 1935 Lah 753 (756) (DB).

('35) 22 AIR 1935 Lah 489 (490) : 16 Lah 1060 (DB). (Reversing AIR 1935 Lah 44.)

6. ('25) 12 AIR 1925 Mad 226 (226).

('29) 16 AIR 1929 Lah 294 (295). (Suit by *A* for pre-emption against *B*, one of two vendees, and recovery of entire property — Subsequent suit by *C*, other vendee, against *A* and *B* for recovery of his share of property and decree therein—Suit by *A* against *B* for refund of half the price was not barred.)

('80) 5 Cal 425 (431) (DB).

('28) 15 AIR 1928 Lah 489 (491).

7. ('92) 1892 Pun Re No. 124.

('21) 8 AIR 1921 Bom 195 (196) : 45 Bom 24 (DB).

('81) 1881 All W N 163 (163). (Plea as to pre-emption in a redemption suit.)

('32) 19 AIR 1932 Bom 222 (223) : 56 Bom 292 (DB).

8. ('20) 7 AIR 1920 Pat 291 (322) : 5 Pat L Jour 164 (DB).

('93) 16 Mad 11 (18).

('33) 20 AIR 1933 Cal 900 (903) : 60 Cal 1158 (DB). (Former suit by purchaser from Hindu widow against her and reversioners for possession —Subsequent suit by reversioners after death of widow for possession on the ground of want of legal necessity not barred.)

(3) Pleas, the evidence in support of which is such that it might be *destructive* of the other pleas.[9]

(4) Pleas based on causes of action which cannot be united without *inconsistency and confusion*.[10]

Where a point is one, which the Court, in *its discretion*, may or may not decide, it cannot be said that it ought to have been raised.[11]

38. Grounds of attack. — The grounds of attack in Explanation IV mean grounds of attack *in respect of the claim made* and do not include *other claims that were open to the plaintiff*.[1] In respect of the claim made, the plaintiff is bound to set up *all the grounds of his title* in the alternative, by which he became entitled to the relief, and, if he fails to do so, cannot maintain a subsequent suit for the same claim on any ground so omitted to be raised.[2] If he sets up a title to certain properties and he has

('11) 9 Ind Cas 585 (586) (Cal).
('25) 12 AIR 1925 Lah 552 (553).
('97) 1897 Pun Re No. 76.
('29) 16 AIR 1929 Mad 379 (381) (DB).
('13) 19 Ind Cas 589 (591) (DB) (Mad).
('13) 9 Nag L R 143 (144).
('08) 11 Oudh Cas 69 (73) (DB). (Decision in a suit instituted for inheritance would not bar a subsequent suit for dower.)

9. ✣('08) 31 Mad 385 (396).
('21) 8 AIR 1921 Pat 326 (327) (DB).
('08) 5 All L Jour 729 (730, 731).
('99) 1899 All W N 190 (191) (DB). (Objection which would put the objector out of Court could not be raised.)
†('31) 18 AIR 1931 Bom 187 (189) (DB).
('82) 8 Cal 819 (823) (DB).
†('35) 22 AIR 1935 Lah 753 (756) (DB).
('31) 18 AIR 1931 Mad 268 (269) (Alternative claims should be set up in the same suit unless they are incompatible.)
('26) 13 AIR 1926 Oudh 545 (545).

10. ('42) 29 AIR 1942 Oudh 286 (287) (DB). (Claim to certain land in previous suit based on custom of dhardhura—Claim negatived—Decision does not operate as *res judicata* in subsequent suit in which title is claimed on other basis — S. 11, Expl. 4 held not applicable—In the previous suit it would have been inconsistent with plaintiff's claim to have based his title on the basis on which he claimed it in the subsequent suit.)
('41) 28 AIR 1941 Lah 139 (142) (DB). (Previous suit by mortgagee based on failure of consideration for mortgage dismissed—Subsequent suit based on mortgage deed is not barred.)
('41) 28 AIR 1941 Rang 118 (120) : 1941) Rang L R 14 (DB). (Previous suit by wife for divorce—No alternative plea for declaration that she is not wife —Subsequent suit for such declaration not barred by *res judicata*.)
✣('40) 27 AIR 1940 Lah 27 (29, 30). (Application under S. 9, Punjab Debtors' Protection Act, is inconsistent with the plea of the judgment-debtor that property attached is his personal property. Hence, failure of the judgment-debtor to raise the alternative plea under S. 9 in an application based on personal claim, does not debar him from raising the plea subsequently.)
('40) 27 AIR 1940 Cal 550 (552) : I L R (1940) 1 Cal 544. (Plaintiff's first suit was against mortgagee as trespasser. Second suit for redemption not barred. The title put forward by the plaintiff in the former suit appeared to be entirely different from and dissimilar to the subsequent claim and the joining of these two together would have led to *confusion* as to evidence to be adduced in respect of the alternative claims.)
('23) 71 Ind Cas 1009 (1011) (Lah).
('12) 17 Ind Cas 334 (337) (DB) (Oudh).
('24) 11 AIR 1924 All 355 (356) : 46 All 230 (DB).
('07) 29 All 331 (338, 339) : 34 Ind App 72 : 10 Oudh Cas 117 (PC).
('05) 27 All 142 (144, 145) (DB).
('05) 2 All L Jour 342 (344).
('22) 9 AIR 1922 Bom 29 (30) : 46 Bom 803 (DB).
('30) 17 AIR 1930 Cal 588 (590) (DB). (Suit for ejectment of defendant as trespasser — Plea of tenancy—Subsequent suit for ejectment as tenant after giving notice.)
('28) 107 Ind Cas 110 (112) (Lah).
('13) 18 Ind Cas 973 (974) (DB) (Mad).
('09) 12 Oudh Cas 347 (379) (DB).
('17) 4 AIR 1917 Sind 93 (94) : 10 Sind L R 29 (DB).
[*See also* ('14) 1 AIR 1914 All 457 (458).
('27) 14 AIR 1927 Nag 322 (322, 323). (Alternative causes of action need not be added —It is conceived that in this case the two causes of action were inconsistent with each other.)]

11. ('27) 14 AIR 1927 Mad 120 (121) (DB).

Note 38

1. ('94) 18 Bom 537 (542) (DB).
('29) 16 AIR 1929 All 696 (697) (DB). (Suit for redemption of whole mortgage by one co-mortgagor — Contribution against other co-mortgagors need not be set up in the suit.)
('31) 18 AIR 1931 All 73 (76) (DB). (Grounds relating to other claims need not be urged. The observations as to different grounds of title not being necessary to be urged are, it is submitted, not correct. See Note 70.)
('92) 15 Mad 336 (341, 343). (First suit for declaring will as forgery — Second suit questioning validity of will not barred.)

2. † ('31) 18 AIR 1931 Mad 268 (269).
✣('76) 2 Cal 152 (172, 173, 177) (FB).
('31) 18 AIR 1931 All 462 (466) : 53 All 568 (DB).

two or more *alternative capacities* on which to rest such title, he must disclose both those capacities.[3] But where the capacity in which he sues in the subsequent suit is one in which he is a *stranger* to the capacity in which he sued in the former suit, he need not set up both the capacities in the former suit.[4] The reason is that in such a case the litigation is itself *under a different title* from that of the former suit and on that ground the subsequent suit will not be barred by *res judicata*.[5] The following illustrations will elucidate the above principles clearly :

Illustrations.

1. *A* sues *B* for a sum of money on a contract for the supply of boats and on failing therein sues *B* again for the same amount as compensation for services rendered in supplying the boats. The suit is barred inasmuch as the latter ground could have been advanced as a ground of attack in the former suit.[6]

('23) 10 AIR 1923 All 231 (232) (DB). (Suit by son to avoid execution sale of joint family property on ground of no necessity — Second suit to avoid sale on ground of immorality barred.)
('12) 15 Ind Cas 817 (817) (DB) (All).
('09) 31 All 323 (325) (DB).
('94) 16 All 252 (253).
('75) 7 N W P H C R 60 (63, 64, 66) (FB). (Former suit for possession of a one-fifth share of her deceased husband's estate as legatee under an alleged will—Her claim was dismissed—Second suit on the ground of heirship to recover three out of forty-eight shares in the same estate not barred.)
('67) 2 Agra 305 (305, 306).
('13) 37 Bom 224 (230) (DB).
✣('01) 25 Bom 189 (192, 197, 201) (DB).
('78) 3 Bom 137 (140) (DB).
('39) 43 Cal W N 437 (439). (Mokarari lease by Mahant — Suit by his successor for ejectment of successor of tenant on ground that plaintiff is heir of tenant and alternatively that tenant held only life interest—Suit dismissed — Subsequent suit by another Mahant on ground that mokarari lease was void after death of grantor — Suit barred by constructive *res judicata*.)
('08) 12 Cal W N 292 (298) (DB).
('88) 15 Cal 422 (431) : 15 Ind App 66 (PC). (That in the former suit the plaintiff asked for sub-proprietary right, and in the latter for the superior proprietary right, does not make any difference as regards the cause of action.)
('79) 4 Cal 190 (197) : 5 Ind App 149 (PC).
('79) 3 Cal L Rep 253 (256, 257). (Prior suit to set aside the sales for irregularity dismissed — Subsequent suit on the ground that the sales were void *ab initio* barred.)
('74) 22 Suth W R 464 (465) (DB).
('73) 20 Suth W R 482 (483) (DB).
('72) 18 Suth W R 163 (164) (PC).
('72) 17 Suth W R 351 (352) (DB).
('71) 15 Suth W R 168 (169) (DB).
('70) 13 Suth W R 209 (209) (DB).
('69) 12 Suth W R 336 (337) (DB).
('69) 12 Suth W R 55 (56) (DB).
('68) 10 Suth W R 426 (426) (DB). (Dismissal of a claim to recover land as to *lowfir* or excess bars a subsequent suit for possession of the same land as part of the claimant's taluk.)
✝('31) 18 AIR 1931 Lah 217 (219).
('08) 1908 Pun L R No. 95, p. 290 (DB). (Suit for possession as mortgagee—His claim to succeed as a reversioner not barred.)
('08) 1908 Pun L R No. 65, p. 172. (First suit on the ground that the plaintiff and not the deceased was the owner of the property dismissed—Second suit on the ground that he was adopted son and heir of the deceased not barred.)
('96) 1896 Pun Re No. 63. (Prior suit for proprietary possession dismissed — Subsequent suit for possession as occupant without right of proprietorship barred.)
('24) 11 AIR 1924 Mad 711 (712). (Person entitled to a share claiming whole and failing—Second suit for share is barred.)
('20) 7 AIR 1920 Mad 900 (900).
('84) 7 Mad 264 (265) (DB).
✝('38) 174 Ind Cas 777 (778) (Nag). (First suit for possession based on title — Defendants pleading possession as heirs—Dismissal of suit—Subsequent suit for joint possession with defendants—Plaintiff ought to have asserted this right in former suit — Not having done so, suit held barred.)
('15) 2 AIR 1915 Low Bur 152 (153). (Suit for redemption on the basis of a mortgage failed—Second suit based on promise to allow redemption on payment not barred.)
[But see ('06) 9 Oudh Cas 235 (238).]
Also see Note 35 and O. 2, R. 1 Note 3.
3. ✝('23) 71 Ind Cas 1009 (1011) (Pesh).
('26) 13 AIR 1926 Mad 849 (851).
('31) 18 AIR 1931 Lah 217 (219).
('31) 18 AIR 1931 Mad 268 (269).
4. ('86) 1886 Pun Re No. 6.
('10) 34 Bom 416 (419) (DB).
('38) 25 AIR 1938 Lah 139 (145) (DB). (Former suit as exclusive owner — Subsequent suit as co-sharer for accounts not barred.)
5. See Note 70, for a full discussion of the meaning of the words "litigating under the same title."
('32) 19 AIR 1932 Mad 589 (591).
6. ('12) 15 Ind Cas 374 (375) (DB) (Low Bur).
('75) 1 Bom 87 (89, 90) (DB). (Prior suit on contract against the defendants as principals—Second suit on the same contract against the defendants as agents barred.)
('77) 3 Cal 23 (25) (DB).
('98) 8 Mad L Jour 197 (199) (DB). (Suit on pronote for money due on accounts—Second suit for amount due on accounts is barred.)
('82) 5 Mad 47 (50) (DB). (First suit for money based on one partnership — Second suit based on another partnership barred.)

2. *A*, a minor, sues to set aside a compromise on the ground of fraud. His suit is dismissed on the ground that the fraud is not proved. *A* subsequently sues to set aside the same compromise on the ground that the Court's sanction was not obtained under O. 32, R. 7, in the suit in which the compromise decree was passed. The suit is barred. The latter ground ought to have been made a ground of attack in the former suit.[7]

3. *A*, the plaintiff, bases his claim on *nearness of kin* but does not mention the family custom but for which the nearness could not be proved. His suit is dismissed on the merits. Subsequently he files a suit for the same relief basing his claim on *nearness of kin by family custom*. His suit is barred.[8]

4. *A* sues to eject *B* from certain properties on the ground that he is the reversionary heir of one *X* deceased. Failing in this suit he brings a fresh suit for the same relief on the ground that he is the heir of *Y* (who had died even at the time of the former suit). The suit is barred. The plaintiff was bound to have set up both the capacities under which he became entitled to eject *B*.[9]

Where the assignee of a promissory note sues the promisor and the assignor and seeks relief against both jointly or severally, the only basis of the claim against the assignor could be that the assignment has failed for want of consideration. This ground of attack must, therefore, be taken to be one which might and ought to have been raised and impliedly decided.[10]

39. Grounds of defence. — A party having several grounds of defence to a suit is bound to set forth all such grounds and cannot reserve any one or more of them for a separate suit.[1] In *Srimut Rajah Mootoo Vijaya* v. *Katama Natchiar*,[2] their Lordships of the Privy Council said :

> "When a plaintiff claims an estate and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge then, to bring forward."

7. ('98) 21 Mad 91 (99) (DB).

8. ('25) 12 AIR 1925 P C 55 (57) : 47 All 158 : 52 Ind App 100 (PC).
('80) 2 Mad 352 (355) (DB). (First suit—Claim for possession based on inheritance—Second suit claiming under agreement not barred.)

9. ('26) 13 AIR 1926 Mad 234 (234).
('20) 7 AIR 1920 Nag 37 (38).
('97) 19 All 517 (519) (DB). (First suit as owner—Second suit as mortgagee.)
✠('31) 18 AIR 1931 Bom 114 (116).
('01) 25 Bom 189 (192, 197, 201) (DB). (First suit as surviving member of joint family—Second suit as reversioner.)
('30) 17 AIR 1930 Cal 690 (691).
('77) 2 Cal 152 (172, 173, 177) (DB). (First suit as heir of *A*. Second suit as heir of *B*.)
('31) 18 AIR 1931 Lah 217 (219). (Right of inheritance and by sale.)
('13) 1913 Pun L R No. 324, p. 1088 : 1913 Pun Re No. 86 (DB). (First suit based on one relationship—Second suit on another.)
✠('23) 10 AIR 1923 Mad 257 (259) : 46 Mad 135 (DB). (Title by purchase asserted and negatived—Subsequent suit on title by heirship.)
('17) 4 AIR 1917 Mad 481 (482, 483). (First suit for ejectment based on ancestral right—Second suit as heir of another person.)
('03) 26 Mad 645 (646) (DB).
('28) 15 AIR 1928 Rang 9 (10, 11) : 5 Rang 565 (DB). (First suit as kittima adopted son—Second suit as apatitha son.)
('23) 10 AIR 1923 Rang 122 (123, 124) : 11 Low Bur Rul 451. (First suit as donee from deceased, father—Second suit as heir of deceased father.)
[*See also* ('28) 15 AIR 1928 All 127 (127) : 50 All 306. (Prior suit for possession based on title as vendee—Subsequent suit for possession on basis of mortgage.)]

10. ✠('29) 16 AIR 1929 Oudh 172 (174) : 4 Luck 603 (FB).

Note 39

1. ('42) 29 AIR 1942 All 267 (287) : ILR (1942) All 518 (DB). (The fact that it was not to his *personal interest* to contest a suit is immaterial.)
('42) 29 AIR 1942 Oudh 354 (356) (DB).
('30) 130 Ind Cas 495 (496) (DB) (All). (Suit for restitution of conjugal rights—Wife not pleading that husband was impotent—Subsequent suit for dissolution of marriage on ground of impotency barred.)
('30) 1930 All L Jour 601 (606).
('26) 13 AIR 1926 Lah 162 (163) : 7 Lah 40 (DB).
('24) 11 AIR 1924 Cal 138 (139) (DB).
('78) 1 All 316 (316) (DB).
('75) 1 All 75 (76) (DB).
('81) 1881 Bom P J 281 (DB).
('14) 1 AIR 1914 Lah 390 (392) : 1915 Pun Re No. 12 (DB).
('26) 13 AIR 1926 Mad 1141 (1144). (Party not entitled to appeal but in a position to file cross-objection is barred by *res judicata*.)
('96) 19 Mad 145 (148) (DB).
('38) 25 AIR 1938 Pat 41 (42) : 16 Pat 748 (DB).
('14) 1 AIR 1914 Sind 24 (24, 25) : 8 Sind L R 218 (DB).
[*See also* ('78) 5 Ind App 149 (155) : 4 Cal 190 (PC).]
Also see Note 35.

2. † ('66) 11 Moo Ind App 50 (73) (PC).

But the grounds which will be barred must be grounds which will be *answers to the claim made* in the previous suit, that is, they must be such as, if raised, would *defeat* the plaintiff's claim.[3] If not, the party is not bound to raise them.[4] This means that there must be a *claim* before there can be a ground of defence. If there is no *claim* at all there is no point in saying that a particular matter might and ought to have been raised as a ground of defence in the former suit. A mere assertion in a plaint is not a claim, unless the plaintiff invites the Court's decision on the matter. An assertion may be a claim if the defendant treats it as such by denying it and inviting the Court's decision thereon.[5]

Illustrations.

1. *A* sues *B* in ejectment. *B* is not entitled to retain possession as against *A*, but has got a right of redemption of a mortgage on the said property. He does not set up his right of redemption in *A*'s suit, but brings a separate suit therefor, subsequently. He is not barred from doing so because the existence of the right of redemption is not a valid defence to the suit for ejectment and therefore need not have been raised in the former suit.[6]

2. *A*, a purchaser of certain properties from certain members of a joint Hindu family, sues to recover the property purchased by him impleading alienees of *other* properties from the same members as parties. The latter need not claim possession of *their* properties in that suit inasmuch as such a claim will not be an answer to the plaintiff's claim.[7]

3. *A* sues *B* for recovery of a certain sum of money. *B* is entitled to plead a set-off under O. 8, R. 6, of a sum of money due by *A* to him, but does not plead it. He subsequently sues *A* for such sum. He is not barred from doing so, because the plea of set-off is not an answer to the plaintiff's claim in the first suit but is a separate claim by defendant himself against such plaintiff.[8] Where, however, the former suit was on a *general balance of accounts*, a set-off of moneys received by the plaintiff from the defendant would be an answer to the plaintiff's claim and therefore must be pleaded as a ground of defence.[9]

4. In a suit for possession of land based on title, a claim for compensation for the improvements made by the defendant ought to be set up by him in defence. If it is not so set up, a decree for possession passed in the suit would operate as a bar to the further agitation of the question of compensation in a subsequent suit.[10]

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3. † ('42) 29 AIR 1942 Oudh 354 (356) (DB). (The Court has to see whether a certain plea, if taken, would have defeated the suit as brought and if it finds that there was any such plea which was not taken, one must hold that that plea ought to have been taken and that it could not be taken in a subsequent suit.)
† ('41) 28 AIR 1941 Cal 574 (576).
† ('24) 11 AIR 1924 Lah 83 (83) (DB).
('14) 1 AIR 1914 Lah 452 (453) : 1914 Pun Re No. 29 (DB).
('32) 19 AIR 1932 Nag 36 (38).

4. ('36) 19 Nag L Jour 290 (293) (DB). (Plaintiff's mortgage void as against landlord who was also a subsequent mortgagee—Landlord was not bound to set up his mortgage in plaintiff's suit—Landlord's suit to enforce his mortgage is not barred.)
('35) 62 Cal L Jour 153 (168) (DB).
('06) 4 Cal L Jour 211 (216)(DB). (Plaintiff bringing two suits based on different causes of action with regard to the same property—Defendant need not plead in each suit what is properly a defence to the other.)
('13) 1913 Pun L R No. 82, p. 316 : 1913 Pun Re No. 87 (DB).
('39) 26 AIR 1939 Mad 70 (74) (DB). (Partition suit—Coparceners may restrict scope of suit to what may be necessary for the grant of relief by the plaintiff.)
('33) 20 AIR 1933 Pesh 61 (63) (DB). (Plea of maintenance not complete answer to claim for possession—Suit for maintenance is not barred.)
[*See also* ('29) 16 AIR 1929 Oudh 455 (455) : 5 Luck 369. (Suit for redemption by puisne mortgagee—Sub-mortgagee made party need not claim payment to himself.)]

5. ('41) 28 AIR 1941 Cal 574 (578).
6. ('21) 8 AIR 1921 Nag 69 (70) : 17 Nag L R 33.
7. ('27) 14 AIR 1927 Mad 61 (62) (DB).
8. ('19) 6 AIR 1919 Lah 220 (220) : 1919 Pun Re No. 74.
('15) 2 AIR 1915 Mad 1213 (1213) (DB).
('26) 13 AIR 1926 Mad 1020 (1021).
('25) 12 AIR 1925 Mad 830 (831, 832).
[*See also* ('23) 10 AIR 1923 Lah 146 (146).]
Also see O. 8, R. 6, N. 13.
9. ('07) 1907 All W N 275 (275).
10. ('38) 42 Cal W N 110 (114) (DB).

But it has been held that a claim for Government revenue paid by a person in possession stands on a different footing from other payments and that his failure to claim a set-off in respect of Government revenue paid by him, in defence to a suit for mesne profits against him would not preclude him from claiming it in a separate suit.[11] A plea of constructive *res judicata* must be determined only with reference to the suit as framed and not with reference to what under the law the suit must have been.[12]

40. Application of the above principles to mortgage suits. — The principles stated in the foregoing Notes apply to all suits, including mortgage suits.[1] It will, however, be useful to illustrate their applicability to different classes of cases arising out of mortgage transactions.

Several suits for redemption of the same mortgage. — There was a conflict of opinion as to whether, where nothing is done under a prior decree for redemption, a subsequent suit for redemption is barred by *res judicata*. On the one hand, it was held that a prior suit and decree for redemption, which had not been executed and in which, in default of redemption, the property was not decreed to be foreclosed or the right of redemption declared to be extinguished, did not bar a subsequent suit for redemption, as, notwithstanding the decree the relationship of mortgagor and mortgagee continued.[2] The High Court of Bombay supported this view on the ground that the issue in a suit for redemption is not the existence of the mortgage, but *how much must be paid by the mortgagor to the mortgagee* in order to entitle him to recover possession or get reconveyance of the mortgaged property, and that, if it could be shown that the

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11. ('41) 28 AIR 1941 Mad 847 (850) (DB). (Case law considered.)

12. ('39) 26 AIR 1939 Mad 70 (75) (DB).

Note 40

1. *See* ('06) 29 Mad 65 (68) (DB). (Where it was held that S. 85 of the Transfer of Property Act, corresponding to O. 34, R. 1, does not modify the law of *res judicata*.)

2. ('10) 32 All 215 (218) (DB).
✠('99) 21 All 251 (262) (DB).
('29) 16 AIR 1929 All 409 (410) (DB).
† ('27) 14 AIR 1927 All 305 (305). (But second suit not maintainable during pendency of first suit or before execution is barred.)
('26) 13 AIR 1926 All 20 (21) : 48 All 17 (DB).
('25) 12 AIR 1925 All 484 (486). (The decree in the previous suit was not under O. 34, R. 7, but was a combined decree under O. 34, R. 8, which had the effect of extinguishing the mortgage — Second suit for redemption was held barred.)
† ('22) 9 AIR 1922 All 377 (379): 44 All 730 (DB).
('13) 18 Ind Cas 326 (326) (DB) (All).
('12) 15 Ind Cas 15 (15) (All).
('11) 9 Ind Cas 158 (159) (DB) (All). (Suit for sale by prior mortgagee against puisne mortgagee — Decree not executed — Suit for redemption by latter is not barred.)
('11) 33 All 302 (305) (DB).
('09) 4 Ind Cas 410 (412, 413) (DB) (Lah).
('09) 2 Ind Cas 630 (632) (All).
('07) 29 All 481 (483, 484) (DB). (Decree that right to redeem shall be extinguished on non-payment —Second suit is barred.)
† ('02) 24 All 44 (52, 56, 66) (FB). (Overruling 19 All 202.)
('98) 20 All 506 (510) (DB).
('89) 11 All 386 (392) (DB).
('67) 2 Agra 256 (256, 257).
✠('30) 17 AIR 1930 Bom 401 (405) (DB).
('23) 10 AIR 1923 Bom 287 (288) (DB).
† ('14) 1 AIR 1914 Bom 200 (201) : 39 Bom 41 (46, 47) (DB).
('16) 3 AIR 1916 Cal 43 (44) (DB). (Previous suit by mortgagee to remain in possession till his debt is satisfied out of the usufruct does not bar a subsequent suit for redemption — Following 14 Bom 327.)
('91) 18 Cal 139 (142) (DB).
('74) 22 Suth W R 172 (173, 174) (DB).
('30) 17 AIR 1930 Lah 423 (424) (DB). (Right to redeem finally decided in previous suit — Subsequent suit will be barred.)
('27) 14 AIR 1927 Lah 9 (9) : 7 Lah 420 (DB).
('25) 12 AIR 1925 Lah 31 (31) : 5 Lah 371 (DB).
('23) 10 AIR 1923 Lah 680 (682).
('15) 2 AIR 1915 Lah 125 (127) : 1915 Pun Re No. 93 (DB).
('09) 1909 Pun L R No. 135, page 524.
('07) 1907 Pun Re No. 43. (Order of dismissal of previous suit for redemption became final—Second suit for redemption was barred.)
('08) 1908 Pun Re No. 93.
('87) 1887 Pun Re No. 20.
('81) 1881 Pun Re No. 14.
('77) 1877 Pun Re No. 86.
[*See also* ('40) 27 AIR 1940 Mad 577 (578). (Malbar kanom—Suit for redemption by holder of melcharth—Decree allowed to lapse—Fresh suit by subsequent melcharth holder is maintainable provided the previous melcharthdar is impleaded as a party.)]
[But see ('09) 2 Ind Cas 662 (666) (Cal). (Redemption suit dismissed for default of payment.)]

mortgagor in his second suit raises in issue a substantially different matter to that decided in the first suit such, for example, as the *amount payable by him at the date of the second suit as distinct from that payable at the date of the first suit*, such second suit would not be barred.[3] The High Court of Madras and the Oudh Judicial Commissioner's Court, on the other hand, held a contrary view on the ground that the issue in a redemption suit is the right of redemption and when that has been decided once by an executable judgment, a second suit for the same relief is barred.[4] The conflict has now been set at rest by the Privy Council in *Raghunath Singh* v. *Mt. Hansraj Kunwar*.[5] In that case a decree for redemption was passed in the following terms :

> "It is ordered and decreed that the plaintiff is entitled to a decree for possession by redemption of mortgage in the following terms, *viz.*, that he should pay Rs. 4,208-6-0 by the 15th of November 1896, that if he will pay the said sum he will get all costs . . . . . and that in case of default *his case will stand dismissed.*"

No payment was made but a fresh suit was subsequently instituted for redemption. It was held that by the Proviso to S. 60 of the Transfer of Property Act, 1882, the right to redeem subsists unless "it has been extinguished by . . . . . order of a Court," that this right conferred upon the mortgagor by express enactment can only be taken away by means and in manner enacted for the purpose, that the words in the previous decree "his case will stand dismissed" could not be construed as meaning that the plaintiff was to be debarred from all right to redeem and that consequently it did not operate as *res judicata*. See also the undermentioned cases[6] which proceed on the view that where the prior decree for redemption does not provide that in default of payment within the time fixed, the right of redemption must be extinguished, a fresh suit for redemption is not barred.

But even if a fresh suit may lie for redemption, all matters actually decided, such as the *amount due*, etc., will be conclusive and cannot be raised in the fresh suit.[7]

Suits for redemption and settlement of accounts between mortgagor and mortgagee. — In suits for redemption there ought to be a complete and final settlement of all

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3. ✣('18) 5 AIR 1918 Bom 1 (6) : 43 Bom 334 (FB).
('23) 10 AIR 1923 Bom 300 (300, 301) : 47 Bom 692 (DB).
('31) 18 AIR 1931 Bom 480 (481) (DB).
† ('29) 16 AIR 1929 Bom 116 (119).
('11) 10 Ind Cas 748 (752) (Bom).
[*See also* ('27) 14 AIR 1927 Bom 32 (35) : 50 Bom 730.]
[But see ('17) 4 AIR 1917 Bom 162 (164) : 42 Bom 246 (252) (DB). (No longer law in view of AIR 1918 Bom 1 : 43 Bom 334 (FB).)
('92) 16 Bom 243 (248) (DB) (*Quære*).
('88) 13 Bom 567 (570) (DB).
('83) 7 Bom 467 (470) (SB).]

4. ('16) 3 AIR 1916 Mad 887 (888) : 39 Mad 896 (DB).
('02) 25 Mad 300 (307, 312, 315) (FB). (Overruling 6 Mad 119; 7 Mad 423; 8 Mad 478; 15 Mad 366; 21 Mad 18 and referring to 17 Mad 96.)
✣('26) 13 AIR 1926 Mad 816 (820) : 49 Mad 691 (DB). (In suit for sale also, right of redemption is in issue. AIR 1925 Mad 1191 reversed.)
('25) 12 AIR 1925 Oudh 696 (697) : 28 Oudh Cas 212 (DB). (But see the earlier decisions, 1 Oudh Decisions 198 (199), 6 Oudh Cas 367 (369) and 1 Oudh Cas 289 (300).)
('24) 11 AIR 1924 Oudh 245 (246).
('21) 8 AIR 1921 Oudh 139 (140) : 24 Oudh Cas 289 (DB). (Oudh Estates Act—Claim for redemption decided by settlement officer—Subsequent suit barred.)
('18) 5 AIR 1918 Oudh 364 (365) (DB).
('11) 12 Ind Cas 993 (998, 999) : 14 Oudh Cas 257 (SB).
(1900) 3 Oudh Cas 371 (382) (DB).
See also the following cases :
('13) 6 Sind L R 140 (141, 142) (DB).
('09) 3 Sind L R 17 (23, 30).
('31) 18 AIR 1931 Rang 283 (284, 285) : 9 Rang 360 (DB).
('30) 17 AIR 1930 Oudh 465 (467) (DB). (Where the principles are discussed.)

5. ('34) 21 AIR 1934 P C 205 (207, 208) : 61 Ind App 362 : 56 All 561 (PC).

6. ('41) 28 AIR 1941 Mad 217 (221) (DB). (Unless there has been an extinction of the mortgage right or of the right to redeem, by a decree passed under O. 34, R. 8 (2) in the former suit, there can be no question of bar by way of *res judicata* to a second suit for redemption.)
† ('36) 23 AIR 1936 Pat 420 (421) : 15 Pat 607 (DB).

7. ('74) 22 Suth W R 269 (270) (DB).

accounts between the mortgagor and the mortgagee up to the date of the redemption.[8] But a separate suit for mesne profits between the date of the payment under the preliminary decree and the date when the mortgagor is put in possession of the mortgaged property is not barred.[9]

Suits for redemption of several mortgages.—Where there are several mortgages by the mortgagor in favour of the same mortgagee, a suit for redemption of one of such mortgages cannot bar a subsequent suit for redemption of the other mortgages; the redemption of other mortgages is not a *ground of attack* in a suit for the redemption of the first mortgage.[10] See Note 38. See also the Authors' Commentaries on the Transfer of Property Act, 1st (1943) Edn., S. 61.

Suits for redemption and for ejectment.—A suit for redemption of a mortgage does not bar a subsequent suit by the mortgagor as a proprietor for ejectment of the mortgagee and *vice versa*, the matters involved in the two suits being totally different and distinct.[11] Similarly, in a suit by a prior mortgagee against the puisne mortgagee for ejectment, the latter is not bound to set up his title to redeem as it is not a valid ground of defence to the suit in ejectment.[12] Similarly, where mortgagor sues to eject the mortgagee, not entitled to possession under his mortgage, the latter need not set up his rights under his mortgage.[13] Where in a suit by the plaintiff against the mortgagee the claim of the plaintiff is founded upon an absolute title treating the mortgagee as trespasser and no question of the plaintiff's rights of redemption is raised, a subsequent suit by the plaintiff on the dismissal of the prior one, for redemption of the mortgage is not barred.[14]

Suits by puisne mortgagee against the mortgagor and the prior mortgagee. — A prior mortgagee who is made a party to a suit by a puisne mortgagee on his mortgage, *but whose prior mortgage is not impugned or sought to be postponed* in any way, need not set up his prior mortgage, as such a plea is a *paramount* claim not affecting the claim made on the puisne mortgage and therefore not a ground of defence.[15] Where,

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[*See also* ('40) 27 AIR 1940 Oudh 273 (274) : 15 Luck 545 (DB). (Previous suit for enforcement of mortgage—Amount due determined—It operates as *res judicata* in a subsequent suit for redemption.)
('27) 14 AIR 1927 Lah 9 (9) : 7 Lah 420 and 29 All 481 cited in foot-note (2) and *compare* 13 Moo Ind App 404 (PC).]

8. ('08) 30 All 36 (37).
('92) 16 Bom 656 (659) (DB).
('08) 30 All 225 (229) (DB).
('36) 23 AIR 1936 Cal 200 (202). (Mortgagor must include claim for over-payments made to mortgagee or excess profits received by latter.)
('10) 6 Ind Cas 336 (337) (DB) (Cal).
† ('07) 34 Cal 223 (232, 233, 234) (DB).
('20) 7 AIR 1920 Mad 531 (532) (DB).
('09) 12 Oudh Cas 152 (153) (DB).
('05) 8 Oudh Cas 302 (303).
Also see O. 34, R. 7, N. 4 and O. 34, R. 9, N. 3.

9. ('25) 12 AIR 1925 Rang 13 (14) : 2 Rang 382.
† ('18) 5 AIR 1918 Mad 284 (284) (DB).
('38) 25 AIR 1938 Mad 405 (411) (DB).
('31) 18 AIR 1931 Pat 13 (13) (DB).
[But see ('07) 31 Bom 527 (534) (DB). (Deposit under S. 83 of the Transfer of Property Act.)]
Also see O. 2 R. 2 Note 18 and O. 34 R. 9 Note 3.

10. ('06) 29 Mad 153 (154) (FB).
('01) 13 Mad L Jour 448 (453, 454, 457, 458) : 26 Mad 760 (DB).
† ('30) 17 AIR 1930 Mad 264 (266) (DB). (*cf.* AIR 1927 P C 32:50 Mad 180:54 Ind App 68 (PC) which is no longer law. See Transfer of Property Act, Section 61.)

11. ('29) 16 AIR 1929 Lah 833 (833, 834) (DB).
('99) 2 Oudh Cas 139 (142).
('11) 12 Ind Cas 387 (388, 389) : 35 Bom 507 (DB).
('89) 13 Bom 326 (329).
('74) 11 Bom H C R 224 (230) (DB).
('72) 9 Bom H C R 65 (67) (DB).
† ('04) 27 Mad 102 (105) (DB).
Also see Order 2 Rule 2 Note 26.

12. † ('21) 8 AIR 1921 Nag 69 (70) : 17 Nag L R 33.
[*See also* ('39) 26 AIR 1939 Bom 303 (304, 305). (Suit for possession on basis of ostensible sale deed executed by defendant to plaintiff—Omission by defendant to plead that transaction was really mortgage—Effect—Plea in later suit is not barred by *res judicata*.)]

13. ('04) 14 Mad L Jour 485 (487) (DB).

14. ('40) 27 AIR 1940 Cal 550 (552): ILR (1940) 1 Cal 544.

15. ('20) 7 AIR 1920 PC 81 (83) : 47 Cal 662 : 47 Ind App 11 (PC).
('30) 17 AIR 1930 All 163 (164) (DB).
('13) 35 All 111 (115) (DB).

however, the prior mortgage is impugned or sought to be postponed in any way, the prior mortgagee must set up his rights under the mortgage. Otherwise his rights will be barred.[16] Thus, where a person having a prior mortgage is impleaded *only* as a *subsequent* mortgagee or as the owner of the equity of redemption, thus impliedly negativing the priority, he must, by way of defence, set up his priority or he will be barred from doing so later on.[17]

Suit by mortgagee against mortgagor and puisne mortgagee. — A puisne mortgagee who is impleaded in a suit on a mortgage brought by a prior mortgagee is not simply entitled to resist the suit on the ground that he is himself entitled to be redeemed by the mortgagor. Where, therefore, in such a case, the prior mortgage is satisfied before sale under the decree in favour of the prior mortgagee, the puisne mortgagee can sue the mortgagor for sale on his mortgage.[18]

Where a usufructuary mortgagee brings a suit for possession against the mortgagor, a subsequent suit by the latter for redemption is not barred inasmuch as the plea of the right of redemption is irrelevant in the former suit and, therefore, not one which ought to have been raised.[19] See Note 37. But in a suit on a mortgage the defendant, mortgagor, is bound to put forward a counter-claim for any sum that may be due to him by the mortgagee *arising out of the mortgage transaction*, the general rule being that all claims relating to the mortgage between the parties thereto must be determined in one suit.[20]

In a suit to enforce a mortgage against the heirs of a mortgagor, an heir who has an *independent* title in the mortgaged properties is not bound to set up his title.[21]

It has been held by the Nagpur High Court that where the subsequent mortgagee of a holding governed by the Central Provinces Tenancy Act is the landlord himself, and the prior mortgage has not been created with his consent, he is in the position of a person claiming by title paramount in respect of such prior mortgage and so, even though he may be added as a party to the suit by the prior mortgagee, the landlord is not bound to set up his rights under his mortgage in such suit.[22]

('34) 21 AIR 1934 Cal 552 (553) : 61 Cal 494 (DB).
('15) 2 AIR 1915 Cal 373 (374) (DB).
('27) 14 AIR 1927 Mad 431 (432) (DB).
('12) 13 Ind Cas 182 (182) (DB) (Mad).
('33) 20 AIR 1933 Nag 190 (192).
('10) 6 Nag L R 156 (158).
† ('29) 16 AIR 1929 Oudh 463 (466) : 4 Luck 250 (DB).
('29) 16 AIR 1929 Oudh 88 (89) : 3 Luck 472 (DB).
('38) 25 AIR 1938 Pat 444 (447) : 17 Pat 180 (DB).
('20) 7 AIR 1920 Pat 630 (631, 632) (DB).
[But see ('01) 11 Mad L Jour 333 (334) (DB).]
Also see O. 34 R. 1 Note 10 and O. 34 R. 12 Note 3.

16. ('21) 11 AIR 1924 All 927 (927).
('23) 10 AIR 1923 Pat 290 (291) : 2 Pat 435 (DB).
('29) 117 Ind Cas 820 (821) (All).
('12) 34 All 599 (602) (DB).
† ('02) 24 All 429 (438) : 29 Ind App 118 (PC).
('01) 31 Cal 428 (431) (DB).
('35) 18 Nag L Jour 274 (278).
See also ('42) 29 AIR 1942 Pat 226 (229, 230) : 20 Pat 841 (DB). (*Obiter* — The result of all the decisions seems to be that in a mortgage suit paramount title cannot ordinarily be drawn into controversy without the consent of the parties. But if there is an allegation in the plaint, derogatory to the title of the prior mortgagee and if the prior mortgagee consents to have that title decided then he will be bound by the decision in that suit.)]
Also see Order 34 Rule 1 Note 10.

17. ('16) 3 AIR 1916 Cal 808 (808) (DB).
('12) 14 Ind Cas 496 (502) : 39 Cal 527 : 39 Ind App 68 (PC).
('15) 2 AIR 1915 Cal 496 (498).
† ('04) 8 Cal W N 385 (390) (DB).
[But see ('19) 6 AIR 1919 Nag 57 (59, 60, 62) : 15 Nag L R 114 (FB).]
Also see Order 34 Rule 1 Note 10.

18. ('19) 6 AIR 1919 Mad 100 (102) : 42 Mad 90 (DB).
† ('19) 6 AIR 1919 Mad 63 (66) (DB).
('22) 9 AIR 1922 Lah 358 (360) (DB). (Sale under prior mortgage decree — Deposit by subsequent mortgagee and application to reserve rights under his mortgage—Latter prayer rejected—Suit on his mortgage—Latter is not barred.)

19. ('13) 35 All 227(233, 234): 40 Ind App 74 (PC).

20. † ('20) 7 AIR 1920 Mad 531 (532) (DB).

21. ('32) 19 AIR 1932 Cal 12 (13) : 58 Cal 1222 (DB).

22. ('36) 19 Nag L Jour 290 (293) (DB).

Suit by mortgagee without impleading puisne mortgagee. — A mortgagee who omits to implead a subsequent mortgagee in his suit for sale is not debarred from afterwards bringing a second suit on the same mortgage against the subsequent mortgagee.[23]

Two mortgages in favour of same person — Suit on one of them only. — See Authors' Commentaries on the Transfer of Property Act, 1st (1943) Edn., S. 67A.

Plea of paramount title in mortgage suits. — A defendant claiming paramount title is an unnecessary party in a mortgage suit and he need not raise such plea in the suit.[24] Thus, where A mortgages properties x, y and z to B and then mortgages x alone to C but it appears that y and z did not belong to A at all but to C as owner and in a suit on his mortgage by B, C is made a party as *subsequent mortgagee of property* x, the question of C's paramount title to y and z need not be raised by him in that suit. A subsequent suit by him, therefore, for declaration of his title to y and z is not barred by *res judicata*.[25] It makes no difference to the applicability of this principle that the person claiming paramount title is impleaded in the suit as a purchaser or other person interested in the equity of redemption.[26] But if the party claiming paramount title invites the Court to decide the question of his title and the Court goes into it and decides the question against him, he will of course be bound by it.[27] Where a party claims paramount title in the mortgage suit and causes himself to be dismissed from the suit, he cannot sue subsequently to *redeem* the mortgage.[28]

Suit for redemption by mortgagor — Pleas which the mortgagee might and ought to raise. — Where there are two mortgages by A in favour of B, one usufructuary and one simple, and A sues for redemption of the usufructuary mortgage, B need not set up his rights under the simple mortgage also inasmuch as it is not a ground of defence to the suit.[29] Where a suit for redemption is decreed, the mortgagee must, on failure of the mortgagor to deposit the mortgage amount within the time fixed, obtain an order for sale; if he does not do so, he will be barred from suing again on the mortgage debt.[30] Where a mortgagor sues to cancel a mortgage given in renewal of an earlier mortgage and for possession, the defendant-mortgagee is bond to set up his rights under the earlier mortgage; otherwise he will be barred from subsequently suing to enforce his rights thereon.[31]

A mortgagee who had purchased the equity of redemption in a portion of the mortgaged property and whose mortgage amount was thus discharged in proportion, filed

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23. ('38) 25 AIR 1938 All 115 (115) (DB).
24. ('42) 29 AIR 1942 Pat 226 (229, 230) : 20 Pat 841 (DB).
† ('29) 16 AIR 1929 Cal 672 (675) (DB).
('32) 19 AIR 1932 Cal 12 (13) : 58 Cal 1222 (DB).
('33) 20 AIR 1933 Cal 325 (329) : 60 Cal 87 (DB).
('16) 3 AIR 1916 Cal 170 (172) (DB). (But see a contrary view in 1891 All W N 132.)
✣('37) 1937 Mad W N 60 (62).
('27) 14 AIR 1927 Mad 945 (946) (DB).
† ('27) 14 AIR 1927 Mad 301 (304).
('24) 11 AIR 1924 Nag 408 (408).
('30) 17 AIR 1930 Oudh 97 (99) : 5 Luck 658 (DB).
† ('29) 16 AIR 1929 Pat 678 (682) : 9 Pat 539 (DB).
('29) 16 AIR 1929 Pat 333 (336) : 9 Pat 118.
25. ('18) 5 AIR 1918 All 81 (83, 84) : 40 All 584 (588, 590) (DB).
('34) 21 AIR 1934 Cal 384 (387).
('34) 21 AIR 1934 Nag 33 (34).
26. ('40) 27 AIR 1940 Sind 103 (104): ILR (1940) Kar 302 (DB).
✣('39) 26 AIR 1939 Cal 692 (694, 695): ILR (1939) 2 Cal 551 (DB). (Lease of property to *A*—Then mortgage of same property to *B* — Then purchase of equity of redemption by *A*—Suit on mortgage by *B*—*A* impleaded as party — But no allegations derogatory to his right as prior lessee — He need not plead his right as lessee.)
27. ✣('42) 29 AIR 1942 Pat 226 (229, 230): 20 Pat 841 (DB).
('31) 18 AIR 1931 Pat 64 (68): 10 Pat 234 (DB).
† ('06) 33 Cal 425 (439) (DB).
[*See also* ('33) 20 AIR 1933 Cal 680 (682): 60 Cal 832 (DB)]
28. ('86) 12 Cal 414 (421, 422) : 12 Ind App 171 (PC).
('20) 7 AIR 1920 Cal 688 (689) (DB).
Also see O. 34 R. 1, Note 5.
29. ('25) 12 AIR 1925 Lah 516 (516).
30. ('89) 13 Bom 567 (570, 571) (DB).
31. ('11) 14 Oudh Cas 117 (123).
[But see ('27) 14 AIR 1927 Nag 83 (84).]

a suit on the mortgage for recovery of the *whole* amount denying the fact of his purchase when raised by the defendants. The suit was decreed to the effect that on payment of the whole amount, *the whole of the* mortgaged properties should be delivered to the defendants. The latter paid up the whole amount. Subsequently, the mortgagee filed a suit for a declaration of his title to the property purchased by him. It was held that he was barred by *res judicata* from claiming such relief.[32]

In a suit for redemption by a puisne mortgagee against the prior mortgagee and this sub-mortgagee, it is not incumbent on the latter to claim payment of the amount due to him and the failure to do so will not preclude him from subsequently suing his mortgagor for recovery of such money.[33] Nor need the mortgagee in a redemption suit set up in defence his right to specific performance of an agreement to sell.[34]

Claim for personal decree in mortgage suits. — Where the mortgagee's right to obtain a personal decree in the event of the sale proceeds proving insufficient is adjudicated upon and decided in favour of the plaintiff, the same is *res judicata* in subsequent proceedings and cannot be challenged in an application under Order 34, Rule 6.[35] See also Note 123.

Suit on mortgage against Hindu father impleading the sons. — In the undermentioned cases,[36] a suit was brought against the father of a Hindu joint family for the enforcement of a mortgage. The sons were also joined as defendants in the suit but the plaintiff did not ask for any relief against their interests in the joint family property but only claimed a personal decree against them. The personal decree was not granted. Then the plaintiff sought to proceed against the sons' interests in the joint family property. It was held that the granting of such relief to the plaintiff was barred by the principle of constructive *res judicata*.

41. Former suit must have been between the same parties or between parties under whom they or any of them claim. — A person may be a *party* to a suit or a person *claiming under a party*, or a person *represented* by a party or a complete stranger.[1] The general principle is that a person, not a party nor claiming under, or represented by, a party, to a litigation is not bound by it, the maxim being *Res inter alios acta alteri nocere non debet* — things done between strangers ought not to injure a party. A decision, therefore, in a litigation between A and B will be binding on them and their privies,[2] but will not operate as *res judicata* (unless it were a judgment

32. ('19) 6 AIR 1919 All 123 (125) (DB).
33. ('29) 16 AIR 1929 Oudh 455 (455): 5 Luck 369.
34. ('30) 17 AIR 1930 Mad 539 (540) (DB).
35. ✠ ('30) 17 AIR 1930 Oudh 378 (389) : 6 Luck 132 (FB).
[But see ('05) 1905 All W N 144 (145, 146). (Which was a case under the Transfer of Property Act.)]
36. † ('42) 29 AIR 1942 Oudh 9 (11): 17 Luck 319 (DB).
('36) 23 AIR 1936 Oudh 139 (141): 11 Luck 523 (DB).

Note 41

1. ('82) 6 Bom 703 (709, 710).
2. ('41) 28 AIR 1941 Mad 480 (480) (DB). (Decision binding on legal representatives of parties.)
('07) 30 Mad 447 (449) (DB). (A defendant, in a previous suit, having no right of appeal, may be bound by the decision.)
('14) 1 AIR 1914 P C 31 (32) : 41 Ind App 247 (PC). (Partition suit by cosharers ending in decrees—Cosharer who is party to them is bound by them.)
('25) 12 AIR 1925 All 663 (663) (DB).
('24) LR 5 All (Rev) 329 (329).
('02) 24 All 112 (116) (DB).
('92) 14 All 64 (66) (DB). (Person who is impleaded in the appeal remains a party to the suit on remand.)
('71) 8 Bom H C R A C 241 (243) (DB).
('11) 12 Ind Cas 464 (479) : 38 Cal 639 (DB).
('76) 25 Suth W R 366 (367) (DB).
('74) 12 Beng L R 433 (438) (PC).
('70) 13 Suth W R 64 (66) (DB).
('67) 8 Suth W R 366 (367) (DB). (A person made defendant only by way of precaution is also bound by the decision.)
('23) 10 AIR 1923 Lah 556 (556) (DB).
('30) 17 AIR 1930 Mad 714 (716) (DB).
('08) 18 Mad L Jour 576 (578) : 31 Mad 485 (DB).
('69) 4 Mad H C R 285 (296) (DB).
(1863) 1 Mad H C R 245 (246) (DB).

in rem) in a subsequent litigation between A and C.[3] Such a judgment may, however, be *admissible in evidence* to prove that a right or liability had, in a previous suit, been unsuccessfully set up by one of the parties in the subsequent suit.[4] As to what is meant by a "party," see Note 42. A party not bound by a previous proceeding between third parties cannot also take advantage of findings in his *favour* in those proceedings.[5]

42. "Same parties," meaning of. — To maintain a plea of *res judicata* it must appear from an inspection of the records that the person whose interest it is sought to bind was in some way a *party* to the suit.[1] A 'party' is a person whose name appears on the record *at the time of the decision*.[2] The mere omission of his name in the *formal order* by oversight will not however deprive him of his character of a party.[3]

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† ('29) 16 AIR 1929 Oudh 172 (174):4 Luck 603(FB). (Prior suit by transferee of pronote against executant and assignor dismissed—Second suit by transferee against assignor alone for damages is barred.)

3. ('42) 29 AIR 1942 Oudh 301 (303).
('01) 5 Cal W N 421 (422, 423) (DB).
('12) 1912 Pun W R No. 105, p. 280.
('27) 14 AIR 1927 P C 128 (131) : 54 Cal 770 : 54 Ind App 238 (PC).
('14) 1 AIR 1914 P C 67 (69) : 41 Cal 972 : 41 Ind App 110 (PC).
('32) L R 13 All (Rev) 15 (16).
('24) 11 AIR 1924 All 910 (911).
('23) 10 AIR 1923 All 232 (232) (DB).
('22) 9 AIR 1922 All 475 (476).
('21) 63 Ind Cas 240 (241) (DB) (All).
('11) 10 Ind Cas 924 (925) : 33 All 453 (FB).
† ('11) 33 All 493 (496, 499) (FB).
('10) 5 Ind Cas 451 (452) : 32 All 119 (DB).
('99) 23 Bom 597 (598, 601) (DB).
('81) 5 Bom 496 (498) (DB).
(1864) 1 Bom H C R A C 141 (143) (DB).
('34) 21 AIR 1934 Cal 788 (792).
('28) 15 AIR 1928 Cal 130 (134) : 55 Cal 448 (DB). (Judgment against creditor who sought to attach property cannot operate as *res judicata* as against judgment-debtor in a suit brought by him against the claimant.)
('27) 14 AIR 1927 Cal 97 (98) (DB).
('23) 10 AIR 1923 Cal 322 (323) (DB). (Judgment-debtor not party to previous application for execution can plead bar of limitation.)
('21) 8 AIR 1921 Cal 425 (426) (DB). (Prior suit under S. 5, Religious Endowments Act — Public not made parties — Second suit by public under S. 92, C. P. Code, not barred.)
('20) 7 AIR 1920 Cal 754 (755) (DB).
('06) 10 Cal W N 1084 (1084) (DB).
('03) 7 Cal W N 574 (575) (SB).
(1900) 4 Cal W N 63 (65) (DB).
('83) 9 Cal 945 (948) : 10 Ind App 45 (PC).
† ('80) 6 Cal 171 (189) (FB).
('71) 16 Suth W R 298 (298).
('71) 15 Suth W R 309 (310) (DB).
('32) 19 AIR 1932 Lah 232 (234) (DB).
('27) 14 AIR 1927 Lah 900 (902) (DB).
('19) 6 AIR 1919 Lah 174 (176) (DB).
('15) 2 AIR 1915 Lah 309 (309).
('10) 1910 Pun L R No. 100, p. 286.
(1900) 1900 Pun LR p.241 (244): 1900 Pun Re No.27.
('79) 1879 Pun Re No. 59.
('79) 1879 Pun Re No. 9. (Previous suit for custody of defendant as plaintiff's wife — Finding that marriage not proved—Subsequent suit by another for custody of same defendant as his wife — Wife not estopped by previous finding.)
('68) 1868 Pun Re No. 90.
('68) 1868 Pun Re No. 10.
('68) 1868 Pun Re No. 3.
('66) 1866 Pun Re No. 8.
('66) 1866 Pun Re No. 6.
('30) 17 AIR 1930 Mad 751 (754) (DB). (Observations in a judgment relating to a different matter though connected cannot bind third party.)
('22) 9 AIR 1922 Nag 189 (190).
('22) 9 AIR 1922 Nag 156 (157). (Defendant not represented by his brother in previous suit—Decision against brother does not bind defendant.)
('29) 16 AIR 1929 Oudh 455(455):5 Luck 369. (Omission by sub-mortgagee to claim amount due on sub-mortgage does not bar fresh suit against mortgagor.)
('21) 8 AIR 1921 Oudh 150 (153). (Sale in execution is not binding on persons not parties.)
('20) 7 Oudh L Jour 611 (612).
('16) 3 AIR 1916 Oudh 100 (102) : 19 Oudh Cas 39 (42). (Person not a party to a decree cannot be held bound by an account made therein.)
('06) 9 Oudh Cas 33 (34).
('28) 15 AIR 1928 Pat 116 (117) (DB). (Dismissal of application for insolvency is not a bar for making fresh application.)

4. †('21) 8 AIR 1921 Mad 248 (253, 254, 257) : 44 Mad 778 (FB). (Overruling 10 Mad L Tim 450, 36 Mad 141 and 33 Mad 483.)
('30) 17 AIR 1930 Lah 237 (237, 238).
('34) 21 AIR 1934 Cal 788 (792).
('33) 20 AIR 1933 Lah 57 (57).
† ('32) 19 AIR 1932 Pat 105 (112): 11 Pat 50 (DB).
[*See* ('75) 1875 Pun Re No. 61.
('28) 15 AIR 1928 Pat 615 (625) : 8 Pat 122 (DB).]
[*See also* ('41) 28 A I R 1941 P C 128 (129) : 21 Pat 243 : ILR (1941) Kar P C 150 (PC). (Lease by *A* to *B* and then to *C* on the ground that the prior lease to *B* had been forfeited — Decision between *A* and *B* that there was no forfeiture is not *res judicata* when the question again arises between *B* and *C* but the prior decision may be taken into account.)]
[But see ('30) 17 AIR 1930 Mad 751 (754) (DB).]

5. ('25) 12 AIR 1925 Mad 300 (301).

Note 42

1. ('06) 28 All 1 (17) : 32 Ind App 229 (PC).
2. ('82) 6 Bom 703 (710, 711, 712).
3. ('30) 17 AIR 1930 PC 22 (23): 57 Ind App 24 (PC).

The following persons have been held not to be *parties* to a litigation :

(1) A party whose name is struck off[4] or who is discharged from the suit[5] or who dies pending suit but whose name continues on the record erroneously.[6]

(2) Persons *wrongly* made parties in execution proceedings.[7]

(3) A person who applied to be made a party but whose application was refused.[8]

(4) Persons whose names are introduced on the record by fraud and without their knowledge.[9]

(5) Minor not represented in the suit by any guardian.[10]

(6) A person merely interested in litigation. Such a person is not bound to make himself a party and is not bound by the result of the litigation.[11]

Where the previous suit is *by* A as trustee of a certain shrine and the second suit is by the same shrine *through* A as trustee, the two suits are by the same party.[12]

A party who pleads insanity but who is not adjudged as an insane person continues to be a "party" though not represented by a guardian.[13] Where a guardian *ad litem* representing a minor in a suit applies to have his name removed on the ground that the minor has attained majority and this is ordered *without notice to the minor*, the latter cannot be deemed to be a party to that order and is not barred in a subsequent suit from asserting that he was a minor on the date of the order.[14]

The words "same parties" do not necessarily mean parties ranged on *opposite sides*. Further, the expression "between the same parties" qualifies not only the words "former suit" but the whole expression "in issue in a former suit."[15] A decision may thus be *res judicata* between the parties on the *same side* if the matter in issue has been *actively in issue between* them and the *decision thereon is necessary to grant relief to the plaintiff or against the defendant.*[16] A former suit by A and B against C is not between the same parties as a subsequent suit by X and B against C.[17] Similarly, a former suit by A against B is not between the same parties as a subsequent suit by A against B and C.[18] But so far as the parties *common to the two suits* are concerned, a matter directly and substantially in issue between them would be *res judicata*.[19] As against the parties not common, however, the decision cannot operate as *res judicata*.[20] See also Note 7 on S. 47.

4. ('72) 18 Suth W R 29 (30) (DB).

5. ('26) 13 AIR 1926 Lah 202 (202, 203).
('25) 12 AIR 1925 Oudh 650 (651).
('05) 27 All 59 (61) (DB).
('02) 6 Cal W N 314 (317) (DB).
[*See also* ('98) 17 Bom 341 (348) : 20 Ind App 1 (PC). (Irregularly made party for the purpose of discovery.)]

6. The principle of the decisions in foot-notes (4) and (5) will apply to this also.

7. ('10) 8 Ind Cas 161 (161) (DB) (Mad).

8. ('27) 14 AIR 1927 P C 108 (110) : 54 Ind App 190 : 51 Cal 595 (PC).

9. *See* ('82) 6 Bom 703 (710, 711, 712).

10. ('42) 29 AIR 1942 Pat 279 (281) (DB). (Suit against members of Hindu joint family.)
('22) 9 AIR 1922 All 217 (219) : 44 All 428 (DB).
Also see Order 32 Rule 3 Note 5.

11. ('20) 7 AIR 1920 Nag 184 (186).

12. ('38) 25 AIR 1938 Mad 257 (258).

13. ('15) 2 AIR 1915 All 265 (267) (DB).

14. ('27) 14 A I R 1927 Pat 271 (275) : 6 Pat 388 (DB).
[*See also* ('31) 18 AIR 1931 Mad 192 (193) (DB). (Non-compliance with proviso regarding notice under O. 21, R. 16 renders all subsequent proceedings void as against unnoticed defendant and his representatives.)]

15. ('04) 31 Cal 95 (100).
[But see ('82) 1882 All W N 168 (168) (DB). (Parties must have been arrayed on opposite sides in former suit.)
('10) 1910 Pun W R No. 42, p. 109. (Where it was held that co-defendants do not fall within the category of same parties.)]

16. ('01) 4 Oudh Cas 108 (117) (DB).
See also Notes 46 and 47.

17. ('68) 10 Suth W R 457 (457).

18. ('99) 26 Cal 428 (431) (FB).

19. ('40) 27 AIR 1940 Mad 201 (203).
('40) 45 Cal W N 420 (425).
('29) 16 AIR 1929 All 500 (501) (DB).
('03) 1903 Pun L R No. 49, p. 132 (133): 1903 Pun Re No. 12.
('28) 15 AIR 1928 Pat 436 (437) : 7 Pat 840 (DB).

20. ('99) 26 Cal 428 (432) (FB).

As to whether a decision will be *res judicata* in regard to a *pro forma* party, see Note 12.

43. Jus tertii. — Where A sues B, for instance, on title, and B sets up title in C, it is called a plea of *jus tertii*. A decision on such a plea of *jus tertii* will not, however, operate as *res judicata* in a suit by C or his privies on their title against A.[1] Suppose now that in a previous suit between A and C it had been decided, as between them, that A and not C had the title. Is the decision *res judicata* in a suit by A against B in which B sets up title in C? The High Court of Madras and the Chief Court of Oudh have held that it is not.[2] The High Court of Calcutta has, in the undermentioned case, held that it is,[3] but in a later case[4] has expressed the opinion that such a decision though not operating as *res judicata* is a strong piece of evidence in the subsequent suit on the question of title. It is submitted that the Madras view is the correct one.

44. Intervenors. — A person intervening in the suit will be considered to be a party thereto, no matter at what stage of the suit he so intervenes, and the decision in that suit will bar a subsequent suit by or against him on the points already so decided.[1] Thus, where in a rent suit a question of title was raised as between an intervenor and the plaintiff, he will be bound by the decision of that question.[2] Under the Code of 1859, the two suits had to be on the *same cause of action*[3] in order that the principle of *res judicata* may apply and it was held, where an intervenor was added as a party, that the cause of action against him would be different from that against the original defendant, and that, therefore, there could be no bar.[4] Under the present Code, the requirement as to the cause of action being the same in the two suits has been taken away.

45. Same person as party in different characters. — See Note 70.

46. Co-defendants. — As regards parties arrayed on the same side such as co-defendants, an adjudication between them may be *res judicata* in certain circumstances.[1] It will operate as *res judicata* if the following conditions are satisfied :

(1) there must be a *conflict of interest* between the defendants concerned,

(2) it must be *necessary to decide* the conflict in order to give the relief which the plaintiff claims,

(3) the question between the defendants must have been *finally decided*,[2] and

('25) 12 AIR 1925 Lah 309 (310).
('32) 16 R D 90 (91).
('27) 14 AIR 1927 Lah 259 (261).

Note 43

1. ('27) 14 AIR 1927 Mad 844 (845) : 50 Mad 877 (DB).
('26) 13 AIR 1926 All 77 (78).
2. ✣('21) 8 AIR 1921 Mad 248 (253) : 44 Mad 778 (FB). (Overruling AIR 1916 Mad 465 and 33 Mad 483.)
('32) 19 A I R 1932 Oudh 342 (343) : 6 Luck 710. (Though it is not *res judicata* it is not open to *I:* to set up title in *C.*)
('25) 12 AIR 1925 Mad 1025 (1025).
3. ('22) 9 AIR 1922 Cal 198 (200): 50 Cal 23 (DB).
4. ('25) 12 AIR 1925 Cal 1218 (1219, 1220) (DB).

Note 44

1. † ('86) 12 Cal 563 (565) (DB). (Previous suit dismissed against intervenor under O. 17, R. 3 for failure of plaintiff to adduce evidence—Subsequent suit against him barred.)
('78) 3 Cal 705 (707) (DB).
✣('75) 1 Cal 141 (147) : 2 Ind App 283 (PC).
2. ('78) 2 Cal L Rep 33 (39).
† ('78) 3 Cal 145 (147, 148) (FB).
Also see Note 14.
3. See S. 2 of Act VIII of 1859.
4. ('75) 24 Suth W R 218 (219) (DB).
[*See also* ('66) 6 Suth W R (Act X) 38 (39).]

Note 46

1. ('13) 30 A I R 1943 Cal 76 (83) : I L R (1942) 2 Cal 299 (DB).
('23) 10 AIR 1923 Lah 186 (189) (DB).
('27) 14 AIR 1927 All 365 (366).
† ('26) 13 AIR 1926 Cal 568 (571) (DB).
See also the cases in foot-note (2).
2. ('43) 30 AIR 1943 All 197 (201) (DB). (Decision unnecessary in former suit—Suit dismissed against all the defendants—Decision does not operate as *res judicata*.)

(4) the co-defendants were necessary or proper parties in the former suit.[3]

If *all* the conditions exist the adjudication will operate are *res judicata* between co-defendants.[4] But it will not so operate, if either there is no conflict of interest

† ('43) 30 A I R 1943 Cal 76 (83) : ILR (1942) 2 Cal 299 (DB). (The doctrine of *res judicata* as between co-defendants must, however, be applied with great caution. Where the plaint itself in a prior suit did not raise any conflict between the defendant and the co-defendant and the defendant did not appear, but the co-defendant appeared and claimed an interest conflicting with the interest of the absentee defendant, the decision, if any, on the point cannot operate as *res judicata* unless the absentee defendant gets notice of the conflict. In such circumstances the matter cannot be said to have been heard and finally decided so as to bind the parties.)
† ('43) 30 AIR 1943 Mad 276 (277) (DB).
† ('42) 29 AIR 1942 Cal 1 (16, 17) : ILR (1941) 2 Cal 434 (DB).
† ('42) 29 AIR 1942 Cal 92 (95): ILR (1942) 1 Cal 169 (DB).
('41) 28 AIR 1941 Pat 83 (87) : 19 Pat 669 (DB).
✣('31) 18 AIR 1931 P C 114 (117) : 53 All 103 : 58 Ind App 156 (PC).
('31) 18 AIR 1931 P C 231 (234) (PC).
('25) 12 AIR 1925 All 546 (547) ; 47 All 778 (DB).
('24) 11 A I R 1924 All 310 (310, 312) : 46 All 220 (DB).
('34) 21 A I R 1934 Bom 329 (334, 338) (DB). (Latter two conditions not satisfied.)
† ('34) 21 AIR 1934 Bom 313 (316) : 58 Bom 544 (DB).
('23) 10 AIR 1923 Bom 203(205):47 Bom 534 (DB).
('15) 2 AIR 1915 Bom 222 (224):40 Bom 210(DB).
† ('32) 19 A I R 1932 Cal 271 (272, 273) : 59 Cal 636 (DB).
('25) 12 AIR 1925 Cal 431 (432) : 51 Cal 997 (DB).
('17) 4 AIR 1917 Cal 679 (680) (DB). (Doctrine of *res judicata* between co-defendants should be applied with great caution.)
('09) 1 Ind Cas 913 (922) : 36 Cal 193 (DB).
(1864) 1864 Suth W R 299 (300) (DB). (Previous suit not determining any cause of action as between co-defendants—No *res judicata*.)
('38) 25 AIR 1938 Lah 227 (231) (DB).
('35) 22 AIR 1935 Lah 605 (606) (DB).
('25) 12 AIR 1925 Lah 434 (434).
('23) 10 AIR 1923 Lah 186 (189) (DB).
('21) 63 Ind Cas 735 (735) (DB) (Lah).
('15) 2 AIR 1915 Lah 283 (284).
('12) 14 Ind Cas 535 (536) (DB) (Lah).
('38) 25 AIR 1938 Mad 959 (960) (DB).
('38) 1938 Mad W N 224 (226).
('35) 22 AIR 1935 Mad 821 (823).
('35) 22 AIR 1935 Mad 649 (650).
('29) 16 AIR 1929 Mad 638 (639) (DB).
('28) 15 AIR 1928 Mad 630 (632) (DB).
('22) 9 AIR 1922 Mad 452 (453) (SB).
('19) 6 AIR 1919 Mad 359 (362) (DB). (The judgment must define real rights and obligations of the defendants *inter se*.)
('18) 5 AIR 1918 Mad 39 (40, 42) (DB). (Finding unnecessary for the suit—Not *res judicata*— But if embodied in the decree it is *res judicata*.)
('88) 11 Mad 204 (206) (DB).
('27) 14 AIR 1927 Nag 369 (369).
('24) 11 AIR 1924 Nag 429 (430): 20 Nag L R 197.
('24) 11 AIR 1924 Nag 142 (143, 144). (Decision necessary to decide plaintiff's claim.)
('03) 16 C P L R 42 (43, 44).
('20) 7 AIR 1920 Oudh 221 (222). (There must be conflict of interest.)
('34) 21 AIR 1934 Pat 270 (272). (Plaintiff and defendant in the latter suit were ranged as respondents in the previous appeal—*Held* barred by *res judicata*.)
('26) 13 AIR 1926 Pat 478 (480, 481) (DB).
('17) 4 AIR 1917 Pat 585 (586, 587) (DB). (*Ex parte* decree can operate as *res judicata*, but not decision on issue not necessary to be determined.)
('28) 15 AIR 1928 Rang 315 (316) : 6 Rang 575.
('25) 12 AIR 1925 Rang 228 (229) : 3 Rang 77.
('24) 11 AIR 1924 Rang 279 (281, 282) (DB).
('07) 1907 Upp Bur Rul Civ. Pro. 5.
('31) 18 AIR 1931 Sind 170 (177) : 25 Sind L R 498 (DB).
('26) 13 AIR 1926 Sind 282 (283). (There must be conflict of interest.)
[*See also* ('21) 8 AIR 1921 Cal 632 (632) (DB). (Co-defendants—Consent-decree — No conflict of interest between co-defendants—Decree is not *res judicata*.)
('20) 7 AIR 1920 Lah 54 (56).
('89) 2 C P L R 52 (53, 54).]

3. ('42) 29 AIR 1942 Cal 92 (95) : ILR (1942) 1 Cal 169 (DB).
('42) 29 AIR 1942 Cal 1 (16, 17): I L R (1941) 2 Cal 434 (DB).

4. ('43) 30 AIR 1943 Mad 276 (277) (DB). (No *res judicata* as second condition not fulfilled.)
('40) 27 AIR 1940 Rang 136 (137).
('39) 26 AIR 1939 Mad 830 (833) (DB).
('29) 16 AIR 1929 Mad 638 (640) (DB).
('33) 20 AIR 1933 Rang 255 (257) (DB).
('35) 22 AIR 1935 P C 139 (142) : 14 Pat 611 : 62 Ind App 224 (PC).
✣('32) 19 AIR 1932 P C 161 (164, 165) : 59 Ind App 247 : 10 Rang 322 (PC).
('33) 20 AIR 1933 All 206 (208) : 55 All 250.
('32) 19 AIR 1932 All 643 (646) (DB).
('32) 19 AIR 1932 All 520 (522, 523) (DB).
('20) 7 AIR 1920 All 189 (190) (DB).
('20) 7 AIR 1920 All 30 (31) (DB).
('19) 6 AIR 1919 All 318 (320) (DB).
('13) 11 All L Jour 844 (848).
('11) 10 Ind Cas 324 (325) (All).
('10) 7 Ind Cas 67 (67) (DB) (All).
✣(1900) 22 All 386 (390) (DB).
('96) 18 All 65 (67, 68).
('82) 4 All 92 (96, 97) (DB).
('14) 1 AIR 1914 Bom 134 (136): 38 Bom 438 (DB).
('03) 5 Bom L R 97 (98) (DB).
✣('87) 11 Bom 216 (220) (DB).
('07) 5 Cal L Jour 611 (628) : 36 Cal 193 (DB).
('83) 9 Cal 120 (124) (DB).
('81) 6 Cal 91 (93) (DB).

between them[5] or there is no necessity to decide such conflict for granting relief to the

('67) 7 Suth W R 181 (182) (DB).
('38) ILR 1938 Lah 75 (78, 79) (DB).
('35) 22 AIR 1935 Lah 544 (545). (Person having same interest as plaintiff impleaded as defendant in prior suit — His interest hostile to other co-defendants—Decision operates as *res judicata*.)
('35) 22 AIR 1935 Lah 102 (103) (DB). (It is not a condition that the plea of the non-contesting co-defendant should not be identical with that of the plaintiff.)
('33) 20 AIR 1933 Lah 325 (326): 14 Lah 442 (DB).
('33) 20 AIR 1933 Lah 274 (277): 14 Lah 31 (DB).
('27) 14 AIR 1927 Lah 112 (112).
('25) 12 AIR 1925 Lah 434 (434).
('12) 1912 Pun L R No. 188, p. 596: 1912 Pun Re No. 103 (DB).
('36) 23 AIR 1936 Mad 252 (255). (Issue as to joint family nature of property decided between co-defendants in suit by another — In suit between co-defendants, issue as to jointness is *res judicata*.)
('35) 22 AIR 1935 Mad 821 (824). (Suit by co-mortgagee — Other co-mortgagee made defendant — Claim of co-mortgagee defendant adjudicated being necessary to grant plaintiff's relief — Subsequent suit by co-mortgagee defendant's transferee for mortgage debt due to his transferor — Co-mortgagee plaintiff in prior suit made party — Decision in first suit operates as *res judicata*.)
('24) 11 AIR 1924 Mad 604 (605) (DB). ((1843) 3 Hare 627 followed.)
('19) 6 AIR 1919 Mad 212 (215) (DB).
('13) 21 Ind Cas 15 (16) (DB) (Mad).
('11) 11 Ind Cas 17 (17) (DB) (Mad).
('10) 5 Ind Cas 760 (760, 761) : 33 Mad 112 (DB).
('07) 30 Mad 447 (448, 449) (DB).
('06) 29 Mad 515 (517) (DB).
('94) 4 Mad L Jour 282 (283): 18 Mad 164. (Though the previous suit was tried *ex parte* the decision in that suit will be *res judicata* as between the defendants.)
('92) 15 Mad 264 (265) (DB).
('92) 2 Mad L Jour 203 (206) (DB).
('91) 14 Mad 324 (327) (DB).
('24) 11 AIR 1924 Nag 142 (143, 144).
('26) 13 AIR 1926 Oudh 281 (287) : 29 Oudh Cas 336 (DB).
('37) 24 AIR 1937 Pat 27 (30). (*Held*, there was conflict of interest and titles between the co-defendants and *res judicata* operated.)
('33) 20 AIR 1933 Pat 146 (147).
('39) 26 AIR 1939 Pesh 1 (2).
('15) 2 AIR 1915 Low Bur 133 (133) : 8 Low Bur Rul 105.
('31) 18 AIR 1931 Sind 170 (177) : 25 Sind L R 493 (DB).
[*See also* ('29) 16 AIR 1929 All 814 (815) (DB).
('81) 9 Cal L Rep 365 (368) (DB).]
[But see ('86) 12 Cal 580 (582) (FB).
('71) 16 Suth W R 128 (129) (DB).
('93) 6 C P L R 87 (89).]

5. ✣('39) 43 Cal W N 1214 (1217) (DB). (Joint decree passed against some of partners in respect of debt contracted by them — Defence that other partners are necessary parties negatived—Question if debt is partnership debt—Not *res judicata*.)
('39) 43 Cal W N 940 (942) (DB). (Decision in execution held not *res judicata* between co-judgment-debtors where no controversy was raised between the co-judgment-debtors.)
('29) 16 AIR 1929 Mad 291 (292) (DB).
('28) 15 AIR 1928 Pat 603 (606) : 7 Pat 566 (DB).
('37) 1937 All L Jour 1141 (1149, 1150) (DB).
('27) 14 AIR 1927 All 365 (366).
('23) 10 AIR 1923 All 169 (170).
('14) 1 AIR 1914 All 398 (399) (DB).
('10) 6 Ind Cas 331 (333) (DB) (All).
('08) 30 All 394 (398, 399) (DB).
('86) 8 All 91 (94) (DB).
('81) 3 All 152 (156, 157) (FB).
('29) 117 Ind Cas 100 (102) (All).
✝('21) 8 AIR 1921 Cal 632 (633) (DB).
('20) 7 AIR 1920 Cal 541 (541). (*Ex parte* decree against joint debtors does not operate as *res judicata* in contribution suit between them.)
('26) 96 Ind Cas 625 (627) (DB) (Cal).
('13) 18 Ind Cas 117 (118) (DB) (Cal).
('10) 7 Ind Cas 123 (124) (DB) (Cal).
('97) 24 Cal 330 (333) (DB).
('78) 2 Cal L Rep 406 (407) (DB). (Joint decree against *A*, *B* and *C* satisfied by *A* alone — Subsequent suit by *A* against *B* and *C* for contribution not barred.)
('72) 17 Suth W R 191 (192) (DB). (Decision between ryot and body of cosharers is not binding upon several cosharers *inter se*.)
('69) 12 Suth W R 524 (525) (DB).
(1864) 1 Suth W R 287 (288) (DB).
✝('21) 8 AIR 1921 Lah 47 (47) : 2 Lah 88 (DB). (Co-defendant not necessary party—No conflict of interest—Decision not *res judicata*.)
('21) 8 AIR 1921 Lah 25 (25) (DB).
('12) 1912 Pun L R No. 231, page 773.
('12) 1912 Pun L R No. 154, page 471 : 1912 Pun Re No. 42 (DB).
('05) 1905 Pun L R No. 102, page 411 : 1905 Pun Re No. 79.
('80) 1880 Pun Re No. 121 (FB).
✝('39) 26 AIR 1939 Mad 228 (233) (SB).
('38) 25 AIR 1938 Mad 959 (960) (DB).
('32) 19 AIR 1932 Mad 298 (299) : 55 Mad 601 (DB).
('24) 11 AIR 1924 Mad 711 (712).
('22) 9 AIR 1922 Mad 404 (405) (DB).
('18) 5 AIR 1918 Mad 564 (568) (DB).
('17) 4 AIR 1917 Mad 997 (1006) (DB). (Suit for redemption by puisne mortgagee against prior mortgagee—Mortgagor impleaded.)
✝('38) 1938 Mad W N 224 (226) (DB).
('35) 22 AIR 1935 Mad 649 (651).
('25) 12 AIR 1925 Mad 917 (948). (Finding on question of title neither necessary nor embodied in decree is not *res judicata*.)
('24) 11 AIR 1924 Mad 858 (858) (DB). (Suit dismissed — Findings in judgment as between co-defendants not embodied nor implied in decree are not *res judicata* nor appealable.)
('03) 26 Mad 337 (338) (DB).
('95) 18 Mad 374 (377) (DB).
('93) 16 Mad 61 (63) (FB).
✝('37) 20 Nag L Jour 159 (163) (DB).

plaintiff[6] or the conflict has not been decided.[7] It is not, however, necessary that the issue between the co-defendants should have been the *only ground* on which the Court could have decided the suit.[8] Nor is it necessary that there should have been an *active* contest between the co-defendants. It is only necessary that there must have been a conflict of interest[9] and this conflict may exist notwithstanding that one of the concerned defendants did not contest at all.[10] But, where a defendant in a prior suit was *ex parte* and a co-defendant was added as a party *later*, it was held that as the former was not even aware of the claim of the other defendant, no question between the defendants could be said to have been heard and *finally* decided.[11]

The decision between the co-defendants can be on a point directly and substantially in issue between them either actually or *constructively*. Thus, in an interpleader suit the several defendants-claimants are *deemed* to be claiming adversely to each other. If one of them puts forward a right as against the others, the latter must contest it on all grounds which might and ought to have been raised by them, and if they do not do so, the point will be deemed to be constructively in issue between them and to be impliedly decided.[12]

The doctrine of *res judicata* must, however, be applied to co-defendants with great caution.[13] In a partition suit where there is a *complete partition* the rights of each

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('24) 11 AIR 1924 Nag 429 (432): 20 Nag L R 197.
('34) 21 AIR 1934 Oudh 437 (439).
('28) 15 AIR 1928 Rang 315 (316) : 6 Rang 575.

6. † ('43) 30 AIR 1943 Mad 276 (277) (DB).
('40) 27 AIR 1940 Rang 136 (137). (Decision in suit in which conflict of interest between co-defendants was not decided as plaintiff's suit was dismissed for failure to establish title to suit land does not operate as *res judicata*.)
('40) 27 AIR 1940 Mad 187 (189) : I L R (1940) Mad 501 (FB).
('28) 15 AIR 1928 Mad 630 (632, 635) (DB).
('27) 14 AIR 1927 Rang 156 (156) (DB). (Plaintiff's case dismissed—Issue between co-defendants need not be decided.)
('31) 18 AIR 1931 All 695 (698) (DB). (Suit by remote reversioner—Suit dismissed as unsustainable—Nearer reversioners as defendants—Finding adverse to them recorded.)
(1900) 22 All 386 (390) (DB).
('96) 18 All 65 (68).
† ('23) 10 AIR 1923 Bom 203 (205) : 47 Bom 534 (DB).
('15) 2 AIR 1915 Bom 222 (223) : 40 Bom 210 (216) (DB).
('03) 5 Bom L R 97 (98) (DB). (Suit for redemption against mortgagee and his sub-mortgagee—Decree—Subsequent suit for redemption of sub-mortgage barred.)
('98) 22 Bom 245 (250) (DB).
('25) 12 AIR 1925 Cal 996 (1000) (DB).
('19) 6 AIR 1919 Cal 256 (257) (DB).
('01) 5 Cal W N 724 (725) (DB).
('38) 25 AIR 1938 Lah 227 (232).
('29) 16 AIR 1929 Lah 294 (295).
('24) 11 AIR 1924 Mad 604 (605) (DB).
('22) 9 AIR 1922 Mad 452 (453) (SB).
('10) 6 Ind Cas 889 (889) (DB) (Mad). (Suit for partition dismissed — Plea of self-acquisition not raised—Plea not barred in subsequent suit.)
('30) 17 AIR 1930 Nag 3 (4) : 26 Nag L R 121.
('24) 11 AIR 1924 Nag 168 (169).
† ('36) 1936 Oudh W N 982 (997, 998) (DB).
('31) 18 AIR 1931 Oudh 375 (376, 377) (DB).
('36) 23 AIR 1936 Rang 308 (310).
('29) 16 AIR 1929 Rang 162 (163) : 7 Rang 80.
('26) 13 AIR 1926 Rang 71 (72) (DB).
('26) 96 Ind Cas 625 (627) (DB) (Cal). (Point only incidentally raised.)

7. ('41) 28 AIR 1941 Pat 211 (212). (Suit against *A* and *B* on footing that *A* was principal and *B* was surety — But question not really raised or decided as between the two defendants — Not *res judicata*.)
('40) 27 AIR 1940 Rang 136 (137).
('29) 16 AIR 1929 Mad 291 (292) (DB). (Co-defendant withdrawing his plea, hence no finding given.)
('27) 14 AIR 1927 Mad 50 (51) (DB).
('22) 9 AIR 1922 All 19 (21) : 44 All 334 (DB). (Co-defendant's title not in issue nor determined.)
('10) 7 Ind Cas 892 (894) (DB) (Cal).
('11) 1911 Pun L R No. 71, page 311. (Question of liability of the co-defendants in the previous suit left open by Court.)
† ('23) 10 AIR 1923 Oudh 101 (102).
('99) 2 Oudh Cas 303 (306). (Suit for arrears of maintenance—Decree against one of the defendants—Liability of defendants *inter se* not decided—Suit for contribution not barred.)
† ('16) 3 AIR 1916 Pat 126 (129) (DB).

8. ('25) 12 AIR 1925 All 546 (546, 547) : 47 All 778 (DB).

9. ('43) 30 AIR 1943 Cal 76 (85) : I L R (1942) 2 Cal 299 (DB).

10. ('35) 22 AIR 1935 Mad 81 (83).

11. ('43) 30 AIR 1943 Cal 76 (84) : ILR (1942) 2 Cal 299 (DB).
('38) 1938 Mad W N 224 (226) (DB).

12. ('28) 15 AIR 1928 Oudh 155 (179, 181).

13. † ('43) 30 AIR 1943 Cal 76 (84) : I L R (1942) 2 Cal 299 (DB).
('25) 12 AIR 1925 Cal 431 (432) : 51 Cal 997 (DB).

party are determined, not only against the plaintiff but as against all the co-defendants and such determination will, therefore, bar a subsequent suit between the co-defendants on the points decided.[14] But whether rights between co-defendants amongst themselves have, or have not, been determined in any particular case, depends on no hard and fast rule. It is necessary to bear in mind in each case the *nature* of the partition suit brought.[15] Where the partition is *not a complete* one but only the plaintiff is divided off, it will not be *res judicata* between the defendants *inter se*, as there could, in such a case, be no *conflict* of issues between them.[16] It has been held that a suit for partition stands on a different footing from an ordinary title suit or money suit and in a partition suit, a matter may become *res judicata* as between co-defendants even though its decision may not have been *necessary* to give relief to the plaintiff.[17] The reason is that every defendant in a partition suit is himself in the position of a plaintiff.

In the case of a *nominal* or *pro forma* defendant there is really no conflict of interest between him and another defendant and so there can be no *res judicata* between them.[18]

47. Co-plaintiffs. — The same principles of *res judicata* applicable to co-defendants apply also to co-plaintiffs *inter se*. Therefore, if there is a conflict of interest between them and it is necessary to decide that in order to give relief against the defendants and the matter is decided, then it will operate as *res judicata* between the co-plaintiffs.[1] Where there is no such conflict,[2] or it is not necessary to decide it for the purpose of granting relief against defendants,[3] or it is not decided either actually or constructively,[4] there can be no question of *res judicata* between them.

48. "Parties under whom they or any of them claim." — The whole policy of the Code is that if the proceeding originally instituted is right and proper, any

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('17) 4 AIR 1917 Cal 679 (679) (DB).
('34) 21 AIR 1934 Oudh 437 (439).
14. † ('26) 13 AIR 1926 Sind 282 (283, 285).
('10) 32 All 469 (475) (DB).
('30) 17 AIR 1930 All 287 (288) : 51 All 850 (DB).
('29) 16 AIR 1929 All 500 (501) (DB).
('01) 3 Bom L R 94 (97) (DB).
('78) 3 Cal 551 (552) (DB).
('25) 12 AIR 1925 Oudh 566 (566, 567).
('19) 6 AIR 1919 Oudh 105 (108) : 22 Oudh Cas 300 (305) (DB).
15. ('29) 16 AIR 1929 Oudh 275 (277, 278) : 4 Luck 713 (DB).
† ('26) 13 AIR 1926 Sind 282 (285).
16. † ('23) 10 AIR 1923 Bom 203 (205) : 47 Bom 534 (DB).
('25) 12 AIR 1925 All 246 (246) (DB). (Proceedings for partition of cosharer village — Rate of profits allowed to out-going cosharers is not *res judicata* as between parties continuing as cosharers after partition.)
† ('32) 19 AIR 1932 All 666 (668) : 54 All 742 (DB).
('22) 9 AIR 1922 All 19 (21) : 44 All 334 (DB).
('86) 8 All 91 (94) (DB).
17. ('41) 28 AIR 1941 Pat 83 (88, 89) : 19 Pat 669 (DB).
18. ('10) 6 Ind Cas 554 (559) (DB) (Cal).
('01) 25 Bom 74 (77) (DB).
† ('36) 64 Cal L Jour 3 (5).
('35) 62 Cal 642 (652).
('19) 6 AIR 1919 Cal 596 (597).
('07) 5 Cal L Jour 653 (657) (DB).
('38) 25 AIR 1938 Lah 842 (846) (DB).
('21) 8 AIR 1921 Lah 47 (47, 48) : 2 Lah 88 (DB).
† ('14) 1 AIR 1914 Lah 161 (163) (DB)
('32) 19 AIR 1932 Mad 298 (301) : 55 Mad 601 (DB).
('39) 26 AIR 1939 Pat 225 (228) (DB). (Suit by *A* and *B* against *C*—*A* dying — *A*'s son *D* refusing to join the suit as plaintiff and, hence, made *pro forma* defendant—Decision in *C*'s favour not *res judicata* against *D*.)
('30) 17 AIR 1930 Pat 355 (356) (DB).
[See however † ('39) 26 AIR 1939 Mad 830 (833) (DB). (It is clear that neither the fact that a defendant did not contest but supported the plaintiff's claim, nor the fact that he was merely joined as *pro forma* defendant nor again the fact that the suit finally ended in a dismissal is a good reason for negativing a plea of *res judicata* between co-defendants if they in fact occupied a position of conflict in the prior suit.)]
Also see Note 12.

Note 47

1. ('25) 12 AIR 1925 Mad 645 (650).
('33) 20 AIR 1933 Lah 569 (570).
2. ('21) 8 AIR 1921 Pat 218 (225) (DB).
('11) 8 All L Jour 807 (809, 810).
('12) 14 Bom L R 854 (859).
('29) 122 Ind Cas 329 (329, 330) (Oudh).
[But see ('38) 25 AIR 1938 Lah 571 (574).]
3. ('12) 14 Ind Cas 466 (467, 468) : 36 Bom 207.
('33) 20 AIR 1933 Bom 287 (289) : 57 Bom 488.
4. ('18) 5 AIR 1918 Mad 1080 (1081).

decision obtained therein is binding on all persons on whom the right or interest may devolve.[1] A previous decision, therefore, is binding on all persons who claim under the parties to the decision,[2] whether they have *notice* of it or not.[3] The words "parties under whom they or any of them claim" are very wide but their meaning should be restricted so as to bind a person only in respect of the *interest represented* by the party in the former suit at the time of the suit, the ground of privity for purposes of *res judicata* being *property* and not *personal relationship*.[4] "Parties under whom they or any of them claim" comprise two classes of persons —

(1) parties *actually* claiming under a party to the previous suit, and

(2) parties who were *represented* by a party in the previous suit in respect of a public right or of a private right claimed in common for such person and others. See Explanation VI.

It is necessary for the application of the rule of *res judicata* that the parties to the former suit under whom the parties in the subsequent suit claim, should have been ranged on *opposite sides* or, at least, have had *conflicting interests*.[5] Where the plaintiff and the defendant in the subsequent suit claim through the *same person* who was a party in the former suit, they cannot be said to claim under the *parties* to the previous litigation and the decision in that suit is, therefore, not *res judicata*.[6] Even though the defendant in the subsequent suit was a party to the prior suit, the decision in the prior suit will not be *res judicata* between the parties to the subsequent suit, when both of them claim through the other party to the former suit.[7]

49. Parties claiming under parties in previous suit. — A person is said to claim under another when he derives his title through the other by assignment or otherwise.[1] But his title must have arisen *subsequently to the commencement of the first suit*.[2] Thus, where a person is adjudged an insolvent, any decision obtained against

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Note 48

1. ('28) 15 AIR 1928 Mad 246 (248).
('26) 13 AIR 1926 Nag 200 (201) : 21 Nag L R 159.
('22) 9 AIR 1922 All 19 (20) : 44 All 334.
('06) 33 Cal 1001 (1009).

2. ('27) 14 AIR 1927 All 39 (41) : 48 All 803.
('69) 13 Moo Ind App 270 (275) (PC).
('11) 33 All 752 (756).
('32) 19 AIR 1932 Bom 15 (18).
('16) 3 AIR 1916 Bom 273 (274) : 40 Bom 606 (612, 613).
('85) 9 Bom 198 (224, 232) (FB). (Judgment against one holder of service vatan lands is *res judicata* as regards a succeeding holder.)
('23) 10 AIR 1923 Cal 121 (130). (Plea taken and abandoned by assignors cannot be taken by assignees in subsequent proceedings.)
('21) 59 Ind Cas 808 (809) (Lah).
('15) 2 AIR 1915 Lah 92 (93).
('24) 11 AIR 1924 Mad 711 (712).
('69) 4 Mad H C R 349 (352).
('18) 5 AIR 1918 Pat 41 (46) : 4 Pat L Jour 213.
[*See also* ('27) 14 AIR 1927 Mad 1081 (1082).]

3. ('19) 6 AIR 1919 Cal 169 (170).

4. ('10) 5 Ind Cas 732 (733) : 33 Mad 459.
('09) 4 Ind Cas 1091 (1092, 1093) (Mad).
('31) 18 AIR 1931 Nag 183 (183) : 27 Nag L R 127. (Successive holders of a Jahgir.)
('37) 1937 Oudh W N 423 (427).
[*See also* ('31) 18 AIR 1931 All 635 (642): 54 All 299 (FB).]

5. ('87) 1887 All W N 246 (247).

6. ('25) 12 AIR 1925 Oudh 164 (166).
('03) 30 Cal 556 (564) : 30 Ind App 71 (PC).

7. ('32) 19 AIR 1932 Mad 198 (203) : 55 Mad 40.

Note 49

1. ('07) 29 All 1 (3).
('22) 9 AIR 1922 Pat 63 (67, 68) : 1 Pat 174.
('35) 22 AIR 1935 All 888 (889). (Decision against judgment-debtor—Creditor subsequently attaching property involved in that suit is bound by that decision.)
[*See also* ('10) 7 Ind Cas 184 (185) (Mad).]

2. ('28) 15 AIR 1928 Mad 635 (636).
('24) 11 AIR 1924 Nag 422 (423, 424).
('93) 15 All 108 (111).
('86) 8 All 324 (337, 338).
('16) 3 AIR 1916 Cal 673 (674).
('05) 32 Cal 357 (361).
('67) 7 Suth W R 103 (103).
('93) 1893 Pun Re No. 26.
('38) 25 AIR 1938 Mad 501 (502). (Title suit against vendor and vendee—Decree holding that vendor had no title — Appeal by vendee impleading plaintiff alone — Vendor not party to appeal —Vendor not appealing—Effect—Finding against vendor not *res judicata* against vendee so as to bar his appeal—AIR 1937 Mad 228 reversed.)

him subsequently thereto will not bind the Official Receiver as his title arose previous to the decision.[3] Similarly, a purchaser, mortgagee, lessee or donee of a property is not bound by a decree obtained in a suit against the vendor, mortgagor, lessor or donor commenced after the date of the purchase, mortgage, lease or gift.[4] When the predecessor in the previous suit did not fill the same *character* as that in which the successor claims in the subsequent suit, it cannot be said that the latter is claiming under the predecessor.[5]

50. Hindu son, if claims through father. — A Hindu son gets his right to ancestral property by *birth* and does not claim through his father in respect of such right.[1] Much less can he be said to claim through the father where he actually claims as the heir of a third person.[2] But a suit brought against the Hindu father may bind the sons where the suit against the former was as *representing his sons' interests also* within the meaning of Explanation VI to S. 11.[3] Where, however, it is clearly proved that, as a fact, there was no representation of the plaintiff's interests by his father in the previous suit, he will not, of course, be bound by the decision.[4] See also Note 61.

51. Co-heirs, if claim under each other.—One heir does not claim under another and cannot be barred by *res judicata* by a decision against the former.[1] See also Note 63b.

52. Co-owners, if claim under each other. — Nor does one co-owner claim under another co-owner. A judgment rendered against one co-owner does not, therefore, bar a suit against another co-owner.[1]

53. Co-tenants. — Ordinarily a decision against one tenant cannot operate as *res judicata* against co-tenants, who were not parties thereto.[1] In suits for rent under the Bengal Rent Act, 1869, where a *registered* tenant is sued for rent and a decree is obtained, the *whole tenure* is saleable under certain circumstances; in such cases, therefore, the other tenants will also be bound thereby.[2] In other cases the ordinary

('32) 19 AIR 1932 Mad 238 (239).
('25) 12 AIR 1925 Mad 358 (358).
('21) 8 AIR 1921 Mad 30 (36) : 44 Mad 232.
('15) 2 AIR 1915 Mad 502 (503).
('23) 73 Ind Cas 711 (713) (Pesh).
('16) 3 AIR 1916 Low Bur 102 (102).
3. ('24) 11 AIR 1924 Mad 689 (691): 47 Mad 633.
4. ('42) 29 AIR 1942 Pat 234 (236) (DB).
('33) 20 AIR 1933 Lah 66 (67).
('35) 22 AIR 1935 All 351 (353).
('35) 22 AIR 1935 Mad 414 (416).
[*See also* ('32) 19 AIR 1932 Mad 238 (239).]
5. ('94) 1894 Pun Re No. 51.
('32) 19 AIR 1932 Mad 198 (203, 204): 55 Mad 40.

Note 50

1. ('07) 29 All 1 (3).
('30) 17 AIR 1930 All 727 (729).
('93) 1893 All W N 168 (169).
('88) 10 All 411 (413).
('11) 9 Ind Cas 300 (302): 1911 Pun Re No. 26 (FB).
('31) 18 AIR 1931 Mad 550 (551).
[*See also* ('16) 3 AIR 1916 Lah 15 (19) : 1916 Pun Re No. 25.]
2. ('78) 1 All 734 (743).
3. ('30) 17 AIR 1930 Mad 257 (258).
('30) 17 AIR 1930 Mad 206 (208).
('29) 16 AIR 1929 All 726 (730) : 51 All 932.
('29) 16 AIR 1929 Bom 213 (214) : 53 Bom 414.
('12) 15 Ind Cas 657 (658) (Cal).
('05) 1905 Pun Re No. 68.
('79) 1879 Pun Re No. 103.
('99) 22 Mad 461 (462, 463).
('89) 12 Mad 235 (237).
('32) 19 AIR 1932 Nag 90 (92). (Failure by joint Hindu father to take possible plea does not entitle son to plead that he was not properly represented.)
('18) 5 AIR 1918 Pat 73 (76) : 2 Pat L Jour 725.
4. ('29) 16 AIR 1929 All 910 (911). (Suit dismissed on ground that a person had no right to continue suit cannot act as *res judicata* against his sons.)
('13) 11 All L Jour 36 (38).
('31) 18 AIR 1931 Mad 550 (551). (At the time of the decree against the father, the son was not born.)
[*See also* ('87) 1887 All W N 217 (217).]

Note 51

1. ('82) 1882 Pun Re No. 2.

Note 52

1. ('86) 13 Cal 352 (356) (FB).

Note 53

1. ('12) 16 Ind Cas 698 (701) (DB) (Mad).
('09) 1 Ind Cas 184 (185) (DB) (Cal).
2. ('95) 22 Cal 364 (372) (DB).
('99) 26 Cal 677 (690, 691) (SB).
('05) 32 Cal 1031 (1033) (DB).
('98) 25 Cal 396 (398) (DB).
[*See also* ('06) 10 Cal W N 240 (241).]

rule that only the right, title and interest of the judgment-debtor passes under the sale, will apply and the other tenants will not be bound by the decision in respect of their shares,[3] unless the tenant sued actually so represented his tenancy that the decree should be regarded as a decree made in a suit against the tenant in his representative capacity.[4]

54. Transferor and transferee.—In accordance with the principle noted in Note 49 above, a transferee will be a person claiming under the transferor within the meaning of S. 11 if his transfer is subsequent to the institution of the suit by or against the transferor[1] but not otherwise.[2]

55. Mortgagor and mortgagee. — A mortgagee is a transferee from the mortgagor of an interest in the property mortgaged, and therefore, in respect of the interest transferred, the same principles as have been mentioned in Notes 49 and 54 will apply. That is, the mortgagee will be bound by a decision against his mortgagor in respect of the mortgaged property, if the decision was in a suit which was instituted *prior* to the mortgage[1] but not otherwise.[2]

In respect of the *proprietary title* to the property mortgaged, the mortgagee is not a representative of the mortgagor and therefore a decision against the former in respect of such title is not *res judicata* against the latter.[3]

Where a mortgagee sues a *stranger* for possession on the ground that the mortgaged property belonged to the mortgagor, he is really suing in a representative character *on behalf* of the mortgagor also and the decision will therefore operate as a bar in a subsequent suit by the mortgagor for redemption in which the stranger is also a party and tries to raise the same plea against the mortgagor.[4]

A mortgagor cannot be said to be claiming under his co-mortgagor.[5] But the Oudh Judicial Commissioner's Court has held that a suit for redemption by a co-mortgagor

3. ('09) 1 Ind Cas 184 (185) (DB) (Cal).
('09) 1 Ind Cas 539 (542) (DB) (Cal).
4. ('21) 8 AIR 1921 Cal 584 (590) (DB).

Note 54

1. ('16) 3 AIR 1916 Low Bur 102 (102).
('26) 13 AIR 1926 Nag 200 (201): 21 Nag L R 159. (Case of execution by assignee of a decree.)
('87) 15 Ind App 97 (99) : 15 Cal 756 (PC).
('84) 6 All 506 (509) (DB).
('03) 27 Bom 266 (271) (DB).
('01) 28 Cal 23 (26) (DB).
('88) 15 Cal 94 (99, 100) (DB).
('86) 12 Cal 299 (301, 302) (DB). (Alienee *pendente lite*.)
('39) 26 AIR 1939 Mad 94 (95). (Prior suit by Court of Wards in charge of estate — Subsequent suit by purchaser of estate.)
† ('25) 12 AIR 1925 Nag 132 (134) : 22 Nag L R 110. (Alienee after preliminary but before final decree.)
† ('21) 59 Ind Cas 808 (809) (DB) (Lah).
2. † ('25) 12 AIR 1925 Mad 358 (358).
('93) 15 All 108 (111, 112) (DB).
('24) 11 AIR 1924 All 474 (475, 476) (DB).
† ('86) 8 All 324 (335, 336, 338) (DB).
('11) 35 Bom 297 (300) (DB).
('98) 22 Bom 939 (943, 944) (DB).
('05) 1 Cal L Jour 337 (345) (DB).
('93) 1893 Pun Re No. 26.
('16) 3 AIR 1916 Nag 78 (79) : 13 Nag L R 19.
('16) 3 AIR 1916 Low Bur 102 (102).

Note 55

1. † ('14) 1 AIR 1914 All 386 (388).
('12) 13 Ind Cas 641 (641, 642) (All).
('10) 6 Ind Cas 764 (765) : 34 Mad 115 (DB).
[*See also* ('72) 18 Suth W R 206 (207).
('31) 18 AIR 1931 Mad 542 (547, 548) (DB).]
2. ('40) 27 AIR 1940 Nag 382 (383). (Suit against the mortgagor instituted after he had mortgaged the property to another—*Held* mortgagee not bound by the decision in that suit.)
('10) 32 All 119 (123) (DB).
† ('86) 8 All 324 (335, 338) (DB).
('35) 22 AIR 1935 All 351 (353). (Decision against transferee from mortgagor after mortgage is not *res judicata* against mortgagee.)
('16) 3 AIR 1916 Bom 204 (205) : 40 Bom 679 (684, 686) (DB).
('95) 22 Cal 364 (371, 372) (DB).
('79) 4 Cal 692 (696) (DB).
('69) 12 Suth W R 362 (363) (DB).
('35) 22 AIR 1935 Mad 414 (416).
('26) 13 AIR 1926 Oudh 1 (2) : 1 Luck 25 (DB).
3. ('18) 5 AIR 1918 Oudh 176 (180).
('01) 4 Oudh Cas 100 (103) (DB).
('24) L R 5 Oudh (Rev) 118 (118).
4. ('24) 11 AIR 1924 Bom 299 (299, 300) (DB).
5. ('04) 32 Ind App 229 (241, 242) : 28 All 1 : 9 Oudh Cas 7 (PC).
('18) 5 AIR 1918 Oudh 25 (27).

must be deemed to be one brought in a representative capacity on behalf of all the mortgagors and that, in that view, the decision will bind them all.[6]

56. Judgment-debtor, decree-holder and auction-purchaser. — An auction-purchaser in execution of a *money* decree purchases only the right, title and interest of the judgment-debtor and therefore claims under him and will, therefore, be bound by a previous decision against him in respect of such property.[1] An auction-purchaser in execution of a *mortgage* decree not only purchases the right, title and interest of the judgment-debtor, namely his equity of redemption, but also the *mortgagee interest* which was vested in the decree-holder. (See O. 34, R. 5, Note 19.) He thus purchases the whole property which had vested in the mortgagor and mortgagee together. He therefore represents both the mortgagor and the mortgagee in respect of their respective interests.[2] Whether, in any particular case, he represents the mortgagor or the mortgagee depends upon the particular interest that is in question in the litigation.

The auction-purchaser in execution of a decree on a mortgage is a purchaser of rights *as on the date of the mortgage* and will not be affected by a decision in a suit subsequent to the mortgage, though the auction-purchase itself may be subsequent to the suit.[3] A purchaser in execution of a puisne mortgagee's decree against the mortgagor and his sons who has purchased subject to a first mortgage, is not debarred in a suit by the first mortgagee on his mortgage from challenging the validity of the first mortgage as the sons themselves could have done, if the validity of that mortgage was not in question in the former suit.[4] It has been held in some cases[5] that even in the case of an auction sale in execution of a *money* decree, the auction-purchaser is a representative of a decree-holder in respect of *his right to sell* the properties of the judgment-debtor in execution of his decree. It is submitted that this view is wrong. A right to sell the judgment-debtor's properties in execution of a money decree is not an *interest in property* which alone is a ground of privity for the purposes of *res judicata*.[6] See Note 19 on section 47 for a fuller discussion.

In a *revenue sale* what is sold is not the right, title and interest of the defaulting proprietor but the *whole property* free from incumbrances. The auction-purchaser, in such a case, claims *paramount* title and not through the defaulting proprietor and is therefore not barred by *res judicata* by a previous decision against the defaulting proprietor.[7]

A files a suit against B to establish his title to certain property. The suit is dismissed on the ground that the property belongs to B. C thereafter attaches the

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6. ('25) 12 AIR 1925 Oudh 696 (697) : 28 Oudh Cas 212 (DB).

Note 56

1. ('22) 9 AIR 1922 Pat 63 (64,67,68):1 Pat 174(DB).
('97) 24 Cal 62 (74) (FB).
('35) 22 AIR 1935 All 888 (889) (DB). (Property alleged as belonging to *R* attached by *S* in execution of decree against *R* — Suit by *RS* that it did did not belong to *R* and that he was absolute owner — *R* and *S* impleaded and suit decreed — Subsequent attachment of same property by *B*, another creditor of *R* and purchase of property by *N* — Declaratory suit by *RS*—Decree in original suit is binding on *B* and *N* and as such they cannot call upon *RS* to prove his title again.)
('04) 26 All 447 (460, 464) (FB).
('95) 22 Cal 909 (919) : 22 Ind App 129 (PC).
('33) 20 AIR 1933 Lah 171 (172).
('22) 9 AIR 1922 Nag 81 (82).
† ('11) 14 Oudh Cas 89 (94).
('26) 13 AIR 1926 Pat 478 (479) (DB).
[*See also* ('28) 15 AIR 1928 Pat 108 (109). (Auction-purchaser not a representative of decree-holder.)]

2. ('29) 16 AIR 1929 Rang 183 (183).

3. ('22) 9 AIR 1922 Mad 390 (390) (DB).
('10) 8 Ind Cas 846 (847, 848) (Mad).

4. ('28) 15 AIR 1928 Mad 557 (558).

5. ('95) 18 Mad 13 (18) (DB).
See also cases cited under Note 19 on S. 47.

6. See Note 48.

7 ('04) 8 Cal W N 676 (680) (DB).
('05) 9 Cal W N 383 (385, 386) (DB).
('20) 7 AIR 1920 Cal 420 (421) (DB).
('12) 15 Ind Cas 869 (870) (DB) (Cal).

property in execution of a decree obtained by him against B. A prefers a claim under O. 21, R. 58 and on its dismissal sues under O. 21, R. 63, making B and C both defendants. It has been held by the High Court of Rangoon that C, the decree-holder, must be held to claim under B and that therefore the previous decision in A's suit would operate as *res judicata* in the latter suit in favour of C also.[8] See also the following decisions of the High Courts of Allahabad[9] and Calcutta[10] which proceed on the view that an attaching creditor of A is a person claiming under him, in regard to whom a decision passed in favour of or against A would operate as *res judicata*. The Oudh Chief Court has also held that a creditor asserting the title of his debtor claims under him and is bound by a decision against the debtor.[11] In the undermentioned decision,[12] however, of the Madras High Court, a contrary view was expressed. But the judgment-debtor does not claim under the decree-holder. Thus, where C, a decree-holder, sues A, the claimant under O. 21, R. 63 to establish the title of B, the judgment-debtor, to certain properties and the suit is dismissed, the decision will not operate as *res judicata* in a subsequent suit by B against A on the strength of his title.[13]

The Bombay High Court has, in the undermentioned case,[14] held that an auction-purchaser is the representative of neither the judgment-creditor nor the judgment-debtor. It is submitted that the view cannot be supported on principle.[15]

57. Lessor and lessee. — The lessor cannot be said to claim from the lessee and is not bound by the litigation against the lessee.[1] Nor can a lessee be said to claim under the lessor for the purposes of S. 11, unless his title as lessee arises *subsequent to the previous litigation* which is alleged to operate as bar.[2] A successor of a landholder to whom a special privilege is given under S. 26 cl. (3) of the Madras Estates Land Act, 1903, namely, the right to enhance a low rent agreed to by the predecessor is, in respect of the right of enhancement, not a person "claiming under" the landholder.[3] Similarly,

† ('07) 34 Cal 868 (871) (DB).
('86) 12 Cal 82 (90, 91) (DB).
8. ('34) 21 AIR 1934 Rang 206 (207).
9. ('39) 26 AIR 1939 All 202 (203).
('36) 23 AIR 1936 All 722 (723).
10. ('42) 29 A I R 1942 Cal 92 (95) : ILR (1942) 1 Cal 169 (DB). (Authority of AIR 1928 Cal 130: 55 Cal 448 held to be shaken by A I R 1931 P C 114 : 53 All 103 : 58 Ind App 158 (PC).)
11. ('42) 29 A I R 1942 Oudh 327 (330) (DB). (Declaratory decree against representatives of deceased debtor that certain property does not belong to estate of deceased—Decree is *res judicata* against creditors of estate asserting in administration suit, that such property forms part of the estate.)
12. ('42) 29 AIR 1942 Mad 128 (129). (In this case the previous decision was given in claim proceedings regarding the same property—The judgment creditor was different from the present judgment creditor — The claim proceedings resulted in the objection to attachment being dismissed — It was held that it could not be contended that this was a decision in favour of the judgment-debtor of which the subsequent attaching creditor could avail himself.)
13. ('90) 1890 All W N 177 (177).
('87) 11 Bom 114 (119) (DB).
('28) 15 AIR 1928 Cal 130 (134): 55 Cal 448 (DB).
14. ('11) 35 Bom 275 (277) (DB).
15. ('95) 22 Cal 909 (919) : 22 Ind App 129 (P C).

Note 57

1. ('82) 11 Cal L Rep 122 (124).
† ('24) 11 AIR 1924 Mad 576 (576, 577).
('27) 14 AIR 1927 Bom 270 (272) (DB).
('85) 11 Cal 562 (566) (DB).
('75) 24 Suth W R 128 (129) (DB).
('21) 8 AIR 1921 Mad 306 (308): 44 Mad 514 (DB).
('35) 22 AIR 1935 Nag 61 (62): 31 Nag L R 165. (Decision against Municipality in former suit which was a sort of lessee from Government — Government not bound by decision.)
('35) 22 AIR 1935 Oudh 394 (398) : 11 Luck 209. [*See also* ('42) 29 AIR 1942 Oudh 301 (303). (Subsequent mortgagee obtaining decree for rent in revenue Court against tenant of prior mortgagee in possession—Prior mortgagee not impleaded—Tenant always paying rent to prior mortgagee—Rent decree does not affect rights of prior mortgagee — Prior mortgagee can sue for declaration in Civil Court that he was mortgagee in possession and not tenant of subsequent mortgagee.)]
2. ('24) 11 AIR 1924 Mad 576 (577).
('19) 6 AIR 1919 Cal 782 (785) (SB).
('21) 8 AIR 1921 Mad 708 (708) (DB).
[But see ('37) 24 AIR 1937 Mad 544 (546). (A lessee is bound by a judgment given against his lessor in the absence of any fraud or collusion on his part — The decision proceeds on the ground that the lessee holds the property subordinately to the landlord.)]
3. ('18) 5 AIR 1918 Mad 312 (313, 314) (DB).

a transferee from a *licensor* who is not bound by the license under S. 59 of the Easements Act is also not bound by a previous decision in a suit by the licensor against the licensee.[4] Similarly, where in a former suit between the landlord and the tenant, the heirs of the grantee of the tenancy set up a remission of rent, and the question was decided in favour of the heirs, and, subsequently, the heirs transferred the *tenure* and transferees against whom the landlord brought a suit for rent raised the same question of remission of rent, it was held that the former suit did not operate as *res judicata* inasmuch as the transferees were only of the tenure and not of the *exemptions* from rent in which case alone they could be said to claim under the *heirs* for the purposes of S. 11.[5]

58. Miscellaneous. — Where an *inam* was granted to A *and his male descendants in perpetuity*, the successors to the inam are representatives of the prior holders for the purposes of S. 11. Each succession of a male heir does not involve a re-grant by the Government.[1]

An Official Assignee *acting on behalf of creditors* cannot be said to be representing the insolvent where the Official Assignee is not litigating under the same title as the insolvent debtor. Therefore, in such a case, a decision against the insolvent in a previous proceeding is not binding on the Official Assignee acting on behalf of the creditors in the subsequent proceeding.[2] In the undermentioned case[3] it was held that the Official Assignee does not represent the creditors for all purposes and that a decision of the Insolvency Court holding that a certain person is not a partner of the insolvent firm, though binding on the Official Assignee would not operate as *res judicata* against a creditor of the firm.

A pre-emptor stands in the shoes of the vendee, and so a decision in a suit between the original vendor and the vendee relating to the pre-empted properties cannot be challenged in a subsequent suit between the original vendor and the pre-emptor.[4]

A decree for foreclosure obtained against a life estate holder without impleading the remainderman is not binding on the remainderman.[5]

59. Persons represented in prior suits — Representative suits — Explanation VI. — Explanation VI of the section extends the meaning of the words "under whom they or any of them claim" by enacting that where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall be *deemed to claim* under persons so litigating. This explanation is not confined to cases covered by O. 1 R. 8, but extends to include any litigation in which, apart from that rule altogether, parties are entitled to represent interested persons other than themselves.[1] In order that a suit might be a

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4. ('30) 17 AIR 1930 Oudh 203 (204) (DB).
5. ('08) 7 Cal L Jour 202 (207) (DB).

Note 58

1. ('25) 12 AIR 1925 P C 184 (187) : 52 Cal 971 : 21 Nag L R 117 : 52 Ind App 294 (PC).
('89) 12 Mad 235 (237). (Decree in a suit by a karnam as such binds his successor in respect of land held on service tenure.)
2. ('25) 12 AIR 1925 Mad 688 (688).
[See however ('42) 29 AIR 1942 Oudh 327 (330 (DB). (In this case it was held that a decision between a debtor and a third person may be binding as *res judicata* on the creditors of the debtor —In this case the creditor was an official liquidator of a company.)]
3. ('40) 27 AIR 1940 Cal 225 (226).
4. ('33) 20 AIR 1933 Lah 529 (530).
5. ('31) 18 AIR 1931 Oudh 358 (362) : 6 Luck 715 (DB).

Note 59

1. ('33) 20 AIR 1933 P C 183 (189) : 56 Mad 657 : 60 Ind App 278 (PC). (A I R 1928 Mad 77 : 51 Mad 128 (FB) overruled.)
('37) 24 AIR 1937 Bom 238 (240) : I L R (1937) Bom 326.
('37) 24 AIR 1937 Lah 70 (71).
[*See* ('31) 18 AIR 1931 Lah 161 (162) : 12 Lah 497 (DB).]

representative one under this explanation, it is essential that —

(1) the party litigating must do so in respect of a *public right* or of a *private right claimed in common for himself and others*, and

(2) the litigation must be conducted *bona fide* in respect of such right.[2]

Where these conditions are satisfied, then a decision in such litigation will bind *all persons interested* in the right litigated.[3]

The onus of proving the want of *bona fides* in respect of the previous litigation is on the party seeking to avoid the prior decisions.[4] Proof of negligence is not sufficient to establish such want of *bona fides*.[5]

The words "public right" have been added in Explanation VI in view of the new S. 91 and to prevent multiplicity of litigation in respect of public rights.[6] As regards private rights, there must be a *community of interest* between the parties such as is referred to in O. 1, R. 8 of the Code.[7] In other words, they must claim under a common *title*.[8] But, in the case of a public right, such a right necessarily implies that it is claimed by the plaintiff in common with others and the expression in Explanation VI "claimed in common for themselves and others" would be superfluous in the case of such a right and cannot apply to it.[9] Where it does not appear that all the persons intended to be

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2. ('23) 10 AIR 1923 All 338 (339, 340).
('95) 18 Mad 164 (167).
('33) 20 AIR 1933 P C 183 (190) : 56 Mad 657 : 60 Ind App 278 (PC).
('35) 22 AIR 1935 Lah 505 (507). (Suit for declaration of title and possession by one of collaterals for himself and excluding title of others—Decision in it does not operate as *res judicata* in suit by another, but is of evidentiary value.)
('35) 22 AIR 1935 Lah 391 (395) : 17 Lah 20 (DB).
('28) 15 AIR 1928 Mad 268 (271) (DB). (Fraudulent withdrawal—No *res judicata*.)
('27) 14 AIR 1927 Mad 645 (647). (The word "*bona fide*" in Expl. VI can only apply to a litigation where every attempt is made to bring all the persons interested before the Court.)

3. ('42) 29 AIR 1942 Cal 1 (18, 19) : ILR (1941) 2 Cal 434 (DB). (*A* and *B* both claiming to be persons interested in the wakf character of the property in suit, not on their own behalf but on behalf of their co-religionists for the benefit of whose religion the dedication had been made — *Held* both were litigating in a representative capacity for the purpose of ensuring that the dedicated property should be utilized for promoting the object of the dedication.)
('24) 11 AIR 1924 All 178 (180) : 46 All 110 (DB). (Dispute between trustees of a mosque and municipality decided against the former — They cannot in a subsequent suit by the public set up their rights to it.)
('17) 4 AIR 1917 Pat 123 (123, 124) (DB).
('29) 16 AIR 1929 All 775 (776) : 52 All 71 (DB).
('23) 10 AIR 1923 All 338 (339). (Decision in suit instituted in the interest of the estate binds persons inheriting afterwards.)
('36) 23 AIR 1936 Lah 13 (14) (DB). (Public or private right claimed in common with others — Person may litigate *bona fide* and bind by S. 11, C. P. C., others interested, by findings, though others not named.)
('19) 6 AIR 1919 Lah 172 (173). (Suit on behalf of Mahomedan community.)
('14) 1 AIR 1914 Lah 133 (135) (DB).
('14) 1 AIR 1914 All 441 (442) : 36 All 424 (DB).
('27) 14 AIR 1927 Mad 1088 (1089) (DB).
† ('20) 7 AIR 1920 Mad 568 (572, 573): 43 Mad 487 (DB). (Suit for kattubadi against agraharamdars.)
('31) 18 AIR 1931 Nag 183 (183, 184) : 27 Nag L R 127. (Jagirdar—Decree against.)
('28) 15 AIR 1928 Oudh 155 (182). (Decision against adoptive mother to the effect that she possessed no authority to adopt binding upon the adopted son.)
('01) 4 Oudh Cas 100 (104) (DB).
('34) 21 AIR 1934 Pat 350 (351).
[*See also* ('33) 20 AIR 1933 Lah 325 (326) : 14 Lah 442. (Explanation VI applies to persons who are not actual parties.)]

4. ('42) 29 AIR 1942 Cal 1 (19) : ILR (1941) 2 Cal 434 (DB).
('37) 24 AIR 1937 P C 1 (4) : ILR (1937) Mad 263 : 64 Ind App 17 (PC).
('38) 25 AIR 1938 Lah 499 (501).

5. ('37) 24 AIR 1937 P C 1 (4) : I L R (1937) Mad 263 : 64 Ind App 17 (PC).

6. ('18) 5 AIR 1918 Mad 166 (167) (DB).
('33) 20 AIR 1933 P C 183 (189) : 56 Mad 657 : 60 Ind App 278 (PC).

7. ('03) 16 C P L R 161 (162).
('11) 9 Ind Cas 819 (820, 821) : 33 All 493 (FB).
('81) 6 Cal 31 (33) (DB).
(1900) 23 Mad 28 (32).
('23) 10 AIR 1923 Oudh 185 (199) : 26 Oudh Cas 133 (DB).

8. ('88) 10 All 411 (412) (DB).
† ('81) 6 Cal 49 (54).
('35) 22 AIR 1935 Oudh 62 (67) : 10 Luck 443 (DB). (Person claiming in former suit whole estate for himself and asserting his exclusive title — He cannot be said to be representing interests of others.)

9. ('37)24 AIR 1937 Lah 425(428): ILR (1937) Lah 629 (DB). (On appeal from A I R 1937 Lah 70.)

represented are *necessarily interested* in obtaining the relief sought, a suit is not a representative one.[10] Nor will the explanation apply where the plaintiff claims a right *for himself*, though the right may be common to others also.[11] Thus, where A sues B, a decree-holder, that his property is not liable to attachment in execution of B's decree, B cannot be deemed to represent other persons holding other decrees against A and seeking to sell the property.[12]

Whether a plaintiff, in a particular case, sues in a representative character or a defendant is sued or defends in a representative character, depends upon the facts of that case. It also depends upon the *substance* and not the *form* of pleadings. Thus, it is not necessary that the *cause title* of the suit or pleading should make it plain that the suit is one in a representative capacity.[13] As examples of suits of a representative character may be mentioned, suits under Ss. 91 and 92 of the Code, suits under O. 1 R. 8, suits by or against the manager of a joint Hindu family, suits by or against a trustee or administrator and suits referred to in Notes 60 to 67 below. A suit for partition by a member of a joint Hindu family wherein all matters in dispute between the members of the family are decided, is a suit brought by the plaintiff in a representative capacity.[14] The explanation is not confined in its applicability to the right of a joint Hindu family or of a Malabar *Tarwad* or of joint trusteeship.[15]

A decision against a community is not *res judicata* against some members who stand in the second suit in a *special capacity* other than the capacity of a communal member, inasmuch as the latter claim is not under the same common *title*.[16]

59a. Suits under O. 1 R. 8 and Section 91, Civil Procedure Code. — For fuller notes, see Note 59. Also see O. 1 R. 8 Note 21.

Where a suit to which the provisions of O. 1 R. 8 apply, is conducted without complying with any of the conditions imposed by that Rule, it has recently been held by the Privy Council that the benefit of Explanation VI to this section cannot be extended to a decree in such a suit even though the litigation might have been *bona fide*.[1] See

10. ('05) 28 Mad 457 (463) (FB). (Quoting Daniell's Chancery Practice.)
('82) 1882 Pun Re No. 111.

11. ('42) 29 AIR 1942 Oudh 199 (200) (DB). (The general principle is that one person will not represent others in litigation unless it is expressly stated that he is litigating in a representative capacity and that provisions of R. 8 of O. 1, C. P. C., are observed.)
('07) 30 Mad 185 (190) : 34 Ind App 93 (PC).
† ('27) 14 AIR 1927 Mad 645 (647).
('75) 1 Bom H C R 141 (143).
('69) 12 Suth W R 117 (118) (DB).
('35) 22 AIR 1935 Lah 537 (538) (DB). (Explanation VI applies only to those suits which are instituted in a representative capacity.)
('33) 20 AIR 1933 Nag 169 (170, 171):29 Nag L R 246.
[*See also* ('37) 24 AIR 1937 Lah 425 (427):ILR (1937) Lah 629 (DB).]

12. ('42) 29 AIR 1942 Mad 128 (129). (A suit to set aside an adverse claim order may in certain circumstances be in essence a suit under S. 53, T. P. Act, but when one creditor merely resists a claim by a claimant his resistance in those summary proceedings cannot be deemed to be on behalf of all the creditors. 18 All 413 followed—Hence an adjudication as between one creditor and the claimant cannot be *res judicata* as between another creditor and the same claimant.)
('96) 18 All 413 (413) (DB).

13. ('28) 15 AIR 1928 Mad 445 (446) (DB).
Also see O. 7 R. 4, Note 14.

14. ('25) 12 AIR 1925 Oudh 566 (566, 567).

15. ('17) 4 AIR 1917 Mad 457 (459) (DB).

16. ('10) 6 Ind Cas 229 (230) : 33 Mad 483 (DB).

Note 59a

1. † ('33) 20 AIR 1933 P C 183 (190):56 Mad 657: 60 Ind App 278 (PC).
('36) 23 AIR 1936 P C 147 (149) (PC). (Case from Gold Coast Colony—An action by or on behalf of a family may result in *res judicata*, but such an action, if it is to bind absent or future members of the family, must be so constituted according to the local rules of procedure or by a representation order or in some other way that all such members can be regarded as represented before the Court.)
('37) 24 AIR 1937 All 289 (289). (A I R 1933 P C 183: 56 Mad 657:60 Ind App 278 (PC), followed.)
('97) 24 Cal 385 (389) (DB).
('37) 24 AIR 1937 Lah 425 (426):ILR (1937) Lah 629 (DB). (A decision in a representative suit binds all persons other than the plaintiffs expressly named in the plaint only when, (a) if the suit

also the decisions below[2] which have followed this view. Their Lordships have, however, observed "that they would not exclude the possibility of a decree being within the benefit of the explanation where the litigation having been *bona fide*, the omission to comply with the conditions of the Rule has been inadvertent and no injury has been sustained by the plaintiff in the second suit. But it is, their Lordships think, imperative to have it recognized that the burden upon a defendant seeking a ruling to that effect is heavy indeed." Accordingly, it has been held that the test in such cases is whether the previous litigation was *bona fide* and whether any injury had resulted to the plaintiffs in the second suit on account of the omission (in the former suit) to comply with the requirements of O. 1 R. 8.[3]

On the same principle, where a suit is brought by any member of the public, without the sanction of the Advocate-General, in respect of a public nuisance in a case in which no special damage has been caused, the decree in that suit will not bind the other members of the public.[4]

60. Suits by or against shebaits and trustees. — A trustee suing or being sued as a trustee must be taken as suing or being sued on behalf of himself and on behalf of the whole body of persons interested in the subject-matter of the trust.[1] Where a person sues as a trustee of a certain institution, the decision in such a suit will operate as *res judicata* in any subsequent suit, on behalf of the institution, notwithstanding that the person suing as trustee in the former suit occupied a representative position in regard to *another* institution also.[2] But where a *shebait* of an idol sues or is sued as *representing the idol* and a decree is obtained by or against him, it is binding upon the succeeding *shebaits* not by virtue of Explanation VI but by reason of the fact that the *shebaits* with their predecessors and successors form one *continuous representation of the idol* which is the party, and that consequently the subsequent suit is between the *same parties*.[3] In

relates to a private right the formalities as laid down in O. 1 R. 8, C. P. C., are observed, and (b) if the suit relates to a public right the formalities laid down in S. 91, C. P. C., are observed.)
('85) 8 Mad 496 (499) (DB).
[*See also* ('38) 25 AIR 1938 All 523 (524) (DB). ('19) 6 AIR 1919 Pat 230 (231).]
The following cases are no longer good law in view of the above Privy Council case :
('32) 19 AIR 1932 Cal 271 (274):59 Cal 636 (DB).
('28) 15 AIR 1928 Mad 77 (87, 88, 89) : 51 Mad 128 (FB).
('24) 11 AIR 1924 Mad 88 (89) (DB).
2. ('37) 24 AIR 1937 Lah 425 (427) : ILR (1937) Lah 629 (DB).
('36) 23 AIR 1936 Lah 965 (967).
3. ('38) 25 AIR 1938 Lah 369 (390) (FB).
('36) 23 AIR 1936 Lah 965 (967).
('36) 23 AIR 1936 Lah 13 (14, 15) (DB). (Previous suit *bona fide* and no injury caused to plaintiffs in next suit by omission to comply with O. 1, R. 8—Next suit held barred.)
4. ✣('33) 20 AIR 1933 P C 183 (190) : 56 Mad 657 : 60 Ind App 278 (P C).
('37) 24 AIR 1937 Lah 425 (427):ILR (1937) Lah 629 (DB). (On appeal from AIR 1937 Lah 70.)

Note 60

1. ('24) 11 AIR 1924 Mad 88 (89, 90) (DB).
('32) 19 AIR 1932 All 603 (605) (DB).
† ('24) 11 AIR 1924 All 504 (506) : 46 All 651 (DB).
('14) 1 AIR 1914 All 441 (442) : 36 All 424 (DB).
('38) 25 AIR 1938 Lah 499 (501). (Suit against trustee of temple—Decision is *res judicata* in suit by worshippers.)
† ('38) 25 AIR 1938 Lah 369 (388) (FB). (Suit for possession of mosque by mutwalli—Decision binds all Mahomedans.)
('36) 23 AIR 1936 Lah 998 (999):ILR (1937) Lah 100 (DB). (Decree against Municipality in respect of Government land transferred in trust and vested in Municipality operates as *res judicata* in subsequent suit by Government as the Municipality being constituted trustee represented the title for the time being.)
('28) 15 AIR 1928 Lah 888 (891). (Decision that property is not wakf in a suit by *B* against *A* under S. 92, C. P. C. — Subsequent suit by *B* against *A* and *C* for declaration that property is wakf — Previous decision is binding not only between *B* and *A* but also as between *B* and *C*.)
('38) 25 AIR 1938 Mad 257 (258) (DB).
('29) 16 AIR 1929 Mad 687 (688) (DB).
('26) 13 AIR 1926 Mad 267 (269) (DB).
('06) 29 Mad 553 (555) (DB).
('88) 11 Mad 191 (193) (DB).
('35) 22 AIR 1935 Oudh 394 (398) : 11 Luck 209 (DB).
2. ('38) 25 AIR 1938 Mad 257 (258) (DB).
3. ✣('74) 2 Ind App 145 (152) (PC).
('12) 14 Ind Cas 142 (143) : 39 Cal 887 (DB).
† ('07) 6 Cal L Jour 621 (633) (DB).

the undermentioned case,[4] it has been held that this principle applies to a suit by the mahant of a mutt concerning the property of the mutt and that the decision in such a suit will be *res judicata* in a subsequent suit by a succeeding mahant. A decree against a *shebait* who, to the knowledge of the plaintiff, has been dismissed from the temple or who has been guilty of gross negligence in the conduct of the case, cannot be said to be a decree against the *shebait* as *representing the idol* and therefore cannot bind succeeding *shebaits*.[5]

A suit under S. 92 of the Code or one under S. 14 of the Religious Endowments Act, 1863, is a representative suit prosecuted by the plaintiffs as representatives of the general public and a decision therein will operate as *res judicata on all* persons interested in the subject-matter of the suit.[6] But a suit under S. 92 will cease to be a suit of a representative character if it is subsequently amended without the sanction of the Advocate-General and by adding reliefs not covered by S. 92.[7] A suit, not under S. 92 of the Code, for declaring certain trust deeds invalid, brought without leave obtained under O. 1, R. 8 of the Code, is not a representative suit.[8] (See also S. 92 Note 41.)

61. Suits by or against manager of a Hindu family. — A suit by or against the manager of a Hindu family where the latter has been *bona fide* acting on behalf of the other members interested, must be taken to be one litigated in a representative capacity and will bind the others so interested as *res judicata*.[1] The

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('15) 2 AIR 1915 Cal 327 (329) : 42 Cal 440 (DB).
('13) 18 Ind Cas 394 (397) (DB) (Cal).
('07) 6 Cal L Jour 404 (407) (DB).
('07) 12 Cal W N 739 (742) (DB).
('02) 6 Cal W N 178 (180) (DB).
('73) 20 Suth W R 86 (89) (DB).
('91) 1 Mad L Jour 390 (391).
[*See* ('27) 14 AIR 1927 Cal 606 (607) (DB).
('08) 35 Cal 691 (696,699) (DB).]
[*See also* ('42) 29 AIR 1942 Pat 181 (183) (DB). (Suit by *some* of the shebaits of an idol in their representative capacity — Decision binds other shebaits also as *res judicata*.)]

4. ('35) 22 AIR 1935 All 255 (256).

5. ('11) 11 Ind Cas 280 (283,284) (DB) (Cal).
('31) 18 AIR 1931 Mad 641 (641, 642).
[*See also* ('41) 28 AIR 1941 Pat 354 (362) (DB). (Suit on mortgage executed by mahant of math —Nothing to show that he was sued in his representative capacity—Decree does not bind institution and his successor in office can challenge decree.)]

6. ('25) 12 AIR 1925 Mad 1070 (1071, 1072) (SB).
('37) 24 AIR 1937 P C 1 (3) : ILR (1937) Mad 263 : 64 Ind App 17 (PC).

7. ('28) 15 AIR 1928 P C 16 (20) : 55 Ind App 96 : 55 Cal 519 (P C). (Reversing AIR 1925 Cal 187.)

8. ('30) 17 AIR 1930 Cal 787(797) :58 Cal 474 (DB).

Note 61

1. ('40) 27 AIR 1940 Lah 120 (122).
✠('27) 14 AIR 1927 P C 56 (57) : 51 Bom 450 : 54 Ind App 122 (PC).
('32) 19 AIR 1932 Nag 90 (92).
('14) 1 AIR 1914 P C 136 (137) : 36 All 383 : 41 Ind App 216 (PC). (Affirming 33 All 71.)
('78) 6 Ind App 233 (236, 237) (PC).
† ('72) 14 Moo Ind App 367 (376) (PC).
('39) 26 AIR 1939 All 203 (205) (DB). (Constructive *res judicata*.)
('37) 24 AIR 1937 All 731 (734) (DB).
('37) 24 AIR 1937 All 108 (111) (DB). (Decision binds even minor members.)
('37) 24 AIR 1937 All 28 (29) (DB). (But where there is a finding in the subsequent suit that the father who was a party to the previous suit was in collusion with the opposite party, S. 11, Expln. VI will not apply.)
('29) 16 AIR 1929 All 775 (776): 52 All 71 (DB).
† ('26) 13 AIR 1926 All 201 (201). (Decree binds persons born subsequently.)
('25) 12 AIR 1925 All 67 (68).
('20) 7 AIR 1920 All 50 (51): 42 All 359 (361) (DB).
('12) 17 Ind Cas 290 (290) (All).
('10) 33 All 71 (79) (DB). (Affirmed on appeal in AIR 1914 P C 136: 36 All 383: 41 Ind App 216 (PC).)
('38) 25 AIR 1938 Bom 465 (466, 467). (When a Hindu father files a suit for recovery of certain property for the family for the benefit of himself and all his sons and in a representative capacity, and agrees to be bound by a special oath taken by the defendant, if such oath is taken, the decree following thereon binds the sons also not only on principles of Hindu law but also under S. 11, C. P. C., read with Explanation VI thereto.)
('29) 16 AIR 1929 Bom 213 (214) : 53 Bom 444. (It was doubted in this case whether it was *res judicata* by virtue of Explanation VI.)
('13) 15 Bom L R 36 (40) (DB).
('10) 34 Bom 354 (357) (DB).
('90) 14 Bom 597 (602, 603) (DB).
† ('83) 7 Bom 467 (471, 473) (DB).
('81) 5 Bom 685 (687) Note 2.
('15) 2 AIR 1915 Cal 464 (470) (DB). (But it must be shown that the matter was one in which the member sued was entitled to represent the whole family.)
('88) 15 Cal 70 (81, 82) : 14 Ind App 187 (PC).
('24) 11 AIR 1924 Lah 26 (27) (DB).

question whether a Hindu father, in a particular suit, in which he alone of the family is a party, represents his coparceners, is a question to be decided with reference to the circumstances of each case.[2] Thus, a Hindu father making an improper use of a tenure (*e. g.*, construction of a building in an agricultural holding) cannot be deemed to represent his minor sons in a suit for ejectment on account of such use.[3]

Where a suit is decided against the father as representing the family, a subsequent suit raising the same question between the parties cannot be said to be not *res judicata* merely by reason of the fact that the sons were not added as party defendants.[4] The sons must be deemed to have been parties to the former suit inasmuch as they were *represented* by the father therein.[5] It is not necessary that he must have been described expressly as the manager of the family.[6]

But the representation can be only in respect of *joint family property* and not other property.[7] So also, where the question is as to whether a debt contracted by the father is tainted by illegality, or immorality, the father cannot represent the sons in regard to such question and a decree against the father will not bar a suit by the sons attacking the debt as immoral or illegal.[8] Similarly, it has been held that a prior decision against the father on the basis of an alienation of the joint family property made by the father will not bar a suit by the sons questioning the validity of the alienation.[9] A suit by or against a *son* cannot be binding on the father unless there is something to show that he sued or was sued in a representative capacity or asserted joint family, and not his own individual, rights.[10] See also the case mentioned below.[11]

62. Suit by or against karnavan of Malabar tarwad. — A decree in a suit in which the *karnavan* of a Malabar *tarwad* sues or is sued in a representative capacity and which he honestly conducts, is binding on the other members of the family,

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('15) 2 AIR 1915 Lah 92 (93) (DB).
('24) 11 AIR 1924 Mad 571 (573) (DB).
('21) 8 AIR 1921 Nag 52 (53).
('14) 1 AIR 1914 Oudh 353 (355) (DB).
('34) 21 AIR 1934 Pat 617 (617) (DB).
('28) 15 AIR 1928 Pat 557 (561) (DB).
('25) 12 AIR 1925 Pat 308 (310).
('16) 3 AIR 1916 Pat 269 (270) : 1 Pat L Jour 221 (DB).
[*See* ('40) 27 AIR 1940 All 86 (87). (Pre-emption suit by manager dismissed—Suit for pre-emption by other members is barred.)
('20) 7 AIR 1920 P C 1 (3) : 47 Cal 924 (931) : 47 Ind App 91 (PC).
('12) 34 All 572 (575, 576, 577) (FB).
('12) 34 All 549 (554, 561, 571) (FB).
('32) 19 AIR 1932 Mad 207 (212) : 55 Mad 483. (A brother held not to represent other members of family.)]
[*See also* ('11) 33 All 272 (276, 277) : 38 Ind App 45 (PC).)]

2. ('07) 17 Mad L Jour 197 (198, 199) (DB).
('33) 20 AIR 1933 Nag 44 (46) : 29 Nag L R 77.
† ('14) 1 AIR 1914 Bom 113 (114) : 39 Bom 29 (33, 34) (DB).
('11) 11 Ind Cas 291 (294) (Oudh). (Former suit held not representative.)
[*See* ('07) 29 All 1 (3). (Case remanded to ascertain in what capacity the father sued in the former suit.)]
[*See also* ('19) 6 AIR 1919 Mad 776 (776, 777). (Suit by a Hindu father to set aside an alienation on the grounds of undue influence and fraud is no bar to a suit by the sons to set it aside on the ground that it is not for a binding family purpose.)]

3. ('07) 17 Mad L Jour 197 (198, 199) (DB).
4. ('39) 26 AIR 1939 All 399 (400) : I L R (1939) All 602 (FB). (House of agriculturist — Dismissal of father's objection in execution — Sons cannot re-agitate it by separate suit.)
('28) 15 AIR 1928 Pat 436 (437) : 7 Pat 840 (DB).
('30) 17 AIR 1930 Mad 257 (258) (DB). (Matter *res judicata* against father — *Res judicata* is operative against son also.)
5. ('28) 15 AIR 1928 Pat 436 (437) : 7 Pat 840 (DB).
6. ('30) 17 AIR 1930 Mad 206 (207, 208).
7. † ('25) 12 AIR 1925 Oudh 75 (75, 76). (Property inherited by right of collateral succession cannot be treated as joint family property in respect of which the manager as such could sue or be sued so as to bind the rest of the family.)
[*See also* ('82) 5 Mad 37 (42, 46). (Sons' own property.)]
8. ('39) 26 AIR 1939 All 6 (7). (13 Cal 21 (PC) followed.)
9. ('36) 23 AIR 1936 Mad 488 (489).
10. ('85) 1885 Pun Re No. 1.
11. ('42) 29 AIR 1942 Pat 279 (281) (DB). (Suit on hand-note against members of joint family — Some of the defendants were minors and were not represented by any guardian — Decree passed against the members — *Held* that the minors not being represented by any guardian were not in the eye of law parties to the suit at all.)

in respect of their interests as members of the *tarwad*, though not actually made parties thereto.[1] But where, for instance, the *karnavan* in the previous suit raised contentions *opposed* to the interests of the other members, *e. g.*, denying their membership of the *tarwad*, he could not be taken to have represented them, and the decision against him will not operate as *res judicata* as against the other members in a subsequent suit.[2] Similarly, where the *karnavan* is acting in excess of his powers or is submitting to a decree in respect of a debt borrowed in excess of his powers, he cannot be said to represent the *tarwad*.[3]

63. Suits by or against a Hindu widow.—A Hindu widow represents the entire inheritance in respect of her husband's estate and a decree against her, fairly and properly obtained, is binding on the succeeding heirs.[1] In *Katama Natchir* v. *Srimut Rajah Mootoo Vijaya*,[2] Lord Justice Turner in delivering the judgment of the Board said :

> "And their Lordships are of opinion that unless it could be shown that there had not been a fair trial of the right in that suit—or, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the *Zillah* Court by any person claiming in succession to Anga Moottoo Natchiar. For assuming her to be entitled to the Zamindari at all, the whole estate would, for the time, be vested in her, absolutely for some purposes, though in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

Note 62

1. ('27) 14 AIR 1927 Mad 1043 (1050): 51 Mad 46 (FB). (Overruling 30 Mad 215 and 24 Mad 658.)
† ('96) 20 Mad 129 (133) (FB). (Overruling 5 Mad 201, 6 Mad 121 and referring to 7 Mad 413, 8 Mad 484 (FB), 15 Mad 6 and 10 Mad 79.)
('21) 8 AIR 1921 Mad 520 (521, 522, 523) (DB).
('36) 23 AIR 1936 Mad 861 (863).
('23) 10 AIR 1923 Mad 153 (156, 157) (DB).
('07) 30 Mad 215 (216) (DB).
('03) 13 Mad L Jour 68 (69).
('98) 21 Mad 8 (10) (DB).
('92) 15 Mad 403 (404).
('87) 10 Mad 223 (225) (DB).
('80) 2 Mad 328 (331, 333) (DB).
[*See* ('87) 10 Mad 322 (328, 329, 330) (SB).]
[*See also* ('23) 10 AIR 1923 Mad 514 (514) (DB).]
Also see S. 47 Note 7 and O. 1 R. 8 Note 21.
2. ('10) 8 Ind Cas 129 (130) (DB) (Mad).
3. ('37) 1937 Mad W N 435 (438).

Note 63

1. ✠(1863) 9 Moo Ind App 539 (604) (PC).
('22) 9 AIR 1922 Cal 321 (324, 326) : 49 Cal 45 (DB).
('31) 18 AIR 1931 P C 114 (117, 118): 53 All 103: 58 Ind App 158 (PC).
✠('84) 11 Ind App 197 (207) : 11 Cal 186 (PC).
('66) 11 Moo Ind App 241 (266, 267) (PC).
('29) 119 Ind Cas 446 (447) (DB) (All).
('25) 12 AIR 1925 All 339 (340) : 47 All 490 (DB).
('15) 2 AIR 1915 All 360 (364, 365, 366) : 37 All 496 (507) (DB).
('05) 1905 All W N 270 (271) : 28 All 241 (DB).
('86) 8 All 429 (432, 433) (DB).
('86) 8 All 365 (371) (DB).
('81) 1881 All W N 106 (106) (DB).
('76) 1 All 282 (283) (DB).
('18) 5 AIR 1918 Bom 85 (86, 88) : 43 Bom 249 (253, 254) (DB).
('13) 17 Ind Cas 866 (867) : 37 Bom 172 (DB).
('15) 2 AIR 1915 Cal 629 (630) (DB).
('07) 6 Cal L Jour 621 (631) (DB).
('07) 6 Cal L Jour 490 (524) (DB).
('94) 21 Cal 8 (17) : 20 Ind App 183 (PC).
('88) 16 Cal 40 (56) : 15 Ind App 105 (PC). (Decree against widow as representing estates binds subsequently adopted minor son.)
('68) 9 Suth W R 505 (507) (FB).
('18) 5 AIR 1918 Lah 169 (170).
('88) 1888 Pun Re No. 139.
† ('25) 12 AIR 1925 Mad 1270 (1272, 1273) (DB).
('22) 9 AIR 1922 Mad 233 (234) (DB).
('07) 17 Mad L Jour 160 (161) (DB).
('01) 24 Mad 405 (407) (DB). (Daughter.)
('85) 8 Mad 348 (349) (DB).
('29) 16 AIR 1929 Nag 27 (29).
('20) 7 AIR 1920 Nag 239 (240, 241).
('18) 5 AIR 1918 Nag 1 (5) : 15 Nag L R 24 (29, 30) (DB).
('28) 15 AIR 1928 Oudh 155 (182).
('18) 5 AIR 1918 Pat 175 (177) : 3 Pat L Jour 426 (DB).
[*See* ('75) 3 Ind App 72 (76, 84): 1 Cal 289 (PC). (Point not decided.)]
[*See also* ('69) 12 Suth W R 504 (505) (DB).]
2. ('66) 9 Moo Ind App 539 (604) (PC).

It has been held by the Privy Council that a decision against the widow is binding on the succeeding heirs not by virtue of the rule of *res judicata* enacted in S. 11, but on *general principles* of *res judicata*.[3] The principle applies as well to a decree based on a *bona fide* compromise as to a decree on contest.[4] The High Court of Allahabad has, however, in the undermentioned case,[5] held that a Hindu widow suing for the benefit of the estate must be taken to be suing in a representative capacity *within the meaning of Explanation VI of Section 11*. The attention of the Court does not, in that case, seem to have been drawn to the decision of the Privy Council referred to above to the effect that it is the *general principle* and not S. 11 that applies to such cases.

Where a decree is passed against the widow on a ground *personal* to herself[6] or the litigation is not conducted by her *bona fide* for the benefit of the estate, it binds only her widow's estate and is not binding on the reversioner.[7] Whether the widow represents the estate in a litigation may be gathered from the nature of the allegations put forward and the issues raised, tried and decided in the former suit. The mere allegation that she did or did not, would be of little value. Was it a claim by or against the widow *personally* or the inheritance which she represented? If the contentions raised

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3. ✣('18) 5 AIR 1918 P C 87 (91) : 40 All 593 : 45 Ind App 168 (PC).
[*See also* ('15) 2 AIR 1915 All 360 (365) : 37 All 496 (DB).
('19) 6 AIR 1919 Bom 146 (150) : 43 Bom 869 (DB).
('25) 12 AIR 1925 Mad 1270 (1272, 1273) (DB). (The rule is applicable only if the widow as a matter of fact represented the estate in prior litigation.)
('36) 23 AIR 1936 Pat 200 (209, 210): 14 Pat 518 (DB).
('34) 21 AIR 1934 Pat 696 (698) (DB).]

4. ('39) 44 Cal W N 612 (614).
✣('22) 9 AIR 1922 P C 356 (357, 358) : 40 Ind App 342 : 1 Pat 741 (PC).
('21) 8 AIR 1921 Mad 475 (476) (DB).
('16) 3 AIR 1916 All 38 (41) : 38 All 679 (686, 687) (DB).
('13) 35 All 240 (242) (DB).
('13) 11 All L Jour 574 (578, 579). (Collusive compromise not binding.)
('12) 34 All 385 (387) (DB).
('12) 10 All L Jour 101 (105) (DB).
('12) 9 All L Jour 778 (780, 781) (DB).
✣('11) 33 All 356 (367) : 38 Ind App 87 (PC).
('07) 29 All 239 (242, 243) (DB). (Collusive arbitration—Not binding.)
('18) 5 AIR 1918 Bom 85 (86, 87) : 43 Bom 249 (253, 254) (DB). (Compromise not fairly obtained —Not binding.)
✝('16) 3 AIR 1916 Cal 938 (943) (DB).
('19) 6 AIR 1919 Lah 292 (294) : 1919 Pun Re No. 9 (DB).
('17) 4 AIR 1917 Mad 807 (808) (DB). (Allowing suit to go *ex parte*.)
('17) 4 AIR 1917 Mad 326 (328) (DB).
('14) 1 Oudh L Jour 490 (492). (Confession of judgment.)
('18) 5 AIR 1918 Pat 477 (480) (DB).
('17) 4 AIR 1917 Pat 600 (606) (DB).
('17) 4 AIR 1917 Pat 490 (491, 492) : 2 Pat L Jour 370 (376). (Compromise for her own interest not binding.)
('17) 4 AIR 1917 Pat 86 (89): 3 Pat L Jour 83 (87) (DB). (No *bona fides*—Compromise not binding.)

The following cases in so far as they express a contrary view cannot now be accepted as correct:
('09) 1 Ind Cas 180 (181) (DB) (All).
('08) 30 All 75 (76) (DB).
('07) 29 All 487 (494) (DB).
('86) 8 All 365 (372) (DB).
('20) 7 AIR 1920 Bom 81 (82) (DB).
('03) 5 Bom L R 885 (887).
Also see O. 23, R. 3, N. 22.

5. ('25) 12 AIR 1925 All 79 (83): 46 All 637 (DB).

6. ✣('38) 25 AIR 1938 P C 254 (256, 258) : ILR (1938) 2 Cal 653 : 65 Ind App 365 : 32 Sind L R 918 (PC).
('39) 26 AIR 1939 All 197 (202) (DB). (Suit by daughters).
Also see O. 22, R. 4, N. 16.

7. ('19) 6 AIR 1919 Bom 146 (148, 150): 43 Bom (869, 879, 883, 884) (DB).
('23) 10 AIR 1923 Cal 204 (206) (DB).
('31) 18 AIR 1931 All 407 (411) (DB). (Only a judgment of the Court, given in a fair fight between a female heir representing the estate operates as *res judicata*.)
('29) 16 AIR 1929 All 963 (965): 52 All 178 (DB).
('08) 30 All 394 (398) (DB).
('35) 22 AIR 1935 Bom 131 (133).
('33) 20 AIR 1933 Bom 126 (128) (DB).
('87) 11 Bom 119 (130) (DB). (Not *bona fide*).
('31) 18 AIR 1931 Cal 511 (513) (DB).
('31) 18 AIR 1931 Cal 73 (75) (DB).
('12) 16 Ind Cas 437 (438) (DB) (Cal).
('12) 14 Ind Cas 299 (300) : 39 Cal 925 (DB). (Death of widow—Pending suit—Legal representative does not represent full estate.)
('99) 26 Cal 285 (298) (DB).
('89) 16 Cal 511 (513) (DB). (Decree for arrears of rent.)
('84) 10 Cal 985 (991, 992) : 11 Ind App 66 (PC).
('75) 1 Cal 193 (138, 140) : 2 Ind App 275 (PC).
('98) 1898 Pun Re No. 78.

are those connected with the inheritance and the trial was with reference to them, the widow must be held to be representing the estate. If not, the litigation must be deemed to be personal to her and not binding on the reversioners.[8] Thus, a suit by a Hindu widow challenging an adoption,[9] or for recovery of the inheritance,[10] or for protecting or preserving the inheritance as against strangers,[11] will be one brought by her as representing the estate. If, however, the suit is in relation to anything which she may have done herself to the *prejudice* of the reversionary heirs, she cannot be said to be litigating in respect thereof as representing the estate.[12] A decree thus obtained by a mortgagee on the basis of a mortgage *not executed by her for legal necessity* cannot bind the reversioners.[13] If the mortgage was for legal necessity or for the benefit of the estate, the decree against the widow would, of course, be binding on the reversioners.[14]

The "special cause" referred to in the *Shivaganga case*[15] must be *ejusdem generis* with unfairness or irregularity in the proceedings referred to by the Judicial Committee, and does not include a mere failure to implead the reversioner in the prior proceedings.[16] As to the binding nature of compromises made by the widow out of Court, on the reversioners, see the undermentioned cases.[17]

The above principles will apply also to the case of other female heirs with limited estates under the Hindu law.

63a. Suits by Hindu reversioners. — The right to sue a Hindu widow for a declaration that certain alienations made by her are not binding beyond her lifetime, belongs only to the nearest reversioner, except in cases where such reversioner has precluded himself from suing, in some way, by his own act or conduct, when a remote reversioner might sue.[1] During the lifetime of the widow the reversionary right is a mere possibility and is common to all the reversioners, for it cannot be predicated as to who would be the nearest reversioner at the time of her death. Where a suit is brought by the nearest reversioner in the lifetime of the widow that an adoption made by her is not valid or an alienation by her is not binding on the inheritance, it is not brought for his personal benefit, for the object is to remove a *common apprehended injury* to all the reversioners, presumptive and contingent alike. It is a suit brought in a *representative capacity* and on behalf of all the reversioners. The act complained of is to their *common*

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8. † ('24) 11 AIR 1924 Mad 301 (307) (DB).
('29) 16 AIR 1929 All 963 (965) : 52 All 173 (DB).
('93) 20 Cal 906 (924) (DB). (Widow not representing estate— No *res judicata*.)
('19) 6 AIR 1919 Oudh 213 (214) : 22 Oudh Cas 156. (Do.)
[*See also* ('85) 32 All 33 (42, 43) (DB).
('06) 9 Oudh Cas 339 (347, 348) (DB).]
9. † ('25) 12 AIR 1925 All 79 (83) : 46 All 637 (DB).
('95) 1895 Pun Re No. 29 (FB).
('15) 2 AIR 1915 Mad 637 (638, 639) (DB).
† ('34) 21 AIR 1934 Pat 696 (698) (DB).
10. ('09) 1 Ind Cas 62 (64) (DB) (Bom).
('13) 37 Bom 172 (177, 178) (DB).
11. † ('19) 6 AIR 1919 Oudh 258 (259) : 22 Oudh Cas 260.
('17) 4 AIR 1917 Bom 11 (13): 42 Bom 69 (79) (DB).
('36) 23 AIR 1936 All 422 (430) (DB).
('24) 11 AIR 1924 Mad 301 (304) (DB).
[But see ('18) 5 AIR 1918 Mad 756 (757) (DB).]
12. ('19) 6 AIR 1919 Oudh 258 (259) : 22 Oudh Cas 260.
13. ('40) 27 AIR 1940 All 433 (436) (DB).
('25) 12 AIR 1925 Pat 625 (673, 674) : 4 Pat 510 (DB).
('19) 6 AIR 1919 Oudh 258 (259) : 22 Oudh Cas 260 (263, 264).
[But see ('18) 5 AIR 1918 Cal 876 (877) (DB). (A decree against a widow and the then reversioner binds the whole inheritance.)]
14. ('09) 4 Ind Cas 483 (485) (DB) (Cal).
15. ('66) 9 Moo Ind App 539 (604) (PC).
16. ('22) 9 AIR 1922 Mad 233 (234) (DB).
17. ('18) 5 AIR 1918 P C 70 (74) : 40 All 487 (496) : 45 Ind App 118 (PC).
('22) 9 AIR 1922 All 217 (219) : 44 All 428 (DB).
('21) 11 AIR 1924 P C 56 (58, 59) : 47 Mad 181 : 51 Ind App 145 (P C).
('17) 4 AIR 1917 P C 95 (98) : 45 Cal 590 : 45 Ind App 35 (PC). (Held not binding, as the conditions which make a decree against a limited owner, binding on the estate, were absent in the case.)
('14) 1 AIR 1914 P C 44 (45) (PC).
('25) 12 AIR 1925 Oudh 30 (33).

Note 63a

1. ('14) 1 AIR 1914 P C 34 (35) : 37 All 45 (P C).

detriment just as the relief sought for is for their common benefit.[2] The decision in such a suit affects the reversioners as a body and under Explanation VI to S. 11 bars a fresh suit by another reversioner on the *same cause of action*.[3] The principle would apply equally whether it is a decree after contest or on a *bona fide* compromise.[4]

Where in the previous suit the plaintiff who sued as a reversioner was held not to be a reversioner, he cannot be said to have represented the reversionary body and, therefore, the decision would not operate as *res judicata* against other reversioners.[5] Again, where a reversioner sues not in a representative capacity but in a personal one, it will not operate as *res judicata* in a suit by the actual reversioner after the widow's death.[6]

63b. Decree against one only of several legal representatives.—Where one of several legal representatives is sued alone, he may sufficiently represent the estate of the deceased for the purposes of the suit and in the absence of fraud or collusion the decree passed in such suit may be held to be binding on the estate and on all the other representatives.[1] But where a person is substituted as the legal representative of a deceased party without deciding *whether he was such representative*, the decision in the suit would not bar as *res judicata* a subsequent suit by such representative for a declaration that the decree is not binding on him.[2] A suit against a *wrong* person as the legal representative of a deceased person is not *res judicata* in a subsequent suit against the real heir.[3] As for *execution proceedings* against wrong representatives, see S. 52, Notes 5 and 6. See also Note 11 on O. 34, R. 1.

64. Suits by or against administrators. — An executor or administrator of a deceased person's estate represents the estate in litigation and a decision against him as such representative is binding on all persons who subsequently succeed to the estate.[1]

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2. ('15) 2 AIR 1915 P C 124 (125) : 38 Mad 406 : 42 Ind App 125 (PC).
('31) 18 AIR 1931 Lah 79 (80) : 12 Lah 275 (DB).
3. ✠('25) 12 AIR 1925 P C 272 (276, 277) : 52 Ind App 398 : 47 All 883 (PC).
('15) 2 AIR 1915 P C 124 (126) : 38 Mad 406 : 42 Ind App 125 (PC).
('25) 12 AIR 1925 All 483 (484) : 47 All 505 (DB).
✠('22) 9 AIR 1922 All 301 (308, 309) : 44 All 19 (FB). (The decisions in AIR 1921 All 237 : 43 All 558; 22 All 33 and 3 Ind Cas 117 in so far as they are against this decision must be deemed to be overruled by this decision.)
('02) 4 Bom L R 893 (908).
('39) 26 AIR 1939 Cal 135 (140). (AIR 1916 P C 117: 39 Mad 634: 43 Ind App 207 (PC) Relied on.)
('32) 19 AIR 1932 Cal 271 (274) : 59 Cal 636 (DB). (Principle of *res judicata* in representative suit stated.)
('68) 9 Suth W R 463 (465) (DB).
† ('38) 25 AIR 1938 Lah 571 (573) (DB).
('29) 16 AIR 1929 Lah 295 (305) : 10 Lah 613 (DB). (Different alienation and different cause of action—No bar.)
('28) 15 AIR 1928 Lah 371 (373).
('27) 14 AIR 1927 Lah 835 (835) (DB).
('25) 12 AIR 1925 Lah 180 (180).
('25) 12 AIR 1925 Lah 89 (90) : 5 Lah 421 (DB).
('25) 12 AIR 1925 Mad 1162 (1163).
('25) 12 AIR 1925 Mad 86 (86, 87) (DB).
('18) 5 AIR 1918 Mad 659 (661) (DB).
('19) 6 AIR 1919 Mad 479 (482) (DB).
('22) 9 AIR 1922 Oudh 236 (242) : 25 Oudh Cas 189 (DB).
('20) 7 AIR 1920 Oudh 265 (267) (DB).
('31) 135 Ind Cas 505 (506) (DB) Lah).
('26) 98 Ind Cas 505 (505) (All).
[*See* ('98) 21 Mad 344 (351) (PC).]
The following decisions to the contrary are no longer good law :
('03) 25 All 546 (575) (DB).
(1900) 22 All 382 (383) (DB).
('05) 32 Cal 62 (67, 71) (DB).
('84) 10 Cal 324 (333) : 10 Ind App 150 (PC).
('03) 13 Mad L Jour 359 (361, 362) (DB).
4. ('07) 1907 Pun L R No. 120, page 384 : 1907 Pun Re No. 37 (DB).
† ('22) 9 AIR 1922 P C 356 (358) : 1 Pat 741 : 49 Ind App 342 (PC).
('33) 20 AIR 1933 Oudh 322 (326) (DB).
5. ('26) 13 AIR 1926 All 573 (573) (DB).
('25) 12 AIR 1925 All 585 (586) : 47 All 929 (DB).
6. ('30) 17 AIR 1930 All 9 (11) (DB).

Note 63b

1. † ('42) 29 AIR 1942 Oudh 216 (217) : 17 Luck 720. (Suit on pronote executed by deceased, against son of the deceased as legal representative —Widow not impleaded.)
† ('02) 26 Mad 230 (234, 235) (DB).
('28) 15 AIR 1928 Mad 1199 (1199, 1200).
('11) 10 Ind Cas 32 (33) (Cal).
('18) 5 AIR 1918 Mad 147 (148) (DB).
2. ('81) 6 Cal 777 (781) (DB).
3. ('28) 15 AIR 1928 Pat 362 (363).

Note 64

1. ('09) 4 Ind Cas 483 (485) (DB) (Cal). (Executrix.)
('05) 29 Bom 96 (100) (DB). (Administrator.)

It has been held that a declaratory decree obtained against the representatives of a deceased debtor to the effect that a certain property does not form part of the assets of the deceased is binding as *res judicata* in a suit for administration of the estate in which a creditor of the estate claims the property as part of the assets of the deceased.[2]

65. Suits by or against a benamidar or agent. — A *benamidar* in fact *represents* the real owner and, so far as their relative legal positions are concerned, he is a mere trustee for the real owner and a decision in a litigation by or against him will bind the beneficial owner as *res judicata*.[1] The question may be viewed in another aspect, namely that, in the absence of any evidence to the contrary, it is to be presumed that the *benamidar* has instituted the suit or defends it with the full knowledge of the beneficial owner.[2] In yet another view the *benamidar* is only *another name* for the real owner and, as such, the real owner himself must be deemed to be a party for purposes of S. 11.[3] Where, however, the *benamidar* protests that he is only a *benamidar* and does not want to carry on the litigation and wants the real owner to be brought on record, but without doing so a decree is obtained against him, it cannot be said that he *represented* the real owner and the latter will therefore not be barred by *res judicata*.[4] The same principles would apply to a decision against an *agent*. It is binding on the principal inasmuch as he must be deemed to be a party to the suit.[5]

66. Suits by or against joint contractors or wrong-doers. — See O. 1 R. 6, Note 6.

67. Miscellaneous.—A *creditor* of a party is not a representative of the party for the purposes of S. 11.[1]

The *municipal board* represents the public in disputes about wells, etc., vested in them, and a decision against them in respect of such matters will be *res judicata* in a subsequent suit by other persons.[2] A judgment obtained against the municipal council in a former suit will operate as *res judicata* in a subsequent suit against the chairman of the municipal council.[3] The reason is that for the purpose of applying the principle of *res judicata* the municipal council and its chairman cannot be viewed as two independent entities.

The *Official Liquidator* represents the debenture-holders and creditors as well as the company, and if an order is made against him in respect of the company's property, the order is conclusive in the winding-up, on all parties so represented.[4]

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2. ('42) 29 AIR 1942 Oudh 327 (330) (DB).

Note 65

1. † ('18) 5 AIR 1918 P C 140 (143) : 46 Cal 566 : 46 Ind App 1 (PC).
('20) 7 AIR 1920 Nag 184 (185).
('07) 30 All 30 (32). (Right to redeem not availed of by benamidar — Subsequent suit by beneficial owner barred.)
('96) 18 All 69 (77) (DB).
('26) 13 AIR 1926 Bom 115 (115, 116) : 49 Bom 832 (DB). (Principle applies even to cases falling within Dekkhan Agriculturists' Relief Act.)
('93) 22 Bom 672 (679) (DB).
('87) 11 Bom 708 (722, 723) (DB).
('20) 7 AIR 1920 Cal 425 (426) (DB).
('14) 1 AIR 1914 Cal 896 (898) (DB).
('13) 20 Ind Cas 499 (500) (DB) (Cal).
('92) 15 Mad 267 (268) (DB).
('05) 3 Low Bur Rul 18 (19, 20).
('99) 1899 P J (Low Bur) 512. (Cited in 3 Low Bur Rul 18 (20).)
2. † ('84) 10 Cal 697 (705) (DB).
('96) 18 All 69 (77) (DB).
('13) 21 Ind Cas 979 (980) (DB) (Cal).
('09) 2 Ind Cas 990 (990) (DB) (Cal).
3. † ('84) 10 Cal 697 (705, 706).
('24) 11 AIR 1924 Lah 702 (705) (DB).
('81) 3 All 812 (814) (DB).
('18) 5 AIR 1918 Cal 253 (254) (DB).
('14) 1 AIR 1914 Cal 323 (324) (DB).
('70) 13 Suth W R 157 (159) (DB).
4. ('14) 1 AIR 1914 All 173 (175) : 36 All 446 (450, 451) (DB).
5. ('13) 1913 Pun L R No. 104, page 387.
('88) 11 Mad 309 (316) (FB). (Decision against manager of party.)

Note 67

1. ('92) 15 Mad 477 (479) (DB).
For a fuller discussion of this subject, see Note 56. See also Note 58.
2. ('24) 11 AIR 1924 All 178(180): 46 All 110(DB).
3. ('33) 20 AIR 1933 Mad 59 (61).
4. ('20) 7 AIR 1920 P C 56 (58) : 43 Mad 550 : 47 Ind App 33 (PC).

A decree against a *vatan* holder as representing the estate is binding on his successor.[5] Likewise a decree passed against a jahgirdar as representing the estate is binding on his successors.[6]

68. Judgments in rem.—A judgment, as a rule, affects only the parties thereto and their privies. Judgments *in rem* form an exception to this rule, and are valid not only *inter partes* but against all the world. Sections 40 to 44 of the Evidence Act deal with the relevancy of judgments of Courts of justice. Section 40 enacts that the existence of a judgment, order or decree which, by law, prevents any Court from taking cognizance of a suit or from holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial. Section 41 deals with final judgments, decrees or orders of competent Courts *in the exercise of Probate, Matrimonial, Admiralty or Insolvency Jurisdiction*, or what is known as judgments *in rem*, and it states that such judgments, decrees or orders are conclusive proof of the *matters specified in the section*, and, by S. 4 of the Evidence Act, evidence cannot be allowed to disprove the facts established by such judgments.[1] As regards judgments *in rem*, therefore, strangers are in the same position as the parties themselves.[2]

As regards judgments which do not fall within S. 41 of the Evidence Act, they can only be *evidence* if they come under S. 42 or any other relevant section of that Act,[3] but cannot be used for the purpose of preventing the other side from proving facts which he sets up.[4]

A judgment is not a judgment *in rem* because in a suit by A for the recovery of an estate from B, it has determined an issue raised concerning the *status* of a particular person or family.[5] As has been said before, the judgment must have been given by the Court in the exercise of its Probate, Matrimonial, Admiralty or Insolvency Jurisdiction.[6] The judgment of an Insolvency Court declaring a person to be a creditor of the insolvent does not confer any '*legal character*' on him within the meaning of S. 41 of the Evidence Act and hence such a declaration does not operate as a judgment *in rem*.[7] Similarly, a finding of the Insolvency Court that a certain person is not a partner in the insolvent firm is not a decision as to his status or legal character and is not a judgment *in rem*.[8]

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5. ('85) 9 Bom 198 (221) (FB).
6. ('31) 18 AIR 1931 Nag 183 (184): 27 NagLR 127.

Note 68

1. †('21) 8 AIR 1921 Mad 248 (253, 255) : 44 Mad 778 (FB).
('67) 7 Suth W R 338 (341) (SB).
†('16) 3 AIR 1916 P C 78 (80) : 43 Cal 694 : 43 Ind App 91 (PC).
('31) 18 AIR 1931 Cal 138 (139, 140) (DB).
†('26) 13 AIR 1926 Cal 568 (573).
2. ('82) 6 Bom 703 (710, 711).
3. ('96) 20 Bom 53 (57, 58) (DB).
†('95) 22 Cal 533 (542) : 22 Ind App 60 (PC). (Admissible under S. 13 of the Evidence Act.)
('88) 10 All 585 (586) (DB). (Do.)
†(1900) 24 Bom 591 (598, 599) (DB). (Do.)
('78) 3 Bom 3 (5) (SB). (Do.)
('08) 7 Cal L Jour 384 (386) (DB). (Do.)
('08) 7 Cal L Jour 90 (93) (DB). (Do.)
('07) 11 Cal W N 380 (388) (DB). (Do.)
†('02) 29 Cal 313 (354) : 29 Ind App 62 (PC). (Do.)
(1900) 27 Cal 379 (391) (DB). (Do.)
('98) 2 Cal W N 172 (173).
('97) 1 Cal W N 120 (120) (DB).
('85) 11 Cal 745 (748) (DB). (Admissible under S. 13 of the Evidence Act.)
('33) 20 AIR 1933 Lah 553 (554) : 14 Lah 630.
('33) 20 AIR 1933 Lah 57 (57).
('12) 1912 Pun L R No. 142, pp. 429, 430.
('92) 15 Mad 12 (14) (DB). (Admissible under S. 13 of the Evidence Act.)
[*See also* ('93) 15 All 261 (268, 269) (PC). (Affirming 12 All 1 on appeal.)]
4. †('21) 8 AIR 1921 Mad 248 (253, 256): 44 Mad 778 (FB).
†('07) 31 Bom 143 (158) (DB).
('66) 2 Bom H C R 385. (Second Edition p. 363 (365).)
('16) 3 AIR 1916 Lah 322 (323) (DB).
5. †('66) 9 Moo Ind App 539 (601) (PC).
6 ('28) 15 AIR 1928 All 395 (396) (DB). (Judgment that *A* is not the adopted son of *B* is not one *in rem*.)
('33) 20 AIR 1933 Rang 250 (251) : 11 Rang 198 (DB). (Suit for restitution of conjugal right by *A* against *B* decreed—Declaratory suit by *B* against another that she is the wife of *C* — Former judgment is not one *in rem*.)
7. †('31) 18 AIR 1931 Mad 441 (445, 448, 451) : 54 Mad 601 (SB).
8. ('40) 27 AIR 1940 Cal 225 (226).

There is a broad distinction between the *effect* of a judgment *in rem* and a judgment *in personam*. The point adjudicated upon in the former is always as to the *status* of a person and is conclusive against the world *as to that status*; whereas in a judgment *in personam* the point, *whatever it may be*, which is adjudicated upon is conclusive only between the parties or their privies.[9] A collision at sea between two ships A and B having occurred and B having been sunk as a result of such collision, the accident is enquired into by a Marine Court as a result of which the certificate of a certain officer on A is suspended. The certificate is restored by the Admiralty Court. Then a suit is brought by the owners of B against the owners of A for damages for negligence. In this suit, the order of the Admiralty Court operates as judgment *in rem* only as regards the status and the certificate of the particular officer concerned and does not preclude an inquiry into the question whether the accident was due to the negligence of the officers on A, in general.[10]

69. Decree against minor. — As has been seen in Note 41 it is necessary, in order to maintain a plea of *res judicata*, that the person whose interest it is sought to be bound or his predecessor-in-title should have been properly represented in the former litigation.[1] When a decree is obtained against a minor who was not represented *at all*, or, what is the same thing in effect, represented by a person *incompetent* to act as guardian, the minor is no *party* to the suit and as such the decree is without jurisdiction and not binding on him as *res judicata*.[2] Even where the minor was represented by a person *competent to act*, the decision will not operate as *res judicata* against him if his interests were not *properly* represented owing to *gross negligence* or *fraud* or *collusion* of the guardian.[3] As to what amounts to gross negligence such as would vitiate the decision against a minor, see the undermentioned cases.[4]

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9. ('40) 27 AIR 1940 Cal 225 (226). (There is a distinction between a person's *right* and his *status* —It is a decision about the latter that can operate as judgment *in rem*.)
† ('28) 15 AIR 1928 Sind 121 (124) : 22 Sind L R 105 (DB).

10. ('39) 26 AIR 1939 Sind 349 (356): ILR (1940) Kar 53.

Note 69

1. ('14) 1 AIR 1914 Low Bur 141 (141).
† ('09) 31 All 572 (582) : 36 Ind App 168 (PC). (Case of a minor not properly represented in execution proceedings.)
('14) 1 AIR 1914 Bom 113 (113, 114) : 39 Bom 29 (34).
('01) 1901 Pun L R No. 4, p. 11.

2. ('74) 21 Suth W R 109 (109).
('20) 7 AIR 1920 Oudh 84 (87).
('04) 32 Ind App 229 (241) : 28 All 1 : 9 Oudh Cas 7 (PC). (Suit on behalf of minor—Minor not party even on record.)
('14) 1 AIR 1914 Bom 113 (113, 114) : 39 Bom 29.
('97) 1897 Pun Re No. 38.
('73) 1873 Pun Re No. 66.
('29) 16 AIR 1929 Mad 213 (219) : 52 Mad 175.
† ('27) 14 AIR 1927 Pat 271 (275): 6 Pat 388 (DB). (Application by guardian *ad litem* to be discharged on the ground of minor's attaining majority — No notice to minor served.)

3. ('41) 28 AIR 1941 Cal 401 (404, 405) : I L R (1941) 1 Cal 477.
('28) 15 AIR 1928 All 447 (448) (DB).
('26) 13 A I R 1926 Lah 289 (290) : 7 Lah 129 (DB).
† ('32) 19 AIR 1932 All 293 (300) : 54 All 646 (FB).
('19) 6 AIR 1919 All 170 (174) : 41 All 182 (195, 196) (DB).
('95) 19 Bom 571 (576, 577).
('95) 22 Cal 8 (11) (DB).
('17) 4 AIR 1917 Lah 83 (84).
('12) 1912 Pun L R No. 15, pp. 43, 44.
('09) 1909 Pun L R No. 25, p. 112 (DB).
('98) 1898 Pun Re No. 35.
('33) 20 AIR 1933 Mad 806 (816).
('20) 7 AIR 1920 Mad 895 (897) (DB).
('15) 2 AIR 1915 Mad 384 (385) (DB).

4. ('26) 13 AIR 1926 All 36 (41) : 48 All 44 (DB). (Any act or omission which in the result has brought prejudice to the minor's interest.)
('25) 12 AIR 1925 Mad 258 (259). (Omission to bring to the notice of the Court a previous judgment between the parties for the purpose of raising the plea of *res judicata* is not.)
('03) 5 Bom L R 174 (176) (DB). (Mere withdrawal by a guardian ad litem from a suit is not.)
('18) 5 AIR 1918 Lah 223 (224) : 1917 Pun Re No. 103 (DB). (Not preferring an appeal is not.)
('16) 3 AIR 1916 Oudh 289 (289) : 19 Oudh Cas 119. (Remaining ex parte is not.)

In the absence of *gross* negligence or fraud or collusion of the guardian, a decree obtained against a minor properly represented is *res judicata*,[5] even in respect of pleas which might and ought to have been raised but which were not raised by the guardian.[6] A compromise without the Court's sanction under O. 32 R. 7 is without jurisdiction and cannot operate as *res judicata*.[7] It was held in the undermentioned case[8] that where there are several defendants besides the minor defendants, having identical interests, a decision therein is binding on the minors, as the other defendants must be deemed to have litigated on behalf of themselves and of the minors under Explanation VI to S. 11. Where a major is improperly impleaded as a minor but no objection is raised by him in the suit nor any appeal preferred by him against the decree, he cannot have the decree declared not binding on him on the ground that he was a major. In such a case he will be *estopped* from questioning the validity of the decree later on.[9]

70. Litigation must be under the same title. — The expression "title" in S. 11 refers to the capacity or interest of a party, that is to say, whether he sues or is sued for himself in his *own interest* or for himself as *representing the interest of another*, or *as representing the interest of others along with himself*; it has nothing to do with the particular *cause of action* on which he sues or is sued.[1]

Illustration.

On the death of *K*, *A* claimed certain lands as the real owner, on the allegation that *K* was a mere *benamidar* for him, and the suit was dismissed. *A* then sued to recover the same land as the *heir* of *K*. It was held that, in each case, he was suing only as an *individual* whether on the basis of a transaction being *benami*, or as the heir of *K* and that, therefore, his *title* was the same. It would be different if he had brought the second suit as representing all the heirs.[2]

A suit against a person in his individual capacity does not cease to be so merely because he pleads that he is a trustee or shebait and is in possession as such.[3]

The following classes of suits will, on the above principles, be suits litigated under the *same* title :

(1) First suit for possession as reversioner of A. Second suit for the same relief

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5. ('41) 28 AIR 1941 Oudh 189 (192). (Where a person is mentioned by name as defendant but he is really sued as sarbarakar of a pardanashin lady and is also her uncle and guardian managing her property, the decision in such a suit would bind the lady in question and would operate as *res judicata* in subsequent suits in which she or her representatives are parties.)
('18) 5 AIR 1918 Lah 250 (257) : 1918 Pun Re No. 13.
('94) 17 Mad 316 (334, 336) (DB).
('94) 1894 All W N 141 (142) (DB). (Mere negligence not sufficient.)
(1900) 24 Bom 547 (552) (DB).
('72) 17 Suth W R 492 (494) (DB).
Also See O. 32, R. 1, Note 10.

6. †('27) 14 A I R 1927 Oudh 354 (354, 355) (DB).
('30) 17 AIR 1930 Lah 654 (655) (DB).
('24) 11 AIR 1924 Mad 608 (609) : 47 Mad 476 (DB).
[But see ('25) 12 AIR 1925 Oudh 633 (640) (DB).)]

7. ('17) 4 AIR 1917 P C 146 (151) : 45 Cal 17 : 44 Ind App 229 (PC).

†('11) 36 Bom 53 (57) (DB).

8. ('29) 16 AIR 1929 All 346 (346).

9. ('06) 28 All 416 (417).

Note 70

1. †('41) 28 AIR 1941 Cal 574 (579).
('40) 27 AIR 1940 Sind 227 (228) : I L R (1941) Kar 99 (DB).
†('29) 16 AIR 1929 All 400 (402).
('82) 5 Mad 239 (241) (DB).
('39) 26 AIR 1939 All 110 (111). (*Res judicata* applies though the causes of action are different.)
('35) 22 AIR 1935 Oudh 121 (128) : 10 Luck 361 (DB). ("Same title" in S. 11 means same capacity —When a party occupies different positions in the two suits, the decision in the prior suit will not operate as *res judicata* in the later suit.)
('33) 20 AIR 1933 Lah 66 (67) (DB). (Plaintiff attacked a mortgage in the first suit and a gift in the second suit—*Held* though subject-matter was different, title litigated was same.)
('33) 20 AIR 1933 Oudh 535 (537) : 9 Luck 237 (DB).

2. ('29) 16 AIR 1929 All 400 (402).

3. ('41) 28 AIR 1941 Cal 574 (579).

as reversioner of B.[4] The claim in each case is as an *individual* and therefore under the same title.[5]

(2) First suit as trustee. Second suit also as trustee.[6] The claim in each case is *as representing* the persons interested in the trust and therefore under the same title.

(3) First suit against a firm. Second suit against a partner thereof.[7]

(4) First suit litigated as heir of husband. Second suit on the basis of a claim for *dower*.[8]

(5) First suit based on right by purchase. Second suit based on right as *heir*.[9]

Where in the previous suit, title is asserted as heir under the customary law, the decision in such suit will be *res judicata* in respect of a plea asserting title as heir under the personal law.[10] Where the plaintiff in both the suits sues as the reversionary heir in respect of a Hindu widow's estate, the mere fact that in one of the suits the plaintiff professes *also* to sue in another capacity, viz., that of a donee and owner of the property does not make the second suit one not litigated under the same title.[11]

In the former suit, a Hindu father sued his son claiming certain property as his self-acquired property. The second suit was by the father against a creditor of the son and was for declaration that the property was not liable to attachment in execution of a decree held by the creditor against the son. It was held that the creditor claimed under the son litigating under the same title and the bar of *res judicata* arose so far as the question whether the property was the self-acquired property of the father was concerned.[12] See also the undermentioned cases [13]

The following are examples of suits litigated under *different titles* :

(1) First suit in a *personal* or individual capacity. Second suit in a *representative* capacity, such as that of a trustee, and *vice versa*.[14]

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4. ('26) 13 AIR 1926 Mad 234 (234).

5. *See also* ('09) 4 Ind Cas 241 (242) : 34 Bom 416 (DB). (Both suits in personal capacity.)

6. ('10) 7 Ind Cas 184 (185) (DB) (Mad).
('30) 17 AIR 1930 Cal 47 (49) : 57 Cal 258 (DB). (Both suits as mutawallis of wakf.)
[*See also* ('38) 25 AIR 1938 Mad 257 (258) (DB). (First suit by *A* as trustee of shrine—Second suit by shrine through *A* as trustee.)]

7. ('09) 34 Bom 244 (249) (DB).
[But see ('25) 12 AIR 1925 Cal 1195 (1198) (DB). (The issue in the second suit was not heard and decided in the first suit—The observations as to title are, it is submitted, not correct.)]

8. † ('20) 7 AIR 1920 All 70 (72) : 42 All 290 (294) (DB).
('27) 14 AIR 1927 Oudh 60 (62) (DB).

9. ('23) 10 AIR 1923 Mad 257 (259) : 46 Mad 135 (DB).

10. ('35) 22 AIR 1935 Pesh 150 (150) (DB).

11. ('38) 25 AIR 1938 Nag 401 (405) : ILR (1938) Nag 496 (DB).

12. ('37) 24 AIR 1937 Mad 651 (652).

13. ('42) 29 AIR 1942 Nag 119 (121) : ILR (1942) Nag 721. (Mere fact that the lessor and lessee had subsequent to a decision in a suit for rent between them acquired the additional capacity of sadar lambardar and lambardar would not alter their capacities in a later suit between them, for rent in respect of later years — Nor would it bar the application of the rule of *res judicata*.)
✠ ('40) 27 AIR 1940 Sind 227 (228) : I L R (1941) Kar 99 (DB). (A purchaser of a mortgage debt at an auction sale brought a suit on the mortgage bond but his suit was dismissed for want of registered deed of assignment of mortgage debt. Subsequently a second suit was brought based essentially on the same purchase but supported by a registered deed of assignment obtained after the dismissal of the first suit—*Held*, that the suit was barred by *res judicata*.)
('40) 45 Cal W N 854 (856, 857). (In first suit defendant impleaded in personal capacity but asserting that he was shebait of deity to which disputed property belonged—In subsequent suit defendant impleaded in both capacities but asserting the same title—*Held*, he was litigating under the same title.)
('38) 42 Cal W N 560 (563). (First suit setting up purchase from defendant alleging that defendant inherited property from grandfather—Second suit alleging that defendant inherited property from father who obtained it by deed of gift from grandfather — Plaintiff sues in same capacity in both suits—But question raised in second suit was not in issue in previous suit.)

14. † ('24) 11 AIR 1924 Lah 275 (276) (DB).
('27) 14 AIR 1927 Mad 1100 (1100).
('27) 14 AIR 1927 PC 128 (130, 131) : 54 Ind App 238 : 54 Cal 770 (PC). (Confirming AIR 1925 Cal 996 but overruling the contention that where same shebaits sue other shebaits, they both represent the idol.)

(2) First suit as heir of K. Second suit as manager of *Mutt.*[15]

(3) First suit in which A is impleaded as *legal representative of a party who died pending suit.* Second suit by A in his *personal* capacity and *vice versa.*[16] In the former case A only litigates as *representing* the deceased party and cannot set up pleas open to him in his *personal capacity.*[17] See also the undermentioned decisions.[18]

The words "between parties under whom they or any of them claim litigating under the same title" cover a case where the litigants in the later suit occupy by succession the same position as the litigants in the former suit. There is no distinction between *forms* of succession.[19]

In the undermentioned cases,[20] it was held that the person suing in the former litigation was *litigating under a different title* from that in which he was litigating

('36) 23 AIR 1936 All 422 (429) (DB).
('24) 11 AIR 1924 All 355 (356) : 46 All 230.
('20) 7 AIR 1920 All 318 (321) (DB). (Former suit brought to establish personal right — Subsequent suit on behalf of guild.)
('11) 36 Bom 29 (36) (DB).
('98) 22 Bom 216 (220) (DB).
('86) 10 Bom 24 (27) (DB).
('79) 4 Bom 37 (39) (FB).

† ('39) 26 AIR 1939 Cal 148 (151) (DB). (A decision in a prior suit against a party in his personal capacity cannot operate as *res judicata* against him in a later suit by him as mutwalli of a certain endowment.)

('21) 8 AIR 1921 Cal 425 (426) (DB). (First suit under S. 5, Religious Endowments Act — Public not made parties — Second suit by public under S. 92.)
('20) 7 AIR 1920 Cal 379 (381) : 47 Cal 866 (DB).
('70) 13 Suth W R 52 (55) (DB).
('33) 20 AIR 1933 Lah 920 (921) (DB).
('31) 18 AIR 1931 Lah 610 (613) : 13 Lah 195 (DB). (First suit as owners—Defence in second suit as permanent tenants held not barred.)
('31) 18 AIR 1931 Lah 161 (162) : 12 Lah 497 (DB). (First suit under S. 92—Second suit in individual right.)
('30) 17 AIR 1930 Lah 487 (488). (First suit as reversioner—Second suit as owner.)
('30) 17 AIR 1930 Lah 284 (284) (DB). (Do.)
('29) 106 Ind Cas 864 (865) (Lah). (Do.)
('17) 4 AIR 1917 Lah 250 (250).
('15) 2 AIR 1915 Lah 122 (123) : 1915 Pun Re No. 68 (DB).
('14) 1 AIR 1914 Lah 288 (288) : 1914 Pun Re No. 1 (DB). (First suit as guardian of minor—Second suit in his own right.)
('86) 1886 Pun Re No. 6. (First suit on joint claim for pre-emption—Second suit for exclusive right.)
† ('32) 19 AIR 1932 Mad 589 (591) (DB). (Trustee.)
('22) 9 AIR 1922 Mad 394 (396) (DB).
('15) 2 AIR 1915 Mad 62 (62) (DB).
('13) 18 Ind Cas 973 (974, 975) (DB) (Mad).
('36) 23 AIR 1936 Nag 71 (73) : 31 Nag L R Sup 202 (DB). (Trustee.)
('26) 13 AIR 1926 Oudh 578 (583) : 1 Luck 489.

15. ('04) 28 Bom 215 (226) (FB).
16. ('25) 12 AIR 1925 Mad 59 (59) (DB).

† ('29) 16 AIR 1929 All 252 (253) (DB).
('17) 4 AIR 1917 Cal 667 (668) (DB).
('26) 13 AIR 1926 Rang 191 (192) (DB).

17. ('25) 12 AIR 1925 Mad 59 (59) (DB). [But see ('22) 9 AIR 1922 All 463 (464, 465) (DB).]

18. ('41) 28 AIR 1941 Rang 159 (160) : (1941) Rang L R 204 (DB). (First suit as representative of the Sanghas of kyaungdaik — Second suit as presiding monk of the kyaungadaik)
('37) 24 AIR 1937 Bom 334 (336) : ILR (1937) Bom 636 (DB).
('36) 23 AIR 1936 Cal 585 (589) (DB). (Executor impleaded in personal capacity — Decision not *res judicata* against him in his capacity as executor.)
('37) 24 AIR 1937 Mad 153 (155) (DB). (First suit by life estate holder claiming property to be trust property—Second suit by remainderman in personal capacity — Widow cannot be said to have litigated under same title.)

19. † ('16) 3 AIR 1916 Bom 273 (275) : 40 Bom 606 (613, 614) (DB).
('24) 11 AIR 1924 Nag 422 (423, 424).

20. ('14) 1 AIR 1914 All 109 (110). (Issues different.)
('34) 21 AIR 1934 Oudh 293 (295) : 10 Luck 61.
('31) 18 AIR 1931 All 73 (76) (DB). (Subject-matter of the two suits different and the matter in issue also.)
('31) 18 AIR 1931 All 21 (22) (DB). (First suit as heir of *A*—Second suit as heir of *B* — *Held* to be on different title—*Held* also that the former decision was by a Court not competent to try the subsequent suit.)
('17) 4 AIR 1917 All 261 (262). (Issues not same.)
('08) 5 All L Jour 729 (730, 731).
('34) 21 AIR 1934 Cal 356 (362) : 60 Cal 1406 (DB). (Claim in the first suit as heirs to mother disallowed — Subsequent suit as heirs to their father's estate not barred.)
('23) 10 AIR 1923 Lah 16 (17). (Not in issue and not between same parties.)
('22) 9 AIR 1922 Lah 44 (45) (DB). (Issues different.)
('16) 3 AIR 1916 Mad 1101 (1101) (DB). (Case under Section 10.)
('35) 22 AIR 1935 Nag 61 (62) : 31 Nag L R 165.

in the later suit. The cases were, however, really decided on other grounds and the observations about the litigation being on different titles cannot be accepted as correct. See also Note 38 and Note 59. A applied as a widow of X for letters of administration to the estate of X. The application was dismissed on the ground that X being the first husband's brother of A, her marriage with X was void and that, therefore, she was not the widow of X. Subsequently, the Deceased Brother's Widow's Marriage Act, 1921 (11 & 12 Geo. V, Ch. 24) was passed by which such marriages were validated retrospectively. A thereupon again applied as widow of X for letters. The High Court of Patna held that the application was not barred by *res judicata* on the ground that the *whole status* of A had changed in the meantime.[21] It is submitted that the decision is not correct. The remedy in such cases can only be by way of *review* and not by way of a fresh application.

71. Nature of title derived from party. — See Note 49.

72. Identity of subject-matter and cause of action. — Under the Code of 1859, S. 2, it was enacted as follows : "The Civil Courts shall not take cognisance of any suit brought on a *cause of action* which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim." It was accordingly held in cases coming under that Code that where the *cause of action* in the subsequent suit was different from that in the former suit, the latter suit was not barred even if the *issue* decided was the same.[1] The Codes of 1877, 1882 and the present Code have substituted the words "no Court shall try any *suit or issue* in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit" for the words "the Civil Courts shall not take cognisance of any suit brought on *cause of action* which shall have been heard," etc.

There is, therefore, nothing in the present section to show that the words "any matter" mean "matter arising out of the same *cause of action*."[2] Nor is there any

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('37) 24 AIR 1937 Oudh 165 (167) : 12 Luck 516 (DB). (In a prior suit lessor held entitled to eject lessees from certain shops — Subsequent suit by lessor to eject the same lessees from other shops— Judgment in prior suit could not operate as *res judicata* in subsequent suit as lessees claimed to hold under different titles.)
('12) 14 Ind Cas 12 (14) (Oudh).
('18) 5 AIR 1918 Pat 275 (276). (Issues not same.)
[*See also* ('37) 24 AIR 1937 Bom 334 (336): I L R (1937) Bom 636.
('32) 19 AIR 1932 Bom 456 (458).]
21. ('24) 11 AIR 1924 Pat 624 (627, 628).

Note 72

1. ('86) 10 Bom 28 (30).
('74) 22 Suth W R 282 (283). (Cause of action same—Second suit barred.)
† ('74) 2 Ind App 283 (285) : 1 Cal 144 (146) (PC). ('Cause of action' in S. 2, Act VIII of 1859 to be construed with reference to substance rather than to form of action.)
('75) 7 N W P H C R 251 (254).
('74) 22 Suth W R 172 (173, 174).
('73) 20 Suth W R 450 (452).
('73) 20 Suth W R 412 (413).
('72) 18 Suth W R 202 (203).
('72) 18 Suth W R 19 (20).
('71) 16 Suth W R 264 (264).
† ('70) 13 Suth W R 97 (98) (DB).
('69) 12 Suth W R 79 (80). (Cause of action same —Suit barred.)
('69) 11 Suth W R 244 (244, 245).
('69) 11 Suth W R 193 (193).
('69) 11 Suth W R 149 (149, 150).
† ('68) 10 Suth W R 100 (100) (DB).
('66) 6 Suth W R 44 (45, 46).
('70) 1870 Pun Re No. 59.
('72) 7 Mad H C R 160 (166). (Cause of action same—Suit barred.)
('93-1900) 1893-1900 Low Bur Rul 490.
2. † ('04) 6 Bom L R 594 (597, 598) (DB).
† ('24) 11 A I R 1924 Pat 265 (266) : 2 Pat 771 (DB).
('29) 16 AIR 1929 Cal 445 (447) (DB). (Causes of action different—*Res judicata* should be restricted to question of fact and mixed question of law and fact and not to pure question of law.)
('38) 25 A I R 1938 Nag 401 (406): I L R (1938) Nag 496 (DB).
('28) 15 AIR 1928 Nag 112 (112). (Causes of action arising out of same title — Second suit barred.)
('29) 16 A I R 1929 Oudh 172 (174) : 4 Luck 603 (FB). (Referring to 20 All 110 confirmed in 24 All 429 (PC); A I R 1924 Pat 265 : 2 Pat 771; 12 Oudh Cas 347.)
† ('11) 11 Ind Cas 346 (348) : 14 Oudh Cas 117.

express allusion in the section to the identity of the *subject-matter* of the two suits. The *result* or the *fruit* of the litigation at which the parties are aiming is no longer a matter for consideration for the Courts. What is to be considered is whether the *issue* which is directly and substantially in question in the subsequent suit has been directly and substantially in question in the former suit.[3] In other words, it is the *matter in issue* directly and substantially, either actually or constructively, and not the *subject-matter* of the suit that forms the test of *res judicata*.[4] If the matter in issue decided covers a subject-matter besides that involved in the first suit, it will still be *res judicata*.[5]

Where the causes of action in the two suits are different, it often happens that the *matter in issue* in the two suits is not the same. It also happens in many cases that the cause of action in the subsequent suit was *not in existence* on the date of the former and, therefore, *could* not have been raised as a ground of attack or defence in the former suit. In such cases, the former suit does not operate as *res judicata* in the subsequent suit, though the decisions do not specifically advert to this distinction but simply hold that the cause of action is different in the later suit and that, therefore, there is no *res judicata*.[6] (See also O. 2, R. 2, Note 23.) On a careful perusal of the said decisions it will

3. † ('02) 24 All 112 (115, 117) (DB).
('98) 25 Cal 571 (576) (DB).
† ('28) 15 AIR 1928 All 62 (64) (DB).
('36) 63 Cal 550 (558, 559) (DB). (Subject-matter need not be the same in the two suits.)
('35) 157 Ind Cas 381 (382) (Cal).
('38) 25 A I R 1938 Lah 369 (388) (FB). (Former suit for possession of mosque dismissed on ground of adverse possession of defendant—Mosque demolished—Subsequent suit for restoration of mosque and for declaration of right to say prayers—Issue in both suits same and second suit barred — Per Full Bench; Din Mahomed, J., dissenting.)

4. ('42) 29 AIR 1942 Bom 309 (310): ILR (1942) Bom 822.
('42) 29 AIR 1942 All 410 (421) : I L R 1942 All 624 (DB).
('42) 29 AIR 1942 Oudh 286 (288) (DB).
('40) 45 Cal W N 420 (425) (DB).
('82) 4 All 55 (58) (DB).
('33) 20 AIR 1933 Oudh 535 (537): 9 Luck 237 (DB).
('81) 12 Ind App 16 (21) : 8 Mad 219 (PC).
('10) 5 Ind Cas 278 (280) (All). (Identity of title and not of subject-matter that is important.)
† ('01) 23 All 5 (12) (DB).
† ('89) 11 All 148 (157, 163) (SB).
('89) 13 Bom 25 (32) (DB).
('80) 5 Bom 27 (29). (First suit on footing of partition which was held against — Second suit for partition not barred.)
('36) 63 Cal 550 (559) (DB).
† ('35) 157 Ind Cas 381 (382) (Cal).
('33) 20 AIR 1933 Cal 879 (879) (DB).
('33) 20 AIR 1933 Cal 222 (230) (DB).
('30) 17 AIR 1930 Cal 47 (50) : 57 Cal 258 (DB).
('05) 2 Cal L Jour 540 (541, 542) (DB).
('88) 15 Cal 756 (761) : 15 Ind App 97 (PC).
('24) 11 AIR 1924 Lah 423 (424).
('33) 20 AIR 1933 Mad 925 (928) : 57 Mad 73 (DB). (Suit to recover arrears of kattubadi—The fact that previous decision as to the liability to pay kattubadi was given with respect to previous years has no bearing on the question of *res judicata*.)
('17) 4 AIR 1917 Mad 299 (305) (DB).
('38) 25 AIR 1938 Nag 401 (406) : I L R (1938) Nag 496 (DB).
† ('25) 12 AIR 1925 Oudh 444 (444).
('25) 12 AIR 1925 Oudh 390 (391): 29 Oudh Cas 93.
† ('25) 12 AIR 1925 Oudh 118 (119).
('26) 13 AIR 1926 Rang 122 (122): 4 Rang 8 (DB).
[But see ('31) 18 AIR 1931 All 73 (76).]

5. ('42) 29 AIR 1942 All 267 (287): ILR (1942) All 518 (DB).
('23) 10 AIR 1923 All 613 (615) : 45 All 515 (DB).
('24) 11 AIR 1924 All 10 (10, 11) (DB).
('85) 8 Mad 219 (225) : 12 Ind App 16 (PC).
[*See also* ('25) 12 AIR 1925 Rang 30 (32) : 2 Rang 367.)]

6. *In the following cases it will be found that the matters in issue in the two suits were really different* :
† ('84) 8 Bom 174 (181) (FB).
('35) 22 AIR 1935 All 790 (791). (Two separate and unconnected buildings erected on land — Suit for removal of one and possession of land underneath dismissed — Subsequent suit for removal of other is not barred.)
('35) 22 AIR 1935 All 645 (647).
† ('32) 19 AIR 1932 All 553 (554) (DB).
('29) 16 AIR 1929 All 844 (844). (Suit dismissed for want of cause of action is not a bar.)
('29) 16 AIR 1929 All 696 (697) (DB).
('29) 16 AIR 1929 All 462 (462, 463) : 51 All 842 (DB). (Case under Agra Pre-emption Act.)
('23) 10 AIR 1923 All 176 (179) : 45 All 59 (DB).
('41) 28 AIR 1941 All 217 (218). (First suit for recovery of specific sum — Second suit for rendition of accounts held barred neither by O. 2, R. 2 nor S. 11.)
('40) 27 AIR 1940 Bom 311 (312) (DB). (Claim for possession of property as owner dismissed—Subsequent suit as mortgagee of same property to enforce mortgage is not barred.)
('02) 4 Bom L R 960 (961).
('90) 1890 Bom P J 72 (72) (DB).
('87) 11 Bom 160*n* (165*n*) (DB).

be found in all those cases that the *matter in issue* was not the same in the two suits or that the cause of action in the subsequent suit was *not in existence* at the date of the former suit and could not have been the subject of litigation then. The same observations apply to decisions which hold that there is no *res judicata* as the *subject-matter* of the later suit was different from that in the former suit.[7] On the examination of such cases it

† ('83) 7 Bom 408 (410) (DB) (Previous suit on no cause of action at all.)
('86) 12 Cal 339 (345, 348) (DB).
('38) 25 AIR 1938 Lah 492 (493). (First suit for pre-emption on the ground that an alleged gift to a Muhammadan widow was in reality a sale—Suit dismissed — Second suit for declaration of title on the ground that the plaintiff was entitled to the property as heir to the deceased, as the widow had remarried—Second suit not barred.)
('33) 20 AIR 1933 Lah 1017 (1017) (DB).
('21) 8 AIR 1921 Lah 133 (134) (DB). (Decision in a suit which proceeds on a cause of action, which has no existence in the eye of the law cannot operate as *res judicata*.)
('38) 25 AIR 1938 Mad 221 (223) (DB).
† ('25) 12 AIR 1925 Mad 1172 (1172).
† ('03) 26 Mad 760 (769, 770) (DB).
('93) 16 Mad 335 (338) (DB).
('24) 83 Ind Cas 309 (311) (Nag).
('37) 24 AIR 1937 Oudh 263 (265) : 13 Luck 192 (DB).
('18) 5 AIR 1918 Oudh 32 (59) : 21 Oudh Cas 1 (58) (DB).
('17) 4 AIR 1917 Pat 589 (590) : 2 Pat L Jour 13 (DB). (Suit dismissed for misdescription — Second suit on same cause of action not barred.)
('33) 20 AIR 1933 Rang 106 (107).

In the following cases it will be found that the cause of action in the later suit was not in existence at the date of the former suit:

('42) 29 AIR 1942 Bom 322 (323): ILR (1942) Bom 798 (DB). (*S*, a Hindu widow adopting a son *M* to her husband in 1927—Suit for declaration against *M* and *S* by an agnate of the husband that the adoption was invalid — Compromise decree passed in which adoption was declared as null and void — *S* again adopting *M* in 1932 when there was a change in law — Suit for declaration by *M* that he was the adopted son of *S* — *Held*, the titles under which *M* was litigating in the two suits were derived from different transactions though of the same nature.)
('42) 29 AIR 1942 Oudh 286 (288).
('40) 27 AIR 1940 All 433 (438, 440) (DB). (Reversioner's suit for possession after widow's death is not barred by previous suit by him for declaring alienation by her void.)
('40) 27 AIR 1940 Pat 204 (227) : 19 Pat 1 (DB). (There can be no *res judicata* regarding "a cause of action" that arose subsequently to the suit.)
('96) 20 Bom 491 (492) (DB).
('93) 17 Bom 510 (511) (DB).
('78) 2 Mad 23 (28, 29): 5 Ind App 206 (PC).
('32) 19 AIR 1932 All 96 (97) : 54 All 68 (DB). (Failure of suit under S. 77 of the Registration Act, no bar to a suit for specific performance of the original contract.)
('28) 15 AIR 1928 All 272 (273) : 50 All 476.
('05) 27 All 142 (144) (DB).
('81) 1881 All W N 23 (23).
('23) 10 AIR 1923 Bom 467 (468) (DB). (Right to partition is a continuing right—See Note 36.)
('12) 36 Bom 189 (197) (DB).
('89) 13 Bom 326 (329) (DB).
('89) 13 Bom 72 (74) (DB).
('07) 9 Bom L R 274 (279).
('02) 6 Cal W N 314 (318) (DB).
('93) 20 Cal 732 (738, 739) (DB).
('75) 24 Suth W R 471 (471) (DB). (Suit on fresh tort.)
('28) 15 AIR 1928 Lah 263 (266) (DB).
('10) 1910 Pun L R No. 216, pp. 660, 661.
('27) 14 AIR 1927 Mad 415 (415, 416).
('26) 13 AIR 1926 Mad 1128 (1129) (DB).
('26) 13 AIR 1926 Mad 683 (686) : 49 Mad 596 (DB). (Right to partition is a continuing right. See Note 36.)
('25) 12 AIR 1925 Mad 1070 (1072) (DB).
('22) 9 AIR 1922 Mad 413 (415) (DB).
('82) 5 Mad 1 (3) (DB).
('24) 11 AIR 1924 Oudh 129 (130) : 26 Oudh Cas 98.
('22) 9 AIR 1922 Oudh 251 (254) : 25 Oudh Cas 157.
('06) 9 Oudh Cas 235 (238).
('05) 8 Oudh Cas 65 (74) (DB).

In the following cases the causes of action and the issues in the two suits were the same and the subsequent suit was held barred :

('11) 6 Ind Cas 233 (237, 238) : 34 Mad 97.
('06) 29 Mad 320 (321, 322) (DB).
('88) 15 Cal 808 (817) : 15 Ind App 113 (PC).
('15) 2 AIR 1915 Mad 1107 (1110) (DB).
('94) 1 Cal L Jour 248 (252).

[7] *The issues were different in the following decisions :*

('42) 29 AIR 1942 Mad 128 (129). (The subject matter of the claim order, that is, the crops on lands not identical with the land itself and hence a decision in a previous claim for crops under O. 21 R. 58, does not operate as *res judicata* in a subsequent suit with respect to the land. AIR 1917 Cal 669 : 44 Cal 698, *Rel. on.*)
('31) 18 AIR 1931 Lah 254 (254) (DB).
† ('90) Bom 206 (212, 213) (DB).
('24) 11 AIR 1924 All 922 (923) (DB).
('87) 11 Bom 355 (360) (DB).
('23) 10 AIR 1923 Cal 379 (380) : 50 Cal 475 (DB).
('17) 4 AIR 1917 Cal 669 (670) : 44 Cal 698 (DB).
('97) 24 Cal (88, 89) (DB).
('75) 24 Suth R 23 (23, 24) (DB).
(1864) 1864 S W R (Gap) 110 (111) (DB).
('92) 2 Mad L r 36 (38).
† ('68) 3 Mad R 320 (325, 326, 333) (DB).
('34) 21 AIR 1 Pat 515 (518) (DB).
[*See* ('98) 25 C 22 (530, 531) (FB).]

will be found that, as a matter of fact, the matter in issue was different in the two suits or that the ground of attack or defence did not exist at the date of the former suit and, therefore, could not be raised in the former suit.[8]

73. The Court trying the former suit must have been competent to try such subsequent suit or the suit in which such issue has been subsequently raised. — Section 2 of the Code of 1859 and S. 13 of the Code of 1877 were so worded that it was enough for the operation of the rule of *res judicata* that the Court trying the former suit or issue was a "Court of competent jurisdiction" *to try that suit or issue.* In *Mt. Edun* v. *Mt. Bechun*,[1] Sir Barnes Peacock, C. J., interpreted the words to mean that the former Court must be one "which would have had jurisdiction *over the matter in the subsequent suit* in which the first decision is given in evidence as conclusive;" in other words, it must be a Court of *concurrent* jurisdiction with that of the Court trying the subsequent suit. This view was, however, negatived in *Run Bahadur Singh* v. *Lucho Koer*.[2] This conflict of views was settled by the Legislature by enacting in S. 13 of the Code of 1882, that the Court trying the former suit must have been competent to try "such subsequent suit or the suit in which such issue has been subsequently raised," thus adopting the view of Sir Barnes Peacock, C. J., above referred to as to the necessity of the *concurrency of jurisdiction* between the two Courts. The contrary view that had been expressed in *Run Bahadur Singh* v. *Lucho Koer*[3] was, on appeal, overruled by their Lordships of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer*.[4]

Under the Code of 1882 and under the present Code also, it is now necessary that the Court trying the former suit should have been competent to try the *subsequent suit itself*.[5] Otherwise, the rule of *res judicata* under the section will not apply.[6] Where the

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8. *The matter in dispute was not in existence in the previous suit, in the following cases:*
('29) 16 AIR 1929 Oudh 15 (16) (DB).
('28) 15 AIR 1928 Lah 263 (266) (DB).
('94) 18 Bom 537 (541, 542) (DB).
('33) 20 A I R 1933 Cal 246 (249) : 60 Cal 8 (DB). (Defendant's plea of adverse possession negatived —Plea that at the date of the later suit defendant had perfected her title by adverse possession is not barred.)
('29) 16 AIR 1929 Cal 201 (202).
('81) 6 Cal 559 (563) (DB).
('69) 11 Suth W R 382 (383, 384) (DB).

Note 73

1. ('67) 8 Suth W R 175 (179).
2. ('81) 6 Cal 406 (413, 414).
3. ('81) 6 Cal 406 (413, 414).
4. ('85) 11 Cal 301 (308, 309):12 Ind App 23 (PC).
5. ('42) 29 AIR 1942 Nag 119 (121):I L R (1942) Nag 721.
('28) 15 AIR 1928 Mad 840 (844) (DB).
11 Lah L T 98.
† ('37) 24 AIR 1937 All 20 (21). (Mere competency to try the issue raised in the subsequent suit is not enough.)
† ('32) 19 AIR 1932 All 483 (483) : 54 All 786 (DB).
('23) 10 AIR 1923 All 113 (115). (Former Court competent, therefore barred.)
('33) 20 AIR 1933 Bom 398 (401) : 57 Bom 456 (DB).
('38) 25 AIR 1938 Cal 724 (728) (DB).
† ('35) 22 AIR 1935 Cal 792 (797) (DB).
('26) 13 AIR 1926 Cal 1053 (1054) (DB).
('10) 5 Ind Cas 573 (575, 576) (DB) (Cal).
† ('08) 35 Cal 353 (358) (DB).
('74) 21 Suth W R 207 (208) (DB). (Former Court competent, therefore barred.)
('68) 10 Suth W R 325 (326) (DB). (Do.)
('91) 4 C P L R 84 (87). (Do.)
† ('37) 24 AIR 1937 Lah 346 (347).
('33) 20 AIR 1933 Lah 551 (552) : 14 Lah 369 (DB).
('33) 20 AIR 1933 Mad 913 (914) : 57 Mad 335 (DB).
('25) 12 AIR 1925 Mad 1167 (1167) (DB).
('99) 9 Mad L Jour 196 (197) (DB).
('95) 18 Mad 257 (263) (DB).
('34) 21 AIR 1934 Pat 270 (273).
('28) 108 Ind Cas 623 (624) (Lah).
6. ('42) 29 AIR 1942 Oudh 25 (27) : 17 Luck 215
('41) 28 AIR 1941 Oudh 429 (432) (DB). (Former suit for ejectment and rent of a house tried by Munsif—Subsequent suit for declaration of plaintiff's ownership tried by Additional Civil Judge — Subsequent suit held not barred by *res judicata* as former Court was not competent to try it.)
('41) 28 AIR 1941 Cal 104 (105). (Decision in rent suit in Small Cause Court that tenancy is governed by Transfer of Property Act — No bar to subsequent title suit in which it is claimed that tenancy is governed by Bengal Tenancy Act.)
('40) 21 Pat L T 894 (896) (DB).
† ('39) 26 AIR 1939 Pat 375 (377):18 Pat 342 (DB).

Court which tried the former suit is incompetent to try the later suit, the fact that the decree in the prior suit is based on an award made by arbitrators cannot render the matters decided therein *res judicata* in the subsequent suit.[7] As the section is explicit on this point the general principles of *res judicata* cannot be invoked in this respect.[8]

The section does not, in express words, say that the Court trying the first suit should have been competent to try *that* suit. But obviously, such competency is also quite necessary.[9] As has been seen in Note 3 on S. 9, if a Court has no jurisdiction to try a suit, its judgment and orders are mere *nullities* and have no effect either as estoppel or otherwise and therefore cannot operate as *res judicata* in subsequent proceedings.[10] But

('39) 26 AIR 1939 Sind 329 (330) : I L R (1940) Kar 15 (DB).
('02) 29 Cal 707 (715) : 29 Ind App 196 (PC).
('08) 35 Cal 353 (358, 359) (DB).
('36) 23 AIR 1936 All 459 (460).
('31) 18 AIR 1931 All 454 (458) : 53 All 560 (DB).
('27) 14 AIR 1927 All 297 (298) : 49 All 543 (DB).
('26) 13 AIR 1926 All 34 (35).
('24) 11 AIR 1924 All 466 (466).
('23) 10 AIR 1923 All 368 (369).
('21) 3 L R All (Rev) 156 (157) (FB).
('20) 7 AIR 1920 All 23 (25) (DB).
('13) 11 All L Jour 231 (232).
† ('25) 12 AIR 1925 Bom 241 (242, 243) : 49 Bom 442 (FB).
('21) 8 AIR 1921 Bom 434 (435): 45 Bom 805(DB).
('38) 67 Cal L Jour 223 (227, 228) (DB).
('36) 23 AIR 1936 Cal 629 (637). (But the finding creates a paramount duty on the party against whom it is given to displace it.)
('34) 21 AIR 1934 Cal 192 (198) (DB).
('30) 17 AIR 1930 Cal 238 (239) (DB).
('26) 13 AIR 1926 Cal 603 (603) (DB).
('24) 11 AIR 1924 Cal 487 (489) (DB). (Former decision by Small Cause Court — Subsequent suit in the ordinary civil Court.)
('18) 5 AIR 1918 Cal 70 (71) (DB).
('09) 4 Ind Cas 442 (445) (Cal) (DB).
† ('35) 156 Ind Cas 1031 (1033) (DB) (Lah).
('30) 17 AIR 1930 Lah 501 (503) (DB).
('94) 1894 Pun Re No. 146.
('22) 9 AIR 1922 Mad 394 (396) (DB.)
('09) 4 Ind Cas 97 (97) (DB) (Mad).
† ('34) 21 AIR 1934 Nag 178 (179). (General principles of *res judicata* cannot be applied to such a case so as to override tha specitic provisions of this section.)
('15) 2 AIR 1915 Oudh 30 (31).

7. ('32) 19 AIR 1932 Pat 105 (110) : 11 Pat 50 (DB).
8. ('41) 28 AIR 1941 Cal 104 (106).
9. ('18) 5 AIR 1918 Mad 988 (989) (DB).
(1900) 1900 Pun L R No. 105, at p. 435 : 1900 Pun Re No. 39.
('31) 18 AIR 1931 All 425 (426) (DB). (Court has jurisdiction to decide wrong as well as right.)
† ('26) 13 AIR 1926 Bom 481 (484).
('20) 7 AIR 1920 Cal 131 (134) : 47 Cal 770 (DB).
('24) 11 AIR 1924 Mad 716 (717, 720) : 47 Mad 850 (DB). (Wrong suit followed by a wrong decree does not bar a correct suit.)
('03) 2 Low Bur Rul 24 (25, 26).
10. ('42) 29 AIR 1942 Cal 1 (13) : I L R (1941) 2 Cal 434 (DB).

('40) 27 AIR 1940 P C 222 (225) : ILR (1940) Kar P C 460 (PC). (A Court which declines jurisdiction cannot bind the parties by its reasons for declining jurisdiction. Such reasons are not decisions and are certainly not decisions by a Court of competent jurisdiction.)
('83) 7 Bom 408 (410) (DB).
('32) 19 AIR 1932 Oudh 313 (314) : 6 Luck 697 (DB).
('77) 4 Ind App 66 (75) : 2 Cal 327 (P C).
('31) 18 AIR 1931 All 454 (458) : 53 All 560 (DB).
('31) 18 AIR 1931 All 200 (201).
(30) 17 AIR 1930 All 681 (685, 686) : 52 All 868 (DB).
('26) 13 AIR 1926 All 650 (652).
('22) 9 AIR 1922 All 397 (398, 399) (DB).
('10) 6 Ind Cas 98 (100) (DB) (All).
('09) 2 Ind Cas 456 (457, 458) (All).
('75) 1 All 588 (590) (DB).
('75) 7 N W P H C R 99 (100) (DB).
† ('13) 20 Ind Cas 530 (532) : 37 Bom 563 (DB).
('07) 9 Bom L R 274 (279). (Judgment against a dead person.)
(1900) 24 Bom 77 (85) (DB). (Judgment of foreign Court having no jurisdiction over subject-matter.)
('88) 1888 Bom P J 383.
('26) 13 AIR 1926 Cal 991 (992) (DB).
('05) 9 Cal W N 956 (960, 961) (DB).
('81) 7 Cal 739 (744) (DB).
('74) 22 Suth W R 308 (309) (DB).
† ('29) 16 AIR 1929 Lah 627 (629, 630). (Judgment of foreign Court having no jurisdiction over subject-matter.)
('23) 10 AIR 1923 Lah 141 (142) (DB).
('03) 1903 Pun Re No. 37.
('99) 1899 Pun Re No. 2. (Judgment of foreign Court having no jurisdiction over subject-matter.)
('32) 19 AIR 1932 Mad 233 (233, 234).
('28) 15 AIR 1928 Mad 746 (752) (DB). (*Ultra vires* order in execution.)
† ('28) 15 AIR 1928 Mad 327 (333) : 51 Mad 720 (DB). (Judgment of foreign Court having no jurisdiction over subject-matter.)
('05) 28 Mad 42 (49, 50) : 32 Ind App 45 (PC).
('35) 22 AIR 1935 Nag 250 (256) : 31 Nag L R Sup 43 (FB).
('35) 22 AIR 1935 Nag 28 (30).
('17) 4 AIR 1917 Nag 118 (119). (Incompetent reference under O. 46, R. 1.)
('28) 15 AIR 1928 Oudh 296 (297). (Such finding must be regarded as *obiter dictum*.)
('32) 19 AIR 1932 Pat 105 (110) : 11 Pat 50 (DB).
('25) 12 AIR 1925 Pat 807 (810) : 4 Pat 440 (DB). (*Ultra vires* order in execution.)

a Court has *always jurisdiction* to decide for itself whether it has jurisdiction to try the suit before it and its decision thereon will be as much *res judicata* in a subsequent suit as a decision on any other point.[11] Where therefore the existence or otherwise of jurisdiction depends upon facts proved or upon facts in the knowledge of the party which he had an opportunity of bringing forward in the Court but which he did not, and the Court expressly or impliedly decides that it has jurisdiction and proceeds with the suit, the decision cannot be challenged on the ground of want of jurisdiction in subsequent proceedings.[12] (See also S. 21 Note 8.)

74. "Court," meaning of. — See also section 2 clause (8) and Notes thereon.

In order to found an estoppel under this section the former decision must have been that of a *Court. Administrative* Officers are not 'Courts' within the meaning of this section, though they may have been invested by the Legislature with certain powers to inquire into and decide certain matters, and though they are bound to conduct such inquiry in conformity with the principles of natural justice.[1]

('22) 9 AIR 1922 Pat 252 (255) : 6 Pat L Jour 650 (DB).
('38) 25 AIR 1938 Pesh 54 (57) (DB). (Reference to arbitration under Sec. 152, Companies Act — Award which is executable only by District Judge executed by Sub-Judge—Execution is ultra vires—Point decided in such ultra vires proceedings is a *nullity* and hence cannot become *res judicata*.)
('35) 22 AIR 1935 Rang 517 (520).
[*See* ('27) 14 AIR 1927 All 505 (506) : 49 All 918. ('15) 2 AIR 1915 Lah 164 (164) : 1915 Pun Re No. 73.]
[*See also* ('43) 30 AIR 1943 Cal 56 (57). (Application purporting to be under S. 47 — S. 47 not applicable but O. 21, R. 58 possible to apply—Order by Court is not without jurisdiction.) ('93) 16 Mad 481 (485).]
Also see S. 9 Note 3.

11. ('42) 76 Cal L Jour 183 (188) (DB). (Erroneous decision of Executing Court that the matter was not within its competence is *res judicata*.)
('41) 28 A I R 1941 Cal 156 (159) : I L R (1940) 2 Cal 277. (But not the decision that the amount is barred by limitation, which was gone into only for deciding the question of jurisdiction.)
('40) 27 A I R 1940 P C 222 (225) : I L R (1940) Kar P C 460 (PC). (Court declining jurisdiction —Reasons for declining jurisdiction are not decisions and cannot bind parties — Decision as to jurisdiction is *res judicata*.)
('03) 1903 Pun L R No. 16, p. 51 : 1902 Pun Re No. 92 (SB).
† ('37) 24 AIR 1937 Lah 649 (652).
† ('35) 22 A I R 1935 Mad 835 (838) : 59 Mad 62 (DB).
[*See* (1887) 11 Bom 488 (490).]
‖ But see ('41) 28 A I R 1941 Cal 493 (494, 495). (*Ites judicata* — Principles of, do not apply to decision as to Court's jurisdiction — Execution applications filed in Court of competent jurisdiction—Court wrongly deciding on last application to have no jurisdiction—Principles of *res judicata* held did not apply—Applications can be availed of to save time — Question of bad faith does not arise.)‖

12. † ('22) 9 AIR 1922 Pat 322 (333, 334) (DB).
('33) 20 AIR 1933 Pat 104 (106, 107) : 12 Pat 117 (DB).
('26) 13 AIR 1926 All 650 (652).
✣ ('26) 13 AIR 1926 Bom 481 (485, 487).
('26) 13 A I R 1926 Cal 1101 (1103) (DB). (Even erroneous decision of jurisdiction is *res judicata*.)
('38) 25 AIR 1938 Mad 257 (262) (DB). (Objection as to want of pecuniary or territorial jurisdiction.)
('26) 13 AIR 1926 Oudh 369 (369).
('26) 13 AIR 1926 Oudh 239 (240).
('19) 6 AIR 1919 Oudh 123 (124).
('36) 23 AIR 1936 Sind 34 (38).

Note 74

1. † ('07) 29 All 519 (533) : 34 Ind App 125 (P C). (Committee of Oudh Talukdars.)
('06) 30 Bom 220 (224) (DB). (Talukdari settlement officer in Bombay.)
('38) 25 A I R 1938 P C 210 (216) : 13 Luck 508 : 32 Sind L R 845 : 65 Ind App 314 (PC). (Where no objection is raised under S. 111 of U. P. Land Revenue Act, the Collector in partition proceedings under that Act does not function as a civil Court.)
('66) 1 Agra 135 (136) (DB). (Settlement officer.)
('04) 1 All L Jour 9 (13, 14) (DB). (Do.)
† ('29) 16 A I R 1929 Cal 130 (132) (DB). (Certificate officer under the Bengal Public Demand and Cess Recovery Act.)
('06) 3 Cal L Jour 133 (134, 135) (DB).
('01) 28 Cal 471 (473, 474) (DB). (Settlement officer.)
('96) 23 Cal 257 (260, 261) (DB). (Do.)
('81) 7 Cal 736 (738) (DB). (Registrar acting under the Indian Registration Act.)
(1864) 1864 Suth W R (Gap) 26 (27) (FB). (Agent to the Governor General before Regulation XIII of 1833.)
('68) 1868 Pun Re No. 6 (Rev).
('38) 25 AIR 1938 Mad 148 (151) : ILR (1938) Mad 151 (SB). (Income-tax officer does not constitute a Court.)
✣ ('30) 17 AIR 1930 Mad 209 (213) : 53 Mad 420 (FB). (Income-tax officer.)
('39) 26 A I R 1939 Oudh 73 (73). (Findings by Deputy Commissioner in proceedings under S.30A of the Oudh Rent Act—Not *res judicata*.)

75. Where Court deciding former suit is one of exclusive jurisdiction. — As has been seen already in Note 73, S. 11 requires that the Court trying the former suit must be one of *concurrent* jurisdiction with that of the Court trying the subsequent suit. It does not deal with the effect of the decision of a Court of *exclusive* jurisdiction. Where the former Court is a Court of *exclusive* jurisdiction, matters decided by it will be beyond the competence of a Court trying a subsequent suit, which has no such exclusive jurisdiction. On general principles of *res judicata*, the decision of the former Court of exclusive jurisdiction will be conclusive on the matter decided irrespective of the limitation that the former Court must be competent to decide the subsequent suit.[1] Thus, Small Cause Courts and Revenue Courts have been empowered by the Legislature to try particular classes of suits to the *exclusion* of ordinary Civil Courts[2] and any decision arrived at by such Courts in the exercise of such exclusive power is conclusive and cannot be questioned by the ordinary Civil Courts.[3] In some decisions, however, it has been held that a prior decision by a Small Cause Court will *not* be *res judicata* if the same question again arises in a regular suit.[4] It is submitted that these decisions are not correct.

The judgment of a Court of exclusive jurisdiction can operate as *res judicata only on a matter* which that Court could exclusively decide. Thus, the decision of a Small Cause Court on a question of title to immovable property cannot operate as *res judicata* in a suit in the ordinary Civil Court.[5] See also the undermentioned case.[6]

76. Exclusive jurisdiction of Revenue and Civil Courts.—As has been seen in the above Note, Revenue Courts in the various Provinces have been given *exclusive* jurisdiction in certain matters by the Legislatures of those Provinces. The decisions on some matters by the Revenue Courts have been declared to have the

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('16) 3 A I R 1916 Low Bur 30 (32) : 8 Low Bur Rul 556 (560). (Orders of revenue officers.)
[*See* ('38) 25 AIR 1938 Lah 369 (418). (See judgment of Din Mahomed J., regarding the decision of a Deputy Commissioner in the Punjab, delivered in 1855 according to the Punjab Civil Code which was then in force.)]

Note 75

1. ✠('32) 19 AIR 1932 Oudh 199 (203, 204) : 7 Luck 716 (FB).
† ('26) 13 AIR 1926 Sind 236 (237) : 21 Sind L R 23 (DB). (Small Cause Court.)
('37) 24 AIR 1937 Lah 346 (347).
('35) 22 AIR 1935 Lah 826 (827). (Finding by a Gurudwara Tribunal that property belonged to the Gurudwara — Subsequent suit in Civil Court by Gurudwara for possession — Previous decision operates as *res judicata*.)
('39) 26 AIR 1939 Oudh 17 (27). (Decision of Revenue Court of Oudh before 1865 regarding rights to land operates as *res judicata*.)
[*See also* ('34) 21 AIR 1934 Sind 112 (113).]

2. See for instance S. 16, Provincial Small Cause Courts Act and S. 189, Madras Estates Land Act, 1908.

3. ('94) 16 All 464 (472). (Revenue Court.)
('18) 5 AIR 1918 All 49 (50, 51) : 41 All 97 (103). (Do.)
('27) 14 AIR 1927 All 189 (190). (Do.)
('23) 10 AIR 1923 All 527 (528). (Do.)
('23) 10 AIR 1923 All 437 (438). (Do.)
('19) 6 AIR 1919 All 190 (191) : 41 All 203 (205). (Do.)
('93) 15 All 387 (390, 392) (FB). (Do.)
† ('85) 7 All 191 (194) (DB). (Do.)
('85) 7 All 148 (151, 152) (DB). (Do.)
('83) 5 All 245 (248) (DB). (Do.)
('38) 25 AIR 1938 Lah 811 (813) : I L R (1939) Lah 183. (Small Cause Court.)
('37) 24 AIR 1937 Lah 346 (347). (Do.)
('29) 16 AIR 1929 Lah 586 (587). (Revenue Court.)
† ('88) 9 Mad 39 (41, 42) (DB). (Do.)
† ('29) 16 AIR 1929 Oudh 362(363): 4 Luck220.(Do.)
('26) 13 AIR 1926 Oudh 348 (349). (Do)
('26) 13 AIR 1926 Oudh 205 (205). (Do.)
('34) 21 AIR 1934 Sind 112 (113). (Small Cause Court.)
('26) 13 AIR 1926 Sind 236 (237) : 21 Sind L R 23 (DB). (Do.)
Also see S. 9 Note 51.

4. † ('24) 11 AIR 1924 Cal 487 (489) (DB).
('39) 26 AIR 1939 Nag 130 (131). (Former suit in Small Cause Court — Later suit on regular side— Same Judge presiding over both Courts — Still no *res judicata*.)
('34) 21 AIR 1934 Nag 178 (179).

5. ('34) 21 AIR 1934 Lah 324 (325).
('37) 41 Cal W N 1019 (1019).
('38) 25 AIR 1938 Lah 811 (813) : I L R (1939) Lah 183.

6. ('39) 26 AIR 1939 Cal 719 (719). (Order rejecting application for possession by mortgagor under S. 26G of Ben. Ten. Act, is not *res judicata*.)

force of a decree of a Civil Court[1] and some again, as final.[2] As a general rule, the Revenue Courts have been given such jurisdiction over questions relating to the existence or otherwise of the *relationship of landlord and tenant*, as to the *status* of the tenant, as to the *terms* on which he holds the tenancy and as to similar questions. In all such cases the decision of the Revenue Court will be conclusive in subsequent proceedings in the Civil Court.[3] Questions of title, and questions as to rights of the landlords or tenants *inter se*, are ordinarily outside the cognizance of Revenue Courts.[4] The decision of such a Court on a question of title will not therefore bar a fresh litigation in respect thereof in a Civil Court, even if it was absolutely necessary for the Revenue Court to have decided it for the purpose of disposing of the case before it.[5] On the other

Note 76

1. See S. 107, Ben. Ten. Act, VIII of 1885; S. 96 (b), N. W. P. Rent Act, XII of 1881; S. 111, U. P. Land Revenue Act, III of 1901.
('39) 26 AIR 1939 Cal 719 (719). (While an order restoring possession under sub-s. (6) of S. 26G, Ben. Ten. Act (VIII of 1885) has the effect of a decree of a Civil Court, there is no such provision with regard to an order rejecting an application.)
† ('16) 3 AIR 1916 All 83 (84) : 38 All 302 (FB).
('96) 18 All 270 (283).
[*See also* ('02) 29 Cal 252 (255, 256).]

2. ('28) 15 AIR 1928 Cal 479 (480) : 55 Cal 464 (DB).
† ('28) 15 AIR 1928 Cal 706 (708) (DB).
[*See* ('18) 5 AIR 1918 Pat 660 (663) : 3 Pat L Jour 379 (DB).]

3. ('38) 25 AIR 1938 P C 210 (214):13 Luck 508. 32 Sind L R 845 : 65 Ind App 314 (PC). (Question of title affecting partition not raised in partition proceedings—Partition completed—Question cannot be raised in Civil Court by virtue of S. 233 (k), U. P. Land Revenue Act, III of 1901.)
('16) 3 AIR 1916 All 345 (346) : 38 All 533.
('33) 20 AIR 1933 Lah 738 (740).
('29) 16 AIR 1929 All 232 (232, 233).
('28) 15 AIR 1928 All 343 (344).
('27) 14 AIR 1927 All 613 (614).
('13) 35 All 464 (465) (DB).
('12) 10 All L Jour 52 (56).
('07) 1907 All W N 1 (1) (DB).
† ('97) 19 All 101 (104) (FB).
('96) 18 All 325 (328) (DB).
('16) 3 AIR 1916 Cal 686 (688) : 43 Cal 136 (DB).
† ('74) 22 Suth W R 362 (363) (DB).
('70) 13 Suth W R 342 (342).
('66) 5 Suth W R Act X 3 (4, 5).
('64) 1 Suth W R 128 (128) (DB).
('32) 19 AIR 1932 Lah 623 (624).
✣ ('07) 30 Mad 510 (514) (DB).
('07) 30 Mad 320 (321) (DB).
('04) 27 Mad 65 (66) (DB).
† ('90) 13 Mad 287 (291) (DB).
('32) 19 AIR 1932 Oudh 273 (274) (DB).
('17) 4 AIR 1917 Oudh 12 (13).
('31) 18 AIR 1931 Pat 215 (216): 10 Pat 337 (DB).
[*See* ('34) 21AIR 1934 Cal 467 (468). (Principle of constructive *res judicata* does not apply to proceedings under S. 105 of the Bengal Tenancy Act.)]

4. ('42) 29 AIR 1942 Oudh 301 (302). (The decision of a Revenue Court in a suit for rent that the defendant is a tenant and liable to pay rent does not bar the defendant from maintaining a suit in a Civil Court for a declaration that he is the owner.)
[*See* ('27) 14 AIR 1927 All 70 (74):48 All 774(FB).]

5. ('42) 29 AIR 1942 Oudh 258 (259) : 17 Luck 558 (DB).
('42) 29 AIR 1942 Oudh 301 (303).
('42) 29 AIR 1942 Oudh 25 (27) : 17 Luck 215.
('24) 11 AIR 1924 All 163 (164) (DB).
('04) 27 All 163 (165) : 1 All L Jour 503 (506).
✣ ('16) 3 AIR 1916 P C 150 (151) : 20 Oudh Cas 8 (PC).
('30) 17 AIR 1930 All 611 (614) : 52 All 823 (DB).
('29) 16 AIR 1929 All 17 (18).
('24) 11 AIR 1924 All 479 (479).
('20) 7 AIR 1920 All 21 (21):42 All 309 (311) (DB).
('19) 6 AIR 1919 All 285 (286) (DB).
('16) 3 AIR 1916 All 157 (158).
('16) 3 AIR 1916 All 83 (84) : 38 All 302 (310, 311) (FB).
('15) 2 AIR 1915 All 90 (91).
('15) 2 AIR 1915 All 49 (49): 37 All 223 (225) (DB).
('12) 15 Ind Cas 239 (240) (DB) (All).
('09) 2 Ind Cas 587 (589) (All).
('09) 1 Ind Cas 517 (518) (All).
† ('05) 27 All 569 (572) (DB).
('04) 26 All 601 (602) (DB).
('04) 26 All 468 (470) (DB).
('02) 24 All 153 (154) (DB).
('98) 20 All 520 (523) (DB).
('88) 10 All 347 (349, 350).
('85) 7 All 224 (226, 227) (FB).
('84) 6 All 403 (406) (DB).
('84) 6 All 295 (297) (DB).
('82) 4 All 11 (13) (DB).
('81) 3 All 521 (522, 523) (DB).
('81) 3 All 81 (84) (DB).
('81) 3 All 51 (54, 55) (DB).
('81) 3 All 40 (44) (DB).
('70) 2 N W P H C R 64 (66) (DB).
('68) 3 Agra 311 (312) (DB).
('67) 2 Agra 127 (128) (DB).
('66) 1 Agra 27 (30) (DB).
('27) 14 AIR 1927 Cal 216 (217) : 54 Cal 114 (DB).
('14) 1 AIR 1914 Cal 701 (702) (DB).
('13) 20 Ind Cas 910 (913) (DB) (Cal).
('05) 2 Cal L Jour 306 (310, 311) (DB).
('04) 8 Cal W N 741 (744) (DB).
† ('03) 30 Cal 339 (364, 365) (DB).
('99) 3 Cal W N 202 (206) (DB).
('94) 21 Cal 378 (382) (DB).
('92) 19 Cal 641 (643) (DB).
('82) 8 Cal 470 (472) (DB).
('74) 21 Suth W R 25 (26) (DB).

hand, where, as between the parties to a revenue suit, a Civil Court of competent jurisdiction has decided a question of title, the decision will operate as *res judicata* in the revenue suit.[6]

Where the Revenue Court has no jurisdiction at all to decide the subsequent suit or an issue in such suit, its decision on such matter is not conclusive in the subsequent suit in the Civil Courts.[7]

As to *concurrent* jurisdiction of Revenue Courts with the Civil Courts, see Note 77. Also see S. 9, Note 51.

77. Concurrent jurisdiction of Revenue, Rent and Settlement Courts and Civil Courts. — It has been already mentioned that the determination of a question of title is generally the function of a Civil Court. (See Note 76.) But if the Legislature invests a Revenue or Rent or Settlement Court with the power of deciding

('73) 20 Suth W R 455 (455) (DB).
('73) 20 Suth W R 105 (106) (DB).
✠('73) 19 Suth W R 322 (331, 332) (FB).
('73) 19 Suth W R 217 (218) (DB).
('71) 15 Suth W R 424 (425) (DB).
('69) 12 Suth W R 284 (284) (DB).
† ('69) 12 Suth W R 30 (31) (FB).
('68) 10 Suth W R 6 (7) (DB).
('68) 9 Suth WR 594 (595) (DB).
('68) 9 Suth W R 359 (359) (DB).
('68) 9 Suth W R 306 (306) (DB).
('67) 8 Suth W R 487 (487) (DB).
('67) 8 Suth W R 68 (70) (DB).
('67) 7 Suth W R 469 (469) (DB).
('67) 7 Suth W R 97 (97) (DB).
('66) 6 Suth W R Act X 44 (45) (DB).
('66) 5 Suth W R Act X 3 (6) (DB).
(1865) 4 Suth W R 2 (2) (DB).
(1865) 3 Suth W R 227 (227) (DB).
(1864) 1 Suth W R 99 (100) (DB).
(1863) 1863 Suth W R 70 (71) (FB).
† ('35) 22 AIR 1935 Lah 739 (740):17 Lah 38 (DB).
† ('26) 13 AIR 1926 Lah 178 (179) (DB). (Revenue Officer not deciding the question of title as a Civil Court.)
('18) 5 AIR 1918 Lah 368 (369) : 1918 Pun L R No. 75, p. 267.
('18) 5 AIR 1918 Lah 290 (291) : 1918 Pun Re No. 45.
('13) 1913 Pun L R No. 196, p. 670 : 1913 Pun Re No. 83 (DB).
('09) 1909 Pun Re No. 12.
('01) 1901 Pun L R No. 170, p. 439 : 1901 Pun Re No. 68.
('83) 1883 Pun Re No. 163 (FB).
† ('34) 21 AIR 1934 Mad 551 (552) (DB).
('20) 7 AIR 1920 Mad 558 (560) : 43 Mad 859 (DB).
('17) 4 AIR 1917 Mad 195 (196) (DB).
('15) 2 AIR 1915 Mad 53 (53, 54) (DB).
† ('94) 17 Mad 106 (107) (DB).
('90) 13 Mad 41 (42) (DB).
('84) 7 Mad 61 (62) (DB).
† ('31) 18 AIR 1931 Oudh 21 (22) : 6 Luck 419 (DB).
('28) 15 AIR 1928 Oudh 344 (347) : 3 Luck 636 (DB).
('27) 14 AIR 1927 Oudh 183 (185) (DB).
('26) 13 AIR 1926 Oudh 181 (181).
† ('21) 8 AIR 1921 Pat 218 (225) (DB).
[*See also* ('37) 24 AIR 1937 Mad 303 (305, 306).]

6. ('09) 31 All 253 (256) (FB).
('09) 31 All 257 (261, 262) (FB).
('32) 19 AIR 1932 All 178 (182) (DB).
('05) 2 All L Jour 834 (835) (DB).
(1864) 1 Suth W R 331 (332) (DB).
('18) 5 AIR 1918 Mad 222 (223) (DB).
('98) 2 Oudh Cas 28 (31).

7. † ('71) 15 Suth W R 30 (31) (PC). (Decision by Revenue Court on validity of an ekrarnama.)
† ('30) 17 AIR 1930 Cal 238 (239) (DB).
('37) 24 AIR 1937 All 481 (494) : ILR (1937) All 628 (DB).
('19) 6 AIR 1919 All 225 (225) : 41 All 369 (371) (DB).
† ('16) 3 AIR 1916 All 50 (51) (DB). (Suit relating to grove—Revenue Court has no jurisdiction.)
('14) 1 AIR 1914 All 135 (141) (DB). (Question of authority of an agent to grant a lease.)
('03) 25 All 138 (140, 141) (DB). (Genuineness of a document.)
('84) 6 All 68 (69). (Suit to eject a tenant, on the ground of misconduct in building on the land.)
† ('81) 3 All 85 (87) (FB). (Do.)
('80) 2 All 429 (429) (DB). (Suit on the ground of fraud.)
† ('16) 3 AIR 1916 Cal 735 (737):43 Cal 547 (DB). (Decision on whether land is lakheraj or not.)
('10) 5 Ind Cas 133 (134, 135) (DB) (Cal). (Do.)
('08) 7 Cal L Jour 202 (207) (DB). (Do.)
† ('07) 11 Cal W N 859 (860, 861) (DB). (Do.)
† ('95) 22 Cal 244 (249) (DB). (Do.)
✠('75) 24 Suth W R 154 (156) (FB). (Do.)
('71) 15 Suth W R 32 (33) (DB). (Genuineness of a document.)
('70) 13 Suth W R 129 (130, 131) (DB). (Do.)
('67) 7 Suth W R 92 (93) (DB). (Do.)
† ('66) 5 Suth W R Act X 61 (62) (FB). (Do. —Quære.)
('36) 23 AIR 1936 Lah 710 (711).
† ('21) 8 AIR 1921 Mad 473 (473) (DB). (Decision in commutation proceedings under the Madras Estates Land Act, whether lands constitute an estate or not.)
('08) 31 Mad 62 (63) (DB).
('97) 20 Mad 392 (393, 394) (DB).
[*See* ('94) 21 Cal 38 (43) (FB). (Decision on question whether land is lakheraj or not).]

the question of title in certain cases, it becomes in such cases *pro tanto* a Civil Court of concurrent and competent jurisdiction and when such Court decides a question of title against a party, he is barred by the rule of *res judicata* from re-opening the question of title in a Civil Court.[1]

A decision by a Revenue Court in a matter within its competence will, of course, be *res judicata* in a subsequent suit in another Revenue Court, where the other conditions of *res judicata* are satisfied.[2]

78. Court deciding former suit must be a Court of concurrent jurisdiction both as regards pecuniary value and as regards subject-matter. — The words "in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised" mean, as has been seen in Note 73, a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as

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Note 77

1. ('41) 28 AIR 1941 Oudh 189 (192). (A Tahsildar Sadr Munsarim with judicial powers was held competent according to Gonda Settlement Report to decide claims as to under-proprietary rights.)
('08) 30 All 470 (475) (DB).
('11) 33 All 453 (456). (Title decided by Revenue Court under S. 199, Agra Tenancy Act.)
† ('37) 24 AIR 1937 All 481 (493) : I L R (1937) All 628 (DB).
('27) 14 AIR 1927 All 717 (718) : 49 All 606 (DB). (Title decided by Revenue Court under S. 199, Agra Tenancy Act.)
('24) 11 AIR 1924 All 609 (611). (Do.)
('24) 11 AIR 1924 All 10 (10, 11) (DB). (Do.)
('23) 10 AIR 1923 All 556 (556). (Do.)
('23) 10 AIR 1923 All 527 (528). (Under Act XII of 1881.)
† ('22) 9 AIR 1922 All 95 (97) (DB). (Title decided by Revenue Court under S. 199, Agra Tenancy Act.)
✠ ('21) 8 AIR 1921 All 348 (349) : 43 All 55 (FB). (Do.)
('21) 8 AIR 1921 All 59 (60) (DB). (Do.)
('15) 2 AIR 1915 All 282 (282) : 37 All 280 (283) (DB). (Do.)
('14) 1 AIR 1914 All 483 (484) : 37 All 41 (43, 44) (DB). (Do.)
('10) 7 All L Jour 555 (559) (DB). (Under S. 167, Agra Tenancy Act.)
('09) 32 All 8 (10, 11) (DB). (Title decided by Revenue Court under S. 199, Agra Tenancy Act.)
('07) 29 All 601 (604). (Do.)
('06) 29 All 160 (162) (DB). (Do.)
('05) 2 All L Jour 334 (335) (DB). (Do.)
✠ ('96) 18 All 270 (283) (FB). (Under Act, XII of 1881.)
('96) 18 All 59 (62, 63) (SB). (Decision under Act IX of 1873.)
('94) 16 All 461 (471, 472) (DB). (Do.)
('87) 9 All 388 (391, 392) (DB). (Do.)
('83) 5 All 429 (430) (DB). (Under Act XII of 1881.)
('83) 5 All 280 (284) (DB). (Decision under Act IX of 1873.)
('78) 2 All 294 (296) (DB). (Decision under Act XIX of 1863.)
('71) 2 N W P H C R 261 (262) (DB). (Under S. 23, Bengal Tenancy Act, X of 1859.)
† ('29) 16 AIR 1929 Cal 385 (386) (DB). (Under S. 106, Bengal Tenancy Act.)
('23) 10 AIR 1923 Cal 433 (434) : 50 Cal 79 (DB). (Do.)
('16) 3 AIR 1916 Cal 738 (739) (DB). (Do.)
('15) 30 Ind Cas 944 (944) (DB) (Cal). (Under S. 105, Bengal Tenancy Act.)
('13) 20 Ind Cas 910 (913) (DB) (Cal). (Do.)
('13) 20 Ind Cas 298 (299) (DB) (Cal). (But see contra under S. 106, Ben. Ten. Act.)
('10) 7 Ind Cas 71 (73) (DB) (Cal). (Under S. 105, Ben. Ten. Act.)
('07) 11 Cal W N 939 (941) (DB). (Under S. 107, Ben. Ten. Act.)
('03) 1 Cal L Jour 310 (313) (DB). (Do.)
('01) 5 Cal W N 798 (799, 800) : 28 Cal 471 (DB). (Under S. 106, Ben. Ten. Act.)
('01) 5 Cal W N clv (clvi). (Under S. 107, Ben. Ten. Act.)
(1900) 27 Cal 167 (168) (DB). (Do.)
('98) 2 Cal W N 491 (493) (DB). (Under S. 106, Ben. Ten. Act.)
† ('90) 17 Cal 721 (725, 726) (DB).
('84) 10 Cal 507 (509, 510) (DB). (Under S. 18, Bengal Act, VIII of 1869.)
('70) 13 Suth W R 417 (418) (DB). (Under S. 23, Ben. Ten. Act, X of 1859.)
(1865) 3 Suth W R 176 (176) (DB). (Under S. 28, Act X of 1859.)
(1864) 1 Suth W R 218 (218) (DB). (Do.)
('21) 63 Ind Cas 781 (782, 783) (DB) (Lah). (Under S. 111, Punjab Land Revenue Act.)
('07) 17 Mad L Jour 557 (558) (DB). (Decision of Forest Settlement Officer under Madras Act V of 1882.)
('26) 13 AIR 1926 Oudh 72 (73).
('24) 11 AIR 1924 Oudh 245 (247).
('15) 2 Oudh Cas 351 (354).
† ('31) 18 AIR 1931 Pat 215 (216) : 10 Pat 337 (DB).
('18) 5 AIR 1918 Pat 660 (663) : 3 Pat L Jour 379 (385) (DB). (Under S. 105, Ben. Ten. Act.)
[*See* ('78) 2 All 200 (202, 203) (FB). (Title decided by Revenue Court under S. 199, Agra Tenancy Act.)]
2. ('90) 13 Mad 287 (291) (DB).
('15) 2 Oudh L Jour 63 (64).
† ('31) 18 AIR 1931 All 462 (466) : 53 All 568 (DB).
('76) 25 Suth W R 189 (189).

conclusive; in other words, a Court of *concurrent* jurisdiction.[1] In *Misser Raghubardial* v. *Sheo Baksh Singh*,[2] their Lordships of the Privy Council observed as follows:

> "As to what is a Court of concurrent jurisdiction, it is material to notice that there is, in India, a great number of Courts; that one main feature in the Acts constituting them is that they are of various grades with different pecuniary limits of jurisdiction; and that, by the Code of Civil Procedure a suit must be instituted in the Court of the lowest grade competent to try it . . . . . In their Lordships' opinion it would not be proper that the decision of a Munsif upon (for instance) the validity of a will, or of an adoption, in a suit for a small portion of the property affected by it, should be conclusive in a suit before the District Judge or in the High Court, for property of a large amount, the title to which might depend upon the will or the adoption . . . . . By taking concurrent jurisdiction to mean concurrent as regards the *pecuniary limit as well as the subject-matter*, this evil or inconvenience is avoided."[3]

It would appear that 'competency' in section 11 has no reference to *territorial jurisdiction* so far as Courts in British India are concerned.[4] As regards foreign Courts, however, the jurisdiction which alone is material is the competence of the Court under the *International Law*, namely its *territorial* competence over the subject-matter and over the defendant.[5] A foreign Court can never have such competency to try a subsequent suit filed in British India and consequently its judgment will be a nullity and cannot operate as *res judicata*. But on matters directly adjudicated upon by such Court, and within its jurisdiction, the judgment will be conclusive in proceedings taken on such judgment in British India under section 13 of the Code.[6]

79. Pecuniary jurisdiction, nature of. — In order to make the decision of one Court final and conclusive in another Court, it must, as has been seen already, be the decision of a Court which would have had *pecuniary* jurisdiction over the matter in the subsequent suit, in which the first decision is given in evidence as conclusive.[1]

Note 78

1. ('38) 25 AIR 1938 All 82 (85) : ILR (1938) All 184 (DB).
2. ('83) 9 Cal 439 (444) : 9 Ind App 197 (PC).
3. *See also* ('85) 11 Cal 301 (309): 12 Ind App 23 (PC).
   ('67) 8 Suth W R 175 (179, 180) (SB).
   ('94) 16 All 183 (184) (DB).
   (1900) 24 Bom 456 (457) (DB).
   ('90) 14 Bom 206 (213) (DB).
   ('70) 13 Suth W R 129 (131) (DB).
   ('06) 29 Mad 65 (67) (DB).
   ('94) 17 Mad 273 (275) (DB).
   ('92) 15 Mad 494 (496, 497) (DB).
   ('89) 12 Mad 223 (225) (DB).
   ('17) 4 AIR 1917 Nag 107 (108) DB).
4. ('14) 1 AIR 1914 All 514 (514, 515) : 37 All 1 (DB). (Confirmed on appeal in AIR 1916 PC 136. See the observations at p. 514 as follows : "There can be no doubt that if all the property was situated in British India, the decision of the Subordinate Judge, Bareilly, confirmed by the High Court, would operate as *res judicata* against the defendants.")
   ('25) 12 AIR 1925 Mad 1167 (1167) (DB).
   † ('39) 26 AIR 1339 All 202 (202).
   ('32) 19 AIR 1932 All 660 (661) : 54 All 824 (DB).
5. See Section 13, Note 9.
6. † ('16) 3 AIR 1916 PC 136 (138)(PC). (Affirming on appeal AIR 1914 All 514 : 37 All 1.)
   † ('38) 25 AIR 1938 Bom 173 (177) : ILR (1938) Bom 16 (DB).
   ('04) 6 Bom L R 98 (102, 103) (DB). (Dissenting from 13 Bom 224.)
   ('68) 10 Suth W R 337 (337) (DB).
   ('72) 1872 Pun Re No. 41. (Former suit decided by the Political Agent of Ambala—The subject-matter of the suit was not within his territorial jurisdiction—The decision is not *res judicata* in a subsequent suit filed in British India.)
   ('18) 5 AIR 1918 Low Bur 30 (31) : 9 Low Bur Rul 103 (105, 106).
   [*See also* 6 Suth W R Civ Ref 31 (32).]

Also see Ss. 13 and 14, Note 8.

Note 79

1. ('43) 30 AIR 1943 Oudh 58 (60) (DB). (Previous suit tried by Munsif — Subsequent suit tried by Civil Judge as valuation of suit exceeded Munsif's pecuniary jurisdiction — Subsequent suit is not barred by *res judicata.*)
   ✠(1853) 9 Cal 439 (443, 444, 445) : 9 Ind App 197 (PC).
   † (1900) 24 Bom 456 (458 (DB).
   ('30) 17 AIR 1930 All 430 (431).
   † ('27) 14 AIR 1927 All 297 (298) : 49 All 543 (DB).
   ('20) 7 AIR 1920 All 23 (25) (DB).
   ('26) 13 AIR 1926 Cal 603 (603, 604) DB). (But judgment of former Court with limited pecuniary jurisdiction is valuable evidence.)
   ('22) 9 AIR 1922 Cal 138 (139, 140) (DB).
   ('96) 23 Cal 693 (696) (DB).
   ('30) 17 AIR 1930 Lah 501 (503) (DB).
   ('23) 10 AIR 1923 Lah 141 (142) (DB).

Illustration.

A suit is filed in a Court, the jurisdiction of which is limited to Rs. 5000 for recovery of interest on a bond for Rs. 12,000. It is contended in defence that the amount actually lent on the bond is only Rs. 4000 and interest is due only on that amount. The Court finds that the amount lent on the bond is only Rs. 4000, and awards interest thereon. In a subsequent suit by the plaintiff in the High Court for recovery of Rs. 12,000, the principal due under the bond, the defendant contends again that the amount lent is only Rs. 4000 and that the question whether Rs. 12,000 or Rs. 4000 were lent is *res judicata*. The contention is not correct, for, the jurisdiction of the former Court being *limited to Rs. 5000*, it was not a Court competent to try the subsequent suit. *Misser Raghubardial* v. *Sheo Baksh Singh*.[2]

It has been held by the Madras High Court that the same rule applies to a case where the plea is founded on general principles of *res judicata* apart from the terms of the section.[3] But a contrary view was held by the Nagpur High Court in a recent case. In that case A brought a suit against B for dissolution of partnership and accounts, valuing his suit tentatively at Rs. 5,500, at the same time reserving his right to receive more if more were found due to him subject to payment of additional court-fee. A's suit was dismissed. Later on he brought a similar suit against B but valued it at two lakhs of rupees. It was held that as in the former suit A could have been given a decree for the two lakhs which he was claiming in the later suit, S. 11 could, in the circumstances of the case, be applied and further that if the section did not apply then under the general principles of *res judicata* the later suit was barred.[4]

80. Bona fide valuation of plaint determines jurisdiction. — A plaintiff cannot get rid of the bar of *res judicata* by including in a subsequent suit a clearly unsustainable and therefore not a *bona fide* claim and bringing it in a Court of higher jurisdiction.[1] Nor can he evade the rule by deliberately or arbitrarily *overvaluing* the same claim in the subsequent suit.[2]

It has been seen in Note 21, that the word "suit" in S. 11 means such a matter as might have formed the subject-matter of a separate suit independently of the several provisions of the Code which enable a person to unite several causes of action in one and the same suit. Accordingly, it has been held that where A institutes a suit in Court X for possession of properties valued at Rs. 1000 (the jurisdiction of Court X extending only up to Rs. 1000), the decision therein will operate as *res judicata* in a subsequent suit by A in Court Y (a Court of a higher grade) for possession of the same properties valued at Rs. 1000 *and* Rs. 42 mesne profits.[3] But where the first suit is for *rent* valued at a certain amount and the second suit is for a *declaration of title for possession and for mesne profits* valued *bona fide* at a figure beyond the pecuniary limits of the

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('19) 6AIR1919Lah18(18):1919 Pun Re No.87 (DB).
('16) 3 AIR 1916 Lah 322 (323) (DB). (But judgment of former Court with limited pecuniary jurisdiction is valuable evidence.)
('07) 1907 Pun W R No. 186, page 830: 1907 Pun Re No. 111.
('11) 9 Ind Cas 686 (687) (DB) (Mad).
('24) 11 AIR 1924 Oudh 147 (149).
[*See also* ('42) 29 AIR 1942 Cal 571 (574): I L R (1942) 2 Cal 363 (DB).]

2. ('83) 9 Cal 439 (444, 445): 9 Ind App 197 (PC).
3. † ('25) 12 AIR 1925 Mad 1270 (1273,1274) (DB).
[But see ('36) 23 AIR 1936 Mad 951 (953) (DB). (Limitations as to pecuniary jurisdiction embodied in S. 11, are not part of the general principle of *res judicata*.)]
4. ('41) 28 AIR 1941 Nag 346 (349, 350) (DB).

Note 80

1. † ('26) 13 AIR 1926 Mad 829 (830). (Addition of an untenable claim.)
('10) 6 Ind Cas 287 (287) (DB) (Mad).
2. ('43) 30 AIR 1943 Pesh 37 (40) (DB).
('41) 28 AIR 1941 Nag 346 (351) (DB).
('17) 4 AIR 1917 Pat 409 (410) (DB).
† ('28) 15 AIR 1928 All 127 (128) (DB).
('97) 10 C P L R 89 (89, 90).
3. ('23) 10 A I R 1923 All 176 (177): 45 All 59 (DB).
('19) 6 AIR 1919 Nag 25 (26) : 16 Nag L R 91.
[*See also* ('32) 19 AIR 1932 Cal 162 (163) (DB). (First suit for certain properties—Second suit for those properties as well as other properties under an independent claim.)]

jurisdiction of the first Court, the second suit is not barred.[4] Similarly, where by reason of the additional relief which cannot be said to be unnecessary, jurisdiction is given to a superior Court, the earlier decision will not bar the subsequent suit.[5] See also Note 81.

81. It is not determined by the amount of demand or of the transaction from which the claim has arisen. — It follows from what has been said in Notes 21 and 80, that a party who has lost in one Court cannot add causes of action to the original causes of action in the earlier suit for the purpose of swelling the amount of the valuation and then claim that the former Court is not competent to try the subsequent suit. If it were so, any defeated party can, by merely adding another claim, re-agitate the same question in a fresh suit instituted in a higher Court.[1] For the purpose of deciding a question of *res judicata*, each cause of action in the subsequent suit should be treated as a separate suit and, if it be found that one of these causes of action was relied upon in the earlier suit, then, although taking all the causes of action together the second suit may be said to be outside the jurisdiction of the former Court, the former decision will operate as *res judicata* in the subsequent suit.[2]

82. When the first Court is an inferior Court and the second Court a superior Court. — From what has been said in Note 78 above, it will be clear that the decision on an issue by a Court of inferior jurisdiction would not operate as a bar to the trial of that issue by a Court of superior jurisdiction in a subsequent suit, if the latter *suit* was beyond the jurisdiction of the Court of inferior jurisdiction.[1]

Illustration.

A sues *B* for Rs. 53 for rent in a Munsif's Court. The defence is that *C* and not *A* is the landlord and *C* intervenes as a defendant. The Court finds that *A* is entitled to the rent sued for. *C* then sues *A* in the sub-Court for a declaration of title and possession of the properties valuing the claim at about 2 lakhs of rupees. The suit is not barred, for a Munsif's Court has no jurisdiction to entertain the subsequent suit. (*Run Bahadur* v. *Lucho Koer*.[2])

83. Jurisdiction as regards subject-matter. — There must be concurrency of jurisdiction between the two Courts not only as regards pecuniary value but also as

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4. ('22) 9 AIR 1922 Cal 138 (139, 140) (DB).

5. † ('29) 16 AIR 1929 Mad 529 (539) (DB). (Addition of a prayer for valuation and consequent increase in valuation.)

Note 81

1. ('42) 29 AIR 1942 Nag 119 (121) : ILR (1942) Nag 721.
('01) 28 Cal 78 (81) (DB).
('01) 28 Cal 318 (322) (DB).
† ('28) 15 AIR 1928 All 62 (63, 64) (DB).
† ('35) 22 AIR 1935 Cal 792 (797) (DB). (But if it appears that his subsequent suit proceeds upon a cause of action which did not exist or of which he could not have availed at the date of the previous suit the bar of *res judicata* will not apply.)
('23) 10 AIR 1923 Rang 239 (241) : 1 Rang 363.

2. See Note 21.
('42) 29 AIR 1942 Nag 119 (121) : I L R (1942) Nag 721.
('13) 21 Ind Cas 15 (18) (DB) (Mad).
† ('32) 19 AIR 1932 Cal 162 (162, 163) (DB).
† ('28) 15 AIR 1928 All 714 (716): 50 All 306 (DB).
('24) 11 AIR 1924 All 849 (850) (DB).
('85) 7 All 247 (251, 252, 253).
('26) 13 AIR 1926 Cal 1053 (1053, 1054) (DB).
('35) 22 AIR 1935 Lah 391 (394) : 17 Lah 20 (DB).
('33) 20 AIR 1933 Mad 913 (915, 916) : 57 Mad 335 (DB).
† ('27) 14 AIR 1927 Mad 273 (275).
('15) 2 AIR 1915 Mad 1215 (1217, 1218) (DB).
('01) 24 Mad 275 (279) (DB).
('85) 8 Mad 83 (86) (DB).
('26) 13 AIR 1926 Nag 234 (235).
('34) 21 AIR 1934 Pesh 9 (9).
[*See* ('38) 67 Cal L Jour 223 (228). (In spite of a large valuation in the subsequent suit there would be *res judicata* at least with regard to so much of the property as was dealt with in the previous suit.)]
[But see ('08) 35 Cal 353 (360) (DB).]

Note 82

1. ('43) 30 AIR 1943 Oudh 58 (60) (DB).
('29) 16 AIR 1929 Lah 781 (781, 782) (DB).
(1900) 27 Cal 38 (43) (DB).
('30) 17 AIR 1930 All 430 (431).
('20) 7 AIR 1920 Cal 407 (408) (DB).
('05) 9 Cal W N 656 (661) (DB).
('08) 1908 Pun W R No. 58, p. 219.
('07) 1907 Pun Re No. 111 : 1907 Pun W R No. 186, p. 830.
('96) 16 Mad 456 (458, 459) (DB).

2. ('85) 11 Cal 301 (308, 309) : 12 Ind App 23 (PC).

regards the *subject-matter*. Certain Courts such as the Small Cause Courts and Revenue Courts, cannot deal with *questions of title*.[1] Similarly, in suits for rent between landlord and tenant, the Court cannot deal directly with questions of title though it may incidentally do so.[2] In all such cases, the said Court cannot be said to have *concurrent jurisdiction over questions of title*, with Civil Courts dealing with questions of title. A decision of such Court therefore upon an issue incidentally arising as to the title of immovable property cannot operate as *res judicata* in any subsequent suit for the determination or enforcement of any right or interest in immovable property.[3] The same result will follow even if the small cause suit is transferred to the regular side and tried by that Court, since the suit retains its character of a small cause even after transfer.[4] But if a suit of a small cause nature is decided by a Judge on the regular side for want of small cause powers, then a finding as to title will be *res judicata* in a subsequent suit between the parties.[5]

84. Jurisdiction of a special nature. — A mortgagee governed by the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) first sued for interest due on the principal amount for certain years. It was decreed on the finding that the principal amount was Rs. 350. Subsequently, the mortgagee sued on the mortgage contract for sale of the mortgaged property, a suit which fell within the meaning of S. 3 cl. (*y*) of the Act. It was contended that the former decision as to the amount of the principal sum operated as *res judicata*. It was held by the High Court of Bombay that the subsequent suit was of a special character given to it by a special law, and as S. 12 of the Dekkhan Agriculturists' Relief Act directed the Court in such a suit to go into the history of the transaction between the parties from the date of the transaction notwithstanding any admissions of the parties, the former decision did not operate as *res judicata*.[1] (Now see Bombay Agricultural Debtors Relief Act, XXVIII of 1939.)

85. Proceedings under the Land Acquisition Act. — See Note 28.

86. Proceedings under the Companies Act. — See Note 28.

87. Administration proceedings. — See Note 28.

88. Proceedings under the Dekkhan Agriculturists' Relief Act. — See Note 84.

89. Proceedings under the Probate and Administration Act (now the Indian Succession Act). — See Note 28.

90. Proceedings under the Oaths Act. — See Note 28.

91. Proceedings under the Small Cause Courts Act. — See Notes 75 and 83.

92. Proceedings under the Insolvency Acts. — See Note 28.

93. The Court must have been able to try the whole suit and not merely the issue — See Note 73.

Note 83

1. See Notes 75 and 76.
2. ('85) 11 Cal 301 (309, 310, 318) : 12 Ind App 23 (PC).
('15) 2 AIR 1915 Mad 654 (655) (DB). (Title to property will not be gone into, in a suit for rent for which alone court-fee is paid.)
3. ('78) 2 All 97 (99).
('24) 11 AIR 1924 Bom 454 (454): 48 Bom 541 (DB).
('23) 4 L R All 285 (285).
('07) 4 All L Jour 517 (518).
('83) 1883 All W N 203 (204) (DB).
('13) 37 Bom 675 (680, 681) (FB).
('73) 1873 Bom P J 170 (170).
('71) 8 Bom H C R A C 23 (24) (DB).
('00) 4 Cal W N 470 (473) (DB). (Reversing 26 Cal 778 on Letters Patent Appeal.)
('69) 12 Suth W R 290 (291) (DB).
†('27) 14 AIR 1927 Mad 96 (96).
('25) 12 AIR 1925 Mad 357 (357).
✣('81) 3 Mad 192 (196, 199) (FB).
Also see Note 13.
4. See S. 24, Sub-s. 4 of the Code.
[*See* ('14) 1 AIR 1914 All 229 (230).]
5. ('18) 5 AIR 1918 All 52 (53): 41 All 54 (59) (DB).
('12) 16 Ind Cas 496 (496) (All).
[*See* ('22) 9 AIR 1922 All 241 (243).]

Note 84

1. ('12) 36 Bom 548 (550): 16 Ind Cas 442 (442,443) (DB).

94. The competency must be of the trial Court in the former suit and not that of the Appellate Court therefrom. — The words "*in a Court competent* to try such subsequent suit . . . . . ." refer to the competency of the *original* Court and the fact that the Appellate Court in the previous litigation was competent to try the subsequent suit would not make the earlier decision *res judicata*, if the former *trial Court* was not competent to try the subsequent suit.[1] Similarly, the 'competency' of the former Court refers to the competency to try the later *suit* and not the *appeal* in such suit.[2]

95. The Court does not cease to be competent if the inability to try arises, not from incompetence, but from the existence of another Court with preferential jurisdiction. — Under the Small Cause Courts Act, a suit cognisable by a Small Cause Court is not to be instituted and tried by an ordinary Civil Court if, and so long as, within the local limits of its jurisdiction, a Small Cause Court is established competent to take cognizance of such a small cause suit. So that when a former judgment, between the parties, of a Court acting on the regular side is relied upon in a small cause suit, the circumstance that the small cause suit could not have been tried by the former Court will not make it a Court of jurisdiction incompetent to try the subsequent suit.[1]

Illustration.

Defendant had executed to plaintiff three bonds for Rs. 3000, 250 and 300 respectively. In a suit in the sub-Court on the bond for Rs. 3000 defendant pleaded payments to the extent of Rs. 4000 on account of all the bonds. The defence was found true. Subsequently, plaintiff filed a suit on the other two bonds in the Small Cause Court. The defendant pleaded the same defence relying on the former judgment and admitted a small balance. *Held* that the plea of *res judicata* was good on the ground that the inability of the former Court to try the small cause suit arose not from incompetence but from *the existence of a Court with preferential jurisdiction.* (*Madho Rao* v. *Amrit Rao.*[2])

96. The fact that appeals lie or do not lie to different Courts does not affect competency — Explanation II. — Under the Code of 1882, it was held by the Bombay and Madras High Courts and the Punjab Chief Court that a prior decision in which no second appeal lay (as for instance cases under S. 102 of the Code) cannot be pleaded as a bar in a case which was open to second appeal, the reason being that a decision to be *res judicata* must have been given in a previous suit in which the parties, according to the ordinary procedure, were entitled to take the case ultimately to the same or corresponding appellate tribunal to which the subsequent litigation, wherein the decision is relied on as conclusive, could be carried and that the words 'competent jurisdiction' in the section admitted of the provisions of law relating to appealability being considered in giving effect to the plea.[1] But the Calcutta High Court maintained

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Note 94

1.✠('80) 5 Cal 832 (838) (DB).
†('96) 23 Cal 415 (419) (DB).
('37) 24 AIR 1937 All 20 (21).
('22) 9 AIR 1922 All 445 (446) : 44 All 712 (DB).
('25) 12 AIR 1925 Bom 241 (242, 243) : 49 Bom 442 (FB).
('04) 30 Bom 220 (225) (DB).
('36) 23 AIR 1936 Cal 629 (637) (DB).
('11) 11 Ind Cas 389 (392) (DB) (Cal).
('11) 9 Ind Cas 686 (687) (DB) (Mad).
†('88) 1 C P L R 92 (97, 98).
('36) 23 AIR 1936 Oudh 387 (400) : 12 Luck 371 (DB).
('12) 14 Ind Cas 86 (88) (DB) (Oudh).

2. ('39) 26 AIR 1939 Sind 329 (330) : ILR (1940) Kar 15 (DB).

Note 95

1. ('02) 27 Mad 63 (61) (DB).
('16) 3 AIR 1916 Mad 573 (574).
('17) 4 AIR 1917 All 263 (264) : 39 All 717 (719).
†('04) 28 Bom 338 (340) (DB).
('18) 5 AIR 1918 Nag 163 (164) : 14 Nag L R 115 (116).
2. ('18) 5 AIR 1918 Nag 163 (164): 14 Nag L R 115.

Note 96

1. ('85) 9 Bom 75 (81) (DB).
('91) 15 Bom 101 (105).
[But see ('07) 1907 Pun Re No. 111 : 1907 Pun W R No. 186, p. 829 (830).]

the contrary view that the section did not require that the two suits must be open to appeal *in the same way*.[2] In view of this conflict, Explanation II has been added in the present Code adopting the Calcutta view that it is the competency of the *original Court* that determines *res judicata*, irrespective of any provision as to a right of appeal from the decision of such Court and the fact that appeals do not lie or lie to different Courts is immaterial.[3] The undermentioned cases[4] which had been overruled in later cases under the old Code would now be good law. It has been held by the High Court of Madras and the Punjab Chief Court that the Explanation is not retrospective in operation.[5]

97. The competency must have existed at the date of the former suit. — The words "*in a Court competent to try such subsequent suit*" must be construed to refer to the jurisdiction of the Court *at the time* when the first suit was brought;[1] that is to say, if the Court which tried the first suit was competent to try the subsequent suit if *then* brought, the decision of such Court would be conclusive, although on a subsequent date by a rise in the value of the property which was the subject-matter of the suit[2] or from any other cause[3] the said Court ceases to be the proper Court to take cognizance of the suit relating to that matter. Otherwise, a rise in value being a recurring incident of most properties due either to fortuitous circumstances or to the lapse of time, would knock at the bottom of all finality and lead to absurd results. But it has been held by the Madras High Court that 'the augmentation of a claim by *accrual of interest* is not similar to a rise in the value of one and the same property' and therefore if a subsequent suit on a pecuniary claim has to be filed in a Court of superior jurisdiction on account of the accumulation of interest, the former decision would not conclude the matter.[4] The same High Court has, however, held that if the claim for interest is not *bona fide* and is clearly *untenable*, the subsequent suit will be barred.[5]

98. Fraud if affects competency — Judgment obtained by fraud or collusion.—A decree obtained by fraud or collusion is a nullity and cannot operate as a bar to a fresh suit between the parties with respect to the same subject-matter; the reason is that 'fraud is an extrinsic collateral act which vitiates the most solemn proceedings of

('91) 1891 Pun Re No. 20. (Overruling 1888 Pun Re No. 145.)
('06) 29 Mad 195 (199, 200). (Overruling 24 Mad 444 and 27 Mad 63.)
('95) 18 Mad 189 (191).
('94) 17 Mad 168 (179).
('92) 15 Mad 111 (120).

2. ('83) 9 Cal 183 (184) (DB).
† ('98) 25 Cal 571 (579) (DB).
('01) 28 Cal 78 (81) (DB).

3. ('39) 26 AIR 1939 Sind 329 (330) : ILR (1940) Kar 15 (DB).
('18) 5 AIR 1918 All 52 (53, 54): 41 All 54 (59) (DB).
('28) 15 AIR 1928 Cal 758 (758) (DB).
('27) 14 AIR 1927 All 189 (189, 190).
('12) 16 Ind Cas 496 (496) (All).
('10) 32 All 67 (70) (DB).
('24) 11 AIR 1924 Lah 644 (644).

4. ('01) 24 Mad 444 (446, 447) (DB).
('88) 1888 Pun Re No. 145.

5 ('16) 3 AIR 1916 Mad 1035 (1036) (DB).
('10) 1910 Pun Re No. 97 : 1911 Pun L R No. 11, p. 103.

Note 97

1. ('42) 29 AIR 1942 Nag 119 (121) : ILR (1942) Nag 721.
('41) 28 AIR 1941 All 18 (22) : ILR (1940) All 691 (DB).
*('84) 10 Cal 697 (706, 707) (DB).
('98) 25 Cal 571 (577, 578) : 2 Cal W N 297 (301) (DB).
('37) 24 AIR 1937 All 20 (21).
('33) 20 AIR 1933 Cal 879 (880) (DB).
('32) 19 AIR 1932 Cal 271 (272) : 59 Cal 636 (DB).
('15) 2 AIR 1915 Cal 629 (631) (DB).
('31) 18 AIR 1931 Lah 217 (219).
('28) 15 AIR 1928 Lah 929 (930) (DB).
('19) 6 AIR 1919 Oudh 111 (112) : 22 Oudh Cas 331.
† ('99) 2 Oudh Cas 261 (267).

2. ('41) 28 AIR 1941 All 18 (22) : ILR (1940) All 691 (DB).
('36) 23 AIR 1936 Lah 998 (1000) : ILR (1937) Lah 100 (DB).
† ('36) 23 AIR 1936 Mad 951 (952) (DB.)

3. † ('85) 11 Cal 153 (157) (DB). (Former Court not competent to try later suit on account of legislative enactment.)
('91) 15 Mad 494 (496) (DB). (Do.)
('03) 3 Ind Cas 117 (120) (All) (Do.)
('19) 6 AIR 1919 Mad 236 (237) : 42 Mad 702 (DB). (Do.)

4. ('06) 29 Mad 65 (67, 68) (DB).
5. ('26) 13 AIR 1926 Mad 829 (830).

Courts of Justice."[1] There can, also, be no question of *res judicata* in a case where a party seeks to *set aside* a decree on the ground of fraud or collusion[2] and so a suit will lie to set aside a decree on the ground that it is tainted by fraud or collusion.[3] (See S. 9, Note 61.) But although a decree can be set aside on the ground of fraud, if the question has *already been agitated* between the parties and decided by a Court of competent jurisdiction, for instance, in proceedings to set aside an *ex parte* decree, the matter is *res judicata* and cannot again be re-opened in a subsequent suit.[4] If, however, the allegations of fraud in the subsequent suit are plainly an attack, not on the regularity or sufficiency of the service of summons or the proceedings, but on the *whole suit* as a fraud from beginning to end, the question of fraud in the service of summons may be re-opened; for, though it may have, by itself, founded an application to set aside the *ex parte* decree, it is treated in the subsequent suit as part and *indicia* of a whole.[5] When a subsisting judgment, decree or order is set up by one party as a bar to the claim of the other party, it is not necessary for the latter to bring a *separate suit* to have the same set aside; it is open to him in the suit in which it is sought to be used against him to show that it was obtained by fraud or collusion. See section 44 of the Indian Evidence Act, the language of which is wide enough for this purpose.[6]

Where a decree is sought to be set aside on the ground of fraud, "the fraud alleged must be *actual, positive* fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and the obtaining of that decree by that contrivance."[7] But when the parties have had the opportunity of putting their respective cases before the Court and the Court has come to a conclusion on the evidence, the rule of *res judicata* comes into operation and it is not open to the defeated party to re-open the matter by merely alleging that the evidence and the averments

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Note 98

1. (1775) 2 Amb 756, Meadows v. Kingston. (Per-Lord Chief Justice De Grey. Referred to in 26 Cal 891.)
('33) 20 AIR 1933 Lah 573 (574) (DB).
('37) 24 AIR 1937 All 28 (29) (DB).
('25) 6 L R All (Rev) 229 (231).
('94) 1894 All W N 141 (142).
('95) 19 Bom 821 (826) (DB).
† ('17) 4 AIR 1917 Oudh 197 (198).
('16) 3 AIR 1916 Oudh 148 (150) : 10 Oudh Cas 334.
('31) 18 AIR 1931 Sind 27 (27) (DB).
2. ✣('41) 28 AIR 1941 Cal 401 (404):ILR (1941) 1 Cal 477.
('93) 16 Mad 198 (200) (DB).
('36) 23 AIR 1936 All 422 (429) (DB).
3. ('09) 32 All 145 (147) (DB).
('19) 6 AIR 1919 Pat 232 (232) : 4 Pat L Jour 205 (206) (DB).
† ('18) 5 AIR 1918 PC 184 (188) (PC).
('24) 11 AIR 1924 Bom 460 (466) : 48 Bom 583.
✣('82) 6 Bom 703 (711).
('21) 8 AIR 1921 Cal 298 (298) : 48 Cal 298 (DB).
('24) 11 AIR 1924 Pat 241 (243) (DB).
('17) 4 AIR 1917 Pat 529 (530) (DB).
('11) 10 Ind Cas 780 (785) (Low Bur).
[But see ('42) 29 AIR 1942 All 302 (305) (DB). (Dissenting from AIR 1921 Cal 298:48 Cal 298.]
Also see Section 9 Note 61.
4. ('42) 29 AIR 1942 Pat 357 (359) (DB). (Suit to set aside *ex parte* decree on ground of fraud — Fraud consisting of allegation that summons had been fraudulently suppressed and that plaintiff was described as major though he was minor—Allegation investigated and negatived in proceedings under O. 9, R. 13—Matter is *res judicata*.)
('07) 29 All 608 (611, 612) (DB).
('34) 21 AIR 1934 Rang 135 (138, 139).
('24) 11 AIR 1924 Pat 769 (770) (DB).
† ('24) 11 AIR 1924 Pat 238 (239) : 2 Pat 833 (DB).
('21) 8 AIR 1921 Pat 12 (13) : 6 Pat L Jour 1 (DB).
[*See also* ('10) 5 Ind Cas 119 (119, 120) (Mad).]
Also see S. 11, Note 9 and O. 9, R. 13, Note 12.
5. ✣('02) 29 Cal 395 (399, 400):29 Ind App 99 (PC).
('24) 11 AIR 1924 Pat 241 (242) (DB).
6. † (1900) 27 Cal 11 (17, 21) (DB).
('99) 26 Cal 891 (919).
('04) 26 All 272 (282).
('02) 24 All 242 (246, 247) (DB).
('94) 1894 All W N 141 (141) (DB).
† (82) 6 Bom 703 (715).
('29) 16 AIR 1929 Cal 685 (686).
('23) 10 AIR 1923 Cal 79 (81) (DB).
('75) 24 Suth W R 217 (217) (DB).
7. ('15) 2 AIR 1915 All 397 (400) : 38 All 7.
('15) 2 AIR 1915 All 400 (401) : 37 All 535 (540, 541) (DB).
('23) 10 AIR 1923 Cal 425 (426) (DB).
† (94) 21 Cal 612 (619) (DB).
('24) 11 AIR 1924 Oudh 419 (419, 420).
('23) 10 AIR 1923 Pat 242 (245) : 2 Pat 335 (DB).
('20) 7 AIR 1920 Pat 741 (741) : 5 Pat L Jour 259 (DB).
('34) 21 AIR 1934 Rang 135 (139).

which the Court believed were untrue.[8] As to the cases in which a decree can be set aside for fraud, see the undermentioned cases.[9]

99. Criminal and Civil Courts. — The finding of a Criminal Court is not conclusive in a Civil Court when the same matter is in issue in the Civil Court and the latter is bound to decide the question for itself.[1] But the judgment of the Criminal Court is a valuable piece of evidence.[2] A judgment in a civil action also cannot be used as conclusive in a criminal case.[3] The decision, however, would be admissible in evidence if the parties are substantially the same and the issues in the two cases are identical.[4] The decision of a Magistrate in a proceeding under S. 488, Criminal Procedure Code, is binding on the succeeding Magistrate on the general principles of *res judicata*.[5] As to the applicability of the principle of *res judicata* in Criminal Courts, see the undermentioned cases[6] and S. 403 of the Criminal Procedure Code.

100. The matter must have been heard and finally decided. — "*Res judicata*," said Lord Romilly in *Jenkins* v. *Robertson*,[1] "by its very words means a matter upon which the Court has exercised its judicial mind and has come to the conclusion that one side is right and has pronounced a decision accordingly. In my

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8. ('16) 3 AIR 1916 Mad 364 (365) : 38 Mad 203 (DB).
('22) 9 AIR 1922 Mad 404 (404) (DB).
('22) 9 AIR 1922 All 167 (168) (DB).
('24) 11 AIR 1924 Bom 100 (101).
('15) 2 AIR 1915 Lah 153 (154) : 1915 Pun Re No. 98 (DB).
('19) 6 AIR 1919 Oudh 272 (275): 22 Oudh Cas 60.
('23) 10 AIR 1923 Pat 226 (227) (DB).
('21) 8 AIR 1921 Pat 12 (14) : 6 Pat L Jour 1 (DB).
† ('20) 7 AIR 1920 Pat 831 (832) (DB).
('19) 6 AIR 1919 Pat 163 (164) : 4 Pat L Jour 187 (189) (DB).
('34) 21 AIR 1934 Rang 135 (138, 139).
[*See also* ('42) 29 AIR 1942 All 302 (305) (DB). (It would be most unsafe to hold that a decree can be set aside on the ground that the defendant did not raise a plea which was open to him, but which he did not raise because he did not know all the necessary facts.)]

9. ('25) 12 AIR 1925 Cal 555 (557). (Fraud alleged by the plaintiff not proved — *Ex parte* decree obtained by the defendant was not set aside.)
('22) 9 AIR 1922 Pat 291 (292) (DB). (Mere non-service of summons is no evidence of fraud—Prior suit against minor — Guardian ad litem not appointed — *Ex parte* decree against the minor was set aside.)
('23) 10 AIR 1923 Bom 379 (380, 381) (DB).
('24) 11 AIR 1924 Cal 395 (395) (DB).
('23) 10 AIR 1923 Cal 569 (569).
('25) 12 AIR 1925 Lah 431 (432) (DB). (Suit to set aside compromise decree—One defendant not joining in compromise—Failure of plaintiff to inform this fact to the Court does not amount to fraud.)
('25) 12 AIR 1925 Lah 357 (358).
('18) 5 AIR 1918 Lah 140 (141).
('25) 12 AIR 1925 Mad 640 (644) (DB).
('18) 5 AIR 1918 Pat 548 (561) : 3 Pat L Jour 522.
('25) 12 AIR 1925 Rang 200 (200) : 3 Rang 65. (In consequence of fraudulent trick resorted to by the defendant the summons was never served upon the plaintiff — *Ex parte* decree obtained by the defendant was set aside.)
('24) 11 AIR 1924 Rang 119 (122) ; 1 Rang 500.
('23) 10 AIR 1923 Rang 82 (82).
('14) 1 AIR 1914 Sind 63 (64) : 8 Sind L R 81 (84) (DB).

Note 99

1. ('69) 12 Suth W R 477 (478) (DB).
('70) 14 Suth W R 339 (339) (DB).
('68) 9 Suth W R 77 (77) (DB).
('66) 6 Suth W R Civ Ref 26 (26) (DB).
('66) 5 Suth W R 27 (27) (DB).
('66) 5 Suth W R 26 (26) (DB).
('77) 1877 Pun Re No. 56.
2. ('99) 21 All 26 (28).
† ('33) 20 AIR 1933 Lah 461 (461) : 15 Lah 262. (Judgment can be used in a suit for damages for malicious prosecution only to establish acquittal of accused.)
('70) 2 N W P H C R 88 (88) (DB).
('33) 20 AIR 1933 Mad 429 (430) : 56 Mad 641 (DB). (Judgment can be used in a suit for damages for malicious prosecution only to establish acquittal of accused.)
[See however ('68) 10 Suth W R 56 (56) (DB).]
3. ('81) 1881 Pun Re No. 18 (Cr).
† ('32) 19 AIR 1932 Mad 254 (255, 256) : 55 Mad 346 (DB). (Dismissal of suit for damages for defamation — Judgment in suit is not admissible in evidence in a prosecution for the same.)
('81) 5 Bom 387 (390). (Decision as regards possession of a certain land given by the mamlatdar — Decision regarding possession of the same land given by Magistrate—Decision of Magistrate will prevail.)
4. † ('96) 23 Cal 610 (618, 619) (DB).
('16) 3 AIR 1916 Bom 163 (163) : 41 Bom 1 (3, 4, 5) (DB).
5. ('83) 5 All 224 (226).
6. ('94) 21 Cal 262 (265) (DB).
('15) 2 AIR 1915 Bom 203 (204) : 40 Bom 97 (101, 102, 103, 104) (DB).
('27) 14 AIR 1927 Sind 10 (15) : 21 Sind L R 1 (DB).

Note 100

1. (1867) L R 1 H L 117.

opinion *res judicata* signifies that the Court has, after argument and consideration, come to a decision on a contested matter."

In other words, in order to support a plea of *res judicata*, it is not enough that the parties are the same and that the same matter is in issue, it must also be shown that the matter was *heard and finally decided*.[2] In *Genda Lal* v. *Hazari*

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2. ('42) 29 AIR 1942 Pat 279 (281) (DB). (Title suit under O. 21, R. 63 on basis of kobala executed by members of joint Hindu family including minor defendants 8 to 10 — Alternative claim for declaration that at least share of defendants 8 to 10 did not pass by auction sale as they were not parties to decree or execution proceeding — Suit dismissed as kobala found to be farzi transaction — Decision held could not preclude defendants 8 to 10 from asserting their right to property.)
('40) 27 AIR 1940 Mad 544 (545) : I L R (1940) Mad 815. (A decree passed against a Hindu father personally after the sons had been exonerated can be executed against the sons' interest in the family property in respect of a decree debt passed against the father—It cannot be said that the dismissal of the suit as against the sons amounts to an adjudication that the sons are not liable in respect of the decree debt—AIR 1937 Mad 718 followed.)
† ('97) 24 Cal 616 (626, 627) : 24 Ind App 50 (PC).
('32) 19 AIR 1932 Bom 326 (327) (DB).
('37) 24 AIR 1937 All 401 (405) : ILR (1937) All 489 (DB).
('35) 22 AIR 1935 All 411 (415) : 57 All 797 (DB).
('32) 19 AIR 1932 All 45 (46) (DB).
('31) 18 AIR 1931 All 99 (100) : 52 All 901 (DB).
('99) 21 All 505 (514) : 26 Ind App 175 (PC).
('38) 25 AIR 1938 Bom 291 (294).
('32) 19 AIR 1932 Bom 442 (443) (DB).
† ('08) 32 Bom 315 (319) (DB).
('37) 24 AIR 1937 Cal 741 (745) : I L R (1938) 1 Cal 187 (DB). (Issue raised but not decided — No *res judicata*.)
('89) 16 Cal 173 (182) : 15 Ind App 186 (PC).
(1865) 3 Suth W R 39 (39) (DB).
(1865) 2 Suth W R 79 (80) (DB).
('37) 24 AIR 1937 Lah 265 (266).
('37) 24 AIR 1937 Lah 21 (22) (DB).
('83) 1883 Pun Re No. 104.
('38) 25 AIR 1938 Mad 325 (326).
('35) 22 AIR 1935 Mad 977 (982) (DB). (Before a matter can be held to be *res judicata* the finding must be certain and it must be clear that the decree in the previous suit was intended to be rested on that finding.)
('33) 20 AIR 1933 Mad 868 (869).
('11) 9 Ind Cas 686 (687) (DB) (Mad).
('66) 3 Mad H C R 84 (85) (DB).
(1864) 2 Mad H C R 131 (143, 146) (DB).
('31) 18 AIR 1931 Oudh 157 (158) (DB).
('37) 24 AIR 1937 Rang 324 (325).
('37) 24 AIR 1937 Rang 204 (205). (Question raised but not decided—No *res judicata*.)
('34) 21 AIR 1934 Rang 379 (380) (DB). (Decision in preliminary enquiry in a receiver application, as to *prima facie* claim for possession is not *res judicata*.)
('34) 21 AIR 1934 Rang 154 (155) (DB). (Order striking out party's name amounting to dismissal —No appeal — Subsequent suit for same relief is barred.)

Cases in which it was held that the matter was heard and finally decided:

('88) 15 Cal 756 (761) : 15 Ind App 97 (PC).
('30) 17 AIR 1930 P C 224 (226) : 8 Rang 326 : 57 Ind App 208 (PC).
('31) 18 AIR 1931 P C 289 (293) : 58 Ind App 381 : 55 Mad 93 (PC).
('21) 8 AIR 1921 P C 131 (135) : 23 Oudh Cas 291 (PC).
† ('21) 8 AIR 1921 P C 11 (12) : 48 Cal 499 : 48 Ind App 187 (PC).
('14) 1 AIR 1914 P C 31 (32) : 41 Ind App 247 (PC).
('26) 13 AIR 1926 All 420 (420) (DB).
('25) 12 AIR 1925 All 663 (663) (DB).
('25) 12 AIR 1925 All 417 (418).
('20) 7 AIR 1920 All 298 (300) (DB).
('13) 11 All L Jour 937 (940).
('12) 9 All L Jour 165 (169) (PC).
('11) 11 Ind Cas 87 (88) (All).
('98) 20 All 370 (374) (DB).
† ('83) 5 All 514 (517, 518) (DB).
✠ ('75) 7 N W P H C R 17 (23, 28, 29, 31) (FB).
('68) 3 Agra 40 (41).
('67) 2 Agra 221 (221).
('30) 17 AIR 1930 Bom 135 (137) : 53 Bom 676 (DB).
('27) 14 AIR 1927 Bom 145 (148) (DB).
('21) 8 AIR 1921 Bom 427 (429): 45 Bom 99 (DB).
('87) 11 Bom 160*n* (167*n*).
('69) 6 Bom H C R A C 109 (113).
('64) 2 Bom H C R 77. (Second Edition 72 (74).)
('29) 16 AIR 1929 Cal 385 (386) (DB).
('26) 13 AIR 1926 Cal 1228 (1228) (DB).
('26) 13 AIR 1926 Cal 369 (370) (DB).
('26) 13 AIR 1926 Cal 80 (82) (DB).
('25) 12 AIR 1925 Cal 427 (430) (DB).
('23) 10 AIR 1923 Cal 361 (361, 362) (DB).
('15) 2 AIR 1915 Cal 660 (661) (DB).
('12) 13 Ind Cas 688 (688) (Cal).
('12) 13 Ind Cas 40 (42) (DB) (Cal).
('10) 8 Ind Cas 945 (945) (DB) (Cal).
('07) 34 Cal 1020 (1024) : 11 Cal W N 1100 (1103).
('82) 11 Cal L Rep 483 (486) (DB).
('73) 19 Suth W R 62 (63) (DB).
('72) 18 Suth W R 260 (261) (DB).
('72) 17 Suth W R 350 (350, 351) (DB).
('69) 12 Suth W R 182 (183).
('68) 10 Suth W R 465 (465, 466) (DB).
('67) 7 Suth W R 188 (189) (DB).
('66) 6 Suth W R 157 (158) (DB).
(1865) 3 Suth W R 210 (212) (DB).
(1861) 1 Suth W R 343 (344) (DB).
('29) 16 AIR 1929 Lah 769 (769).

('25) 12 AIR 1925 Lah 596 (597) (DB).
('22) 67 Ind Cas 755 (757) (Lah).
('21) 8 AIR 1921 Lah 187 (187).
('21) 8 AIR 1921 Lah 394 (395) (DB).
('12) 17 Ind Cas 365 (366) (Lah).
('08) 1908 Pun W R No. 116, page 394.
('87) 1887 Pun Re No. 79.
('83) 1883 Pun Re No. 95.
('77) 1877 Pun Re No. 77.
('75) 1875 Pun Re No. 70.
('70) 1870 Pun Re No. 60.
('30) 17 AIR 1930 Mad 714 (716) (DB).
('26) 13 AIR 1926 Mad 241 (241, 243) : 49 Mad 483 (DB).
('25) 12 AIR 1925 Mad 1179 (1181) (DB).
('25) 12 AIR 1925 Mad 218 (220) (DB).
('24) 11 AIR 1924 Mad 299 (300) (DB).
('23) 10 AIR 1923 Mad 88 (89, 91) : 46 Mad 525.
('21) 8 AIR 1921 Mad 701 (704) (DB).
('20) 7 AIR 1920 Mad 449 (451) (DB).
('08) 4 Mad L Tim 413 (413).
('04) 14 Mad L Jour 103 (104) (DB).
('03) 13 Mad L Jour 485 (487) (DB).
('03) 13 Mad L Jour 134 (134) (DB).
('01) 11 Mad L Jour 7 (8).
('16) 3 AIR 1916 Nag 1 (2) : 13 Nag L R 76 (78) (DB).
('29) 16 AIR 1929 Oudh 275 (278) : 4 Luck 713 (DB).
('27) 14 AIR 1927 Oudh 60 (62) (DB).
('26) 13 AIR 1926 Oudh 613 (614) (DB).
('26) 13 AIR 1926 Oudh 27 (28).
('25) 12 AIR 1925 Oudh 607 (608). (Question of title heard and decided in former suit—*Res judicata.*)
('21) 8 AIR 1921 Oudh 46 (46) : 24 Oudh Cas 215.
('15) 1 Oudh L Jour 745 (746).
('30) 17 AIR 1930 Pat 71 (75, 76) (DB).
('24) 11 AIR 1924 Pat 307 (309) (DB).
('23) 10 AIR 1923 Rang 82 (82).
('19) 6 AIR 1919 Low Bur 38 (38) : 9 Low Bur Rul 273 (274) (DB).
('09) 1909 Upp Bur Rul 2nd Quarter C P C 31.
('21) 59 Ind Cas 808 (809) (DB) (Lah).
('12) 15 Ind Cas 685 (686) (All). (Points heard and decided in partition proceedings between parties—*Res judicata.*)
('82) 5 Mad 239 (241) (DB). (Do.)
('08) 35 Cal 701 (716, 717) : 7 Cal L Jour 563 (577) (DB). (Do.)
('28) 15 AIR 1928 Cal 758 (758) (DB). (Suit under S. 9, Specific Relief Act — *Res judicata* as to question of dispossession.)
('17) 4 AIR 1917 All 263 (264) : 39 All 717. (Do.)

Cases in which it was held that the matter was not heard and decided; therefore no res judicata :

('41) 28 AIR 1941 Cal 289 (291).
('41) 28 AIR 1941 Lah 169 (171) (DB). (Decision in previous suit holding suit as framed under Mahomedan law barred by O. 22, R. 9 (1), C. P. C. —Question whether subsequent suit based on customary law is barred is not *res judicata* because the question of Customary law was neither heard nor finally decided.)
('40) 27 AIR 1940 Lah 27 (30).
('40) 27 AIR 1940 Nag 163 (168) : ILR (1941) Nag 513 (DB).
('39) 26 AIR 1939 Pat 633 (636).
('93) 17 Bom 35 (40) (DB).
('25) 12 AIR 1925 Bom 181 (183) (DB).
✠('30) 17 AIR 1930 P C 45 (50) (PC).
†('35) 22 AIR 1935 All 457 (457).
('24) 11 AIR 1924 All 867 (868).
('10) 5 Ind Cas 325 (329) (All).
('07) 29 All 287 (289, 290) (DB).
('01) 23 All 346 (354) (DB).
†('92) 1892 All W N 238 (238) (DB).
('29) 16 AIR 1929 Bom 116 (117).
('25) 12 AIR 1925 Bom 311 (313) (DB).
('14) 1 AIR 1914 Bom 312 (315) (DB).
('03) 5 Bom L R 737 (740) (DB).
(1900) 2 Bom L R 871 (871) (DB).
('97) 21 Bom 563 (566, 567) (DB).
('94) 1894 Bom P J 12 (13) (DB).
('90) 14 Bom 327 (330).
('73) 10 Bom H C R 369 (372) (DB).
('35) 22 AIR 1935 Cal 716 (720) : 63 Cal 385. (Application for substitution based on valid adoption—Application dismissed without considering validity of adoption—Question of validity can be challenged in subsequent suit.)
('31) 18 AIR 1931 Cal 511 (513) (DB). (Decree silent as regards certain claim — This does not mean that claimant can never have any claim over that property again.)
†('18) 5 AIR 1918 Cal 523 (524) (DB).
('15) 2 AIR 1915 Cal 46 (48) (DB).
('10) 5 Ind Cas 781 (782) (DB) (Cal).
('07) 34 Cal 83 (88, 89) (DB).
('01) 5 Cal W N 304 (306) (DB).
('99) 27 Cal 515 (520) : 27 Ind App 39 (PC).
†('97) 24 Cal 711 (713, 714) (DB).
('95) 22 Cal 692 (707).
('89) 16 Cal 545 (548) (DB).
('77) 3 Cal 6 (11) (DB).
('76) 25 Suth W R 208 (209).
('71) 15 Suth W R 527 (529) (DB).
('69) 12 Suth W R 325 (325, 326) (DB).
('68) 10 Suth W R 486 (486) (DB).
('68) 10 Suth W R 305 (306) (DB).
('26) 13 AIR 1926 Lah 178 (178, 179) (DB).
('24) 11 AIR 1924 Lah 469 (470) (DB).
('21) 8 AIR 1921 Lah 296 (296) (DB).
('20) 7 AIR 1920 Lah 54 (55).
('14) 1 AIR 1914 Lah 76 (78) (DB).
('13) 1913 Pun W R No. 75, p. 209 (210).
('84) 1884 Pun Re No. 25.
('82) 1882 Pun Re No. 24.
('31) 1931 Mad W N 813 (814) (DB).
('29) 16 AIR 1929 Mad 687 (688) (DB).
('29) 16 AIR 1929 Mad 291 (292).
('28) 15 AIR 1928 Mad 268 (271) (DB).
('27) 14 AIR 1927 Mad 1100 (1100).
('26) 13 AIR 1926 Mad 162 (163) : 48 Mad 688 (DB).
('25) 12 AIR 1925 Mad 1107 (1107).
('21) 8 AIR 1921 Mad 126 (128) (DB).
('20) 7 AIR 1920 Mad 710 (710) (DB).
('11) 9 Ind Cas 613 (614) (DB) (Mad).
('09) 4 Ind Cas 1117 (1117) (DB) (Mad).
('66) 3 Mad H C R 120 (123) (DB).

Lal,[3] Sulaiman, C. J., observed as follows: "While the suit is pending and the Court is still seised of the case, although it may be that a defendant may not be allowed to reopen a finding which has been recorded on a particular issue, there is nothing to preclude the Court itself from changing its mind and coming to a contrary conclusion, particularly if a new ruling containing a fresh interpretation of some provision of law comes into existence in the meantime." A decree in a suit expressed to be 'subject to the final decision of the Privy Council' in another case was held not to be a *final* decree within the meaning of this section.[4] A remark in a judgment which is in the nature of an *obiter dictum* cannot operate as *res judicata*. (See Note 12.) At the same time, the mere fact that the judgment contains observations made *obiter* will not prevent the point which arises in the case and is decided by the Court from operating as *res judicata*.[5] It is not necessary that the matter should have been decided in *explicit* terms in the former suit in order to constitute it *res judicata*; it is enough if an adjudication on the matter is necessarily involved in the decision in the prior suit.[6] Nor is it necessary that the decision should have been appealable.[7]

It has already been seen in Note 33, that a matter *constructively* in issue could not be *actually* decided but could only be *deemed* to be heard and decided, except where the case was not tried upon the merits. A matter could not be said to have been *heard* and decided either actually or constructively, if it was decided behind the back of a party without *notice* to him.[8]

Where the former suit was tried according to the procedure then in force, the mere fact that such procedure was summary does not affect the finality of the decision.[9]

Where a matter has been heard and decided by two or more former decisions, one conflicting with the other, the last of such decisions in order of date will be the one which will operate as *res judicata*.[10] The basis of this rule is that if a party who could raise the plea of *res judicata* does not do so when an opportunity is given to him,

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('31) 18 AIR 1931 Oudh 62 (63) (DB). (Order passed in execution proceedings as to the nature of land which is sought to be sold is not a final one and the same cannot operate as *res judicata* in a later suit.)
('27) 14 AIR 1927 Oudh 15 (16).
('19) 6 AIR 1919 Oudh 177 (177) : 21 Oudh Cas 324 (325, 326).
('01) 4 Oudh Cas 408 (418) (DB).
('26) 13 AIR 1926 Pat 289 (290) : 5 Pat 276.
('24) 11 AIR 1924 Pat 683 (686) (DB).
('29) 16 AIR 1929 Rang 55 (58) : 6 Rang 691 (DB).
('15) 2 AIR 1915 Upp Bur 18 (19) : 2 Upp Bur Rul 81.
[But see † ('25) 12 AIR 1925 Cal 1046 (1047, 1048).]

3. ('36) 23 AIR 1936 All 21 (23) : 58 All 313 (FB).
4. ('42) 29 AIR 1942 P C 8 (10) : ILR (1942) 2 Cal 1 : ILR (1942) Kar P C 23 : 69 Ind App 51 (PC). (The only proper course in such a case is to adjourn the suit, without making any decree, until the final determination of the other suit.)
5. ('36) 17 Pat L Tim 356 (358).
6. ('73) 20 Suth W R 377 (378, 379) : Ind App Sup Vol. 212 (PC).
✠ ('33) 20 AIR 1933 Lah 594 (595, 596) : 14 Lah 409.
('36) 23 AIR 1936 Bom 402 (404) : 60 Bom 1008 (DB).
('98) 2 Cal W N 254 (256) (DB).
† ('28) 15 AIR 1928 Lah 888 (891) (DB).
('14) 1 AIR 1914 Mad 399 (414) : 37 Mad 70 (FB).

7. ✠ ('39) 26 AIR 1939 Cal 169 (174) : ILR (1938) 2 Cal 418 (DB).
('38) 25 AIR 1938 Pat 359 (360).

8. ('30) 17 AIR 1930 All 699 (700) : 52 All 1024.
9. ('38) 25 AIR 1938 Lah 369 (388) (FB). (Decision of the year 1855 under the Punjab Civil Code, delivered by a Deputy Commissioner in the Punjab is *res judicata* — Per Full Bench; Din Mahomed, J., dissenting.)
10. ('43) 30 AIR 1943 Mad 36 (37) : ILR (1943) Mad 40 (DB).
('12) 14 Bom L R 854 (859, 860) (DB).
† ('32) 19 AIR 1932 All 520 (521) (DB).
('35) 22 AIR 1935 All 645 (647).
('27) 14 AIR 1927 All 717 (718) : 49 All 606 (DB).
('24) 11 AIR 1924 All 310 (311) : 46 All 220 (DB).
† ('15) 2 AIR 1915 All 420 (420) : 37 All 531 (534) (DB).
('04) 1 All L Jour 416 (418).
('33) 20 AIR 1933 Cal 69 (71) : 59 Cal 513. (Two compromises—Later compromise prevails.)
('29) 16 AIR 1929 Cal 163 (164) (DB).
('21) 8 AIR 1921 Mad 612 (615) (DB).
('17) 4 AIR 1917 Mad 950 (950) (DB).
('35) 22 AIR 1935 Nag 122 (123) : 31 Nag LR 211

he must be deemed to have waived it.[11] This rule is, however, subject to a statutory provision to the contrary. Thus, in the undermentioned case[12] an objection to the execution of a decree against certain property was taken by a person who claimed the property to be his. This objection was disallowed. Subsequently, in a suit to which both the claimant and the decree-holder were parties (but which was not a suit by the claimant under O. 21, R. 63), a decision was given to the effect that the claimant was entitled to the property. The question arose whether the order of dismissal of the claimant's objection or the subsequent decision was *res judicata*. It was held that under O. 21, R. 63 the former order was subject only to the decision of a suit which the *claimant* must bring within one year to establish his right. If he failed to do so he could not rely on the subsequent decision to which he and the decree-holder were parties. It was, therefore, the former order, and not the subsequent decision, that operated as *res judicata*.

An application for a rule (revision) and its rejection does not prevent a Court, on a subsequent occasion, if the occasion arises, from granting a rule in the interest of justice.[13]

101. No matter left undecided can be deemed to have been decided. — It has been seen in Note 12, that if a matter is *not in issue at all*, there can be no *res judicata*. It cannot be said in such a case that the matter was heard and finally decided.[1] It has also been seen in Note 100, that where a matter, though in issue has, as a fact, been not heard and decided, either actually or constructively, it cannot operate as *res judicata*. The same principle will apply where a matter, though *directly raised in issue, is expressly left open and undecided*,[2] or where the suit has been allowed to be *withdrawn* with liberty to bring a fresh suit in respect of the same matter.[3] Where a

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11. ('35) 22 AIR 1935 All 645 (647).

12. ('43) 30 AIR 1943 Mad 36 (38) : I L R (1943) Mad 40 (DB).

13. ('36) 23 AIR 1936 Pat 119 (120).

Note 101

1. ✣ ('25) 12 AIR 1925 PC 184 (187) : 21 Nag L R 117 : 52 Cal 971 : 52 Ind App 294 (PC).
('97) 19 All 277 (288) : 24 Ind App 10 (PC).
('25) 12 AIR 1925 All 791 (795).
('86) 8 All 396 (401).
† ('32) 19 AIR 1932 Bom 3 (7) (DB).
('69) 12 Suth W R 525 (527) (DB).
('35) 22 AIR 1935 Mad 456 (458).
('27) 14 AIR 1927 Mad 431 (432) (DB).
† ('01) 11 Mad L Jour 10 (17) (FB).
('22) 11 AIR 1924 Nag 124 (124).
Also see Notes 7 and 12

2. ✣ ('99) 21 All 505 (514) : 26 Ind App 175 (PC).
('84) 1884 Pun Re No. 25.
('32) 19 AIR 1932 All 694 (695, 696) (DB).
('25) 12 AIR 1925 All 770 (771) : 48 All 34 (DB).
('06) 28 All 700 (704).
('78) 2 All 582 (589, 591) (FB).
('21) 8 AIR 1921 Bom 284 (285) : 45 Bom 1335 (DB).
('90) 14 Bom 31 (39).
('19) 6 AIR 1919 Cal 809 (811) : 46 Cal 485 (DB).
('19) 6 AIR 1919 Cal 974 (975) (DB).
('15) 2 AIR 1915 Cal 568 (569) (DB).
('84) 10 Cal 856 (860) (DB).
('72) 18 Suth W R 61 (62).
('35) 22 AIR 1935 Lah 686 (687).
('17) 1917 Pun L R No. 149, p. 408.
('31) 18 AIR 1931 Mad 830 (832). (Point left for decision in a fresh suit.)
('29) 16 AIR 1929 Mad 687 (688) (DB).
('29) 16 AIR 1929 Mad 391 (392).
('25) 12 AIR 1925 Mad 497 (525) : 48 Mad 1 (DB).
('82) 4 Mad 308 (310) (DB).
('30) 17 AIR 1930 Oudh 218 (218).
('30) 17 A I R 1930 Oudh 124 (128) : 4 Luck 404 (DB). (Point decided by first Court but left open in appeal.)
† ('31) 18 AIR 1931 Pat 1 (10, 12.)
✣ ('37) 24 A I R 1937 Rang 421 (424) : 1937 Rang L R 136.
('26) 96 Ind Cas 302 (302) (Lab).

3. ('42) 197 Ind Cas 27 (29) (PC). (Claim included in prior action but not judicially decided upon— Plaintiff electing not to proceed with that action but withdrawing the same — Claim not barred by *res judicata*.)
('11) 1911 Pun W R No. 149, p. 392.
('98) 1 Oudh Cas 97 (99).
('24) 11 A IR 1924 All 260 (261). (Leave to withdraw granted by Appellate Court.)
('36) 163 Ind Cas 367 (369) (Cal). (Do.)
('71) 16 Suth W R 276 (276) (DB).
† ('18) 5 AIR 1918 Mad 1287 (1292) : 40 Mad 259 (FB). (Leave to withdraw granted by Appellate Court.)
('14) 1 AIR 1914 Oudh 234 (235).
[*See also* ('35) 22 AIR 1935 Oudh 35 (36). (Application to set aside *ex parte* decree — Withdrawal of application as being defective—Second application not barred.)]

plaintiff abandons his claim, there is no trial of issues arising between the parties and consequently there is no decision which can operate as *res judicata*. But to prevent the defendant from being harassed unnecessarily a second time on the same cause of action the law prescribes that the plaintiff shall not sue again on the same cause of action unless the suit is withdrawn under O. 23, R. 1, Civil Procedure Code, owing to some technical defect and the permission of the Court to sue again is obtained.[4] "It would be a contradiction in terms to say that the Court had finally decided matters which it expressly left untouched and undecided.[5] But if the Court had no *power* to leave a matter open,[6] or the order granting permission is in contravention of O. 23, R. 1 and consequently without jurisdiction, such reservation will not prevent the application of the rule of *res judicata*.[7]

Illustrations.

1. *A*, a landlord, sues *B* for possession of certain properties with mesne profits on the allegation that *B* was his *annual tenant*. *B* pleads *permanent tenancy*. The only issue in the case is whether *B* is *annual* or a *permanent* tenant. The Court finds against the permanent tenancy and decrees *A's claim* ; *B* appeals and then applies to the appellate Court, to the effect that the question of permanent tenancy should be left open to be decided in a subsequent suit, but that, subject to such permission, the appeal may be dismissed. The appellate Court passes the following order : "The permission asked for is granted. The appeal is dismissed with costs." *B* then sues *A* for a declaration that he is a *permanent* tenant of *A*. The suit is barred. The reason is that the *only* issue in the case being that of permanent tenancy, and the suit being decreed, the Court had no power to reserve the matter to be decided again in any other suit. It would be different if there were *two* issues one of which is sufficient for the decision and the other is left open.[8]

2. *A* sues to set aside a gift made by a Hindu widow out of her husband's estate alleging that he is the presumptive heir. The widow dies pending suit and *A* applies to amend his plaint by setting up a family custom of inheritance and claiming possession of the properties. The application is disallowed and the suit is *dismissed* but liberty is given to *A* to file a fresh suit for possession. *A* subsequently sues for possession on the ground of family custom. The suit is barred, since the Court, having dismissed the former suit had no power under O. 23 to give liberty to bring a fresh suit.[9]

3. *A* files a suit against *B*. The suit is dismissed on the ground that the plaintiff has failed to *produce evidence* in support of his case, but his right to bring another suit in respect of the same matter is reserved. A suit subsequently brought by *A* against *B* in respect of the same matter, will nevertheless, be barred inasmuch as the reservation of liberty in a decree dismissing a suit for failure of proof, is without jurisdiction.[10] It would be different where the suit is dismissed on a *preliminary or technical point*, but reserving the plaintiff's right to file a fresh suit.[11] Where, however, an order is made granting leave to withdraw under O. 23, R. 1, the mere fact that it is *erroneous* or is made on *unjustifiable grounds* does not make it an order without *jurisdiction*, and a subsequent suit in accordance with the liberty given is not barred.[12]

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4. ('39) 26 AIR 1939 Lah 414 (415).
5. † ('99) 21 All 505 (514) : 26 Ind App 175 (PC).
('19) 6 AIR 1919 Lah 72 (74):1918 Pun Re No. 70 (DB).
6. ('31) 18 AIR 1931 Mad 268 (270).
† ('89) 11 All 187 (190) (FB).
('80) 2 All 843 (848, 849) (FB).
('04) 6 Bom L R 594 (598) (DB).
('80) 1880 Pun Re No. 84.
('34) 21 AIR 1934 Mad 68 (70).
7. ('22) 9 AIR1922 Pat489(490,491): 1 Pat 228(DB).
('20) 7 AIR 1920 Pat 63 (64) (DB).
('31) 18 AIR 1931 Mad 268 (269).
† ('25) 12 AIR 1925 Mad 1162 (1165).
('16) 3 AIR 1916 Mad 554 (554) (DB).
('18) 5 AIR 1918 Pat 575 (577) : 3 Pat L Jour 404 (DB).
8. † ('31) 18 AIR 1931 Bom 417 (418).
9. ✠ ('25) 12 A I R 1925 P C 55 (58, 59) : 47 All 158 : 52 Ind App 100 : 27 Oudh Cas 334 (PC).
10. ('69) 13 Moo Ind App 160 (171, 172) (PC).
Also see O. 23 R. 1 N. 29.
11. ('30) 17 A I R 1930 Lah 634 (635). (Suit dismissed on account of formal defect in plaint.)
('12) 1912 Pun Re No. 56 : 15 Ind Cas 930 (932) (DB). (Dismissal on ground of no cause of action.)
('15) 2 AIR 1915 Lah 303 (304). (Relief refused on the ground of want of jurisdiction.)
('75) 1875 Pun Re No. 55.
('08) 18 Mad L Jour 198 (199) (DB). (Suit for possession dismissed on failure to produce sale certificate.)
12. † ('21) 8 AIR 1921 Cal 34 (38):48 Cal 138 (FB). (Overruling AIR 1916 Cal 255)

Where a matter is decided by the first Court but is left undecided by the appellate Court on appeal, the result is the same as if the matter was not decided at all. The reason is that when a judgment of a Court of first instance is appealed against, the finality of the decision is destroyed, the matter becoming again *sub judice*; and if the appellate Court without deciding that issue, disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of appeal.[13]

When a suit comprises several distinct matters a separate judgment and decree in regard to each would be legal under the Code and these may be passed at different stages as each matter is disposed of. Each such decree would operate as *res judicata* in so far as the matters covered by it are concerned.[14] It cannot be argued that a decision which decides only certain matters in issue and leaves others undecided cannot operate as *res judicata* at all in any case.

102. Reservation of liberty to bring a fresh suit on an issue. — See Note 101.

103. Issues omitted or refused to be decided. — If a matter which has not been heard and decided in a previous suit is not *res judicata*, it is impossible to say that a question not only not decided in the previous suit but expressly refused to be decided, or excluded from the decision in the suit, can be treated as *res judicata*.[1] Nor will the principle of constructive *res judicata* embodied in Explanation IV apply to such a case inasmuch as the questions *are actually raised* in such cases.[2]

104. Decision must have been on merits. — In order to support a plea of *res judicata* the former decision must have been on the *merits* of the question

('18) 5 AIR 1918 Mad 1093 (1095) (DB).
('12) 9 All L Jour 378 (379).
Also see O. 23 R. 1 N. 36.

13. ('39) 26 AIR 1939 Lah 540 (540). (Objection by judgment-debtor that he is governed by custom in matter of succession allowed by executing Court but disallowed by Appellate Court — In appeal High Court not going into question of custom but reversing lower Appellate Court's decision on other grounds—Plea that judgment-debtor, is governed by custom, is not *res judicata* in subsequent suit.)
✠ ('97) 24 Cal 616 (627) : 24 Ind App 50 (PC).
† ('81) 6 Bom 110 (112) (DB).
('17) 4 AIR 1917 P C 201 (203) : 44 Ind App 213 : 45 Cal 442 (PC).
('25) 12 AIR 1925 All 243 (244) (DB).
('12) 9 All L Jour 67 (69, 70).
('12) 14 Ind Cas 161 (162) (DB) (All).
('34) 21 AIR 1934 Cal 14 (17) (DB).
('26) 13 AIR 1926 Cal 672 (676) (DB).
('26) 13 AIR 1926 Cal 179 (180).
('26) 13 AIR 1926 Cal 163 (164) (DB).
('25) 12 AIR 1925 Cal 1195 (1197) (DB).
('09) 3 Ind Cas 87 (87) (Cal).
('07) 5 Cal L Jour 653 (657) (DB).
('98) 25 Cal 571 (576, 577) (DB).
('82) 8 Cal 631 (633, 634) (DB).
('81) 7 Cal 381 (384) (DB).
('78) 3 Cal L Rep 417 (449, 450).
(1865) 4 Suth W R 50 (51) (SB).
('37) 24 AIR 1937 Lah 167 (167).
('10) 1910 Pun W R No. 42, p. 108.
('37) 24 AIR 1937 Mad 709 (711).
† ('21) 8 AIR 1921 Mad 21 (22, 24) (FB).
('20) 7 AIR 1920 Mad 77 (80) (DB).
('08) 4 Nag L R 98 (101, 103).
('39) 26 AIR 1939 Oudh 2 (10) : 14 Luck 277 (DB).
('37) 24 AIR 1937 Oudh 246 (247) : 13 Luck 186 (DB).
('18) 5 AIR 1918 Pat 526 (528).
('17) 4 AIR 1917 Pat 188 (189) (DB) (Appellate Court allowing withdrawal.)
('14) 1 AIR 1914 Upp Bur 43 (43).
('07) 1 Sind L R 171 (172) (DB).

14. ('40) 27 AIR 1940 Lah 1 (3) : ILR (1940) Lah 171 (DB).

Note 103

1. ('39) 26 AIR 1939 Mad 818 (824) (DB).
† ('81) 6 Cal 777 (781) (DB).
('81) 7 Cal 214 (216) (DB).
('29) 16 AIR 1929 All 252 (253) (DB).
('87) 14 Cal 323 (343) (DB).
('84) 10 Cal 507 (509) (DB).
† ('13) 1913 Pun Re No. 87 : 18 Ind Cas 787 (789). (DB).
('10) 5 Ind Cas 262 (263) (DB) (Mad).
('82) 5 Mad 9 (10) (DB).
('23) 10 AIR 1923 Oudh 101 (102).
(1900) 3 Oudh Cas 273 (275).
† ('18) 5 AIR 1918 Pat 618 (619, 620) (DB).
2. See also Note 33, point (10).
✠ ('21) 8 AIR 1921 Mad 21 (24) (FB).
† ('08) 32 Bom 315 (320) (DB).
('82) 9 Cal L Rep 474 (478).
('80) 5 Cal 923 (925) (DB).
('19) 6 AIR 1919 Lah 72 (74) : 1918 Pun Re No. 70 (DB).
('22) 9 AIR 1922 Mad 259 (262) (DB).
('98) 21 Mad 278 (285) (DB).

in issue in the subsequent suit. Otherwise, it cannot operate as a bar.[1] Thus, where a suit was brought by a firm to recover the price of goods and was dismissed under S. 69, cl. (2) of the Partnership Act (1932) on the ground that the firm was unregistered and a second suit was instituted on the same cause of action after the registration of the firm, it was held that the suit was not barred by *res judicata*.[2]

Where a case is disposed of on the merits, all points necessarily involved in such decision and all questions which might and ought to have been raised in such suit will also be deemed to be decided on the merits. See Note 33. As to what points are so involved in the decision of *ex parte* decrees, see Note 19.

105. Decision on preliminary or technical points. — It follows from what has been stated in Notes 101 to 104, that in order to conclude a plaintiff by a plea of *res judicata* it is necessary to show that there was a *decision* finally granting or withholding the relief sought. Therefore, when the prior suit has been dismissed on some technical ground without going into the merits of the questions raised, there can be no decision on such questions and therefore no *res judicata*.[1]

Note 104

1. ('41) 28 AIR 1941 Rang 24 (26) : 1940 Rang L R 643 (DB). (Where a representor plaintiff abandons the suit and it is dismissed without a decision on the merits, it cannot operate as *res judicata* to prevent a representee who is not made a party to the suit from re-agitating the matter by a separate suit.)
('40) 45 Cal W N 220 (222).
† ('86) 8 All 282 (291) (DB).
('18) 5 AIR 1918 Mad 78 (79) (DB). (Dismissal on pleadings.)
('09) 2 Ind Cas 622 (623) (DB) (All).
('12) 13 Ind Cas 351 (352) (DB) (Cal).
(1865) 3 Suth W R Act X, 140 (141) (DB).
('37) 24 AIR 1937 Lah 241 (241).
('37) 24 AIR 1937 Lah 211 (212, 213).
('30) 17 AIR 1930 Lah 501 (503) (DB).
('80) 1880 Pun Re No. 107.
2. ('37) 24 AIR 1937 Nag 146 (147) : ILR (1937) Nag 430.

Note 105

1. ('42) 29 AIR 1942 All 410 (419) : I L R (1942) All 624 (DB). (Dismissal on ground of limitation.)
('42) 29 AIR 1942 Pat 293 (294). (Order that question raised was premature and should be raised at proper stage of litigation cannot operate as *res judicata* not being a final decision on the matter in dispute.)
† ('17) 4 AIR 1917 P C 201 (203): 45 Cal 442: 44 Ind App 213 (PC). (Dismissal on account of defect in the frame of suit.)
('86) 8 All 282 (289, 290) (DB).
('31) 18 AIR 1931 All 200 (201). (Dismissal on account of want of jurisdiction).
('30) 17 AIR 1930 All 112 (113) (DB). (Order of rejection of memorandum of appeal as not properly presented.)
('29) 16 AIR 1929 All 910 (911) (DB). (Dismissal of suit on the ground that plaintiff had no right to maintain it.)
('29) 16 AIR 1929 All 844 (844). (Dismissal for want of cause of action.)
('21) 8 AIR 1921 All 242 (244) (DB). (Dismissal of appeal for want of copy of trial Court's judgment.)
('12) 9 All L Jour 67 (69, 70) (DB). (Dismissal on the ground of limitation.)
('05) 27 All 443 (446) (DB). (Dismissal on technical points.)
('05) 27 All 254 (257) (DB). (Suit premature and so dismissed.)
('85) 1885 All W N 171 (171) (DB). (Dismissal for non-joinder.)
('84) 1884 All W N 2 (2) (DB). (Dismissal for want of cause of action).
('82) 4 All 261 (273, 274) (FB). (Dismissal under S. 42, Specific Relief Act.)
('81) 3 All 334 (337) (DB). (Dismissal on technical points.)
('74) 6 N W P H C R 77 (78, 79). (Dismissal on account of want of jurisdiction.)
('35) 22 AIR 1935 Bom 131 (133) (DB). (Mis-joinder of parties and causes of action.)
('22) 9 AIR 1922 Bom 96 (97): 46 Bom 726 (DB). (Dismissal on technical points.)
('06) 30 Bom 395 (408) (DB). (Dismissal on the ground of limitation.)
('98) 22 Bom 216 (221) (DB). (Do).
('93) 17 Bom 562 (565). (Dismissal on account of want of jurisdiction.)
('83) 7 Bom 408 (411) (DB). (Dismissal for want of cause of action.)
('80) 5 Bom 48 (57) : 7 Ind App 181 (PC). (Do.)
('78) 3 Bom 223 (226) (DB). (Dismissal on technical points.)
('77) 2 Bom 19 (25, 55) (DB). (Dismissal on account of want of jurisdiction.)
('71) 8 Bom H C R A C 205 (208). (Dismissal on technical ground.)
('66) 4 Bom H C R A C 110 (112). (Dismissal on the ground of under-valuation.)
('34) 21 AIR 1934 Cal 799 (802) (DB). (Dismissal for want of cause of action.)
('27) 14 AIR 1927 Cal 794 (795) (DB). (Dismissal for non-joinder.)
('97) 24 Cal 616 (626) : 24 Ind App 50 (PC). (Do.)
('83) 13 Cal L Rep 83 (86). (Dismissal on account of want of jurisdiction.)
('80) 5 Cal 246 (249) (DB). (Dismissal on ground of limitation.)

Illustrations.

(1) *A* and *B* were partners. The partnership was dissolved by a deed of dissolution and *A* executed a bond in favour of *B* for the amount found due by *A* to *B*. *A* sued *B* for cancellation of the bond on the ground of fraud. *B* pleaded that the suit for cancellation would not lie, the bond being based on the dissolution deed. The suit was dismissed in second appeal without going into the merits, on the ground that the suit was not *properly framed*. *B* then sued *A* on the bond who pleaded fraud. It was held that the plea was not barred. (*Abdulla Ashgar Ali Khan* v. *Ganesh Das.*[2])

('79) 3 Cal L Rep 395 (396). (Dismissal on technical points.)
('78) 2 Cal L Rep 10 (12). (Dismissal for misjoinder.)
('74) 22 Suth W R 308 (309) (DB). (Dismissal on account of want of jurisdiction.)
('74) 21 Suth W R 272 (273). (Dismissal for non-joinder.)
('74) 21 Suth W R 105 (106) (Do.)
('72) 17 Suth W R 380 (382). (Dismissal for want of cause of action.)
('72) 17 Suth W R 360 (360, 361) (DB). (Suit premature and so dismissed.)
('71) 15 Suth W R 208 (208) (DB). (Dismissal on technical points.)
('70) 13 Suth W R 461 (461) (DB). (Dismissal on the ground of limitation.)
('68) 9 Suth W R 461 (462) (DB). (Dismissal on technical ground.)
('68) 9 Suth W R 327 (328). (Dismissal on technical points.)
(1864) 1864 Suth W R 163 (163). (Case struck off on ground of discrepancy.)
('35) 22 AIR 1935 Lah 974 (975). (Suit dismissed as being premature.)
('35) 22 AIR 1935 Lah 893 (894) : 17 Lah 275 (DB). (Suit on pronote by unregistered firm dismissed under S. 69, Partnership Act—Subsequent suit in time after registration is not barred.)
('31) 18 AIR 1931 Lah 79 (80) : 12 Lah 275 (DB). (Previous suit dismissed as having abated.)
('29) 16 AIR 1929 Lah 596 (597) (DB). (Dismissal under S. 42, Specific Relief Act.)
('25) 12 AIR 1925 Lah 193 (194). (Dismissal on the ground of misdescription of property.)
('23) 10 AIR 1923 Lah 150 (151). (Dismissal on the ground of limitation.)
('21) 8 AIR 1921 Lah 133 (134) (DB). (Dismissal for want of cause of action.)
('16) 3 AIR 1916 Lah 229 (229) : 1916 Pun Re No. 1 (DB). (Dismissal on the ground of limitation.)
('06) 1906 Pun Re No. 6 : 1906 Pun L R No. 61, page 175 (176) (DB). (Do.)
('91) 1891 Pun Re No. 51. (Suit premature and so dismissed.)
('89) 1889 Pun Re No. 130. (Dismissal for want of cause of action.)
('85) 1885 Pun Re No. 72. (Suit premature and so dismissed.)
('84) 1884 Pun Re No. 66. (Dismissal under S. 42, Specific Relief Act.)
('83) 1883 Pun Re No. 190. (Dismissal on the ground of limitation.)
('83) 1883 Pun Re No. 137. (Dismissal for want of cause of action.)
('82) 1882 Pun Re No. 64. (Dismissal on account of want of jurisdiction.)
('36) 23 AIR 1936 Mad 165 (166) (DB). (Dismissal of a suit on the ground that the plaintiff was not entitled to raise the plea on which he founded the suit, without any enquiry into his title, cannot be taken to be a decision that for all time and in all proceedings between the parties it must be taken that the plaintiff had no title.)
('22) 9 AIR 1922 Mad 259 (262) (DB). (Dismissal for non-joinder.)
('21) 8 AIR 1921 Mad 279 (280) (DB). (Dismissal on the ground of limitation.)
† ('95) 18 Mad 466 (468). (Dismissal on technical points.)
('89) 12 Mad 500 (502) (DB). (Suit dismissed for want of notice.)
('87) 10 Mad 102 (107) (DB). (Dismissal on technical ground.)
('90) 13 Mad 510 (511) (DB). (Dismissal for failure to deposit Commissioner's fee.)
('19) 6 AIR 1919 Nag 15 (15, 16) : 16 Nag L R 206. (Dismissal on technical ground.)
('16) 3 AIR 1916 Nag 38 (38). (Dismissal on technical points.)
('12) 8 Nag L R 68 (70, 71).
('90) 3 C P L R 3(5). (Dismissal of mortgage suit on ground that the mortgage could not be split up.)
('38) 25 AIR 1938 Oudh 54 (56). (Previous suit dismissed on ground that plaintiff cannot sue alone.)
('30) 17 AIR 1930 Oudh 270 (272) : 5 Luck 684 (DB). (Point left undecided.)
('28) 15 AIR 1928 Oudh 503 (507) : 4 Luck 159 (DB). (For non-payment of court-fees.)
('15) 2 AIR 1915 Oudh 148 (149). (Dismissal for mis-joinder.)
('35) 22 AIR 1935 Pat 82 (83) (DB). (Dismissal for want of jurisdiction.)
('26) 13 AIR 1926 Pat 289 (290) : 5 Pat 276. (Application under S. 151 challenging validity of a compromise decree dismissed — Suit for the same purpose not barred.)
† ('17) 4 AIR 1917 Pat 589 (590) : 2 Pat L Jour 313 (318) (DB). (Dismissal on the ground of misdescription of property.)
[*See also* ('90) 13 Mad 44 (45) (DB). (For non-payment of court-fees.)
('35) 22 AIR 1935 Pat 59 (61) (DB). (Revision application against an order amending a consent decree behind the back of a party dismissed on the ground that Court had not exceeded its jurisdiction — Separate suit for same relief is not barred.)]
[**But see** ('67) 9 All 155 (157, 158) (DB).
('83) 5 All 595 (596) (DB).
('82) 6 Bom 477 (478) (DB).
('34) 21 AIR 1934 Rang 154 (155) (DB).]

2. ('17) 4 AIR 1917 P C 201 (203) : 45 Cal 442 : 44 Ind App 213 (PC).

(2) *A* filed a suit for a *mere* declaration against *B* and it was dismissed under Section 42 of the Specific Relief Act because a mere declaratory suit could not be maintained when the plaintiff under the law could have asked for consequential relief. The decision could not operate as *res judicata* in a subsequent suit for possession. (*Mahomed Yar* v. *Mahomed Yar.*[3])

106. Dismissal for non-prosecution or for default to do anything ordered by the Court to be done. — The dismissal of a suit for default under the provisions of O. 9 cannot operate as *res judicata*.[1] In *Chand Koer* v. *Partab Singh*,[2] the plaintiffs as nearest agnates of a deceased proprietor, sued for a declaration that a gift made by a widow of the estate of her late husband did not affect their right of succession on her death. Prior to the gift a suit, praying for a declaration and to have the widow restrained by injunction from alienating the same estate, had been struck off in 1878 for the plaintiff's default under Ss. 102 and 103 of the Code of 1877 (corresponding to O. 9, Rr. 8 and 9). The plea of *res judicata* was raised. Their Lordships of the Judicial Committee held the plea to be inoperative. The dismissal of a suit in terms of O. 9, R. 8 was plainly not intended to operate as *res judicata*. It imposes, however, when read along with O. 9, R. 9 a certain disability upon the plaintiff whose suit has been dismissed, namely, that he is thereby precluded from bringing a fresh suit in respect of the *same cause of action*.[3] But the dismissal of a claim under O. 17, R. 3 on account of the plaintiff's default in *producing evidence* to substantiate his case has the same effect as a dismissal founded upon evidence and the subject-matter of such a claim will be *res judicata*.[4] Similarly, a judgment pronounced against a party under O. 10, R. 4 (2) will operate as *res judicata*.[5]

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3. ('29) 16 AIR 1929 Lah 596 (597).

Note 106

1. ('39) 44 Cal W N 576 (579). (Dismissal under O. 9, R. 8.)
✠('88) 16 Cal 98 (101, 102): 15 Ind App 156: 1888 Pun Re No. 177 (PC).
('29) 16 AIR 1929 Bom 116 (119) (DB).
('90) 17 Ind App 150 (155) : 13 All 53 (PC).
('14) 1 AIR 1914 All 222 (223): 12 All L Jour 53 (55).
('14) 1 AIR 1914 All 83 (84).
('96) 28 All 749 (751) (SB). (Dismissal under O. 9, Rule 2.)
('29) 16 AIR 1929 Bom 217 (219) (DB).
('97) 21 Bom 91 (97) (DB).
('35) 22 AIR 1935 Cal 212 (214) : 62 Cal 15 (DB). (Former suit dismissed under Ch. 10, R. 36 of the Calcutta High Court Rules.)
('35) 22 AIR 1935 Cal 160 (166) : 61 Cal 1023 (DB).
('20) 7 AIR 1920 Cal 407 (408) (DB).
† ('17) 4 AIR 1917 Cal 11 (11) (DB).
('14) 1 AIR 1914 Cal 674 (675) (DB).
('12) 15 Ind Cas 863 (864) (DB) (Cal).
('10) 7 Ind Cas 126 (127) (DB) (Cal).
('04) 10 Cal W N 40 (41, 42) (DB).
('83) 9 Cal 163 (166) (DB). (Dismissal under O. 9, Rule 2.)
('83) 9 Cal 426 (430) : 12 Cal L Rep 29 (33) (DB).
('75) 24 Suth W R 114 (115) (DB).
('70) 14 Suth W R 81 (82) (DB).
('69) 11 Suth W R 250 (251) (DB).
('83) 1883 Pun Re No. 104.
('25) 12 AIR 1925 Mad 861 (870). (Dismissal of an application for probate.)
('24) 11 AIR 1924 Mad 473 (473, 474) (DB). (Dismissal of an application.)
('19) 6 AIR 1919 Mad 8 (9) (DB).
('20) 7 AIR 1920 Nag 113 (114).
† ('14) 1 A I R 1914 Nag 20 (21) : 10 Nag L R 39 (40).
('25) 12 AIR 1925 Oudh 337 (346) : 28 Oudh Cas 8 (DB). (Under O. 9, R. 3.)
('28) 15 AIR 1928 Pat 116 (117) (DB). (Dismissal of an insolvency petition.)
('23) 10 AIR 1923 Pat 514 (514, 515) : 2 Pat 739 (DB). (Dismissal of an appeal for default.)
('17) 4 AIR 1917 Pat 627 (629) (DB).
[*See also* ('30) 17 AIR 1930 All 727 (729).
('33) 20 AIR 1933 Pat 208 (208) : 12 Pat 179].
Also see O. 9 R. 5 Note 4 and O. 9 R. 9 Note 5.

2. ('89) 16 Cal 98 (102) : 15 Ind App 156 (PC).

3. ('20) 7 AIR 1920 All 340 (341) : 42 All 193 (195).

4. ('76) 1 Mad 84 (87) (DB).
('86) 12 Cal 563 (566) (DB).
('36) 23 AIR 1936 Lah 385 (386).
('28) 15 AIR 1928 Cal 271 (272) (DB).
† ('05) 9 Cal W N 679 (689).
('75) 23 Suth W R 58 (59).
('71) 15 Suth W R 573 (574) (DB).
('12) 1912 Pun L R No. 25, p. 86.
('08) 1908 Pun L R No. 198, p. 636.
('29) 16 AIR 1929 Mad 404 (407) (DB).
('10) 34 Mad 97 (100) : 6 Ind Cas 233 (235) (DB).
('87) 10 Mad 272 (277) (DB).
Also see O. 17 R. 3 Note 7.

5. ('11) 13 Bom L R 658 (660) (DB).

The dismissal of a suit on default of plaintiff to furnish *security for costs* or to pay *commissioner's fees* as ordered by Court does not bar a second suit on the same cause of action.[6]

On the principle enunciated in *Chand Koer* v. *Partab Singh*[7] the *abatement* of a suit cannot operate as *res judicata* though a subsequent suit on the same cause of action may be barred.[8]

107. Plea of set-off. — Where a defendant in answer to a claim against him pleads a set-off which had been adjudicated upon previously in a separate suit brought by him, the plea is unsustainable, it having been already heard and decided.[1]

108. Decision must have been necessary for the determination of the suit—General.—It has been seen in Note 7, that an unnecessary or irrelevant issue, the decision of which either way will not affect the decision of the suit, cannot be said to have been directly and substantially in issue. Where, therefore, the Court gives a finding on such an issue, the matter cannot be said to be *finally* decided and therefore cannot operate as *res judicata*.[1] It has also been seen in the same note that if a decision is based on several issues, the finding on each of the issues will operate as *res judicata*. Where however a Court, while dismissing a suit basing its decision expressly on a particular point, gives a finding against the plaintiff on another issue in order to prevent a remand in case the Appellate Court should take a different view on the other point,[2] or, while dismissing the suit as not being maintainable, gives a finding against the plaintiff on another issue,[3] the decision of the case cannot be said to be *based* upon the finding so given and the finding cannot therefore operate as *res judicata*.

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6. ('82) 6 Bom 482 (486).
('02) 26 Bom 637 (640).
('90) 13 Mad 510 (511) (DB).
7. ('89) 16 Cal 98 (102) : 15 Ind App 156 (PC).
8. ('10) 5 Ind Cas 325 (329) (All).
('04) 6 Bom L R 638 (639) (DB).

Note 107

1. † ('71) 15 Suth W R 252 (252).

Note 108

1. ('41) 28 AIR 1941 Oudh 405 (406):17 Luck 116. (Court's valuation of the suit at a certain figure at the time of returning plaint for presentation to proper Court cannot operate as *res judicata*.)
('89) 1889 Pun Re No. 157.
† ('23) 10 A I R 1923 All 495 (497) : 45 All 466 (DB).
('23) 10 AIR 1923 All 15 (16) (DB).
('20) 55 Ind Cas 938 (939) (U P B R) (DB).
('11) 11 Ind Cas 89 (90) (All).
✣('95) 17 All 174 (194) (DB).
('25) 12 AIR 1925 Bom 181 (183).
('11) 12 Ind Cas 813 (818, 819) (Bom).
('09) 11 Bom L R 366 (370).
('93) 18 Bom 597 (602).
('86) 1886 Bom P J 201 (202).
('36) 23 AIR 1936 Cal 772 (774).
('36) 23 AIR 1936 Cal 203 (204).
('34) 21 AIR 1934 Cal 430 (432) : 61 Cal 1.
('27) 14 AIR 1927 Cal 106 (107) : 53 Cal 837.
('21) 8 AIR 1921 Cal 202 (207) : 48 Cal 1059.
('19) 6 AIR 1919 Cal 55 (55).
('15) 2 AIR 1915 Cal 571 (573).
('37) 24 AIR 1937 Lah 638 (639).
('33) 20 AIR 1933 Lah 412 (415).
('33) 20 AIR 1933 Lah 218 (219).
('32) 19 AIR 1932 Lah 179 (180) : 13 Lah 524.
('30) 17 AIR 1930 Lah 149 (150).
('29) 16 AIR 1929 Lah 437 (438).
('28) 15 AIR 1928 Lah 967 (969) : 10 Lah 389.
('27) 14 AIR 1927 Lah 804 (805).
('23) 10 AIR 1923 Lah 248 (249).
('14) 1 A I R 1914 Lah 289 (290) : 1914 Pun Re No. 102.
('14) 1 AIR 1914 Lah 76 (78).
('13) 1913 Pun L R No. 156, p. 533.
('11) 1911 Pun L R No. 120, p 457.
('02) 1902 Pun L R No. 10, p. 39.
('98) 1898 Pun Re No. 31.
('84) 1884 Pun Re No. 29.
('12) 15 Ind Cas 229 (231) (Mad).
('11) 9 Ind Cas 787 (787, 788) (Mad).
† ('30) 17 AIR 1930 Oudh 124 (127, 128):4 Luck 404 (DB).
('21) 11 AIR 1924 Oudh 205 (206).
'25) 12 AIR 1925 Oudh 190 (196) (DB).
('24) 5 L R Oudh (Rev) 101 (102).
('23) 10 AIR 1923 Oudh 139 (141) (DB).
('18) 5 AIR 1918 Oudh 275 (277).
('17) 4 AIR 1917 Pat 622 (623).
('36) 23 AIR 1936 Pesh 61 (63) (DB).
('38) 25 AIR 1938 Rang 275 (275) (DB).
('34) 21 AIR 1934 Rang 375 (377).
('12) 6 Low Bur Rul 93 (93) (DB).
[*See* ('38) 173 Ind Cas 447 (448) (PC).]
[*See also* ('30) 17 AIR 1930 Pat 71 (75) (DB).]
Also see Notes 7, 14 and 23.
2. ('24) 11 AIR 1924 Mad 893 (894) (DB).
3. ('25) 12 AIR 1925 Cal 996 (1000) (DB).
('10) 7 Ind Cas 967 (968) : 35 Bom 38 (DB).
('18) 5 AIR 1918 Lah 40 (41).

109. Plaintiff's suit wholly dismissed — Adverse finding against defendant.—It has been seen in Note 7, that an adverse finding against the successful party is not *res judicata* in a subsequent suit between the parties. Thus, where a decree is one of dismissal in favour of the defendant but there is an adverse finding against him on one point, a plea of *res judicata* cannot be founded upon that decision; because the defendant having succeeded on the other plea, had no occasion to go further as to the findings against him.[1]

In *Thakur Magundeo* v. *Thakur Mahadev Singh*,[2] a landlord sued to eject his tenant who defended upon the ground that the tenure was permanent. A previous suit by the plaintiff had been dismissed on the ground that no notice to quit had been served, but the Court held at the same time that the tenure was not permanent. It was held that the previous decision was not *res judicata*, "the decree dismissing the suit being based, not upon the finding adverse to the defendant in that case, but *in spite of it*."[3] Where, however, the *decree itself embodies the finding*, it cannot be said to be not *res judicata* merely because the suit itself was dismissed on another point.[4]

110. Suit wholly decreed — Adverse finding against plaintiff. — The principles stated in Note 109 apply equally to a case where a plaintiff's suit is entirely decreed in his favour with an adverse finding against him.[1]

('79) 1879 Pun Re No. 27 (FB).
('16) 3 AIR 1916 Oudh 6 (7):19 Oudh Cas 69 (DB).

Note 109

1. ✣('22) 9 AIR 1922 P C 241 (243) :48 Cal 460:48 Ind App 49 (PC).
('33) 20 A I R 1933 Oudh 439 (450) : 8 Luck 602 (DB).
('38) 25 AIR 1938 All 491 (497) (DB).
✣('36) 23 AIR 1936 All 21 (23) : 58 All 313 (FB).
('24) L R 5 All (Rev) 3 (5).
('23) 10 AIR 1923 All 15 (16, 17) (DB).
('99) 1899 All W N 182 (183) (DB).
✝('95) 17 All 174 (193) (DB).
('95) 1895 All W N 108 (109).
✝('85) 7 All 606 (611) (FB).
('37) 24 AIR 1937 Bom 208 (209).
('20) 7 A I R 1920 Bom 335 (336) : 44 Bom 321 (325, 326) (DB).
('19) 6 AIR 1919 Bom 81 (83) : 43 Bom 568 (571, 572, 574) (DB).
('94) 18 Bom 597 (603) (DB).
('83) 7 Bom 464 (466) (DB).
('35) 22 AIR 1935 Cal 733 (735).
('30) 17 AIR 1930 Cal 5 (7) : 56 Cal 639.
('23) 10 AIR 1923 Cal 297 (297) (DB).
(19) 6 AIR 1919 Cal 500 (501) (DB).
('17) 4 AIR 1917 Cal 398 (399) (DB).
('12) 40 Cal 29 (32) : 15 Ind Cas 453 (454) (DB).
('05) 9 Cal W N 60 (66) (DB).
('01) 5 Cal W N 445 (446, 447) (DB).
('91) 18 Cal 647 (651) (DB).
('86) 13 Cal 17 (20) (DB).
✝('85) 11 Cal 301 (306) (PC).
(1865) 4 Suth W R 104 (104) (DB).
('38) 25 AIR 1938 Lah 179 (180) (DB).
('12) 1912 Pun Re No. 42: 1912 Pun L R No. 154, p. 471 (DB).
('35) 22 AIR 1935 Mad 701 (703).
('32) 19 AIR 1932 Mad 207 (211): 55 Mad 483(DB).
('25) 12 AIR 1925 Mad 52 (52) (DB).
('24) 11 AIR 1924Mad469 (470) : 47 Mad 453(DB).
('22) 9 AIR 1922 Mad 514 (517) (DB).
('19) 6 AIR 1919 Mad 212 (213) (DB).
('16) 3 AIR 1916 Mad 618 (618) (DB).
('13) 21 Ind Cas 219 (221) (DB) (Mad).
('15) 2 AIR 1915 Mad 294 (295):37 Mad 25:12 Ind Cas 167 (168) (DB).
('84) 7 Mad 145 (149) (DB).
('82) 4 Mad 134 (136) (DB).
('23) 10 AIR 1923 Nag 139 (139).
('24) 11 AIR 1924 Nag 333 (334).
('18) 5 AIR 1918 Nag 91 (92).
('92) 6 C P L R 87 (89).
('36) 23 AIR 1936 Oudh 189 (191). (Finding though not *res judicata* still throws heavy onus on such party in subsequent suit to prove that finding in prior suit is wrong — Judgment in prior suit is admissible.)
('28) 15 AIR 1928 Oudh 241 (244) : 3 Luck 392 (DB).
('24) 11 AIR 1924 Oudh 205 (206).
('15) 2 Oudh L Jour 386 (387).
('34) 21 AIR 1934 Rang 375 (377).
('92) 1892 Low Bur Rul 625.
[But see ('28) 15 AIR 1928 Cal 706 (708).
('32) 19 AIR 1932 Lah 421 (422).
('20) 7 AIR 1920 Mad 871 (873, 875) (DB). (This is no longer law in view of AIR 1922 P C 241 : 48 Cal 460 : 48 Ind App 49 (PC).)
('20) 7 AIR 1920 Mad 622 (624) (DB). (Do.)
('19) 6 AIR 1919 Mad 1097 (1099) (DB). (Do.)]
2. ('91) 18 Cal 647 (651).
3. *See* ('29) 16 AIR 1929 All 910 (912) (DB).
4. ('29) 16 AIR 1929 Cal 449 (450) (DB).
✝('24) 11 AIR 1924 Mad 626 (632, 633) (DB). (Cost to defendants disallowed as finding on main issue going against them; such finding is *res judicata*.)
('16) 3 AIR 1916 Bom 277(278): 40 Bom 662 (DB).

Note 110

1. ✝('99) 23 Bom 296 (302) (DB).

111. Finality of appealable decisions.—Where an appeal is *filed* against a decree, the finality of the decisions of the lower Court is destroyed and the matter again becomes *sub judice*.[1] "Where an appeal lies, the finality of the decree *on such appeal being taken*, is qualified by the appeal and the decree is not final in the sense that it will form *res judicata* as between the same parties."[2] But the mere possibility of an appeal being filed does not affect the finality of the decree.[3] The view expressed in the undermentioned cases[4] that a judgment *liable to appeal* is only a *provisional* and not a *final* adjudication and therefore cannot operate as *res judicata* does not appear to be sound on principle. No one can predicate when a decision is likely to become final. For, any party can appeal from a decision after an indefinitely long time taking advantage of S. 5 of the Indian Limitation Act, provided, of course, sufficient cause is shown.

If a decision is appealed against, it is the appellate judgment that must be looked into in order to decide a question of *res judicata*.[5] An appellate judgment operates by way of *res judicata* as regards all the findings of the lower Court which, though not expressly referred to in it, are necessary to sustain the appellate decree.[6] If the appeal is withdrawn or is dismissed on a preliminary point without a decision on the merits, or is dismissed for default of appearance of the appellant, the parties are bound by the decision of the lower Court on each point as actually decided by it.[7] But if the appeal is allowed on preliminary points, then the findings of the trial Court are not *res judicata*.[8]

('32) 19 AIR 1932 Mad 541 (541) (DB).
('29) 16 AIR 1929 All 910 (912) (DB).
('26) 13 AIR 1926 Cal 672 (676) (DB).
('30) 17 AIR 1930 Lah 149 (150) (DB).
('14) 1 AIR 1914 Lah 289 (290) : 1914 Pun Re No. 102 (DB).
† ('33) 20 AIR 1933 Mad 770 (771).
('32) 19 AIR 1932 Mad 207 (211) : 55 Mad 483 (DB).
('38) 25 AIR 1938 Oudh 18 (19).
[But see ('27) 14 AIR 1927 Mad 643 (644). (Submitted wrongly decided.)]

Note 111

1. ('31) 18 AIR 1931 Sind 170 (172, 173) (DB).
('27) 14 AIR 1927 Lah 1 (1) : 7 Lah 423 (DB).
('32) 19 AIR 1932 All 288 (288) : 54 All 444 (DB). (In execution proceedings.)
† ('89) 11 All 148 (161) (FB).
('86) 13 Cal 13 (15, 16) (DB).
('38) 25 AIR 1938 Lah 232 (234) (DB). (Former decree set aside by Appellate Court while appeal in subsequent suit was pending — Former decree is not *res judicata* in such appeal.)
('31) 18 AIR 1931 Lah 161 (162): 12 Lah 497 (DB).
† ('17) 4 AIR 1917 Mad 597 (598) (DB).
('08) 4 Nag L R 98 (103).
[*See also* ('31) 18 AIR 1931 Cal 239 (240, 241) (DB).]
[But see ('66) 4 Bom H C R A C 81 (85) (DB). (Submitted wrongly decided.)]
2. ('31) 18 AIR 1931 P C 263 (264) (PC).
[But see ('38) 25 AIR 1938 All 635 (636) (DB). (Decision in second appeal that firm did not possess certain land—Letters Patent appeal pending —Subsequent suit against firm by other party to appeal for possession of same land under S. 9, Specific Relief Act — Court trying suit is bound by decision in second appeal on question of possession.)]
3. ('26) 13 AIR 1926 Rang 122 (123) : 4 Rang 6 (DB).
4. ('89) 11 All 148 (161) (FB). (The observation was obiter in this case.)
('17) 4 AIR 1917 Mad 597 (598) (DB). (Do.)
('38) 25 AIR 1938 Lah 232 (234) (DB). (Following AIR 1916 Lah 177 : 1916 Pun Re No. 48.)
('16) 3 AIR 1916 Lah 177 (179) : 1916 Pun Re No. 48 (DB).
('08) 4 Nag L R 98 (103).
[*See* ('35) 22 AIR 1935 Cal 306 (307) (DB). (Execution proceedings—Judgment-debtor not objecting though notice sent to him — Attachment directed — Subsequent objection by judgment-debtor *held* not barred by *res judicata* as such objection was raised before expiry of time for appeal or review against order for attachment.)]
5. ('39) 26 AIR 1939 Bom 522 (524) : ILR (1939) Bom 639.
('12) 39 Cal 925 (929) : 14 Ind Cas 299 (300).
('15) 2 AIR 1915 All 360 (364) : 37 All 496 (511, 514).
('34) 21 AIR 1934 Bom 313 (317) : 58 Bom 544 (DB). (Finding based on evidence on a ground different from that given by lower Court would operate as *res judicata*.)
6. ('05) 28 Mad 338 (341) (DB).
7. ('83) 6 Mad 43 (46, 47). (Withdrawal.)
('32) 19 AIR 1932 All 603 (605).
('13) 37 Bom 172 (176). (Withdrawal.)
('08) 4 Nag L R 98 (103, 104). (Dismissed on the ground of limitation.)
('31) 18 AIR 1931 Sind 170 (173) : 25 Sind L R 493. (Appeal dismissed for default.)
[*See also* ('36) 23 AIR 1936 Pat 198 (199): 14 Pat 633. (If the appeal fails, or abates or is otherwise not proceeded with, the judgment becomes final, and does not lose its effect or finality for the purpose of *res judicata*.)]
8. ('32) 19 AIR 1932 Lah 452 (454) : 13 Lah 375.

Where there is a decree or an order against a party and he, having a right to appeal against it, does not avail himself of that remedy, the decision becomes final and cannot be attacked later in the course of the same proceeding or in a separate proceeding,[9] although another party to the suit may have appealed against the decree.[10] Where on the dismissal of his suit the plaintiff appeals only in respect of a portion of the disputed property and the appellate Court restricts its decision to that portion, it cannot be said that the decision of the lower Court regarding the remaining portion merged in the appellate decision. The former decision will, therefore, operate as *res judicata*.[11]

112. Finality of provisional orders. — A provisional order, as in the case of orders under O. 21, R. 63, which grows into a permanent one, when steps are not taken, or being taken fail to displace it within a certain time, becomes *res judicata* after the lapse of that time.[1] Hence, a claimant in proceedings under O. 21, R. 58 who brings a suit under O. 21, R. 63 to displace an order against him in such proceedings is not precluded by *res judicata* from raising in such suit points which were not raised by him in the prior proceedings.[2] As to whether decrees *liable* to appeal are not final decisions but only provisional ones, see Note 111.

113. Finality of conditional decrees. — A decree, which imposes a condition on the performance of which within a specified time it is to take effect, and on the failure of which the suit is to stand dismissed, will not, where the suit has been dismissed for failure to perform the condition, bar a subsequent suit for the same relief *after the performance* of the condition.[1] In *Mt. Maina Bibi* v. *Chaudhri Vakil Ahmad*,[2] a suit for immediate possession by the heirs of a deceased Mahomedan against his widow who was in possession in lieu of dower due to her, was decreed in favour of the plaintiffs on condition that they paid a certain sum to the widow, being the balance of dower amount remaining unsatisfied. The suit was ultimately dismissed on plaintiffs' default in payment. In a subsequent suit for possession by the same persons after the widow's claims were satisfied from the usufruct of the properties, it was held that the claim was not barred. The reason is that the right to get immediate possession of land at the date of the prior suit is a wholly different *res* from the right to recover it at some future time and possibly under wholly altered circumstances. The non-fulfilment of the condition attached to the decree in the earlier suit only extinguished the right to recover immediate possession and could not and did not extinguish the right of the plaintiffs to the possession of the inheritance. See Note 36.

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9. ('96) 19 Mad 249 (253).
('22) 9 AIR 1922 Lah 361 (361).
('09) 36 Cal 336 (344):36 Ind App 27 : 1 Ind Cas 124 (125) (PC).
('37) 24 AIR 1937 All 54 (55). (Decision not appealed against, whether right or wrong, operates as *res judicata*.)
('10) 5 Ind Cas 210 (210) (All).
('02) 24 All 361 (363).
('31) 18 AIR 1931 Cal 397 (400). (Where state of affairs after decision in suit still continues the decision operates as *res judicata*.)
[*See also* ('27) 14 AIR 1927 P C 252 (255) : 6 Rang 29 : 55 Ind App 7 (PC).]

10. ('37) 1937 Oudh W N 429 (433).

11. ('40) 45 Cal W N 854 (858).

Note 112

1. ('83) 7 Bom 408 (410).
[*See also* ('40) 27 AIR 1940 Cal 16 (17). (Finding of fact arrived at in the summary proceeding under R. 100 of O. 21 would not be *res judicata* in a subsequent suit — AIR 1928 P C 139 : 55 Ind App 256 : 51 Mad 349 (PC) relied on.)]

2. ('37) 24 AIR 1937 Pesh 13 (16).
[*See also* ('83) 7 Bom 408 (410). (Rejection of claim held not *res judicata*.)]

Note 113

1. ('25) 12 AIR 1925 P C 63 (70) : 47 All 250 : 52 Ind App 145 (PC). (Affirming AIR 1919 All 128 : 41 All 538.)
('27) 14 AIR 1927 All 39 (40) : 48 All 803.
('15) 2 AIR 1915 Lah 165 (166).
('09) 1909 Pun Re No. 100 : 4 Ind Cas 854 (855).
('79) 1879 Pun Re No. 93 (FB).

2. ('25) 12 AIR 1925 P C 63 (69) : 47 All 250 : 52 Ind App 145 (PC).

114. Consent decrees. — This section is not strictly applicable to compromise decrees, as it applies in terms only to what has been *heard and finally decided* by a Court.[1] But a judgment by consent raises an estoppel between the parties as much as a judgment whereby the Court exercises its mind on a contested case ; for "a judgment by consent is intended to put a stop to litigation between the parties, just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end."[2] (See also O. 23, R. 3 Note 24.) But an estoppel by a consent decree can arise only when the question raised in the subsequent suit was present to the minds of the parties and was actually dealt with by the consent decree. The question in all such cases would be whether the parties did intend that the question at issue should be finally settled between them by the consent decree and whether the consent decree did actually settle that question.[3] In order to effect an estoppel it is also necessary that it should

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Note 114

1. ('29) 16 AIR 1929 Mad 96 (103).
('33) 20 AIR 1933 Sind 53 (55).
('30) 17 AIR 1930 All 619 (619). (Omission to settle a part of the dispute in consent decree — Subsequent suit not barred.)
('29) 16 AIR 1929 All 243 (249): 51 All 575. (Compromise decree cannot be taken to decide every point that ought to have been pleaded.)
('24) 11 AIR 1924 All 905 (906) : 46 All 820.
('06) 30 Bom 395 (408) (DB).
('26) 13 AIR 1926 Cal 672 (675). (DB).
('25) 12 AIR 1925 Cal 1011 (1012) (DB).
('21) 8 AIR 1921 Cal 202 (206, 207) : 48 Cal 1059. (Compromise decree in so far as it relates to extraneous matters is not *res judicata*.)
('07) 36 Cal 193 (223): 5 Cal L Jour 611 (636) (DB.)
('30) 17 AIR 1930 Lah 487 (488).
('24) 11 AIR 1924 Lah 469 (470) (DB).
('29) 16 AIR 1929 Mad 379 (381) (DB).
('16) 3 AIR 1916 Mad 411 (411) (DB). (Omission to settle a part of the dispute in consent decree — Subsequent suit not barred.)
† ('12) 17 Ind Cas 434 (435) (DB) (Mad).
('11) 11 Ind Cas 834 (835) (DB) (Mad).
('11) 35 Mad 75 (80) : 9 Ind Cas 875 (881) (DB).
('10) 8 Ind Cas 261 (264) (DB) (Mad).
[But sse ('39) 26 AIR 1939 Oudh 269 (272) : 14 Luck 763 (DB). (It cannot be said that a consent decree can never operate as *res judicata* in a subsequent suit.)]

2. ('41) 28 AIR 1941 Nag 346 (350) (DB). (63 Cal 550 followed.)
('41) 28 AIR 1941 Nag 271 (272) : I L R (1942) Nag 498.
('41) 28 AIR 1941 All 18 (23) : I L R (1940) All 691 (DB).
('40) 27 AIR 1940 Pat 406 (409) (DB).
('24) 11 AIR 1924 Mad 88 (89, 90) (DB).
('70) 13 Moo Ind App 497 (517, 518) (PC).
† ('29) 16 AIR 1929 P C 289 (294) (PC).
('15) 2 AIR 1915 All 332 (333) : 38 All 75 (DB).
('22) 9 AIR 1922 All 19 (20) : 44 All 334 (DB).
('13) 35 All 428 (431, 432) (DB).
('36) 23 AIR 1936 Bom 301 (304) (DB). (Plea of estoppel will prevail even when the result of giving effect to it will be to sanction what is prohibited by statute unless the consent decree is set aside in a separate suit.)
('28) 15 AIR 1928 Bom 279 (281) (DB).
('11) 35 Bom 371 (378) (DB).
('11) 36 Bom 283 (287) : 12 Ind Cas 535 (535, 536).
(1900) 24 Bom 77 (85) (DB).
† ('36) 63 Cal 550 (558) (DB).
('36) 63 Cal 454 (463). (The Court, if the matter is in any way challenged, should be careful to see that the decree if, by consent, is not vitiated by fraud or otherwise.)
('28) 15 AIR 1928 Cal 852 (853) (DB).
('26) 13 AIR 1926 Cal 672 (675) (DB).
('15) 2 AIR 1915 Cal 464 (467) (DB).
('12) 14 Ind Cas 713 (714) (DB) (Cal).
('07) 5 Cal L Jour 15 (17) (DB). (Agreement outside the scope of the suit compromised not to operate as bar for subsequent suit.)
('05) 1 Cal L Jour 388 (396) (DB).
('98) 2 Cal W N 174 (175) (DB).
('97) 24 Cal 216 (237).
('17) 4 AIR 1917 Lah 11 (12) : 1917 Pun L R No. 55, page 143.
('04) 1904 Pun Re No. 1.
('11) 36 Mad 46 (49) : 12 Ind Cas 317 (320) (DB).
('02) 12 Mad L Jour 445 (447) (DB).
† ('99) 22 Mad 508 (514) : 26 Ind App 101 (PC).
('95) 18 Mad 1 (12) : 21 Ind App 128 (PC). (Affirming 14 Mad 153).
('17) 4 AIR 1917 Nag 37 (39): 14 Nag LR 35 (40).
('29) 16 AIR 1929 Oudh 63 (64): 4 Luck 181 (DB).
('22) 9 AIR 1922 Oudh 34 (37) (DB).
('99) 2 Oudh Cas 112 (114).
('99) 2 Oudh Cas 28 (32).
('24) 11 AIR 1924 Pat 823 (824).
('21) 8 AIR 1921 Pat 131 (134) : 6 Pat L Jour 208 (DB).
('17) 4 AIR 1917 Pat 9 (10) : 1 Pat L Jour 208 (211).
('36) 23 AIR 1936 Sind 99 (101) : 29 Sind L R 455 (DB).
('11) 4 Sind L R 271 (275) (DB).

3. ('41) 28 AIR 1941 Pat 536 (539). (Consent decree — Question in issue in subsequent suit not being subject-matter in earlier suit which was compromised—Consent decree does not operate as *res judicata*.)
('16) 3 AIR 1916 Mad 411 (411) (DB).
('34) 21 AIR 1934 Mad 454 (456).
('38) 25 AIR 1938 Mad 225 (226).
('35) 22 AIR 1935 Pat 59 (61).
('20) 7 AIR 1920 Pat 212 (215) (DB). (Matter left open by consent decree not *res judicata*.)

appear on record that the question had been put in issue. Thus, in a prior suit for a certain sum of money on account of cesses, defendants appeared in person, filed no written statement and simply confessed judgment whereupon a decree was passed against them, it was held that the prior decision did not preclude the defendants from disputing in a subsequent suit the right of the plaintiff to levy the cess.[4]

A compromise decree cannot create an estoppel between the parties to it, where the parties have subsequently entered into another compromise which has been embodied in a decree.[6]

A party to a suit who is not a party to the compromise is not bound by the compromise or the decree based on it and such decree cannot operate as an estoppel against him.[6]

A consent decree can be set aside either by a regular suit or by an application for review of judgment, but not by a rule or motion.[7] It can be set aside on any ground which would justify a cancellation of the agreement on which the decree is based. (See O. 23, R. 3 Note 28.)

115. Declaratory decrees. — Where the decree in a prior suit is merely declaratory in its nature and does not give consequential relief, a subsequent suit for working out the rights so declared would not be barred[1] though the decree will be conclusive as to the rights which were declared.[2] See Note 36.

It has been held that apart from the provisions of this section, a declaratory decree is conclusive between the parties to it under S. 43 of the Specific Relief Act and hence, though in a particular case such a decree may not operate as *res judicata* under this section, the re-trial of the questions decided by the decree will be barred under the provisions of S. 43 of the Specific Relief Act.[3]

116. Finality of decrees in redemption suits. — Where in a suit for redemption of a mortgage a decree is passed to the effect that the right to redeem shall be *extinguished* upon the non-payment of the money within the time allowed, a second suit for redemption after the previous decree is allowed to become final by non-payment, is barred by *res judicata*.[1] Where, however, the decree does not provide that the right to

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[*See* ('36) 63 Cal 550 (558) (DB). (Consent decree operates as estoppel not only with regard to the conclusions but also to the findings on the essential facts on which the judgment on the ultimate conclusion is founded.)]

[But see ('35) 22 AIR 1935 Lah 487 (488) (DB). (Grounds of attack or defence which might and ought to have been raised cannot be reagitated in subsequent suit.)

('36) 23 AIR 1936 Sind 99 (101) : 29 Sind L R 455 (DB). (Constructive *res judicata*—Principle applies to consent decree.)]

4. ('29) 16 AIR 1929 Mad 694 (696).

5. ('33) 20 AIR 1933 Cal 69 (71) : 59 Cal 513. (The word *res judicata* seems to be loosely used instead of 'estoppel'.)

6. ('39) 26 AIR 1939 Pat 225 (228) (DB).

7. ('11) 36 Bom 77 (78).
('33) 20 AIR 1933 Sind 29 (31): 26 Sind L R 395.
('11) 13 Bom L R 332 (336, 339).

Note 115

1. ('84) 7 Mad 80 (82) (DB).
† ('21) 8 AIR 1921 Low Bur 22 (24): 11 Low Bur Rul 60.
('81) 3 All 297 (302, 303) (DB).
('89) 12 Mad 183 (186) (DB). (But if prior decree awards consequential relief also, subsequent suit would be barred.)
('27) 14 AIR 1927 Oudh 457 (460) (DB).
('05) 8 Oudh Cas 361 (370) (DB).
('03) 6 Oudh Cas 239 (245) (DB).
[*See* ('42) 29 AIR 1942 Bom 44 (46): ILR (1942) Bom 14 (DB). (Suit in 1924 by co-tenant for share of income—No ouster claimed or decided—Claim decreed—Subsequent suit by son of such co-tenant for partition of same property held not barred by S. 11 or S. 47. Whether the previous decree was held to be a declaratory decree or not.)]
Also see S. 47, Note 33.

2. ('73) 19 Suth W R 175 (176) (PC).
('98) 21 Mad 344 (351) : 25 Ind App 102 (PC).
('85) 9 Bom 111 (114) (DB).
('76) 25 Suth W R 225 (226) (DB).
('66) 5 Suth W R 90 (90) (DB).
(1865) 2 Suth W R Act X 69 (70) (DB).

3. ('36) 23 AIR 1936 Mad 951 (953) (DB).

Note 116

1. ('94) 17 Mad 96 (98) (DB).

redeem shall be extinguished on non-payment of the mortgage money within the time fixed, there will be no such bar.[2] See Note 40. In any case, the findings as to the *amount due* and similar questions, arrived at in the previous suit, cannot be re-opened in the subsequent suit.[3]

117. Decision need not have been embodied in the decree. — It has been seen in Note 100 that all matters *necessarily* involved in the decision will be deemed to have been heard and decided. It is not necessary that the decree should expressly refer to such a matter.[1]

118. Decision need not be express but may be implied. — As has been seen in Note 100, where a question was necessarily decided in *effect*, though not in *express* terms. the decision cannot be re-agitated as between the parties to the suit in any other form in any other suit.[1] But the decision in the former suit must *necessarily involve* an adjudication in a particular way on the issue raised in the later suit and such adjudication must be *inconsistent* with the claim made in the later suit.[2] Again, if the matter was not *raised at all* in the previous suit, there can be no question of implied decision in the prior suit.[3] See Note 12.

119. How to determine what issues were decided—General. — The question whether a matter was raised and then heard and finally decided is one of fact to be decided upon the circumstances of each particular case[1] and the burden of establishing the plea of *res judicata* lies upon the party setting it up.[2] It cannot be maintained where the decree or order upon which it rested has not been produced.[3]

Even if the judgment in the prior suit shows clearly enough what the Judge understood to be the questions for decision, the Court cannot give effect to the plea unless it can say for itself that the matters now in issue were in issue in the former proceedings; whether any issues were settled in those proceedings or the points in dispute were

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('19) 6 AIR 1919 Bom 34 (35) : 43 Bom 703 (706, 707) (DB).
('25) 12 AIR 1925 All 484 (486).
('07) 29 All 481 (484) (DB).
† ('22) 9 AIR 1922 Bom 127 (127, 129) : 46 Bom 348 (DB).
2. † ('34) 21 AIR 1934 P C 205 (207) : 56 All 561: 61 Ind App 362 (PC).
3. ('29) 16 AIR 1929 All 814 (815) (DB).
('29) 16 AIR 1929 All 409 (411) (DB).
('17) 4 AIR 1917 Lah 446 (447) (DB).
('98) 21 Mad 18 (25) (DB). (Overruled in 25 Mad 300 (FB) on other point.)

Note 117

1. † ('94) 21 Cal 252 (255) (DB).
('91) 15 Bom 89 (92).
('08) 5 All L Jour 48 (51, 52).
('07) 3 Nag L R 35 (40).
('06) 28 All 365 (371, 372) (DB).

Note 118

1. ('41) 28 AIR 1941 Nag 346 (350) (DB).
† ('73) 20 Suth W R 377 (380) : Ind App Sup Vol 212 (PC).
('75) 1 Cal 144 (146) (P C).
('04) 6 Bom L R 288 (290) (DB).
('91) 15 Bom 89 (92).
('20) 7 AIR 1920 Cal 253 (254) (DB).
('02) 29 Cal 252 (256) (DB).
('72) 18 Suth W R 182 (183) (PC).
('28) 15 AIR 1928 Lah 888 (891) (DB).
('19) 6 AIR 1919 Mad 597 (598).
('15) 2 AIR 1915 Mad 106 (107):39 Mad 1202 (FB).
✠('14) 1 AIR 1914 Mad 399 (413, 414):37 Mad 70: 17 I. C. 445 (452) (FB). (Overruling 10 Ind Cas 75.)
('03) 26 Mad 403 (410) (DB).
('26) 13 AIR 1926 Oudh 101 (107) (DB).
Also see Note 100.
2. ('14) 1 AIR 1914 Mad 399 (406) : 37 Mad 70:17 Ind Cas 445 (452) (FB).
('31) 18 AIR 1931 Cal 353 (357) (DB).
3. ('25) 12 AIR 1925 P C 184 (187) : 52 Cal 971 : 52 Ind App 294 (PC).
('18) 5 AIR 1918 Mad 884 (887) (SB).
[*See* ('32) 19 AIR 1932 Bom 3 (7).]

Note 119

1. ('19) 6 AIR 1919 Bom 81 (82) : 43 Bom 568 (DB).
('17) 4 AIR 1917 All 21 (26) (DB).
('11) 13 Bom L R 1061 (1071, 1076) (DB).
2. ('07) 1907 Pun W R No. 66, p. 383 (FB).
3. ('91) 18 Cal 216 (224) : 17 Ind App 181 (P C).
Refique and Jackson's P C No. 122.
('35) 156 Ind Cas 970 (971) (All).
('97) 1897 Bom P J 67 (69) (DB).
† ('35) 22 AIR 1935 Cal 792 (796) (DB). (Decision of lower Court confirmed on appeal—Judgment of appellate Court not produced.)
See also Note 6.

otherwise formulated must appear from the record.[4] The baro wording of the decree is not the sole test of what the Court decided in the prior suit; so that if it is not clear from the decree, the Court may and should look into the judgment and the pleadings in the case.[5] As the plea of *res judicata* is one in bar of legal rights, it should be given effect to only on a strict construction of the pleadings and of the decisions in the previous suits.[6] In order to render a prior decision conclusive in a subsequent suit is must appear from the record of the former suit that the particular matter sought to be concluded was necessarily determined. If there be any uncertainty on this head in the record, as for example, if it appears that several distinct matters may have been litigated, upon one or more of which the judgment may have been passed, without indicating which of them was thus litigated and upon which the judgment was rendered, the whole subject-matter of the action will be at large.[7]

120. Reference to judgment. — In order to see what was in issue in a suit or what has been heard and decided, the judgment[1] must be looked at. For, the decree, according to the Code, is only to state the relief granted or other determination of suit. The determination may be on various grounds, but the decree would not show the *ground*, and will not afford any information as to matters which were in issue or have been decided.[2] But if a decree is specific and is at variance with a statement in the judgment, regard must be had to the decree and not to the statement in the judgment.[3]

121. Reference to pleadings. — See Note 119.

122. Extrinsic evidence. — If there is any ambiguity in the record of the prior proceeding as to what matters were decided therein, it will not be open to the parties to adduce extrinsic evidence to show that a particular matter was decided.[1] In such cases the former decision will not operate as *res judicata*.[2] But if the uncertainty be

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4. ('06) 33 Cal 116 (127) : 32 Ind App 244 (PC).
('97) 24 Cal 504 (519, 520) : 24 Ind App 33 (PC).
('13) 18 Ind Cas 1007 (1007) (Lah).
('07) 1907 Pun W R No. 66, p. 383 (FB).
('29) 16 AIR 1929 Mad 545 (561) (DB). (Should not base its conclusion from stray clauses in the plaint.)
('34) 21 AIR 1934 Oudh 265 (271) (DB). (In order to decide question of *res judicata*, the pleadings., the issues and the decision in the case must be referred to.)
[*See* ('43) 22 Pat 220 (253, 254) (DB). (Interest on arrears of royalty granted to plaintiff in earlier case—Special circumstances or grounds on which it was granted not mentioned—*Held*, Court was not bound to grant interest' in subsequent case between same parties.)]

5. ('92) 19 Cal 159 (172).
('33) 20 AIR 1933 Cal 222 (230) (DB).
('87) 1887 All W N 1 (4) (DB).
('11) 13 Bom L R 162 (171).
†('31) 18 AIR 1931 Cal 511 (513) (DB). (Decree silent on a point—This by itself is no criterion.)
('12) 13 Ind Cas 82 (83) (DB) (Cal).
('09) 4 Ind Cas 81 (84) (DB) (Cal).
('09) 36 Cal 193 (209) : 1 Ind Cas 913 (920) (DB).
✠('05) 1 Cal L Jour 337 (349) (DB).
('18) 5 AIR 1918 Lah 250 (255) : 1918 Pun Re No. 13 (DB).
('07) 1907 Pun W R No. 66, p. 383 (FB).
('94) 1894 Pun Re No. 60 (SB).
('36) 23 AIR 1936 Mad 469 (470).
('98) 11 C P L R 130 (131, 132).
†('30) 17 AIR 1930 Pat 71 (74) (DB).
('17) 4 AIR 1917 Pat 653 (654) : 2 Pat L J 159 (DB).
('18) 5 AIR 1918 Low Bur 135 (136) (DB). (Pleading should be construed in the same way as in the previous suit.)
[But see ('82) 4 Mad 134 (136) (DB). (Submitted wrong.)]

6. ('29) 16 AIR 1929 All 29 (31).
('29) 16 AIR 1929 All 506 (508) : 51 All 805 (DB). (Plea in bar can be allowed to succeed only where the law expressly provides for it or the implication is so irresistible that its provisions are inconsistent with a contrary hypothesis.)
See also Note 6.

7. ('01) 11 Mad L Jour 379 (389) (DB).
('83) 1883 All W N 190 (192) (DB).
('02) 26 Bom 25 (32) (DB).
†('31) 18 AIR 1931 Mad 381 (396) (DB).

Note 120

1. †('39) 26 AIR 1939 Pat 19 (20) (DB).
2. ✠('89) 16 Cal 173 (183) : 15 Ind App 186 (PC).
('98) 21 Mad 344 (350) : 25 Ind App 102 : 2 Cal W N 337 (340) (PC).
('03) 27 Bom 418 (423) : 5 Bom L R 396 (397) (DB).
('25) 12 AIR 1925 Cal 1116 (1118).
('04) 31 Cal 95 (101) (DB).
†('19) 6 AIR 1919 Pat 196 (199) (DB).
[But see ('85) 8 Mad 77 (78) (DB). (Wrongly decided.)]
3. †('93) 15 All 3 (5) (DB).

Note 122

1. ('97) 24 Cal 504 (519, 520) : 24 Ind App 33 (PC).
2. ('23) 10 AIR 1923 Mad 514 (515) (DB).

with regard to the meaning of certain indefinite terms used in the prior decree, the acts of the parties can be taken into consideration in fixing the meaning of such terms.[3]

123. Relief claimed but not granted — Explanation V — General. — The legal effect of this explanation is to treat the omission to grant a relief asked for as equivalent to an *express refusal* to grant it.[1] Thus, where in a suit on a security bond, praying for a money decree and in default of payment of money by the defendant for the sale of the secured properties, the Court granted only a money decree, the prayer for the sale of the properties must be deemed to have been refused and such refusal will operate as *res judicata* in a subsequent suit for sale of the said properties.[2] But it is necessary that a *decree should have been passed* in the suit, a relief claimed in which is omitted to be granted. Where, therefore, the suit did not result in a decree at all, as where it is withdrawn without liberty to bring a fresh suit,[3] or where no relief is asked for in the plaint, or the Court refuses to grant a relief on the ground that no such relief is claimed in the plaint,[4] or where the Court *could* not grant the relief, as where a personal remedy is asked for in the plaint in a mortgage suit, which could not be granted at the time of passing the decree for sale,[5] the explanation does not apply. Nor does it apply to consent decrees.[6] See Note 114.

Where a particular relief asked for in a prior suit was not objected to by the other parties, but somehow or other the decree omitted to grant the relief, it cannot be said that a subsequent suit for the same relief is barred by reason of this explanation.[7]

It is also necessary for the application of the explanation that the relief claimed must be a *substantive* one, and also such as the Court was *bound* to grant. An *auxiliary* or *discretionary* relief is not within the explanation. See Notes 124 and 125.

It has been held that the explanation only applies to a relief claimed in the *plaint*.[8] Hence, where in disposing of an application for a personal decree against the mortgagor under O. 34, R. 6 the Court does not expressly grant the prayer for a personal decree, a second application for a personal decree is not barred by *res judicata*.[9]

124. Relief claimed must have been substantive and not auxiliary. — Explanation V of this section refers to a case where several heads of relief independent of each other are claimed, put in issue and duly controverted and one of them is neither

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3. ('92) 19 Cal 312 (321, 322) : 19 Ind App 69 (PC).

Note 123

1. † ('91) 14 Mad 328 (331) (DB).
('94) 21 Cal 252 (254) (DB).
('18) 5 AIR 1918 All 339 (340, 341): 16 All L Jour 685 (688) (DB).
('09) 31 All 19 (20) (DB).
† ('89) 11 All 187 (190) (FB).
('81) 1881 All W N 13 (13, 14) (DB).
('01) 25 Bom 115 (120, 122) (DB).
('06) 33 Cal 849 (852) (DB).
('74) 21 Suth W R 304 (304) (DB).
('27) 14 AIR 1927 Mad 1131 (1132).
('27) 14 AIR 1927 Pat 395 (395).
† ('38) 25 AIR 1938 Pesh 68 (69) (DB). (Maintenance suit—Prayer that it should be charged on property not granted —Subsequent suit for such charge is barred by *res judicata*.)
('92) 1892 Low Bur Rul 311.
[But see ('90) 3 C P L R 170 (172). (Wrongly decided.)]
2. ('33) 20 AIR 1933 Rang 158 (159).
3. ('94) 21 Cal 265 (267, 268) (DB).
† ('05) 15 Mad L Jour 462 (464) (FB).
4. ('01) 25 Bom 589 (592) (DB).
('17) 4 AIR 1917 Oudh 20 (23) : 4 Oudh L Jour 354 (359). (Refusal on the ground that no such relief is claimed.)
† ('25) 12 AIR 1925 Pat 145 (147) (DB).
5. † ('27) 14 AIR 1927 Mad 779 (780, 781) (DB).
† ('35) 22 AIR 1935 All 411 (414): 57 All 797 (DB).
('32) 19 AIR 1932 All 96 (97) : 54 All 68 (DB). (Failure of suit under S. 77, Registration Act—No bar to suit for specific performance of contract and possession—But if it is adjudicated upon at the time of decree, it will be barred.)
('90) 1890 All W N 142 (143) (DB).
[*See also* ('16) 3 AIR 1916 Mad 328 (330) (DB). (Suit under S 9, Specific Relief Act—Question of mesne profits cannot be gone into.)]
6. † ('30) 17 AIR 1930 All 619 (619) (DB).
('34) 21 AIR 1934 Oudh 293 (294) : 10 Luck 61.
7. ('29) 16 AIR 1929 Bom 323 (325).
8. ('40) 27 AIR 1940 Rang 136 (138).
9. ('37) 24 AIR 1937 Lah 204 (206) (DB). (Reversing on appeal, AIR 1936 Lah 388).

granted nor refused. If a relief is not claimed specifically but simply as the ground for the real and substantial relief or merely as an argumentative step towards the decree sought, the absence of any mention in the decree will not bar a subsequent suit for that relief.[1] Thus, where a suit was instituted for recovery of possession of certain lands with a prayer for declaration that the defendant had no title to the properties in question but the suit was dismissed on the ground of limitation, it was held that the declaration claimed was not one under S. 42 of the Specific Relief Act, 1877, but an argumentative step which led up to the main relief claimed in the suit, namely possession; and that therefore the omission to grant the declaration cannot be treated under the explanation as a refusal to grant the relief.[2]

125. Relief must have been one which the Court was bound to grant and not one which it has discretion to grant or refuse. — The words 'relief claimed' only apply to something which forms part of the claim strictly so called, i. e., something which the plaintiff may claim *as of right*, something included in his cause of action and which, if he establishes his cause of action, the Court has no *discretion* to refuse. They do not apply to reliefs which the Court may, in the exercise of its discretion, grant or refuse.[1] A files a suit for possession and for *past* and *future* mesne profits (i. e., mesne profits before and after the institution of the suit.) Here if A establishes his cause of action, he is entitled *as of right* to get past mesne profits and the Court has no discretion to refuse it. Where therefore the decree omits to grant it, it will be deemed to have been refused under this explanation.[2] But A is not entitled, as of right, to get *future* mesne profits, the granting or refusal thereof depending upon the discretion of the Court. It has accordingly been held that the omission to grant future mesne profits is not a bar to a subsequent suit for such profits.[3]

Section 11 has no application to cases under the Dekkhan Agriculturists' Relief Act where a prayer for the passing of a decree for instalments is refused in the suit;

Note 124

1. ('89) 13 Bom 242 (249). (Affirming 12 Bom 454 on this point.)
('31) 18 AIR 1931 All 657 (658) (DB). (Application by defendant before preliminary decree in a mortgage suit that his property be sold last rejected — No bar to granting the same relief in final decree.)
† ('25) 12 AIR 1925 Cal 1195 (1197, 1198) (DB).
('21) 8 AIR 1921 Mad 21 (22, 24) (FB). (Secondary relief claimed and determined by lower Court but not by appellate Court is not *res judicata*.)
2. ('25) 12 AIR 1925 Cal 1195 (1197, 1198) (DB).

Note 125

1. ('05) 15 Mad L Jour 462 (465) (FB).
2. ('94) 21 Cal 252 (254, 255) (DB).
[*See also* ('05) 15 Mad L Jour 462 (465) (FB).]
3. ('35) 22 AIR 1935 Bom 306 (308) : 59 Bom 454 (DB).
('30) 17 AIR 1930 Mad 30 (31, 32) : 53 Mad 838.
('16) 3 AIR 1916 Cal 673 (674).
† ('18) 5 AIR 1918 Mad 484 (486) : 41 Mad 188 (FB). (Overruling AIR 1915 Mad 1132.)
('31) 18 AIR 1931 Cal 788 (789) : 58 Cal 1040 (DB).
('32) 19 AIR 1932 All 169 (171) (DB).
('32) 19 AIR 1932 All 45 (46) (DB). (Prior decision construed as omission — But distinction between past and future mesne profits not apparent.)
('27) 14 AIR 1927 All 446 (448) : 49 All 565 (DB)
('18) 5 AIR 1918 All 412 (413) : 40 All 292 (296 (DB).
† ('99) 21 All 425 (438) (FB).
('38) 25 AIR 1938 Bom 231 (233) : I L R (1938) Bom 655 (FB). (Overruling AIR 1920 Bom 39 : 44 Bom 954.)
('32) 19 AIR 1932 Bom 222 (223, 224) : 56 Bom 292 (DB).
('95) 19 Bom 532 (538, 539) (DB).
('29) 16 AIR 1929 Cal 566 (568) : 57 Cal 381.
('05) 32 Cal 118 (122) (DB).
('92) 19 Cal 615 (616) (DB).
† ('90) 17 Cal 968 (971) (DB).
('75) 24 Suth W R 193 (195): 2 Ind App 219 (PC).
('37) 24 AIR 1937 Mad 879 (881).
('37) 24 AIR 1937 Mad 46 (49) : I L R (1937) Mad 284 (DB).
('05) 15 Mad L Jour 462 (464, 465) (FB).
('91) 14 Mad 328 (331, 333) (DB).
('06) 2 Nag L R 91 (92).
('31) 18 AIR 1931 Pat 13 (13) (DB).
('31) 18 AIR 1931 Pat 1 (7, 12) (DB).
('15) 2 AIR 1915 Upp Bur 18 (19) : 2 Upp Bur Rul 81 (82).
[*See* ('39) 26 AIR 1939 Sind 367 (368) : I L R (1940) Kar 36 (DB). (Omission to ask for future mesne profits in a partition suit does not bar a subsequent suit.)]

notwithstanding it, the executing Court can grant a prayer for recovery of the amount in instalments.[4]

126. Effect of supersession of decree in appeal or otherwise.— Money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; the reason is that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding.[1] But, if it is reversed on an appeal therefrom,[2] or in an appeal from another proceeding in the same suit,[3] or otherwise superseded by a separate suit,[4] then the prior decision will not operate as *res judicata* in a subsequent suit.

127. Judgments not res judicata may be admissible in evidence. — See Notes 2, 41 and 68.

128. Withdrawal of suit without permission. — The basic principle of *res judicata* being the existence of a final adjudication on the merits, there can be no bar on the ground of *res judicata* where a suit is *withdrawn* without obtaining liberty to file a fresh suit.[1] But the effect of such a withdrawal will be to bar a fresh suit on the same cause of action under O. 23, R. 1.[2] See also O. 23, R. 1 and Note 101.

129. Wrong decision on a question of res judicata — Revision. — See Section 115, Note 13.

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12. Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

Bar to further suit.

Synopsis

1. Scope and object of the section.
2. "Precluded by rules."
3. "Cause of action." See Section 20.
4. "In any Court to which this Code applies." See Preamble Note 2.
5. "Code." See Section 2 (1).
6. Local extent of Act. See Section 1.
7. Application of Code to Revenue Courts. See Section 5.
8. Extent of applicability of Code to Provincial Small Cause Courts. See Sections 7 and 8.

[*See also* ('24) 11 AIR 1924 Mad 473 (473, 474). (Preliminary decree awarding mesne profits — Rejection of petition praying ascertainment of the profits for default—Subsequent fresh petition not barred by *res judicata*.)

4. ('08) 32 Bom 391 (393) (DB).

Note 126

1. (1865) 3 Suth W R 11 (13) (PC).
† ('98) 20 All 237 (241) (DB).
('21) 8 AIR 1921 Cal 761 (761) (DB).
2. ('39) 26 AIR 1939 Lah 510 (510). (A finding in a judgment that a certain party is governed by Hindu law and not by custom is not *res judicata* in a later proceeding, when on appeal by him the judgment is reversed, although the Appellate Court does not specifically disturb the finding.)
†('77) 3 Cal 30 (35, 37) (FB).
('80) 5 Cal 589 (591, 592) (DB).
† ('12) 17 Ind Cas 205 (206) (DB) (Bom).
('29) 16 AIR 1929 Lah 1 (5) : 10 Lah 447 (DB).
('26) 13 AIR 1926 Lah 534 (534).
3. ('23) 10 AIR 1923 All 456 (457) (DB).
('15) 2 AIR 1915 P C 111 (113) : 1915 Pun Re No. 93 (PC).
4. ('16) 3 AIR 1916 Lah 237 (237).

Note 128

1. ('39) 26 AIR 1939 Lah 414 (415). (Plaintiff abandoning claim—There is no decision operating as *res judicata*.)
('28) 15 AIR 1928 Lah 710 (712).
('26) 13 AIR 1926 Mad 490 (491).
('28) 15 AIR 1928 All 689 (692) (DB).
(1900) 2 Bom L R 871 (871) (DB).
('99) 23 Bom 35 (38, 39) (DB).
('94) 21 Cal 265 (268) (DB).
('11) 1911 Pun L R No. 249, p. 922.
('37) 24 AIR 1937 Mad 718 (719) (DB).
('09)5 NagLR 88(91). (But withdrawal after an issue is tried and decided will operate as *res judicata*.)
2. ('39) 26 AIR 1939 Lah 414 (415).
† ('18) 5 AIR 1918 Cal 23 (26) (DB).
('21) L R 3 All (Rev) 84 (86).
('14) 1914 Pun L R No. 19, p. 65 (66) (DB).
('37) 24 AIR 1937 Mad 718 (719) (DB).

1. Scope and object of the section. — This section has been newly added in the Code of 1908 and is necessitated by the transfer of certain of the provisions of the Code of 1882 to Rules.[1]

2. "Precluded by rules." — The term "rules" has been defined in S. 2 (18) as meaning rules and forms contained in the First Schedule and rules made under Ss. 122 and 125. For illustrations of rules barring fresh suits, see the following rules:

O. 2, R. 2.—Where plaintiff omits to sue on or relinquishes part of his claim.

O. 9, R. 9.—Dismissal for default.

O. 22, R. 9.—Abatement of suit.

O. 23, R. 1.—Withdrawal without liberty to bring a fresh suit.

3. **"Cause of action."** — See Section 20.

4. **"In any Court to which this Code applies."** — See Note 2 on the Preamble.

5. **"Code."** — See Section 2 (1).

6. **Local extent of Act.** — See Section 1.

7. **Application of Code to Revenue Courts.** — See Section 5.

8. **Extent of applicability of Code to Provincial Small Cause Courts.** — See Sections 7 and 8.

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13. [S. 14.] A foreign judgment[3] shall be conclusive[8] as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim[6] litigating under the same title[7] except—

When foreign judgment not conclusive.

(a) where it has not been pronounced by a Court of competent jurisdiction;[9]

(b) where it has not been given on the merits of the case;[13]

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable;[14]

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;[15]

(e) where it has been obtained by fraud;[16]

(f) where it sustains a claim founded on a breach of any law in force in British India.[17]

[1877, S. 14; See S. 2, Cls. 5, 6; Expln. to S. 10; S. 29; Ss. 43—45.]

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14. [S. 13, Expl. VI.] The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record: but such presumption may be displaced[11] by proving want of jurisdiction.

Presumption as to foreign judgments.

[1877, S. 13, Expl. VI.]

Section 12 — Note 1

1. See Notes on Clauses appended to the Report of the Special Committee.

SECTIONS 13 & 14.

Synopsis

1. Legislative changes.
2. Scope and principles of the sections.
3. "Foreign judgment," meaning of.
4. Act of State. See Note 3.
5. Judgments of the Courts of Native States. See Notes 3 and 19.
6. "Same parties or between parties under whom they or any of them claim."
7. "Litigating under the same title." See S. 11, Note 70.
8. Foreign judgments, when not conclusive.
9. Where it has not been pronounced by a Court of competent jurisdiction — Clause (a).
10. Foreign judgment against firm.
11. Presumption as to competency.
12. Submission to, and waiver of objection as to jurisdiction.
13. "Where it has not been given on the merits" — Clause (b).
14. Where it is against international law or based on non-recognition of British Indian law — Clause (c).
15. Where the proceedings are opposed to natural justice — Clause (d).
16. Where it has been obtained by fraud — Clause (e).
17. Where the decree is founded on a breach of British Indian law — Clause (f).
18. Effect of foreign judgment.
19. Enforcement of foreign judgments in British India.
20. Execution proceedings. See S. 44.
21. Foreign judgment on a decree of British Indian Court—Effect of.
22. Suit on foreign judgments.
23. Limitation. See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 117 and Notes thereon.

NOTE to the Synopsis. See Notes indicated for the following topics :

Defendants not served with notice. See Note 15.

Effect of carrying on business in a foreign country through agent. See Note 12.

Ex parte decree, when amounts to submission. See Note 12.

Foreign judgment if final, when an appeal is pending in a foreign Court. See Note 18.

Irregularities in procedure do not affect jurisdiction. See Note 9.

Onus to prove want of jurisdiction. See Note 11.

Operation of the section. See Notes 2 and 8.

Possession of immovable property in a foreign country does not give jurisdiction in personam. See Note 9.

Recognition of foreign judgments, and judgments of Courts of Native States as a basis of suit. See Note 19.

1. Legislative changes. — Section 13 is substantially the same as the old section 14 except that the last clause of that section has been omitted and cl. (a) newly added. See Note 19.

2. Scope and principles of the sections. — A State is not bound, under the Law of Nations, to enforce within its territories the judgment of a foreign tribunal.[1] But in England and in countries where the English system of jurisprudence prevails, such a judgment is enforced on the principle that where a Court of competent jurisdiction has adjudicated that a certain sum is due from one person to another, a legal *obligation* arises to pay that sum on which an action of debt to enforce the judgment can be maintained.[2] This is the principle on which S. 13 is based and it declares that a foreign judgment is conclusive as to any matter *directly adjudicated upon* except in the six cases specified.[3] *In Mallappa Yellappa Bennur* v. *Raghavendra Shamrao Desh-*

Sections 13 & 14 — Note 2

1. (1871) 6 Q B 139 (148, 154), Godard v. Gray.
('27) 14 AIR 1927 Sind 160 (161): 23 Sind L R 46.
2. (1845) 13 M & W 628 (633), Williams v. Jones.
('97) 20 Mad 112 (114) (DB).
(1842) 9 M & W 810 (818, 819), Russel v. Smyth. (Cited in 2 Mad 400.)
3 Blk Com 163 (164). (Foreign judgment creates an obligation belonging to the class of implied contracts, which are described as arising from the "general implication and intendment of the Court of judicature that every man hath engaged to perform what his duty or justice requires"; Addison on Contracts, 6th Edn., page 40. Law raises an implied contract to pay a sum of money adjudged to be due. Both cited in 6 Bom 292 (294).)

3. ('42) 29 AIR 1942 Mad 478 (480) (DB). (Suit for money lent and payable in foreign Court—

pande,[4] it was observed as follows; "Now, ordinarily it is not open to the Courts in British India to sit in appeal over a foreign judgment because it proceeds on grounds which would not be adequate in British India, unless it offends against the rules under S. 13." British Indian Courts can, however, refer to the pleadings of the parties and the reasons of the Judge to understand what the judgment actually decides and to decide whether any of the exceptions in S. 13 applies.[4a] Section 13 applies not only to cases where a foreign judgment is set up as a defence but also to cases in which the plaintiff seeks to obtain a decree in a British Indian Court on a foreign judgment.[5]

3. "Foreign judgment," meaning of. — "Foreign judgment" has been defined in S. 2 (6) as the judgment of a foreign Court. Under S. 2 (5) "foreign Court" means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Central Government or the Crown Representative. Thus, the Courts in England,[1] the Supreme Court of Mauritius,[2] the French Courts in India,[3] the Courts in Ceylon[4] and the Courts of the Native States[5] are all foreign Courts. The Privy Council is not a foreign Court as it has *authority within British India*.[6] See S. 2 (5) for full notes.

The word "judgment" in the expression "foreign judgment" as used in S. 2 (6), has the meaning given to it in English law and not the meaning given by S. 2 (9). That is, the term "foreign judgment" means the decree or order of a foreign Court,[7] and not the Judge's reasons for his decision.[7a]

An order which is not a "judgment" cannot be a foreign judgment.[8] Thus, a summary order under S. 12 of the Arbitration Act enforcing an award in England is not a *judgment* and cannot be regarded as a foreign judgment for the purposes of this section.[9] Similarly an act of State passed by a State in its sovereign capacity is not a foreign judgment.[10]

Foreign Court having compelled defendant to pay to Official Assignee there—Defendant is discharged and not liable to be sued in British Indian Court.)
('41) 28 A I R 1941 Pat 109 (114) : 20 Pat 144 (DB). (Exceptions specified in S. 13 shown to be inapplicable—Defendant cannot be allowed to go behind foreign judgment and re-open issues on merits.)
('21) 8 AIR 1921 Lah 20 (23) : 2 Lah 207 (DB).
† (15) 2 AIR 1915 Mad 486 (487) : 39 Mad 24 (FB). (The recognition of foreign judgments under S. 13 is not absolute but is subject to certain reservations.)
[*See* ('43) 30 AIR 1943 Bom 201 (206) (DB). (Decree on award in Native State—Misconduct on part of arbitrator which does not go to jurisdiction cannot be gone into in British Indian Court.)]

4. † ('38) 25 AIR 1938 Bom 173 (177) : I L R (1938) Bom 16 (DB).

4a. ('43) 30 AIR 1943 Bom 201 (204) (DB).

5. ('28) 15 AIR 1928 Rang 319 (319) : 6 Rang 552.
('28) 15 A I R 1928 Mad 327 (336) : 51 Mad 720 (DB).

Note 3

1. ('01) 28 Cal 641 (645) (DB).
('71) 8 Bom H C R O C 200 (208) (DB). (Call order on contributory of company registered in England.)

2. ('02) 29 Cal 509 (516) (SB).

3. (1865) 4 Suth W R 107 (109) (DB).
('81) 6 Bom 292 (295) (DB).
('80) 2 Mad 400 (405) (DB).
('80) 2 Mad 337 (338) (DB).
('74) 8 Mad H C R 14 (16) (DB).

4. (09) 32 Mad 469 (474) : 3 Ind Cas 190 (192) (DB).
('97) 20 Mad 112 (114) (DB). (Court at Kandy in Ceylon.)
[*See also* ('08) 4 Nag L R 61 (62). (In which it was held that in Berar the judgment of the Nagpur Court is a foreign judgment.)]

5. (1900) 24 Bom 86 (88, 89) (DB).
('88) 1888 Pun Re No. 191.
('95) 22 Cal 222 (237) : 21 Ind App 171 : 1894 Pun Re No. 112 (PC).

6. *See* ('84) 8 Bom 571 (574).

7. ('32) 19 AIR 1932 Mad 661 (662).
('33) 20 A I R 1933 Mad 511 (515) : 56 Mad 951 (DB).
[*See also* ('35) 22 AIR 1935 Lah 975 (976) : 17 Lah 341. (Call order by Liquidation Court in Native State *held* not a decree and hence not a foreign judgment.)]

7a. ('43) 30 AIR 1943 Bom 201 (204) (DB). (Such reasons may however be looked into to understand what the decision is.)

8. ('77) 1877 Pun Re No. 36 (FB).

9. ('04) 31 Cal 274 (282).

10. ('93) 17 Bom 620 (624). (Order of the State of Mewar deposing a high priest from his office is not a judgment.)

4. Act of State. — See Note 3.

5. Judgments of the Courts of Native States. — See Notes 3 and 19.

6. "Same parties or between parties under whom they or any of them claim." — See Notes 41 to 67 on S. 11. In a suit for the administration in a foreign Court of a deceased testator's estate, the title of the executors as such was challenged. It was held by the High Court of Bombay that though executors would ordinarily represent the legatees regarding all matters which have necessarily to be decided in a suit to which the executors are parties, they could not, where their title was challenged, be said to have represented the legatees, nor that the latter claimed through the executors, and that under such circumstances, the legatee was not bound by a foreign judgment against the executors.[1]

See also the undermentioned case.[2]

7. "Litigating under the same title." — See Section 11, Note 70.

8. Foreign judgments, when not conclusive.—A foreign judgment, to be a valid cause of action for a suit upon it in British India, must be *final and conclusive* in the Court in which it is passed. In order to establish that a final and conclusive judgment has been pronounced, it must be shown that, in the Court by which it was pronounced, it conclusively, finally and for ever, established the existence of the right of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties.[1] A foreign judgment will not operate as *res judicata* between the same parties or their representatives on any matter *not directly adjudicated upon* by that judgment and also in the six cases specified in clauses *(a)* to *(f)*.[2] See Notes 9 to 17 below. Further, it is only in *proceedings on a foreign judgment* that the question of the effect of the foreign judgment can properly arise.[3]

9. Where it has not been pronounced by a Court of competent jurisdiction—Clause (a).—It is a fundamental principle of law that where Court has no jurisdiction over a matter, its judgments and orders are null and void.[1] A judgment, therefore, of a foreign Court will not be conclusive unless it was *competent* to pronounce it. But whether a foreign Court is or is not, of a competent jurisdiction within the meaning of S. 13 *(a)*, has to be determined in accordance with the principles of *international law* and not in accordance with the law of the country in which the foreign Court is situated.[2] In *Pemberton* v. *Hughes*,[3] Lindley, M. R., observed :

> "The jurisdiction which alone is important in these matters is the competence of the Court in an *international* sense, i. e., its *territorial* competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the Courts of this country."

Note 6

1. ('38) 25 AIR 1938 Bom 394 (397) : I L R (1938) Bom 529 (DB).
2. ('80) 2 Mad 337 (338) (DB).

Note 8

1. ('35) 22 AIR 1935 Rang 284 (289) (DB).
   [*See* ('43) 30 AIR 1943 Bom 201 (205, 206) (DB). (Merely filing an appeal which becomes infructuous does not destroy the finality of the lower Court's judgment.)]
2. ('21) 8 A I R 1921 Lah 20 (23, 24) : 2 Lah 207 (DB).
   ('38) 25 A I R 1938 Bom 173 (175) : I L R (1938) Bom 16 (DB).
   Also see S. 11 Note 78.
3. ('16) 3 AIR 1916 P C 136 (138) (PC).

Note 9

1. See for full discussion as to jurisdiction Notes on Section 9.
2. ('17) 4 AIR 1917 Mad 780 (782) : 39 Mad 733.
   ('25) 12 AIR 1925 Mad 788 (791).
   ('38) 25 A I R 1938 Bom 173 (177) : I L R (1938) Bom 16 (DB).
   ('38) 25 A I R 1938 Cal 511 (515) : 63 Cal 1033. (Under what circumstances in a personal action, a foreign Court has jurisdiction in an international sense discussed.)
3. (1899) 1 Ch 781 (791).

And the Courts in India are guided by the same principles in dealing with foreign judgments.[4]

As a general rule the plaintiff must sue in the Court to which the defendant is subject at the time of the suit.[5] *Actor sequitor forum rei*—and this lies "*at the root of all international* and of most domestic jurisprudence."[6] In respect of actions concerning property situate within the territory, territorial jurisdiction always exists. But the fact that the defendant possesses property within jurisdiction will not confer jurisdiction in actions of a *personal* nature against him.[7] The cases in which foreign Courts are, in England, recognised to be internationally of competent jurisdiction in regard to suits of a *personal* nature, have been stated by Fry, L. J., in *Rousillon* v. *Rousillon*,[8] to include the following:

(*a*) Where the defendant is the *subject* of the foreign country in which the judgment has been obtained;

(*b*) Where he was *resident* in the foreign country when the action began;

(*c*) Where he in the character of plaintiff has selected the forum in which he is afterwards sued;

(*d*) Where he has voluntarily *appeared*; and

(*e*) Where he has *contracted to submit* himself to the *forum* in which the judgment was obtained.

See also the undermentioned cases.[9]

The Legislature of a country cannot by its legislation confer jurisdiction over a non-resident foreigner in cases not recognised by international law.[10] Thus, the Legislature of the Native State of Pudukottah cannot confer powers on the Courts at Pudukottah to try cases against Indians residing in British India, on the ground that the *cause of action* (e. g., the making of the bill of exchange) arose in Pudukottah. A decree passed in such cases by the Court at Pudukottah cannot be enforced in British India under

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4. ('42) 29 AIR 1942 Mad 614 (616):I L R (1942) Mad 376. (Immovable property in foreign territory—British Court will not entertain suit affecting property—Nor will British Court recognize foreign judgment adjudicating title to immovable property within British juriediction.)
('83) 6 Mad 273 (276) (DB).
('97) 20 Mad 112 (114).
('38) 25 A I R 1938 Bom 394 (401) : I L R (1938) Bom 529 (DB).

5. † ('95) 22 Cal 222 (237) : 21 Ind App 171 : 1894 Pun Re No. 112 (PC).

6. Sir Robert Phillimore on International Law, Vol. IV, S. 891. (Cited in 22 Cal 222 (PC).)

7. ('42) 29 AIR 1942 Bom 199 (201): I L R (1942) Bom 688.
('27) 14 A I R 1927 Lah 200 (212) : 8 Lah 54 (DB).

8. † (1880) 14 Ch D 351 (371).

9. ('42) 29 AIR 1942 Bom 199 (201): I L R (1942) Bom 688. (Action *in personam* on any cause of action—Cases in which foreign Courts have jurisdiction, stated — Circumstances in which foreign Courts do not acquire jurisdiction, indicated — Execution of power of attorney in favour of agent does not amount to agreement to submit to jurisdiction — Parties cannot resile from contract to submit to jurisdiction — "Conduct amounting to submission to jurisdiction" explained—Citing with approval Dicy's Conflict of Laws.)
('22) 9 A I R 1922 Pat 34 (35) : 1 Pat 356 (DB). (Suit for injunction — Submission to Court gives jurisdiction.)
('14) 1 AIR 1914 Mad 556 (588) : 37 Mad 163 : 18 Ind Cas 189 (191) (DB).
(Quoting with approval Emanuel v. Simon, (1908) 1 K B 302.)
(1874) 9 Ex 345 (353), Copin v. Adamson. (Cited in AIR 1914 Mad 556 : 37 Mad 163.)
('38) 25 AIR 1938 Bom 173 (175) : I L R (1938) Bom 16 (DB). (Necessary conditions for its extra-territorial validity explained.)
('38) 25 AIR 1938 Cal 511 (515) : 63 Cal 1033. (In addition to the above five conditions, there may be a sixth case, namely where the defendant has real estate within the foreign jurisdiction in respect of which the cause of action arose while he was within that jurisdiction.)
('37) 24 AIR 1937 Mad 97 (98). (Cases in which in an action *in personam* the Courts will enforce the judgment of a foreign Court stated.)

10. † ('95) 22 Cal 222 (238):21 Ind App 171 : 1894 Pun Re No. 112 (PC).
('38) 25 AIR 1938 Cal 511 (515) : 63 Cal 1033.

S. 13.[11] The reason is that *cause of action* is not a ground of jurisdiction recognised by international law. It will, however, be otherwise where the non-resident foreigner is a subject of the sovereign power which legislates. Thus, the British Parliament can confer powers on British Courts to try cases against Indians residing in British India in cases where the cause of action arises in England[12] and a judgment of the High Court of Justice in England founded on a breach of contract committed by them within the jurisdiction of that Court is not without jurisdiction.[13] The reason is that the defendant is a *subject* of the British Sovereign owing allegiance or obedience to him, and that this fact is a ground of jurisdiction recognised by international law. But in the absence of powers conferred by the sovereign Legislature, the Legislature of one country cannot confer jurisdiction over non-resident foreigners of another country even though both the countries owe allegiance to the same sovereign power. Thus, a judgment pronounced by the Court at Kandy in Ceylon against a person residing in British India and who has not submitted himself to the jurisdiction of that Court, cannot be enforced in British India notwithstanding the fact that both Ceylon and British India owe allegiance to the British Sovereign.[14]

The leading case on the subject is *Gurdyal Singh* v. *Raja of Faridkot*.[15] Lord Selborne in delivering the judgment of the Board observed as follows :

> "All jurisdiction is properly territorial and '*extra territorium jus dicenti non paretur impune.*' Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily *resident* within the territory, while they are within it; but *it does not follow them after they have withdrawn from it, and when they are living in another independent country.* It exists always as to land within the territory; . . . . . and in questions of status or succession governed by domicile, it may exist as to persons domiciled or who, when living, were domiciled within the territory. As between different provinces under one sovereignty (e. g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; *but no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners who owe no allegiance or obedience* to the power which so legislates."

It was accordingly held that a decree in a personal action pronounced by a Court of the Native State of Faridkot *in absentum* against a resident of Jhind who owed no allegiance to the State of Faridkot was, by international law, a nullity. A foreign judgment may therefore be impeached on the ground that the Court was without jurisdiction either because the property in respect of which the suit is brought is situate outside its jurisdiction[16] or because the defendant was not a *resident* within jurisdiction

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11. ('76) 1 Mad 196 (198) (DB).
('09) 32 Mad 469 (474) : 3 Ind Cas 190 (193) (DB). (Fact that contract was made within jurisdiction is immaterial.)
[*See also* ('38) 25 AIR 1938 Cal 511 (513) : 63 Cal 1033. (Personal action in Court of Cooch Behar State on cause of action arising there — Defendant not resident of Cooch Behar State, nor residing there at the time of action nor submitting to its jurisdiction — Judgment passed is by a Court of incompetent jurisdiction and cannot be enforced in British India under S. 13 — 1 Mad 196 followed.)]

12. ('38) 25 A I R 1938 Cal 511 (516) : 63 Cal 1033.

13. But it is open to a defendant to show that the English Court had in fact no jurisdiction, on the ground that the cause of action did not arise in England as alleged—See the following cases :
† ('01) 28 Cal 641 (648) (DB).
('15) 2 AIR 1915 Mad 660 (662) : 39 Mad 95 (100). (Affirmed in AIR 1916 PC 121 : 40 Mad 112 : 44 Ind App 6 (PC).)
('16) 3 AIR 1916 Low Bur 67 (68).
('09) 3 Sind L R 81 (84) : 3 Ind Cas 892 (893) (DB).

14. ('09) 32 Mad 469 (473) : 3 Ind Cas 190 (191, 192) (DB).

15. ✝('95) 22 Cal 222 (238): 21 Ind App 171 : 1894 Pun Re No. 112 (PC).

16. ('29) 16 AIR 1929 Lah 627 (629).
(1828) 3 Macq. 99, London and North Western Railway v. Linsay.
(1908) 1 K B 302 (308, 309), Emanuel v. Symon.
('14) 1 AIR 1914 All 514 (515) : 37 All 1 (DB).
('96) 19 Mad 257 (263) (DB). (The decree of a foreign Court cannot directly affect land situated in British India.)

and did not submit himself by appearance or otherwise to the jurisdiction of that Court.[17] A casual passage through, or a momentary presence in a State, is not a sufficient residence for creating jurisdiction, but something much more permanent is necessary although it might not amount to *domicilum*.[18] Similarly, in an action *in personam* the fact that the defendant was carrying on business in a foreign country through a manager or agent at the time when the obligation (in respect of which the action is brought) was incurred, will not confer jurisdiction on the foreign Court.[19] But a foreign Court can pass judgment against a *subject* of the foreign State though resident abroad. Thus, a Cochin Court can pass a decree against a Cochin subject resident in India.[20]

A judgment of a foreign Court declaring that a certain person is the adopted son of another is not a judgment *in rem* within the meaning of S. 41 of the Evidence Act. But according to international law a declaration by a competent Court as to the status of a person domiciled within its territory is treated as *analogous* to a judgment *in rem* to this extent that it will govern succession to *moveable* property though not situated within the jurisdiction of the foreign Court. This principle does not generally apply in the case of succession to *immovable* property, as moveable property can be carried about while immovable property cannot. But, in the case of persons who are governed in matters of succession, by their *personal* law, irrespective of the territory of their domicil, it has been held that there is no reason for making a distinction between the two classes of property and that even in regard to succession to immovable property situated outside the jurisdiction of the foreign Court, its adjudication as to the status of a person domiciled within its jurisdiction will be binding. Thus, it has been held that the declaration by a French Indian Court that A is the validly adopted son of B (parties being Hindus and A being domiciled within the jurisdiction of the French Court) will be valid not only with regard to succession to the property situated in French India but also to the succession

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17. ('41) 28 AIR 1941 Pat 109 (113) : 20 Pat 144 (DB). (Personal decree against a defendant who did not reside in the French territory and who did not submit to the jurisdiction of the French court is a nullity.)
('39) 26 AIR 1939 Bom 374 (376). (Personal decree in regard to mortgage debt.)
('82) 4 Mad 359 (366) (DB). (An *ex parte* judgment of a foreign Court against a native of British India upon a cause of action arising in British India is no bar to a suit in British India.)
('27) 14 A I R 1927 Lah 200 (212) : 8 Lah 54 (DB).
('16) 3 AIR 1916 Bom 307 (308) : 40 Bom 551 (DB). (In cases of personal claim, residence alone gives jurisdiction.)
(1900) 24 Bom 77 (85) (DB). (The judgment of the Baroda Court against one partner (the first defendant) is no bar to a fresh suit against the other partners on the same cause of action who were not subject to its jurisdiction then.)
('86) 11 Bom 241 (246) (DB).
('81) 5 Bom 223 (231, 232).
('38) 25 AIR 1938 Cal 511 (516) : 63 Cal 1033.
('02) 29 Cal 509 (517) (DB). (Decree of the Supreme Court at Mauritius.)
('01) 28 Cal 641 (643, 644) (DB).
('99) 26 Cal 931 (936) (DB).
† ('95) 22 Cal 222 (238) : 21 Ind App 171 : 1894 Pun Re No. 112 (PC).
('71) 16 Suth W R 240 (244) (DB).
(1865) 4 Suth W R 107 (109) (DB).
('35) 22 AIR 1935 Lah 551 (551).
('35) 158 Ind Cas 24 (24) (DB) (Lah). (Foreign Court has no jurisdiction against subject of another State who neither resides there nor submits to its jurisdiction.)
('33) 20 AIR 1933 Mad 112 (113) (DB).
('11) 36 Mad 414 (417): 12 Ind Cas 1006 (1007) (DB).
('10) 7 Ind Cas 810 (811) (DB) (Mad).
('09) 32 Mad 469 (473) : 3 Ind Cas 190 (192) (DB).
('97) 20 Mad 112 (117) (DB). (Decree of Court at Kandy against resident in British India.)
('95) 18 Mad 327 (329, 330) (DB).
('91) 15 Mad 82 (82) (DB).
('90) 13 Mad 496 (499, 501) (DB).
('83) 7 Mad 105 (107) (DB).
('80) 2 Mad 407 (412) (DB).
('76) 1 Mad 196 (198) (DB).
('75) 8 Mad H C R 14 (16, 17) (DB).
† (1880) 14 Ch D 351 (371), Rousillon v. Rousillon.
† (1871) 6 Q B 155 (161), Schibsby v. Westenholtz.

18. ('90) 13 Mad 496 (498) (DB).
[*See* ('42) 29 AIR 1942 Bom 199 (201) : I L R (1942) Bom 688. (Presence of defendant at the time when the obligation in respect of which the action is brought was incurred is not sufficient to confer jurisdiction.)

19. ('42) 29 AIR 1942 Bom 199 (201) : ILR (1942) Bom 688.

20. ('41) 28 AIR 1941 Mad 688 (689, 690) : ILR (1941) Mad 891 (DB). (Defendant was held to be both a Cochin and British Indian subject.)

to the property moveable and immovable situated in British India.[21] But it must be noted that under the above principles only the parties and their privies are bound by the foreign judgment.

Where the foreign Court is competent in the international sense to pass a judgment, it will be conclusive even though there were irregularities in that Court, not affecting the jurisdiction of that Court, which under the law governing the foreign Court would render the judgment a nullity.[22]

The words "Court of competent jurisdiction" should, for purposes of actions relating to the office of trusteeship, be held to refer to Courts of the country which have jurisdiction in what may be called the domicile of the trust, i. e., the place where most of the trust properties are situate and almost the whole of the trust is to be performed.[23]

10. Foreign judgment against firm.—The mere fact that a person residing in one State is a *partner* of a firm carrying on business in another State will not enable the Court of the latter State to pass a personal decree in *absentum* against the former, though it can pass such a decree against the partners resident within the jurisdiction.[1] In the case of an *incorporated company*, however, it is different. It has to be sued and must sue or be sued through some officer or agent and hence judgment against such officer or agent or member of the firm residing within the jurisdiction is binding on all.[2]

11. Presumption as to competency. — Section 14 provides that when a foreign judgment is relied upon, the production of the copy of the judgment duly authenticated is presumptive evidence that the Court which pronounced it had jurisdiction unless the contrary appears on the record but that the presumption may be displaced by proving want of jurisdiction[1] and the onus of so doing lies on the defendant.[2]

12. Submission to, and waiver of objection as to jurisdiction.—It has been seen in Note 9 above that one of the cases in which foreign Courts are recognized to be internationally of competent jurisdiction is voluntary *submission* by the party to the jurisdiction of the Court.[1] The reason for this is that having taken a chance of judgment

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21. ('39) 26 AIR 1939 Mad 693 (697): ILR (1939) Mad 507 (DB). (AIR 1938 Bom 394 : ILR (1938) Bom 708 referred to.)
22. ('07) 30 Mad 292 (294) (DB).
† (1899) 1 Ch D 781 (793, 795, 796), Pemberton v. Hughes.
('18) 5 AIR 1918 Mad 274 (275, 276) : 41 Mad 205. (A wrong view as to onus of proof.)
('82) 4 Mad 359 (365) (DB).
('80) 2 Mad 400 (406) (DB).
[*See also* ('43) 30 AIR 1943 Bom 201 (205) (DB). (The question as to which domestic Court in the foreign state is competent to decide the suit is really a question for the foreign tribunal ; and if that tribunal decides that the particular Court which made the decree has jurisdiction, it is not open to the Court in British India to disagree.)]
23. ('28) 15 AIR 1928 Mad 327 (337) : 51 Mad 720 (DB).

Note 10

1. ('11) 36 Mad 414 (417): 12 Ind Cas 1006 (1007) (DB).
(1900) 24 Bom 77 (85) (DB).
(1889) 23 Q B D 526 (529), Russel v. Cambefort.
2. (1850) 9 C B 661 (686, 687, 688), Bank of Australasia v. Harding.
(1851) 16 Q B 717, Bank of Australasia v. Nias.
('78) 2 Mad 400 (403) (DB).
(1899) Pr P 1. La Bergoyne.
(1889) 23 QBD 519 (524, 525), Haggin v. Comptoir D'escompte De Paris.
(1872) 7 Q B 293 (296), Newby v. Van Oppen. (Referred in AIR 1914 Mad 556 : 37 Mad 163.)

Note 11

1. ('42) 29 AIR 1942 Bom 199 (200) : ILR (1942) Bom 688.
('28) 15 AIR 1928 Pat 375 (381) (DB).
('01) 28 Cal 641 (644, 645) (DB).
[*See also* ('89) 13 Bom 224 (226).]
2. ('42) 29 AIR 1942 Bom 199 (202) : ILR (1942) Bom 688.
('27) 14 AIR 1927 All 510 (512) : 50 All 270 (DB).
('19) 6 AIR 1919 Mad 446 (446) (DB).
('02) 29 Cal 509 (515) (SB). (NOTE:—The observation of Johnstone, J., in 1910 Pun L R No. 41 : 4 Ind Cas 1020 (1021) that under old Code the onus was on the plaintiff to prove jurisdiction seems to be based on misconception of the words of Explanation VI to S. 13 of the old Code — The same remarks also will apply to the decision in 1889 Pun Re No. 2.)

Note 12

1. ('37) 24 AIR 1937 Mad 97 (98).
('07) 30 Mad 292 (294) (DB).

in his favour by submitting to the jurisdiction of the Court, it is not right that he should turn round when the judgment goes against him, and say that the Court had no jurisdiction.[2] The mere fact that the defendant allowed the suit in the foreign Court to be heard *ex parte* will not amount to his submitting to the jurisdiction of that Court.[3] A submission to the jurisdiction of the Court may be in the following ways :

(1) Where there is an *express agreement* to submit to the Court's jurisdiction.[4] The agreement must, however, be fairly *specific*. The mere fact of entering into a contract of partnership in a foreign country does not involve an agreement that all matters and disputes arising thereunder shall be submitted to the jurisdiction of the Courts of that country.[5]

(2) *Where the party, as a defendant, voluntarily appears in the cause in the foreign Court.*—Where the defendant voluntarily appears in the cause *without any protest* as to jurisdiction or without any such protest until a late stage of the case, his conduct will clearly amount to a submission to the jurisdiction of the Court.[6] Thus, where the defendant appears in the suit, files a written statement and applies jointly with the plaintiff for adjournment of the case to enable a settlement to take place, it will clearly amount to a submission.[7] Where he voluntarily appears and *protests* against jurisdiction *but also pleads on the merits*, it will, nevertheless, amount to a submission to jurisdiction.[8] Even where he appears and *merely protests* against the jurisdiction, the appearance will amount to a submission.[9] In *Boiseire and Co.* v. *Brockner and Co.*,[10] Cave, J., said :

> "For the defendant it is submitted that as the foundation for legal obligation is consent, an appearance under protest affords no indication of consent to the jurisdiction. . . . . Now no one supposes that when a man appears voluntarily as a defendant in an action before a foreign Court he does so because he likes it; he appears because, on the whole, he deems it his interest to submit to have the dispute decided by the foreign tribunal . . . . If this is the true source of the obligation, why should it not extend to the case of a man who appears without duress and therefore voluntarily in one sense, *but who accompanies his appearance with a protest* and appears not because he is compelled to do so, but because he judges it to be for his interest to do so?"

The mere fact that the defendant employs a pleader in a suit in a foreign Court

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[*See also* ('17) 4 AIR 1917 Mad 780 (783, 787) : 39 Mad 733 (FB).
('95) 22 Cal 222 (237) : 21 Ind App 171 : 1894 Pun Re No. 112 (PC).

2. † (1871) 6 Q B 155 (160), Schibsby v. Westenholtz.
('80) 2 Mad 407 (412) (DB).
('84) 7 Mad 105 (107) (DB).
('80) 2 Mad 400 (405) (DB).
('75) 8 Mad H C R 14 (16, 17).

3. ('31) 18 AIR 1931 All 689 (692): 53 All 747 (DB).

4. (1874) 9 Ex 345 (354), Copin v. Adamson.
[*See* (1880) 14 Ch D 351 (371), Rousillon v. Rousillon. (Cited in AIR 1917 Mad 780 : 39 Mad 733 (FB).)]

5. (1908) 1 K B 302 (308), Emanuel v. Symon.
('33) 20 AIR 1933 Mad 112 (113) (DB).

6. † (1871) 6 Q B 155 (161), Schibsby v. Westenholtz.
('74) 8 Mad H C R 14 (16) (DB).
('24) 11 AIR 1924 All 161 (161): 46 All 119 (DB).
('09) 32 Mad 469 (476): 3 Ind Cas 190 (194) (DB). (Where defendant applied for leave to defend which was granted on condition of furnishing security.)
('92) 15 Mad 82 (83) (DB).
('84) 7 Mad 105 (107) (DB). (Protest only at the appellate stage of the case.)
('80) 2 Mad 400 (405) (DB).

7. ('29) 16 AIR 1929 Mad 469 (469, 470): 52 Mad 503 (DB). (Defendant first appearing but along with plaintiff filing joint petition praying that trial may be postponed with a view to a settlement—Trial postponed but on date fixed defendant not appearing and so decree passed in plaintiff's favour —Decision is binding on Court in British India.)

8. ('41) 28 AIR 1941 Mad 387 (388). (Defendant applying for setting aside an *ex parte* order and then filing a written statement in which he attacked the plaintiffs on *various grounds* including the jurisdiction of the Court — *Held*, there was submission to jurisdiction.)
('38) 25 AIR 1938 Cal 511 (516) : 63 Cal 1033.
('34) 21 AIR 1934 All 740 (756, 757): 56 All 828 (DB).
(1915) 2 K B 580 (587, 588), Harris v. Taylor.
('14) 1 AIR 1914 Bom 111 (112) : 39 Bom 34 (DB).
('17) 4 AIR 1917 Mad 780 (787): 39 Mad 733 (FB).
('16) 3 AIR 1916 Mad 1037 (1037) (DB). (Protest in the Court of first instance not persisted in, on appeal.)

9. ('41) 28 AIR 1941 Mad 387 (388).
('38) 25 AIR 1938 Cal 511 (516) : 63 Cal 1033.
('17) 4 AIR 1917 Mad 780 (787) : 39 Mad 733 (FB).
† ('15) 2 AIR 1915 Mad 486 (487): 39 Mad 24 (FB).

10. † (1890) 6 T L R 85. (Cited in AIR 1915 Mad 486.)

will not amount to a submission to its jurisdiction if at the hearing the pleader reports that he has no instructions from his client.[11]

Suppose now that a foreign Court passes a judgment in *absentum* against a defendant not resident within its jurisdiction and *subsequent* thereto the defendant applies to that Court to set aside the *ex parte* decree. Does this amount to a submission to jurisdiction so as to make the decree originally passed against him a valid one? There is a conflict of opinion on the point. The High Court of Madras has held that it does not.[12] The High Court of Lahore[13] and the Court of the Judicial Commissioner of Nagpur[14] have held that it does. The Bombay High Court, in the undermentioned case[15] has held that if a defendant, against whom a judgment in *absentum* has been passed by a foreign Court, allows it to be executed in a British Court without objection, he must be taken to submit to the decree of the foreign Court and cannot seek to set aside the sale in execution proceedings. It is submitted, with respect, that the Madras view is correct. A decree, which when passed is an absolute nullity, cannot, on any principle of law become valid by reason of a *subsequent* submission to the jurisdiction of the Court. Such submission, if anything, will only operate to give jurisdiction to the Court in respect of future orders passed by it.[16] In other words, in order to give jurisdiction and therefore validity to the decree of the foreign Court, there must be submission to the foreign Court before judgment is pronounced.[17]

Where a business is carried on within the jurisdiction of a foreign Court by means of an agent resident there and a decree is passed on summons to him or on a pleader authorized to receive summons, the decree is *prima facie* binding on the principal who will be deemed to have submitted to the jurisdiction of the foreign Court.[18] Where, however, the power of attorney under which the agent is authorised to defend suits has come to an end and the agent ceases to live within the jurisdiction of the foreign Court at the time when the suit is brought, it cannot be said that the defendant has submitted to the jurisdiction of the foreign Court.[19]

A submission is not *voluntary* if the appearance is made under duress, as for instance where it is made to obtain release of property seized by a foreign tribunal in attachment or other proceedings.[20] But an appearance merely to avoid an inconvenience that might happen in the future does not make it an involuntary appearance.

Where in a suit against a minor defendant the Court appoints its own officer as the *guardian ad litem* in spite of the existence of a *de facto* and *de jure* guardian who has not expressed his unwillingness to act as *guardian ad litem*, it cannot be said that the defendant has voluntarily submitted to the jurisdiction of the foreign Court, because the Court by appointing an officer of the Court as a *guardian ad litem* acts against the

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11. ('95) 18 Mad 327 (330) (DB).
12. ('95) 18 Mad 327 (330) (DB).
('33) 20 AIR 1933 Mad 393 (394, 395).
('34) 21 AIR 1934 Mad 434 (434):57 Mad 824 (DB).
13. ('27) 14 AIR 1927 Lah 200(213):8 Lah 54(DB).
14. ('26) 13 AIR 1926 Nag 77 (78) : 22 NagLR 82.
15. ('24) 11 AIR 1924 Bom 351 (352) (DB).
16. *See* ('41) 28 AIR 1941 Pat 109 (113) : 20 Pat 144. (*Ex parte* decree passed by a French Court against a defendant resident in British India—Defendant starting opposition proceeding under the French procedure must be deemed to have submitted to the jurisdiction—*Ex parte* decision confirmed—*Ex parte* decree is not validated but the judgment of confirmance will be valid.)
17. ('31) 18 AIR 1931 All 689 (692) : 53 All 747 (DB). (Per Niamatullah, J.—Subsequent conduct of the defendant may be an indication of his intention to submit to the jurisdiction of the Court at the time when the suit was pending.)
18. ('14) 1 AIR 1914 Mad 556 (561, 562):37 Mad 163 : 18 Ind Cas 189 (194) (DB).
('25) 12 AIR 1925 Mad 155(156):47 Mad 877 (DB).
('30) 17 AIR 1930 Bom 511 (515). (Following AIR 1925 Mad 155 : 47 Mad 877.)
('26) 13 AIR 1926 Mad 259 (259) (DB).
[*See also* ('03) 26 Mad 544 (553) : 30 Ind App 220 (PC). (*Quære.*)]
19. ('42) 29 AIR 1942 Bom 199 (202) : I L R (1942) Bom 688.
20. (1886) 55 L J (NS) Q B 39(42), Voinet v. Barrett.
† ('15) 2 AIR 1915 Mad 486 (487):39 Mad 24 (FB).

interests of the minor and against natural justice by indirectly compelling the minor defendant to appear in the suit.[21]

(3) *By conduct apart from appearance.* — Where in a suit in a foreign Court against a defendant residing in British India, the plaintiff effected an attachment before judgment of moneys belonging to the defendant in the hands of a third person, and the defendant wrote a letter to the plaintiff praying that he might be allowed to collect a portion of the money and stating that the plaintiff might collect the rest of it and the defendant therefore allowed the suit to proceed *ex parte*, it was held in the undermentioned case[22] that there was a submission to the jurisdiction of the foreign Court and that the defendant could not, at the time of execution, object to the decree as being without jurisdiction.

(4) *By a party himself invoking the aid of the Court.*—A person, by instituting a suit for damages caused by a collision at sea, subjects himself to the jurisdiction of the Court and renders himself liable for damages rendered by the same collision.[23] The mere fact, however, that a party has once appeared before a foreign Court in the character of a plaintiff, cannot be taken to be a submission to the jurisdiction of that Court in regard to all subsequent actions against him in that Court.[24]

13. "Where it has not been given on the merits" — Clause (b). — A foreign judgment must, in order to operate as *res judicata*, have been on the merits of the case,[1] and Courts in India have the power to examine the judgment to see whether it has been given on the merits.[2] Under some systems of law prevailing in foreign countries when the defendant commits *default* in appearance, a judgment is given to the plaintiff without any further hearing in the matter. Such a judgment is not a decision on the merits of the case but is a *penalty* for default of appearance, and will not therefore operate as *res judicata*.[3] Thus, the true test for deciding whether a judgment has been given on the merits or not is to see whether it has been given as penalty for any conduct of the defendant or whether it is based on a consideration of the truth or otherwise of the plaintiffs' case.[4] Where, in an action for recovery of money in the King's Bench Division of the High Court in England, the defendant having failed to comply with an order to answer interrogatories, his defence was struck off and judgment was entered for the

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21. ('39) 26 AIR 1939 Bom 374 (377).
22. ('36) 23 AIR 1936 Mad 552 (555) : 59 Mad 918 (DB).
23. ('66) 4 Bom H C R A C 149 (149) (DB).
24. ('37) 24 AIR 1937 Mad 97 (99).
('36) 23 AIR 1936 Mad 552 (554):59 Mad 918 (DB).

Note 13

1. ('19) 6 AIR 1919 Lab 188 (189):1919 Pun Re No. 14 (DB).
('13) 7 Low Bur Rul 56 (59):20 Ind Cas 971 (973).
(1900) 24 Bom 86 (87, 88) (DB).
('89) 13 Bom 224 (227) (DB).
('71) 15 Suth W R 500 (500) (DB).
('21) 8 AIR 1921 Lah 20 (23) : 2 Lah 207 (DB).
('89) 1889 Pun Re No. 66.
('88) 1888 Pun Re No. 191.
(1890) 15 App Cas 1 (10, 14, 18), Gustan Nouvion v. Freeman.
(1853) 2 El & Bl 14, Patrick v. Sheddin.
2. ('38) 25 AIR 1938 Bom 173 (177) : ILR (1938) Bom 16 (DB).
3. †('22) 9 AIR 1922 P C 120 (122) : 45 Mad 496 : 49 Ind App 174 (PC). (A judgment on an award obtained in England by default.)
†('27) 14 AIR 1927 Mad 265 (270) : 50 Mad 261 (FB). (Overruling AIR 1925 Mad 155:47 Mad 877; AIR 1926 Mad 259 is also overruled by the Full Bench.)
('27) 14 AIR 1927 All 510 (511):50 All 270 (DB). (Judgment "on merits" is one in contradistinction to one by way of penalty.)
('36) 62 Cal 682 (689) : 163 Ind Cas 931 (935).
('30) 17 AIR 1930 Mad 149 (152) (DB).
('30) 17 AIR 1930 Mad 146 (148) (DB). (Judgment of Ceylon Court.)
('28) 15 AIR 1928 Mad 133 (135) (DB).
('28) 15 AIR 1928 Rang 319 (320, 321):6 Rang 552.
[*See also* ('35) 22 AIR 1935 Lah 729 (732) : 16 Lah 757. (A foreign judgment dismissing a suit of the creditor against the principal debtor for default is not a judgment *inter partes* on the merits of the case and cannot be availed of by the surety to resist his liability to the creditor.)]
('35) 22 AIR 1935 Lah 396 (400) : 16 Lah 768. (Judgment "on merits" is used in contradistinction to decision on a matter of form or by way of penalty.)]
4. ('41) 28 AIR 1941 Pat 109 (112) : 20 Pat 144 (DB). (Mere fact that a decision is *ex parte* will not justify a finding that it was not on merits.)
('39) 26 AIR 1939 Bom 374 (376).
('32) 19 AIR 1932 Lah 649 (650) : 14 Lah 58.

plaintiff, it was held by the Privy Council that the judgment was not one given on the merits of the case and that no action could be maintained on it in Indian Courts.[5] Section 13 (b) refers to cases where the controversy raised in the action has not been, in fact, the subject of direct adjudication by the Court.[6] Thus, a judgment given in a case in which the defendant puts in no appearance, no evidence is called or considered, and in which judgment is given by default by way of summary procedure, is not a judgment "on the merits."[7] But where the controversy raised in the action is the subject of direct adjudication by the Court, the mere fact that the defendant was not present at the hearing will not make the judgment one not on merits unless the defendant proves that evidence was not taken.[7a] For, there is a presumption under S. 114 of the Evidence Act that judicial acts have been regularly performed and it is for the defendants to rebut it.

Where, notwithstanding the non-appearance of the defendant, evidence is taken on behalf of the plaintiff and judgment is given on such evidence, it will be one on the merits.[8]

Similarly, where a suit is adjourned for settlement and the parties agree that if the suit is not settled by the adjourned date, a judgment should be passed in favour of the plaintiff and a judgment is so passed on the adjourned date, there having been no settlement, the judgment will be one on the merits of the case.[9] It has been held in the undermentioned case[10] that an *ex parte* decree obtained under the summary procedure of the Court of Ceylon is not one on the merits, is not even a judgment and therefore does not satisfy the requirements of this clause. It has, however, been held that a judgment of a French Court in an *ex parte* case may be *prima facie* presumed to be based upon a consideration of the truth of the claim in accordance with the French Civil Procedure Code.[11]

A wrong view of the legal liability of a party or of the *onus* of proof will not show that the judgment is not one on the merits.[12] But the dismissal of a suit as being barred by limitation will not be deemed to be on the merits except where that law not only bars the remedy but *extinguishes the right itself*.[13] The fact that a foreign judgment may fail to show that every separate issue was separately framed and decided is irrelevant unless it can be shown that that failure brings the case within one of the exceptions.[14]

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5. † ('16) 3 AIR 1916 P C 121 (123) : 40 Mad 112 : 44 Ind App 6 (PC).
6. ('16) 3 AIR 1916 P C 121 (123) : 40 Mad 112 : 44 Ind App 6 (PC).
7. ('35) 62 Cal 682 (684).
7a. ('43) 30 AIR 1943 Cal 42 (43, 44, 45) (DB).
8. ('42) 29 AIR 1942 Bom 199 (202) : ILR (1942) Bom 688.
('41) 28 A I R 1941 Mad 387 (389). (Defendant *ex parte* — Defendant getting *ex parte* order set aside and filing written statement raising various issues and then withdrawing — Decree after examination of plaintiff is one on merits.)
('39) 26 A I R 1939 Bom 374 (376). (In this case the guardian ad litem of the minor defendant did not appear and the Court appointed its own officer as guardian ad litem.)
('25) 12 AIR 1925 Mad 788 (790).
† ('32) 19 AIR 1932 Lah 649 (650) : 14 Lah 58.
('19) 6 AIR 1919 All 228 (229) : 41 All 521 (DB). (When a writ of summons was served on defendant's solicitor who entered appearance, and defendant was absent.)
† ('30) 17 AIR 1930 Bom 511 (515).
('20) 7 AIR 1920 Mad 587 (588) (DB).
('35) 22 AIR 1935 Rang 284 (289) (DB).
('13) 7 Low Bur Rul 56 (59):20 Ind Cas 971 (973). (Judgment given on consideration of affidavits by parties is one on merits.)
[*See* ('09) 4 Ind Cas 1020 (1021) (Lah). (Decision given on merits—Fact that the decree is *ex parte* is immaterial.)]
[*See also* ('35) 22 AIR 1935 Lah 396 (400):16 Lah 768. (A case must be taken to have been decided on the merits where the defendant had ample opportunity to raise a defence and voluntarily refrained from raising such defence and the judgment was therefore passed *ex parte*.)]
9. ('29)16 AIR 1929 Mad 469(471):52Mad503(DB).
10. † ('33) 20 AIR 1933 Mad 544 (547).
11. ('41) 28 AIR 1941 Pat 109 (112) : 20 Pat 144 (DB). (Defendant *ex parte* — Plaintiff's pleader heard on the case and the letters of the defendant, which were said to form the basis of the contract were considered — Judgment delivered after deliberations should be deemed to be on merits.)
12. ('18)5 AIR1918Mad 274(275):41 Mad205(DB).
13. ('09) 32 Mad 469 (477).
(1879) 4 Q B 653 (657, 658), Harris v. Quine.
(1835) 2 Bing N C 202 (213), Huber v. Steiner.
14. ('41) 28 AIR 1941 Pat 109 (114) : 20 Pat 144 (DB.)

Where an appeal is filed against a foreign judgment (which is on merits) and the appeal is held to be not competent, the judgment appealed from will be the judgment in the case and so there will be a judgment on the merits in such a case though the appellate judgment is not on the merits.[15]

14. Where it is against international law or based on non-recognition of British Indian law — Clause (c). — A judgment based upon an incorrect view of international law or a refusal to recognize the law of British India where such law is applicable is not conclusive.[1] But the incorrectness or the refusal must appear *on the face* of the proceedings.

15. Where the proceedings are opposed to natural justice—Clause (d). — Clause (d) has undergone a change. In the old Code, the words were "if it is in the opinion of the Court before which it is produced contrary to natural justice." But the present language of the clause refers to the *procedure* taken by the foreign Court for arriving at a judgment rather than to the *merits* of the case.[1] It is a principle of natural justice that a person must be given an opportunity of being heard before an adjudication is made against him. Thus, a judgment obtained *without notice of the suit* to the defendant is contrary to natural justice.[2] Similarly, a judgment against a party not properly represented in the proceedings, as for instance where no *guardian ad litem* is appointed for a minor defendant,[3] or where the interest of the person so appointed is in conflict with that of the minor,[4] or where the legal representative of a deceased party is not brought on record,[5] is contrary to natural justice. So also where the Court appoints its own officer as the guardian *ad litem* of a minor defendant in spite of the fact that there is in existence a *de facto* and *de jure* guardian who has not expressed his unwillingness to act as guardian *ad litem*, the Court acts against the interest of the minor and against natural justice by indirectly compelling him to appear in the suit by appointing its own officer as guardian *ad litem*.[6]

Courts in India will insist on a strict proof of the service of process alleged to have emanated from a foreign Court, before giving effect to a foreign judgment.[7] But where the foreign Court has held a particular notice to be sufficient, it must, in the absence of any evidence to the contrary, be presumed to be correct.[8]

A foreign judgment based on a second or a third review is opposed to natural justice.[9] An incorrect view of the law by the foreign Court will not, however, render the

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15. ('43) 30 AIR 1943 Bom 201 (205, 206) (DB). (Appeal not even entertained—The finality of the judgment is not disturbed or destroyed though the appellate judgment is not on the merits.)

Note 14

1. ('88) 1888 Pun Re No. 191.
('34) 21 AIR 1934 Mad 145 (147).
('38) 25 A I R 1938 Bom 173 (179) : I L R (1938) Bom 16 (DB).
('99) 26 Cal 931 (935) (DB). (Legislation giving jurisdiction in cases not recognised by international law — Judgment based on it is not one in accordance with international law.)

Note 15

1. ('43) 30 AIR 1943 Bom 201 (206) (DB). (Where in the case of a foreign judgment, the parties were heard by that Court and it reached its conclusion, the mere fact that the Court in British India may disagree with the conclusion is not enough to justify the British Indian Court in holding that the decision is opposed to natural justice.)
('18) 5 AIR 1918 Mad 274 (276): 41 Mad 205 (DB).
2. ('02) 29 Cal 509 (516) (SB).
('01) 28 Cal 641 (643) (DB).
('85) 9 Bom 346 (351, 352).
('80) 5 Bom 223 (232).
('71) 8 Bom H C R 200 (207) (DB).
('95) 22 Cal 222 (238) : 21 Ind App 171 :1894 Pun Re No. 112 (PC).
('71) 15 Suth W R 500 (501) (DB).
('89) 1889 Pun Re No. 66.
('88) 1888 Pun Re No. 191.
('90) 13 Mad 496 (499, 501) (DB).
3. ('27)14 AIR 1927 Lah 200(214):8 Lah 54 (DB).
4. ('34) 21 AIR 1934 Bom 390 (397).
5. ('27)14 AIR 1927 Lah 200(215):8 Lah 54 (DB).
6. ('39) 26 AIR 1939 Bom 374 (377).
7. ('87) 11 Bom 241 (245) (DB).
(1880) 14 Ch D 351 (371), Rousillon v. Rousillon.
8. ('25)12AIR1925 Mad 155(157):47 Mad 877(DB).
9. ('27) 14 AIR 1927 Lah200(211):8 Lah 54 (DB).

judgment one opposed to natural justice.[10]

Natural justice in this clause does not mean British Indian justice as opposed to the justice of any particular foreign country. The fact that the foreign Court follows its own rules of procedure and does not follow the procedure of British Indian Courts and British Indian rules as to evidence cannot afford ground for finding that the proceedings are opposed to natural justice.[11]

16. Where it has been obtained by fraud — Clause (e). — It is an established rule that a party to an action can impeach the judgment in it for fraud,[1] for it vitiates the most solemn transactions.[2] But the fraud must not be merely *constructive*; it must be *actual* fraud consisting of representations designed and intended to mislead; a mere concealment of facts is not sufficient to avoid a foreign judgment.[3] Again, the fraud should be one connected with the *procedure* in the suit. Thus, merely because the plaintiff obtains a decree upon evidence which is believed by the Court, but which in fact is not true,[4] or that in obtaining the judgment the plaintiff had included certain items for which the defendant was not liable,[5] it cannot be said that the decree has been obtained by fraud so as to attract the operation of this clause. Nor will a mere error of law in obtaining a judgment constitute fraud.[6]

17. Where the decree is founded on a breach of British Indian law— Clause (f). — Where a foreign judgment is founded on a breach of any law in force in British India, it will not be enforced even though the defect is not apparent on the face of the proceedings.[1] A foreign judgment on a claim which is barred according to law of British India cannot be said to be based upon a breach of the Indian law[2] and will be conclusive in a suit upon the judgment in British India.[3] Where the foreign decree sustains a claim which is founded on two grounds one of which involves a breach of British Indian law and the other does not and the latter is sufficient in itself to support the claim, the decree is not open to attack under cl. (f) of this section. Thus, where a person sues on the basis of a contract as well as under the principle embodied in S. 68 and obtains a decree in his favour, the fact that the claim on the *contract* is not sustainable under British Indian law owing to the minority of the persons who are alleged to have entered into the contract, does not affect the validity of the decree in so far as it is based on the other ground and is not open to impeachment under clause (f) of this section.[4]

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10. (1862) 2 B. & S. 11 (11), Scott v. Pilkington.
('16) 3 AIR 1916 Lah 330 (332).
('18) 5 AIR 1918 Mad 274 (275, 276):41 Mad 205.
11. ('41) 28 AIR 1941 Pat109(114):20 Pat 144 (DB).

Note 16

1. ('99) 26 Cal 891 (913).
(1890) 25 Q B D 310 (315), Vadala v. Lawes.
('34) 21 AIR 1934 Bom 390 (393). (Foreign judgment can be impeached for fraud.)
('91) 15 Bom 216 (221).
('71) 8 Bom H C R O C 200 (208) (DB).
('71) 15 Suth W R 500 (500) (DB).
('65) 4 Suth W R 107 (108) (DB).
('22) 9 AIR 1922 Lah 175 (176) (DB).
('99) 1899 Pun Re No. 2.
('88) 1888 Pun Re No. 191.
('84) 7 Mad 164 (166) (DB).
(1880) 5 App Cas 685 (697), Wallingford v. Mutual Society.
2 Sm L C, 9 Edn., 822, Duchess of Kingston's Case.
† (1883) 10 Q B D 295 (303), Abouloff v. Oppenheimer & Co.
2. † ('90) 17 Cal 769 (784) (FB).
3. (1861) 30 L J Q B 163 (168), Castrique v. Beherens.
(1880) 5 App Cas 685 (697), Willingford v. Mutual Society. (Mere allegation of fraud, in general term insufficient.)
[*See* ('41) 28 AIR 1941 Pat 109 (111):20 Pat 144 (DB). (Mere fact that plaintiff misdescribed himself in the plaint as a firm and got a decree would not go to show that the decree was obtained by fraud.)]
4. ('41) 28 AIR 1941 Mad 387 (389).
5. ('42) 29 AIR 1942 Bom 199 (202) : ILR (1942) Bom 688.
6. 91 Hun 43, Nevitt v. First National Bank.

Note 17

1. (1880) 14 Ch D 351 (371), Rousillon v. Rousillon.
('09) 33 Bom 479 (482) : 2 Ind Cas 530 (531) (DB). (But the same rule may not apply to domestic judgments.)
2. ('24) 11 AIR 1924 All 161(162): 46 All 119 (DB).
('16) 3 AIR 1916 Low Bur 67 (68).
3. ('08) 2 Sind L R 51 (52).
4. ('41) 28 AIR 1941 Mad 387 (389).

18. Effect of foreign judgment. — According to private international law a foreign judgment only creates a new obligation to pay but does not extinguish the original cause of action for the debt. A foreign judgment involves no merger of the original cause of action. On obtaining a foreign judgment the creditor has two remedies open to him, namely —

(1) of bringing an action in a domestic tribunal on the foreign judgment which he has recovered, or

(2) of bringing in a domestic tribunal a suit upon the original cause of action.

The mere fact that by reason of a notification issued under section 44 of the Code the plaintiff has the right to enforce the foreign judgment by an application for execution does not alter the legal character of the foreign judgment. In law it would still be regarded as only creating an independent obligation on the judgment-debtor to pay the sum adjudged without involving a merger of the 'original cause of action.[1] Hence, a plaintiff, who has obtained a judgment in a foreign Court against some of the joint promisors on a promissory note, can successfully maintain a suit in a British Indian Court against the rest of the joint promisors on the same cause of action.[2]

A foreign judgment has no force or authority as such in British India, but may give a cause of action for a suit to obtain the same relief in British India. It is only in such proceedings that the question of effect of the foreign judgment properly arises.[3] It has been seen that a foreign judgment is conclusive if passed by a competent Court[4] except in the cases mentioned in cls. (a) to (f) of S. 13. This will be so even though the judgment is subject to appeal and an appeal is actually pending in the foreign country where it was given. Even a stay of execution does not affect the finality of the foreign judgment which, nevertheless, can be sued on.[5]

Where the foreign Court *did not decide the issue raised*, the British Indian Court is not barred from deciding that issue.[6] Nor is *every* issue *decided* by the foreign Court binding though the relief granted or refused is binding.[7]

There is a distinction between a case in which a defendant relies on a foreign judgment as a bar to suit and a case in which the plaintiff seeks to enforce a foreign judgment. In the former case, the fair presumption is that the defendant submitted to the jurisdiction of the Court in the foreign country.[8]

In a suit upon a foreign judgment the plaintiff cannot recover anything more than what appears on the face of the judgment.[9] He cannot, for instance, claim interest when the foreign judgment is silent about it.[10]

Even where there is no question of the binding character of a foreign judgment, when the issue is as to what is the customary law in a foreign State, a judgment pronounced by the highest tribunal of that State would be valuable evidence of such law.[11]

Note 18

1. ('41) 28 AIR 1941 Cal 64 (65) : ILR (1941) 1 Cal 171 (DB).
2. ('41) 28 AIR 1941 Cal 64 (67, 68):ILR (1941) 1 Cal 171 (DB).
3. † ('16) 3 AIR 1916 P C 136 (138) (PC).
('74) 1874 Pun Re No. 4,
('88) 1888 Pun Re No. 191.
4. ('28) 15 AIR 1928 P C 83 (85) (PC).
(1900) 23 Mad 458 (473) (DB). (An adjudication of insolvency in French territory bars a subsequent suit for a debt everywhere.)
5. ('27) 14 AIR 1927 Lah 200 (207) : 8 Lah 54 (DB).
6. ('21) 8 AIR 1921 Lah 20 (23, 24) : 2 Lah 207 (DB).
7. ('28) 15 AIR 1928 Mad 327 (336) : 51 Mad 720 (DB).
8. ('99) 26 Cal 931 (935).
9. ('41) 28 AIR 1941 Pat 109 (115) : 20 Pat 144 (DB). (Where a foreign judgment is made the sole foundation of a suit, the relief asked for in the suit must be such as is awarded by the foreign judgment.)
('01) 28 Cal 641 (648) (DB).
10. ('01) 28 Cal 641 (648) (DB).
11. ('42) 29 AIR 1942 Bom 185 (189) : ILR (1942) Bom 467 (DB).

19. Enforcement of foreign judgments in British India. — A foreign judgment which is conclusive under S. 13 can be enforced in British India in the following ways —

(1) by instituting a *suit* on such foreign judgment, or,

(2) in cases of judgments of the Courts of Native States notified under S. 44, by *execution* of the decrees of the foreign Court as if they had been passed by the Courts of British India.[1]

There was a conflict of opinion at one time whether a judgment of a Court of a Native State in India could be enforced by a suit on the judgment. The High Court of Madras held that it could.[2] The Bombay High Court held that it could not, on the ground that judicial inquiries in Native States were not conducted with intelligence or integrity.[3] In order to remove this conflict, ACT VII of 1888 added a clause to S. 14 of the Code of 1882 to the effect that a suit could be brought on such judgment but that the British Indian Court was not precluded from an enquiry into the *merits* of the case in which the judgment was passed.[4] This clause has now been omitted and the reason was stated by the Special Committee as follows :

> "It appears to the committee that it is not possible to maintain this distinction in the case of all Asiatic Courts. The Courts in Japan, for instance, are entitled to be treated on the same footing as European Courts."[5]

There is, therefore, now no distinction between the judgments of the Courts of Native States and other foreign judgments. A suit can be brought on such judgments,[6] and in such a suit as a general rule the Court cannot institute an enquiry into the *merits* of the original claim or the *propriety* of the decision.[7]

20. Execution proceedings. — See Section 44.

21. Foreign judgment on a decree of British Indian Court—Effect of. — The existence of a foreign judgment on a decree of a British Indian Court is no bar to the execution of the British Indian decree in the British Indian Court.[1] A judgment of a British Indian Court does not entitle the decree-holder to restrain the judgment-debtor from proceeding in a foreign Court.[2]

22. Suit on foreign judgments. — See also Note 19.

A suit upon a foreign judgment cannot be brought against persons other than those against whom the foreign judgment was passed. Thus, where A obtains a decree

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Note 19

1. † ('15)2 AIR 1915 Mad 486(488):39Mad 24 (FB).
2. ('97) 20 Mad 112 (114) (DB).
('92) 15 Mad 82 (83) (DB).
('84) 7 Mad 164 (166) (DB).
3. ('84) 8 Bom 593 (595).
('81) 6 Bom 292 (296).
[But see (1900) 24 Bom 86 (88, 89).]
4. ('98) 21 All 17 (19).
('92) 1892 Pun Re No. 102.
5. See Notes on Clauses.
6. ('67) 8 Suth W R 32 (33) (DB).
('34) 21 AIR 1934 Bom 390 (392).
('78) 3 Bom 193 (196) (DB).
('71) 15 Suth W R 500 (500) (DB).
('16) 3 AIR 1916 Lah 330 (332).
('88) 1888 Pun Re No. 191.
('37) 24 AIR 1937 Mad 97 (98).
('84) 7 Mad 164 (166) (DB).
('95) 22 Cal 222 (237) : 21 Ind App 171 : 1894 Pun Re No. 112 (PC).
[*See* ('38) 25 AIR 1938 Cal 511 (516) : 63 Cal 1033. (No suit can be brought on a judgment by a Court without jurisdiction.)]
7. † ('24)11 AIR 1924 All 161(162):46 All 119(DB).
† (1865) 4 Suth W R 107 (108) (DB).
('34) 21 AIR 1934 Bom 390 (392).
† ('81) 6 Bom 292 (296) (DB).
('23) 10 AIR 1923 Mad72(73,74):45 Mad 1014(DB).
('18) 5 AIR 1918 Mad 949 (954) (DB). (See discussion as to right of foreign Court to decide about right or title to property not within its jurisdiction.)
('35) 22 AIR 1935 Rang 284 (291) (DB).
(1881) 6 QBD 288 (289), Henderson v. Henderson.
(1861) 6 H & N 301 (307, 308), Decosse Brissac v. Rathlone.
[*See also* (1871) 6 Q B 199 (154), Godard v. Gray.
(1850) 9 CB 661, Bank of Australasia v. Harding.]

Note 21

1. † ('81) 7 Cal 82 (88, 84) (DB).
2. *See* ('16) 3 AIR 1916 P C 136 (138) (PC).

against B and C in Ceylon, he cannot sue B, C, D and E in a British Indian Court on the foreign judgment on the ground that D and E were *partners* of B and C.[1] Nor can a suit be brought on a foreign judgment unless it is for an *ascertained* sum of money.[2]

A suit on a foreign judgment is not a small cause suit and does not lie in a Small Cause Court.[3]

23. Limitation. — See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Article 117 and Notes thereon.

PLACE OF SUING

Court in which suits to be instituted.

15. [S. 15.] Every suit shall be instituted in the Court of the lowest grade competent to try it.

[1877, Ss. 15 and 25; 1859, S. 6, Para. 1.]

Synopsis

1. Scope and object of the section.
2. "Suit." See S. 11, Note 21.
3. "Shall be instituted."
4. "Court of the lowest grade."
5. "Competent to try it"—General.
6. Valuation in plaint determines jurisdiction. See Note 4 on Section 6.
7. Cases in which satisfactory valuation is not possible.
8. Effect of improper valuation.
9. Valuation for jurisdiction is different from valuation for court-fees.
10. Mode of valuation.
11. Redemption and mortgage suits.
12. Pre-emption suits.
13. Partition suits.
14. Suit for accounts and administration.
15. Suit for mesne profits. See under Note 6.
16. Declaratory and injunction suits.
16a. Suit pertaining to maintenance.
17. Suit to set aside adoption. See Note 7.
18. Suit for removal of karnavan. See Note 7.
19. Suit for cancellation and setting aside of documents. See Note 7.
20. Suit to enforce registration of documents. See Note 7.
21. Suit to remove trustees. See Note 7.
22. Suit between landlord and tenant.
23. Execution and claim cases. See Order 21, Rule 63.
24. Suit for restitution of conjugal rights. See Note 7.
24a. Suit for dissolution of Mahomedan marriage.
25. Miscellaneous suits.
26. Mode of valuation for appellate jurisdiction. See Note 18 on S. 96.
27. Suits embracing two or more subjects.
28. Objection to jurisdiction. See S. 21.
29. Waiver of objection to jurisdiction. See Note 5 on Section 9.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Competence of Court to pass a decree for an amount exceeding its pecuniary limits. See S. 6.

Effect of instituting a suit in a Court of lower grade when it ought to have been instituted in a Court of higher grade and *vice versa*. See Note 3.

Inferior Court can declare decree of a superior Court a nullity. See Note 5.

Place of suing. See Note 1.

Value of claim proved does not affect jurisdiction nor defendant's plea. See S. 6.

When once suit is instituted Court cannot transfer it on finding that plaintiff is entitled only to a part of a claim cognisable by a lower Court. See Note 3.

Note 22

1. † ('83) 6 Mad 273 (276) (DB). (*A* obtained a decree against *B* and *C* in Ceylon, and having obtained part satisfaction by sale of property in Ceylon, brought a suit for balance upon the foreign judgment in British India against *B*, *C*, *D*, *E*, *F* and *G* alleging that all were members in one firm —*Held* that the suit would not lie against *D*, *E* *F* and *G*, upon the foreign judgment.)

2. † ('95) 22 Mad 382 (383) (DB).

3. † ('88) 1888 Pun Re No. 97.
† ('83) 6 Mad 191 (192) (DB).
See also Art. 25 of Sch. II of the Provincial Small Cause Courts Act (IX of 1887.)

1. Scope and object of the section. — This and the following sections up to section 20 regulate the *forum* for the institution of suits in British India.[1] The rule requiring every suit to be instituted in the Court of the lowest grade is only a rule of procedure and not of jurisdiction. Thus, the District Judge and the Subordinate Judge have *jurisdiction* over all original suits cognisable by the Civil Court subject, in its exercise, to a certain *procedure*, namely, that the suits be instituted in the Court of the *lowest* grade competent to try them.[2] "The object of the Legislature," said Petheram, C. J., "is that the Court of the higher grade shall not be overcrowded with suits."[3]

It has been held that this section does not apply to the High Court in the exercise of its original civil jurisdiction.[4]

2. "Suit." — See Section 11, Note 21.

3. "Shall be instituted." — As has already been seen in Note 1 above, this section merely lays down a rule of *procedure*. It does not deprive any Court of the jurisdiction which it may otherwise possess under the Acts constituting them.[1] Hence, the institution in a Court of a higher grade, of a suit, which ought to have been instituted in a Court of lower grade, is only an irregularity in procedure covered by S. 99 of the Civil Procedure Code, and does not affect the jurisdiction of the Court.[2] The contrary view taken in the undermentioned cases[3] cannot be accepted as correct. In *Nidhi Lal* v. *Mazhar Hussain*,[4] Petheram, C. J., said :

> "The word 'shall' is, in my opinion, imperative on the *suitor*. The word is used for the purpose of protecting the Courts. The suitor shall be obliged to bring his suit in the Court of the lowest grade competent to try it. The object of the Legislature is that the Court of the higher grade shall not be overcrowded with suits. . . . . The proviso is for the benefit of the Court of the higher grade and it is not bound to take advantage of it. If it does not wish to try the suit it may refuse to entertain it. If it wishes to retain the suit in its Court it may do so: it is not bound to refuse to entertain it."

It is thus clear that where a suit which ought to have been instituted in a Court of lower grade is instituted in a Court of a higher grade, the latter cannot be said to have no *jurisdiction* to try the suit though as a matter of procedure the plaint ought to

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Section 15 — Note 1

1. ('28) 15 AIR 1928 Lah 297 (299) : 9 Lah 455 (DB). (They regulate the venue within British India and apply only to those places where the Code is in force.)
2. † ('85) 7 All 230 (234, 235, 240, 241) (FB). (Per Oldfield, J.)
('03) 30 Cal 453 (457) (FB). (This section controls S. 144, Ben. Ten. Act.)
3. ('85) 7 All 230 (234) (FB).
4. ('35) 22 AIR 1935 Rang 517 (520).
Also see S. 120 Note 2.

Note 3

1. ('90) 17 Cal 155 (159, 160) (DB).
('76) 24 Suth W R 137 (138) (DB).
† ('85) 7 All 230 (234, 235) (FB). (Subordinate Judge trying a suit of Munsif.)
('04) 31 Cal 849 (853) (DB).
('98) 25 Cal 46 (48) (DB). (Sale of property by a Court attached by higher Court is not without jurisdiction.)
('76) 25 Suth W R 219 (220) (DB).
('74) 22 Suth W R 301 (302) (DB).
(1900) 23 Mad 367 (371) (DB). (Case under Ganjam & Vizag Agency Court Act XXIV of 1839.)
('92) 15 Mad 241 (246) (DB). (District Court trying a case which should have been instituted before a Subordinate Judge.).
('91) 14 Mad 183 (185) (DB).
('82) 4 Mad 220 (226) (DB).
('15) 2 AIR 1915 Sind 3 (3) : 9 Sind L R 164.
[*See also* ('06) 8 Bom L R 516 (521).
('10) 5 Ind Cas 691 (692) (Cal). (Subordinate Judge trying a Munsif's case.)
('88) 1888 Pun Re No. 184.]
2. ('27) 14 AIR 1927 Mad 568 (569).
† ('08) 2 Low Bur Rul 192 (193, 194). (District Judge trying a case which should have been tried by a Township Court.)
† ('85) 7 All 230 (242) (FB).
('90) 17 Cal 155 (159) (DB).
('75) 24 Suth W R 137 (138) (DB). (The plaintiff should not be allowed more costs than if he had sued in the lower Court.)
('88) 1888 Pun Re No. 184.
('03) 2 Low Bur Rul 117 (120).
Also see S. 99 Note 5.
3. ('90) 13 Mad 25 (27) (DB).
('90) 13 Mad 273 (274) (DB).
('11) 4 Sind L R 264 (265) : 10 Ind Cas 980 (980).
4. ('85) 7 All 230 (233) (FB).
[*See also* ('25) 12 AIR 1925 Rang 278 (278).]

be returned for presentation to the proper Court.[5]

Where in such a case, the plaint is returned for presentation to the proper Court, the date of the *institution* of the suit is the date on which the plaint was originally presented in Court and not the date on which it was re-presented after the return.[6]

Where, however, a suit is instituted in a Court of a lower grade than the one which is competent to try it, the proceedings are null and void as being *without jurisdiction*,[7] and it must be presumed that material prejudice has been caused to the party concerned.[8] The willingness of the plaintiff not to claim, out of the sum that might be realised by the sale of the suit property, anything in excess of the pecuniary jurisdiction of the Court cannot confer on the Court jurisdiction to try the suit.[9]

Where A, as a sole plaintiff, can only sue in the Court of the Subordinate Judge as being the Court of the lowest grade competent to try the suit, but B, his co-plaintiff, can, by virtue of Act XX of 1863, sue only in the District Court, this section does not prevent A and B from *together* instituting the suit as co-plaintiffs in the District Court.[10]

Once the *institution* of the suit takes place according to the provisions of this section its operation is exhausted and the suit should not be transferred merely because it is subsequently found that the plaintiff is entitled only to a part of the claim which would have been cognisable by a lower Court.[11]

4. "Court of the lowest grade." — The following are the several grades of Courts in order, which have been established in British India :

1. *High Courts.* — There are *Chartered* High Courts in Allahabad, Bombay, Calcutta, Lahore, Madras, Patna and Nagpur, a Judicial Commissioner's Court in Peshawar and Chief Courts in Oudh and Sind. All these are "High Courts" for the purpose of the Code. See the General Clauses Act, X of 1897, S. 3 (24).

2. *District Courts.* — Next below the High Court is the District Court which is the principal Civil Court of original jurisdiction in the district. It is also a Court of appeal from the decrees and orders of Subordinate Courts in certain cases.[1]

3. *Courts of the Subordinate Judges (in the Bombay Presidency and the Central Provinces, Subordinate Judges of the First Class).* — The jurisdiction of these Subordinate Judges extends to all original suits of any value.[2]

4. *Courts of the District Munsifs (correspond to Courts of Subordinate Judges of the Second Class in the Bombay Presidency and the Central Provinces).* — These have only a *limited* pecuniary jurisdiction, that of the Second Class Subordinate

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5. ('85) 7 All 230 (240, 241) (FB).
('28) 15 AIR 1928 Lah 484 (486) (DB). (No discretion is conferred on the suitor.)
('88) 12 Bom 169 (171) (DB).
('73) 10 Bom H C R 495 (496) (DB). (The fact of the Court of the lowest grade being closed does not authorise the institution of the suit in the Court of the next superior grade.)
[*See* ('30) 122 Ind Cas 187 (188) (All). (It would be improper to return the plaint after the hearing of the whole case.)]

6. ('41) 28 AIR 1941 Mad 711 (712) (DB).

7. ('41) 28 AIR 1941 Mad 711 (712)(DB). (In such a case, if the plaint is returned for presentation to the proper Court and re-presented to such Court, the date of such *re-presentation* and not the date of its original presentation is the date of the *institution* of the suit.)
† ('11) 38 Cal 639 (668) : 12 Ind Cas 464 (476) (DB).
('83) 6 Mad 192 (196) (DB). (Plea as to jurisdiction is not merely technical.)
('95) 19 Bom 46 (48) (DB). (But when the suit has been instituted in the superior Court the inferior Court to which the suit is properly made over for trial has jurisdiction to try the suit.)
('89) 17 Cal 155 (160) (DB).

8. ('33) 20 AIR 1933 Lah 8 (9)

9. ('87) 10 Mad 152 (154) (DB).

10. ('99) 23 Mad 537 (540) (DB).

11. ('20) 7 AIR 1920 Nag 47 (48).

Note 4

1. See the Civil Courts Acts : Bombay Act XIV of 1869; Madras Act III of 1873; Bengal N W P and Assam Act XII of 1887; The Oudh Court Act XIII of 1879 and IV of 1925; (Agra) Tenancy Act III of 1926; Central Provinces Act XVI of 1885; Punjab Act XVIII of 1884; Burma Act VI of 1900; Jhansi Act XVIII of 1867.

2. See foot-note 1.

Judge in Bombay and Central Provinces extending up to Rs. 5,000; that of the District Munsif in Madras extending up to Rs. 3,000 and that of the Munsif in Bengal, North-Western Provinces and Assam extending up to Rs. 1,000.[3]

In each of the Presidency Towns of Bombay, Calcutta and Madras there is also a Small Cause Court with pecuniary jurisdiction up to Rs. 2,000. Clause 12 of the Letters Patent of these High Courts provides that the High Court has *no jurisdiction* over small cause suits the value of which is *less* than Rs. 100.[4] In suits of a small cause nature where the value of the subject-matter exceeds Rs. 100 but does not exceed Rs. 2000, both the High Court and the Small Cause Court have jurisdiction to try the suits, but as a matter of procedure they should be instituted only in the Small Cause Court as being the Court of the lowest grade.[5]

The words "Court of the lowest grade" refer only to Courts to which the Civil Procedure Code applies. The Code does not apply to Village Munsif's Courts in Madras Presidency and a small cause suit therefore which is cognisable both by the Small Cause Court as well as by the Court of the Village Munsif need not be necessarily filed in the latter Court as being the Court of the "lowest grade."[6]

5. "Competent to try it" — General. — As has been observed already in S. 9, the jurisdiction of a Court to try a suit is of three kinds, viz., jurisdiction with reference to the nature of the suit, pecuniary jurisdiction and territorial jurisdiction.[1] Thus, the exemption of certain suits from the cognisance of Small Cause Courts relates to the jurisdiction of Courts with regard to the *nature* of the suit.[2] The prohibition of Presidency Small Cause Courts from entertaining suits of which the value exceeds Rs. 2000 is an example of *pecuniary* jurisdiction. And the rule that a Court shall not try a suit for immovable property situated beyond certain local limits prescribed as the limits of its jurisdiction is an example of *territorial* jurisdiction.

Where the Court has jurisdiction to try a suit, it has jurisdiction to decide every question arising in the suit and its decree, though it may be wrong, is binding on the parties until it is reversed in some manner provided by law.[3] Similarly, where any law sets out the jurisdiction of the Court in general terms and does not particularize the remedies or processes whereby that jurisdiction may be exercised, then the grant of jurisdiction includes by implication the authority to issue such writ or process as is

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3. See foot-note 1.
4. (1862) 1 Hyde 272.
5. *See* ('10) 34 Bom 13 (54).
6. ('90) 13 Mad 145 (146) (DB).
('69) 5 Mad H C R 45 (47) (FB).
[*See also* ('40) 27 AIR 1940 Mad 495 (496) : ILR (1940) Mad 684. (Suit triable both by Village Court and District Munsif—S. 15 does not apply to such suit.)]

Note 5

1. ('94) 16 All 183 (184) (DB).
† ('83) 9 Cal 439 (444) : 9 Ind App 197 (PC). (A fourth kind of jurisdiction is jurisdiction with reference to person, e. g., jurisdiction of Courts over foreign princes.)
2. See Sch. 2 of the Provincial Small Cause Courts Act and S. 19 of the Presidency Small Cause Courts Act. For similar provisions restricting the jurisdiction of the Court with reference to the subject-matter of suits, reference may be made to S. 92, C. P. Code, S. 5 of the Succession Certificate Act; so also under the Tenancy Acts of the various provinces certain classes of suits are exclusively triable by Revenue Courts.
See also the following cases holding that the particular suits in question must be brought in the District Court:
('87) 9 All 191 (202) : 13 Ind App 134 (PC). (Suit for infringement of patent.)
('79) 3 Bom 146 (147). (In Bombay Presidency suits against a municipality.)
('81) 6 Cal 499 (503). (Suit for infringement of copyright.)
('89) 12 Mad 188 (189). (A suit to dismiss a zamindari karnam.)
[*See also* ('88) 12 Bom 358 (363).]
3. † ('04) 26 All 522 (525).
† (1900) 22 All 270 (280) (FB).
† ('01) 25 Bom 337 (347, 348) : 27 Ind App 216 (PC).

necessary to enforce it.[4] But where a suit is instituted in a Court having *no jurisdiction* to try it, the defect is a fatal one[5] and cannot be cured by its subsequent transfer to a Court having jurisdiction.[6] Once jurisdiction is acquired by a Court over a suit, it continues in all matters in the suit that are brought within its cognisance by the Civil Procedure Code.[7]

An inferior Court has jurisdiction to set aside the decree of a superior Court obtained by fraud provided it is otherwise competent to try the suit.[8]

No matter is deemed to be beyond the jurisdiction of a superior Court of Record (like a Chartered High Court) unless it is expressly shown to be so, and an objection to the jurisdiction of a superior Court of general jurisdiction must show what other Court has jurisdiction so as to make it clear that the exercise by the superior Court of its general jurisdiction is unnecessary.[9]

When a superior Court of general jurisdiction (like a Chartered High Court) has had territorial jurisdiction conferred upon it, the jurisdiction cannot be taken away except by express words or necessary implication.[10]

6. Valuation in plaint determines jurisdiction.—See Note 4 on Section 6.

7. Cases in which satisfactory valuation is not possible. — There are many suits which are not capable of satisfactory valuation for purposes of jurisdiction, such as suits for the restitution of conjugal rights and suits for the removal of a trustee. Under S. 9 of the Suits Valuation Act the High Court has power to make rules providing that any such suits may be valued in a specified manner. In the absence of any such rules framed by the High Courts, a conflict of view has arisen as to the right method of valuation of such suits. The Allahabad,[1] Bombay[2] and Calcutta[3] High Courts have held that, in such cases, the plaintiff's valuation should be accepted as determining jurisdiction. According to the Madras High Court[4] the principle to be adopted is that where the subject-matter is wholly unrelated to anything which can be readily stated in definite money terms, the plaintiff's own valuation must be accepted, but that where the subject-matter is so *related* to things which have a real money value and *which will be affected* by the relief claimed, the *market value of the property affected* will determine jurisdiction.

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4. ('40) 27 AIR 1940 Rang 84 (89) : 1940 Rang L R 325 (SB). (High Court has power to issue writ of certiorari.)

5. ('35) 22 AIR 1935 Pesh 174 (175).

6. ('87) 9 All 191 (202) : 13 Ind App 134 (PC).
('82) 4 All 478 (480) (DB). (But S. 21 of the Code is a qualification to this rule. See notes thereon.)
Also see S. 24, Note 12.

7. ('86) 10 Bom 200 (202) (DB).

8. ('19) 6 AIR 1919 Sind 53 (54) : 13 Sind L R 144. (Such a suit will lie to set aside a decree on award.)
† ('18) 5 AIR 1918 Mad 711 (712) : 41 Mad 213 (DB).
('05) 11 Cal W N 579 (581) (DB). (It can set it aside as a nullity.)
('19) 6 AIR 1919 Mad 223 (224) (DB).

9. ('40) 27 AIR 1940 Rang 84 (89) : 1940 Rang L R 325 (SB). (Rangoon High Court has power to issue writ of certiorari.)

10. ('40) 27 AIR 1940 Rang 84 (90) : 1940 Rang L R 325 (SB).

Note 7

1. ('93) 15 All 378 (379) (DB). (Adoption.)
† ('06) 28 All 545 (551) (FB). (Restitution of conjugal rights.)
2 ('95) 1895 Bom P J 228 (228). (Adoption.)
('11) 35 Bom 264 (265) (DB). (Do).
3. ('10) 37 Cal 860 (862) (DB). (To set aside adoption.)
† ('07) 34 Cal 352 (356) (DB). (Restitution of conjugal rights—Dessenting from the obiter dictum in 31 Cal 849 and distinguishing 13 Cal 232.)
[But see ('91) 18 Cal 378 (381) (DB). (Appeal to Privy Council.)
('87) 14 Cal 351 (352) (DB). (Appeal to High Court.)]
4. † ('27) 14 AIR 1927 Mad 563 (565) : 50 Mad 646 (DB).
[*See* ('35) 22 AIR 1935 Mad 874 (875). (Suit for declaration that a will is not valid — A valuation grossly in excess of the value of the property covered by the will and which was not a *bona fide* valuation not accepted though the suit properties being properties set apart for charitable purposes—Market value is not the correct basis.)]

Illustrations.

1. *A* sues for the restitution of conjugal rights. According to all the High Courts the plaintiff's valuation will determine the jurisdiction.[5]

2. *A* sues for a declaration of the validity of an adoption or to set aside an adoption. According to the Allahabad, Bombay and Calcutta High Courts the plaintiff's valuation will determine jurisdiction.[6] According to the Madras High Court the relief claimed *affects properties* which the person adopted will be entitled to and therefore the *market value of the properties* will determine jurisdiction.[7]

3. *A* sues for the removal of *karnavan* of a Malabar *tarwad* or of a trustee. According to the Madras High Court the value of the suit for purposes of jurisdiction must be guided by the value of the tarwad or trust property.[8] In Madras, rules have now been framed under S. 9 of the Suits Valuation Act, 1887, for the valuation of suits for removal of karnavans. See the Notification referred to below.[9]

4. *A* sues to set aside a document or to compel the registration of a document. The reliefs claimed are *not incapable* of valuation and therefore the value of the interest affected by the document is the value for purposes of jurisdiction.[10]

8. Effect of improper valuation. — Although it is the plaintiff's valuation that determines the *forum* of a suit, where the value can be correctly ascertained the plaintiff is not at liberty to place an arbitrary value on his suit or to misrepresent its real value so as to have it tried by a Court different from that intended by the Legislature.[1] If it appears to the Court that the allegation in the plaint is falsely made for the purpose of avoiding the jurisdiction of the proper Court, the Court may require the plaintiff to prove that the valuation is proper.[2] Where however a decree is passed in

5. † ('06) 28 All 545 (551) (FB).
('86) 13 Cal 232 (236) (DB).
('09) 34 Bom 236 (237) : 4 Ind Cas 836 (836) (DB).
('07) 34 Cal 352 (356) (DB).
See also the cases cited in foot-notes (2) and (4) above which bear out the principle involved.
Also see S. 96 Note 18.

6. ('93) 15 All 378 (379) (DB).
('95) 1895 Bom P J 228 (228).
('10) 37 Cal 860 (862) (DB).

7. † ('27) 14 AIR 1927 Mad 563 (565) : 50 Mad 646 (DB).
[*See also* ('24) 11 AIR 1924 Mad 84 (85).
('83) 6 Mad 192 (196).]

8. ('10) 8 Ind Cas 545 (545) (DB) (Mad).
('85) 8 Mad 516 (518) (DB).
('88) 11 Mad 266 (267, 268) (DB). (But if the value put by the parties is *bona fide* it may be accepted.)
[But see ('91) 14 Mad 78 (79).]

9. Notification of 26-2-1903, Fort St. George Gazette of 3-3-1903, Part II, page 368, R. I. (Suit for removal of karnavan, etc., should be valued at one third of the amount at which the same would be valued under the Court-fees Act if the suit were one brought by a stranger for the recovery of the whole property possessed by the Tarwad or Illoms to which the suit relates.)

10. † ('08) 31 Mad 89 (93) (FB). (Suit to enforce registration.)
('90) 13 Mad 56 (59) (DB). (Do.)
† ('24) 11 AIR 1924 Mad 84 (84, 85). (Suit to set aside award.)
('92) 15 Mad 294 (295) (DB). (To set aside an instrument.)

Note 8

1. † ('32) 19 AIR 1932 All 413 (414) (DB). (Suit for dissolution of partnership—Assets over-valued.)
† ('03) 6 Oudh Cas 255 (260). (Pre-emption suit.)
('84) 8 Bom 31 (33, 34) (DB).
('13) 21 Ind Cas 771 (772) (DB) (Cal).
('12) 40 Cal 245 (249) : 17 Ind Cas 162 (163) (DB). (Suit for partition.)
('10) 11 Cal W N 705 (711) (DB).
('06) 3 Cal L Jour 143 (154) (DB). (Per Mukerjee, J.)
('90) 17 Cal 680 (683) (DB).
('85) 8 Mad 384 (388). (Suit for payment of annual emoluments.)
[*See also* ('07) 31 Bom 73 (78).
('76) 25 Suth W R 76 (76). (Plaintiff may be punished by saddling him with costs, but suit should not be dismissed.)
('73) 19 Suth W R 20 (22).
('72) 17 Suth W R 243 (243).
('14) 1 AIR 1914 Lah 214 (216) : 1913 Pun Re No. 111 (FB).
('25) 12 AIR 1925 Rang 278 (278).]
[But see ('13) 18 Ind Cas 363 (363) (FB) (Mad).]

2. ('01) 24 Mad 158 (159).
('24) 11 AIR 1924 All 652 (656) : 46 All 553. (Plaintiff may be asked to deliver particulars of his valuation.)
('97) 24 Cal 661 (667). (The plaint should be returned to proper Court.)
('70) 13 Suth W R 326 (327). (If a question of proper valuation is raised the Court must decide it.)
† ('15) 2 AIR 1915 Mad 444 (445).
[*See* ('82) 8 Cal 975 (977). (The question of valuation ought to be the preliminary question which a Court should decide.)]

the suit, the Appellate Court has no power to entertain any objection to the jurisdiction of the trial Court on the ground of overvaluation or undervaluation, unless the objection was taken in the trial Court at or before the framing of the issues or unless the Appellate Court is satisfied that, on account of the overvaluation or undervaluation, the decision of the suit on the merits has been prejudiced. (See S. 21 Note 1 and S. 99 Note 6.) The mere change in the *forum* consequent on the overvaluation or undervaluation of a suit will not be considered as affecting the disposal of the suit on the merits.[3] But it has been held by the Calcutta High Court that where, owing to the undervaluation of a suit, the appeal from the decree is heard and decided by a District Court instead of by the High Court, the decree passed by the District Court is a nullity.[4]

9. Valuation for jurisdiction is different from valuation for court-fees. — The special rules applicable to valuation for court-fees are not to be taken as necessarily a guide in determining the value of the subject-matter of a suit for purposes of jurisdiction.[1] Where a suit is brought for a bare declaration of title to property, a fixed court-fee of Rs. 10 is payable under the Court-fees Act, Sch. II, Art. 17, on the plaint. But the value of the suit for purposes of *jurisdiction* will be the real value of the property and not the amount for which Rs. 10 would be an *ad valorem* fee under the Court-fees Act.[2] The Suits Valuation Act and the Court-fees Act are purely fiscal enactments and they have no bearing on the question as to which is the proper Court for the institution of the suit, having regard to the property involved in the suit.[3]

10. Mode of valuation. — The mode of valuation of suits for purposes of jurisdiction is laid down in the Suits Valuation Act, 1887. Generally the amount of the claim or the actual value of the property claimed determines jurisdiction,[1] except in certain cases mentioned in the Suits Valuation Act. Among these, special mention may be made of the suits referred to in S. 8 of the Suits Valuation Act. In such cases, the values for purposes of jurisdiction as well as of court-fees will be the same.[2]

11. Redemption and mortgage suits. — A suit for the recovery of money due on a mortgage is a suit for money and the value of such a suit for the purpose of court-fees is the amount claimed as due, under S. 7 (i) of the Court-fees Act, 1870. The same will determine the value for purposes of *jurisdiction* under S. 8 of the Suits Valuation Act, 1887.[1]

In suits for redemption and for foreclosure, the mode of valuation for jurisdiction is not prescribed by statute, as S. 8 of the Suits Valuation Act, 1887, expressly excepts such suits from its operation. There has consequently been a difference of opinion on the

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3. † ('18) 5 AIR 1918 Mad 590 (591) (DB).
('97) 24 Cal 661 (664) (DB).
('10) 20 Mad L Jour 726 (728).
4. ('11) 38 Cal 639 (668) : 12 Ind Cas 464 (476, 477) (DB).
[*See also* ('80) 5 Cal 188 (191).]

Note 9

1. ('40) 27 AIR 1940 Cal 375 (375) (DB).
('87) 11 Bom 591 (595) (DB). (Per Birdwood, J.)
† ('80) 4 Bom 515 (527) (FB).
† ('07) 31 Bom 73 (77) (DB). (But see Section 8, Suits Valuation Act, VII of 1887).
('77) 1 Bom 543 (547) (DB).
('77) 1 Bom 538 (541) (DB).
('82) 8 Cal 757 (759).
('80) 5 Cal 489 (492, 493) (DB).
('76) 25 Suth W R 39 (39) (DB).
† ('73) 20 Suth W R 33 (35) (DB).
('72) 18 Suth W R 109 (110) (DB).
('83) 6 Mad H C R 151 (162) (FB).
(1900) 1 Low Bur Rul 96 (97).
2. ('18) 5 AIR 1918 P C 188 (191) : 43 Bom 507 ; 46 Ind App 24 (PC).
3. † ('32) 19 AIR 1932 All 413 (414) (DB).

Note 10

1. *See* ('66) 3 Mad H C R 170 (172).
2. ('21) 8 AIR 1921 Cal 84 (85).

Note 11

1. ('94) 18 Bom 696 (698). (Including the interest.)
('80) 2 All 698 (704) (DB). (Value of the property is immaterial.)

point. The Madras and Allahabad High Courts have held that it is the *principal amount* of the mortgage that will determine the jurisdiction,[2] while the Bombay,[3] Calcutta[4] and Lahore[5] High Courts and the Judicial Commissioner's Court of Nagpur[6] hold that the amount *due on the mortgage* will determine jurisdiction.

12. Pre-emption suits. — The valuation for jurisdiction of this class of suits also has not been provided by the Suits Valuation Act, 1887, S. 8. But under S. 3 of that Act, however, the Provincial Government may make rules for valuing such suits. Rules have been framed in the Punjab.[1] Where the property sold is a revenue-paying land, the value of the suit is thirty times the *jama*[2] and where it is a house, then the market-value thereof, as given by the plaintiff.[3] In Bengal, under the Bengal Civil Courts Act (VI of 1871) the value of *the subject-matter of pre-emption* determines the jurisdiction.[4] In Madras under S. 14 of the Madras Civil Courts Act, 1873, the value is that fixed under S. 7 (v) of the Court-fees Act for a suit for possession of the land sought to be pre-empted.[5] It has been held in Oudh that the value of the property as stated in the plaint determines the jurisdiction.[6]

13. Partition suits. — Where a suit is brought for partition and *separate possession* of the plaintiff's share, the plaintiff being out of possession, it should be valued for purposes of jurisdiction on the *share* claimed by the plaintiff.[1] Where the suit is merely to enforce a right to share in a joint family property, the plaintiff can value it as he pleases, for the purposes of jurisdiction and court-fees under S. 8 of the Suits Valuation Act read with S. 7 (iv) (b) of the Court-fees Act.[2] If the suit is by a plaintiff tenant-in-common in *joint possession* of the properties for partition of his share, the value of the suit for purposes of jurisdiction will be the value of the *entire* property and not merely the share of the plaintiff.[3]

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2. ('09) 31 All 44 (45) (DB). (Not the value of the property.)
('83) 5 All 332 (333) (DB). (Do.)
† ('86) 8 All 438 (442, 443) (FB). (Redemption of share — Share of principal money determines jurisdiction.)
('81) 3 All 822 (824) (DB). (Further incumbrance on the property with a bond is not to be considered.)
('80) 2 All 778 (780) (DB).
('79) 1 All 620 (622) (DB). (When the question is whether the property and the right to redeem belongs to the plaintiff the question of jurisdiction depends on the value of the property.)
('16) 3 AIR 1916 Mad 631 (631) : 39 Mad 447.
('82) 5 Mad 287*n* (289*n*).
3. ('87) 11 Bom 591 (594) (DB).
('90) 14 Bom 19 (23) (DB).
4. ('24) 11 AIR 1924 Cal 783(785):51 Cal 737(DB).
5. ('26)13 AIR 1926 Lah 376(378): 7 Lah 570(FB).
6. ('13) 9 Nag L R 161 (163) : 21 Ind Cas 918 (919).
(NOTE.— In (1900) 1 Low Bur Rul 96 (97) it has been held that the value of the land mortgaged will govern jurisdiction in suits for redemption.)

Note 12

1. See Rules & Orders, Vol. 3, p. 83.
2. ('08) 1908 Pun Re No. 46.
('08) 1908 Pun Re No. 16 (FB).
3. (1900) 1900 Pun Re No. 101.
[*See also* ('02) 24 All 218 (225, 226) (DB). (Indigo factory buildings to be valued as 'house' and not as 'land'.)
4. ('69) 3 Beng L R (App) 143 (144) (DB).
('86) 13 Cal 255 (256) (DB).
5. ('19)6AIR1919Mad1062(1063): 41 Mad 721(DB).
6. ('11) 9 Ind Cas 414 (414) (Oudh). (12 Oudh Cas 31, Not followed.)

Note 13

1. ('91) 14 Mad 183 (184) (DB).
('92) 15 Mad 69 (70) (DB).
('09) 25 All 277 (279) (DB).
('02) 24 All 381 (382) (DB).
('90) 12 All 506 (509) (DB).
† ('98) 22 Bom 315 (316) (DB).
('84) 8 Bom 31 (34) (DB).
('90) 17 Cal 680 (683) (DB).
('82) 8 Cal 126 (128) (DB).
('15) 2 AIR 1915 Lah 131 (132) (DB).
('88) 1888 Pun Re No. 110 (FB).
('98) 21 Mad 234 (236) (DB).
† ('97) 20 Mad 289 (292) (DB).
('96) 19 Mad 56 (59) (DB). (Following 14 Mad 183.)
('90) 13 Mad 25 (27) (DB).
('88) 11 Mad 140 (141) (DB).
('33) 20 AIR 1933 Oudh 547 (549) : 9 Luck 219.
[*See also* ('09) 33 Bom 658 (663) (DB).]
[But see ('83) 13 Cal L Rep 253 (253). (The value will be the difference between the value of the plaintiff's share and the value of the same not partitioned.)
('85) 8 Mad 235 (236) (DB).]
Also see S. 110, Note 3.
2. ('13) 18 Ind Cas 363 (363) (FB) (Mad).
3. ('25) 12 AIR 1925 Cal 320(320): 52 Cal 128(DB).

14. Suit for accounts and administration. — Suits for accounts fall within S. 7 (iv) (f) of the Court-fees Act, 1870, and the plaintiff can put his own valuation for the purpose of court-fees. The same will also be the valuation for the purposes of jurisdiction under S. 8 of the Suits Valuation Act, 1887.[1]

15. Suit for mesne profits. — See under Note 6.

16. Declaratory and injunction suits. — A suit for a declaration and injunction is a suit for a declaration with consequential relief within the scope of the Court-fees Act, S. 7, cl. (iv) (c) and hence, by virtue of S. 8 of the Suits Valuation Act the value of the suit depends on the amount at which the plaintiff values his relief in the plaint.[1] But in a suit for a bare declaration, the value of the property likely to be affected is the value of the suit.[2] Although in cases coming under the Court-fees Act, S. 7 (iv) (c) and (d), the value fixed by the plaintiff determines jurisdiction, the Calcutta High Court has held that when a question as to the proper valuation is raised the Court can and should decide it.[3] The High Court of Madras has, on the other hand, held that the Court is bound by the plaintiff's valuation in the plaint.[4]

16a. Suit pertaining to maintenance. — It has been held by the Madras High Court that in a suit for *reduction* of maintenance awarded by a decree to a widow the value of the suit for purposes of jurisdiction will be the value of the benefit which the plaintiff is going to derive. Such benefit would depend on the expected duration of the widow's life which may be sought in mortality tables constructed for life assurance purposes.[1]

17. Suit to set aside adoption. — See Note 7.

18. Suit for removal of karnavan. — See Note 7.

19. Suit for cancellation and setting aside of documents. — See Note 7.

20. Suit to enforce registration of documents. — See Note 7.

21. Suit to remove trustees. — See Note 7.

('06) 3 Cal L Jour 257 (258) (DB).
('06) 3 Cal L Jour 197 (198) (DB).
('06) 4 Cal L Jour 509 (509) (DB).

Note 14

1. † ('18) 5 AIR 1918 Cal 883(886):44 Cal 890(DB).
('32) 19 AIR 1932 Bom 111 (112): 56 Bom 23(DB).
('15) 2 AIR 1915 Bom 59 (60) : 39 Bom 545 (DB).
† ('14) 22 Ind Cas 71 (72) (DB) (Bom).
('95) 19 Bom 198 (201).
('94) 18 Bom 40 (42) (DB).
('89) 13 Bom 517 (519) (DB).
('88) 12 Bom 675 (677) (DB).
('85) 9 Bom 22 (24) (DB).
('95) 22 Cal 692 (708) (DB).
('14) 1 AIR 1914 Lah 490 (491) : 1914 Pun Re No. 100 (DB).
('14) 1 AIR 1914 Oudh 1 (18) (DB).

Note 16

1. ('13) 40 Cal 615 (618):21 Ind Cas 404(405)(DB).
† ('07) 6 Cal L Jour 427 (431) (DB).
† ('18) 5 AIR 1918 P C 135 (136) : 43 Bom 376 : 46 Ind App 15 (PC). (Both for court-fee and jurisdiction.)
('20) 7 AIR 1920 Bom 105 (106, 107) : 44 Bom 331 (DB). (Do.)
('94) 18 Bom 100 (103) (DB). (Do.)
('12) 40 Cal 245 (249) : 17 Ind Cas 162 (163)(DB).
('05) 32 Cal 734 (739) (DB). (Both for court-fee and jurisdiction.)
('12) 6 Sind L R 114 (116): 17 Ind Cas 44(45)(DB). (Suit for rent, declaration of title and injunction.)
[*See also* ('88) 1888 Pun Re No. 163. (Suit for the removal of certain dams.)
('87) 1887 Pun Re No. 26. (Suit for removal of wall—Value of wall and land on which it stands —Punjab Courts Act S. 40, Cl. (a).)
('87) 1887 Pun Re No. 5. (Suit for closing doorway —Value held to be difference in selling price of plaintiff's premises before and after the door was opened—Punjab Courts Act, S. 40, Cl. (a).]
2. ('18) 5 A I R 1918 P C 188 (191) : 43 Bom 507 : 46 Ind App 24 (P C). (In such a case, the value for purposes of jurisdiction cannot be said to be the amount for which the court-fee (Rs. 10 under Sch. 2 Art. 17 of Court-fees Act) would be an *ad valorem* fee under Schedule 1 of Court-fees Act.)
('07) 30 Mad 18 (21) (DB).
('87) 10 Mad 371 (373) (DB).
('96) 20 Bom 736 (742) (DB). (A suit for setting aside a decree is a suit for declaration.)
† ('92) 15 Mad 501 (502) (DB).
('89) 12 Mad 223 (225) (DB).
[*See also* ('14) 1 AIR 1914 Lah 95 (95) : 1914 Pun Re No. 54. (Suit by occupancy tenant against his landlord.)
('92) 1892 Pun Re No. 145.)]
[But see ('97) 1897 Pun Re No. 18.]
3. ('07) 6 Cal L Jour 427 (434) (DB).
4. ('15) 2 AIR 1915 Mad 948(950):38 Mad 922(FB).
('13) 24 Mad L Jour 233(235). (Following 27 Mad 480.)

Note 16a

1. ('35) 22 AIR 1935 Mad 655 (656) : 59 Mad 159.

22. Suit between landlord and tenant. — In a suit for rent against a tenant, the amount claimed will determine jurisdiction also.[1] In a suit for recovery of the property leased from the tenant, the amount of the rent payable for one year next before the date of presenting the plaint will determine jurisdiction.[2]

23. Execution and claim cases. — See Order 21, Rule 63.

24. Suit for restitution of conjugal rights. — See Note 7.

24a. Suit for dissolution of Mahomedan marriage.—In *Burhan Mirdha* v. *Mt. Khodeja Bibi*,[1] the question was raised as to whether a suit for the dissolution of a Mahomedan marriage could be instituted only in the Court of the District Judge (the principal Court of civil jurisdiction) corresponding to the chief kazi under the Mahomedan law, or whether the rule contained in this section applies also to such a suit so that it can be instituted in the Court of the lowest grade within whose jurisdiction the valuation of the suit falls. In holding that the rule contained in this section applies also to such suits, the Calcutta High Court observed as follows :

> "It appears to us that the idea or notion that the principal Court of original jurisdiction under the British Government in India is vested generally speaking with the powers exercised by the kazi, has been derived from cases relating to wakfs under S. 92 of the Civil Procedure Code, or to cases of granting of leases of wakf property . . . . The wakf cases must therefore be kept apart when we are considering the question of the forum regarding matrimonial matters where the parties are Mahomedans . . . With regard to matrimonial disputes amongst the Mahomedans, however, the Civil Courts have taken the place of the kazis . . . . The question of jurisdiction is a question of procedure and not of substantive law. The substantive law has been saved to Moslems, but the procedure is to be of our British Indian Courts."

25. Miscellaneous suits. — The value of a suit for establishing a right of an occupancy *raiyat* in a garden and for possession thereof is that of the interest claimed and not that of the entire interest in the land.[1] A suit by one shareholder to set aside a sale of the property held by several shareholders must be valued according to the value of the entire property, although the plaintiff asks for possession of his share alone.[2] The value of a suit to establish the validity of a charge upon a property is the amount of the charge or the value of the property, whichever is less.[3]

26. Mode of valuation for appellate jurisdiction. — See Note 18 on Section 96.

27. Suits embracing two or more subjects. — In such cases the aggregate value of the different subjects included in the suit constitutes the value of the suit.[1]

28. Objection to jurisdiction. — See Section 21.

29. Waiver of objection to jurisdiction. — See Note 5 on Section 9.

Note 22

1. See Section 7 (i) of the Court-fees Act, 1870, and S. 8 of the Suits Valuation Act, 1887.
[*See also* ('03) 30 Cal 453 (457) (SB).]
2. See S. 7 (xi) (cc) of the Court-fees Act and S. 8 of the Suits Valuation Act.

Note 24a

1. ('37) 21 A I R 1937 Cal 189 (190, 191) : I L R (1937) 2 Cal 79 (SB). (Suit for dissolution of Mahomedan marriage — Value of suit less than Rs. 1000 — Suit can be instituted in Munsif's Court.)

Note 25

1. ('14) 1 AIR 1914 Cal 530 (530) (DB).
2. ('74) 21 Suth W R 68 (70) (DB).
3. ('82) 4 Mad 339 (341) (DB).

Note 27

1. ('93) 16 Mad 328 (329) (DB). (Suit to redeem a kanom and for arrears of rent.)
† ('12) 36 Bom 628(637):16 Ind Cas 1005(1007)(DB).
('81) 6 Cal 6 (8) (DB).
('07) 30 Mad 61 (64) (DB). (Whether claims are cumulative or alternative is immaterial.)

Suits to be instituted where subject-matter situate.

16. [S. 16.] Subject to the pecuniary or other limitations prescribed by any law,[3] suits —

(a) for the recovery[4] of immoveable property[5] with or without rent or profits,

(b) for the partition of immoveable property,[6]

(c) for foreclosure, sale or redemption[7] in the case of a mortgage of or charge upon immoveable property,

(d) for the determination of any other right to or interest in immoveable property,[8]

(e) for compensation for wrong to immoveable property,[9]

(f) for the recovery of moveable property actually under distraint or attachment,[10]

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate :

Provided that a suit to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant[12] may, where the relief sought can be entirely obtained through his personal obedience,[11] be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides,[14] or carries on business,[15] or personally works for gain.[16]

Explanation. — In this section "property" means property situate in British India.

[1877, S. 16; 1859, S. 5.]

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. Subject to the pecuniary and other limitations prescribed by law.
4. Immovable property.
5. Suits for the recovery of immovable property—Clause (a).
6. Suits for partition of immovable property —Clause (b).
7. Suits for foreclosure, sale or redemption —Clause (c).
8. Suits for the determination of any other right to, or interest in, immovable property—Clause (d).
9. Suits for compensation for wrong done to immovable property—Clause (e).
10. Suits for the recovery of moveable property actually under distraint or attachment—Clause (f).
11. "Where the relief sought can be entirely obtained through his personal obedience"—Proviso.
12. "Held by or on behalf of the defendant."
13. Suits for specific performance of an agreement.
14. "Actually and voluntarily resides." See Section 20 Note 3.
15. "Carries on business." See S. 20 Note 8.
16. "Personally works for gain." See S. 20 Note 11.
17. Chartered High Courts.
18. Explanation. See Notes 2, 5, 6, 9, 10 and 11.

1. Legislative changes. — The words "with or without rents or profits" have been added in cl. *(a)*. According to the report of the Select Committee the insertion of these words is intended "to remove any difficulty, there may be, where the defendant does not reside within the local limits of the Court within whose jurisdiction the property is situate." The word "sale" has been newly added in cl. *(c)*.

2. Scope and object of the section. — This section deals with local or territorial jurisdiction. Suits for the recovery of immovable property, or for the determination of any other right or interest in immovable property or for the recovery of moveable property actually under distraint or attachment must, under this section, be instituted in the Court within the local limits of whose jurisdiction the property is situate.[1] The object of the section is to limit the territorial jurisdiction of Courts in regard to the property that they are entitled to deal with.[2] As a rule therefore, Courts have no power to decide on rights and interests in property lying outside their local jurisdiction.[3] The explanation to the section makes it also clear that Courts of this country have no power to entertain suits in respect of property situate outside British India.[4]

But the section does not preclude the Courts from trying any question in respect of property lying outside their territorial jurisdiction where such question arises *incidentally*.[5] Nor is the section confined to suits involving *only* immovable property. It applies to suits for the recovery of immovable property as well as moveable property provided the immovable property is situate, wholly or in part, within the Court's local jurisdiction.[6]

3. Subject to the pecuniary and other limitations prescribed by law. — For pecuniary limitations, see S. 15. For instances of other limitations, see the following :

(1) A suit under S. 92 of the Code must be instituted in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Provincial Government.

(2) A suit regarding an infringement of copyright must, under section 13 of the Copyright Act, III of 1914, be instituted only in the High Court or the District Court.

(3) A suit against the Government or a Government officer in his official capacity must, in Bombay, under the Bombay Civil Courts Act, 1869, S. 32, be filed only in the High Court or the District Court.

Section 16 — Note 2

1. ('90) 17 Cal 699 (703) (FB).
('28) 15 AIR 1928 Mad 1272 (1277). (Suit to set aside decision of Board under Madras Religious Endowments Act in respect of a temple must be filed in the Court in the jurisdiction of which the temple is situate.)
[*See* ('85) 12 Cal 225 (237, 238): 12 Ind App 215 (PC). (High Court, by remanding suit to a Court not having jurisdiction over property cannot confer jurisdiction.)]

2. ('90) 17 Cal 699 (703) (FB).
('99) 23 Bom 22 (31) (DB).

3. † ('99) 23 Bom 22 (31) (DB). (Interest in respect of property lying in a Native State.)
('90) 17 Cal 699 (703) (FB). (Do.)

4. ('41) 28 AIR 1941 Mad 129 (137) (DB). (Obiter —Part of property outside British India—British Indian Court has no jurisdiction although rest of the property is within its jurisdiction—S. 17 does not apply to such a case.)
('41) 28 AIR 1941 Nag 36 (38, 49) : ILR (1941) Nag 1 (FB). (Before Government of India Act of 1935, Court in British India lacked territorial jurisdiction in respect of property in Berar.)
('81) 3 All 568 (572) (DB). (Property within the family domain of the Maharaja of Benares.)
('18) 5 AIR 1918 Nag 151 (152). (Suit for recovery of *joshipan* income —Suit relating to immovable property.)
('35) 22 AIR 1935 Nag 250 (255) : 31 Nag L R Sup 43 (FB). (Berar is foreign territory.)
('35) 22 AIR 1935 Nag 192 (193): 31 Nag LR 357 (DB). (Courts in British India have no jurisdiction to pass decrees in respect of property in Berar which is a foreign territory.)
('31) 18 AIR 1931 Sind 47 (48) : 25 Sind L R 204 (DB). (Application to file an award covering immovable property outside local jurisdiction.)
(1865) 2 Mad H C R 437 (438) (DB). (Property in Puddukotah State.)
('10) 7 Ind Cas 67 (67) (DB) (Mad). (Property in Cochin.)

5. ('80) 5 Cal 928 (931) (DB).
('99) 23 Bom 22 (30) (DB). (Suit for varshasan allowance.)
† ('67) 4 Bom H C R 173 (175).
† ('11) 10 Ind Cas 267 (267) (DB) (Mad.)
[*See also* ('97) 19 All 450 (451).]

6. † ('26) 13 AIR 1926 Lah 503 (504) (DB).

4. Immovable property. — The phrase 'immovable property' has not been defined in the Code but 'moveable property' has been defined in S. 2 (13) as including growing crops. The definition of 'immovable property' in S. 3 (25) of the General Clauses Act, X of 1897, read with S. 2 (13) of the Code, will therefore govern the meaning of those words for the purposes of the Code.[1] Under section 3 (25) of the General Clauses Act 'immovable property' includes —

(1) land,

(2) benefits to arise out of land, and

(3) things attached to the earth, or permanently fastened to anything attached to the earth.

Land.—The word 'land' includes water covering the land and includes a *jalkar* or a right of fishery.[2] *Jalkar* includes the right to drift stranded timber as well.[3] The right to fish in territorial sea waters is, however, common to all and is not property of any kind.[4]

Benefits to arise out of land. — These include such incorporeal hereditaments as issue out of, or are connected with immovable property so called and savouring of realty[5] such as rights of common, rights of way and profits in *alieno solo* such as rents, pensions and annuities secured upon land.[6] A right of ferry,[7] a *hat*,[8] an easement,[9] the interest of a Hindu widow in the rents of her husband's lands,[10] a *malikana* right[11] and a *haq-i-chaharum* or liability to pay customary dues attached to land,[12] are all within the definition of immovable property. But a *sayer* compensation, i. e., duty which an owner of a bazaar levies on commodities sold there is not immovable property.[13] Nor is a chance of acquiring a right to light and air, immovable property inasmuch as it is incapable of any valuation at all.[14]

It is the *nature of the thing* that has ordinarily to be looked to for determining whether it is immovable property.[15] But in certain cases a right is, in law, deemed to be immovable property, independent of the nature of the right.[16] Thus, hereditary offices are, by Hindu law, regarded as immovable property,[17] so is a right to levy a cess or rate granted by the *Peshwa*.[18]

('31) 18 AIR 1931 Sind 50 (52): 25 Sind L R 275. (Partition—Moveables alone within jurisdiction, immovables outside—No relief can be granted for immovables.)

Note 4

1. See S. 3 of the General Clauses Act, X of 1897.
2. ('78) 3 Cal 276 (279) (DB).
('93) 20 Cal 446 (448) (DB).
('97) 24 Cal 449 (454) (DB). (A suit for arrears of rent of fishery.)
('92) 19 Cal 544 (547, 554, 570, 571) (FB). (But it is not immovable property within the meaning of S. 9, Specific Relief Act, 1877.)
('97) 1897 Pun Re No. 48. (Do.)
[*See* ('91) 18 Cal 80 (82, 83).]
3. ('97) 24 Cal 504 (517) : 24 Ind App 33 (PC).
4. ('77) 2 Bom 19 (48, 53) (DB).
5. ('81) 5 Bom 322 (335) (DB).
6. ('81) 5 Bom 322 (336) (DB).
7. ('13) 35 All 156 (157) : 18 Ind Cas 282 (283).
('90) 13 Mad 54 (55) (DB).
8. ('09) 36 Cal 665 (669): 1 Ind Cas 520 (521) (DB).
('95) 22 Cal 752 (755) (DB).
But it is not immovable property within S. 9, Specific Relief Act, 1877 : *see* ('02) 29 Cal 614 (617, 618) (DB).
9. ('41) 28 AIR 1941 Mad 91 (95) : ILR (1941) Mad 157.
('09) 4 Ind Cas 116 (117) (Cal). (Right of way.)
('75) 24 Suth W R 300 (300) (DB).
10. ('99) 23 Bom 1 (11).
11. ('87) 9 All 591 (601).
12. ('73) 1 Ind App 34 (53) (PC).
13. ('92) 19 Cal 8 (10, 12) (DB).
14. ('96) 20 Bom 704 (715) (DB).
15. ✣('81) 5 Bom 322 (335) (DB).
16. †('81) 5 Bom 322 (335) (DB). (Grant by Peshwa out of Antashta Sadilwar.)
('74) 1 Ind App 31 (50): 21 Suth W R 178 (181) (PC).
17. ('73) 1 Ind App 34 (50) (PC). (Affirming 9 Bom H C R A C 99.)
('81) 5 Bom 322 (335) (DB).
('69) 6 Bom H C R A C 137 (138, 140) (DB).
('84) 10 Cal 73 (73, 74) (DB). (Right to officiate as priest at funeral ceremonies.)
('18) 5 AIR 1918 Nag 151 (151).
18. ('09) 33 Bom 373 (375) : 2 Ind Cas 489 (489).
('84) 6 Bom 546 (560) (FB).

A mortgage is an interest in immovable property and is therefore itself immovable property.[19] Where, however, the mortgage includes a covenant to pay, there is also a "debt," and for purposes of execution by attachment and sale, such "debt" is *moveable* property.[20] (See also O. 21, R. 46 Note 4.) The reason is this : the definition of 'immovable property' as well as other definitions given in S. 3 of the General Clauses Act apply only where there is no repugnancy thereto in the subject or context. Order 21, R. 46 relating to the attachment of debts, constitutes such a repugnancy in respect of execution by attachment and sale of mortgage debts.[21] Where a *decree* is passed on a mortgage and the right to, or interest in, immovable property has thus been determined, the mortgage *decree* is not immovable property.[22] Nor does a right to mesne profits under a decree constitute immovable property.[23] An equity of redemption is clearly immovable property.[24]

Things attached to the earth. — Trees standing on land are immovable property.[25] There was a conflict of opinion under the old Code as to whether growing crops can be treated as immovable property for the purposes of the Code. The conflict has been removed now by the provision in cl. (13) of S. 2 of this Code that 'moveable property' includes growing crops.[26] Tiled huts are immovable property.[27] So are doors and windows which are fixed to, and are part of, a building.[28] For other illustrations, see the undermentioned cases.[29]

5. Suits for recovery of immovable property—Clause (a).—This clause refers to suits to recover possession of immovable property where the *title* to that property

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19. † ('27) 14 AIR 1927 Lah 373 (375) (DB). (Mortgage with possession.)
('29) 16 AIR 1929 All 161 (164) : 51 All 494 (DB). (Sale of mortgagee's interest can be only by registered deed.)
('93) 17 Bom 570 (572) (DB).
('16) 3 AIR 1916 Bom 272 (273) : 40 Bom 337 (DB). (Suits to charge with maintenance fall under this section.)
('26) 13 AIR 1926 Lah 660 (661).
20. ✣ ('24) 11 AIR 1924 All 796 (798) : 46 All 917 (DB).
† ('02) 26 Bom 305 (309, 310) (DB).
('93) 15 All 134 (135) (DB). (Attachment under S. 274 is not necessary.)
('95) 19 Bom 121 (123) (DB). (Do.)
('93) 20 Cal 805 (809) (DB).
† ('86) 12 Cal 546 (550) (DB).
† ('09) 1 Ind Cas 450 (451) (Lah).
† ('15) 2 AIR 1915 Mad 209 (210) : 37 Mad 51 : 13 Ind Cas 91 (92) (DB).
('12) 16 Ind Cas 816 (816) (DB) (Mad).
('94) 18 Mad 437 (438) (DB). (Attachment under S. 274 is not necessary.)
† ('19) 6 AIR 1919 Oudh 132 (133) : 21 Oudh Cas 400 (DB).
21. † ('02) 26 Bom 305 (309, 311) (DB).
22. † ('04) 26 All 603 (605) (DB).
('96) 23 Cal 450 (453) (DB).
† ('91) 13 All 89 (91) (DB).
† ('02) 6 Cal W N 5 (6) (DB).
† ('19) 6 AIR 1919 Nag 19 (20) : 16 Nag L R 72. (Small Cause Court can attach mortgage decree.) [But see ('77) 1 Bom 267 (268) (DB). ('72) 9 Bom H C R A C 64 (64) (DB).]
23. † ('99) 22 Mad 356 (357) (DB).
24. † ('94) 18 Bom 739 (745) (DB).
† ('97) 21 Bom 226 (228) (DB).
† ('95) 22 Cal 33 (41) (DB).
25. ('67) 2 Agra 300 (301) (DB).
('83) 5 All 564 (566) (FB). (Under Small Cause Courts Act.)
(1900) 24 Bom 31 (33) (DB). (Mango tree is not timber.)
('98) 22 Bom 610 (611) (DB). (Under T. P. Act, trees pass with the land.)
('95) 19 Bom 207 (208) (DB).
('92) 16 Bom 353 (356) (DB).
('08) 7 Cal L Jour 152 (157, 166) (DB).
('75) 24 Suth W R 394 (394) (DB).
('97) 20 Mad 58 (63, 66) (FB).
('89) 12 Mad 203 (209) : 1 Weir 758 (FB). (Tree Pattadar has an interest in land — Madras Forest Act, V of 1882, S. 6.)
26. See Notes on S. 2, Cl. (13).
27. ('68) 10 Suth W R 416 (417) (DB).
('72) 17 Suth W R 309 (311) (FB).
('04) 31 Cal 340 (342). (Under the Presidency Small Cause Courts Act.)
('99) 4 Cal W N 470 (473) (DB). (Do.)
28. ('85) 11 Cal 164 (166) (DB). (Of a pucca building.)
('90) 13 Mad 518 (520) (DB).
29. ('79) 4 Cal 946 (948). (Flour and oil mill, steam engine and boilers are fixtures and not goods and chattels under the Small Cause Courts Act when attached to the earth.)
('31) 18 AIR 1931 Rang 109 (111) : 9 Rang 13. (Suit for damages for preventing plaintiff from removing buildings and materials.)
('72) 4 N W P H C R 15 (16). (Stone sugar mill is only moveable.)
('35) 39 Cal W N 1018 (1023, 1024). (Machinery and plant permanently installed must be looked upon as land itself.)
('71) 15 Suth W R 499 (499). (Thatch when severed is moveable under the Small Cause Courts Act.)

is in dispute.[1] But as has been seen already in Note 2, the property must be one in British India. Where the properties are within British India, but within the jurisdiction of different Courts, a suit for the recovery thereof may, under S. 17, be instituted in any Court within the local limits of whose jurisdiction any portion of such properties is situate. (See S. 17 Note 2.)

A suit for the recovery of property after setting aside a decree must be brought in the Court within the local limits of whose jurisdiction the property is situate though the decree may be that of another Court.[2] But if the suit is merely to set aside the decree without anything more, it may be instituted in the Court which passed the decree though the properties affected by the decree are situate elsewhere.[3]

6. Suits for partition of immovable property—Clause (b).—A suit for the partition of immovable property must be brought in the Court within whose jurisdiction the property is situate. As to where the properties are situated in different jurisdictions, see S. 17. Where the property is situate outside British India, the Court cannot grant any relief in respect of such property.[1] It has, however, been held by the Lahore High Court that in a suit for accounts and for partition of joint family property part of which is situated in a foreign State, the Court could grant relief even in respect of the property situated in the foreign State.[2] The decision, it is submitted, cannot be accepted as correct.

7. Suits for foreclosure, sale or redemption — Clause (c). — Suits for foreclosure[1] or for sale[2] or for redemption[3] of a mortgage, being suits for reliefs respecting immovable property, must be brought in the Court within the local limits of whose jurisdiction the property is situate. If the land is therefore beyond the Court's local jurisdiction, the suit is incompetent.[4] But a Court is not precluded in a suit for redemption from incidentally deciding questions relating to the mortgaged property held by the defendants outside the jurisdiction for the purpose of deciding plaintiff's right to recover the mortgaged property *within* the jurisdiction.[5] A suit by a purchaser for contribution in respect of a payment made on account of an arrear of revenue against a person on whose

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Note 5

1. † ('41) 28 AIR 1941 Bom 247 (249, 250) : I L R (1941) Bom 361 (DB). (Suit for specific performance and possession by vendee under prior agreement against vendor and vendees under subsequent sale —Suit as against subsequent vendees held fell under S. 16 (a).)
† ('19) 6 AIR 1919 All 350 (350):41 All 513 (DB).
2. † ('01) 5 Cal W N 559 (561) (DB).
('06) 8 Bom L R 516 (516).
3. ('24) 11 AIR 1924 Pat 831 (831) (DB).
('01) 5 Cal W N 559 (561) (DB).

Note 6

1. † ('28) 15 AIR 1928 Nag 295 (295, 296): 24 Nag L R 95.
[See however ('42) 29 AIR 1942 Mad 614 (621): I L R (1942) Mad 376 (DB). (Suit in respect of property in British India and Burma filed in British India—Pending suit Burma separated by Government of India Act, 1935—Jurisdiction of British Indian Court to try suit in respect of property in Burma held not taken away.)]
2. ('23) 10 AIR 1923 Lah 551 (553) (DB).
[But see ('27) 14 AIR 1927 Sind 160 (161) : 23 Sind L R 46.]

Note 7

1. ('83) 9 Cal 733 (735).
(1865) Bourke O C 319.
('86) 1 Ind Jur (N S) 40.
2. ('71) 15 Suth W R 277 (278) (DB).
('72) 18 Suth W R 269 (270) (DB).
('93) 17 Bom 570 (572) (DB).
('76) 1 Cal 163 (167) : 3 Ind App 1 (PC).
('72) 18 Suth W R 287 (287) (DB).
('68) 10 Suth W R 379 (379) (DB).
('68) 9 Suth W R 170 (173) (FB).
(1864) 2 Mad H C R 307 (308) (DB).
3. ('66) 1 Ind Jur (N S) 319.
(1863) 1 Hyde 141.
('92) 19 Cal 361*n* (362*n*).
4. ('66) 1 Ind Jur (N S) 319.
('35) 22 AIR 1935 Nag 192 (193) : 31 Nag L R 357 (DB). (Mortgage of property in C. P. and Berar — Suit in C. P. Court for sale of both property — Court cannot pass decree for sale of Berar property as it is foreign territory.)
[See ('38) 25 AIR 1938 Lah 226 (227). (Award relating to mortgaged property situated at Sialkot — Amritsar Court has no jurisdiction to make order filing award under Arbitration Act.)]
5. † ('77) 1 All 431 (433) (DB). (Account of all the mortgaged lands.)
[*See also* ('80) 5 Cal 928 (930).]

part there is no personal obligation to pay but whose estate alone is liable, must be brought within the local limits of the jurisdiction of the Court where the property is situate.[6] Where a party brings a suit on a hypothecation bond in a Court which has no jurisdiction over the hypothecated property, the decree passed can be looked upon only as a money decree.[7]

Where a suit, say for foreclosure or for redemption, is brought in the Court of a particular district within whose limits the properties are situate, but before final decree is passed the territorial jurisdiction of the Court is transferred to another Court, the original Court's jurisdiction is not lost and a final decree for foreclosure passed by the original Court is not bad; the reason is that once a Court gets validly seised of the case, the subsequent events will not divest it of jurisdiction.[8]

8. Suits for the determination of any other right to, or interest in, immovable property—Clause (d).—A suit for the determination of any other right to, or interest in, immovable property must, under clause *(d)*, be instituted in the Court within the local limits of whose jurisdiction the property is situate.[1] If the property be situate within jurisdiction, the Court has power to try a suit in respect thereof even though the parties may happen to be residents in a foreign State.[2] But it is necessary that the suit itself is for *the purpose of determining such rights* : it is not enough, for the clause to apply, to say that the relief granted in the suit would *indirectly* affect rights in immovable property.[3] Thus, a suit for a declaration that a will is a forgery,[4] or that a certain adoption is invalid,[5] or a suit for an administration of an estate which does not involve a direct dealing with property outside jurisdiction,[6] or a suit for dissolution of partnership,[7] or to have certain lands registered as owner in the revenue records,[8] or for money paid as compensation for land acquired under the Land Acquisition Act,[9] or a suit on an agreement to lease,[10] or a suit under S. 36 of the Bengal Money-Lenders Act (1940)

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6. † ('16) 3 AIR 1916 Mad 980 (981) : 39 Mad 795 (DB).
7. † ('86) 8 All 117 (119) (DB).
('75) 23 Suth W R 123 (125) (DB).
[*See also* ('01) 27 Mad 118 (119, 120).]
8. ✠ ('25) 12 AIR 1925 Mad 117 (118) (DB). (Unless it is specifically removed by a competent authority.)
('32) 19 AIR 1932 Sind 67 (69). (Subsequent finding that no property is situate within the jurisdiction will not divest the jurisdiction of the Court.)
[*See also* ('10) 8 Mad L Tim 299 (300).]
Also see S. 21 Note 4 and S. 150 Note 2.

Note 8

1. See the case in foot-note 7.
('41) 28 AIR 1941 Cal 363 (364). (Suit under O. 21, R. 63.)
('41) 28 AIR 1941 Mad 91 (95) : ILR (1941) Mad 157. (Suit for an injunction restraining the defendant from doing certain acts with reference to his tanks over which the plaintiff claims a right of easement must be regarded essentially as one to establish a right to immovable property.)
('01) 6 Bom L R 301 (302) (DB). (Suit under O. 21, R. 103.)
('13) 21 Ind Cas 438 (440) (DB) (Cal).
('12) 17 Ind Cas 758 (758) (DB) (Mad). (Suit for declaration that the mortgage is not binding.)
('01) 2 Upp Bur Rul 216. (Suits under O. 21, R. 63.)
[*See also* ('69) 1 N W P H C R 288 (289). (Suit for a malikana allowance.)]
2. ('15) 2 AIR 1915 Mad 116 (116) (DB). (Suit for rent of lands in British territory belonging to a temple in French territory.)
[*See also* ('41) 28 AIR 1941 Bom 247 (249, 250): ILR (1941) Bom 361 (DB). (Suit for specific performance and possession against vendor residing outside jurisdiction of Court.)
('41) 28 AIR 1941 Mad 91 (95, 96) : ILR (1941) Mad 157. (Jurisdiction in respect of injunctions resides in the Court of the country in which the injunction is to operate—Suit for injunction to restrain defendant in British India from interfering with a flow of water from his land in British India on to the land of the plaintiff situated in Native State—Suit in British India lies.)]
3. † ('23) 10 AIR 1923 Mad 109 (110) (DB). (Suit for cancellation of a will.)
('31) 18 AIR 1931 Lah 673 (674). (Suit for accounts of factory for particular year — Not an interest in immovable property.)
4. ('23) 10 AIR 1923 Mad 109 (110) (DB).
5. ('29) 30 Mad L W 691 (695, 696) (DB).
6. ('21) 8 AIR 1921 Low Bur 82 (86, 87): 11 Low Bur Rul 189 (DB). (Administration suit dealing directly with property within jurisdiction—S. 16(d) applies.)
[*See* ('26) 13 AIR 1926 Lah 503 (504). (Reversing AIR 1926 Lah 456.)]
[*See also* ('03) 30 Cal 369 (383).]
7. ('19) 6 AIR 1919 All 350 (350): 41 All 513 (DB).
8. ('95) 19 Bom 43 (45) (DB).
9. ('83) 6 Mad 344 (347) (DB).
10. ('74) 22 Suth W R 287 (287) (DB).

to re-open a mortgage decree,[11] is not within this clause notwithstanding the fact that the relief claimed may indirectly affect rights to or interest in immovable property.

The words "determination of any right" do not only mean determination of an *existing* right; these words also include the determination of a right claimed which may not be in existence at the time the suit is brought.[12]

Suits in respect of the following rights have been held to be suits for the determination of an interest in immovable property :

(1) A right to a *toda giras hak*.[13]

(2) A right to the possession and management of a *saranjam*.[14]

(3) A right to open a water-course through land.[15]

(4) A right to hold land free of Government assessment.[16]

(5) A mortgage right.[17]

(6) *Varshasans* (annual allowance) charged on immovable property.[18]

(7) A right to levy toll on all imports and exports from a State into British territory.[19]

(8) A right to emoluments of a hereditary office arising out of a grant by the sovereign power,[20] but not if the emolument is due by *custom*.[21]

(9) A right to eject a person from land coupled with a right to recover *rent*.[22]

(10) A right to *future* rent where such right is denied,[23] but not a right to arrears of rent *accrued due*.[24]

(11) A right to maintenance or other amount to be charged on immovable property.[25]

(12) Suit under para. 20 of sch. II, to file an award declaring the proprietary title to immovable property.[26]

[But see ('06) 33 Cal 1065 (1075) (DB). (Possession of land also claimed.)]

11. ('42) 29 AIR 1942 Cal 69 (71) : ILR (1942) 1 Cal 235 (DB).

12. ('41) 28 AIR 1941 Bom 247 (249) : ILR (1941) Bom 361 (DB). (Suit for specific performance and possession.)

('16) 3 AIR 1916 Bom 272 (273) : 40 Bom 337 (DB). (Suit for maintenance praying for charge on land.)

13. ('73) 1 Ind App 34 (53) (PC).

14. ('91) 15 Bom 247 (255) (DB).

15. (1865) 4 Suth W R 107 (107) (DB).

16. ('74) 11 Bom H C R 1 (2) (DB). (A case under Limitation Act.)

[But see ('98) 20 All 35 (36, 37) (FB).]

17. ('74) 8 Mad H C R 100 (102) (DB). (Mortgage of a house standing on site exclusive of site — Limitation Act.)

18. ('99) 23 Bom 22 (26) (DB).

19. ('09) 33 Bom 373 (376) : 2 Ind Cas 489 (489).

20. (1837) 2 Moo Ind App 23 (35, 36) (PC).

('82) 6 Bom 512 (515) (FB). (Baluta or Aya allowance—3 Bom 28, Not followed.)

21. ('99) 22 Mad 351 (352) (DB).

22. ('23) 10 AIR 1923 Cal 619 (621) (DB). (Under S. 66, Bengal Tenancy Act. See also S. 144 of the same Act.)

23. ('99) 23 Bom 22 (30).
('95) 5 Mad L Jour 95 (99).

24. ('69) 6 Bom H C R A C 29 (30) (DB).
('99) 26 Cal 204 (218).
('97) 19 All 450 (451) (DB).
('23) 10 AIR 1923 Cal 619 (621) (DB).

25. ('16) 3 AIR 1916 Bom 272 (273) : 40 Bom 337 (DB).
('71) 15 Suth W R 277 (278) (DB). (Suit to declare land liable for a debt.)
('26) 13 AIR 1926 Lah 660 (661). (Suit for money due on pro-note and for charge.)
('35) 22 AIR 1935 Mad 1043 (1043). (Suit by Hindu widow for maintenance coupled with prayer for charge on lands.)
('09) 33 Mad 131 (133) : 3 Ind Cas 930 (931) (DB).
('31) 18 AIR 1931 Sind 47 (48) : 25 Sind L R 204 (DB). (Suit on award creating a charge on immovable property.)
[*See also* (1861) 2 Mad H C R 307 (308). (Debt with a charge on immovable property.)]
[But see ('83) 9 Cal 535 (555) (DB).]

26. ('33) 20 AIR 1933 All 380 (382) : 55 All 542 (DB).

Where a dispute referred to arbitration out of Court involves the determination of a right to or interest in immovable property, the Court will have no jurisdiction to file the award if the property is situate outside the jurisdiction of such Court.[27]

9. Suits for compensation for wrong done to immovable property — Clause (e). — This clause applies to all wrongs of a civil nature affecting immovable property, such as trespass,[1] nuisance, etc.[2] Such suits must be instituted in the Court within the local limits of whose jurisdiction the property is situate.[3]

10. Suits for the recovery of moveable property actually under distraint or attachment—Clause (f). — It is a general maxim of law that moveables follow the person—*mobilia sequuntur personam*. They have no visible locality of their own and follow the law of the person.[1] Where, however, moveable property is attached, the locality becomes fixed and a suit to recover such property must be instituted in the Court within whose jurisdiction it is.[2] Thus, where moveable property situated in a foreign State and belonging to a person within the jurisdiction of a British Indian Court is under attachment of a Civil Court of such foreign State, the British Indian Court has no jurisdiction to deal with such moveable property.[3]

11. "Where the relief sought can be entirely obtained through his personal obedience" — Proviso. — This proviso is based on the well known maxim, *equity acts in personam* whereby the Court looks to the fulfilment of its decree to the *person* of the defendant.[1] The principle on which this maxim itself is based is that Courts can give relief in suits respecting immovable property situate abroad by enforcing their judgments by process *in personam*, i. e., by arrest of the *person* of the defendant or by attachment of his *personal property*.[2] But in order to do this it is essential that the defendant must either reside or carry on business or personally work for gain within the local limits of the jurisdiction of the Court. In *Ewing* v. *Orr Ewing*,[3] Lord Selborne observed as follows :

> "The Courts of Equity in England are, and always have been, Courts of conscience operating *in personam* and not *in rem*; and in the exercise of this *personal* jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction. They have done so, as to land, in Scotland, in Ireland, in the Colonies, in foreign countries."

The jurisdiction of Courts in this country is governed and must be ascertained by the same principles except so far as they may be at variance with the legislative enactments.[4] Such jurisdiction must, with regard to the High Court,[5] be considered with reference to the Letters Patent and the general jurisdiction which it has inherited from

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27. † ('38) 25 AIR 1938 Lah 226 (227) (DB).
† ('34) 21 AIR 1934 Lah 652 (653) (DB).
† ('34) 21 AIR 1934 Sind 183 (184).

Note 9

1. ('93) 20 Cal 689 (692) (DB).
2. ('22) 9 AIR 1922 Bom 188 (188) : 46 Bom 108 (DB).
('95) 22 Cal 877 (885). (Suit for damages caused by trespass on plaintiff's land and for cutting crops—But a suit for damages to the crops only is a suit for damages to moveable property.)
3. ('99) 12 C P L R 48 (49).

Note 10

1. (1791) 1 H B L 665 (690), Sill v. Worswick.
2. See O. 21, R. 43 under which attachment of moveables is by actual seizure.

Note 11

1. (1750) 1 Ves Sen 444 (454), Penn v. Baltimore.
[*See also* ('09) 36 Cal 233 (235) : 1 Ind Cas 927 (928).]
2. (1750) 1 Ves Sen 444 (447), Penn v. Baltimore.
3. (1883) 9 App Cas 34 (40).
[*See also* (1902) 2 Ch D 132 (140), Dudar v. Amster Danish Trustees.]
4. † (1900) 24 Bom 407 (411) (DB).
('34) 21 AIR 1934 Sind 123 (127) : 28 Sind L R 54 (DB). (Suit to set aside partition of property outside British India, on the ground of undue influence of defendant.)
5. For decisions under Cl. 12, Letters Patent, embodying this maxim, see Notes on Cl. 12, Letters Patent.

the Supreme Court administering the Chancery Rules, and, with regard to the provincial Courts, with reference to this proviso. It must be noted, however, that the only cases in which Courts of Equity in England exercise jurisdiction *in personam* are *(a)* cases of *contracts* such as suits for the specific performance of contracts for sale of land[6] or for foreclosure, sale or redemption of a mortgage,[7] *(b)* cases of *fraud* as where lands abroad have been acquired by the fraud of a party residing within the jurisdiction,[8] and *(c)* cases of *trust* as where a suit is filed against a person residing within jurisdiction, to enforce an express trust affecting land outside jurisdiction.[9] But suits *directly involving title to property*, such as suits for the recovery,[10] partition,[11] or damages for trespass[12] in respect of immovable property situate abroad, will not be entertained.

The proviso applies only —

1. Where the relief is respecting *immovable property* situated *within* and not beyond British India.[13] It has been held by the High Court of Madras that if the relief sought is in respect of *moveable property* situate in a foreign State and can be obtained entirely through the personal obedience of the defendant, within the jurisdiction, a decree *in personam* can be passed.[14] It has also been held by the High Court of Bombay and by the Judicial Commissioner's Court at Nagpur that even if the proviso may not be applicable to cases of land situate outside British India, the English law with regard to jurisdiction *in personam* will apply to Courts in India and that accordingly a suit to recover mesne profits of land situated outside British India can be instituted in British India if the relief can be obtained entirely through the personal obedience of the defendant.[15]

2. Where such property is held by or on behalf of the defendant.[16]

3. Where the relief can be obtained entirely through the *personal obedience of the defendant.*[17]

The expression 'personal obedience' must be interpreted with special reference to the fact that the defendants reside or work within the jurisdiction of the Court whose order is to be obeyed; the obedience must be such as the defendants could render without going beyond jurisdiction.[18] In the case of more than one defendant, the proviso will not apply unless *all* the defendants reside or work within the jurisdiction.[19] The *onus* is on

6. ('26) 13 AIR 1926 Nag 313 (313). (Suit to enforce registration of an agreement to surrender an occupancy holding.)

7. (1874) 18 Eq 118 (125), Paget v. Ede. (Foreclosure.)
[*See also* ('32) 19 AIR 1932 Bom 642 (650) : 57 Bom 234. (High Court can enforce sale of property situate in native State.)
('31) 18 AIR 1931 Bom 161 (162) : 55 Bom 536.
('29) 16 AIR 1929 Lah 449 (453).]

8. (1796) 3 Ves 170 (182), Lord Cranstown v. Johnston.

9. (1846) 8 Beav 547 (568), Nelson v. Bridport.

10. (1883) 23 Ch D 743 (748), Hathrone Graham v. Massey.
('99) 23 Bom 22 (30).

11. (1676) 2 Cas in Ch 214, Cartwright v. Pettus.

12. (1892) 2 Q B 358 (373), Companhia de Mocambique v. British South Africa Company.
(1893) 1893 App Cas 602 (629, 634). British South Africa Company v. Companhia de Mocambique.

13. ('09) 33 Bom 373(375):2 Ind Cas 489(490)(DB).

14. ('12) 14 Ind Cas 279 (282) (DB) (Mad). (Pronote attached by foreign State at defendant's instance.)

15. ('22) 9 AIR 1922 Bom 188 (188) : 46 Bom 108 (DB).
(1900) 24 Bom 407 (414) (DB). (Suit to establish a right to a share of income.)
('09) 33 Bom 373 (375,376):2 Ind Cas 489 (489)(DB).
('28) 15 AIR 1928 Nag 56 (58) : 23 Nag L R 170.

16. See Note 12 below.

17. ('12) 17 Ind Cas 758 (758) (DB) (Mad). (Relief not obtainable through personal obedience — Proviso does not apply.)
('93) 20 Cal 689 (692) (DB). (Relief not obtainable through personal obedience — Proviso does not apply—Damages to land by removing grass.)
('96) 20 Bom 495 (500) (DB). (Defendant living in foreign State—Proviso cannot be applied.)
('99) 26 Cal 891 (921, 922). (Suit for administration.)

18. † ('05) 1 Nag L R 121 (124).
('99) 23 Bom 756 (759) (DB).

19. ('99) 23 Bom 756 (759) (DB).

the plaintiff to show that the defendant is personally subject to the Court's jurisdiction.[20]

A suit for rent is not a "suit to obtain relief respecting immovable property" within the meaning of the proviso to this section.[21] A suit for arrears of rent is therefore governed not by this section but by section 20.

12. "Held by or on behalf of the defendant." — The proviso will apply only where the property is held by or on behalf of the *defendant*. Thus, in a suit for damages for trespass on land where the plaint alleged that the land in dispute was in possession of the plaintiff, it was held that he was not entitled to the benefit of the proviso.[1] Further, the property must be so held *at the time of the institution of the suit*.[2]

13. Suits for specific performance of an agreement. — There is a difference of opinion as to whether a suit for specific performance of a contract to sell land is a suit for land or for the determination of any right to or an interest in immovable property. It was held in the undermentioned cases[1] that where the suit is by the vendor, it is not in respect of immovable property, but that the case might be different if the suit is by the *vendee*. On the other hand, it has been held by the Nagpur Judicial Commissioner's Court that such a suit is one for the determination of a right to immovable property and that there is no difference between a suit by the vendor or a suit by the purchaser.[2] The High Court of Madras has held that a suit by the vendor to enforce specific performance of a contract to purchase land is a suit coming under clause *(d)* of this section and that a suit by the vendee is covered by the proviso to this section.[3] In the latter case the relief is one relating to immovable property and it can be entirely obtained through the personal obedience of the defendant. In a recent decision, the Bombay High Court has held that a suit for specific performance and possession by the vendee falls, in respect of the former relief, under cl. *(d)* of this section and in regard to the latter relief, under cl. *(a)*, and that a Court within whose local jurisdiction the property is situated can entertain the suit.[4] As to such cases arising within the original civil jurisdiction of the Chartered High Courts, see Notes on Clause 12, Letters Patent, Calcutta.

There is also a difference of opinion as to whether a suit to recover unpaid purchase money of land sold is one for the determination of a right to, or interest in, the land. It has been held by the High Court of Madras in the undermentioned cases[5] dissenting from a prior decision of the same Court[6] that such a suit is not one coming under S. 16, cl. *(d)*. The Chief Court of the Punjab, following the prior Madras decision referred to above, has held[7] that such a suit is one coming under cl. *(d)*. It is submitted that the former view is correct. The fact that question as to title to a property is to be decided *incidentally* for the grant of other reliefs claimed will not be enough to apply clause *(d)* of the section.

('24) 11 AIR 1924 Cal 443 (444) (DB). (Suit for enforcing specific performance of a contract to lease.)
('05) 1 Nag L R 121 (124).
20. ('80) 6 Cal L Rep 417 (420) (DB).
21. ('35) 22 AIR 1935 Mad 545 (545).

Note 12

1. ('93) 20 Cal 689 (692) (DB).
2. ('91) 1891 Pun Re No. 39.

Note 13

1. ('16) 3 AIR 1916 Low Bur 44 (45) (DB).
('33) 20 AIR 1933 Mad 436 (437).
2. ('09) 3 Ind Cas 576 (577) (Nag).
3. ('33) 20 AIR 1933 Mad 436 (437).
[*See also* ('35) 22 AIR 1935 Pat 220 (221).]
4. ('41) 28 AIR 1941 Bom 247 (249, 250) : ILR (1941) Bom 361 (DB).
5. ('11) 10 Ind Cas 267 (267) (DB) (Mad).
('20) 7 AIR 1920 Mad 578 (578). (Following 10 Ind Cas 267.)
[But see ('33) 20 AIR 1933 Mad 436 (437).]
6. ('05) 28 Mad 227 (229) (DB).
7. ('08) 1908 Pun Re No. 122.

14. "Actually and voluntarily resides." — See Section 20, Note 3.
15. "Carries on business." — See Section 20, Note 8.
16. "Personally works for gain." — See Section 20, Note 11.

17. Chartered High Courts. — The section does not apply to Chartered High Courts in the exercise of their original civil jurisdiction.[1] The High Courts of Allahabad, Patna, Lahore and Nagpur have no original civil jurisdiction. In the case of the other High Courts, the exercise of their ordinary original civil jurisdiction is governed by clause 12 of the Letters Patent. See clause 12 of the Letters Patent (Calcutta, Madras and Bombay).

18. Explanation. — See Notes 2, 5, 6, 9, 10 and 11 above.

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17. [S. 19.] Where a suit is to obtain relief respecting, or compensation for wrong to, immoveable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate :

Suits for immoveable property situate within jurisdiction of different Courts.

Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.

[1877, Ss. 19, 22, 23, 24; 1859, Parts of Ss. 11 and 12.]

Synopsis

1. Legislative changes.
2. Scope and object of the section.
2a. "Relief respecting, or compensation for wrong to, immoveable property."
3. "Courts."
4. Selection of forum.
5. Different causes of action.
6. Separate suits.
7. Effect of withdrawing part of claim.
8. Execution against property outside jurisdiction.
9. Chartered High Courts.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Bar of second suit. See Note 6.
Multifariousness. See Note 5.
Power to make decree over property outside Courts' local jurisdiction. See Note 2.

1. Legislative changes. — Section 19 of the old Code corresponding to this section, applied only where the properties were situate *within the limits of a single district* but within the jurisdiction of different Courts.[1] The words "within the limits of a single district but" and the third paragraph have now been omitted.

2. Scope and object of the section. — This section is practically another proviso to S. 16. That section provides that all suits for relief respecting, or for compensation for wrong done to, immovable property, shall be instituted in the Court *within whose jurisdiction the property is situate.* This section enacts that where a suit is to obtain a relief in respect of property situated *in the jurisdiction of different Courts*, the suit can be brought in *any one* of the Courts and such Court can deal with the *whole* of the property, though some portion of it is situated outside its jurisdiction.[1]

Note 17

1. See Section 120.

Section 17 — Note 1

1. *See* ('95) 17 All 483 (484, 485) (DB).

Note 2

1. ('41) 28 AIR 1941 Lah 347 (351) (DB). (Suit in Delhi Court for partition of property in Delhi and also in Ferozepur District—Delhi Court held could grant relief even in respect of Ferozepur property.)
('41) 28 AIR 1941 Mad 129 (136) (DB).
† ('87) 14 Cal 661(666,670)(DB). (Suit on mortgage.)
('34) 21 AIR 1934 Pat 292 (296):13 Pat 486 (DB). (Do.)
('30) 17 AIR 1930 P C 188 (189):54 Bom 495 : 57 Ind App 194 (PC). (Suit for foreclosure or sale of a mortgage.)
('08) 30 All 560 (561, 562) (FB). (Suit for recovery of immovable property.)

And the rule applies whether several properties are situated in different districts or the same property extends over several districts.[2] But the property must, in the particular circumstances of the suit, be capable of being described as *a single* entity. Whether it can or cannot be so described will depend upon the nature ot the dispute between the parties. If there is a dispute, for instance, about a single estate which both parties are claiming as a whole that estate is obviously for the purposes of that particular suit a single entity. If, on the other hand, the owner of an estate has a claim against unconnected trespassers who have trespassed upon different parts of the estate or different properties situated within it, those parts or those properties would not for the purposes of the dispute between him and the trespassers be one entity but several entities and the provisions of this section would not apply.[3]

The section is intended for the benefit of suitors and to prevent multiplicity of suits.[4] It embraces evidently all the suits relating to immovable property to which S. 16 may apply.[5] But it applies only where the properties are situated in British India[6] and in jurisdictions to which *the Code applies*.[7]

In 1932, a suit was brought in a Court at Trichinopoly in British India, relating to properties part of which were situated in the Trichinopoly District and the rest in Burma. Pending the suit, Burma became separated from British India consequent on

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('13) 21 Ind Cas 438 (442) (DB) (Cal). (Suit for declaration of title to immovable property — Cox, J., dissenting.)

† ('07) 5 Cal L Jour 580 (581, 582) (DB). (Suit to set aside sale of immovable property.)

('06) 33 Cal 1065 (1075) (DB). (Suit for specific performance in respect of properties in two districts.)

('77) 2 Cal 445 (463, 465) (DB). (Award might be filed in any Court in which a suit in respect of the subject-matter of the award might be instituted.)

† ('26) 13 AIR 1926 Lah 503 (504) (DB). (Property in two Provinces—Probate proceedings pending in one—Administration suit in the other province is maintainable.)

✠('10) 5 Ind Cas 835 (838) (DB) (Lah). (Suit for recovery of possession of properties situate both in Delhi and Almora.)

('98) 1898 Pun Re No. 91.

('28) 15 AIR 1928 Mad 820 (820) (DB). (Suit to set aside alienations of properties in different districts.)

('89) 12 Mad 380 (386) (DB). (Suit for partition.)

('29) 16 AIR 1929 Oudh 341 (347) : 4 Luck 573 (DB). (Suit for rent of lands in different jurisdiction — Oudh Rent Act.)

('28) 15 AIR 1928 Oudh 67 (78). (Part of property was wakf in different jurisdiction—Wakf property being appendage of the estate—Court trying suit for the estate can also try claim to wakf.)

2. ('82) 8 Cal 703 (705) (DB).

3. ('42) 29 AIR 1942 All 387 (389) : I L R (1942) All 862 (DB).

4. † ('91) 16 All 359 (363) (DB).

5. ('84) Coryton 125.
(1861) 1861 S D N W P 588.

6. ('42) 29 AIR 1942 Mad 614 (616) : ILR (1942) Mad 376 (DB). (No British Court will entertain a suit affecting immovable property in a foreign country.)

('41) 28 AIR 1941 Lah 347 (353) (DB). (No decree for partition of property in Patiala State territory could be passed by British Indian Court.)

('41) 28 AIR 1941 Nag 36 (50, 58, 59):ILR (1941) Nag 1 (FB). (Mortgage property situated partly at Wardha and partly at Yeotmal in Berar—Per Niyogi and Bose, JJ.: S. 17 does not apply.)

('14) 1 AIR 1914 P C 140 (148) : 42 Cal 116 : 41 Ind App 197 (PC). (Land situate in the unsettled districts of Sonthal Parganas.)

† ('30) 17 AIR 1930 PC 188 (189, 190) : 54 Bom 495 : 57 Ind App 194 (PC). (The British Indian Court has no jurisdiction to try suit so far as property outside British India is concerned.)

('94) 1894 All W N 4 (5) (DB).

† ('38) 25 AIR 1938 Bom 121 (124): I L R (1937) Bom 895 (DB). (The Courts in Berar are foreign Courts—The words in S. 17 'within the jurisdiction of different Courts' mean Courts to which the Code applies *proprio vigore* and as such, the mere fact that the Code has been applied under the Foreign Jurisdiction Act, would make no difference to the application of S. 17 of the Code.)

('35) 22 AIR 1935 Nag 192 (193):31 Nag L R 357 (DB).

[*See* ('41) 28 AIR 1941 Mad 129 (132) (DB). (Application for filing award—Where part of the subject-matter is in British India and part of the subject-matter in a Native State, the Court in British India cannot exercise jurisdiction over the award.)]

7. † ('19) 6 AIR 1919 PC 150 (152) : 42 Mad 813 : 46 Ind App 151 (PC). (Property situate in scheduled districts.)

('95) 17 All 483 (485) (DB). (Property in district removed from the jurisdiction of the Courts of civil judicature.)

the Government of India Act of 1935. A question then arose whether the British Indian Court at Trichinopoly could go on with the suit, seeing that part of the properties was now outside British India. It was held that the Court, having once been seised of jurisdiction in the case, such jurisdiction would continue till the disposal of the suit and would not be affected by events pending the decision of this suit.[8]

Under the Code of 1859, leave had to be obtained from a superior Court to institute a suit in one Court in respect of properties situated in several districts. No such sanction is now necessary.[9]

The provisions of this Code have been made applicable by S. 135 of the Oudh Rent Act to rent suits where such provisions are not inconsistent with the provisions of that Act. There being no inconsistency in this section, its provisions apply to rent suits in Oudh filed under the Oudh Rent Act.[10] The provisions of this section were applied to an application for filing an award under the now repealed Sch. II, para. 20.[11]

2a. "Relief respecting, or compensation for wrong to, immoveable property." — This phrase must be construed in the light of S. 16 to which this section is merely a sort of another proviso in addition to the one contained in S. 16 itself. Hence, this section cannot apply to suits in respect of immovable property, which are not of any of the categories mentioned in S. 16. The above phrase must be taken to refer only to the kinds of suits mentioned in S. 16.[1]

3. "Courts." — The word 'Courts' in this section must be held as meaning Courts to which the Code applies.[1] Thus, where some of the lands comprised in a mortgage are situated in the jurisdiction of Court A and some in a scheduled district to which the Code does not apply, the Court A cannot, in a suit for sale on the mortgage, order the sale of the property in the scheduled district.[2]

4. Selection of forum. — The section gives an option to the plaintiff of bringing his suit in any Court within whose jurisdiction a portion of the subject-matter is situate.

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8. ('43) 30 AIR 1943 F C 24 (28) (FC). (AIR 1942 Mad 614 : ILR (1942) Mad 376 affirmed.)

9. ('81) 3 All 568 (573) (DB).

('77) 1 All 431 (432) : 2 All 241 (247) (DB). (Where leave was not got under the Code of 1859 a decree could not be given in respect of properties outside jurisdiction : *see* 7 Cal 739 (744) ; 14 Cal 835 (838) and 22 Bom 922 (927). But even in such a case a money decree can be passed : *see* (1880) 5 Cal 928 (930).)

('69) 12 Suth W R 328 (328) (DB).

('91) 1891 Pun Re No. 10. (Code of 1882 no sanction.)

10. ('29) 16 AIR 1929 Oudh 341 (347) : 4 Luck 573 (DB).

11. ('42) 29 AIR 1942 Sind 79 (80) : ILR (1942) Kar 36 (DB).

('41) 28 AIR 1941 Mad 129 (134, 137) (DB). (The intention of Para. 20 (2) of Sch. 2, C. P. Code, is that applications coming thereunder should in every way be treated as suits and the procedure applying to suits should apply to them.)

Note 2a

1. ('42) 29 AIR 1942 Cal 69 (72): ILR (1942) 1 Cal 235 (DB). (Suit for re-opening mortgage decrees in respect of different properties under S. 36, Bengal Money-Lenders Act—S. 17 does not apply.)

Note 3

1. ('41) 28 AIR 1941 Mad 129 (137) (DB). (AIR 1919 P C 150: 42 Mad 813 : 46 Ind App 151 (PC) followed.)

('30) 17 AIR 1930 P C 188 (190) : 54 Bom 495: 57 I. A. 194 (PC). (e.g., British Indian Courts.)

('19) 6 AIR 1919 P C 150 (152) : 42 Mad 813 : 46 Ind App 151 (PC).

('36) 23 AIR 1936 P C 189 (191) : 15 Pat 567 : 63 Ind App 311 (PC). (The choice given by S. 17 can be utilised only if the C. P. Code applies to both the Courts.)

('14) 1 AIR 1914 P C 140 (148): 42 Cal 116 : 41 Ind App 197 (PC).

('95) 17 All 483 (484, 485) (DB).

('38) 25 AIR 1938 Bom 121(124) : I L R(1937)Bom 895 (DB). (Courts in Berar are foreign Courts.)

('79) 4 Cal 222 (228) (DB).

('29) 16 AIR 1929 Lah 24 (26) (DB). (Award as to property outside British India cannot be filed in a Court in British India.)

2. ('19) 6 AIR 1919 P C 150 (152) : 42 Mad 813 : 46 Ind App 151 (PC).

('30) 17 AIR 1930 P C 188 (190) : 54 Bom 495: 57 Ind App 194 (PC). (Mortgaged property partly in British India and partly out of British India.)

[But see ('34) 21 AIR 1934 Pat 292 (296) : 13 Pat 486 (DB). (Land situate partly in Gaya District and partly in Sonthal Parganas.)]

A portion of the property, however, must *actually be existing* in the jurisdiction of the Court in which the suit is brought.[1] Where a mortgage deed mentioned non-existent property within one local area and existing property in another, and a suit was brought on the mortgage in the Court having jurisdiction over the former area, it was held that the Court was not competent to grant a decree for sale.[2]

Where a suit in respect of a house and certain land was filed in a Court within whose jurisdiction the house alone was situate and an appeal from the decree in the suit was filed in the Court to which appeals lie from the decrees of that Court, it was held that the fact that the plaintiff abandoned his claim in respect of the house in appeal and that the appeal related only to the land which did not lie within the jurisdiction of the Appellate Court, would not affect the jurisdiction of that Court to hear the appeal.[3]

5. Different causes of action. — Where a plaintiff has two or more causes of action in the suit, he can take advantage of the provisions of this section if the joinder of such causes of action is permitted by the provisions of O. 1 R. 3 and O. 2 R. 3.[1] If he cannot do so and the joinder of such causes of action is bad for multifariousness, then the suit cannot be tried in either of the Courts within whose jurisdiction the properties are situate.[2]

6. Separate suits. — Where the plaintiff has a cause of action in respect of properties situated within the jurisdiction of different Courts, there are two courses open to him —

(1) he may file a suit on the *whole* claim in *any* one of the Courts, or

(2) he may file separate suits on the same cause of action in respect of each of the properties situated within the jurisdiction of the said Courts,[1]

and none of such suits will operate as a bar to the others.[2] In other words, it leaves untouched the jurisdiction of each Court to entertain a suit in respect of the portion of the property situate within its jurisdiction.[3]

7. Effect of withdrawing part of claim. — The subsequent withdrawal of a part of the claim does not affect the jurisdiction of the Court to dispose of the other part of the claim. Thus, where a suit is brought in Bareilly in respect of the properties situate, one in Bareilly District and the other in the district of Bara Banki and the claim in respect of the lands in Bareilly is withdrawn or compromised or abandoned by the plaintiff, the Bareilly Court does not thereby lose its jurisdiction to proceed to adjudicate on the claim respecting the property in Bara Banki unless the withdrawal or compromise or abandonment is fraudulent or is a mere device to evade the provisions of the Code as

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Note 4

1. ('38) 25 AIR 1938 Bom 121 (122) : ILR (1937) Bom 895 (DB). (Section cannot give a Court jurisdiction unless defendants are in possession of some property within jurisdiction.)
2. ('14) 1 AIR 1914 P C 67 (71): 41 Cal 972 (988): 41 Ind App 110 (PC).
3. ('38) 25 AIR 1938 Oudh 65 (69) (DB).

Note 5

1. ('40) 27 AIR 1940 All 205 (206) (DB). (Suit by sons challenging alienations of different properties by father to different persons.)
('33) 20 AIR 1933 Mad 622 (624) (DB).
('94) 16 All 359 (362) (DB).
('81) 7 Cal 739 (745) (DB).
† ('01) 4 Oudh Cas 397 (403). (Jurisdiction depends on the allegation in the plaint as to the cause of action and subject-matter of the suit.)
2. ('40) 27 AIR 1940 All 205 (206) (DB). (Claims which could not be joined under O. 2, R. 3.)
('10) 5 Ind Cas 835 (838) (DB) (Lah).
† ('85) 1885 All W N 125 (126).
('13) 21 Ind Cas 438 (440) (DB) (Cal).

Note 6

1. ('17) 4 AIR 1917 Mad 350 (351) (DB). (Suit for partition.)
† ('67) 3 Mad H C R 376 (377).
2. ('84) 1884 Pun Re No. 162.
3. ('67) 3 Mad H C R 376 (377) (DB).
[*See also* ('05) 28 Mad 216 (223, 224) (DB).
('70) 5 Mad H C R 419 (421, 422 (DB).]

to local jurisdiction.[1] Similarly, the fact that at the time of the decision the plaintiff is found not to have title to a portion of the property within jurisdiction, as alleged, does not take away the jurisdiction unless the inclusion of such portion is not *bona fide*.[2] The principle is that when once jurisdiction is vested in Courts, it cannot be divested by any act of the parties. (See S. 9, Note 5.)

8. Execution against property outside jurisdiction. — The provisions of Ss. 38 and 39 indicate that the general principle of law is that no Court can execute a decree in which the subject-matter of the suit or of the application for execution, is property situated *entirely* outside the local limits of its jurisdiction.[1] Suits under this section in respect of properties within the jurisdiction of more Courts than one are an exception to this rule. Where a Court has acquired, under this section, jurisdiction over property situated partly within its limits and partly outside it, it will continue in execution proceedings also.[2] For instance, a Court that has jurisdiction to pass a decree for sale of property comprised in a mortgage can sell the *whole* of the property in execution of the decree even though a portion of the property be situated outside the local limits of its jurisdiction.[3] The reason is that the proceedings in execution of a decree are only a continuation of the proceedings in the suit in which the decree is passed.[4] And if a Court has jurisdiction to try the suit and to pass a decree therein, it follows that it has jurisdiction to sell *all* the properties comprised in the decree though some of them may be beyond its jurisdiction.[5] The Court may, however, in its discretion, under S. 39 of the Code, send the decree for execution to the other Court.[6]

9. Chartered High Courts. — This section does not apply to Chartered High Courts in the exercise of their original civil jurisdiction.[1] But under Cl. 12 of the Letters Patent, the High Court can entertain a suit for land situate partly within and partly without the local limits of its ordinary original civil jurisdiction provided the *leave* of the Court is first obtained,[2] and it is not necessary that the cause of action should arise within such local limits, or be one specifically with reference to the portion of the property within those limits.[3] Where, however, the suit is for land situated outside the jurisdiction of the High Court and for *moveables* within, the High Court has no jurisdiction to deal

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Note 7

1. † ('08) 30 All 560 (566, 567 (FB). (Compromise.)
('89) 12 Mad 380 (386) (DB). (Withdrawal.)
[*See also* ('94) 16 All 359 (363) (DB). (Do).)]
Also see O. 23 R. 1 Note 35.
2. ('30) 17 AIR 1930 Nag 189 (191): 26 Nag L R 103.

Note 8

1. ('11) 39 Cal 104 (108) : 14 Cal L Jour 228 (231). (DB).
('90) 17 Cal 699 (703) (FB).
('91) 18 Cal 526 (533) (DB).
('75) 23 Suth W R 233 (234).
Also see S. 38 N 6.
2. † ('92) 19 Cal 13 (15) (DB).
('33) 20 ALR 1933 Lah 687 (687) : 14 Lah 457.
('95) 22 Cal 871 (875) (DB).
('94) 21 Cal 639 (641) (DB).
('87) 14 Cal 661 (668, 670) (DB).
('86) 12 Cal 307 (312) (DB).
('83) 12 Cal L Rep 404 (406).
('82) 8 Cal 703 (705) (DB).
† ('73) 11 Beng L R 56 (64, 66) (SB).
† ('25) 12 AIR 1925 Pat 139 (139, 140) (DB).
[*See also* ('75) 23 Suth W R 154 (155) (DB).]
Also see S. 38 Note 6 and O. 21 R. 3 N 1.
3. See the cases in foot-note (2).
4. See S. 38 Note 6 and Section 39.
[*See also* ('02) 1902 Pun Re No. 8.]
5. ('92) 19 Cal 13 (16) (DB).
('25) 12 AIR 1925 Pat 139 (140) (DB).
6. ('92) 19 Cal 13 (16) (DB).

Note 9

1. See section 120.
2. ('77) 2 Cal 445 (463, 465) (DB).
† ('33) 20 AIR 1933 Cal 295 (300) : 60 Cal 54 (DB).
('98) 22 Bom 922 (926).
('80) 4 Bom 482 (488). (Leave connot be implied from the fact that the leave to sue as a pauper had been granted to plaintiff.)
('97) 24 Cal 190 (192).
('87) 14 Cal 835 (838).
('73) 11 Beng L R 301 (308).
('71) 6 Beng L R 686 (687, 688).
('69) 3 Beng L R O C 85 (87) (DB).
('84) Coryton 125.
[*See also* ('01) 24 Mad 293 (295) (DB).]
3. † ('08) 36 Cal 28 (40, 41).

with lands and no leave to sue therein can be given.[4] It has also been held that the restrictions in Cl. 12 of the Letters Patent apply to the case of a plaintiff and not to that of a defendant.[5]

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18. [S. 16A.] (1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immoveable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction:

Place of institution of suit where local limits of jurisdiction of Courts are uncertain.

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under sub-section (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

Synopsis

1. Scope and principle.
2. Allegation of uncertainty.
3. Effect of not recording statement as to uncertainty.
4. Objection to jurisdiction.
5. Immovable property. See Notes on Section 16.

NOTE to the Synopsis. See the Notes indicated for the following topics:

Absence of notification creates reasonable uncertainty. See Note 2.
Execution proceedings, applicability to. See Note 1.
Effect of prior decision as to boundary. See Note 2.
Whether adjudication by Revenue authorities of boundaries binding. See Note 2.

1. Scope and principle. — The object of the section, as mentioned by Mr. Scoble, in his speech in the Supreme Legislative Council on the 10th March 1888, is "to avoid a difficulty as to jurisdiction which frequently arises where the boundaries of estates are destroyed by fluvial action." The principle of this section applies also to execution proceedings though it does not, in terms, bind persons like execution creditors.[1]

The words "and unless there has been a consequent failure of justice" have been newly added, in order to prevent the taking of technical objections as to jurisdiction.

2. Allegation of uncertainty. — When an allegation as to the uncertainty of the property in dispute lying within the Court's jurisdiction is made, the Court must be satisfied that there is such uncertainty; and if so satisfied, it may record a statement and

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4. † ('96) 19 Mad 448 (451) (DB).
('80) 4 Bom 482 (488).
5. ('97) 24 Cal 190 (193).
† ('10) 37 Cal 907 (911) : 8 Ind Cas 1142 (1144).

Section 18 — Note 1

1. ✣ ('20) 7 AIR 1920 Mad 505 (508) : 43 Mad 135 (140) (DB).

proceed with the case. It must try the question itself and cannot take the decision of a Revenue Court in respect of boundaries as settling the matter.[1] But a former decision of the Privy Council adjudging certain lands to be in a particular jurisdiction is binding upon the Courts and removes the uncertainty in the matter.[2] When there has been no notification fixing the boundaries of a particular district, that fact might create a reasonable uncertainty as to whether a certain property is within that district or not.[3]

3. Effect of not recording statement as to uncertainty. — The non-recording of the statement as to uncertainty will not vitiate the decree where the Judge has, in fact, brought his mind to bear upon the question.[1] Even otherwise it will not vitiate the decree unless —

(1) it appears that no reasonable uncertainty existed at the time of the suit, and

(2) there has been a failure of justice in consequence thereof.[2]

4. Objection to jurisdiction.—An objection to jurisdiction must be taken in the Court of first instance[1] and unless so taken, the decree of the trial Court cannot be set aside on the ground of uncertainty of its territorial jurisdiction.[2]

5. Immovable property. — See Notes on Section 16.

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19. [S. 18.] Where a suit is for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may pe instituted at the option of the plaintiff in either of the said Courts.

Suits for compensation for wrongs to person or moveables.

Illustrations.

(a) *A*, residing in Delhi, beats *B* in Calcutta. *B* may sue *A* either in Calcutta or in Delhi.

(b) *A*, residing in Delhi, publishes in Calcutta statements defamatory of *B*. *B* may sue *A* either in Calcutta or in Delhi.

[1877, S. 18.]

Synopsis

1. Scope of the section.
2. Wrong to person or personal property.
3. Suit must be one for compensation.
4. Torts committed outside British India.
5. "Resides."
6. "Carries on business." See Section 20.
7. "Personally works for gain." See Section 20.
8. Suits against Government. See Note 5.

1. Scope of the section. — Having dealt with suits relating to *immovable property* in Ss. 16, 17 and 18, this section proceeds to deal with another class of cases,

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Note 2

1. ('01) 1901 Pun Re No. 1, p. 3.
(1864) 1864 Suth W R 191 (192) (DB).
('69) 12 Suth W R 150 (150) (DB).
† ('69) 11 Suth W R 389 (391) (DB).
('67) 7 Suth W R 200 (201) (FB).
('66) 5 Suth W R 211 (211) (DB).
('1864) 1864 Suth W R 369 (369) (DB). (Award of the survey authorities is an award within the purview of S. 14 of Act VIII of 1859 and while it so remains a suit in respect of it should not be instituted in the Court of another district.)
2. ('72) 18 Suth W R 182 (183) (PC).
3. ('97) 24 Cal 449 (454) (DB). (Suit for rent of fishery.)

Note 3

1. ('01) 1901 Pun Re No. 1, p. 3.
2. ('22) 9 AIR 1922 Cal 345 (346) : 49 Cal 37 (DB).

Note 4

1. † ('08) 7 Cal L Jour 152 (167) (DB).
2. ('98) 1 Oudh Cas 51 (53) (DB).
('28) 15 AIR 1928 Pat 324 (325) : 7 Pat 216 (DB).
Also see S. 21, Note 4.

namely, suits for *compensation* for wrong done to the *person or personal property*. It declares that suits may be brought either where the wrong is committed, or where the defendant resides or carries on business or personally works for gain.[1] It applies to the High Courts and Chief Courts also.

In order that the section may apply —

(1) there must be a wrong done to the person or personal property, and

(2) the suit must be one for compensation therefor.

2. Wrong to person or personal property. — A wrong, in this section, means the infringement of a legal right[1] and is consequently an *actionable* wrong.[2] Legal civil rights relate to the body, mind, or estate of a person and any invasion of such rights will constitute an actionable wrong.[3] Where there is no legal injury, no action will lie.[4]

The section, however, does not apply to all kinds of actionable wrongs but only to actionable wrongs to the *person* or to *moveable property*. Where wrongful criminal proceedings are instituted against a person and he is arrested thereunder, the arrest is a wrong done to his *person* and the Court of the place where he is arrested will have jurisdiction to try a suit in respect of such wrong.[5] Where plaintiffs' cargo-boats are wrongfully seized by the defendant, the seizure is a wrong done to *moveable property*, and a suit in respect thereof can be brought at the place where the seizure was made.[6] Where property is lost in one district and is found in another, a suit for its recovery may be instituted in the district in which it is found.[7] In suits relating to moveable property the Court within whose jurisdiction the moveable property is kept has jurisdiction to try the case.[8]

3. Suit must be one for compensation. — Suits for injunctions, *e. g.*, against disturbances of rights of patent and trade mark, are excluded from the scope of the section.[1] Where the defendant has, by means of a tort, become possessed of a sum of money at the expense of the plaintiff, the plaintiff may elect to sue either for damages for tort or for the recovery of money obtained by the defendant; the latter is based on an implied contract of agency, the defendant being fictitiously assumed to have rightfully received the money as the plaintiff's agent and to have failed to pay it over to his

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Section 19 — Note 1

1. † ('15) 2 AIR 1915 Mad 1206 (1207, 1208) : 39 Mad 433 (439) (DB). (Suit for damages for defamation committed outside British India.)
† ('26) 13 AIR 1926 P C 88 (89) (PC). (Wrong committed in Persia—Suit could be brought at Quetta where defendant carried on business. Report of the Select Committee appended to Act No. III of 1877.)
† ('34) 21 AIR 1934 All 226 (230) (DB). (Suit for recovery of money.)

Note 2

1. (1869) 13 Moo P C 209 (241) : 15 E R 78 (90), Rogers v. Rajendro Dutt.
(1860) 8 Moo Ind App 103 (131) (PC).
2. † ('01) 25 Bom 230 (236). (Giving of false evidence is not an actionable wrong.)
3. † (1898) 1898 App Cas 1 (73, 96), Allen v. Flood.
† ('01) 25 Bom 230 (236).
(1794) 1 Peak N P C 270, Tarleton v. M'Gawley. (Intentional driving away of customers.)
(1881) 6 Q B D 333 (338), Bowen v. Hall. (Inducing persons to break contracts.)
(1620) Cro Jac 567, Garret v. Taylor. (Threatening servants.)
(1910) 2 Camp 358 (369, 370), Clifford v. Brandon. (Preconcerted hissing at actor on stage.)
(1853) 2 E & B 216 (227), Lamley v. Gye. (Inducing persons to commit breach of contracts.)
(1825) 4 B & C 247 (255), Bromage v. Prosser. (Slander.)
4. (1890) 26 L R Ir 268, Kearney v. Lloyd.
† (1892) 1892 App Cas 25 (38), Moghal Steamship v. McGregor.
(1898) 1898 App Cas 1 (96), Allen v. Flood.
(1859) 7 C B (N S) 175 (187), Barber v. Lesiter.
5. ('70) 6 Beng L R 141 (144).
6. ('05) 3 Low Bur Rul 164 (165).
7. ('68) 9 Suth W R 586 (586).
8. ('34) 21 AIR 1934 All 226 (230).

Note 3

1. For a suit for infringement of copyright, see ('95) 19 Bom 557 (564).

principal, the plaintiff. In the former case, the suit would be one falling within this section and in the latter, within section 20.[2]

4. Torts committed outside British India. — The section applies only to wrongs *in* British India. Cases of wrongs committed *outside* British India by defendants residing within the jurisdiction of the Court fall under S. 20 and not under this section.[1]

5. "Resides." — The word "resides" does not apply to legal entities such as the Government or a company, but to natural persons. Where therefore a tort is committed for which the Secretary of State is liable, the suit can be brought only where the tort was committed and not elsewhere on the ground that he "resides" there.[1] For fuller notes, see section 20.

6. "Carries on business." — See Section 20.

7. "Personally works for gain." — See Section 20.

8. Suits against Government. — See Note 5.

Other suits to be instituted where defendants reside or cause of action arises.

20. [S. 17.] Subject to the limitations aforesaid,[2] every suit shall be instituted in a Court within the local limits of whose jurisdiction —

(*a*) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides,[3] or carries on business,[8] or personally works for gain;[11] or

(*b*) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court[12] is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution;[13] or

(*c*) the cause of action,[14] wholly or in part, arises.[15]

Explanation I. — Where a person has a permanent dwelling at one place and also a temporary residence[4] at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation II. — A corporation[31] shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustrations.

(a) A is a tradesman in Calcutta. *B* carries on business in Delhi. *B*, by his agent in Calcutta buys goods of *A* and requests *A* to deliver them to the East Indian Railway Company. *A* delivers the goods accordingly in Calcutta. *A* may sue *B* for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where *B* carries on business.

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2. ('36) 23 AIR 1936 Sind 229 (231): 30 Sind L R 182 (DB).

Note 4

1. ('15) 2 AIR 1915 Mad 1206 (1208): 39 Mad 433.

Note 5

1. ('27) 14 AIR 1927 Mad 689 (690): 50 Mad 449 (DB). (The case of a company is covered by the words "carries on business.")

(b) *A* resides at Simla, *B* at Calcutta and *C* at Delhi. *A*, *B* and *C* being together at Benares, *B* and *C* make a joint promissory note payable on demand, and deliver it to *A*. *A* may sue *B* and *C* at Benares, where the cause of action arose. He may also sue them at Calcutta, where *B* resides, or at Delhi, where *C* resides ; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

[1877, S. 17; Letters Patent: Bombay, Calcutta and Madras, Cl. 12.]

Synopsis

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NOTE to the Synopsis. See the Notes indicated for the following topics :

Ancestral home at one place and actual residence in another. See Note 3.

Bond—Cause of action for suit on. See Note 19.

Carrier—Suit relating to. See Notes 15, 16 and 18.

Cause of action in suits to compel registration of document. See Note 18.

Cause of action in suits for dower. See Note 27.

Cause of action in suits on hath chitta. See Note 19.

Cause of action in suits for bailment. See Note 18.

Cause of action in suits for services rendered. See Note 18.

Debtor must seek the creditor. See Note 19.

"Dwells" as meant in Clause 12 of the Letters Patent. See Note 3.

Letters of administration. See Note 28.

Plaintiff's right to select his forum. See Note 2.

Suit on contracts for sale of goods—Cause of action. See Note 18.

Suit to recover excess fare paid when goods are sent through railway. See Note 17.

Suit to recover goods lost and found. See Note 17.

Suit to recover money on a life insurance policy, where to be filed. See Note 19.

Voluntary residence. See Note 7.

Zamindari business is not carrying on business within the meaning of this section. See Note 8.

1. Legislative changes.

(1) The words "every suit" have been substituted for the words "all other suits" in the corresponding S. 17 of the Code of 1882.[1]

(2) Explanation III to the old section has been omitted and the words "wholly or in part" in cl. (c) have been newly added.[2]

Section 20 — Note 1

1. ('03) 30 Cal 453 (456). (The words "all other suits" were held to mean all suits other than those mentioned in S. 16 of the old Code.)

2. ('11) 34 All 49 (53): 11 Ind Cas 712 (713). (The change has not altered the meaning of "cause of action" in re : contracts.)

2. Scope and principle of the section. — This section enacts the rule as to the *forum* in cases of personal actions.[1] Its provisions are to be read subject to the provisions of Ss. 15 to 19 as is made clear by the opening words "subject to the limitations aforesaid."[2]

Under the scheme of the Code actions are divided into (a) those which relate to immovable property, (b) those which relate to the person or moveable property, and (c) mixed actions partly relating to immovable property and partly personal. The first and the third classes of suits have been dealt with under sections 16 to 18. Sections 19 and 20 deal with the second class.

A Court gets jurisdiction under this section if —

(1) the defendant resides or carries on business or personally works for gain within the local limits of its jurisdiction, or

(2) the cause of action arises wholly or in part within such local limits.[3]

If several causes of action are joined against a defendant, it is necessary that the Court should have jurisdiction over *all* causes of action.[4] The *onus* is upon the plaintiff to establish one or other of the two facts mentioned above.[5]

After the question of *local* jurisdiction is decided, the question of *pecuniary* jurisdiction may arise before any plea affecting the suit is entertained.[6]

The rules stated in the various portions of the section are *alternative*,[7] and give a choice of forum to the plaintiff. This is based on the general principle of law that where a suit can be instituted in more Courts than one, the plaintiff has a right to *select his own forum*.[8] And very strong reasons must be shown for depriving a plaintiff of such right.[9] But a plaintiff cannot take advantage of his own default to choose his own *forum*.[10] He cannot, after he has made his choice and selected the forum, be allowed to change the forum by withdrawing the suit to be filed elsewhere.[11] Nor will a Court get jurisdiction, where, in order to bring a suit within the jurisdiction, the plaintiff makes a false averment.[12]

Where a Court once obtains jurisdiction over a suit, it is not deprived of it either by the fact that the place where the cause of action arises ceases to be situate within its jurisdiction,[13] or by the defendant changing his residence to a place beyond the local

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Note 2

1. ('96) 19 Mad 477 (478) (DB). (Plaintiff may choose the forum in which to bring the suit.)
2. ('03) 30 Cal 453 (457) (DB).
('31) 18 AIR 1931 Mad 705 (707).
† ('36) 23 AIR 1936 Sind 229 (231) : 30 Sind LR 182.
3. ('96) 19 Mad 477 (478).
('14) 1 AIR 1914 Bom 211 (213, 214): 38 Bom 125: 20 Ind Cas 492 (494, 495) (DB).
('11) 9 Ind Cas 824 (824) (DB) (All). (Defendant neither residing nor cause of action arising within jurisdiction—Court has no power to entertain suit.)
('20) 7 AIR 1920 Low Bur 22 (23). (Suit for restitution of conjugal rights.)
4. See Note 14.
5. ('90) 14 Bom 541 (552).
('80) 6 Cal L Rep 417 (420).
('30) 17 AIR 1930 Bom 150 (151): 54 Bom 192 (DB).
6. ('03) 30 Cal 453 (457) (DB).
('10) 1910 Pun Re No. 83, p. 243 : 7 Ind Cas 718 (718).
7. † ('13) 21 Ind Cas 789 (801) (DB) (Mad).
8. ('96) 19 Mad 477 (478) (DB).
('05) 32 Cal 146 (150) (DB).
('36) 23 AIR 1936 All 514 (515).
† ('23) 10 AIR 1923 Mad 109 (111).
('35) 22 AIR 1935 Rang 310 (314) (DB).
('37) 20 Nag L Jour 238 (240).
[*See also* ('29) 16 AIR 1929 Sind 170 (171) : 23 Sind L R 365.]
Also see S. 22, Note 1.
9. † ('14) 1 AIR 1914 Low Bur 37 (39): 7 Low Bur Rul 129 (DB).
10. ('21) 8 AIR 1921 Lah 213 (213, 214). (Payment to be made at D but made at L owing to plaintiff's default—L Court has no jurisdiction to try the suit.)
11. ('35) 22 AIR 1935 Rang 310 (314) (DB).
12. ('23) 10 AIR 1923 All 137 (138) : 45 All 193 (DB).
See also Notes on Section 9.
13. ('28) 15 AIR 1928 Mad 746 (747) (DB).
† ('33) 20 AIR 1933 Nag 318 (320) : 29 Nag L R 312. (Appeal transferred to Additional Judge holding Court in a local area—Local area and the Court transferred to another district before judgment—Court has jurisdiction to deliver judgment.)

limits of its jurisdiction.[14]

3. **"Actually and voluntarily resides."** — A Court has jurisdiction to entertain a suit, if the defendant resides[1] or all the defendants reside[2] within its jurisdiction even if the cause of action arises outside it.[3] But the residence must be an *actual* and not a constructive residence.[4] Where a person actually resides outside the Court's jurisdiction but has his ancestral home within it, the latter fact would not give the Court jurisdiction.[5]

The word "reside" is not used in the same sense in all the Indian Acts or in other parts of the Code.[6] It is in fact elastic and has been differently construed in different cases.[7] In every case residence is a question of fact and it must depend upon the particular circumstances.[8] It has also to be determined according to the intention of the Legislature as ascertained from the context and the particular provision in which the word occurs.[9]

Under the Code of 1859, the word used in the section corresponding to this section was 'dwell'. Clause 12 of the Letters Patent (Cal.) also provides that suits, other than

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14. ('69) 1869 Pun Re No. 88.

Note 3

1. ('93) 1893 Pun Re No. 1 (FB).
('71) 16 Suth W R 305 (305) (DB). (Suit for legacy —Place of heir's residence is proper forum.)
('13) 21 Ind Cas 789 (801) (DB) (Mad).
('28) 15 AIR 1928 Nag 295 (296) : 24 Nag L R 95. (Defendant living out of British India—No decree can be passed with regard to moveables with him.)

2. ('77) 1 Mad 340 (342, 343) (DB).
[*See also* ('06) 30 Bom 364 (390).
('74) 13 Beng L R 91 (100). ("Defendant" in Cl. 12 of the Letters Patent means "all the defendants.")]

3. ('15) 2 AIR 1915 Mad 1206 (1208): 39 Mad 433 (DB). (Tort committed outside British India.)
('68) 9 Suth W R 215 (216) (DB). (Defendant not residing within jurisdiction — Court has no jurisdiction.)
('19) 6 AIR 1919 All 350 (350) : 41 All 513 (DB). (Parties to partnership suit residing within jurisdiction of Court—Property outside jurisdiction.)
('97) 19 All 450 (451) (DB). (Suit for rent of land in Gwalior State — Defendant resident of British India—Suit maintainable.)
('21) 8 AIR 1921 Bom 460 (460, 461) : 45 Bom 1228 (DB). (Partnership carried on in foreign territory—Partners residing within jurisdiction.)
('69) 6 Bom H C R A C 29 (30). (Do.)
('23) 10 AIR 1923 Cal 619 (621) (DB). (Suit for rent.)
('26) 13 AIR 1926 Mad 1207 (1207, 1208). (Loan borrowed at B—Debtor permanently residing at P and temporarily at B — P Court can try suit to recover the loan.)
('28) 15 AIR 1928 Nag 56 (58) : 23 Nag L R 170. (Suit for mesne profits of property outside British India.)

4. ('67) 7 Suth W R 417 (417, 418) (DB).
(1900) 2 Bom L R 605 (606) (DB).
[*See also* ('71) 3 N W P H C R 121 (123).]

5. ('41) 28 AIR 1941 Cal 670 (671) : ILR (1941) 1 Cal 490. (Mere owning of ancestral house and other immovable property let to tenants and occasional visits do not give jurisdiction.)
(1900) 2 Bom L R 605 (606) (DB).
('33) 20 AIR 1933 Lah 851 (851).
('21) 8 AIR 1921 All 193 (193) (DB).
('17) 4 AIR 1917 Lah 30 (31).

6. See S. 136, O. 3, R. 2 and O. 25, R. 1.

7. ('40) 27 AIR 1940 Mad 584 (585). (Section 3 (3), Divorce Act—A person cannot be said to reside at a place where he spends only a day or two when he has got a fixed place of residence elsewhere; but where a person has no fixed place of residence the place where he actually lives must be taken to be the place where he resides.)
('85) 8 Mad 205 (206).
('94) 21 Cal 634 (638). (Section 5 of the Insolvency Act—Residence need not be permanent.)
('96) 1896 All W N 170 (170) (DB). (Section 33 of the Registration Act, 1877 — "Reside" has same meaning as that in S. 17 of the old Code—It does not include domicile.)
('81) 6 Bom 100 (101, 102) (DB).
('81) 8 Cal L Rep 14 (16). (Section 5 of the Insolvency Act—Residence for the purpose of prosecuting insolvency petition is not "residence" under the Act.)
('74) 1 Ind App 387 (397) : 14 Beng LR 60(74)(PC). ("Reside" used in a will was construed to include occasional use of the house and keeping an establishment there.)
('73) 11 Beng L R 254 (255). (Section 5 of the Insolvency Act—"Reside" includes occupation for trade whether or not accompanied by sleeping or dwelling.)
('68) 1 Beng L R O C 84 (86). (Section 5 of the Insolvency Act—Residence for the purpose of filing petition is not "residence" under the Act.)
('06) 29 Mad 239(254,255): 16 Mad L Jour 238 (262) (DB). (Insolvency Act — Temporary residence is sufficient to give jurisdiction.)

8. ('24) 11 AIR 1924 All 669 (670) (DB).
('79) 3 Bom 227 (229).
('36) 164 Ind Cas 907 (912) (DB) (Cal).

9. ('81) 6 Bom 100 (101) (DB).

those for land, may be brought in the Chartered High Court if the defendant *dwells*, or carries on business, or personally works for gain, within the local limits of the ordinary original jurisdiction thereof. Strictly speaking, the word 'dwell' seems to have a more extended signification than the word 'reside'[10] and seems to imply a more permanent stay than that denoted by the word 'reside'.[11] Neither of the words, however, necessarily implies a permanent state of things.[12] A traveller putting up at a hotel, may be said, in one sense to reside there, but a man can be said to 'dwell' in the sense in which the term is used as giving jurisdiction, only in the place where he *ordinarily and permanently* resides;[13] that is to say, in the place where his family or servants generally reside.[14] The word 'residence' has also been held to denote the place where a person eats, drinks and sleeps, or where his family or servants eat, drink and sleep.[15]

The word 'dwell', as used in the Letters Patent, and the word 'reside' as used in Ss. 16, 19 and 20, are however often treated as being synonymous[16] and have been held to denote the fixed and permanent home of a man's wife and family, to which he has always an intention of returning.[17] The decisions interpreting the former word may therefore be usefully looked to in construing the meaning of the latter word.

4. Temporary and occasional residence—Explanation I. — In order to give jurisdiction on the ground of residence, something more than a *temporary* stay is required.[1] It must be of a more or less permanent character, and of such a nature that the Court in which the defendant is sued is his natural *forum*.[2] An *occasional* residence is, therefore, not sufficient.[3] Where a person has a permanent residence at one place, he cannot be said to dwell also at a place where he *casually* or *temporarily* resides without the intention of remaining there.[4] Where a *guru* residing permanently at *a* came to *b* at the invitation of devotees, and, while there, exchanged visits with his followers and stayed in a house which had been purchased by him for occasional residence, he was held not to dwell in *b*.[5] Similarly, where an officer attached to a regiment at Vellore went on medical leave to Madras where he resided in a rented house and finally returned to Vellore, the latter was held to be the place where he dwelt.[6] But where a person permanently residing in Mysore left his house in charge of a servant and went with his

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10. ('85) 8 Mad 205 (206).
11. ('71) 3 W P H C R 121 (122) (DB).
12. ('79) 3 Bom 227 (229).
13. (1864) 2 Hyde 117 (119).
('71) 3 N W P H C R 121 (123).
('25) 12 AIR 1925 All 140 (140) (DB).
14. ('67) 7 Suth W R 349 (350) (DB). (Temporary confinement in jail — Court at place where family resides has jurisdiction.)
('71) 1871 Pun Re No. 17.
('70) 1870 Pun Re No. 63.
15. ('41) 28 AIR 1941 Cal 670 (671) : ILR (1941) 1 Cal 490. (Residence is not identical with ownership.)
('11) 38 Cal 394 (400) (DB).
16. ('90) 14 Bom 541 (547).
('78) 3 Bom 227 (229). (Only difference being that they are perhaps applied to different classes of society.)
('76) 1 All 51 (52) (DB).
('85) 8 Mad 205 (206).
17. ('75) 1 All 51 (53) (DB).
('71) 16 Suth W R 240 (244) (DB).

Note 4

1. ('90) 14 Bom 541 (550).
2. ('90) 14 Bom 541 (552).
3. Marsh 64.
('73) 19 Suth W R 341 (343) (DB).
4. ('71) 3 N W P H C R 121 (122) (DB). (To dwell in a place is to have permanent abode there.)
(1863) 1 Bom H C R 113 (114). (A stay for a change while on leave.)
(1900) 2 Bom L R 605 (606) (DB).
('94) 18 Bom 290 (292) (DB).
(1864) 2 Hyde 117 (119).
('17) 4 AIR 1917 Lah 30 (31) : 1916 Pun Re No. 112. (Ancestral home not a place of "residence.")
('20) 7 AIR 1920 Low Bur 22 (23). (Casual residence as a traveller.)
(1865) 2 Mad H C R 304 (305). (Dwelling at one place—Cultivation in another.)
(1860) 29 L J Q B 70 (72), Kerr v. Haynes.
(1852) 21 L J C P 27 (30), Macdougall v. Paterson.
[But see ('12) 14 Ind Cas 573 (573) (Mad).]
5. † ('90) 14 Bom 541 (552, 553).
('94) 18 Bom 290 (293) (DB).
6. ('70) 5 Mad H C R 471 (472).

wife and family to Madras with the intention of remaining there for several months, it was held that he must be deemed to dwell at the latter place.[7]

In the case of persons in service, at any place, whether of the Government[8] or of a private person,[9] they will be deemed to dwell at the place of service and not at the place where they have a family house in which their parents live and which they occasionally visit. But a person in Government service who is liable to be sent to various places and may possibly be left at one place for several years cannot be said to have residence at the place where he is stationed for a temporary purpose only.[10]

There is one exception to the rule that a person having a permanent residence at one place cannot be said to dwell also at another place where he *temporarily* resides, and that is provided for by Explanation I to the section. Under the explanation a person will be deemed to reside at the place of temporary stay also in respect of a cause of action arising at the place where he has such temporary residence.[11]

5. Several places of residence. — A man may have more than one place of residence at the same time[1] living sometimes at one and sometimes at another, and during his temporary absence, each house though empty, if there be an *animus revertendi*, will still be his dwelling place.[2] In such a case he may be sued in the place where he is actually staying for the time being. Thus, a person spending his time alternatively in the mofussil and in Calcutta and who resided in Calcutta for some days previous to the filing of the plaint was held to reside in Calcutta for the purposes of jurisdiction.[3]

6. Home non-existent or abandoned. — Every person is deemed in law to have a dwelling or place of residence, and where he has none, he will be deemed to dwell at the place at which he may be *actually* staying at the time.[1]

Illustrations.

(A) *A*, who was the Political Agent at Kolhapur and was living in the Government House there, left it *en route* to England on a year's furlough after having sold off his furniture and stayed in Bombay for three days before sailing for England. It was held that *A* dwelt in Bombay so as to give jurisdiction to the Bombay High Court.[2]

(B) *A*, an officer attached to a regiment at S having availed himself of a furlough of two years and having retained no permanent place of residence at S or elsewhere, attended race meetings at Meerut with the intention of leaving after the races. It was held that during his stay at Meerut he must be deemed to have *dwelt* there.[3]

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7. ('11) 34 Mad 257 (268) : 38 Ind App 129 : 11 Ind Cas 447 (449) (PC).
8. ('92) 1892 All W N 115 (116) (DB).
9. ('67) 7 Suth W R 417 (418) (DB).
('73) 10 Bom H C R 409 (410) (DB).
[Contra ('76) 1 All 51 (53) (DB).]
10. ('11) 11 Ind Cas 851 (852) (Low Bur).
11. ('78) 1878 Pun Re No 75, page 878.
† ('33) 20 AIR 1933 Lah 120 (121). (Suit can be brought at both places.)
('30) 17 AIR 1930 Cal 347 (347) : 57 Cal 65.

Note 5

1. ('81) 3 All 91 (102) : 7 Ind App 196 (PC).
('67) 7 Suth W R 349 (350) (DB).
(1858-'59) 1 El & El 340 (345), Railey v. Bryant.
2. ('41) 28 AIR 1941 Cal 670 (671) : ILR (1941) 1 Cal 490. (Person merely owning ancestral house and other immovable property at a place — The house was let out to tenants — Occasional visits to such place and stay with friends — Statement that he had given up place as place of residence and no idea of returning not contradicted — *Held animus revertendi* was not sufficient.)
('75) 1 All 51 (52) (DB).
3. (1864) 1864 Coryton 24.
('86) 164 Ind Cas 907 (913) (DB) (Cal).

Note 6

1. ('01) 25 Bom 176 (178) (DB).
(1865) 1865 Coryton 152 : Bourke O C 127.
[*See* ('94) 21 Cal 634 (638).]
2. ('01) 25 Bom 176 (178) (DB).
3. ('72) 4 N W P H C R 25 (28, 29) (DB).

(C) *A*, an officer proceeding from Burma to England and having no residence in Burma or elsewhere, stopped for a few days at Madras. It was held that such residence was sufficient to give the Court at Madras jurisdiction over him.[4]

(D) Where a person actually and voluntarily retains his residence at X and has not abandoned it, but occasionally goes to another place for business, the Court at X will have jurisdiction to try suits against him. The onus of proving that he has abandoned his residence at X lies on the person alleging it.[5]

7. Compulsory residence. — In order to give a Court jurisdiction on the ground of residence, it must be *voluntary* and *actual*. A person confined in jail cannot be said to reside there *voluntarily* though he may be residing there *actually*,[1] especially when there is nothing to show that he had no intention of returning to his former abode on the termination of his imprisonment.[2] Under the Code of 1859 it was held in some cases[3] that a person resided at the place where he was *lawfully* confined. The introduction of the word 'voluntarily' in the present section renders those cases obsolete.

8. "Carries on business."—It will be sufficient for a Court to get jurisdiction over a person that he should carry on business within the local limits of its jurisdiction.[1] Thus, where the cause of action against the defendant residing in the Punjab arose in Persia, but the defendant carried on business in Quetta, he can be sued in respect of such cause of action at Quetta.[2] The word 'business,' in its widest sense includes, every trade, occupation or profession.[3] It is, however, used in the section in a restricted sense. This is indicated by the words "personally works for gain" to be found in the same section. The latter words would be unnecessary if the word "business" had been intended to be used in an unrestricted sense.[4] In this Code, it means *commercial* business alone.[5] The phrase 'carry on business' is itself one of varying import and has to be interpreted in each case according to the context and the apparent purpose of the Legislature.[6] Under cl. 12 of the Letters Patent the words "carry on business" have been held to relate to business in which a man may contract debts and become liable to be sued by the person having business transactions with him.[7] A person is said to 'carry on business' when he controls or directs it or has a voice in its control or a share in the gain or loss.[8] The test of carrying on business is not the continuity or the intermittency of the business, but the fact of owning interest in the business and receiving profits.[9] Thus, where the owner of a ginning factory entered into a special contract of combination with other factory-owners, under which his factory was to remain quiescent for same time and he was to derive a profit on account of such contract, it cannot be said that the factory-owner was not carrying on the business.[10] The words 'carry on business' mean the carrying on of business by the person whose business it is, and describe a person managing or conducting his own,

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4. ('85) 8 Mad 205 (207).
5. ('36) 23 AIR 1936 Lah 853 (854).

Note 7

1. ('09) 1909 Pun Re No. 77:3 IndCas 607 (608)(DB).
2. ('67) 7 Suth W R 349 (352) (DB).
3. 1 Mor 147 (148), Duham v. Mendes.
1 (Beng F) S D A 306.

Note 8

1. ('26) 13 AIR 1926 P C 88 (89) (PC).
('26) 13 AIR 1926 Mad 427 (427) (DB). (Business carried on in two places — Courts in both places can entertain a suit for dissolution of partnership.)
2. ('26) 13 AIR 1926 P C 88 (89) (PC).
3. *See* ('87) 14 Cal 256 (273).
4. ('87) 14 Cal 256 (273) (DB). (Under Cl. 12 of Letters Patent, 1865.)
[*See also* (1863) 1 Mad H C R 286 (293, 294).
5. ('27) 14 AIR 1927 Mad 689 (690) : 50 Mad 449 (DB). (And not a business of State or Government.)
('30) 17 AIR 1930 Lah 818 (819).
('37) 24 AIR 1937 Mad 293 (294). (Person looking after factory does not carry on business.)
Also see O. 3 R. 2 Note 5.
6. ('80) 4 Bom 416 (422).
('94) 18 Bom 294 (298) : 21 Ind App 13 (PC).
7. ('94) 18 Bom 294 (298) : 21 Ind App 13 (PC).
8. ('41) 1941 Nag L Jour 37 (41).
† ('22) 9 AIR 1922 All 367 (369) (DB). (The phrase is used as distinct from personally working.)
9. † ('32) 19 AIR 1932 Nag 114 (115) : 28 Nag L R 118.
10. ('32) 19 AIR 1932 Nag 114 (115) : 28 Nag L R 118.

and not somebody else's business.[11]

But in order to determine whether a person is carrying on a business it must first be ascertained what his particular trade or occupation is, and then it must be seen whether the facts proved amount to a carrying on of *that* particular business within the jurisdiction.[12] As noted already the phrase 'carry on business' in this section refers to *commercial* business. Thus, a *guru* or high priest of a community who receives offerings and presents from his disciples and keeps account of them,[13] or a clerk working in a Government office,[14] or a butler employed to look after his master's plate and perform other duties of his occupation,[15] or a man who busies himself with science or politics and has a great deal of business to transact in respect of those matters,[16] cannot be said to carry on business. Similarly, zamindari business[17] does not constitute a carrying on of business. It is doubtful whether the mere letting of house property through an agent can be said to be carrying on business.[18]

To constitute "carrying on of business" *at a particular place*, it is conceived that the essential part of the business must take place there.[19] Thus, where the essential part of the business of a retail dealer in the mofussil consisted in *selling* European goods imported by him and making profits, and he had an agent in Bombay who simply *purchased* and *forwarded* the goods to him, it was held that the dealer cannot be said to carry on his business at Bombay.[20] Similarly, where defendants had no permanent office at Amritsar but only a travelling agent residing there who secured orders for them and forwarded them to the head office at Calcutta, but who had no power to enter into any contract or to receive any money on their behalf, it was held that the defendants did not carry on business at Amritsar.[21] But where the defendant firm had its head office at Bombay and a sub-office at Amritsar and the sub-office conducted correspondence with its local customers, received orders, received and disbursed moneys and though the orders placed at Amritsar were not binding unless accepted by the head-office, it was held that the defendant firm was carrying on business at Amritsar.[22] Similarly, where an insurance company having its head office in Calcutta has a sub-agency office in Nagpur and all business in connexion with the policy-holders of the Company at Nagpur is transacted by the Nagpur office and a Bank account is also maintained in that place, the company must be said to be carrying on business at Nagpur within the meaning of this section.[23]

The business need not be carried on *personally* but may be carried on through servants or agents.[24] The Calcutta High Court has, in the undermentioned case,[25] however, expressed an opinion to the contrary, relying upon the observations of the Madras High

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11. † (1889) 22 Q B D 1 (3, 4), Graham v. Lewis. (Cited in 14 Bom 541. Words do not apply to a clerk who assists another person to carry on his business.)
12. (1865) 1 Bom H C R 220 (221, 222) (DB).
13. ('94) 18 Bom 294 (298, 299) : 21 Ind App 13 (PC). (Confirming decisions in 18 Bom 290 and 14 Bom 541.)
14. ('87) 14 Cal 256 (273) (DB). (Buckley v. Hann, (1849) 5 Ex 43, Cited.)
15. (1889) 22 Q B D 1 (5), Graham v. Lewis. (Cited in 14 Bom 541.)
16. (1889) 22 Q B D 1 (5), Graham v. Lewis. (Cited in 14 Bom 541.)
17. ('87) 14 Cal 256 (273) (DB).
('73) 19 Suth W R 341 (342) (DB).
('75) 23 Suth W R 223 (224) (DB).
18. ('22) 9 AIR 1922 Lah 164 (165).
19. (1865) 1 Bom H C R 220 (222) (DB).
20. (1865) 1 Bom H C R 220 (223) (DB).
21. ('28) 10 AIR 1923 Lah 427 (427).
† ('29) 16 AIR 1929 Mad 347 (348). (Company's agency at Madras acting merely as post office and having no discretion either to conclude, vary, or enter into, contracts—Company cannot be said to carry on business in Madras.)
('37) 24 AIR 1937 Sind 17 (18).
† ('36) 23 AIR 1936 Sind 121 (123) : 29 Sind L R 292.
22. ('33) 20 AIR 1933 Lah 11 (12) : 14 Lah 42.
23. ('41) 1941 Nag L Jour 37 (41).
24. ('22) 9 AIR 1922 All 367 (368, 369). (DB).
('18) 5 AIR 1918 Lah 320 (321) : 1918 Pun Re No. 98.
('82) 4 Mad 209 (212) (DB).
[*See also* ('98) 17 Bom 662 (667).]
Also see Note 9.
25. ('82) 8 Cal 678 (686) (DB).

Court in *Subbaraya Mudali* v. *Government*[26] which has not been followed by that High Court in a later case.[27]

It is not necessary that there should be a *head office* or a *regular place* of business in order to "carry on business." Thus, a person residing at A who goes twice or thrice a week to a friend's house at C and does business there will be held to carry on business there.[28]

9. Business through agent. — As has been seen already, a business may be carried on through an agent[1] and it is not necessary that the principal should have ever gone to the place of business at all. But it is essential that the agent must be an agent in the *strict* sense of the term[2] and must attend exclusively to the business of the principal. A person conducting business at a place through *commission* agents or brokers[3] or general agents[4] cannot be held to carry on business there. A manager of a joint Hindu family is not an agent in the strict sense and the members of the family cannot be said to carry on business through him at any place.[5]

10. Secretary of State. — The words "carry on business" are inapplicable to the Secretary of State for India in Council.[1] Nor do the words "actually and voluntarily resides" apply to the Secretary of State. They refer only to *natural persons* and not to *legal entities*.[2]

11. "Personally works for gain."—It is sufficient to give a Court jurisdiction if the defendant personally works for gain within the local limits of its jurisdiction. To constitute work there must be some physical or mental effort.[1] A *guru* accepting presents and offerings from his *chelas* and invoking blessings upon them in return cannot be said to be personally working for gain.[2] An advocate, who though residing outside the station where the High Court is located, appears in the High Court whenever he is engaged,

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26. (1863) 1 Mad H C R 286 (293).
27. ('82) 4 Mad 209 (212) (DB).
28. (1864) 2 Hyde 79 (83).
('71) 16 Suth W R O C 16 (27) (DB).

Note 9

1. See Note 8, foot-note 24.
See also the following cases :
('37) 24 AIR 1937 All 208 (217) : I L R (1937) All 234.
('03) 26 Mad 544 (553) : 30 Ind App 220 (PC).
('98) 17 Bom 662 (665).
('80) 5 Cal 605 (610). (A trader, residing out of the jurisdiction of High Court but carrying on business at Calcutta by agent, can be adjudicated insolvent in Calcutta.)
(1900) 23 Mad 458 (472). (Person acting as agent should be an agent in the strict and correct sense of the term.)
2. (1900) 23 Mad 458 (472) (DB).
('36) 23 AIR 1936 Sind 175 (178) : 29 Sind L R 410.
('36) 23 AIR 1936 Sind 121 (123) : 29 Sind L R 292. (Expression "carrying on business" does not apply to an agent who is a mere post office for bringing about contracts.)
[*See also* ('03) 26 Mad 544 (553) : 30 Ind App 220 (PC). (Manager of joint Hindu family property is not an agent of the members of the family.)]
3. ('71) 8 Bom H C R O C 102 (113).
('69) 11 Suth W R 530 (531) (DB).
('37) 24 AIR 1937 Sind 17 (18).
('36) 23 AIR 1936 Sind 175 (178) : 29 Sind L R 410.
('36) 23 AIR 1936 Sind 121 (123) : 29 Sind L R 292.
4. ('66) 3 Mad H C R 146 (148). (General agent who acted as broker also.)
('23) 10 AIR 1923 Lah 427 (427).
('36) 23 AIR 1936 Sind 175 (178) : 29 Sind L R 410.
('36) 23 AIR 1936 Sind 121 (123) : 29 Sind L R 292.
5. ('03) 26 Mad 544 (553) : 30 Ind App 220 (PC).
[But see ('22) 67 Ind Cas 69 (70) (DB) (Lah). (Where cases not referred to.)]

Note 10

1. ('27) 14 AIR 1927 Mad 689 (690, 692) : 50 Mad 449 (DB). (Dissenting from 1 Mad H C R 286.)
† ('87) 14 Cal 256 (272) (DB).
('13) 40 Cal 308 (317) (DB). (Following 14 Cal 256.)
✠(1862) 1 Hyde 37 (41).
('30) 17 AIR 1930 Lah 818 (819).
[*See also* (1880) 15 Ch D 1 (9, 10), Kinloch v. Secy. of State. (Cited in 14 Cal 256.)]
Also see Note 31 and S. 79 Note 7.
2. ('30) 17 AIR 1930 Lah 818 (819).

Note 11

1. ('90) 14 Bom 541 (553, 554).
2. ('94) 18 Bom 290 (294) (DB).
('90) 14 Bom 541 (553, 554).

works for gain within the local limits of the jurisdiction of the High Court.[3] Similarly, a person residing at *A* and coming constantly to Calcutta for making contracts, works for gain within Calcutta.[4]

As already observed, the *carrying on of business* may be either in person or through agents; but the *work for gain* must be *in person*. On this ground a person carrying on business through an agent cannot be said to *personally* work for gain where the agent carries on the business.[5]

The Government of India cannot be said to "work for gain" anywhere as the income obtained by it is held for the benefit of the Indian Exchequer.[6]

12. Leave of Court — Clause (b). — Where no part of the cause of action arises within the jurisdiction and some of the defendants reside outside it, leave to sue them should be obtained, unless they *acquiesce* in the institution of the suit.[1] No leave is necessary where the cause of action arises within the Court's jurisdiction though some of the defendants reside outside it.[2] The clause is not to be read as limited to persons merely residing outside the limits of the territorial jurisdiction of the Court but within British India. It makes no difference whether the defendants, in respect of whom leave is asked, are residents of British India though outside the local limits of the Court's jurisdiction or are residents outside British India.[3]

Under clause 12 of the Letters Patent, it is necessary that the leave should be obtained *before* the institution of the suit. (See Letters Patent (Cal.) Cl. 12, Note 9.) Under cl. *(b)* of this section, however, the leave may be granted even *after* the institution of the suit.[4] The leave may be given even after the decision of the preliminary issue as to jurisdiction, but before the plaint is ordered to be returned for presentation to the proper Court.[5] But it is necessary that the grant of leave should be distinctly sought and obtained[6] and cannot be inferred from the plaintiff being allowed to continue the suit.[7] In exercising its power to grant or refuse leave to sue, the question of convenience of parties should be taken into consideration.[8] No notice is necessary to the defendants residing outside jurisdiction, of an application for grant of leave to sue under this section.[9] But the leave cannot be given arbitrarily, and when the defendants who reside outside jurisdiction do not appear, the Court is bound to consider their position before granting leave. This obligation is in no way lessened when they do appear and object, especially when the objecting defendant is the real person against whom the plaintiff wants to proceed.[10] Where leave is granted under this clause without issuing notice to the opposite party, the Court can in the exercise of its inherent powers hear any objection against the grant of such leave and pass such orders as are necessary in the interests of justice.[11]

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3. ('73) 6 N W P H C R 43 (45) (DB).
4. (1862) 2 Hyde 79 (83) (DB).
5. ('69) 11 Suth W R 530 (531) (DB).
6. † ('87) 14 Cal 256 (274) (DB).
(1862) 1 Hyde 37 (41, 42).

Note 12

1. ('22) 9 AIR 1922 Bom 152 (153) : 46 Bom 229 (DB).
[*See* ('17) 4 AIR 1917 Mad 404 (405).]
2. ('29) 16 AIR 1929 Sind 170 (171, 172): 23 Sind L R 365 (DB).
3. † ('38) 25 AIR 1938 Mad 731 (733) : I L R (1938) Mad 1080 (DB).
4. ('06) 30 Bom 570 (574) (DB).
5. ('33) 20 AIR 1933 Sind 179 (180) : 27 Sind L R 230 (DB). (Discretion of trial Court as to grant of leave not to be lightly interfered with in appeal— But where Court refuses to exercise discretion Appellate Court may interfere.)
6. ('91) 15 Bom 93 (98).
† ('80) 4 Bom 482 (488).
7. ('03) 1903 Pun Re No. 27.
8. ('07) 30 Mad 438 (440) (DB). (Application under Cl. 12, Letters Patent.)
Also see L P. (Cal), Cl. 12. Note 9.
9. ('04) 26 All 603 (605) (DB).
('21) 8 AIR 1921 Low Bur 19 (19, 20) : 11 Low Bur Rul 26 (DB).
10. ('38) 25 AIR 1938 Nag 262 (263) : I L R (1940) Nag 502.
11. ('33) 20 AIR 1933 Lah 266 (266, 267).
[NOTE. — For proper remedy available to such party, see S. 22 Note 1.]

13. Acquiescence in institution. — Under S. 20 of the Code of 1882, which provided that any defendant not applying for stay of proceedings before the issues are settled "shall be deemed to have acquiesced in the institution of the suit," it was held that if a non-resident defendant did not apply for a stay of proceedings, he should be taken to have "acquiesced" in the institution[1] though he objected to the jurisdiction in his *written statement*.[2] But the said section has not now been re-enacted in the present Code as sufficient provision for transfer of suits has been made in sections 22 to 24. A defendant who *objects* to the jurisdiction will not be deemed to have acquiesced in the institution simply because he did not apply for transfer of the case.[3] A defendant who *appears* and does not object to the jurisdiction, may, it is conceived, be held to have acquiesced in the institution.

Where a suit is brought against defendants some of whom reside within, and some without the jurisdiction of the Court, and neither the leave of the Court has been obtained nor acquiescence shown on the part of the defendants not residing within jurisdiction, the suit cannot proceed against those only of the defendants who reside within jurisdiction.[4]

14. Cause of action, meaning of. — As has been seen already in Note 2, a Court will have jurisdiction over a matter if the *cause of action* arises within the local limits of its jurisdiction.[1] And such jurisdiction is not affected by the death of the person originally liable.[2]

The words "cause of action" are sometimes used in a restricted sense and sometimes in a wider sense.[3] In the restricted sense they mean the circumstances forming the infringement of the right or the immediate occasion for the action.[4] In the wider sense they mean the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with the right itself.[5] The expression "cause of action" has been compendiously defined to mean every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of *evidence* which is necessary to prove each fact, but every *fact* which is necessary to be proved.[6] In other words, it

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Note 13

1. ('98) 8 Mad L Jour 38 (39) (DB).
('83) 6 Mad 344 (349) (DB).
('06) 30 Bom 81 (83) (DB).
('85) 9 Bom 266 (268) (DB).
[But see ('03) 1903 Pun Re No. 27.]

2. ('98) 8 Mad L Jour 38 (39) (DB).
('06) 30 Bom 81 (82, 83) (DB).

3. ('15) 2 AIR 1915 Cal 62 (63) (DB).
Also see S. 21 Note 3.

4. ('22) 9 AIR 1922 Bom 152 (153) : 46 Bom 229 (DB).

Note 14

1. *See the following cases :*
('85) 9 Bom 451 (455).
(1900) 24 Bom 407 (413).
('90) 12 All 212 (216, 217).
('95) 22 Cal 833 (840).
(1900) 1900 Pun Re No. 93. (Suit against military officer — Court where cause of action arises has jurisdiction.)

2. (1862) 2 Hyde 18 (21) (DB).
[*See also* ('72) 9 Bom H C R 429 (432).]

3. ('95) 22 Cal 833 (840) (DB).
('82) 4 All 423 (425) (DB). (Cause of action comprehends material portion of the cause of action.)
('83) 5 All 163 (173) (FB).
('68) 3 Mad H C R 384 (406) (DB).
[*See also* ('83) 5 All 277 (279, 280).]

4. † ('82) 9 Cal 105 (110) (DB).
('14) 1 AIR 1914 Cal 854 (857) (DB). (Suit for injunction may be filed in the Court where the plaintiff's rights were interfered with.)
('13) 20 Ind Cas 347 (348) (DB) (Cal).
('02) 6 Cal W N 585 (588) (DB).
[*See* ('89) 12 Mad 131 (136).]
[*See also* ('74) 14 Beng L R 367 (369).]

5. ✣('68) 3 Mad H C R 384 (406) (DB).
('83) 5 All 163 (173) (FB).
('87) 14 Cal 256 (270) (DB).

6. ('13) 30 AIR 1943 Cal 199 (200) (DB).
('43) 30 AIR 1943 Cal 172 (175) : I L R (1942) 1 Cal 562.
('40) 27 AIR 1940 Lah 85 (86).
✣(1889) 22 Q B D 128 (131), Read v. Brown. (Followed in 16 All 165).
(1873) 8 C P 107 (116), Cooke v. Gill.

means the whole bundle of material facts which it is necessary for the plaintiff to prove in order to entitle him to succeed in the suit.[7] Thus, in the case of a life insurance policy, the claimant must prove the death of the assured before he can enforce his claim against the insurance company. Hence, the death of the assured is a part of the cause of action for a suit claiming the insurance money.[8] In delivering the judgment of the Board in *Chand Kuar* v. *Partap Singh*,[9] Lord Watson observed as follows:

> "Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour."[10]

Whether any particular facts constitute a cause of action has to be determined with reference to the facts of each case[11] and with reference to the *substance* rather than the form of the action.[12] The cause of action must, however, be *antecedent* to the

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† ('37) 24 AIR 1937 All 208 (210) : I L R (1937) All 234.
('32) 19 AIR 1932 All 543 (545) : 54 All 525 (DB).
('17) 4 AIR 1917 All 17 (18) : 39 All 506 (DB).
('96) 18 All 432 (434) (DB).
('96) 18 All 131 (137) (DB).
('05) 29 Bom 368 (372).
('31) 18 AIR 1931 Cal 659 (662) : 58 Cal 539 (DB).
('04) 31 Cal 274 (282) (FB).
('17) 4 AIR 1917 Mad 221 (222) (DB).
('05) 1 Nag L R 4 (5, 6).
('22) 9 AIR 1922 Oudh 109 (111).
('05) 8 Oudh Cas 389 (393) (DB).
('11) 11 Ind Cas 851 (852) (Low Bur).
('26) 13 AIR 1926 Sind 31 (32) : 20 Sind L R 209.
('21) 8 AIR 1921 Sind 200(201): 17 SindLR41(DB).

7. ('42) 29 AIR 1942 Cal 99 (111) : ILR (1941) 2 Cal 477 (DB). (Per Pal J.)
(1897) 1 Q B 164 (165, 166) : 66 L J Q B 144 : 75 L T 620 : 45 W R (Eng) 162, Bowler v. Barberton Development Syndicate. (Agreement to transfer shares in company to be formed — Company formed outside jurisdiction of Court — Suit for specific performance or damages held not maintainable.)
('33) 20 AIR 1933 Bom 179 (180) : 57 Bom 306.
('32) 19 AIR 1932 Bom 42 (46).
('34) 21 AIR 1934 All 226 (229) (DB).
† ('03) 25 All 48 (52) (DB).
('94) 16 All 163 (170) (FB).
('06) 30 Bom 167 (170).
('05) 29 Bom 368 (372) (DB).
† ('04) 6 Bom L R 1038 (1040).
('97) 21 Bom 126 (133, 134).
('81) 5 Bom 42 (45). (Suit by liquidator of Bank against defendant for failure to respond to call on sharers—Service of balance order is not necessary and is not a part of the cause of action.)
† ('37) 24 AIR 1937 Cal 643 (645).
('35) 22 AIR 1935 Cal 160 (167) : 61 Cal 1023.
('31) 18 AIR 1931 Cal 659 (662) : 58 Cal 539 (DB).
† ('19) 6 AIR 1919 Cal 1014 (1015) (DB).
('95) 22 Cal 451 (453).
('05) 1905 Pun Re No. 1. (Suit to set aside several alienations by widow — Each alienation gives rise to a separate cause of action.)
† ('23) 10 AIR 1923 Mad 109 (110).
('21) 8 AIR 1921 Mad 661 (665) (DB).
† ('19) 6 AIR 1919 Mad 883 (884) (DB).
† ('24) 11 AIR 1924 Nag 308 (309) (DB).
('14) 1 AIR 1914 Oudh 314 (315).
('06) 3 Low Bur Rul 56 (60) (DB).
('36) 23 AIR 1936 Sind 229 (231) : 30 Sind L R 182.
† ('33) 20 AIR 1933 Sind 179 (180, 181) : 27 Sind L R 230 (DB).
('26) 13 AIR 1926 Sind 31 (32) : 20 Sind L R 209.
('25) 12 AIR 1925 Sind 132 (134) : 19 Sind L R 207 (DB).
('14) 1 AIR 1914 Sind 146 (147) : 8 Sind L R 107.
(1889) 22 Q B D 128 (131), Read v. Brown.
✠ (1873) 8 C P 107 (116), Cooke v. Gill.
[*See also* ('87) 11 Bom 649 (652). (In case of an action on contract it consists of the making of the contract and of its breach in the place where it ought to be performed.)
Also see Letters Patent (Cal) Cl. 12 Note 7.

8. ('43) 30 AIR 1943 Cal 199 (201) (DB).

9. ('89) 16 Cal 98 (102).

10. *See also the following cases* :
('43) 30 AIR 1943 Cal 199 (201) (DB).
('42) 29 AIR 1942 Cal 99 (104, 111) : ILR (1941) 2 Cal 477 (DB).
('02) 25 Mad 736 (739) (DB).
('32) 19 AIR 1932 Bom 42 (43).
('05) 7 Bom L R 925 (927). (Cause of action does not mean cause of action according to the facts stated by the defendant.)
('19) 6 AIR 1919 Cal 194 (194, 195) (DB).
('07) 1907 Pun Re No. 57. (Cause of action does not depend on the relief claimed.)
† ('17) 4 AIR 1917 Mad 221 (223) (DB).
('10) 34 Mad 97 (103) : 6 Ind Cas 233 (236) (DB).
('17) 4 AIR 1917 Nag 1 (4).
('05) 1 Nag L R 4 (6).
('29) 16 AIR 1929 Pat 685 (687) : 9 Pat 447 (DB).
[But see ('10) 8 Ind Cas 9 (12) (All.)]

11. *See* ('22) 9 AIR 1922 Nag 127 (128).

12. ('92) 19 Cal 372 (379) (FB).
† ('73) 20 Suth W R 377 (380) : Ind App Sup Vol. 212 (PC).
('75) 2 Ind App 283 (285) : 1 Cal 144 (PC).
[*See also* ('24) 11 AIR 1924 Rang 145 (147) : 1 Rang 694. (Meaning of the expression should be gathered from the previous legislation in India and not from definitions of the expression in English decisions.)]

institution of the suit and cannot be furnished by the pleadings themselves.[13] Where *two or more* causes of action against a defendant are sought to be joined in one suit, the Court to which the plaint is presented must have jurisdiction over *all* the causes of action.[14]

15. "Wholly or in part arises." — This clause makes it clear that in *all* cases covered by this section a suit may be instituted where a *part* of the cause of action arises. Where a right and an infringement thereof are both necessary to be proved before relief can be granted, the cause of action arises partly where the right was created and partly where it was infringed. Thus, where freight was collected from the plaintiff at Calicut, but the goods were short delivered, the cause of action for refund of the freight and for price of goods short delivered arises in part at Calicut.[1] Similarly, the refusal to refer to arbitration on the part of one of the parties was held a fundamental part of the cause of action in an application under Sch. II, para. 17 (now repealed) to have the agreement filed in Court.[2] Similarly, the cause of action for a suit to recover the sum assured by a policy of life insurance arises partly at the place where the assured died and the suit can be instituted in a Court having jurisdiction in such place.[3]

If the creation of the right and the infringement thereof both happen at a particular place, the *whole* cause of action will be said to arise there. But if they take place in different places, *parts* of the cause of action arise in the different places.[4] Where the infringement itself is in respect of several items, parts of the cause of action arise in the several places of infringement in respect of those items.[5]

The corresponding section of the Code of 1882 was amended by the addition of an explanation, being Explanation III, which provided that in suits *arising out of contract*, the cause of action arose within the meaning of the section at any of the following places, namely —

(a) The place where the contract was made.

(b) The place where the contract was to be performed or performance thereof completed.

(c) The place where, in performance of the contract, any money to which the suit relates was expressly or impliedly payable.

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13. ('19) 6 AIR 1919 Pat 507 (510) : 4 Pat L Jour 387 (DB).
('93) 15 All 399 (403) (DB).

14. ('84) 7 Mad 171 (173).
('39) 26 AIR 1939 All 163 (164) : I L R (1939) All 167 (DB). (Suit for two reliefs based on two independent cause of action — Court having jurisdiction in respect of one only—Mere fact that the plaintiff has sued in one plaint for two reliefs would not give jurisdiction to Court in respect of other cause of action.)
('22) 9 AIR 1922 Oudh 124 (126). (Accounts of several shops of plaintiffs treated as one with consent of defendant —Cause of action for accounts is single and not separate.)

Note 15

1. ('19) 6 AIR 1919 Mad 883 (884) (DB).
('15) 2 AIR 1915 All 53 (54) : 26 Ind Cas 620 (621). (Goods booked at Cawnpore—Suit for recovery of excess freight tenable in Cawnpore.)
('82) 4 All 423 (425) (DB). (The term, as used in this section, does not necessarily mean the whole of the cause of action.)
Also see Note 17.

2. ('33) 20 AIR 1933 Lah 18 (21, 22).

3. ('43) 30 AIR 1943 Cal 199 (202) (DB). (25 All 48 referred.)

4. ('18) 5 AIR 1918 Lah 52 (52) : 1918 Pun Re No. 26.
('18) 5 AIR 1918 Lah 320 (320) : 1918 Pun Re No. 98, page 325.
('78) 3 Cal 264 (269). (Jewels obtained by fraud at *C* and pledged at *K*—Cause of action for recovery arises at *C*.)
('74) 13 Beng L R 91 (99) (DB).
('68) 4 Mad H C R 218 (222). (Contract entered into at *S* for carrying on partnership at *B*—Goods to be sent to Madras—Price payable at Madras—Cause of action arises partly in Madras.)

5. ('23) 10 AIR 1923 Mad 109 (111) (DB). (Reversionary right to properties situate in different local jurisdictions.)

This explanation had been added to the old section to make it clear that *suits arising out of contract* could be instituted in the Court within the local limits of whose jurisdiction the cause of action arose either wholly or in part. But this gave rise to doubts whether *other classes* of suits could be instituted in a Court within the local limits of whose jurisdiction *part only* of the cause of action arose. It was, however, held in the undermentioned case,[6] following older decisions,[7] that the introduction of the said explanation did not effect any change in the law and that a Court would have jurisdiction if the *material part* of the cause of action arose within its jurisdiction. The effect of the present addition of clause (c) of the section in substitution of the old Explanation III, is to leave no room for doubt that *all* classes of suits can be instituted where the cause of action arises wholly, or in part. The old Explanation III has now been omitted, but the cases decided thereunder are still good law in cases arising out of contract.[8]

It must, however, be noted that a party to a contract cannot rely, at his *option*, on any of the alternatives mentioned in the old Explanation III in order to sue in any particular *forum*. It depends in each case upon the allegations in the plaint in support of the relief claimed. Thus, where under a contract goods had to be delivered at *a* and the price was payable at *b*, the cause of action for the non-delivery of the goods will arise at *a* alone,[9] and that for the non-payment of the price will arise at *b* alone.[10]

16. Suits on contracts—General. — The meaning of the expression "cause of action" when applied to suits based on contracts should be ascertained by a consideration of the meaning of the expression in the past in the course of the development of legislation in India and the case law based thereon.[1] In a suit based on a contract the cause of action will consist of the *making* of the contract and of its *breach* at the place where it is to be performed.[2] (See also Note 17.) An action therefore for breach of a contract can,

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6. † ('03) 25 All 48 (52, 53) (DB).
7. ('83) 5 All 277 (279).
('75) 14 Beng L R 367 (369).
('89) 13 Bom 404 (415).
('75) 1 Bom 23 (43).
('83) 9 Cal 105 (111).
[*See also* ('74) 13 Beng L R 461 (467, 471, 472).]
8. ('43) 30 AIR 1943 Cal 199 (202) (DB). (History of Expl. III and the effect of its omission is indicated in this case.)
† ('33) 20 AIR 1933 Bom 179 (180) : 57 Bom 306
('11) 34 All 49 (53) : 11 Ind Cas 712 (713) (DB).
As to whether under Clause 12 of the Letters Patent, the High Court has jurisdiction in cases where the cause of action arises in part within its jurisdiction, see the following cases :—
('78) 1 Mad 375 (377). (Whole cause of action must arise within limits. But, if part arises then leave must be obtained.)
('04) 27 Mad 494 (495, 496).
('96) 20 Bom 15 (44, 45). (Partly arising — Leave must be obtained.)
('87) 11 Bom 257 (267). (Do.)
('75) 1 Bom 23 (35). (Part arising within jurisdiction —Leave obtained.)
('87) 14 Cal 256 (270). (Means the whole cause of action—Contract as well as the breach must have taken place within the jurisdiction of the Court if leave is not taken.)
('66) 1 Ind Jur (NS) 218. (If part arises, then leave must be obtained.)
9. ('20) 7 AIR 1920 All 142 (143) : 42 All 480.
10. † ('20) 7 AIR 1920 Mad 146 (148) (DB).

Note 16

1. ✣('24) 11 AIR 1924 Rang 2 (8) : 1 Rang 231 (DB). (Not by reference to any English decision or the construction of any English Statute.)
2. ('87) 14 Cal 256 (270) (DB).
('22) 9 AIR 1922 Lah 164 (165).
('97) 21 Bom 126 (134).
('91) 15 Bom 93 (102), (Letters Patent.)
('87) 11 Bom 649 (652).
('75) 12 Bom H C R 113 (125, 126). (Letters Patent.)
('67) 1867 Pun Re No. 29.
('04) 27 Mad 494 (495) (DB).
✣('24) 11 AIR 1924 Rang 2 (7) : 1 Rang 231 (DB). (Contract of insurance — Loss to property insured is not a cause of action.)
('18) 5 AIR 1918 Low Bur 101 (102) : 9 Low Bur Rul 75.
('39) 26 AIR 1939 Pat 294 (294, 295). (Place of suing is either where contract is made or where it is agreed to be performed—In the absence of plea to the contrary by defendant it may be taken that money was to be repaid where the transaction was made.)
(1864) 2 Hurl & C 954 (957, 958), Sichel v. Borch.
✣[But see ('82) 8 Cal 483 (490, 491, 495) (FB). (Letters Patent.)
('28) 15 AIR 1928 Nag 305 (306). (Suit on fire insurance — Part of cause of action arises where fire occurs.)]

at the option of the plaintiff, be brought either at the place where the contract was made or the place where the breach was committed.[3] Originally the place of making the contract alone was regarded as the proper *forum* of action and it was only afterwards that the place of performance and the place of breach came also to be regarded as *forums* of action.[4] See also Note 15.

To decide the question of jurisdiction of a Court to entertain a suit based upon a contract regarding purchase of goods three points arise : one is the place of the contract, second is the question of delivery of the goods, and the third is the question of payment for the goods.[5]

When a contract is both *made and broken* at a particular place, the whole cause of action will arise there.[6] Thus, where a promissory note is made and delivered in Calcutta, and is also payable to a payee who resides in Calcutta, the whole cause of action arises at Calcutta.[7] Similarly, where A sent money to B at Bombay who received it undertaking to buy goods there and ship them to *a* at Karwar, but failed to do so and A sued B for the return of the money, it was held that the making of the contract (i. e., receipt of the money and the undertaking) and the breach (i. e., for failure to ship goods from Bombay) both having occurred at Bombay, the whole cause of action arose there.[8]

The place where the cause of action arises in respect of any contract must be determined with reference to the terms of the original contract itself and not by subsequent negotiations.[9]

17. Place of making the contract. — As has been seen in Note 16, the *making* of the contract itself is a part of the cause of action.[1] But *antecedent* transactions in respect of which a contract is made will not furnish a cause of action for a suit on the contract. Thus, where A executes a *hundi* in favour of B, at Bassum in respect of an antecedent transaction which had taken place at Bombay, the Court at Bombay has no jurisdiction to entertain a suit on the contract.[2]

A contract is made when an offer of one party is accepted by the other party.[3] An offer, however, must be distinguished from an *invitation to offer*.[4] Where a catalogue is sent by a firm to any person, and he orders for an article mentioned therein,

3. ('78) 1 Mad 375 (377) (DB).
† ('32) 19 AIR 1932 Sind 9 (12) : 26 Sind L R 167.
('33) 20 AIR 1933 Bom 179 (180) : 57 Bom 306.
('74) 22 Suth W R 79 (81) (DB).
('73) 20 Suth W R 6 (7) (DB).
('19) 6 AIR 1919 Lah 272 (272).
4. ('74) 13 Beng L R 461 (472) (DB).
('31) 18 AIR 1931 Mad 115 (116). (Thus though contract was made in a Native State, British Courts will have jurisdiction where the first item of performance began.)
('30) 17 AIR 1930 Rang 216 (218) (DB).
5. ('42) 29 AIR 1942 Lah 252 (252) (DB).
6. ('42) 29 AIR 1942 Lah 252 (252) (DB).
7. ('67) 1 Beng L R O C 35 (37).
[*See also* ('37) 24 AIR 1937 Lah 800 (801). (Suit by Bank at L on pro-note executed by *A*, *B*, *C* and *D* — Pro-note signed by *A* at N and then delivered to Bank at L by *B* with implied authority of *A* — L Court held had jurisdiction to try the suit against *A*.)]
8. ('91) 18 Bom 43 (45) (DB).
9. ('22) 9 AIR 1922 Nag 127 (128).

Note 17

1. ('74) 22 Suth W R 79 (82) (DB).
('12) 1912 Pun Re No. 111 : 15 Ind Cas 12 (13) (DB).
('36) 23 AIR 1936 All 514 (516). (Contract was entered into at A by a canvasser of the defendant and the proprietor (defendant) himself signed the contract at S—Part of cause of action arose at A.)
('29) 16 AIR 1929 All 236 (236).
('25) 12 AIR 1925 All 823 (823).
('19) 6 AIR 1919 All 295 (297) : 41 All 602.
('84) 5 All 277 (280) (DB). (Making of contract is material part of the cause of action.)
('83) 4 All 423 (425) (DB).
('96) 21 Bom 126 (133, 134).
('19) 6 AIR 1919 Lah 272 (273).
('18) 5 AIR 1918 Lah 52 (52):1918 Pun Re No. 26.
('01) 27 Mad 355 (359, 360) (DB).
('23) 10 AIR 1923 Nag 167 (169).
('29) 16 AIR 1929 Oudh 91 (92) : 4 Luck 347 (DB).
† ('24) 11 AIR 1924 Rang 2 (7) : 1 Rang 231 (DB).
('18) 5 AIR 1918 Sind 1 (3) : 12 Sind L R 93.
[*See also* ('71) 15 Suth W R 500 (500).]
2. ('16) 3 AIR 1916 Bom 227 (227) : 40 Bom 473.
3. † ('05) 32 Cal 884 (889, 890) (DB).
4. ('20) 7 AIR 1920 Mad 177 (179) (DB).

it is he who is really making the offer, the catalogue being merely an invitation to offer.[5] The offer itself is a part of the cause of action for a suit based on the contract.[6] An offer is made at the place where it is received and if it is made by post or telegram the place of dispatch is not a material factor.[7]

Where the parties personally meet at any place and the proposal of one is accepted by the other, that place, of course, will be the place of making the contract. (See Illustration (b).) If the proposal and acceptance thereof are made in *different* places, the place of *acceptance* will be the place where the contract is made.[8] The whole correspondence, if the contract was made by correspondence, must be looked into in order to find out where the proposal was accepted.[9] Where the contract is entered into by postal communication, the contract will be deemed to be made where the letter of acceptance is *posted*, and not where it is received.[10] The communication of the acceptance of the proposal only affects the *time* of the coming into force of the contract and not the *place* of making the contract.[11] If the acceptance of a proposal consists of the performance of a condition of the proposal, the contract will be deemed to be made where the condition is performed.[12] If an agreement is to be executed by the plaintiff, part of the cause of action arises where the agreement is executed.[13]

Where the contract purports on the face of it to have been made at any particular place, as for instance, a promissory note dated at x, it will be presumed that the parties have agreed to that place being taken as the place of contract and it will be so treated.[14] (See in this connexion the discussion as to conferring jurisdiction by contract in Note 5 on S. 9.) Where in a suit upon the breach of a contract to deliver goods, it did not appear where the contract, if any, was made, the mere fact that an advance on account of the contract was made at a particular place would not give the Court of that place jurisdiction in the suit.[15]

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5. ('09) 1 Ind Cas 325 (327) (Oudh).
('22) 9 AIR 1922 Lah 100 (101).
[*See also* ('32) 19 AIR 1932 Bom 291 (298) : 56 Bom 324. (Agent sending out terms or quotations to the people — No contract arises on such letter.)
('38) 25 AIR 1938 Nag 186 (188) : ILR (1939) Nag 648. (Letter written by defendant stating the terms on which he did business held to be not an offer but an intimation of readiness to transact business.)]

6. ('20) 7 AIR 1920 Mad 314 (314) (DB).

7. ('40) 27 AIR 1940 Mad 49 (51) : ILR (1941) Mad 195 (DB). (The posting of an offer or the despatch by telegram of an offer from a particular place cannot be regarded as part of the cause of action.)

8. ('43) 30 AIR 1943 Mad 471 (473) (DB).
('41) 28 AIR 1941 Lah 223 (223) (DB). (Contract of sale of goods.)
('41) 1941 Nag L Jour 37 (38). (Proposal to take up a policy in an Insurance Company accepted by its head office in C.—From the fact that proposal form was filled and handed over to the branch office in N which had no power to accept it, it cannot be said that part of the cause of action arose in N.)
('10) 27 AIR 1940 Lah 85 (86). (Offer to act as agent of company sent from M accepted at L — Contract is made at L.)
† ('05) 32 Cal 884 (889, 890) (DB).
('23) 10 AIR 1923 Lah 427 (427).
('19) 6 AIR 1919 Lah 26 (27) : 1 Lah 203 (Orders for goods by wire from L — Acceptance by wire at K.)
('37) 24 AIR 1937 Mad 571 (573) : I L R (1937) Mad 990 (DB).
('14) 1 AIR 1914 Mad 311 (311). (Seller consigning goods to Railway — Suit for price lies where consignment was made.)
('29) 16 AIR 1929 Sind 227 (228).
[*See* ('17) 4 AIR 1917 All 121 (122).
('19) 6 AIR 1919 Mad 1043 (1043) (DB).
[*See also* ('31) 18 AIR 1931 Cal 659 (662) : 58 Cal 539.]

9. ('20) 7 AIR 1920 Mad 177 (179) (DB). (Offer transmitted from N and accepted at M — Payment against bill of lading at M—No part of cause of action arises at N.)

10. ('43) 30 AIR 1943 Mad 471 (473) (DB). (AIR 1942 Mad 13 : ILR (1942) Mad 243 dissented from.)
('09) 1 Ind Cas 77 (77) (All).
('21) 8 AIR 1921 Nag 42 (43) : 17 Nag L R 1.
('34) 21 AIR 1934 Mad 581 (582).

11. ('96) 1896 Pun Re No. 76.

12. ('05) 32 Cal 884 (888) (DB).

13. ('06) 30 Bom 364 (377) (DB).

14. ('05) 28 Mad 19 (22) (DB). (English cases cited.)

15. ('67) 2 Agra 188 (188) (DB).

The principles enunciated above apply both to express as well as *implied* contracts and to obligations resembling those under contracts. Thus, where excess of freight is paid to a Railway Company at a particular place, there is an implied contract on the part of the Company to return the excess and a cause of action for a suit for return of the excess will arise, in part, where the obligation to return came into existence, namely where the excess was paid.[16] Similarly, where plaintiff sent a larger quantity of goods to defendant than that ordered for, and the latter returned the same and the plaintiff filed a suit for damages, it was held that the cause of action arose at the place wherefrom the defendant returned the goods.[17] Similarly, where goods were lost in one district and found in another, the finder is under an obligation to return them at the place where he found them and the Court of that place will have jurisdiction to entertain a suit for the recovery thereof.[18]

In the absence of any contract to the contrary, a transaction of hiring cannot be held to be complete until the article hired is in the hands of the person to whom it is hired.[19]

18. Place of breach or non-performance in general. — As has been mentioned already, the place of breach will also furnish the *forum* for a suit on contract, even though the place of making it be not within the forum.[1] The place of breach is the place where the contract is to be performed,[2] that is, the place where the contract is to be *completely* performed, or where the performance is to be in several places, where it is to be *completed*.[3]

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16. ('15) 2 AIR 1915 All 53 (53).
('19) 6 AIR 1919 Mad 883 (884) (DB).
Also see Note 15.

17. ('19) 6 AIR 1919 Mad 1043 (1043) (DB).

18. ('68) 9 Suth W R 586 (586) (DB).

19. ('42) 29 AIR 1942 Mad 659 (659). (Suit for damages for infringement of copyright by hiring certain film for exhibition at a place R—Court at R has jurisdiction.)

Note 18

1. ('42) 29 AIR 1942 Oudh 250 (252) : 17 Luck 733 (DB). (Contract made at F agreed to be performed at B—Suit for damages for breach—Suit can be filed in B.)
('18) 5 AIR 1918 Upp Bur 17 (18) : 3 Upp Bur Rul 38.
('17) 4 AIR 1917 Lah 12 (12):1916 Pun Re No.93. (Contract of betrothal—Breach.)
('82) 4 All 423 (425) (DB).
('67) 2 Agra 248 (248) (DB). (Goods sent to Cawnpore to be sold there — Sold elsewhere—Cause of action for breach arises at Cawnpore.)
('82) 1882 Pun Re No. 147. (Contract of marriage — Breach.)
('27) 14 AIR 1927 Mad 1150 (1150) (DB).(Plaintiff sole agent of defendant for place M — Defendant not to sell at M under the contract — Defendant selling at M — Court at M has jurisdiction to try suit for damages.)
('03) 27 Mad 355 (358) (DB). (Contract and breach at the same place.)
[*See* ('12) 14 Ind Cas 560 (560) (Mad). (Contract neither made nor to be performed in British India.)]
[Compare ('74) 1874 Pun Re No. 57. (Contract of marriage — Breach of.)]

2. ('42) 29 AIR 1942 Oudh 250 (252):17 Luck 733 (DB).
('87) 11 Bom 649 (652).
('82) 4 Mad 372 (374) (DB).
† ('60) 8 Moo Ind App 291 (307) (PC).
('06) 1906 Pun Re No. 70. (Bailment.)
('21) 8 AIR 1921 Mad 664 (665) (DB). (Agent to sell goods at A—Selling goods at B — Court at B has jurisdiction.)
('24) 11 AIR 1921 Nag 18 (19). (Delivery to be taken at A—Refusal to take delivery—Court at A has jurisdiction.)
('26) 13 AIR 1926 Sind 238 (241) : 22 Sind L R 43. (Negligence of agent—Cause of action arises where acts of negligence or misconduct are committed.)
('24) 11 AIR 1924 Sind 22 (22) (DB). (Failure to carry out instruction.)
('22) 9 AIR 1922 Sind 32 (33) : 15 Sind L R 74. (Sale subject to inspection and approval at K — Court at K has power to try suit for breach of contract.)
('11) 5 Sind L R 97 (100):12 Ind Cas 662(664)(DB). (Goods sent to be tested and accepted at Karachi — Latter place has jurisdiction.)
[*See also* ('07) 9 Bom L R 903 (909, 910).
('06) 29 Mad 69 (70).
('10) 4 Sind L R 20 (26) : 7 Ind Cas 593 (595).]

3. ('24) 11 AIR 1924 Sind 64 (68) (DB).
('24) 11 AIR 1924 Sind 29 (31) : 17 Sind L R 164 (DB). (Delivery at K and payment at *P*—K Court has jurisdiction to try suit for breach of contract.)

Illustrations.

(A) *A* purchases goods of *B* at M but it is agreed that the *delivery* of the goods and the *payment* therefor should be made at N. In this case it is clear that the contract is to be *completely performed* at N and the Court of that place will have jurisdiction to try a suit in respect of the breach of the contract.[4]

(B) It is agreed between *A* and *B* that goods sent by *B* to *A* should be *measured* at M and delivered at P. *B* fails to deliver the goods and *A* sues him for damages for non-delivery. The cause of action arises at P where the performance was to be *completed*.[5]

In cases of contracts for the sale of goods, the place where the goods had to be delivered is the place of performance and the Court of that place will have jurisdiction to entertain a suit in respect of non-delivery according to contract.[6] A delivery to a common carrier is, under S. 91 of the Contract Act (now S. 39 of the Sale of Goods Act), a delivery to the buyer.[7] Thus, where defendants contracted at Bombay to sell goods to plaintiff at Amritsar, the cause of action for the breach of the contract would arise in Bombay, as delivery of the goods to the Railway Company at Bombay would have operated as a delivery to the plaintiff.[8]

Where the Contract itself does not stipulate the place of performance, it is the duty of the promisor under S. 49 of contract Act to apply to the promisee to appoint a reasonable place for the performance of the promise.[9] Where this has not been done, the place of performance should be determined with reference to the intention of the parties as gathered from their acts, the terms of the contract and the surrounding circumstances.[10] Where no actual intention can be inferred, recourse may be had to

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4. ('11) 5 Sind L R 97 (100) : 12 Ind Cas 662 (664) (DB).
('20) 7 AIR 1920 All 6 (8): 42 All 619 (DB). (Goods sent by value payable parcel — Goods found not those ordered — Suit for damages lies where goods were sent and paid for.)
('14) 1 AIR 1914 Sind 146 (147) : 8 Sind L R 107. ("Cause of action" explained.)

5. ('68) 5 Bom H C R A C 33 (34) (DB).

6. ('42) 29 AIR 1942 Lah 252 (252) (DB). (Contract of purchase of goods — Owner consignor and consignee — Consignment at owner's risk — Place of delivery is place to which goods are sent.)
('24) 11 AIR 1924 Lah 349 (350).
('33) 20 AIR 1933 Lah 599 (599, 600).
('34) 21 AIR 1934 All 740 (751) : 56 All 828 (DB).
('20) 7 AIR 1920 All 142 (143) : 42 All 480.
('20) 7 AIR 1920 All 6 (8) : 42 All 619 (DB). (Where goods were sent by V. P. P. the cause of action for sending the wrong goods will arise where delivery is taken.)
('11) 34 All 49 (52, 53): 11 Ind Cas 712 (713) (DB). (Delay in delivery at A on account of negligence— (Suit lies in Court at A).
('12) 13 Ind Cas 943 (944) (Cal).
('13) 18 Ind Cas 130 (131) (Lah).
('06) 1906 Pun Re No. 70.
('34) 21 AIR 1934 Mad 581 (582). (Goods sent by V. P. P.—Place of performance is the place where the goods are to be received.)
('32) 19 AIR 1932 Sind 9 (12, 13) : 26 Sind L R 167).
('09) 3 Sind L R 156 (162): 1 Ind Cas 1147 (1150).
[*See also* ('31) 18 AIR 1931 Mad 115 (116). (Actual contract for despatch of goods entered in Native State — First item of performance performed in British territory — British Court has jurisdiction.)]

7. ('41) 28 AIR 1941 Lah 223 (223) (DB). (Contract to sell goods completed at *B* — Goods to be sent to *A* — Payment also to be made at *B* — Delivery of goods to Railway in *B* held delivery to buyer—Hence Court in *A* had no jurisdiction as no part of cause of action arose there.)
('14) 1 AIR 1914 Mad 311 (311).
('34) 21 AIR 1934 Lah 44 (45).

8. ('22) 9 AIR 1922 Lah 474 (474).
[But see (1863) 1 Mad H C R 200 (202). (Which was however a case before the Contract Act.)]

9. ('05) 7 Bom L R 993 (994) (DB).
('13) 6 Sind L R 181 (182): 19 Ind Cas 433 (433)(DB). (Where no such place is fixed, creditor can institute a suit for recovery of money at the place where he resides.)
† ('38) 25 AIR 1938 Mad 977 (979).

10. † ('87) 11 Bom 649 (653).
('17) 4 AIR 1917 All 365 (365) : 39 All 368. (Evidence whether place of delivery was essential part of contract should be taken.)
(1860) 8 Moo Ind App 291 (307) (PC).
('82) 4 All 423 (426) (DB).
('35) 22 AIR 1935 Bom 283 (285) : 59 Bom 365.
('68) 5 Bom H C R A C 33 (35) (DB).
('12) 13 Ind Cas 943 (944) (DB) (Cal).
† ('03) 7 Cal W N 912 (913, 914) (DB).
('83) 9 Cal 105 (106) (DB).
('74) 22 Suth W R 79 (82) (DB).
('72) 17 Suth W R 345 (345) (DB). (Bond executed at *A* making amount payable to plaintiff in person — Plaintiff residing at time of bond at *A*, though an inhabitant of *P* — *Held*, intention of parties was to make the amount payable at *A*.)

presumptions.[11] But where goods are contracted to be delivered, for instance, in Bengal, the mere fact that the goods were *despatched* from a place in the United Provinces will not give rise to a cause of action at that place, for a suit for damages for non-delivery.[12]

In many cases the place of performance will be determined by the *course of business* to which the contract relates[13] or by the *nature of the act* to be done under the contract. Thus, in a contract of service the salary is payable at the place of work.[14] In a contract of bailment, the remuneration of the bailee is payable where the goods bailed are stored.[15] Where the performance consists of work done on immovable property, the place where it is situated will obviously be the *forum*. Similarly, where an agreement relates to the execution of a document which requires registration at a particular place, that place will be the place where a suit will lie for compelling the registration.[16]

19. Place where money is payable. — The payment of money under a contract is a part of the performance of the contract and will furnish a cause of action.[1] As per the principles set forth in Note 18, the place where money is expressly or impliedly payable will be a *forum* of action.[2] Thus, the place where the money is payable under a promissory note or a bond will be a proper *forum* though the document itself was executed and the executant resides outside the *forum*.[3] Similarly, in the case of

('20) 7 AIR 1920 Lah 412 (413) : 60 Ind Cas 481 (481). (Place of business of defendant held to be place of performance on the facts of the case.)
('13) 18 Ind Cas 496 (496) (Lah). (Indent form providing that all disputes to be settled in a particular place — Civil Court of that place will have jurisdiction.)
† ('38) 25 AIR 1938 Mad 977 (979).
('82) 4 Mad 372 (374) (DB).
(1892) 1 Q B 753 (758), Rein v. Stein.
(1891) 1 Q B 103 (108), Bell v. Antwerp.

11. ('12) 15 Ind Cas 885 (886) (DB) (Cal). (Parties resident of place where money advanced—Absence of agreement to repay at another place—Presumption that money to be repaid where transaction took place.)
('72) 9 Bom H C R 270 (272). (Indorser of *hundi* contracts to pay the amount of the *hundi* to the holder in the place where the *hundi* has been indorsed.)

12. ('22) 9 AIR 1922 All 448 (448).

13. ('82) 4 All 423 (426) (DB). (Place of performance held to be plaintiff's place of business.)

14. ('07) 30 Mad 438 (440) (DB). (Service at *H* — Suit for salary at Madras will not lie.)
(1900) 2 Bom L R 511 (515). (Service at *S* — Suit for salary lies at *S*.)
('34) 21 AIR 1934 All 549 (550). (Doctor treating a patient under agreement made at *K* where the treatment was made. Cause of action arose at *K*.)

15. ('17) 4 AIR 1917 All 121 (122).

16. ('73) 7 Mad H C R 176 (178) (DB).

Note 19

1. ('09) 1 Ind Cas 977 (978) (Lah).
† ('78) 3 Cal L Rep 159 (160) (DB).
('75) 23 Suth W R 63 (63) (DB). (Refusal of payment gives cause of action for suit for payment.)
('33) 20 AIR 1933 Lah 599 (599, 600).

2. ('68) 1 Beng L R (O C) 76 (78) (DB). (Impliedly payable.)
('08) 1908 Pun Re No. 36.
† ('33) 20 AIR 1933 All 147 (148, 149). (Lease of property outside jurisdiction. There is an implied promise to pay at place of lessor's residence.)
('66) 1 Agra 115 (116) (DB).
('87) 11 Bom 257 (267, 268).
('26) 13 AIR 1926 Cal 100 (101). (Thing purchased at *C*—Part of purchase money paid at *D*—Court at *D* has jurisdiction to try suit for return of purchase money on ground of breach of warranty.)
('34) 21 AIR 1934 Lah 803 (803).
('22) 9 AIR 1922 Lah 36 (37).
† ('24) 11 AIR 1924 Mad 789 (790).
('82) 4 Mad 372 (374) (DB). (Impliedly payable.)
('30) 17 AIR 1930 Nag 90 (91). (Expressly payable.)
† ('25) 12 AIR 1925 Nag 408 (408). (Contract to supply goods— Breach — Suit for damages at place where price was payable is maintainable.)
('24) 11 AIR 1924 Nag 308 (309) (DB).
('16) 3 AIR 1916 Low Bur 67 (68). (Money payable in England — King's Bench Court has jurisdiction.)
('10) 6 Ind Cas 111 (112) (Sind). (Contract made in *P* and defendant residing in *P* — No evidence that money is payable at *K* — Court at *K* has no jurisdiction.)

3. ('68) 3 Agra 242 (244) (FB).
('96) 19 Mad 477 (478) (DB).
('35) 22 AIR 1935 Bom 283 (283) : 59 Bom 365.
('80) 5 Cal 82 (86). (Suit for recovery of money lent.)
('15) 2 AIR 1915 Lah 481 (482) : 1916 Pun Re No. 2 (DB).
('21) 11 AIR 1924 Mad 461 (465) : 47 Mad 403 (DB). (Hundi drawn by Calcutta firm on Madras firm agreed to be payable in Madras — Payment cannot be considered to be made when hundi is negotiated—Madras Court has jurisdiction.)
[*See* (1863) 1 Mad H C R 436 (439) (Neither note executed nor money payable within jurisdiction — High Court cannot entertain suit.)]
[*See also* ('31) 21 AIR 1934 Cal 175 (176).

goods sold and delivered, a suit for the price thereof will lie where the same is to be paid,[4] even though both the sale and the delivery should have been made in another place.[5] An action to recover money due on a life insurance policy can be instituted in the place where the death of assured takes place, as the death furnishes the cause of action for the payment.[6] Similarly, in a contract of insurance against burglary, the burglary is a part of the cause of action entitling the plaintiff to sue, and a claim for the insurance amount can be made at the place where the burglary was committed.[7]

From what has been stated in Note 18, it follows that where the place of payment is not indicated in the contract, it is to be ascertained with reference to the intention of the parties and the circumstances of the case.[8] Thus, where a *hatchitta* was executed and the parties were also resident at a particular place, the money, is presumably repayable there.[9]

The rule that debtor must find the creditor. — Under the Common Law in England, the general rule, in the absence of a contract to the contrary, is that a debtor is bound to find the creditor for making the payment, i. e., the place of payment is the place where the creditor resides.[10] The same rule has been held to apply in India also.[11] In *Raman Chettiar* v. *Gopalachari*,[12] which was a case under the old Code, the Madras High Court held that the said Common Law rule did not control the express provisions in Explanation III to the section, and that the place of payment, in order to give

('33) 20 AIR 1933 Lah 940 (941). (Promissory note payable in district *M* assigned in district *N* —Court at *N* has jurisdiction to try suit.)]
Also see Note 23.

4. ('42) 29 AIR 1942 Lah 252 (252) (DB).
('03) 7 Cal W N 912 (914) (DB).
('29) 16 AIR 1929 Oudh 91 (92): 4 Luck 347 (DB).
† ('35) 22 AIR 1935 Mad 663 (664) (FB).
('20) 7 AIR 1920 Mad 146 (148) (DB).

5. ('82) 4 All 423 (426) (DB). (Payment by draft— Place in which draft drawn presumably is the place of payment.)

6. ('43) 30 AIR 1943 Cal 199 (201, 202) (DB).
† ('18) 5 AIR 1918 Mad 635 (635) (DB).
† ('32) 19 AIR 1932 Bom 392 (393).
('19) 6 AIR 1919 Cal 1014 (1015) (DB).
('18) 5 AIR 1918 Lah 320 (320) : 1918 Pun Re No. 98.
✠('34) 21 AIR 1934 Sind 76 (76) : 28 Sind L R 192.

7. † ('37) 24 AIR 1937 All 208 (211, 212) : I L R (1937) All 234 (DB).

8. ('19) 6 AIR 1919 Nag 135 (136). (Where intention cannot be so ascertained, recourse may be had to presumptions.)
('30) 17 AIR 1930 Lah 818 (820). (Best evidence of intention of the parties is what they actually did.)
('30) 17 AIR 1930 Rang 216 (218) (DB). (Suit for recovery of balance of advances by a commission agent.)

9. ('12) 15 Ind Cas 885 (885) (Cal). (Contract concluded and completed at *A*—Subsequent promise without consideration to pay at *B*—Court at *B* has no jurisdiction.)
[*See also* ('18) 5 AIR 1918 Low Bur 101 (102) : 9 Low Bur Rul 75.]

10. † ('08) 11 Oudh Cas 191 (193).
('09) 1909 Pun Re No. 75.
('13) 20 Ind Cas 683 (683) (Low Bur).
('09) 3 Sind L R 81 (84) : 3 Ind Cas 892 (893).

11. ('35) 39 Cal W N 174 (184, 185) (DB). (Earnest money paid for completion of contract of sale — Contract not proved — Suit for money as on an implied contract — Rule applies — Obiter — Per Costello, J.)
('33) 20 AIR 1933 Sind 62 (64) (DB).
✠('27) 14 AIR 1927 P C 156 (158): 5 Rang 451 :54 Ind App 265 (PC). (Distinguishing 7 Bom L R 993 and approving 11 Bom 649 and 30 Bom 167.)
('26) 13 AIR 1926 All 477 (478) : 48 All 310.
('17) 4 AIR 1917 All 128 (129) (DB). (Banker and depositor.)
('33) 20 AIR 1933 Bom 179 (181, 182) : 57 Bom 306. (Deposit for due performance of contract—On cancellation of contract it becomes a debt due and this rule will apply.)
† ('06) 30 Bom 167 (171, 172).
✠('36) 23 AIR 1936 Cal 97 (99) : 63 Cal 726. (Suit by Mahomedan wife for prompt dowar — Court within whose jurisdiction she resides has juriediction to entertain suit.)
('74) 13 Beng L R 461 (467) (DB).
('31) 131 Ind Cas 303 (304) (Lah).
('35) 22 AIR 1935 Mad 983 (987).
('37) 24 AIR 1937 Nag 39 (40) : I L R (1937) Nag 97. (Agreement to pay maintenance — Absence of recital as to place of payment — Suit lies at promisee's place of residence.)
('30) 17 AIR 1930 Nag 207 (208): 26 Nag L R 300.
('25) 12 AIR 1925 Oudh 209 (210).
('37) 24 AIR 1937 Rang 433 (434) (DB). (Suit not based on promissory note but on loan in regard to which it is incidentally mentioned that a pro-note was executed as collateral security — Rule that debtor must find the creditor applies.)
('36) 23 AIR 1936 Rang 251 (252).
[*See also* ('74) 14 Beng L R 367 (369).]

12. ('08) 31 Mad 223 (226, 227).

jurisdiction, must be where the money is payable expressly or impliedly *under the contract itself* and not under any *general rule of law*. In view of the omission of the explanation in the present section and in view of the decisions of the Privy Council and of other High Courts to the contrary,[13] the view expressed by the Madras High Court cannot be treated as correct law. But in order that the Common Law rule should apply, whether in England or in India, it is necessary that the creditor should be within the *realm*.[14] A debtor in a Native State, for instance, is not bound to seek and pay his creditor who is a resident of British India.[15] Secondly, the parties should be related as debtor and creditor.[16] The rule does not apply to cases where the liability of the defendant is based on an obligation arising under the general law and not on contract, as for instance, the obligation of a Hindu husband to pay maintenance to a wife who is compelled to live separately from him.[17] Thirdly, the Common Law rule will not apply if there is a contract to the contrary. Such a contract may be express or implied. The implication may arise from the circumstances of the case.[18] As to the applicability of the Common Law rule to cases of negotiable instruments, see Note 23.

20. Suit for accounts against agent. — In accordance with the general principles mentioned in Notes 18 and 19, a suit for accounts against an agent can be filed where the contract of agency was made or where the accounts are to be rendered and payment made by the agent.[1] Where the contract does not specifically provide for the place where the accounts are to be rendered, it is to be ascertained by reference to the intention of the parties as gathered from the circumstances of the case.[2] A payment will be taken as intended to be made where the accounts are settled and the balance struck.[3] Where the intention is not clear, the rule that the debtor must seek the creditor will apply

13. See cases in foot-note (11).

14. ('25) 12 AIR 1925 P C 290 (292) : 53 Cal 88 : 53 Ind App 58 (PC).

15. ('25) 12 AIR 1925 P C 290 (292) : 53 Cal 88 : 53 Ind App 58 (PC).

16. ('40) 27 AIR 1940 Mad 588 (588). (*Held*, in the case that relationship of principal and agent who is liable to render account is not that of creditor and debtor — Submitted with respect that it is doubtful if this view is correct. See Note 20.)

17. ('41) 28 AIR 1941 Mad 695 (696) (DB).

18. ('41) 28 AIR 1941 Mad 695 (696, 697)(DB). (AIR 1927 P C 156 : 5 Rang 451 : 54 Ind App 265 (PC) cannot be read as deciding that the rule can always be applied in India where there is no express stipulation with regard to the place of payment or no appointment of a place under S. 49, Contract Act.)

('40) 27 AIR 1940 Mad 588 (588). (NOTE.—In this case it is held that there is an implied contract in an agency that the agent is to render accounts at *his* place. But as will be seen in Note 20 there is a conflict of decisions on the point. There is an observation in the case that it cannot be laid down as an absolute rule that the English rule that the debtor must find the creditor applies even to questions of jurisdiction. This is only obiter because in the circumstances of the case it is held that there is an implied contract to the contrary.)

Note 20

1. ('40) 27 AIR 1940 Lah 85 (86, 87). (Suit for money by Insurance Company against its agent.)

('25) 12 A I R 1925 Lah 387 (389) : 6 Lah 153 (DB).

('20) 7 AIR 1920 Low Bur 48 (48). (Cause of action arises where refusal to account takes place.)

† ('32) 19 AIR 1932 Bom 42 (44, 45).

('30) 17 AIR 1930 Bom 150 (151) : 54 Bom 192 (DB). (Each separate payment or collection is not the cause of action.)

('15) 2 AIR 1915 Mad 1001 (1002) (FB). (Accounts to be rendered in Madras—Madras Hight Court has jurisdiction.)

('38) 25 AIR 1938 Nag 186 (187) : ILR (1939) Nag 648. (Commission agent can be sued at the place from where the order was made if the contract was made at the place.)

† ('32) 19 AIR 1932 Bom 291 (299) : 56 Bom 324 (DB).

('36) 23 AIR 1936 Rang 251 (252).

('26) 13 AIR 1926 Sind 238 (241). (Cause of action arises where refusal to account takes place.)

[*See also* ('17) 4 AIR 1917 All 152 (153). (Where neither the contract is made nor the accounts to be rendered at a particular place, the Court of that place has no jurisdiction.)

('32) 31 Bom L R 1110 (1115).

('26) 13 AIR 1926 Lah 287 (288). (Suit by commission agent against principal is maintainable in a Court within whose jurisdiction commission business is carried on.)]

2. ('71) 7 Beng L R App 35 (36, 37) (DB).

('22) 9 AIR 1922 Lah 36 (37) (DB).

[*See also* ('29) 16 AIR 1929 Lah 605 (607). (Suit by agent against principal for deposit given for due performance of duties.)]

3. ('71) 1874 Pun Re No. 22.

in a suit by a principal against an ordinary agent, for accounts.[4] But the rule has been held to be inapplicable in the case of *pukka adatia* and commission agents.[5] In such cases, in the absence of a specific provision to the contrary, the place of business of the *agent* is the place where the money is payable.[6] The reason is that such agents are very different from ordinary agents in that they are not mere servants of the principal, but are independent factors entrusted with the goods of the principal with wide powers. And though liable to account to the principal, the accounting must necessarily be done at the place where the commission business is transacted.[7] A suit *by* an agent for the recovery of the amount due to him in respect of the business done by him as agent may be brought in the place where he carried on such business. The presumption in such cases is that a part of the cause of action arises in the place where the agent carries on his business as he is required to do a part of the work of agency in that place.[8]

21. Suit for accounts in partnership cases. — The place of performance in the case of a contract of partnership is the place where the *business of the partnership* is carried on.[1] Where the business is carried on in more places than one, a suit may be filed in any one of such places.[2] A contract of partnership was entered into by P firm with D firm, both of whom had their head offices at Calcutta. The P firm had a branch in the District of Muzaffarpur; the contract was that jute was to be purchased by the P firm at *k* in the Muzaffarpur District and was to be sent to Calcutta to the D firm for sale. Accounts of the partnership, that is accounts of sale and of profit and loss of the business, were kept at Calcutta. It was held that the purchase of jute for the purposes of business could not necessarily be the carrying on of the business of the partnership, and that the Court at *k* had therefore no jurisdiction to try a suit for the dissolution of the partnership.[3]

22. Suits between banker and customer. — Where a deposit is made in a Bank the place of repayment is to be determined from the terms of the receipt which ordinarily contains the terms of the contract. However, in the absence of such terms relating to the question there is no general presumption of law that the deposit amount is repayable in a place where the depositor resides and makes a demand. In such a case

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4. ('24) 11 AIR 1924 All 530 (531) : 46 All 465 (DB).
[See however ('40) 27 AIR 1940 Mad 588 (588). (The principle that debtor is bound to seek out his creditor and pay his debt is not applicable in India for the purpose of determining the local jurisdiction of particular Courts. Even assuming that the English rule either in terms or by analogy could be applied in India the rule cannot be extended to the case where the contract itself is not one of loan but of agency.)]

5. † ('24) 11 AIR 1924 All 530 (531) : 46 All 465 (DB).
('24) 11 AIR 1924 Lah 593 (593). (The place of the agent is the place where money is payable.)
[But see ('06) 30 Bom 167 (172, 173).]

6. See cases in foot-note (5).
[*See also* ('40) 27 AIR 1940 Lah 171 (172). (Suit for accounts against commission agent.)]
('32) 19 AIR 1932 Bom 42 (45).
('28) 15 AIR 1928 Bom 548 (549, 550). (Mere sending of goods does not constitute part of the cause of action.)
('35) 22 AIR 1935 Lah 68 (69). (AIR 1928 Lah 297 : 9 Lah 155, foll.)
('28) 15 AIR 1928 Lah 297 (298) : 9 Lah 455.
('02) 1902 Pun Re No. 79.
('96) 1896 Pun Re No. 76.
('84) 7 Mad 171 (173, 174).]

7. ('40) 27 AIR 1940 Lah 171 (172).
† ('24) 11 AIR 1924 All 530 (531) : 46 All 465 (DB).
('32) 19 AIR 1932 Bom 42 (45).
('39) 26 AIR 1939 Pat 140 (140).

8. ('37) 24 AIR 1937 Sind 317 (318) (DB).

Note 21

1. † (1860) 8 Moo Ind App 291 (307) (PC).
('97) 1897 Pun Re No. 62.
('29) 16 AIR 1929 All 236 (236). (Suit lies also at place where agreement of partnership was made.)
('19) 6 AIR 1919 All 402 (403) (DB).
('31) 18 AIR 1931 Lah 673 (674). (Suit lies also at place where agreement of partnership was made.)
('16) 3 AIR 1916 Lah 260 (261) : 1916 Pun Re No. 42 (DB). (Not where the capital is subscribed.)
† ('14) 1 AIR 1914 Oudh 314 (315).

2. ('26) 13 AIR 1926 Mad 427 (427) (DB). (Suit for dissolution of partnership.)

3. ('36) 23 AIR 1936 Pat 6 (7) (DB).

the money becomes repayable at the place where the Bank does its business.[1] In the case of a trader who holds himself out as a person receiving deposits the ordinary rule that the debtor must seek his creditor applies.[2]

23. Suits on negotiable instruments. — A suit may be filed where a promissory note is *made* or bill of exchange is *drawn*.[1] It may also be filed where the instrument is *delivered* to the promisee[2] or where it is *payable*,[3] though it is executed in a different district.[4] A promissory note, which on its face purports to have been made at a particular place, will be presumed to have been made there.[5] Where a promissory note payable on demand was executed by the defendant and handed over by him to the plaintiff at *b*, but the note described the plaintiff as a resident of *m*, it was held that the Court at *m* had no jurisdiction to entertain a suit on the note, but only the Court at *b*.[6]

Where a negotiable instrument is drawn at one place and *accepted* at another, part of the cause of action will arise at the *place of acceptance*.[7] The liability of the acceptor does not attach, however, by merely writing his name upon the bill. It attaches only when the instrument so signed is delivered, or the fact of acceptance is communicated to the person entitled to the bill.[8]

The *indorsement* of a negotiable instrument or the *assignment* of a promissory note will also give rise to a cause of action at the place of indorsement or assignment[9] though the *mere negotiation* of an instrument does not constitute a *payment* of the instrument.[10]

Note 22

1. ('40) 27 AIR 1940 All 243 (245) : ILR (1940) All. 207 (DB). (AIR 1917 All 128 explained.)
2. ('17) 4 AIR 1917 All 128 (129).

Note 23

1. ('16) 3 AIR 1916 Oudh 105 (106).
('08) 31 Mad 223 (227) (DB). (Payee's place of residence not to be presumed to be the place of payment.)
(1900) 1900 Pun Re No. 57 (DB).
[*See also* ('91) 15 Bom 93 (100, 101). (A case under Letters Patent.)
2. ('42) 29 AIR 1942 Bom 251 (253) : ILR (1942) Bom 620 (DB). (Per Wadia, J.)
3. ('39) 26 AIR 1939 Lah 498(498). (Amount on pro-note to be paid in Delhi — Defendant residing in U. P. and governed by U. P. Agriculturists' Relief Act — Suit on pro-note can be brought in Delhi though it contravenes the provisions of S. 7 of the latter Act.)
('20) 7 AIR 1920 Pat 157 (159) : 5 Pat L Jour 536 (DB).
('68) 1 Beng L R (O C) 35 (37). (Instrument made and delivered at *C* and also made payable there.)
('16) 3 AIR 1916 Bom 227 (228) : 40 Bom 473. (Hundi drawn and payable outside Bombay—Bombay High Court has no jurisdiction.)
('29) 16 AIR 1929 Cal 306 (307) (DB). (New place of payment of assignee—Suit does not lie there.)
('66) 1 Ind Jur (N S) 233.
('94) 1894 Pun Re No. 21.
[*See also* ('72) 3 N W P H C R 343 (344). (Hundi drawn at *S* and payable at *F* — Suit cannot be filed at the abode of the endorsee.)
('67) 2 Agra 123 (123). (Hundi drawn at Banda and payable at Benares cannot be sued on at Agra where the bill was sold.)]
4. † ('83) 9 Cal 105 (109) (DB).
('01) 24 Mad 259 (261) (DB).
('15) 2 AIR 1915 Lah 481 (482) : 1916 Pun Re No. 2 (DB). (A different place of payment may be indicated by circumstances.)
('94) 1894 Pun Re No. 21. (Drawn at Jamna and payable at Sialkot.)
('83) 1883 Pun Re No. 71. (Hundi drawn at Multan and payable at Amritsar.)
('20) 7 AIR 1920 Pat 157 (159) : 5 Pat L Jour 536 (DB).
Also see Note 19.
5. ('05) 28 Mad 19 (22) (DB).
(1862) 1 Mad H C R 202 (203).
[*See also* (1863) 1 Mad H C R 436 (440).]
6. ('37) 24 AIR 1937 Nag 241 (242) : I L R (1938) Nag 301.
[*See also* ('42) 29 AIR 1942 Bom 251 (253, 255): 1 L R (1942) Bom 620 (DB). (Pro-note executed in *A*—No place of payment mentioned—Mere description of promisee as resident of *B* is not enough to show that it is payable in *B*.)]
7. † ('20) 7 AIR 1920 Cal 718 (720) : 47 Cal 583 (SB).
('79) 5 Cal L Rep 268 (276, 277).
('03) 1903 Pun Re No. 10.
8. (1865) 34 L J Ex 186 (187), Chapman v. Cottrel.
(1822) 5 B & Ald 471 (478, 479), Cox v. Troy.
9. ('28) 15 AIR 1928 Sind 86 (87) : 22 Sind L R 305.
('33) 20 AIR 1933 Lah 940 (941).
('72) 9 Bom H C R 270 (272).
† ('95) 22 Cal 451 (453).
† ('17) 4 AIR 1917 Mad 221 (222) (DB).
('11) 11 Ind Cas 851 (853) (Low Bur).
10. ('24) 11 AIR 1924 Mad 464 (465) : 47 Mad 403 (DB).

The *dishonour* of a negotiable instrument will also furnish a cause of action and a suit may be brought at the place where it was dishonoured.[11] Even a *notice of dishonour* will be a part of the cause of action and the Court of the place wherefrom it is given will have jurisdiction.[12]

There is a difference of opinion on the question whether the Common Law rule that the debtor must find the creditor is applicable to the case of negotiable instruments. According to the undermentioned case[13] of the Nagpur High Court, it does not apply, the reason being that S. 81 of the Negotiable Instruments Act, 1881, requires the holder of the instrument to *call upon* the person liable to pay. In another case, also of the same Court,[14] the rule was held not to apply but the view was based on the provision in S. 70 of the Negotiable Instruments Act, 1881, that the holder must present it for payment at the place of business or residence of the maker, drawee or acceptor thereof, as the case may be. The High Court of Bombay has also taken a similar view.[15] On the other hand, it has been held by the High Court of Lahore that in the case of a *promissory note* no presentment is necessary when the suit is against the *maker* of the note and that, consequently, in such a case, the Common Law rule will apply.[16] The Common Law rule has also been applied by the Calcutta High Court to the case of a promissory note on demand.[17]

23a. Suits on assigned debts.—A *bona fide* voluntary assignment of a debt affords a valid cause of action to the assignee to sue his assignor and the original debtor in the Court within whose jurisdiction the assignment is made.[1] See also Note 23.

24. Suit on torts. — Section 19, as has already been seen, provides that a suit for compensation for wrong done to the person or to moveable property may be instituted either where the defendant resides or carries on business or personally works for gain or where the wrong was done. Where there are several tort-feasors and some of them only reside within jurisdiction, a suit will be maintainable against them at the place where they reside.[1]

The *commission* of a tortious act will be a part of the cause of action and the Court within the local limits of whose jurisdiction it is committed, is competent to try the suit.[2]

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11. ('76) 1 Bom 23 (35) (DB).
('75) 12 Bom H C R 113 (127).
('83) 1883 Pun Re No. 132.
[*See also* ('38) 25 AIR 1938 Nag 262 (264, 265) : I L R (1940) Nag 502. (*X* at Nagpur drawing hundis on Bombay firm in favour of *Y* of Nagpur —After successive negotiations *Z* of Raipur becoming holder of them—Hundis dishonoured—Suit by *Z* against *Y* and other indorsers not maintainable at Raipur.)]

12. ('75) 1 Bom 23 (43) (DB).
('86) 11 Bom 257 (267).

13. ('38) 25 AIR 1938 Nag 262 (264) : I L R (1940) Nag 502.

14. ('35) 22 AIR 1935 Nag 144 (144).

15. ('42) 29 AIR 1942 Bom 251 (256): ILR (1942) Bom 620 (DB). (A promissory note made at a particular place and containing no stipulation as to the place of payment, cannot be regarded as being payable at any place other than the place where it is made. The Common Law rule that the debtor must seek out his creditor has no application to a negotiable instrument, and hence a suit on such a promissory note has to be instituted only at the place where the note is made.)

16. ('39) 26 AIR 1939 Lah 18 (19).

17. ('40) 27 AIR 1940 Cal 443 (445) : ILR (1940) 1 Cal 323.

Note 23a

1. ('33) 20 AIR 1933 Sind 179 (182): 27 Sind L R 230 (DB).

Note 24

1. ('28) 15 AIR 1928 Cal 887 (889) (DB). (Suit for damages for conversion of land.)

2. ('05) 3 Low Bur Rul 164 (165).
('05) 29 Bom 368 (372). (Malicious prosecution—Place where extradition proceedings are taken will give jurisdiction.)
('70) 2 N W P H C R 13 (16) (DB). (Misrepresentation—Suit for damages can be filed where misrepresentation takes place.)
('88) 13 Bom 178 (181). (Libel—Place of publication will give jurisdiction.)

The *damage* resulting from the tort will also, it is submitted, furnish a cause of action.[3] This is in accord with sound principle. In a suit in respect of a tort the plaintiff has to prove both a *tortious act and a consequent injury or damage*. The damage or injury is, therefore, a material fact which it is necessary for the plaintiff to prove in order to entitle him to succeed in the suit. Thus, where the defendant instituted criminal proceedings at *d* against the plaintiff, who was residing at *c* and the plaintiff suffered damages at *c*, the cause of action for a suit for damages for malicious prosecution arises in part at *c*.[4]

25. Suit for custody of minor. — Where the defendant removes a minor from the custody of his guardian from *a* to *l*, the Courts at both the places have jurisdiction to entertain a suit for the custody of the minor.[1]

26. Suits for restitution of conjugal rights. — The cause of action, in a suit for restitution of conjugal rights, is the breach of the marital obligations on the part of either party.[1] In a suit by a husband against his wife for restitution of conjugal rights, the wife's absenting herself from her husband's residence without his consent will furnish a cause of action, and the suit can therefore be brought in the Court within whose jurisdiction the husband resides.[2] Of course the suit can also be brought at the place where the wife resides at the time of the suit.[3] The reason is that a suit can be brought either where the cause of action arises or where the defendant actually and voluntarily resides.

A suit by the plaintiff against his wife's father for an injunction restraining him from preventing his daughter returning to the plaintiff is not a suit for the restitution of conjugal rights and cannot be filed at the place of the husband's residence, when the father lives beyond the jurisdiction of the Court.[4]

In cases governed by the Divorce Act of 1869 the procedure for obtaining restitution of conjugal rights is by petition to the High Court or the District Court for the local area within which the parties reside or last resided together. At the time of presenting the petition, the petitioner must be resident in British India. (See sections 2, 3 and 32 of the Divorce Act.)

27. Suits for divorce. — What determines jurisdiction under the Divorce Act for a petition for dissolution of a marriage or for declaring a marriage to be null and void is not the cause of action but the *residence* of the parties. The Act provides that

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('71) 6 Beng L R 141 (143, 144). (Malicious prosecution—Cause of action arises where plaintiff is arrested.)

('74) 1874 Pun Re No. 33. (Libel—Publication gives jurisdiction.)

('10) 5 Ind Cas 513 (513) (DB) (Mad). (Wrongful ex-communication — Cause of action arises where order of ex-communication is handed over to the community.)

('30) 17 AIR 1930 Pat 528 (529). (Railway collision—Cause of action is where it took place.)

[*See* ('32) 19 AIR 1932 Bom 42 (44). (Negligence by Agent.)

('78) 2 Bom 19 (21, 53).

('82) 8 Cal 483 (491). (The term 'cause of action' applies to torts as well as contracts.)]

3. [*See* ('74) 13 Beng L R 91 (99). (Effect of certain fraudulent misrepresentations made at Calcutta took place in Bombay—*Held* that suit should be filed at Bombay and not in Calcutta. NOTE.—This case can be explained on the principle stated above.)]

4. ('33) 20 AIR 1933 Cal 706 (708) : 60 Cal 918.

Note 25

1. ('90) 12 All 213 (217) (DB).

Note 26

1. (1884) L R 9 P D 52 (55), Weldon v. Weldon.

2. † ('94) 18 Bom 316 (318) (DB).

('19) 6 AIR 1919 All 96 (96).

('36) 23 AIR 1936 Mad 288 (289) : 59 Mad 392 (DB). (The fact that the wife has not previously lived with her husband within the jurisdiction, or the fact that the marriage was not consummated will make no difference — Letters Patent appeal reversing AIR 1934 Mad 407.)

3. ('11) 1 AIR 1914 Bom 211 (214) : 38 Bom 125: 20 Ind Cas 492 (495) (DB).

4. ('36) 23 AIR 1936 Mad 288 (290): 59 Mad 392.

such a petition is to be presented to the High Court or the District Court for the local area within which the husband and wife reside or *last* resided together. Though thus, residence within jurisdiction is not necessary *at the time of the petition*, it is necessary, in the case of a petition for dissolution of marriage, that the parties must be *domiciled* in India at the time of the petition and in the case of a petition for declaration of nullity of marriage, the marriage must have been solemnised in India and the petitioner must be resident in India at the time of presenting the petition. Thus, in a petition for *dissolution* of marriage, it is not necessary to prove the *place of marriage* or that it took place in India. It is enough if the parties are domiciled in India.[1] (See Ss. 2, 3, 10 and 19 of the Divorce Act.)

A suit for the recovery of dower debt on the divorce of the wife by the husband may be brought at the place where the divorce takes place.[2]

28. Administration suits. — In a suit to administer an estate, the grant of probate and the undertaking to administer will furnish parts of the cause of action.[1] It may be noted that a Court can grant letters of administration only if the deceased, at the time of his death, had any property or had a fixed place of abode, within its jurisdiction.[2]

29. Suit to set aside decrees on the ground of fraud. — A suit to set aside a decree on the ground of fraud can be brought where the defendant actually and voluntarily resides or where the cause of action, wholly or in part arises.[1] The cause of action in such cases is the commission of the fraud and the obtaining of the fraudulent decree.[2] The mere *discovery* of the fraud is not a part of the cause of action.[3]

Where a part of the fraud is committed within the jurisdiction of a Court, that Court will have jurisdiction to entertain the suit.[4] Thus, where A obtains a fraudulent decree against B at *x* and *executes or applies for execution* of the decree at *y*, part of the cause of action arises at *y*.[5] But a mere transfer for execution to another Court

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Note 27

1. (96) 20 Bom 362 (365) (FB). (Decree for dissolution may be passed though *place* of marriage not proved where the adultery is shown to have been committed in India.)
2. ('05) 32 Cal 146 (150) (DB).

Note 28

1. † ('06) 29 Mad 239 (277) (DB).
('26) 13 AIR 1926 Lah 456 (456, 457). (The fact that part of the property to be administered is within another district will not give the other Court jurisdiction.)
2. See Section 270 of the Indian Succession Act (XXXIX of 1925).
('96) 20 Bom 607 (609) (DB).
('93) 17 Bom 689 (690) (DB).

Note 29

1. † ('17) 1 AIR 1917 Pat 598 (599). (Defendant's residence.)
('10) 5 Ind Cas 648 (649) (DB) (Cal).
2. ('40) 27 AIR 1940 Pat 444, (446)(DB). (*A*, residing and doing business at Saran, having transactions with *B*, residing and doing business at Bombay — *A* mortgaging certain property in Saran for money due to *B* — *B* bringing mortgage suit in Bombay and obtaining decree—*A* suing in Court at Saran for declaration that decree of Bombay Court is nullity and fraudulent — Court of Saran held had no juri-diction to try case.)
('14) 1 AIR 1914 All 93 (94) : 36 All 564. (No residence nor fraud within jurisdiction — Suit not entertainable.)
[*See* ('43) 30 AIR 1943 Cal 172 (176, 177) : ILR (1942) 1 Cal 562. (It is doubtful whether a suit to set aside a decree lies at all in the absence of an allegation of fraud.)]
3. ('40) 27 AIR 1940 Pat 444 (445, 446) (DB). (Where and how fraud was committed should be definitely alleged so as to constitute cause of action.)
('23) 10 AIR 1923 Mad 272 (272) (DB).
4. ('03) 30 Cal 369 (381, 382) (DB).
('20) 7 AIR 1920 Lah 290 (291). (Serving officer wrongly reporting that plaintiff was evading summons.)
5. † ('02) 25 All 48 (53) (DB).
('15) 2 AIR 1915 Mad 915 (916) (DB).
('17) 4 AIR 1917 All 176 (177) : 39 All 607 (DB). (Place where plaintiff was arrested in execution of fraudulent decree.)
('15) 2 AIR 1915 All 163 (164, 165) : 37 All 189 (DB).
('33) 20 AIR 1933 Cal 274 (277, 278) : 60 Cal 98.
('23) 10 AIR 1923 Cal 425(425, 426)(DB). (Applied for execution.)
('01) 5 Cal W N 559 (561) (DB). (Sale at *Y* in execution of decree—*Y* Court has jurisdiction.)
('27) 14 AIR 1927 Lah 778 (779) (DB).

without anything more being done will not enable the latter Court to entertain the suit to set aside the decree,[6] though a suit for an *injunction* restraining the defendant from executing the decree is maintainable in that Court.[7]

30. Suit to set aside documents on the ground of fraud. — A suit to set aside a document on the ground that it was obtained by fraud will lie where the fraud was committed. Thus, the cause of action for a suit to set aside a will on the ground that it is a forgery arises at the place where the alleged will is published.[1] It will also arise where the fraudulent document *takes effect* against the plaintiff's interest. Thus, in a suit to set aside, on the ground of fraud, a release deed executed in Calcutta, in respect of the plaintiff's interest in certain property in Bombay, it was held that since the release took effect and operated on the property in Bombay, part of the cause of action arose there.[2] This view has been followed by the High Court of Madras in the undermentioned case.[3]

30a. Suit for infringement of copyright, trade mark, etc. — Such a suit can be brought at the place where the infringement takes place.[1] Where the suit is for infringement of copyright by hiring out a certain film for exhibition, the Court at the place where the hiring is made will have jurisdiction to entertain the suit. The hiring will not be complete till the film reaches the hands of the exhibitor. So where the film is sent from *m* to *r* for exhibition at *r* the hiring is to be held as taking place at *r* and the Court at *r* will have jurisdiction to entertain the suit.[2]

31. Suits against corporations — Explanation II. — The residence and domicile of a trading company is its principal place of business, i. e., the place where the *administrative* business of the company is conducted, which may not be the place where its manufacturing or other business operations are carried on.[1] A foreign company which gets itself registered in British India and carries on business there must be deemed to have its principal office in British India.[2]

('26) 13 AIR 1926 Lah 277 (278) : 7 Lah 61 (DB). (Threat of attachment and sale — Suit lies where property is situate.)
('24) 11 AIR 1924 Lah 398 (399). (Application for rateable distribution based upon fraudulent decree.)
('28) 15 AIR 1928 Oudh 88 (88) : 3 Luck 142(DB).
('24) 11 AIR 1924 Pat 831 (832) (DB). (If application to execute the decree had been put in, that would constitute a cause of action.)
('17) 4 AIR 1917 Pat 598 (599). (Property sold in execution — Suit to recover lies where property is situate.)
[*See* ('42) 29 AIR 1942 Cal 69 (72) : I L R (1942) 1 Cal 235 (DB). (Assumed.)]
[*See also* ('43) 30 AIR 1943 Cal 172 (175) : ILR (1942) 1 Cal 562. (There is no difference in principle between the issue of an application for execution upon a decree and utilising another method by which it is sought to enforce it—In this case on the basis of a decree obtained in Lahore a petition for winding up of the company was filed in Calcutta — Suit to set aside decree in Calcutta held maintainable.)]

6. ('07) 29 All 418 (422) (DB).
('29) 16 AIR 1929 Lah 449 (453).

7. † ('24) 11 AIR 1924 Nag 413 (415).
[*See also* ('18) 5 AIR 1918 Mad 711 (712) : 41 Mad 213. (Declaratory suit — Inferior Court has jurisdiction to set aside decree of superior Court obtained by fraud, provided it is otherwise competent to try the suit.)]

Note 30

1. ('83) 5 All 589 (590): 1883 All W N 128 (128) (DB).
2. ('74) 13 Beng L R 91 (98, 99) (DB).
3. ('23) 10 AIR 1923 Mad 109 (111) (DB). (Cause of action arises where forged will takes effect.)

Note 30a

1. ('42) 29 AIR 1942 Mad 659 (660). (Suit for infringement of copyright against hirer of cinema film — Part of cause of action arises where hiring is completed.)
('15) 2 A IR 1915 All 262 (262) : 37 All 446 (DB). (Infringement of trade mark by means of advertisement — Cause of action arises where the advertisement is published or distributed.)
('10) 33 All 24 (26) : 7 Ind Cas 101 (102) (DB).
2. ('42) 29 AIR 1942 Mad 659 (659).

Note 31

1. ✠('04) 27 Mad 315 (321) (DB). (Citing Adams v. G. & W. Ry. Co., 6 H & N 404; Shiels v. G. N. Ry. Co., 7 Jur (N S) 631; Minor v. L. & N. W. Ry., 1 C B (N S) 325, Corbet v. General Steam Navigation Co., 4 H & N 482; Keynsham Blue v. Baker, (1863) 2 H & C 729; Taylor v. Crowland Gas Co., 11 Ex 1.)
('28) 15 AIR 1928 Sind 111 (113) (DB).
2. ('37) 24 AIR 1937 All 208 (217) : I L R (1937) All 234 (DB).

Where, however, a cause of action arises at any place where the company has a[4] *subordinate* office, that place will (according to Explanation II) be deemed, in respect of such cause of action, to be the place where the company carries on business, irrespective of the location of its head office,[3] or of the nature of work that is actually carried on in the subordinate office.[4]

The Government of India is not a corporation within the meaning of the explanation and the Secretary of State for India in Council cannot be deemed to be carrying on business anywhere in British India.[5]

32. Suits against foreigners. — The general rule of private international law with regard to jurisdiction over foreigners is *extra territorium jus dicenti non paretur legis extra territorium non obligant* — an authority who legislates or administers justice beyond his own realm may be safely disobeyed beyond his jurisdiction.[1] And the presumption is that the Legislature does not intend to exceed its jurisdiction. But it is only where the words of the enactment leave room for doubt whether a Court has such jurisdiction, that the rule of international law would be considered.[2]

Another general rule to be remembered is that all legislation is territorial and is consequently applicable only to such foreigners as come into the country or have made themselves subject to the jurisdiction of the Courts of that country.[3]

The Code does not exempt foreigners from the jurisdiction of British Indian Courts[4] and the ground on which a Court may exercise jurisdiction over a foreigner are, as the section says, residence, carrying on business, personal work for gain or the arising of the cause of action within jurisdiction.

As regards *residence*, it has been held that even a *temporary* residence is sufficient to give jurisdiction.[5]

As regards the carrying on of business by a foreigner within jurisdiction, it was held by the Bombay High Court in the undermentioned case[6] that the foreigner must *personally* carry on business within jurisdiction. That case has, however, been disapproved by the same High Court in a later case[7] and also by the Madras High Court.[8] These cases have held that a foreigner carrying on business *through an agent* within jurisdiction will become amenable to the jurisdiction of the Court.[9]

Where the cause of action against a non-resident foreigner arises within jurisdiction, that, in itself, is a sufficient ground of jurisdiction.[10] The same principle is found in Clause 12 of the Letters Patent which extends to absent foreigners also.

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3. ('18) 5 AIR 1918 Pat 126 (128) : 4 Pat L Jour 141 (DB).
4. † ('13) 30 AIR 1943 Cal 199 (203) (DB). (Branch office of insurance company only collected premia — It could not accept proposals.)
5. ('87) 14 Cal 256 (271) (DB).
('30) 17 AIR 1930 Lah 818 (819).
Also see Note 10 and S. 79, N. 7.

Note 32

1. ('06) 29 Mad 239 (245) (DB).
('27) 14 AIR 1927 Sind 160 (161): 23 Sind L R 46. (Court cannot pass decree against a person, subject of foreign Government, which cannot be enforced against him.)
2. ('06) 29 Mad 239 (246) (DB).
3. ('95) 22 Cal 222 (238) : 21 Ind App 171 : 1894 Pun Re No. 112 (PC).
[*See* (1900) 23 Mad 458 (473). (*Quære.*)]
4. ('27) 14 AIR 1927 All 413 (414) : 49 All 669 (DB).
✣('34) 21 AIR 1934 All 740 (743, 745): 56 All 828 (DB). (Per Niamatullah, J.—Decree passed against a person residing in an Indian State by a Court having jurisdiction under S. 20 cannot be disregarded as one passed without jurisdiction.)
5. ('06) 29 Mad 239 (270) (DB).
('84) 10 Cal 878 (883) (DB).
6. ('88) 12 Bom 507 (521).
7. ('93) 17 Bom 662 (667) (DB).
8. † ('24) 11 AIR 1924 Mad 158 (159).
9. *See also* ('03) 26 Mad 544 (552) : 30 Ind App 220 (PC).
10. ✣('03) 26 Mad 544 (552) : 30 Ind App 220 (PC).
('34) 21 AIR 1934 All 740 (746, 754) : 56 All 828 (DB).

A Court exercising jurisdiction over a foreigner should do so with caution[11] and should protect his interests as if he were a British subject.[12]

33. Revision. — No hard and fast rule as to revision can be laid down in cases of decisions as to jurisdiction under this section and each case must, therefore, be decided on its own merits; ordinarily interference in revision is inadvisable in such cases and should only be resorted to in exceptional cases to remedy an injustice; where the defendant is, by law, entitled to have the case tried at Patna, it will be a grave injustice to him to insist on its trial at Jagraon in the Punjab, and in such a case the High Court will interfere in revision.[1]

34. Chartered High Courts. — This section does not apply to Chartered High Courts in the exercise of their original civil jurisdiction.[1] These are governed by the Letters Patent granted to them.

In order to give the High Court jurisdiction under the Letters Patent, either the whole cause of action must have arisen within the local limits of its jurisdiction or the leave of the High Court must have been obtained.[2]

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21. No objection[3] as to the place of suing[4] shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.[5]

Objections to jurisdiction.

[But compare 1882, S. 16A (2).]

[Ss. 16-20; S. 99, C. P. C. and S. 11, Suits Valuation Act.]

Synopsis

1 Scope and object of the section.
2. Jurisdiction, meaning of. See S. 9, Notes 3, 4 and 5.
3. Objection to jurisdiction—General.
4. Objection as to place of suing.
5. "Unless there has been a consequent failure of justice."
6. Execution proceedings.
7. Insolvency proceedings.
8. Collateral proceedings.
9. Foreign Courts.
10. Court trying a remanded case, jurisdiction of.
11. Procedure where suit is filed in a wrong Court.

† ('01) 25 Bom 528 (536) (DB).
('96) 20 Bom 133 (142, 143) (DB).
('93) 17 Bom 662 (668) (DB).
('38) 25 AIR 1938 Mad 731 (733) : I L R (1938) Mad 1080 (DB).
('35) 22 AIR 1935 Mad 545 (546).
('19) 6 AIR 1919 Mad 883 (884) (DB).
('15) 2 AIR 1915 Mad 116 (116) (DB). (Suit for rent of lands within jurisdiction—Defendant residing outside—Court has jurisdiction.)
('06) 29 Mad 69 (71) (DB).
('69) 4 Mad H C R 218 (222).
† ('03) 2 Low Bur Rul 47 (52). (Case law reviewed.)
11. ('07) 30 Mad 438 (440) (DB).
12. ('26) 13 AIR 1926 Mad 584 (586): 50 Mad 27.

Note 33

1. ('23) 10 AIR 1923 Lah 565 (566).
('22) 9 AIR 1922 Lah 100 (101). (Seller sending quotations on enquiry — Order sent by buyer — Court wrongly holding that suit maintainable at buyer's place — High Court can interfere in revision.)

Note 34

1. See Section 120.
('23) 10 AIR 1923 Mad 272 (274) (DB).
2. ('87) 14 Cal 256 (269, 270) (DB).
('72) 10 Beng L R 122 (124). (Pro-note made without, but payable within, the jurisdiction — Leave not obtained—*Held*, suit not maintainable.)
('05) 29 Bom 249 (253, 254) (DB). (Cause of action in Cl. 12 of the Letters Patent, means the whole cause of action.)
('91) 15 Bom 93 (99, 100, 101). (Do.)
('82) 8 Cal 483 (493) (FB). (Do.)
('74) 13 Beng L R 91 (98, 99) (DB). (Do.)

NOTE to the Synopsis. See the Notes indicated for the following topics :

Absence of jurisdiction. See S. 9.
Analogous law — S. 11, Suits Valuation Act. See Note 1.
"At or before settlement of issues," meaning of. See Note 4.
Waiver of jurisdiction. See S. 9.
Whether executing Court can consider validity of decree. See S. 38.
Whether decree could be challenged in a separate suit for want of jurisdiction. See Note 6.

1. Scope and object of the section. — It has been seen in Notes 3 to 5 on S. 9 that when a Court has no jurisdiction over a litigation, its judgments and orders, however precisely certain and technically correct, are merely nullities and can be declared to be void by every Court in which they may be presented.[1] It has also been seen that in such cases no amount of consent or waiver on the part of the parties can create jurisdiction where there is none.[2] There are, however, two legislative exceptions to this

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Section 21 — Note 1

1. ('23) 10 AIR 1923 Cal 619 (621) (DB).
('11) 38 Cal 639 (668) : 12 Ind Cas 464 (476) (DB).
('31) 18 AIR 1931 Bom 402 (402) : 55 Bom 803 (DB).
('26) 13 AIR 1926 Bom 1 (12) : 50 Bom 1 (FB).
('10) 1910 Pun Re No. 83 : 7 Ind Cas 718 (718) (DB).
('24) 11 AIR 1924 Mad 144 (145) (DB). (Thus an Agency Court has no right to sell the right to collect Kattubadi in villages situated beyond the limits of its territorial jurisdiction.)
('17) 4 AIR 1917 Mad 318 (319) : 39 Mad 1031 (DB).
('18) 5 AIR 1918 Pat 71 (72) : 4 Pat L Jour 202 (DB). (Bengal, N. W. P. and Assam Civil Courts Act, 1887, S. 21, Cl. (a).)
('31) 18 AIR 1931 Oudh 398 (400) (DB).
[*See* ('91) 13 All 300 (305) : 18 Ind App 55 (PC).]
[*See also* ('21) 8 AIR 1921 Upp Bur 15 (16) : 4 Upp Bur Rul 75. (Whenever an objection to the jurisdiction of a Court is taken the Court is bound to entertain it and give effect to it.)]

2. ('42) 29 AIR 1942 Cal 496 (498) : I L R (1942) 1 Cal 149. (Case relating to want of leave under Cl. 12 of Letters Patent—For full discussion of the effect of the want of such consent, see Notes on Letters Patent, Cl. 12.)
('41) 28 AIR 1941 Rang 199 (200) (DB). (Incompetent appeal is not rendered valid by being heard *ex parte*.)
('40) 27 AIR 1940 Oudh 245 (247). (Suit not cognizable by Small Cause Court tried by it.)
('40) 27 AIR 1940 Pat 406 (408) (DB).
('26) 13 AIR 1926 Mad 421 (422) : 49 Mad 746 (DB).
('18) 5 AIR 1918 Cal 946 (946) (DB).
('25) 12 AIR 1925 P C 155 (156) (PC).
('11) 1 AIR 1914 P C 140 (148) : 42 Cal 116 : 41 Ind App 197 (PC). (Where the prohibition is by a statute.)
('31) 18 AIR 1931 All 454 (456) : 53 All 560 (DB).
('26) 13 AIR 1926 All 650 (652, 653).
('09) 2 Ind Cas 677 (680) (All).
† ('87) 9 All 191 (203) : 13 Ind App 134 (PC).
† ('32) 19 AIR 1932 Bom 42 (46).
('27) 14 AIR 1927 Bom 663 (664) (DB). (Where a suit was tried as a small cause, which ought not to have been so tried.)
('11) 10 Ind Cas 746 (747) (DB) (Bom). (As regards valuation agreed upon between pleaders.)
('10) 34 Bom 171 (175) : 4 Ind Cas 830 (831) (DB).
('09) 33 Bom 664 (667) : 3 Ind Cas 816 (817) (DB).
('87) 11 Bom 153 (159) (DB).
('72) 9 Bom H C R 242 (246).
('32) 19 AIR 1932 Cal 629 (631) : 59 Cal 1092.
('32) 19 AIR 1932 Cal 67 (70) : 58 Cal 1251.
('31) 18 AIR 1931 Cal 651 (653) : 58 Cal 768.
('25) 12 AIR 1925 Cal 812 (814) : 52 Cal 559 (DB). (Where a Court has no jurisdiction to refer a dispute to arbitration, the consent of the parties cannot validate the reference.)
('20) 7 AIR 1920 Cal 131 (134) : 47 Cal 770 (DB). (When a Court has no jurisdiction over the subject-matter of suit in which an order is made, such order as made is wholly void and does not operate as *res judicata*.)
('18) 5 AIR 1918 Cal 925 (927) : 45 Cal 519 (DB).
('12) 16 Ind Cas 940 (942) (DB) (Cal).
('11) 38 Cal 639 (669) : 12 Ind Cas 464 (476) (DB).
('09) 3 Ind Cas 466 (467) (DB) (Cal). (Absence of objection does not confer jurisdiction.)
('79) 5 Cal 489 (493) (DB).
('71) 16 Suth W R (Cr) 69 (70). (Ignorance and consequent silence.)
('33) 20 AIR 1933 Lah 746 (747).
('30) 17 AIR 1930 Lah 240 (241).
('23) 10 AIR 1923 Lah 425 (426) (DB). (Agreement.)
('21) 8 AIR 1921 Lah 72 (72).
('15) 2 AIR 1915 Lah 185 (185).
('33) 20 AIR 1933 Mad 471 (474).
('33) 20 AIR 1933 Mad 346 (347).
('24) 11 AIR 1924 Mad 406 (409).
('23) 10 AIR 1923 Mad 497 (498) (DB). (Where directions were issued to a guardian in respect of trust property of which the minor was trustee.)
('15) 2 AIR 1915 Mad 1075 (1076). (Even if defendant is equitably estopped from raising the objection.)
('88) 11 Mad 26 (36) : 14 Ind App 160 (PC).
('19) 6 AIR 1919 Nag 91 (92).
('32) 19 AIR 1932 Oudh 313 (314) : 6 Luck 697 (DB).
('31) 18 AIR 1931 Oudh 398 (400) (DB).
('29) 16 AIR 1929 Oudh 383 (384).
('16) 3 AIR 1916 Oudh 229 (230) : 18 Oudh Cas 364.
('15) 2 AIR 1915 Oudh 114 (116) : 18 Oudh Cas 80 : 27 Ind Cas 543 (544). (Acquiescence.)

rule, the first with reference to the *pecuniary jurisdiction* and the second with reference to the *territorial jurisdiction* of Courts.[3]

(1) Under S. 11 of the Suits Valuation Act, 1887, an objection that by reason of *over-valuation* or *under-valuation* of a suit or appeal, a Court has exercised jurisdiction which it has not, cannot be entertained by an Appellate Court unless such objection was taken in the Court of the first instance at or before the hearing at which issues were first framed or in the lower Appellate Court in the memorandum of appeal *and* such over-valuation or under-valuation has prejudicially affected the disposal of the suit on the merits.[4] (See also section 99 Note 6.) But S. 11 does not apply where there is no over-valuation or under-valuation and a Court not having the requisite pecuniary jurisdiction entertains a suit or appeal in spite of there being no over-valuation or under-valuation. In such a case, the objection as to want of jurisdiction can be taken at any time; it can be taken even in second appeal.[5]

(2) Under this section which is framed on the analogy of S. 11 of the Suits Valuation Act, 1887,[6] an objection as to the *place of suing* cannot be entertained by an Appellate Court except under the circumstances mentioned in the section.[7]

The object of the Legislature in enacting this section is that when the Court of first instance after giving an affirmative finding on jurisdiction takes proceedings on the merits of the case, the latter should not be rendered abortive and all the time and labour spent thereon should not be wasted simply by reason of the fact that the higher Court comes to a contrary finding on the point of territorial jurisdiction.[8] The section applies

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('20) 7 AIR 1920 Pat 291 (324) : 5 Pat L Jour 164 (DB).
('18) 5 AIR 1918 Pat 392 (395) (DB).
('15) 2 AIR 1915 Low Bur 121 (122).
('25) 12 AIR 1925 Sind 324 (328) : 18 Sind L R 286 (DB).

3. ('41) 28 AIR 1941 Mad 129 (136) (DB). (Territorial jurisdiction to entertain application to file award.)
('41) 28 AIR 1941 Nag 36 (44) : I L R (1941) Nag 1 (FB). (Territorial jurisdiction.)
✣('38) 25 AIR 1938 Mad 257 (259, 261) (DB).
('38) 25 AIR 1938 Pesh 77 (78) (DB).

4. ('41) 28 AIR 1941 Oudh 587 (590) : 17 Luck 121 (DB). (Objection not raised as to pecuniary jurisdiction and decree passed held should be deemed to have been waived.)
('39) 26 AIR 1939 All 552 (553) : ILR (1939) All 557 (DB).
('29) 16 AIR 1929 Lah 509 (511) : 11 Lah 15.
('24) 11 A I R 1924 All 388 (389) : 46 All 250 (DB).
('30) 17 AIR 1930 All 869 (873) (DB).
('33) 20 A I R 1933 All 249 (252) : 55 All 345 (FB).
† ('37) 24 AIR 1937 Cal 430 (431) (DB). (Objection cannot be raised in execution proceedings.)
† ('38) 25 AIR 1938 Nag 149 (150) : ILR (1939) Nag 300 (DB). (The objection is to be taken at the earliest possible opportunity—But where issues are to be framed it may be allowed at or before settlement of issues — Court's discretion.)
('37) 24 AIR 1937 Oudh 379 (380) : 13 Luck 340 (DB).

See also the following cases :
('01) 24 Mad 427 (429).
('18) 5 AIR 1918 P C 188 (191, 192) : 43 Bom 507 : 46 Ind App 24 (PC).
('27) 14 AIR 1927 All 359 (360).
('21) 3 U P L R 201 (201) (DB).
('14) 1 AIR 1914 All 128 (128) : 36 All 58 (DB).
('91) 13 All 580 (580, 581) (DB).
(1862) 1 Bom H C R A C 62 (63) (DB). (Cannot be raised in second appeal.)
('04) 31 Cal 849 (856) (DB).
('03) 31 Cal 344 (348) (DB).
('97) 24 Cal 661 (667) (DB).
('95) 1 Cal W N 136 (137) (DB).
('74) 22 Suth W R 301 (302) (DB).
('74) 22 Suth W R 124 (126) (DB).
('74) 22 Suth W R 120 (121) (DB).
('74) 22 Suth W R 101 (101) (DB).
('30) 17 AIR 1930 Mad 541 (542).
('25) 12 AIR 1925 Oudh 561 (563) : 28 Oudh Cas 203 (DB).
('20) 7 AIR 1920 Pat 92 (94) (DB).

5. ('42) 29 AIR 1942 Oudh 481 (482) (DB). (District Judge admitting and deciding appeal value of which was beyond the pecuniary limit—Objection held could be raised in second appeal even at time of arguments.)

6. ('23) 10 AIR 1923 Cal 619 (622) (DB).
† ('14) 1 AIR 1914 Lah 385 (388) : 1914 Pun Re No. 87 (DB).

7. ✣('25) 12 AIR 1925 Mad 117 (119, 123) (DB). (Principle of S. 21, C. P. Code, is that the plea of want of territorial jurisdiction may by waived.)
('23) 10 AIR 1923 Cal 619 (622) (DB).

8. ('14) 1 AIR 1914 Lah 385 (387, 388) : 1914 Pun Re No. 87 (DB). (This section was considered retrospective and was applied to a suit filed before its coming into force.)

to *all* objections as to the place of suing, that is, to territorial jurisdiction based on the alleged infringement of the provisions of Ss. 16 to 20,[9] and its effect is to cure, for all purposes, objections to territorial jurisdiction except under the conditions specified in the section.[10] The failure to notice the provisions of this section is analogous to an irregularity in procedure or a mistake or error apparent on the face of the record.[11]

This section does not apply to Chartered High Courts in the exercise of their original jurisdiction, as they are governed by clause 12 of the Letters Patent.[12]

The principle underlying the section is of general application and has been applied to appeals,[13] and also to cases which do not fall strictly within its terms.[14] See Notes 6 to 8. When a suit is instituted in a British Indian Court, that Court must determine whether it has jurisdiction to hear the suit or not, by the aid of the provisions of this Code.[15]

The section only applies to want of *territorial* jurisdiction. It does not apply to the *inherent* incompetency of a Court to deal with a cause[16] or to the want of *pecuniary* jurisdiction.[17]

See also the undermentioned case.[18]

2. Jurisdiction, meaning of. — See Section 9, Notes 3, 4 and 5.

3. Objection to jurisdiction—General. — It has been seen in Note 5 on S. 9 that a party may waive irregularities in the *exercise* of jurisdiction which the Court has, or an *enquiry* into the existence of facts necessary to give jurisdiction, but that otherwise

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9. ('17) 4 AIR 1917 Mad 198 (200, 201) (DB).
('34) 21 AIR 1934 Sind 123 (129) : 28 Sind L R 54 (DB). (Suit relating to immovable property outside British India—Objection as to want of jurisdiction can be taken on appeal notwithstanding this section.)
† ('24) 11 AIR 1924 Mad 697 (701) (DB).
✠('20) 7 AIR 1920 Mad 1019 (1023, 1024) : 43 Mad 675 (FB).
('18) 5 AIR 1918 Mad 297 (299) (DB). (Quære only.)
('31) 18 AIR 1931 Oudh 411 (411) (DB). (Question whether suit triable on small cause or original side is not governed by section.)

10. ('20) 7 AIR 1920 Mad 1019 (1024) : 43 Mad 675) (FB).
† ('35) 22 AIR 1935 Oudh 358 (360) : 11 Luck 187 (DB).
[*See* ('35) 22 AIR 1935 Cal 153 (153). (Trial Court dismissing suit as against person on ground of want of jurisdiction as against such person—On appeal by other defendant, appellate Court passing decree as against person against whom it was dismissed—In application for review of appellate judgment contention raised that this section cured the defect of want of jurisdiction as against former defendant — *Held*, not cured as objection was in fact raised in trial Court.)]

11. ('29) 16 AIR 1929 Nag 73 (74) : 25 Nag L R 104.

12. † ('29) 16 AIR 1929 Cal 358 (364) : 56 Cal 940 (DB).
('36) 164 Ind Cas 907 (910) (DB) (Cal). (Where High Court has no jurisdiction under Cl. 12, the omission to raise the objection at the earliest opportunity will not preclude defendant from raising it at the appellate stage.)
✠('35) 22 AIR 1935 Rang 517 (520).
[*See also* ('32) 19 AIR 1932 Bom 291 (300) : 56 Bom 324 (DB).]
Also see S. 120, N. 2.

13. ('33) 20 AIR 1933 Nag 318 (321, 322) : 29 Nag L R 342. (Objection to jurisdiction of Appellate Court not raised in first Appellate Court cannot be raised in second appeal.)

14. ('26) 13 AIR 1926 Mad 421 (422, 426) : 49 Mad 746 (DB).
† ('30) 17 AIR 1930 All 873 (874) : 52 All 947. (Section held applicable to an application under O. 9, R. 13.)

15. ('34) 21 AIR 1934 All 226 (230) (DB).

16. ('40) 27 AIR 1940 Oudh 245 (247, 248). (Suit not cognizable by Small Cause Court entertained and dismissed—S. 21 does not apply—Plaint returned to be presented to proper Court.)
† ('37) 24 AIR 1937 All 515 (525) : I L R (1937) All 670 (DB). (Objection that Court had no jurisdiction to entertain an application for restitution it not being the Court which passed the decree in the suit.)
('36) 23 AIR 1936 Nag 1 (3) : 31 Nag L R Sup 57 (FB). (Jurisdiction over subject-matter.)
† ('35) 22 AIR 1935 Nag 250 (256) : 31 Nag L R Sup 43 (FB).

17. ('42) 29 AIR 1942 Oudh 481 (482) (DB).
('37) 24 AIR 1937 All 515 (525) : ILR (1937) All 670 (DB).
† ('37) 24 AIR 1937 Mad 112 (113).
[*See also* ('35) 22 AIR 1935 Mad 723 (724). (Want of pecuniary jurisdiction cannot be waived.)]

18. ('37) 24 AIR 1937 All 567 (569): I L R (1937) All 761.

no amount of consent or waiver can give jurisdiction where there is none. An objection to the inherent jurisdiction of a Court to try a cause cannot therefore be waived and can be raised at any stage of the proceedings.[1] Thus, it can be allowed to be taken for the first time in an execution proceeding[2] in appeal,[3] in second appeal,[4] in Letters Patent appeal,[5]

Note 3

1. ('43) 30 AIR 1943 Lah 129 (134) (DB). (If there is an inherent lack of jurisdiction the proceedings are *coram non judice* and must be set aside even though the objection is raised after the lapse of some years.)
✣('85) 7 All 230 (243) (FB).
('32) 19 AIR 1932 Bom 291 (294): 56 Bom 324 (DB).
('26) 13 AIR 1926 All 650 (652).
('32) 19 AIR 1932 Bom 42 (45) (DB).
('89) 13 Bom 650 (652) (DB).
('88) 12 Bom 155 (157) (DB).
('83) 7 Bom H C R A C 79 (81) (DB).
† ('88) 16 Cal 13 (16) (DB). (Absence of jurisdiction found by the Court itself.)
('82) 8 Cal 678(685)(DB). (A new trial of a small cause suit may be granted on the ground of want of jurisdiction in the Court though not originally raised.)
(1865) 4 Suth W R (Misc) 21 (21) (DB). (Plea of limitation.)
(1865) 2 Suth W R Act X 76 (76) (DB).
(1862) 1862 Suth W R Sup No. 15 (16) (SB).
('33) 20 AIR 1933 Lah 890 (890).
('29) 119 Ind Cas 721 (722) (Lah).
('14) 1 AIR 1914 Lah 85 (85, 86) : 1914 Pun Re No. 64 (DB).
('18) 5 AIR 1918 Mad 757 (758). (No jurisdiction can be conferred by practice however long continued it may be.)
('90) 13 Mad 25 (27) (DB). (If the objection is apparent on the face of the plaint.)
† ('36) 23 AIR 1936 Nag 1 (3) : 31 Nag L R Sup 57 (FB). (Even in execution.)
('35) 22 AIR 1935 Nag 212 (214): 31 Nag L R 408.
('31) 18 AIR 1931 Oudh 411 (411) (DB). (Objection that suit is cognizable only by a Small Cause Court.)
† ('35) 22 AIR 1935 Pesh 151 (152) (DB).
('35) 22 AIR 1935 Rang 174 (176) (DB). (Court can raise the point at the time of delivering judgment even though not raised by the parties.)
('21) 8 AIR 1921 Upp Bur 15 (16): 4 Upp Bur Rul 75.
('15) 2 AIR 1915 Low Bur 107 (108) : 8 Low Bur Rul 211. (Where a suit was brought for the custody of a child and not under the Guardians and Wards Act.)
[*See* ('36) 23 AIR 1936 Cal 133 (135). (Suit by partnership firm not registered under S. 58, Partnership Act—Plea that suit is not maintainable can be raised even after filing written statement.)]
[*See also* ('31) 18 AIR 1931 All 689 (693) : 53 All 747 (DB).]
[But see ('71) 8 Bom H C R A C 245 (247) (DB). (*Held*, the High Court was not bound to entertain the objection unless it was patent on the face of the record.)
('69) 12 Suth W R 140 (140) (DB).]

2. ('42) 29 AIR 1942 Cal 496 (498) : ILR (1942) 1 Cal 149. (Decree obtained in mortgage suit without getting leave under L.P. (Cal) Cl. 12 held to be without jurisdiction. For further discussion of this question see Notes on Letters Patent (Cal) Cl. 12.)
Also see S. 38, N. 8.

3. ('42) 29 AIR 1942 Pesh 81 (82). (Point that civil Court had no jurisdiction to entertain suit in view of S. 21, Punjab Alienation of Land Act, can be raised for first time in appeal.)
('41) 28 A I R 1941 Mad 129 (134, 135) (DB). (Allowed in the course of argument.)
('24) 11 AIR 1924 P C 95 (101) : 51 Cal 361 : 20 Nag L R 33 : 51 Ind App 72 (PC). (If there is a defect of jurisdiction.)
('33) 20 AIR 1933 All 392 (393).
('19) 6 AIR 1919 P C 150 (152) : 42 Mad 813 : 46 Ind App 151 (PC).
('34) 21 AIR 1934 All 139 (140) (DB).
('31) 18 AIR 1931 All 490 (494) : 54 All 25 (FB).
† ('31) 18 AIR 1931 All 406 (407).
('32) 19 AIR 1932 Bom 42 (45).
('87) 11 Bom 153 (170, 171, 172) (DB).
✣('29) 16 AIR 1929 Cal 358(364): 56 Cal 940 (DB).
✣('09) 36 Cal 193 (206, 207) (DB).
('07) 7 Cal L Jour 152 (167). (Question of limitation.)
('90) 13 Mad 25 (27) (DB).
('34) 21 AIR 1934 Sind 123 (129): 28 Sind L R 54 (DB). (Suit relating to immovable property outside British India—Objection as to want of jurisdiction can be taken notwithstanding this section.)
('19) 6 AIR 1919 Low Bur 45 (45).

4. ('42) 29 AIR 1942 Oudh 481 (482) (DB). (District Court admitting and deciding appeal value of which was beyond its pecuniary jurisdiction — Objection held could be raised at time of arguments in second appeal.)
('29) 16 AIR 1929 All 442 (443).
('32) 19 AIR 1932 All 701 (702) : 54 All 998 (DB).
('31) 18 AIR 1931 All 406 (407).
('30) 17 AIR 1930 All 519 (519).
('09) 2 Ind Cas 677 (680) (All).
('23) 10 AIR 1923 Bom 321(349): 47 Bom 843(FB).
('89) 13 Bom 489 (491) (DB).
('89) 13 Bom 424 (427) (DB).
('87) 12 Bom 155 (157) (DB).
(1864) 2 Bom H C R A C 192 (193) (DB).
('99) 26 Cal 598 (600) (DB).
('71) 16 Suth W R 69 (70).
('70) 14 Suth W R 228 (230) (DB).
('70) 14 Suth W R 12 (14) (SB).
(1862) 1862 Suth W R 15 (16) (FB).
('23) 10 AIR 1923 Lah 551 (553) (DB).
('90) 13 Mad 273 (274) (DB).
('35) 22 AIR 1935 Oudh 325 (326) : 11 Luck 106.
('36) 23 AIR 1936 Pat 177 (178) (DB).
Also see Ss. 100 and 101 Note 59.

5. ('32) 19 AIR 1932 All 273 (276): 54 All 573(FB).
† ('35) 22 AIR 1935 All 760 (761, 762): 57 All 916.
[*See* ('35) 22 AIR 1935 All 746 (748) : 57 All 891 (DB). (Where however the question depends upon questions of fact, the plea will not be allowed to be raised for the first time in Letters Patent Appeal against decision of a single Judge in second appeal.)]

in revision,[6] in an appeal after remand,[7] and even in the course of argument before the Privy Council.[8] If the objection is not raised till at a late stage and the jurisdiction is doubtful, the proper course is to proceed with and determine the suit.[9] Where an objection as to jurisdiction is raised very late, the party may in the discretion of the Court be made liable for costs.[10] If a question is raised as to the jurisdiction of the Court, the Court should decide it first and then proceed to decide other points, if it holds that it has jurisdiction.[11]

A defendant who objects to the jurisdiction of a Court cannot be said to have acquiesced in the trial of the suit simply because he did not apply for a transfer.[12]

Although a defect of jurisdiction cannot be waived, the High Court may, in the exercise of its discretion, refuse to interfere in revision where substantial justice has been done.[13]

The proper way to plead to the jurisdiction of the Court is to take the plea in the written statement as a substantive part of the defence.[14]

If a Court is competent to try a suit and the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute the jurisdiction of the Court upon the ground that there were irregularities in the initial procedure which if objected to at the time, would have led to the dismissal of the suit. The irregularity in assuming jurisdiction is waived if no objection is taken in time.[15] Further, where the question of jurisdiction depends upon the decision of some question of fact or law, if a party does not raise the question during the trial, he should not be allowed to do so after the proceedings have been carried to a conclusion.[16]

4. Objection as to place of suing. — As has been observed in Note 1, this section is an exception, so far as *territorial* jurisdiction is concerned, to the general rule that an objection to the jurisdiction of a Court can be entertained at any stage. The expression "place of suing" means venue of trial and has no reference to the competency of the Court in the sense of its general authority to adjudicate on any matter in controversy.[1] Under this section no objection as to the place of suing will be entertained

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Also see Letters Patent (Cal) Cl. 15, N. 14.

6. ('85) 7 All 230 (243) (FB). (At any stage.)
('30) 17 AIR 1930 All 873 (874, 875) : 52 All 947.
('09) 33 Bom 664 (667) : 3 Ind Cas 816 (817) (DB).

7. † ('99) 23 Bom 22 (26, 29, 30) (DB).
('70) 14 Suth W R 288 (288) (DB).
('82) 8 Cal 678 (685) (DB).

8. † ('14) 1 AIR 1914 P C 140 (143) : 42 Cal 116 : 41 Ind App 197 (PC).
('91) 13 All 300 (304) : 18 Ind App 55 (PC).
('84) 2 Bom H C R 40 (45) (SB).

9. (1862) 1 Hyde 284 (286).

10. ('67) 7 Suth W R 490 (490) (DB).
('71) 15 Suth W R 48 (49) (DB).
('36) 23 AIR 1936 Pat 177 (178) (DB). (Costs not allowed.)
[*See* ('35) 22 AIR 1935 Pat 160 (164): 14 Pat 414 (DB). (Objector not allowed costs.)]
[*See also* ('29) 16 AIR 1929 Lah 246 (246). (Objector deprived of costs.)]

11. † ('33) 20 AIR 1933 Oudh 191 (192) : 8 Luck 676 (DB).
('33) 20 AIR 1933 Pat 104 (107): 12 Pat 117 (DB).
Also see S. 9 Note 3.

12. ('15) 2 AIR 1915 Cal 62 (63) (DB).
Also see S. 20 Note 13.

13. ('04) 28 Bom 458 (460) (DB).
('18) 5 AIR 1918 All 355 (356) : 40 All 666.

14. ('32) 19 AIR 1932 Cal 146 (147) : 59 Cal 150 (DB).

15. ('43) 30 AIR 1943 Mad 449 (453) (DB).
('42) 29 AIR 1942 Cal 496 (498) : I L R (1942) 1 Cal 149.
('39) 26 AIR 1939 Bom 485 (486) : I L R (1939) Bom 472. (Court assumed juriadiction under wrong order of transfer.)
('36) 23 AIR 1936 Nag 1 (3) : 31 Nag L R Sup 57 (FB).
('35) 22 A I R 1935 Pat 439 (444) : 14 Pat 356 (DB).
† ('12) 13 Ind Cas 542 (544) (DB) (Cal).

16. ('40) 27 AIR 1940 Pat 406 (408) (DB). (Case of execution proceedings—Property which could not be sold, sold by executing Court competent to do so —No objection raised—*Held*, it could not be raised subsequently even though decision was wrong — AIR 1933 Pat 104 : 12 Pat 117 relied on.)

Note 4

1. ('41) 28 AIR 1941 Nag 36 (51): ILR (1941) Nag 1 (FB). (Per Niyogi, J.)

by any appellate or revisional Court unless the following two conditions exist —

(1) the objection is taken at the earliest possible opportunity, and in cases where issues are settled, at or before such settlement,[2] and

(2) there has been a consequent failure of justice.[3]

In cases in which issues are settled, if the territorial jurisdiction of a Court is transferred to another Court after the settlement of issues, but the former Court nevertheless proceeds to act in the suit, is it necessary to raise an objection to the jurisdiction at the earliest possible opportunity and does S. 21 apply? It was assumed in the undermentioned cases[4] that S. 21 would apply and that if no objection was raised at the earliest possible opportunity after the transfer, the objection would be deemed to have been waived. It is submitted that S. 21 does not apply to such a case. As will be seen in Note 2 on S. 150, where a Court has jurisdiction to entertain a suit or proceeding *at the time of its institution*, such jurisdiction is not lost by the subsequent transfer of the area or territory with reference to which the suit or proceeding was instituted. If this be so, no question of any objection as to the place of suing can arise and consequently no question of the applicability of S. 21.

5. **"Unless there has been a consequent failure of justice."** — Even if an objection has been raised at the proper time, it is still necessary, before an appellate or revisional Court could entertain such objection, to show that the trial in the wrong Court has led to a failure of justice.[1] The question whether trial in the wrong Court has led to a failure of justice must be answered on a consideration of the *merits* of the case.[2]

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2. ('19) 6 AIR 1919 Mad 1063 (1063) (DB).
('19) 6 AIR 1919 Cal 1077 (1078) (DB).
✠('31) 18 AIR 1931 All 454 (456):53 All 560 (DB).
† ('14) 1 AIR 1914 Lah 385 (388) : 1914 Pun Re No. 87 (DB). (Objection as to non-residence within jurisdiction.)
('20) 7 AIR 1920 Mad 1019 (1023) : 43 Mad 675 (FB).
('19) 6 AIR 1919 Mad 242 (244) (DB). (Cannot maintain subsequent suit that the decree is a nullity.)
('31) 18 AIR 1931 Oudh 136 (137).
('28) 15 AIR 1928 Pat 324 (325, 326):7 Pat 216 (DB).
('17) 4 AIR 1917 Pat 598 (599).
Also see S. 18 Note 4.

3. ('40) 27 AIR 1940 Lah 171 (172). (Suit for accounts against commission agent—Objection to place of suit raised — *Held*, it was in interest of justice that suit should be tried in place where agent carried on business.)

4. ('24) 11 AIR 1924 Mad 697 (699) (DB).
[*See also* ('20) 7 AIR 1920 Mad 1019 (1023) : 43 Mad 675 (FB). (The question was raised but not decided)]

Note 5

1. ('19) 6 AIR 1919 All 82 (83) : 42 All 74 (DB).
('33) 20 AIR 1933 Pat 555 (557).
('34) 21 AIR 1934 All 549 (550).
† ('34) 21 AIR 1934 All 226 (230) (DB).
('31) 18 AIR 1931 All 556 (557) (DB).
('29) 16 AIR 1929 All 236 (236). (Waste of public time.)
('22) 9 AIR 1922 Cal 345 (346) : 49 Cal 37 (DB).
('19) 6 AIR 1919 Cal 1014 (1015) (DB).
('13) 20 Ind Cas 370 (371) (DB) (Cal).
('38) 40 Pun L R 234 (234). (Distance.)
† ('34) 21 AIR 1934 Lah 233 (233, 234).
('32) 19 AIR 1932 Lah 135 (135, 136) (DB).
('31) 18 AIR 1931 Lah 142 (143) (DB).
('29) 16 AIR 1929 Lah 509 (511):11 Lah 15 (DB).
('22) 9 AIR 1922 Lah 164 (165).
('19) 6 AIR 1919 Lah 217 (217) (DB).
('17) 4 A I R 1917 Lah 12 (12, 13) : 1916 Pun Re No. 93.
† ('14) 1 AIR 1914 Lah 385 (388) : 1914 Pun Re No. 87 (DB).
('13) 18 Ind Cas 130 (131) (Lah).
('37) 24 A I R 1937 Mad 571 (574) : I L R (1937) Mad 990 (DB).
('35) 22 AIR 1935 Mad 574 (575). (Defendant on whom lay the onus of proving the issues that arose in the suit, was *ex parte* for no satisfactory reason: *Held* that there was no failure of justice.)
('25) 12 AIR 1925 Mad 171 (172) (DB).
('24) 11 AIR 1924 Mad 457 (458) (DB).
('20) 7 AIR 1920 Mad 1019 (1023, 1024) : 43 Mad 675 (FB).
('18) 5 AIR 1918 Mad 297 (299) (DB). (*Quære.*)
('20) 7 AIR 1920 Nag 92 (92).
('22) 9 AIR 1922 Oudh 124 (126).
('28) 15 AIR 1928 Pat 324 (326) : 7 Pat 216 (DB).
('24) 11 AIR 1924 Pat 527 (528).
('16) 3 AIR 1916 Low Bur 44 (45) (DB).
('11) 4 Sind L R 264 (266) : 10 Ind Cas 980 (980).

2. ('40) 27 A I R 1940 Lah 171 (172). (Suit for accounts against commission agent — It is in interests of justice that suit is tried at agent's place.)
('21) 8 AIR 1921 All 66 (67, 68) (DB).
† ('34) 21 AIR 1934 Lah 233 (233, 234).
('39) 26 A I R 1939 All 163 (164) : ILR (1939) All 67 (DB). (Question not pure question of law and cannot be decided without finding facts.)

6. Execution proceedings. — See also Note 8 on S. 38 and O. 21 R. 7.

The question of the applicability of S. 21 to execution proceedings has been viewed in two aspects as exemplified in the illustrative cases below :

(1) A suit is instituted in Court A which has no territorial jurisdiction over it. No objection is, however, raised by the defendant to the want of jurisdiction and a decree is passed therein. Section 21 precludes him from rasing the objection in any *appellate* or *revisional* Court. But can he raise the objection in *execution proceedings ?*

(2) A decree is passed by Court A. After the passing of the decree, the territory with reference to which the suit was filed in Court A is transferred to the jurisdiction of Court B, by Government notification. Court A nevertheless proceeds to execute the decree against properties in the territory so transferred. Does S. 21 apply so as to compel the defendant to raise an objection at the earliest possible opportunity to the jurisdiction of Court A to proceed with the application ?

On the first question it has been held in the undermentioned cases[1] that the objection cannot be raised for the first time in execution proceedings. In *Zamindar of Ettiapuram* v. *Chidambaram*,[2] it was held that the effect of the section was that an objection which an appellate or revisional Court was, under the terms of the section, precluded from allowing, must be considered cured *for all purposes* and that a Court of first instance cannot do that in execution which the appellate or revisional Court is precluded from doing. The Calcutta High Court has, however, held that an executing Court *can* question the jurisdiction of the Court which passed the decree, whether territorial, pecuniary or in respect of the judgment-debtor's person.[3] For a full discussion of the subject, see Note 8 on section 38.

On the second question it has been generally held that the principle of S. 21 applies to execution proceedings also.[4] Thus, a sale or delivery of property by Court A made without objection at the earliest possible opportunity cannot be subsequently objected to on the ground of want of territorial jurisdiction.[5] But the Calcutta High Court has taken a contrary view,[6] based on the ground that S. 21, being an exception to the

('30) 17 AIR 1930 Lah 1016 (1016). (Voluntary omission to adduce evidence on merits by defendant—No ground of failure of justice.)

Note 6

1. ('40) 27 AIR 1940 Sind 150 (153) : ILR (1941) Kar 79 (DB). (Execution of award — Objection that Court filing it had no jurisdiction because it related to property outside its jurisdiction.)
('04) 27 Mad 118 (120) (DB).
('75) 24 Suth W R 363 (364) (DB).
† ('37) 24 A I R 1937 All 567 (569) : ILR (1937) All 761.
(1864) 2 Bom H C R 374 (375) (DB).
† ('31) 18 AIR 1931 Sind 47 (50) : 25 Sind L R 204 (DB). (Consent decree on award of property beyond local limits.)
('35) 22 AIR 1935 Oudh 358(360):11 Luck 187 (FB).
('38) 25 AIR 1938 Pesh 77 (78) (DB).
('35) 22 AIR 1935 Pesh 142 (143).
2. ('20) 7 A I R 1920 Mad 1019 (1024) : 43 Mad 675 (FB).
3. ('25) 12 AIR 1925 Cal 907 (909):53 Cal 166 (FB).
('32) 19 AIR 1932 Cal 380 (380) (DB).
4. ('27) 14 AIR 1927 Mad 627(630):50 Mad 882 (DB). [*See also* ('40) 42 Pun L R 374 (376, 377). (S. 21 applies by virtue of S. 141 to execution proceedings. NOTE.—The statement that S. 21 applies by virtue of S. 141 is not correct because S. 141 does not apply to execution proceedings. See Notes on S. 141.)
See also cases cited in foot-note (5).
5. ('20) 7 AIR 1920 Mad 505 (506, 507, 508) : 43 Mad 135 (DB).
('13) 18 Ind Cas 498 (499) (DB) (Mad). (Sale.)
('34) 21 AIR 1934 Mad 573 (575) (DB). (Do.)
† ('26) 13 AIR 1926 Mad 421 (422, 426, 427) : 49 Mad 746 (DB). (Do.)
('24) 11 AIR 1924 Mad 457 (458) (DB). (Delivery of property.)
[*See also* ('32) 19 AIR 1932 Mad 440 (442) : 55 Mad 856 (DB). (No objection taken as to transferee Court's jurisdiction to execute the decree even on the grounds of appeal—Point cannot be argued in appeal.)
6. ('23) 10 AIR 1923 Cal 619 (622) (DB). (Sale).
[But see ('12) 13 Ind Cas 542 (544) (DB) (Cal).]

general rule that the inherent want of jurisdiction of the Court cannot be waived by consent of the parties, should not be so interpreted as to have a wider application than what is justified by its terms. In a decision of the Madras High Court,[7] one of the learned Judges, Mr. Justice Ramesam, was of opinion that S. 21 cannot be applied to execution proceedings. The observation was, however, *obiter*, and was dissented from by the other learned Judge. The actual decision in that case was that where a Court had *no power* to sell certain properties *though within its territorial jurisdiction*, the objection to jurisdiction cannot be deemed to have been waived by its not having been raised at the earliest possible opportunity.

It was held in the undermentioned case[8] that where a Court sells properties without objection by the judgment-debtor, after the territorial jurisdiction has been withdrawn from it, the estoppel against the judgment-debtor cannot be extended to apply to a subsequent purchaser of the same property at a sale held in execution of a decree against the same judgment-debtor in another suit.

The High Court of Madras has also held[9] that the failure of a party to object to the territorial jurisdiction of a Court *to pass a final decree* does not amount to a waiver of objection to the Court's jurisdiction to *sell* the property in execution of that decree.

When a Court has jurisdiction over the subject-matter of an execution petition, the mere fact that the Court deals with the petition without a formal order of transfer of the decree by the Court which passed it, would not make the orders passed on such petition null and void. The absence of an order of transfer is merely an irregularity in the assumption of jurisdiction by the Court when proceedings are commenced in it; and if objection is not taken in the first instance, it must be taken to have been waived.[10]

7. Insolvency proceedings. — Under the proviso to S. 11 of the Provincial Insolvency Act of 1920, no objection as to the place of presentment of an insolvency petition shall be allowed by any Court in the exercise of appellate or revisional jurisdiction unless such objection was taken in the Court by which the petition was heard, at the earliest opportunity, and unless there has been a consequent failure of justice.

8. Collateral proceedings. — As has been seen already in Note 6, the effect of S. 21 is that an objection to the territorial jurisdiction of a Court not taken in the manner provided by that section must be considered cured for *all* purposes. It has accordingly been held by the High Courts of Lahore,[1] Madras,[2] Nagpur[3] and Patna[4] that an objection as to territorial jurisdiction of a Court, not raised at the proper time under S. 21, cannot be raised in any collateral proceeding or in a separate suit. The High Courts of Bombay,[5] Allahabad[6] and Calcutta[7] have, on the other hand, held that this

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7. ('28) 15 AIR 1928 Mad 746 (759) (DB).
8. ('20) 7 AIR 1920 Mad 505 (506, 507, 508) : 43 Mad 135 (DB).
[*See also* ('39) 26 AIR 1939 Pat 532 (534) : 18 Pat 670 (DB).(Property situated outside territorial jurisdiction cannot be sold—No objection raised at time of sale by judgment-debtor—Another execution creditor not estopped from questioning sale.)]
9. ('27) 14 AIR 1927 Mad 627 (630):50 Mad882(DB).
10. ('43) 30 AIR 1943 Mad 449 (453) (DB).
[*See also* ('43) 30 AIR 1943 Lah 129 (135) (DB). (Objection as to non-compliance with O. 21, R.5, C. P. C., raised six years later — Objection held waived and proceedings held not null and void : AIR 1940 Lah 394, reversed.)]

Note 8

1. † ('29) 16 AIR 1929 Lah 449 (452) (DB).
2. ('25) 12 AIR 1925 Mad 117 (119, 123) (DB).
('19) 6 AIR 1919 Mad 242 (244) (DB).
('29) 16 AIR 1929 Mad 323 (324) (DB). (Objection as to pecuniary jurisdiction.)
[*See also* ('38) 25 AIR 1938 Mad 257 (261, 262) (DB). (Do.)]
3. ('41) 28 AIR 1941 Nag 36 (40, 45, 51) : I L R (1941) Nag 1 (FB). (AIR 1935 Nag 250 : 31 Nag L R (Sup) 43 (FB) should be deemed as overruled.)
4. † ('28) 15 AIR 1928 Pat 324(326): 7 Pat 216(DB).
[*See also* ('33) 20 AIR 1933 Pat 104 (106) : 12 Pat 117 (DB).
('33) 20 AIR 1933 Pat 457 (459).]
5. ('26) 13 AIR 1926 Bom 481 (483).
[*See also* ('33) 20 AIR 1933 Bom 398 (401, 402) : 57 Bom 456 (DB).
('87) 11 Bom 160*n* (170*n*, 171*n*) (DB).]
6. † ('31) 18 AIR 1931 All454(458): 53 All 560(DB).
7. ('37) 24 AIR 1937 Cal 738 (739).

section does not preclude the objection being raised in a separate suit. But the Bombay High Court has arrived at the same conclusion as the former set of High Courts, by applying the principle of constructive *res judicata* to such cases and holding that an objection to the territorial jurisdiction of the Court in a previous suit, which might and ought to have been raised therein, must be deemed to have been heard and decided in favour of the existence of jurisdiction and is barred from being raised again in a subsequent suit.[8] The High Court of Allahabad[9] has held that the principle of constructive *res judicata* will not apply, the reason given being that the decree in the former suit was one passed without jurisdiction. The High Court of Calcutta in coming to the conclusion that the question of territorial jurisdiction can be re-agitated in a separate suit, has not referred to the question of *res judicata*.[10]

9. Foreign Courts. — This section has no application unless the place of suing is one to which the Code applies.[1] It has, therefore, no application to a case in which there has been *usurpation* by the lower Court of the jurisdiction of a foreign Court.[2] Thus, a suit instituted in a British Indian Court against a non-resident foreigner on a cause of action which arose wholly outside British territory is not covered by S. 21. But where the defendant has *submitted* to the jurisdiction of the Court, he cannot subsequently challenge its decision for want of jurisdiction.[3]

10. Court trying a remanded case, jurisdiction of. — The jurisdiction of the Court trying a remanded case depends entirely on the *order of remand*. Where, therefore, a case is remanded to Court A for trial, Court B can have no jurisdiction to deal with it or pass any orders in it. Neither S. 21 in terms nor the principle underlying it is applicable to the case.[1]

Where a case is remanded to Court A for trial *on the merits*, it has been held that it has no power to entertain a question as to jurisdiction raised before it for the first time.[2]

11. Procedure where suit is filed in a wrong Court. — See also O. 7 R. 10.

Where a Court finds that it has no jurisdiction to entertain the suit, the proper procedure is to return the plaint under O. 7 R. 10 for presentation to the proper Court.[1]

('84) 10 Cal 697 (707) (DB).
('81) 8 Cal L Rep 261 (264) (DB). (Irregularity—Objection to, cannot be allowed at a late stage.)
('79) 5 Cal 64 (69, 70, 71) (DB).
('70) 13 Suth W R 292 (293, 294) (DB).
[*See also* ('22) 9 AIR 1922 Pat 322 (334) (DB).]
8. ('26) 13 AIR 1926 Bom 481 (484).
Also see S. 11 N. 73.
9. ('31) 18 AIR 1931 All 454 (458) : 53 All 560 (DB).
10. ('37) 24 AIR 1937 Cal 738 (739).

Note 9

1. ('19) 6 AIR 1919 P C 150 (152) : 42 Mad 813 : 46 Ind App 151 (PC).
† ('28) 15 AIR 1928 Lah 297 (298) : 9 Lah 445 (DB).
2. ('19) 6 AIR 1919 Mad 1043 (1043) (DB).
('28) 15 AIR 1928 Lah 297 (299): 9 Lah 445(DB).
('25) 12 AIR 1925 Mad 788 (789).
3. † ('34) 21 AIR 1934 All 740 (757) : 56 All 828 (DB). (Defendant taking plea of want of jurisdiction but also defending suit on merits is estopped from contending that the Court had no jurisdiction.)

Note 10

1. ('23) 10 AIR 1923 Mad 351 (351, 352).
2. ('68) 5 Bom H C R A C 137 (138) (DB).

Note 11

1. ('40) 27 AIR 1940 Lah 171 (172). (And not to dismiss the suit.)
('19) 6 AIR 1919 Lah 26 (27) : 1 Lah 203.
('75) 23 Suth W R 263 (263) (DB).
('26) 13 AIR 1926 All 708 (709). (Appellate Court can under Ss. 196 and 197, Agra Tenancy Act, if possessed of all materials, itself dispose of the suit on merits.)
('66) 1 Agra 280 (280).
('66) 1 Agra 222 (222). (The Court should not however reject the plaint without recording its reasons.)
('99) 23 Bom 756 (759) (DB).
('89) 23 Bom 679 (681) (DB).
('85) 9 Bom 266 (268) (DB). (Appellate Court may also return.)
('85) 9 Bom 259 (265) (DB) (Do.)
('84) 8 Bom 313 (318) (FB).
('75) 1 Bom 538 (543) (DB). (Appellate Court may also return.)

The objection as to jurisdiction need not have been raised at any particular stage to enable the Court to so transfer. The question of delay mentioned in S. 21 is only applicable where the objection as to jurisdiction is raised before an appellate or revisional authority.[2] The trial Court, however, is incompetent to order the return of the plaint after the passing of the decree.[3]

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22. [S. 22.] Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.

Power to transfer suits which may be instituted in more than one Court.

Synopsis

1. Scope and applicability of the section.
2. "Apply to have the suit transferred."
3. Notice to the other parties necessary before making application.
4. Grounds for transfer. See Section 24.
5. Objections must be heard before making order.
6. Application when to be made.
7. Transfer to Court subordinate to a different High Court. See Section 23.
8. Stay of suit.
9. Appeal.

NOTE to the Synopsis. See the Notes indicated for the following topics :

How application made. See Note 2.
"May be instituted." See Note 1.
"Shall determine in which of the several Courts having jurisdiction the suit shall proceed." See Section 23 Note 4.
Transfer where plaintiff has a choice of Courts. See Note 1.
When discretion exercised. See Note 1.
Whether question as to want of jurisdiction of trying Court can be raised in application for transfer under this section. See Note 1.

1. Scope and applicability of the section. — It is a general principle of law that a plaintiff, as *arbiter litis*, has a right to choose his own *forum*.[1] This section curtails that right to a certain extent by providing that the suit can be transferred under certain circumstances from the *forum* chosen by the plaintiff to another. Very strong reasons, therefore, must be shown to deprive the plaintiff of this right to choose his *forum*;[2] and Courts, as a rule, ought not to lightly interfere with it.[3] (See also S. 24,

('68) 5 Bom H C R A C 212 (213) (DB).
('87) 10 Mad 211 (212) (DB).
[*See* ('88) 11 Mad 482 (485) (DB). (However, the Appellate Court is not bound to return.)]

2. ('11) 4 Sind L R 264 (266): 10 Ind Cas 980 (980).

3. ('15) 2 AIR 1915 Nag 116 (117) : 11 Nag L R 13 (DB).
[*See also* ('84) 8 Bom 380 (389) (DB). (Refusal by High Court to return, after decision in second appeal.)]

Section 22 — Note 1

1. ('40) 27 AIR 1940 Nag 145 (149) : ILR (1941) Nag 311 (DB).
† ('24) 11 AIR 1924 Lah 249 (250).
('24) 11 AIR 1924 Lah 304 (305).
('79) 4 Cal L Rep 282 (284). (Where in both suits practically the same issues are triable, the plaintiff who first institutes his suit is entitled to proceed in the Court in which he has chosen to bring the suit and to have the other suit stayed.)
† ('28) 15 AIR 1928 Lah 183 (184, 185).
('28) 15 AIR 1928 Lah 159 (159, 160).
('24) 11 AIR 1924 Lah 306 (308, 309, 310).

2. ('24) 11 AIR 1924 Lah 306 (310).
('28) 15 AIR 1928 Lah 159 (159, 160).
('20) 7 AIR 1920 Lah 381 (382) : 1919 Pun Re No. 167.
('94) 1894 Pun Re No. 8.
('14) 1 AIR 1914 Low Bur 37 (39) : 7 Low Bur Rul 129 (133, 134).

3. ('24) 11 AIR 1924 Lah 249 (250).

Note 13.) The mere fact that it would be more convenient to the applicant to have the action tried elsewhere is no sufficient reason to force the plaintiff out of the Court in which he is legally entitled to sue. But the totality of circumstances should indicate the preponderance of the balance of convenience in favour of the suit being proceeded with in a Court different from that in which it has been instituted.[4]

This section applies only where the suit in its *entirety* is cognizable by either of the two Courts, namely, the Court in which the suit is instituted and the Court to which it is sought to be transferred.[5]

This section assumes that the party applying for transfer does not question the *jurisdiction* of the Court. Consequently, this section has no application where the party applying for transfer pleads that the Court has no jurisdiction.[6] Where, however, the plea as to want of jurisdiction has been heard and decided in plaintiff's favour and the defendant thereupon applies for transfer on the basis of *the evidence of jurisdiction*, the section will apply.[7]

This section has reference only to cases which, *at the option of the plaintiff*, can be brought in more Courts than one.[8] It is less general than the provisions of S. 24.

This section and S. 23 do not apply to a case in which the question is whether a suit should be tried by a Court subordinate to a High Court or by a High Court. In such a case the High Court may, under its inherent powers, exercise powers similar to those contemplated by these sections.[9]

Where some of the defendants to a suit are resident within the jurisdiction of one Court and others within the jurisdiction of another Court and the suit is instituted in the former Court by leave of Court granted under S. 20 (b), the proper remedy, where such leave has been granted without notice to the opposite party, is to apply under this section to have the suit transferred.[10] Sections 22 to 25 of the Code are not affected by anything contained in S. 11 of Dekkhan Agriculturists' Relief Act (XVII of 1879). (Now see Bombay Agricultural Debtors Relief Act, XXVIII of 1939.)

2. **"Apply to have the suit transferred."** — An application for transfer under this section should be made by petition and affidavits setting forth the grounds of transfer.[1] But the Court may in proper cases dispense with the affidavit.[2] Where there

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('28) 15 AIR 1928 Lah 183 (184, 185).
('09) 10 Cal L Jour 208 (212).
4. ('40) 27 AIR 1940 Nag 145 (149) : ILR (1941) Nag 311 (DB). (The convenience of both parties have to be weighed and the decision would ultimately turn on the balance of convenience.)
('24) 11 AIR 1924 Lah 249 (250).
('24) 11 AIR 1924 Lah 304 (305).
† ('35) 22 AIR 1935 All 979 (980).
('28) 15 AIR 1928 Lah 183 (184, 185).
('24) 11 AIR 1924 Lah 306 (310).
('36) 23 AIR 1936 Pesh 5 (6, 7).
5. ('42) 29 AIR 1942 All 387 (388) : ILR (1942) All 862 (DB). (Each Court having jurisdiction to deal with only part of the dispute—Section 22 does not apply.)
6. ('41) 28 AIR 1941 All 27 (28) : ILR (1940) All 737 (DB).
('01) 1901 All W N 136 (137).
('23) 10 AIR 1923 Lah 288 (289).
('35) 22 AIR 1935 All 979 (980). (Application for transfer maintainable when jurisdiction of Court is not challenged.)
('14) 1 AIR 1914 All 351 (352).
('08) 1908 All W N 46 (47). (Section does not empower a Court to entertain a suit which otherwise it would have no jurisdiction to try.)
('09) 4 Ind Cas 922 (922) (Lah).
('18) 5 AIR 1918 Oudh 441 (442):21 Oudh Cas 217.
('20) 7 AIR 1920 Pat 138 (140).
('19) 6 AIR 1919 Pat 345 (348).
7. † ('27) 14 AIR 1927 Lah 183 (184, 185).
8. ('14) 1 AIR 1914 All 351 (352) : 12 All L Jour 896 (896).
('23) 10 AIR 1923 Lah 288 (289).
† ('34) 21 AIR 1934 All 569 (571).
[*See* ('29) 16 AIR 1929 Lah 175 (176). (Under the section both Courts must have jurisdiction over the suit.)]
9. ('34) 21 AIR 1934 All 14 (16) : 56 All 201.
10. ('38) 25 AIR 1938 Pesh 15 (17).

Note 2

1. ('83) 9 Cal 980 (982).
2. ('12) 14 Ind Cas 561 (561) (Lah).

are several suits to be transferred, a separate application is necessary for each suit.[3] (See also S. 24 Note 3). Even before a *guardian ad litem* has been appointed to a minor defendant, any next friend of the minor may apply on his behalf under this section for transfer of the case to another Court.[4]

This section confers the right of applying. Section 23 indicates to which Court the application is to be made. Under this section such Court is to determine in which of the several Courts having jurisdiction the suit shall proceed. The question has arisen whether this power includes the power to order a transfer or only a power to declare in which Court the suit is to proceed. It has been held by the Nagpur High Court that the power includes the power to transfer.[5] But there is a conflict of decisions on the point. The conflict has arisen with reference to the question whether under this section a High Court has power to transfer a case to a Court subordinate to another High Court. For a discussion of the subject, see section 23 Note 4.

3. Notice to the other parties necessary before making application.— The provision as to notice under this section is mandatory. The words "*after* notice to the parties" indicate that the notice must be given *prior* to the making of the application and that the notice issued by the Court after the application is filed is not what is intended, so that where no notice is given before the application is made, the application must be dismissed.[1] It would seem that an application made *in the presence of the parties* may be assumed to be made after the notice required by the section.[2]

4. Grounds for transfer. — See Section 24.

5. Objections must be heard before making order. — The object of notice to the parties is to see if they have any objections to the application for transfer. Where a party does not file his objections on the first day, the Court may grant him further time to do so.[1]

6. Application, when to be made.—The provision as to the *time* of making the application is also mandatory and an application under the section must be made at the earliest possible opportunity and in cases where issues are settled, at or before such settlement.[1] Issues cannot, however, be settled until after all the parties are properly represented before the Court; as for instance, where a *guardian ad litem* is to be appointed for a minor defendant.[2] A party taking transfer proceedings in the trial Court and then approaching the High Court cannot be said to be guilty of laches.[3]

7. Transfer to Court subordinate to a different High Court. — See Section 23.

8. Stay of suit. — Under S. 20 of the old Code, where a suit which might be instituted in more than one Court was instituted in a Court within the local limits of whose jurisdiction the defendant or all the defendants did not reside or carry on business or personally work for gain, the defendant or defendants might obtain an order staying

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3. ('70) 2 N W P H C R 147 (147, 148).
4. ('89) 16 Cal 771 (776).
Also see O. 32, R. 5, Note 1.
5. ('40) 27 AIR 1940 Nag 145 (147) : ILR (1941) Nag 311 (DB).

Note 3

1. ('16) 3 AIR 1916 Lah 95 (96) : 1917 Pun Re No. 11. (Section 151 cannot empower the Court to ignore the section.)
('78) 2 Cal L Rep 352 (353).
('28) 15 AIR 1928 Lah 183 (183, 184).
† [But see ('35) 22 A I R 1935 All 979 (980). (Notice to other party should be given before making such application but notice given even after making transfer application is sufficient.)]
2. ('78) 2 Cal L Rep 352 (353).

Note 5

1. ('78) 2 Cal L Rep 352 (353).

Note 6

1. ('25) 12 AIR 1925 Lah 322 (322).
('25) 12 AIR 1925 Lah 175 (175).
2. ('14) 25 Ind Cas 723 (724) (Lah).
3. ('28) 15 AIR 1928 Mad 15 (15, 16).

the proceedings on the ground that justice was more likely to be done by the suit being instituted in some other Court.[1] This provision has now been dropped as unnecessary, because sufficient provision has been made for the *transfer* of suits in such cases.[2]

A Court has, of course, an inherent power to stay a suit where the ends of justice require it or to prevent the abuse of the process of the Court.[3]

9. Appeal. — An order under this section is not an appealable one. See S. 104.

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23. [Ss. 22, 23, 24.] (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court.

To what Court application lies.

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

[1877, Ss. 23 and 24; 1859, S. 13.]

Synopsis

1. Scope of the section.
2. "Appellate Court," meaning of.
3. Applicability of section to Chartered High Courts.
4. High Court's power to transfer to Court subordinate to a different High Court.
5. "Subordinate," meaning of. See Section 3.

1. Scope of the section. — This section indicates the Courts to which applications under S. 22 should be made, and should be read along with that section. See Notes on section 22.

The expression "High Court" in this section includes the Chief Court of Oudh.[1]

2. "Appellate Court," meaning of. — The words "Appellate Court" mean the Court to which ordinarily appeals will lie from the Court in which the suit has been filed.[1] If appeals lie to different Courts in *different classes* of cases from the same

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Note 8

1. ('27) 14 AIR 1927 Bom 79 (80) : 51 Bom 26.
('89) 13 Bom 178 (183). (Suit in Bombay High Court — The fact that defendants and witnesses resided in Wardha, in Central Provinces, does not necessarily show that justice is more likely to be done by the suit being filed in Wardha.)
('84) 8 Bom 571 (574). (Costs of previous litigation in foreign Court not paid—No ground for stay of suit.)
('01) 1901 All W N 136 (137).
('08) 35 Cal 541 (542). (Two suits in two Courts under different High Courts—Stay ordered under Ss. 20 and 24 of the Code of 1882.)
('05) 9 Cal W N 748 (749). (Same matter in litigation in High Court and in Small Cause Court — Stay of small cause suit ordered under S. 20.)
('95) 3 Mad L Jour 270 (272). (Where proceedings were stayed, plaintiff was entitled to reinstitute the suit in another Court without paying any additional court-fee.)
(1882) 22 Ch D 397 (406), McHenry v. Levis.
(1883) 23 Ch D 225 (229, 230), The Brovian Guano Company v. Bockwoldt.
2. ('27) 14 AIR 1927 Bom 79 (80) : 51 Bom 26.
3. See S. 151 and Notes thereon.

Section 23—Note 1

1. ('34) 21 AIR 1934 All 14 (15): 56 All 201 (DB).

Note 2

1. ('23) 10 AIR 1923 Rang 22 (22) : 11 Low Bur Rul 446 (DB). (Overruled on another point in AIR 1934 Rang 265 : 12 Rang 548 (FB).)

subordinate Court, the application should apparently be made to that Court to which an appeal would lie in the *class* to which the suit belongs.

3. Applicability of section to Chartered High Courts. — The section provides that an application under S. 22 shall be made to the Appellate Court where the several Courts in which a suit may be instituted are *subordinate* to such Appellate Court. The High Courts of Rangoon,[1] Madras,[2] Calcutta[3] and Patna[4] have held that for the purpose of transfer applications from the original side of the High Court, the Judge sitting on the original side is not subordinate to the High Court. An earlier decision of the Lahore High Court[5] has also taken the same view, but a later case[6] of the same High Court has taken a contrary view. The Rangoon High Court has held that though this section does not prescribe the Court to which an application is to be made in a case in which a suit pending on the original side of a *High Court* is desired to be transferred to another High Court or to a Court subordinate to another High Court, the High Court in which the suit is pending has *inherent* power to transfer the case.[7] The Nagpur High Court has also pointed out that this section and S. 22 do not provide for cases in which the alternative Courts or any of them is itself a High Court.[8] This is also pointed out by other High Courts but the tendency is to hold that the High Court has *inherent* power to transfer in such cases. See Note 4 for further particulars of this discussion.

4. High Court's power to transfer to Court subordinate to a different High Court. — There is a conflict of opinion as to whether a High Court has power to transfer a suit pending in a Court within its appellate jurisdiction to a Court within the jurisdiction of another High Court. The High Court of Bombay,[1] the High Court of Patna in the undermentioned case[2] and the High Court of Nagpur[3] have held that a High Court has such power under Ss. 22 and 23. According to these decisions, the power conferred by S. 22 to "determine in which of the several Courts the suit shall proceed" includes the power to *transfer* the case. On the other hand, other rulings of the Patna High Court,[4] the Upper Burma Judicial Commissioner's Court,[5] and the Oudh Judicial Commissioner's Court[6] have held that there is no such power. They have held, however, that the High Court could *declare* that the suit is to be proceeded with in the other Court, that the effect of the order would be to stay the suit in the Court from which the transfer was asked for and that the only course open to the latter Court is to *return the plaint* for presentation to the proper Court.[7] According to the Rangoon High Court, a High Court on whose original side a suit is pending has *inherent* power to transfer it to a Court subordinate to a different High Court.[8] Similarly, the Allahabad High Court has held that where a suit is pending in a Court subordinate to a certain High Court,

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Note 3

1. ('34) 21 AIR 1934 Rang 265 (265) : 12 Rang 548 (FB). (AIR 1923 Rang 22 : 11 Low Bur Rul 446 overruled.)
2. ('15) 2 AIR 1915 Mad 608 (611) (DB).
3. ('27) 14 AIR 1927 Cal 290 (291) (DB).
('29) 16 AIR 1929 Cal 358 (364): 56 Cal 940 (DB). (The opinion was however an obiter dictum.)
4. ('20) 7 AIR 1920 Pat 365 (365).
5. ('24) 11 AIR 1924 Lah 306 (306).
6. ('28) 15 AIR 1928 Lah 183 (184).
7. ('34) 21 AIR 1934 Rang 265 (266) : 12 Rang 548 (FB). (The application is to be made to the original side of the High Court in which the suit is pending.)
8. ('40) 27 AIR 1940 Nag 145 (146) : ILR (1941) Nag 311 (DB).

Note 4

1. ('27) 14 AIR 1927 Bom 79 (80) : 51 Bom 26 (DB).
2. ('28) 15 AIR 1928 Pat 610 (610).
3. ('40) 27 AIR 1940 Nag 145 (148) : ILR (1941) Nag 311 (DB). (AIR 1916 Nag 31 : 13 Nag L R 81 overruled.)
4. ('20) 7 AIR 1920 Pat 138 (141).
5. ('09) 4 Ind Cas 814 (815) : 1907-09 Upp Bur Rul C P C 25. (Following 2 All 241 and 5 All 60.)
6. ('13) 20 Ind Cas 758 (759) (DB) (Oudh).
7. See the cases in foot-notes (4), (5) and (6).
See also the following case under the old Code:
('69) 11 Suth W R 189 (189). (Application under S. 6 of the Code of 1859.)
8. ('34) 21 AIR 1934 Rang 265 (266) : 12 Rang 548 (FB).

such High Court has inherent power to transfer it for trial to the original side of another High Court.[9] The Lahore High Court also seems inclined to the same view.[10] These decisions concede that Ss. 22 and 23 are not directly applicable and proceed on the ground of inherent power.

It has been held by the High Court of Allahabad that when the plaintiff has chosen a *forum* in utter disregard of the convenience of both parties for some ulterior object and in abuse of his position as *dominis litis*, the High Court can, in the exercise of its inherent power, determine which of two Courts having jurisdiction should try the suit.[11]

5. "Subordinate," meaning of. — See Section 3.

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24. [S. 25.] (1) On the application of any of the parties[3] and after notice[10] to the parties and after hearing such of them as desire to be heard, or of its own motion[4] without such notice, the High Court or the District Court[5] may, at any stage[6]—

General power of transfer and withdrawal.

(*a*) transfer any suit, appeal or other proceeding[7] pending before it[8] for trial or disposal to any Court subordinate to it[9] and competent to try[11] or dispose of the same, or

(*b*) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(*i*) try or dispose of the same; or

(*ii*) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(*iii*) re-transfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either re-try it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes[15] shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

[1877, Ss. 15 and 25; 1859, latter part of S. 6.]

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9. ('34) 21 AIR 1934 All 14 (17): 56 All 201 (DB).
10. *See* ('24) 11 AIR 1924 Lah 306 (306). (Point stated to be "admitted" by counsel.)
11. ('34) 21 AIR 1934 All 14 (17): 56 All 201 (DB).

Synopsis

1. Legislative changes.
2. Scope and applicability of the section.
3. "On the application of any of the parties."
4. "Of its own motion."
5. "District Court," meaning of.
6. "At any stage."
7. "Suit, appeal or other proceeding."
8. Suit must be "pending" in Court from which it is transferred.
9. "Court subordinate to it"—Clause (3).
10. Notice of application is necessary.
11. Court to which proceeding is transferred must be competent to try it.
12. No transfer where Court of institution has no jurisdiction.
13. Grounds of transfer.
14. Absence of order for transfer—Effect.
15. Effect of transfer from or to a Court of Small Causes.
15a. Suit transferred — Power of Court from which suit is transferred.
16. Procedure of Court of transfer.
17. Appeal.
18. Revision.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Adverse decision on point of law in a connected suit as ground of transfer. See Note 13.
After hearing such of them as desire to be heard. See Note 10.
Applicability of Section 476, Criminal Procedure Code. See Note 7.
Chartered High Courts. See Note 2.
Defect in jurisdiction — If cured by subsequent transfer. See Note 12.
Form. See App. H, Form No. 2.
General power of transfer. See Note 2.
Power of transfer—Whether can be delegated. See Note 5.
Power to stay suit. See Note 2.
Power to transfer remanded case. See Note 6.
Re-transfer. See Note 6.
Sub-clause (a). See Note 9.
Sub-clause (b). See Note 9.
Sub-section (2). See Note 16.
Sub-section (4). See Note 11.
Transfer from Presidency Small Cause Court to High Court. See Note 2.
Transfer of applications under special Acts. See Note 7.
Transfer of review application. See Note 11.

1. Legislative changes.

(a) The words "at any stage" are new. See Note 6.
(b) Clause *(a)* of sub-s. (1) is new. See Note 2.
(c) The provision for *re-transfer* in cl. *(b) (iii)* of sub-s. (1) is new. See Note 2.
(d) Sub-section (2) is new. See Note 14.

2. Scope and applicability of the Section. — It has been seen under S. 22 that that section has reference to cases which, *at the option of the plaintiff*, can be brought in more Courts than one.[1] This section is much wider, and gives a *general* power of transfer of all suits, appeals or other proceedings, which can be exercised by the Court *of its own motion* and *at any stage* of the suit. The power exercised under this section is more extensive than that under S. 39 inasmuch as the transfer under the latter section can be made only to the *Courts specified therein*.[2] This section, again, contemplates the transfer of a *particular* case and differs in this respect from S. 150 which relates to the transfer of the *whole business* of the Court to another Court.[3]

In order that this section may apply, it is essential that —

(a) the Court in which the suit has been instituted has *jurisdiction* to entertain it ;[4]

(b) the Court to which it is transferred is one competent to try it;[5] and

(c) the Court to which it is transferred is *subordinate* to the High Court or District Court which orders the transfer.[6]

Section 24 — Note 2

1. See Note 1 on S. 22.
[*See also* ('29) 16 AIR 1929 Sind 170 (171) : 23 Sind L R 365.]
2. † ('26) 13 AIR 1926 Mad 421 (425) : 49 Mad 746 (DB).
3. ('17) 4 AIR 1917 Mad 272 (273) (DB).
4. See Note 12.
5. See Note 11.
6. See Note 9.

If the application for transfer to the District Judge proves ineffective, the High Court may be moved by a fresh application for transfer.[7]

Section 25 of the old Code provided only for *withdrawal* of suits from subordinate Courts and for transfer of the suits *so withdrawn*. The Calcutta High Court had held, in a case arising under that section,[8] that the section was not exhaustive and that the District Court had an inherent power to transfer a case itself to a subordinate Court. The same view was assumed by the Madras High Court also.[9] Sub-section (1) cl. (a) now expressly confers this power.[10]

A Court has no power under this section *to stay* a suit. For its power to do so under other provisions of the Code, see Ss. 10, 22 and 151.

This section applies to the Small Cause Courts.[11]

This section has no application to suits or proceedings under the Divorce Act, 1869, as S. 8 of that Act specifically deals with transfers.[12]

3. "On the application of any of the parties."— Where there are several suits pending which are sought to be transferred, an application should be made in each suit.[1] But in the undermentioned case[2] where a number of suits were tried together and disposed of by the same judgment and from this judgment two appeals were preferred to the High Court and were pending there and a number of other appeals were filed against the same judgment in the District Court, it was held that a single application made to the High Court for the transfer to itself of the appeals from the District Court was sufficient and separate applications were not necessary. The reason given was that in such a case the application to the High Court must be treated not as an *independent* application but as an application in the appeal already pending before the High Court. The Court may in proper cases dispense with an affidavit in support of the application.[3] Where there has been a delay in making the application, such delay should be explained.[4]

See also S. 22 Note 2.

The word "parties" refers to those litigating the suit, appeal, or other proceeding of which the transfer is sought.[5] A person acting on behalf of a minor defendant in a suit, before a guardian *ad litem* is appointed, will be a "party" within the meaning of this section;[6] so also a creditor in an insolvency proceeding under Chapter XX of the old Code.[7]

Even where the High Court has refused to transfer a case *suo motu*, it can do so on an application for transfer.[8]

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7. † ('10) 5 Ind Cas 771 (771) (DB) (Cal).
NOTE.— Where, however, no application is made to the District Judge and no communication is made to the plaintiff, High Court will not exercise any special powers for that purpose: see ('69) 11 Suth W R 189 (189).
('26) 13 AIR 1926 Cal 326 (327) (DB).
('27) 14 AIR 1927 Pat 383 (384). (High Court can transfer under this section as also under its general powers of superintendence.)
8. ('09) 36 Cal 193 (203) : 1 Ind Cas 913 (917) (DB). [But see ('05) 32 Cal 875 (881) (DB).]
9. ('85) 8 Mad 500 (502) (DB).
10. *See* ('29) 16 AIR 1929 Cal 358 (364) : 56 Cal 940 (DB). (Section 24 expressly confers certain powers on the High Court in its original jurisdiction.)
11. ('99) 3 Cal W N 247 (248) (DB). (Presidency Small Cause Courts.)
12. ('42) 29 AIR 1942 Cal 546 (549) : ILR (1942) 2 Cal 461 (SB).

Note 3

1. ('19) 6 AIR 1919 Pat 376 (377) : 4 Pat L Jour 13 (DB).
('70) 2 N W P H C R 147 (147, 148) (DB).
2. ('40) 27 AIR 1940 Cal 84 (85) : I L R (1939) 2 Cal 264 (DB). (As many applications as there were pending appeals in District Court held not necessary.)
3. ('12) 14 Ind Cas 561 (561) (Lah).
4. ('09) 3 Ind Cas 539 (541) (DB) (Cal).
5. ('16) 3 AIR 1916 Nag 123 (125) : 13 Nag L R 203.
6. ('89) 16 Cal 771 (776).
7. (98) 22 Bom 778 (782, 783) (DB).
8. ('23) 10 AIR 1923 All 153 (158) (DB).

4. "Of its own motion." — The High Court or the District Court has power to transfer, under this section, *suo motu* without any application by a party.[1] Where a Court takes action on the application of a non-party treating him as a party erroneously, the transfer order will be deemed to have been made *suo motu*.[2]

5. "District Court," meaning of. — "District Court" means the principal Civil Court of original jurisdiction.[1] It is only a District Court or a High Court that can exercise powers under this section.[2] The District Court, in this section, means a Court of unlimited pecuniary jurisdiction. An Assistant Judge, appointed under the Bombay Civil Courts Act, whose pecuniary jurisdiction is a *limited* one, cannot order a transfer under this section.[3]

Under S. 37 of the Punjab Courts Act (VI of 1918), the District Judge may, with the previous sanction of the High Court, delegate to any Subordinate Judge in his district, the powers conferred on a District Court by this section.[4] But such power can only be exercised in cases pending in a Court *subordinate* to the Court exercising the power.[5]

Merely because there is a notification issued under S. 39 (3) of that Act by the High Court enabling certain classes of appeals to be preferred to and disposed of by the Senior Sub-Judge which but for the notification would lie to the District Judge only, it cannot be said that such a Senior Sub-Judge is a District Court for purposes of this section.[6]

6. "At any stage." — There was a conflict of decisions under the old Code as to whether a suit could be withdrawn or transferred *after the hearing had once commenced*.[1] There was also a conflict of opinion as to whether the District Court could

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Note 4

1. ('41) 28 AIR 1941 Bom 69 (70, 71): ILR (1941) Bom 131 (DB). (Order made by High Court *ex majore cautela* in order to save difficulty and delay.)
('97) 22 Bom 778 (783) (DB).
('33) 20 AIR 1933 Lah 671 (675) : 14 Lah 779.
('36) 23 AIR 1936 Mad 55 (56) (FB).
2. ('16) 3 AIR 1916 Nag 123 (126) : 13 Nag L R 203.

Note 5

1. See S. 2 (4). (In Punjab under Ss. 34 and 38 of Act XVIII of 1884 the Commissioner and Deputy Commissioner as Divisional Judges may exercise the powers of a District Court. In Burma and the Central Provinces a Divisional Court may exercise the powers of a District Court. See S. 31 of Act VI of 1900, Burma, and S. 18 (1) of Act II of 1904. For Courts exercising powers of District Court in Ajmere and Merwara, see Ss. 2 and 26 of Regulation I of 1877.)
('36) 23 AIR 1936 Sind 160 (162) : 30 Sind L R 226 (DB). (The Court of the first class Sub-Judge is neither a High Court nor a District Court.)
2. ('35) 22 AIR 1935 Bom 286 (287): 59 Bom 466 (DB). (Senior Subordinate Judge can transfer case from one Subordinate Judge attached to his Court to another for administrative convenience — But when once a Judge has taken cognizance of a case, any order removing the suit from his file is an order of transfer and such order can be passed only by the District Judge or High Court.)
('39) 26 AIR 1939 Bom 485 (486) : I L R (1939) Bom 472. (Do.—Assumed.)
3. ('10) 34 Bom 411(415, 416): 6 Ind Cas 518 (519) (DB).
4. ('39) 26 AIR 1939 Lah 578 (579).
('17) 4 AIR 1917 Lah 37 (38).
5. ('19) 6 AIR 1919 Lah 27 (28) : 1 Lah 158.
For the powers of delegation under other Acts, see S. 13 of the Burma Courts Act XI of 1922 and S. 76 of the N. W. F. P. Law and Justice Regulation VII of 1901.
6. ('39) 26 AIR 1939 Lah 578 (579). (Application for transfer should be filed before District Judge and not before such Sub-Judge as the latter does not cease to be subordinate to the District Court.)

Note 6

1. ('88) 15 Cal 177 (179) (DB). (No.)
(1900) 23 Mad 314 (317) (DB). (No.)
('75) 1 All 180 (181) (FB). (Execution proceedings could be transferred.)
('74) 6 N W P H C R 80 (83, 84) (DB). (No. If however it is transferred and parties do not object, they cannot later on in appeal raise any objection.)
('98) 22 Bom 778 (781). (Execution proceedings may be transferred.)
('94) 18 Bom 61 (64). (Do.)
('80) 5 Bom 680 (681). (Do.)
('06) 10 Cal W N 12 (13). (Could be transferred though part-heard.)
('05) 32 Cal 875 (881, 882). (No.)
('75) 23 Suth W R 1 (3). (No.)
('72) 17 Suth W R 45 (45). (Code does not authorise District Judge to transfer execution cases.)
('71) 15 Suth W R 574(575). (Execution case cannot be transferred.)

re-transfer a case once withdrawn or transferred,[2] and whether it could transfer or withdraw a case *remanded* by the High Court.[3] The addition of the words "at any stage" and the addition of clause (1) (b) (iii) has now set the conflict at rest. It has accordingly been held that a District Court to which an appeal has been remanded by the High Court for disposal has power to transfer it to a Subordinate Court[4] unless the High Court's order is drawn up in express terms so as to disclose a clear intention of limiting those powers.[5] Similarly, execution proceedings may now be transferred under S. 24 to a Subordinate Court[6] as the words "at any stage of the suit" will include execution proceedings also.[7]

7. **"Suit, appeal or other proceeding."** — It has been seen in Note 6 above that the word "suit" in this section includes execution proceedings also.[1] The old section did not contain the words "other proceedings" but it was held that the procedure of the section applied to miscellaneous proceedings by virtue of section 647 corresponding to the present S. 141.[2] The present S. 24 will, independently of S. 141, include such proceedings.[3] The proceeding must, however, be a *civil* proceeding. As to whether a disciplinary proceeding under the Legal Practitioners Act is a civil proceeding, see S. 141 Note 6. The section will not also apply to special proceedings which were not in contemplation when the Code of 1908 was passed. Thus, S. 24 cannot be applied to proceedings under S. 476 of the Criminal Procedure Code as amended by Act XVIII of 1923 though such proceedings may be pending in a *civil* Court. (See the Authors' Commentaries on the Code of Criminal Procedure, 2nd (1941) Edn., S. 476, Notes 23 and 24.) For powers of transfer under other Acts, see the undermentioned Acts.[4] See also the undermentioned case.[5]

('70) 13 Suth W R 398 (399). (No.)
(1862) 1 Hay 459 : Marsh 195.
('10) 8 Ind Cas 492 (493) (Mad). (No.)
('03) 26 Mad 595 (596). (Could be transferred.)
('84) 7 Mad 592(594). (Execution proceedings could be transferred.)
('83) 6 Mad 357 (359). (Do.)
('07) 10 Oudh Cas 139 (141). (Execution proceedings cannot be transferred.)
('98) 1 Oudh Cas 117 (Execution proceedings could be transferred.)

2. ('02) 24 All 304 (306). (No.)
('02) 24 All 356 (357). (No.)
('98) 20 All 395 (396). (No.)
('89) 13 Bom 654 (655, 656). (No.)
('06) 10 Cal W N 902 (903). (No.)
('06) 10 Cal W N 841 (843). (Yes.)
('07) 1907 Pun L R No. 53. (Yes.)

3. ('71) 15 Suth W R 574 (575). (No.)
('93) 15 All 315 (316). (No.)
('99) 21 All 230 (231). (No.)
('92) 14 All 531 (534). (No.)
('70) 2 N W P H C R 481 (482). (No.)
(1865) 3 Suth W R 147 (149). (Yes.)
('15) 2 AIR 1915 Mad 446 (447). (If remanded, and is not objected to, it is only a mere irregularity.)

4. ('12) 9 Nag L R 40 (41) : 19 Ind Cas 552 (553). (3 Suth W R 147 dissented from.)
('14) 1 AIR 1914 Cal 638 (640) (DB). (Remand to District Judge without liberty to transfer—Transfer to Subordinate Judge agreed to by parties — Parties cannot resile from the position.)
('14) 1 AIR 1914 All 236 (238).
[*See also* ('15) 2 AIR 1915 Mad 446 (447).]

5. ('22) 9 AIR 1922 All 35 (36): 44 All 211 (DB).
[*See also* ('33) 20 AIR 1933 Lah 29 (31) : 13 Lah 806. (Remand by Additional District Judge to a Sub-Judge — The proceeding may be transferred by District Judge to another Sub-Judge.)]

6. ('26) 13 AIR 1926 Mad 421 (425) : 49 Mad 746 (DB).
[*See also* ('15) 2 AIR 1915 Mad 920 (920) : 39 Mad 485. (Execution proceeding transmitted — Court has power to withdraw it.)]

7. ('25) 12 AIR 1925 All 276(277):42 All 57 (DB).

Note 7

1. *See* ('36) 23 AIR 1936 Pesh 56 (57).

2. ('87) 9 All 180 (182, 183). (Proceeding under the Indian Companies Act.)
('84) 8 Mad 546 (550) (FB). (Claim proceedings under old S. 331.)

3. ('39) 26 AIR 1939 Lah 463 (465) (DB). (Proceedings pending in High Court under Ss. 301 and 302, Succession Act and proceedings under S. 317 in District Court — High Court held could under S. 24 transfer latter proceedings to itself at any stage.)
[*See* ('12) 8 Nag L R 51 (53) : 15 Ind Cas 565 (566). (Application to set aside *ex parte* decree—Appellate Court can withdraw it.)

4. Burma Courts Act, XI of 1922, S. 12; Oudh Courts Act, IV of 1925, Ss. 7, 45; Bengal, Agra and Assam Civil Courts Act, XII of 1887 ; Divorce Act (1869), S. 8.

5. ('38) 25 AIR 1938 Oudh 217 (218) : 14 Luck 272. (The phrase 'other proceeding' is sufficiently general to cover the case of the transfer of the disposal of one claim under the U. P. Encumbered Estates Act, from the Court of one Special Judge to the Court of another.)

8. Suit must be "pending" in Court from which it is transferred.— Under S. 25 of the old Code a District Judge had no power to transfer a case pending *before himself*.[1] Clause (a) of sub-s. (1) has now been added with a view to remove this disability.[2] The provisions of the section can have no application to a proceeding which has terminated.[3]

9. "Court subordinate to it" — Clause (3). — The District Court or the High Court can order a transfer under this section only to a Court *subordinate* to it.[1] A subordinate Court even when by delegation it is performing some of the functions of the District Court still remains subordinate to the District Court.[2] For subordination of Courts in general, see S. 3. Clause (3) of this section declares that for the purpose of this section, Courts of Assistant and Additional Judges shall be deemed to be subordinate to the District Court. A District Judge can therefore transfer a case pending before him to the Court of the Additional District Judge.[3] A junior Subordinate Judge is not subordinate to a senior Subordinate Judge within the meaning of this section.[4] The Divisional Judge of Nagpur is not subordinate to the High Court of Bombay though his decree for dissolution of marriage is subject to the confirmation of the Bombay High Court. The latter Court cannot therefore transfer the proceeding filed before it to the Nagpur Court for disposal.[5]

"Court" in this section means the Court to which the Code applies.[6] Thus, a suit pending in a scheduled district cannot be transferred to another Court under this section, as the Code is *inapplicable to the scheduled districts*.[7]

This section does not empower the District Court or the High Court to transfer a suit to any Court beyond the local limits of its own jurisdiction.[8] Nor does it empower them to transfer cases or matters over which they themselves have no jurisdiction.[9] The Courts having jurisdiction under the Provincial Insolvency Act are declared by S. 3 of that Act to be the District Courts. The High Court has thus no power to act under that Act. Hence, it cannot transfer an insolvency proceeding pending before a District Court to the file of the High Court Judge exercising insolvency jurisdiction.[10]

Note 8

1. ('89) 13 Bom 654 (655, 656).
(1900) 10 Mad L Jour 238 (239).
('05) 32 Cal 875 (881).
2. ('14) 1 AIR 1914 Lah 187 (190) : 1915 Pun Re No. 3 (DB).
3. ('37) 24 AIR 1937 Nag 381 (383) : I L R (1940) Nag 496 (DB). (Section 24 (1) (b) has no application to a proceeding which has terminated.)
[*See also* ('40) 27 AIR 1940 Oudh 164 (170) : 15 Luck 619 (DB). (Suit filed in Munsif's Court — Case going to Privy Council after appeal to District Court and High Court — Privy Council remanding case for re-trial— High Court in compliance with order of Privy Council sending case to Civil Judge for re-trial — Case held could not be said to be pending in Munsif's Court when High Court sent it to Civil Judge for re-trial — This section does not apply to such transfer.)]
[But see ('38) 25 AIR 1938 Oudh 217 (218).]

Note 9

1. † ('19) 6 AIR 1919 Lah 27 (28) : 1 Lah 158.
('16) 3 AIR 1916 Nag 31 (32) : 13 Nag L R 81.
('66) 1 Agra 178 (179) (DB). (Munsif's Court is subordinate to High Court.)
('05) 7 Bom L R 143 (143). (High Court transferring case from Small Cause Courts of Bombay.)
('01) 4 Bom L R 970 (971) (DB). (High Court transferring from one mamlatdar's Court to another.)
('10) 5 Ind Cas 771 (771) (DB) (Cal). (Munsif's Court is subordinate to High Court.)
(1865) 4 Suth W R (Misc) 7 (7) (DB). (District Court is subordinate to High Court.)
2. ('39) 26 AIR 1939 Lah 578 (579). (Senior Subordinate Judge empowered by notification under S. 39 (3), Punjab Courts Act, 1918, to hear appeals lying to District Judge — District Judge can transfer appeal pending before such Judge.)
3. ('12) 13 Ind Cas 6 (7) (DB) (Lah).
4. ('19) 6 AIR 1919 Lah 27 (28) : 1 Lah 158.
5. ('15) 2 AIR 1915 Bom 261 (261, 262) : 40 Bom 109 (DB). (Petition for alimony.)
6. ('94) 1894 Bom P J 175 (175) (DB).
7. (1900) 23 Mad 329 (351) (DB).
8. ('24) 11 AIR 1924 Nag 152 (152).
('82) 5 All 60 (62) (DB).
('02) 29 Cal 498 (499) (DB).
9. See the cases in foot-note (10).
('04) 7 Oudh Cas 142 (143). (Partition cases under Ss. 191 and 192 of the U. P. Act III of 1901— Judicial Commissioner can exercise no jurisdiction in respect of such cases.)
10. † ('27) 14 AIR 1927 Rang 105 (107) : 4 Rang 554.
† ('28) 15 AIR 1928 Mad 1091 (1092): 52 Mad 57.

10. Notice of application is necessary. — Where a Court acts under this section *suo motu*, no notice need be given[1] though *after* the transfer is made the parties should be informed that the case has been transferred.[2] But where a *party applies* for transfer the procedure as to notice becomes imperative, and a transfer or withdrawal without notice will be set aside on the ground of illegality or material irregularity.[3] The notice however may be *waived* by the party concerned as the provision is one of procedure and practice.[4] The Allahabad High Court has in the undermentioned cases[5] held that a transfer without notice is *without jurisdiction*. It is submitted that this view does not seem to be sound. The section gives the District Judge jurisdiction to transfer *suo motu* without notice. That shows that the question of notice cannot be a question of jurisdiction and that a transfer without notice is only an irregular exercise of jurisdiction.[6] Where in an application for transfer the Court was also asked to exercise its power to act *suo motu* under this section, the Madras High Court held that the order of transfer without notice was not even a *material* irregularity.[7]

11. Court to which proceeding is transferred must be competent to try it.—A superior Court cannot make an order of transfer of a case unless the Court to which the transfer is sought to be made has jurisdiction to try it.[1] The word "competent" in this section does not refer to *territorial* jurisdiction[2] but only to the *pecuniary value*

Note 10

1. ('20) 7 AIR 1920 All 249 (249).
('36) 23 AIR 1936 Mad 55 (56) (FB).

2. ('23) 10 AIR 1923 Lah 444 (445). (Transfer without notice — *Ex parte* decree set aside.)
('18) 5 AIR 1918 Pat 341 (342) : 3 Pat L Jour 218 (SB).
[*See also* ('30) 17 AIR 1930 Lah 439 (440). (Defendants not taking interest in the suit and refusing to appear even though served—Doubted if notice was necessary.)]

3. † ('16) 3 AIR 1916 Nag 123 (125, 126) : 13 Nag L R 203.
† ('33) 20 AIR 1933 All 178 (178) : 53 All 916 (DB).
† ('26) 13 AIR 1926 All 17 (18) (DB).
('70) 2 N W P H C R 481 (482) (DB).
('16) 3 AIR 1916 Cal 859 (859) (DB).
† ('25) 12 AIR 1925 Lah 189 (189).
('17) 4 AIR 1917 Lah 37 (38).
('10) 8 Ind Cas 7 (7) (DB) (Mad).
('97) 10 C P L R 94 (94).
('23) 10 AIR 1923 Oudh 240 (240) : 26 Oudh Cas 62. (But it is not such an irregularity as to justify an interference in revision.)
† ('20) 7 AIR 1920 Oudh 213 (213) : 23 Oudh Cas 216 (DB).
[*See* ('33) 20 AIR 1933 Lah 635 (636). (No notice by the party before application is necessary.)]
[But see ('32) 19 AIR 1932 Cal 265 (266). (Such transfer without notice is an irregularity—If no prejudice is proved jurisdiction of transferee Court is not affected.)]

4. ('89) 13 Mad 211 (213) (DB).
('12) 1912 Pun W R No. 143, p. 382.

5. ('20) 7 AIR 1920 All 249 (249). (*Held*, action without jurisdiction.)
('26) 13 AIR 1926 All 17 (18) (DB).

6. ('16) 3 AIR 1916 Nag 123 (126) : 13 Nag L R 203.
('32) 19 AIR 1932 Cal 265 (266).

7. ('10) 8 Ind Cas 7 (7) (DB) (Mad). (The irregularity is a mere defect of form.)

Note 11

1. ('18) 5 AIR 1918 Mad 483 (483).
('14) 1 AIR 1914 Mad 677 (677) : 38 Mad 472 (DB). (District Court not competent to try insolvency petition.)
('35) 22 AIR 1935 All 696 (696) : 58 All 85 (DB).
('31) 18 AIR 1931 All 28 (29) : 53 All 62 (DB).
('10) 34 Bom 411 (414,415):6 Ind Cas 518 (519)(DB).
('10) 37 Cal 574 (577) : 6 Ind Cas 97 (98) (DB).
('99) 3 Cal W N 247 (248) (DB). (High Court can transfer suit from Court of Small Causes, Calcutta, to any other Court of equal or superior jurisdiction.)
('18) 5 AIR 1918 Mad 100 (101). (Court established with power to try suits instituted after 1916—Suit instituted before 1916 in another Court cannot be transferred to it.)
('20) 7 AIR 1920 Pat 29 (30) : 5 Pat L Jour 588 (DB). (Munsif specially empowered to try suits up to Rs. 2000 in cases arising within the local limits of his jurisdiction—Case before a Subordinate Judge of a different locality for less than Rs. 2000 cannot be transferred to the former munsif.)
('03) 2 Low Bur Rul 117.

2. ('42) 29 AIR 1942 Oudh 1 (8) : 17 Luck 249 (DB). (Execution petition pending in one Court transferred to another Court — Latter Court has jurisdiction to issue warrant for delivery of possession of property in jurisdiction of former Court.)
('40) 27 AIR 1940 Rang 133 (134) (DB). (Where mortgage suit or execution proceeding is transferred under S. 24 by the High Court to a Court which has otherwise no territorial jurisdiction, the Court can order sale of the property lying outside its local limits.)
('26) 13 AIR 1926 Mad 421 (425): 49 Mad 746 (DB).
('23) 10 AIR 1923 All 249 (249) (DB). (Court having no territorial jurisdiction in which suit was filed, returning plaint—High Court can transfer the case to that Court.)

and the *nature* of the suits which the Court has power to try.[3]

Illustrations.

(A) *A* files a suit in the Subordinate Judge's Court at Madura for recovery of Rs. 6,000 due on a mortgage. The High Court has power to transfer the same to the Court of the Subordinate Judge of Rajahmundry. Here the latter Court has no *territorial* jurisdiction over the suit, though competent to try it in respect of the *pecuniary* value and the *nature* of the suit.[4]

(B) *A* files a suit against *B* in the Subordinate Judge's Court at *X* for recovery of Rs. 6,000 on a mortgage. The suit cannot be transferred to the District Munsif's Court at *X* having pecuniary jurisdiction only up to Rs. 3,000.[5] In this case though there is territorial jurisdiction, there is no *pecuniary* jurisdiction.

(C) *A* files a suit under S. 92 of the Code in the District Court at *X*. The case cannot be transferred to the Additional District Judge, under this section, though the latter has *territorial* as well as *pecuniary* jurisdiction over the matter. The reason is that suits of *that nature* should be instituted in the *principal Civil Court of original jurisdiction* or in any other Court empowered in that behalf by the Provincial Government.[6]

For other cases of want of jurisdiction, as regards the *nature* of the proceeding, see the undermentioned cases.[7]

There is one exception to the rule that a suit cannot be transferred to a Court not having jurisdiction to try it, and it is indicated by sub-s. (4) of this section. Under that sub-section where a small cause suit is transferred to another Court, that Court must be *deemed* for the purposes of that suit to be a Court of Small Causes. This clearly shows that a small cause suit can be transferred to a Court which *is not invested with small cause powers.*[8] *A fortiori*, a suit instituted in a Court of Small Causes can be

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† ('33) 20 AIR 1933 Oudh 154 (155) : 8 Luck 347 (DB).
[*See also* ('32) 19 AIR 1932 Mad 683 (683) : 55 Mad 960.]
[But see ('33) 20 AIR 1933 All 178 (178) : 53 All 916 (DB). (Competency means both pecuniary and territorial competency.)]

3. ('85) 7 All 230 (239) (FB).
('32) 19 AIR 1932 All 660 (661) : 54 All 824 (DB).
('32) 19 AIR 1932 Bom 486 (487) : 56 Bom 387 (DB).
[*See also* ('41) 28 AIR 1941 Bom 69 (71) : I L R (1941) Bom 131 (DB). (Suit instituted in proper Court—Transfer for disposal to another Judge of same Court—Amendment of plaint taking suit beyond pecuniary jurisdiction of Judge—Judge becomes *functus officio*.)]

4. *See* ('26) 13 AIR 1926 Mad 421 (425) : 49 Mad 746 (DB).

5. *See* ('85) 7 All 230 (239) (FB).
NOTE. — But a suit in a Munsif's Court can be transferred to a Sub-Court though the consequence is that the latter has to try it as a small cause suit and thus deprive the parties of the right to appeal: AIR 1917 Cal 616 (616) : 36 Ind Cas 881 (881) and AIR 1929 Cal 354 (357) : 56 Cal 588.

6. ('14) 1 AIR 1914 Cal 616 (616, 617) : 41 Cal 866 (DB).
('19) 6 AIR 1919 Oudh 311 (313) : 22 Oudh Cas 93.
[*See also* ('35) 22 AIR 1935 Bom 172 (173) : 59 Bom 412. (Suit instituted in District Court cannot be transferred to Sub-Court — Authorisation of latter Court by local Government to "hear" suits under S. 92 held not enough.)]
Also see S. 92 Note 38.

7. ('27) 14 AIR 1927 Mad 321 (322). (Summary application in ejectment suit exclusively triable by Presidency Small Cause Court, cannot be transferred to the City Civil Court.)
('18) 5 AIR 1918 Mad 483 (483). (Small cause suit cannot be transferred to City Civil Court—See S. 3, Madras City Civil Courts Act.)
('70) 2 N W P H C R 230 (232). (Review application should be tried by the same Judge who disposed of the matter — Therefore it cannot be transferred to another Judge.)
('14) 1 AIR 1914 Mad 677 (677) : 38 Mad 472.
('10) 8 Ind Cas 7 (8) (Mad). (Petition under O. 39, R. 2 (3) could only be made to Court granting the injunction—Therefore the petition cannot be transferred under this section.)
('19) 6 AIR 1919 Nag 143 (144). ("Other proceedings" do not include an application for review.)

8. ('40) 27 AIR 1940 Mad 9 (9) : ILR (1940) Mad 251 (DB). (Section 3, Madras City Civil Courts Act, is no bar to transfer of suit in Small Cause Court to City Civil Court in view of S. 5 of the same Act.)
('32) 19 AIR 1932 Nag 49 (49) : 27 Nag L R 307.
† ('32) 19 AIR 1932 Mad 683 (684) : 55 Mad 960 (DB).
† ('35) 22 AIR 1935 All 690 (691).
('35) 22 AIR 1935 All 574 (575).
('35) 22 AIR 1935 All 350 (351) (DB).
('34) 21 AIR 1934 All 530 (531).
† ('32) 19 AIR 1932 Bom 486 (488) : 56 Bom 387 (DB).
('34) 21 AIR 1934 Lah 901 (901, 902). (Provincial Small Cause Courts Act, IX of 1887, S. 16—S. 16 is no bar to transfer under S. 24, Civil Procedure Code.)
('43) 1943 Oudh W N 205 (206) (DB) (Do.)

transferred to another Court having small cause powers although the value of the suit exceeds the limits of the *small cause* jurisdiction of such Court.[9]

12. No transfer where Court of institution has no jurisdiction. — The word "pending" in the section must be taken to mean "duly pending." In other words, the section will apply only when the Court in which the suit was instituted is *competent* to try it.[1] And competency for this purpose will include not only pecuniary jurisdiction and jurisdiction as regards the nature of the suit but also *territorial* jurisdiction.[2] Where the Court of institution has no jurisdiction over the suit, a transfer thereof to another Court will not cure the initial defect[3] nor confer jurisdiction on the Court to which it has been transferred.[4] Therefore, a defendant cannot object to the jurisdiction of the Court in which the suit is pending and at the same time apply for transfer of the suit under this section.[5] A consent to such a transfer will not operate as a waiver of the plea of want of jurisdiction[6] and such plea can be raised before the Court to which the suit is transferred.[7] But, it is only necessary for the section to apply that the suit must be pending in a Court which had jurisdiction *at the time when the suit was filed*. Hence, where, at the time when a suit is instituted in a Court, the suit is within the pecuniary jurisdiction of the presiding officer of the Court, the fact that subsequently he is succeeded by another officer whose jurisdiction does not extend to the amount of the value of the suit, does not prevent the applicability of this section.[8]

In the undermentioned case[9] a suit was originally instituted in a Munsiff's Court. The case eventually went up before the Privy Council who remanded it for re-trial. The

[*See also* ('38) 25 A I R 1938 Mad 745 (746). (Madras City Civil Judge is competent to try and dispose of a small cause suit if it is transferred to him.)
('29) 16 AIR 1929 Mad 525 (526).]
[But see ('18) 5 AIR 1918 Oudh 160 (161) : 20 Oudh Cas 350 (DB). (Submitted not correct.)
('29) 16 AIR 1929 Mad 513 (515). (This decision cannot be regarded as good law in view of the decision of a Division Bench in AIR 1932 Mad 683 : 55 Mad 860.)]

9. ('41) 28 AIR 1941 Mad 103 (105). (District Court may transfer proceeding from Court of Small Causes to Court not having adequate small cause powers to deal with it as Court of Small Causes.)
('39) 26 AIR 1939 Cal 345 (345).

Note 12

1. ('40) 27 AIR 1940 Oudh 164 (169) : 15 Luck 619 (DB). (Suit filed in Court which has no pecuniary jurisdiction to try it cannot be validly transferred—There is no distinction between lack of inherent jurisdiction and lack of any other kind of jurisdiction for purposes of S. 24.)
†('87) 9 All 191 (202) : 13 Ind App 134 (PC). (6 Cal 30 entirely approved.)
('81) 6 Cal 30 (31) (DB).
('83) 7 Bom 487 (489) (DB).
('82) 4 All 478 (480) (DB).
('16) 3 AIR 1916 Cal 456 (458) (DB).
('98) 25 Cal 39 (44) (DB).
('30) 17 AIR 1930 Lah 195 (196, 197).
('28) 15 AIR 1928 Mad 400 (400). (A transfer made in contravention would be void.)
('05) 1905 Upp Bur Rul (C P C) 28.
('34) 21 AIR 1934 Sind 95 (95).
('32) 19 AIR 1932 Sind 215 (215): 26 Sind LR 277.

[*See also* ('31) 18 AIR 1931 All 574 (579) : 54 All 171 (FB). (The Court from which transfer is made must be in existence at the time of transfer.)
('86) 10 Bom 274 (280).]
[But see † ('34) 21 AIR 1934 All 569 (571). (Pendency in competent Court is not necessary.)]

2. ('08) 35 Cal 571 (573) (DB).
3. ('87) 9 All 191 (204) : 13 Ind App 134 (PC).
('82) 4 All 478 (480) (DB).
('14) 1 AIR 1914 Cal 858 (860) (DB).
('10) 7 Ind Cas 765 (767, 768) (DB) (Cal). (Court having no jurisdiction cannot act as auxiliary to Court having jurisdiction.)
('23) 10 AIR 1923 Rang 185 (187) : 1 Rang 226 (DB).
[But see ('31) 18 AIR 1931 All 28 (29) : 53 All 62 (DB). (Case sent by Revenue Court under S. 271, Agra Tenancy Act, III of 1926, for trial to a Civil Court of lower pecuniary jurisdiction—High Court transferred it to proper Court.)]
Also see Section 15 Note 5.
4. ('19) 6 AIR 1919 Pat 345 (348, 349) : 3 Pat L Jour 396 (DB).
5. ('32) 19 AIR 1932 Sind 215 (215) : 26 Sind L R 277.
6. † ('87) 9 All 191 (204) : 13 Ind App 134 (PC).
('83) 5 All 371 (379) (DB).
('90) 13 Mad 211 (213) (DB). (Waiver will not confer jurisdiction.)
7. ('98) 25 Cal 39 (44) (DB).
8. ('36) 23 AIR 1936 All 335 (336) (DB). (Suit filed in Court of Munsif having jurisdiction — Munsif subsequently succeeded by another having no pecuniary jurisdiction to try suit — District Judge can transfer suit.)
9. ('40) 27 AIR 1940 Oudh 164 (170) : 15 Luck 619 (DB).

High Court on receiving the order of remand sent the case for re-hearing to the District Judge. It was held that the order of the High Court did not come under this section and that the fact that the suit was beyond the pecuniary jurisdiction of the Munsiff did not affect the District Judge's jurisdiction to try it.

13. Grounds of transfer. — It has been seen in Note 1 on S. 22 that a plaintiff, as *arbiter litis*, has a right to select his own *forum* and that this right should not be interfered with except on very strong grounds.[1] The *onus* of establishing sufficient grounds for the transfer lies heavily upon the applicant.[2]

One of the grounds frequently advanced for the transfer of a case to another Court is the *convenience* of the parties or the cheapness of the trial there. There is a difference of opinion as to how far this is a valid ground of transfer under this section. On the one hand it has been held that it is not merely a *relevant* but a *material* point for consideration and that it is, in fact, the basis of all statutory jurisdiction on the civil side.[3] Where therefore the balance of convenience is strongly in favour of transfer, it has been held to be a valid ground of transfer.[4] Thus, where a suit is instituted in the Court at A but the property involved in the suit is situated at B, and the witnesses all reside at B, the case may be transferred to the Court at B on the ground of convenience.[5] On the other hand, it has been held in the undermentioned cases[6] that the convenience of the parties (such as the properties being situated or the witnesses residing at another place) is not a valid test under the section and is not a good reason for depriving the plaintiff

Note 13

1. ('28) 15 AIR 1928 Lah 159 (159, 160).
('30) 17 AIR 1930 Lah 944 (944).
('19) 6 AIR 1919 All 397 (397) : 41 All 381.
('16) 3 AIR 1916 All 255 (255).
('89) 13 Bom 178 (182).
('09) 10 Cal L Jour 208 (211) (DB).
('16) 3 AIR 1916 Oudh 208 (208).
[*See* ('14) 1 AIR 1914 All 318 (318). (Under Section 23.)]

2. ('16) 3 AIR 1916 All 255 (255).
† ('28) 15 AIR 1928 Mad 15 (16).
('83) 9 Cal 980 (982) (DB).
(1865) Bourke Ex O C 1. (Interest of the party must be shown to be prejudiced by the non-removal of the case.)

3. ('27) 14 AIR 1927 Nag 219 (220).

4. † ('83) 9 Cal 980 (982) (DB).
† ('23) 10 AIR 1923 Oudh 30 (31) (DB)
† ('35) 22 AIR 1935 All 979 (980) (DB).
('83) 5 All 60 (62) (DB).
('94) 1894 Bom P J 175. (Two administration suits relating to same estate pending on same matter in two Courts—Transfer can be ordered.)
('26) 13 AIR 1926 Cal 326 (327) (DB). (Two suits raising same issues instituted in two different Courts — The suits may be ordered to be tried together.)
('09) 3 Ind Cas 539 (541) (DB) (Cal). (Balance of convenience not made out—Application refused.)
('97) 24 Cal 183 (186). (Cheapness of trial and balance of convenience.)
('72) 10 Beng L R 168 (176).
('33) 20 AIR 1933 Lah 1033 (1034).
('27) 14 AIR 1927 Lah 14 (15). (Transfer to be made only where preponderance of convenience necessitates it.)
('23) 10 AIR 1923 Lah 383 (383).
('12) 1912 Pun Re No. 101 : 15 Ind Cas 845 (846) (DB). (Connected appeals—Some appeals lying in Chief Court—Latter can order other appeals before lower Court to be transferred to itself.)
('09) 4 Ind Cas 922 (922) (Lah). (No balance of convenience—No transfer will be made.)
('38) 25 AIR 1938 Mad 745 (746). (Delay of 12 days in applying for transfer is not sufficient to warrant refusing a remedy which should ultimately be convenient to both parties.)
† ('32) 19 AIR 1932 Nag 49 (49): 27 Nag L R 307. (Two suits—Same transaction—Common question of fact.)
('28) 15 AIR 1928 Oudh 89 (89) (DB). (Where suit will be decided more expeditiously and economically if left where it is, no transfer will be ordered.)
† ('24) 11 AIR 1924 Oudh 410 (411).
('20) 7 AIR 1920 Pat 138 (141, 142).
('36) 23 AIR 1936 Pesh 5 (6, 7).
('14) 1 AIR 1914 Low Bur 37 (39) : 7 Low Bur Rul 129 (133, 134) (DB).
('10) 8 Ind Cas 449 (450) (Low Bur). (No balance of convenience and no grounds that ends of justice will be served by transfer—Transfer was refused.)

5. ('89) 16 Cal 771 (776). (Property situated in another place.)
('80) 5 Cal 766 (767, 768).
('22) 9 AIR 1922 All 65 (66) : 44 All 278 (DB). (Dissenting from AIR 1919 All 397 : 41 All 381.)
('21) 8 AIR 1921 Cal 210 (211) : 48 Cal 53.
('24) 11 AIR 1924 Lah 304 (305).
('14) 25 Ind Cas 723 (724) (Lah). (Under S. 23.)
('27) 14 AIR 1927 Nag 219 (220).

6. ('19) 6 AIR 1919 All 397 (398) : 41 All 381.
('24) 2 Pat L Rep 111 (113) (DB).
('93) 1893 All W N 58 (58).
('14) 1 A I R 1914 Sind 147 (147) : 8 Sind L R 43 (DB).

of his right to select his *forum*. And the Patna High Court has held that the power of transfer can be exercised only when the proceedings in one Court constitute an *abuse of the process* of the Court.[7] There seems to be nothing in the section itself to compel such a strict construction thereof. The words "the Court may at any stage" in fact tend to show that the broader interpretation is to be preferred. The mere fact, however, that it is convenient for the *defendant* to have the case tried elsewhere is not a valid ground of transfer unless the institution of the suit in the Court from which the transfer is asked for amounts to an abuse of the process of the Court.[8]

The following have been held to be good grounds for transfer of a case under this section :

(a) Reasonable apprehension of the litigant that he might not get justice in the Court in which the suit is pending.[9]

(b) Judge having a pecuniary interest or other interest sufficient to create a bias,[10] or being related to one of the parties.[11]

(c) Importance and the difficulty of the question involved in the case.[12]

(d) Where interests of justice require a transfer.[13]

See also the undermentioned case.[14]

The following have been held not to be sufficient grounds for transfer :

(a) Party having influence in the locality where the suit is instituted.[15]

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7. ('20) 7 AIR 1920 Pat 365 (366).

8. ('15) 2 AIR 1915 Mad 608 (611) (DB).
('33) 20 AIR 1933 Lah 635 (636).
('89) 13 Bom 178 (181, 182).
('28) 15 AIR 1928 Lah 159 (160). (Convenience of defendant alone not a good ground.)
✠('24) 11 AIR 1924 Lah 306 (310). (Suit brought in bad faith for working injustice on defendant is a good ground of transfer.)
('20) 7 AIR 1920 Lah 381 (381) : 1919 Pun Re No. 167.

9. † ('23) 10 AIR 1923 Lah 564 (565).
('34) 21 AIR 1934 All 448 (449). (Judge discussing the case with an influential relation of the defendant outside Court.)
('33) 20 A I R 1933 Lah 915 (915). (Reasonable ground for party thinking that the Judge is prejudiced against him.)
('31) 32 Pun L R 388 (389). (Definite expression of opinion by Judge as to same account books in prior proceedings.)
('03) 1903 Pun Re No. 88, p. 389.
('33) 20 A I R 1933 Oudh 154 (155) : 8 Luck 347 (DB). (Fear that Judge may not be able to approach the case remanded to him with an open mind as he had already decided on all the evidence on record.)
('28) 109 Ind Cas 402 (402) (Lah). (Expression of opinion by Judge.)

10. † ('95) 19 Bom 608 (610) (DB).
('97) 1897 Bom P J 107 (DB). (Judge, a member of the Municipality which is a party to the suit.)
('95) 1895 Bom P J 158 (159) (DB). (Judge holding interview with parties at his residence with a view to settle the dispute is insufficient to create bias.)
('12) 16 Ind Cas 859 (860) (Cal). (Having personal knowledge of facts.)
('12) 14 Ind Cas 458 (459) (Cal). (Personal interest.)
('84) 10 Cal 915 (917). (Officer directing litigation in executive capacity is disqualified to deal with it as Judge.)
('73) 10 Beng L R 168 (176). (Conduct of Judge.)
(1865) Bourke O C 273. (Personal interest.)
('83) 1883 Pun Re No. 7. (Judge entering into business transactions with party in respect of subject-matter of suit.)
('03) 2 Low Bur Rul 281 (282). (Personal interest — Judge should follow the procedure under S. 33 of the Lower Burma Courts Act, 1900.)
Also see S. 2 (8) N. 3 and S. 9, N. 3.

11. ('32) 19 AIR 1932 Sind 206 (207).

12. ('86) 9 All 180 (184, 185).
('72) 9 Beng L R App 10 (12).
('97) 24 Cal 183 (186).
('66) 1 Ind Jur (N S) 94 (227).
[But see ('10) 8 Ind Cas 444 (444) (Low Bur).]

13. ('41) 28 AIR 1941 Rang 322 (323, 324) : 1941 Rang L R 512 (FB). (If a suit has been filed in a particular Court for the purpose of defeating some right which would otherwise enure to a defendant or of obtaining some unfair advantage by the misuse of legal process, the party aggrieved has a remedy open to him under S. 24.)
('34) 21 AIR 1934 Lah 539 (540). (Judge having expressed opinion in another case on point in dispute — Case should be transferred to another Court in the interests of justice.)
('36) 23 AIR 1936 Mad 55 (56) (FB).

14. ('38) 25 A I R 1938 Mad 745 (745). (Same parties filing suits against each other in different Courts on same cause of action — Suits should be tried by same Court.)

15. ('27) 14 AIR 1927 Lah 80 (80).
('24) 11 AIR 1924 Oudh 372 (373) : 27 Oudh Cas 401. (Refusal of pleaders to accept brief from defendant—Plaintiff having engaged several pleaders —No transfer will be made.)

(b) Judge not being acquainted with the character in which disputed signatures in a case are written.[16]

(c) Judge having decided another similar case in one way[17] or the fact that the points for decisions in both cases are analogous.[18]

(d) Prejudice of Judge against party's pleader, unless it is likely to affect the judicial attitude towards the party.[19]

(e) Expression of opinion by a Judge as to the character of the plaintiff elicited by the conduct of the party himself.[20]

(f) Judge being subordinate to the Commissioner in his executive capacity where the Commissioner's order is challenged.[21]

(g) The conduct of the Judge where parties agreed to the decision of the case by the Judge on a local inspection and did not wish to let in any evidence, and the Judge proceeded to act accordingly.[22]

See also the undermentioned cases.[23]

14. Absence of order for transfer — Effect. — Want of jurisdiction in the trying Court will not be presumed by reason of the absence of an *order of transfer* on the record.[1] Where certain issues were remitted to the trial Court and prior thereto the territorial jurisdiction of the Court to which they were remitted had been transferred, the order remitting the issues will be taken to operate as a transfer of the case to it.[2] An omission to assign *reasons for the transfer* will not vitiate the proceedings in the Court to which the case has been transferred.[3]

15. Effect of transfer from or to a Court of Small Causes. — It has been held by all the High Courts that the words "Court of Small Causes" in sub-s. (4) of this section include a Court vested with the powers of a Court of Small Causes.[1]

Where a small cause suit is transferred to another Court under this section, that Court is to be deemed to be a Court of Small Causes for the purposes of such suit and its procedure is to be governed by the provisions of the Provincial Small Cause Courts Act.[2]

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16. ('98) 20 All 395 (396).
17. ('12) 15 Ind Cas 569 (569) (Cal).
('26) 13 AIR 1926 Lah 345 (345).
('38) 25 AIR 1938 Nag 126 (127): ILR (1939) Nag 631.
18. ('94) 1894 Pun Re No. 8, p. 13 (14).
('21) 8 AIR 1921 Lah 357 (357).
('30) 17 AIR 1930 Lah 176 (176). (Previous decision on same point of law.)
19. ('26) 13 AIR 1926 Mad 359 (360).
('34) 21 AIR 1934 Lah 593 (594). (Mere incidents between Judge and party's counsel do not justify transfer.)
20. ('16) 3 AIR 1916 Mad 763 (763).
21. ('33) 20 AIR 1933 Pat 638 (639).
22. ('28) 15 AIR 1928 All 497 (498, 499).
23. ('38) 25 AIR 1938 Lah 95 (96). (Application for transfer not *bona fide* having been made after Court informs counsel of order before it is pronounced—Party not having any real apprehension that case would not be decided on its merits—Transfer should not be ordered.)
('36) 23 AIR 1936 Pat 345 (345, 346). (Three suits tried by same Court and decided by one judgment —Two appeals filed before District Judge and one before High Court—Application to transfer all appeals to High Court not granted.)

Note 14

1. ('88) 10 All 119 (121, 122).
2. ('10) 7 Ind Cas 864 (864) (Mad).
Also see O. 41, R. 25, N. 7.
3. (1865) 3 Suth W R 147 (149).

Note 15

1. ('40) 27 AIR 1940 Mad 9 (9) : ILR (1940) Mad 251 (DB). (City Civil Court Madras can be deemed to be a Court of Small Causes in view of S. 5 of Madras City Civil Courts Act.)
('17) 4 AIR 1917 All 484 (485) : 38 All 425.
('32) 19 AIR 1932 Bom 486 (487) : 56 Bom 387 (DB).
✠('17) 4 AIR 1917 All 62 (64) : 39 All 214 (DB).
('29) 16 AIR 1929 Cal 354 (356) : 56 Cal 588 (DB).
('18) 5 AIR 1918 Cal 187 (187) (DB). (Dissenting from 31 Cal 1057.)
('16) 3 AIR 1916 Mad 891 (894): 38 Mad 25: 17 Ind Cas 425 (427) (DB).
('18) 5 AIR 1918 Oudh 160 (161) : 20 Oudh Cas 350 (DB).
('08) 31 Bom 314 (318) (FB). (See observations in this case which was a case under S. 203 of the old Code.)
[But see ('98) 23 Bom 382 (384) (DB).]
2. ('17) 4 AIR 1917 All 484 (485) : 38 All 425 (428).

And therefore the trial thereof can only be under the Small Cause Courts Act and no appeal will lie from the decision therein;[3] and this will be so notwithstanding an express direction by the District Judge that the suit is to be tried as a regular suit, as such an order is without jurisdiction.[4]

The word "suit" in this section includes execution proceedings, as has been seen in Note 6 above, and therefore a Court to which such proceedings are transferred from a Court of Small Causes is a Court of Small Causes for the purpose of such proceedings.[5]

This sub-section will only apply, however, where the suit or proceeding is transferred *under* S. 24. If the transfer is made under any *other* provision of law, the Court to which it is transferred cannot be deemed to be a Court of Small Causes[6] and no finality can attach to its decision.[7] Thus, where a small cause decree is transferred for execution to another Court under other provisions of the Code (e. g., Ss. 38, 39, 42, O. 21, R. 4, etc.), its orders in execution will, if they fall under S. 47 of the Code, be open to appeal,[8] though no second appeal will lie by virtue of section 102.

This sub-section does not deal with the case where a suit is transferred from the original side to the small cause side of a Court. It has been held that in such cases the suit will retain its character as an original suit and will have to be tried as such.[9]

('93) 18 Bom 61 (64) (DB).
('25) 12 AIR 1925 Lah 561 (562, 563) (DB).
('99) 1899 Pun Re No. 69, p. 308 (310).
('89) 1889 Pun Re No. 77, p. 293 (294).
('30) 17 AIR 1930 Nag 133 (134). (The Court will have same powers as first Court).
[*See* ('32) 19 AIR 1932 Nag 49 (49):27 Nag L R 307 (309).]

3. ('28) 15 AIR 1928 All 609 (609) (DB). (Consequently no bar to revision.)
('17) 4 AIR 1917 All 484 (485) : 38 All 425 (428).
('39) 26 AIR 1939 All 452 (453). (Transfer to Munsif prior to abolition of Small Cause Court — Decision of Munsif not appealable.)
('31) 18 AIR 1931 All 574 (578, 579) : 54 All 171 (FB). (This result will not follow if there is no transfer under this Section but the case is tried under S. 35, Small Cause Courts Act.)
('29) 16 AIR 1929 All 50 (51) : 50 All 810.
('18) 5 AIR 1918 All 290 (292): 40 All 525 (DB). (Even though the Munsif had no Small Cause power.)
('17) 4 AIR 1917 All 62 (64) : 39 All 214 (DB).
('16) 3 AIR 1916 All 110 (111).
('14) 1 AIR 1914 All 229 (230).
('91) 13 All 324 (325, 326) (DB).
('83) 5 All 274 (275) (DB).
('29) 16 AIR 1929 Cal 354 (357):56 Cal 588 (DB). (Trial as regular suit, still no appeal lies.)
('03) 1903 Pun Re No. 83.
('97) 1897 Pun Re No. 58, p. 257 (258).
('35) 22 AIR 1935 Nag 42 (42) : 31 Nag L R 170.
('97) 10 P C L R 94 (95).
('99) 2 Oudh Cas 143 (144).
('23) 10 AIR 1923 Pat 49 (50) : 1 Pat 696 (DB).
('19) 6 AIR 1919 Pat 376 (377) : 4 Pat L Jour 13 (DB). (But where there was no Small Cause Court at the time of filing the suits, the transferred suits could only be tried as ordinary civil suits.)

4. ('16) 3 AIR 1916 Mad 891 (894) : 38 Mad 25 : 17 Ind Cas 425 (428) (DB).

5. ('26) 13 AIR 1926 Lah 465 (465).

6. ('35) 22 AIR 1935 All 765 (766) : 57 All 957. (U. P. Honorary Munsifs Act, S. 8 — Suit filed in Munsif's Court on Small Cause side transferred to Honorary Munsif's Court — Latter is not Small Cause Court — On application of defendant, suit transferred by District Judge to Additional Munsif's Court having no Small Cause powers—Appeal lies from his decision as transfer is not from Small Cause Court.)

7. ('21) 64 Ind Cas 335 (336) (Lah). (Transfer under S. 23 of the Provincial Small Cause Courts Act.)
('15) 2 AIR 1915 All 219 (221) : 37 All 450 (DB). (Transfer of case to regular side.)
('35) 22 AIR 1935 All 141 (141). (U. P. Honorary Munsifs Act, S. 8—Case pending in Small Cause Court transferred to Honorary Munsif's Court by District Judge—Section 24 (4), C. P. C., does not apply and appeal to Subordinate Judge lies from decision of Honorary Munsif.)
('24) 11 AIR 1924 All 761 (762). (Do.)
('20) 7 AIR 1920 All 352 (352). (Do.)
('19) 6 AIR 1919 All 222 (222). (Do.)
('09) 31 All 1 (2) (DB).
('14) 1 AIR 1914 Bom 302 (302): 38 Bom 190 (DB). (Judge having small cause as well as regular jurisdiction transferring small cause case to regular side—Decree is appealable.)
('84) 8 Bom 230 (234).
('17) 4 AIR 1917 Oudh 104 (104). (United Provinces Munsifs Act, II of 1896, S. 8—S. 24(4) is inapplicable to transfer from Small Cause Court to Honorary Munsif's.)

8. ('07) 11 Cal W N 861 (862) (DB). (Transfer to regular side for execution.)
('16) 3 AIR 1916 All 293 (294). (Section 42, C. P. C.)
Also see S. 42, N. 5, S. 47, N. 84 and S. 102, N. 4.

9. ('35) 22 AIR 1935 Mad 284 (285). (*Held* that the District Court had power to so transfer the suit but the suit would retain its character as an original suit.)

The sub-section only applies where a suit is transferred from a *Court of Small Causes*. But where the Court from which a suit is transferred is not a Small Cause Court, the mere fact that the suit is of a *nature* cognisable by a Small Cause Court will not make the sub-section applicable, and where the Court to which the suit is transferred is not a Small Cause Court, its decision will be appealable.[10] Similarly, the sub-section cannot apply where the Small Cause Court in which a suit was instituted has ceased to exist or the officer invested with Small Cause Court powers (before whom the suit was instituted) has been transferred from the district and there is no other officer possessing such powers.[11] In such cases, if the suit is tried by an ordinary Court, the decision of such Court will be appealable.[12]

15a. Suit transferred — Power of Court from which suit is transferred. — The transfer of a suit implies the transfer of all proceedings which arise out of the suit. Hence a Court which has passed an interim order of injunction ceases to have jurisdiction to enforce the order when the suit is transferred to another Court; such power lies in the Court to which the suit is transferred.[1]

16. Procedure of Court of transfer. — A District Court which withdraws a case for trial before itself may, after such withdrawal, proceed in accordance with any of the recognized modes of procedure laid down in the Code; it can even make over the case to an arbitrator for decision.[1] It can amend the issues first framed and can frame additional issues and go into the whole case except upon any question upon which there has been a judicial finding already.[2] Where a conditional order of attachment is passed by a Court and then the suit is transferred to another Court, the latter can pass a further order regarding the attachment.[3] Where a suit, the subject-matter of which has been referred to arbitration, is transferred to another Court, the latter Court has jurisdiction to pass a decree in terms of the award made by the arbitrators.[4]

Under S. 25 of the old Code where a District Judge withdrew a case in which evidence had been taken, to his own file and without re-taking the evidence dealt with the case as it came to him and dismissed the suit, it was held the judgment was bad as the District Judge had not *tried* the case.[5] The addition of the words "or proceed from the point at which it was transferred or withdrawn" would not now make the *trial* obligatory.[6] Where a case is transferred after the passing of a preliminary decree for accounts, the transferee Court can exercise the discretion of holding a *de novo* trial only from the stage after the passing of the preliminary decree.[7]

Where the Court to which a case has been transferred has jurisdiction over the subject-matter of the suit, any defect arising from irregularities in the commencement of the proceedings such as those arising from a transfer ordered without authority may be

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10. ('35) 22 AIR 1935 All 574 (575).

Note 16

11. ('36) 23 AIR 1936 Lah 883 (885).
('37) 24 AIR 1937 Oudh 398 (399) : 13 Luck 369 (DB). (AIR 1931 All 574 : 54 All 171 (FB) relied on.)

12. ('41) 28 AIR 1941 Mad 103 (105, 106).
('36) 23 AIR 1936 Lah 883 (885).
('37) 24 AIR 1937 Oudh 398 (399) : 13 Luck 369 (DB).

Note 15a

1. ('41) 28 AIR 1941 All 140 (143):ILR (1941) All 295 (DB). (Proceedings for enforcement of injunction under Order 39, Rule 1 are transferable under S. 24.)

1. ('89) 1889 Pun Re No. 167.
2. (1865) 3 Suth W R 147 (150).
Also see O. 14, R. 5, Note 2.
3. ('10) 6 Ind Cas 746 (746) (DB) (Mad).
Also see O. 38, R. 5 N. 23.
4. ('33) 20 AIR 1933 Oudh 547 (548):9 Luck 219.
5. ('85) 7 All 342 (343).
6. *See also* ('10) 5 Ind Cas 588 (589) (All). (Transfer application disposed of by High Court — District Judge can thereafter determine question of jurisdiction and return plaint for presentation to proper Court.)
7. ('29) 16 AIR 1929 Lah 107 (109, 110).

waived by the parties by their failure to object at the proper stage.[8]

The substantive law applicable to the case will be the law of the Court from which it has been transferred.[9]

Sub-section (2) provides that where any suit or proceeding has been transferred or withdrawn the Court which thereafter tries such *suit* may either re-try it or proceed from the point at which it was transferred. The word "suit" occurring for the second time in the sub-section must be taken to include a "proceeding." Hence, where an execution proceeding is transferred from one Court to another Court, the latter Court may either re-try it or proceed from the point at which it was transferred.[10]

17. Appeal. — An order under this section is not appealable.[1]

An order of the High Court transferring a suit under this section is not a "judgment" within the meaning of the Letters Patent and hence a Letters Patent appeal does not lie from such an order.[2] See also Letters Patent (Cal.), Cl. 15, Note 6.

18. Revision.—An order for transfer is a decision of a 'case' within the meaning of S. 115 of the Code[1] and is therefore open to revision in cases where the Court, in making the order has acted without jurisdiction or illegally or with material irregularity.[2] Where, however, the decree or order in the transferred case is *appealable*, the High Court will not interfere.[3] See Notes on section 115.

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25. (1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the Provincial Government,[a] which[b] may, by notification in the Official Gazette,[c] transfer such suit, appeal or proceeding to any other High Court :

Power of Provincial Government to transfer suits.

Provided that no suit, appeal or proceeding shall be transferred to a High Court without the consent of the Provincial Government of the Province in which that High Court has its principal seat.[d]

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8. ('39) 26 AIR 1939 Bom 485 (487) : ILR (1939) Bom 472. (Order of transfer purporting to have been made under cl. (5) of S. 23 of Bombay Civil Courts Act, by a Senior Subordinate Judge after another Subordinate Judge has taken cognizance of the suit is incompetent—But if the parties lead evidence concurring in the Court's assumption of jurisdiction, they cannot afterwards take an objection to jurisdiction—Their conduct amounts to waiver of objection to jurisdiction.)
('19) 6 AIR 1919 Lah 27 (29) : 1 Lah 158.
[*See also* ('40) 27 AIR 1940 Oudh 164 (170) : 15 Luck 619 (DB). (Objection as to jurisdiction of Court in which suit filed not taken upto Privy Council stage—*Held*, it could not be taken in transferee Court to which case is sent for retrial.)]
9. ('69) 4 Beng L R (O C) 1 (26) (DB).
10. ('36) 23 AIR 1936 Pesh 56 (57).

Note 17

1. ('83) 1883 All W N 88 (88) (DB).
('18) 5 AIR 1918 Upp Bur 14 (14) : 3 Upp Bur Rul 61.
('35) 22 AIR 1935 Rang 267 (273) : 13 Rang 457 (FB).
2. ('35) 22 AIR 1935 All 750 (750) (DB).
†('35) 22 AIR 1935 Rang 267 (272) : 13 Rang 457 (FB).

Note 18

1. ('25) 12 AIR 1925 Lah 189 (189).
2. ('20) 7 AIR 1920 All 249 (249).
('94) 18 Bom 61 (64) (DB). (Discretion exercised — High Court will not interfere except under very special circumstances.)
('26) 13 AIR 1926 All 17 (18).
[But see ('38) 25 AIR 1938 Lah 95 (95). (No revision lies, but if it is found that the application for transfer is not a *bona fide* one, the case can be re-transferred.)]
3. ('84) 6 All 233 (234) (DB

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case.

[Compare 1882, Ss. 20, 21.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Governor-General in Council."

b. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "who."

c. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Gazette of India."

d. Inserted by the Government of India (Adaptation of Indian Laws) Order, 1937.

1. Scope and object of the section. — This section is new and proceeds on the analogy of S. 527 of the Criminal Procedure Code which enables the Provincial Government to transfer a case from one High Court to another. The section does not apply to an objection to a particular Judge personally, e. g., that previously while at the bar, he has advised one of the parties. In such a case, all the difficulties would be met by the case being tried by another Judge of the same High Court. Consequently, the objection in question must be one which applies to the High Court as a whole.[1]

2. Appeal from decree in transferred Court. — The appeal from the decree in the transferred case does not lie to the original High Court, but only to the appellate side of the High Court to which the case was transferred.[1]

INSTITUTION OF SUITS

26. [S. 48.] Institution of suits. **Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.**

[See O. 4, R. 1.]

1. Legislative changes. — The words "or in such other manner as may be prescribed" are new. No rules have, however, been framed prescribing any other manner of instituting suits.

2. Institution of suit. — As seen already in Note 5 on S. 2 (2), a suit must commence with the presentation of a *plaint*.[1] Thus, an application for leave to sue in *forma pauperis* is not a suit until the leave is granted and the suit is registered under Order 33, Rule 8.[2]

A suit is instituted when the plaint is *presented* and not when it is registered,[3] though for the purpose of issuing summons to the defendant the suit cannot be said to

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Section 25 — Note 1

1. ('24) 11 AIR 1924 Bom 90 (97, 98).

Note 2

1. ('21) 8 AIR 1921 Mad 687 (687) (DB).

Section 26 — Note 2

1. ('36) 164 Ind Cas 442 (443) (Cal). (No other mode of instituting a suit has up to now been prescribed—Presentation by pleader—Vakalat not signed by plaintiff—Matter can be regularised only by the order of the Court condoning the defect.)

2. ('83) 7 Bom 373 (376) (DB).

[See however ('40) 27 AIR 1940 Oudh 441 (442): 16 Luck 184 (DB). (A plaint in a suit in *forma pauperis* is deemed to have been filed when the application for leave to sue as a pauper is presented.)]

See also Note 5 on S. 2 (2) for fuller discussion.

3. ('35) 62 Cal 1115 (1117). (Register of suits kept in Court is *prima facie* evidence of date of presentation but not conclusive.)

be *duly* instituted until it is registered.[4] A re-presentation of the plaint after amendment is not a fresh institution of the suit.[5] Before a suit can be deemed to be instituted the plaint must be presented to a Court having jurisdiction.[6] And when a plaint has been presented to a Court of higher jurisdiction, because as a result of a finding of fact at a later stage on the question of the value of the subject-matter of the suit, the plaint is returned for presentation to the Court of lower grade, it does not mean that the suit has not been instituted.[7] Where two suits are filed on the same day, the presumption is that they were presented in the order in which they were registered.[8] But the filing of a plaint is not a judicial proceeding and there is no presumption as in the case of judicial proceedings, of its having taken place at the *earliest period* of the day on which it was filed.[9]

A suit against a minor is taken to be instituted for purposes of limitation when the plaint is presented and not when the guardian *ad litem* is appointed.[10]

3. Plaint, meaning of. — A plaint in law means "a private memorial tendered to a Court in which the person sets forth his cause of action; the exhibition of an action in writing."[1] It ought to be in the language of the Court.[2] A written statement claiming a set-off, will be deemed, to that extent, to be a plaint.[3] For the particulars necessary to be mentioned in a plaint, see Order 7.

4. Place of presentation. — See Order 4, Rule 1, Note 4.

4a. Person by whom plaint should be presented. — See Order 4, Rule 1, Note 7.

5. Person to whom plaint should be presented. — See Order 4, Rule 1.

6. Time of presentation. — See Order 4, Rule 1.

7. Presentation of plaint with deficient court-fee or with other defect. — See Notes on Section 149 and Order 7, Rules 1 and 11.

8. Presentation of plaint in Revenue Courts. — See Order 4, Rule 1.

SUMMONS AND DISCOVERY

27. [S. 64.] Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed.

Summons to defendants.

[1877, Ss. 64 and 68; 1859, S. 41. See O. 5.]

('21) 8 AIR 1921 Cal 277 (279) (DB).
(1900) 27 Cal 814 (818, 820) (DB).
('67) 7 Suth W R 241 (241) (DB).
[*See* ('73) 19 Suth W R 159 (159).]

4. ('22) 9 AIR 1922 Cal 234 (235).

5. ('78) 2 All 832 (834, 835) (DB).
('67) 7 Suth W R 157 (158) (DB).
('95) 19 Bom 320 (323) (DB).
('75) 23 Suth W R 447 (447) (DB).
('71) 16 Suth W R 47 (48) (DB).
('66) 6 Suth W R 39 (39) (DB).
('66) 5 Suth W R 207 (207) (DB).
(1865) 3 Suth W R 20 (21) (DB).
('07) 1907 Pun Re No. 123, p. 600 (605, 606).
('92) 15 Mad 417 (417) (DB).

6. ('41) 28 AIR 1941 Mad 711 (712) (DB). (The presentation of the plaint to a Court which has no jurisdiction to try the suit cannot be said to be institution of the suit even though the plaint has been accepted as being in order and registered.)

7. ('41) 28 AIR 1941 Mad 711 (712) (DB).

8. † ('94) 16 All 165 (173) (FB).
('76) 1 All 650 (651) (DB).
Also see O. 4, R. 2, N. 1.

9. ('13) 9 Nag L R 155 (156):21 Ind Cas 602 (603).

10. ('82) 4 All 37 (39) (DB).
Also see O. 32, R. 3, N. 2.

Note 3

1. ('99) 22 Mad 494 (502) (DB).
('21) 8 AIR 1921 Sind 166 (168):17 Sind L R 223.

2. ('67) 8 Suth W R 495 (496) (DB). (This, however, will not exclude plaints in English language.)

3. ('92) 15 Mad 29 (34) (DB).

1. "Duly instituted." — Section 26 enacts that a suit shall be instituted by the *presentation* of a plaint or in such other manner as may be prescribed. But it cannot be said to have been *duly* instituted until, after scrutinising the plaint, the Court registers it as suit.[1] When a plaint is returned for presentation to a competent Court the suit is to be considered as instituted on the date of presentation to such proper Court.[2] A suit against a dead person is not one which can be said to have been duly instituted, and the Court has no jurisdiction at all in the matter.[3]

2. "Summons may be issued." — See Order 5 Rule 1.

3. Manner of service. — See Order 5 Rule 10.

Service of summons where defendant resides in another province.

28. [S. 85.] (1) A summons may be sent for service in another province to such Court and in such manner as may be prescribed by rules in force in that province.

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

[1877, S. 85; 1859, S. 59.]

1. Service of summons where defendant resides in another province. — See O. 5 Rr. 21 and 23.

Service of foreign summonses.

29. [S. 650A.] Summonses [a][and other processes] issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they [b][were summonses] issued by such Courts:

[c]Provided that the Courts issuing such summonses [d][or processes] have been established or continued by the authority of the Central Government or of the Crown Representative, or that the Provincial Government [e][of the Province in which such summonses or processes are] to be served has by notification in the Official Gazette declared the provisions of this section to apply to [f][such Courts].

a. Inserted by the Code of Civil Procedure (Amendment) Act, 1940 (XXXIV of 1940).
b. Substituted for the words "had been", *ibid*.
c. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original proviso.
d. Inserted by the Code of Civil Procedure (Amendment) Act, 1940 (XXXIV of 1940).
e. Substituted for the words "by whose Courts a summons is", *ibid*.
f. Substituted for the words "Courts of the Province", *ibid*.

1. Legislative changes. — This section corresponds to the first part of S. 650A of the old Code. The second part of that section has been omitted.

2. Notifications. — For notifications issued under the section, see Appendix IV.

Section 27 — Note 1

1. ('22) 9 AIR 1922 Cal 234 (235).
2. ('28)15AIR 1928 Bom 421(422):52 Bom 548(DB).
3. ('70) 12 Suth W R 45 (46) (DB).
('08) 31 Mad 86 (89) (DB). (Even the plaint cannot be amended.)

30. Subject to such conditions and limitations as may be prescribed by the Court may, at any time, either of its own motion or on the application of any party,—

Power to order discovery and the like.

(*a*) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;

(*b*) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;

(*c*) order any fact to be proved by affidavit.

1. **Scope of the section.** — This section is enacted for the first time in the Code of 1908. The conditions and limitations referred to in this section are to be found in Orders 11, 12, 13, 16 and 19.

2. **Delivery and answering of interrogatories.** — See Order 11.

3. **Admission of facts and documents.** — See Order 12.

4. **Discovery and inspection of documents.** — See Order 11.

5. **Production, impounding and return of documents.** — See Order 13.

6. **Summons to persons to give evidence.** — See Order 16.

7. **Proof by affidavits.** — See Order 19.

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31. The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects.

Summons to witness.

1. **Summons to witness.** — See Orders 16 and 18.

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32. The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may —

Penalty for default.

(*a*) issue a warrant for his arrest;

(*b*) attach and sell his property;

(*c*) impose a fine upon him not exceeding five hundred rupees;

(*d*) order him to furnish security for his appearance and in default commit him to the civil prison.

[See O. 16, Rr. 10 to 13, 17 and 21.]

1. **Applicability of the section.** — By S. 30 the Court is authorised to issue summonses to persons only when their attendance is required to give evidence, etc., and by S. 32 the Court is given the power to enforce the "attendance" of such persons for

that purpose, by imposing penalties. A fine can therefore be imposed on a person only if he has been required to *attend* the Court in connexion with a case,[1] and not on a person who, after his failure to attend on the date for which he was summoned, is not required to give evidence, etc., and has not been called upon to *appear* on a subsequent date,[2] nor on a person who has been ordered and not *summoned to produce a document.*[3]

JUDGMENT AND DECREE

33. [S. 198.] **The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.**

Judgment and decree.

[1877, S. 198; 1859, S. 183. See O. 20.]

1. Scope and applicability of the section. — This section should be read with the provisions of Order 20 in the first schedule. The section does not apply to the Judicial Commissioner of Peshawar in the exercise of his original civil jurisdiction (section 46 (2) of the N.-W. F. P. Law and Justice Regulation VII of 1901).

The High Court of Patna has held that this section merely states that a decree shall follow the judgment and that it does not preclude the High Court from making a rule to the effect that in suits for money no decree need be drawn up if neither party has to recover anything unless the Judge otherwise directs.[1]

Under the Agra Tenancy Act, III of 1926, List II, Sch. 2 and S. 135 of the Oudh Rent Act, XXII of 1886, no decree need be prepared in the case of applications under the said Acts, unless prescribed by rule to the contrary.

2. "After the case has been heard." — The judgment in a case should be pronounced only after the case has been fully heard.[1] The failure of a Judge to give the parties an opportunity of putting their case before him vitiates the judgment.[2]

3. Judgment to be based on case set up by parties. — See O. 20, R. 4, Note 6.

4. Evidence taken before another Judge. — See Note 3 on O. 20, R. 1.

5. "A decree shall follow." — This section casts on the Court the duty of preparing and passing a decree. A party or his pleader is under no obligation to move the Court to draw up a decree.[1] Where a judgment is pronounced the decree must automatically follow it and the Court has no power to direct that the preparation of the decree be stopped until the payment of deficit court-fees[2] or until the disposal of the application by the judgment-debtor for scaling down the debt under the provisions of the Madras Agriculturists' Relief Act, IV of 1938.[3] Where, after pronouncing judgment in a

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Section 32 — Note 1

1. ('29) 16 AIR 1929 All 850 (853, 854).
('20) 7 AIR 1920 Pat 131 (133) : 5 Pat L Jour 550 (555). (Where the production of the documents was ordered it was held that this section had no application.)
2. ('29) 16 AIR 1929 All 850 (853, 854).
3. ('20) 7 AIR 1920 Pat 131 (136) : 5 Pat L Jour 550 (555).

Section 33 — Note 1

1. ('34)21 AIR 1934 Pat 266(269):13 Pat 371(DB).

Note 2

1. ('07) 4 Low Bur Rul 256 (258) (DB).
('75) 23 Suth W R 77 (77) (DB).
2. ('20) 7 AIR 1920 Lah 246 (247).

Note 5

1. ('14) 1 AIR 1914 Bom 23 (25): 38 Bom 331(DB).
('24) 11 AIR 1924 Nag 271 (274): 20 Nag L R 131.
2. ('32)19 AIR 1932 Pat 228(231): 11 Pat 532 (DB).
3. ('41) 28 AIR 1941 Mad 929 (932): I L R (1942) Mad 346 (FB). (A I R 1940 Mad 478 overruled.)

suit, the Court fails to draw up a decree, the remedy of the party who wants the decree, whether for appeal or execution, is to apply for it to the Court and if the application is refused, to move the High Court in revision. But until the decree is drawn up, there can be neither appeal nor execution.[4] See also Note 8 on S. 2 (2) and Note 4 on O. 41, R. 1.

Where a judgment is passed in favour of a party and it is stated therein that he shall not get a decree unless he produces a succession certificate, a decree cannot be passed till a succession certificate is produced.[5] (See Section 214 of the Succession Act, XXXIX of 1925.)

There can be more than one decree in the same suit and each one of them can be a *final* decree. Thus, where a suit comprises several distinct subject-matters, there can be a separate decree in regard to each of them.[6]

As to contents of decree, see O. 20, R. 6.

INTEREST

34. [S. 209.] (1) Where and in so far as a decree is for the payment of money,[2] the Court may, in the decree, order interest at such rate as the Court deems reasonable[3] to be paid on the principal sum adjudged, from the date of the suit to the date of the decree,[4] in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit,[6] with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment,[5] or to such earlier date as the Court thinks fit.

Interest.

(2) Where such a decree is silent[17] with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.

[1877, S. 209; 1861, S. 10.]

Synopsis

1. Scope of the section.
2. "Decree for the payment of money."
3. Award of interest under the section is a matter of discretion.
4. Interest from date of suit to date of decree.
5. Interest from date of decree to date of payment.
6. Interest prior to suit—General.
7. Agreement express or implied to pay interest.
8. Mercantile usage.
9. Right to interest under statutory provisions.
10. Interest as damages.
11. Mortgage suits. See O. 34 R. 11.
12. Interest, whether payable after tender.
13. Interest on mesne profits. See O. 20 R. 12.
14. Interest on arrears of rent.
15. Interest on costs. See Section 35.
16. Rule of damdupat.
17. Decree silent as to interest — Sub-section (2).
18. Court-fee.

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4. ('12) 8 Nag L R 92 (95, 96): 15 Ind Cas 935 (937).
('83) 5 All 520 (526) (DB).
('10) 34 Bom 182 (188) (DB).
('05) 32 Cal 483 (491) (DB).
('20) 7 AIR 1920 Lah 395 (396) : 1 Lah 223 (DB).
See also Note 9 on O. 6 R. 2.

5. ('20) 7 AIR 1920 Nag 148 (149).
[*See* ('31) 18 AIR 1931 Bom 407 (408). (Limitation for execution will not run until succession certificate is produced.)]

6. ('40) 27 AIR 1940 Lah 1 (3) : ILR (1940) Lah 171 (DB).

NOTE to the Synopsis. See the Notes indicated for the following topics :

Cases under Interest Act. See Notes 7 and 9.
Compound interest. See Notes 3 and 6.
Contribution suit. See Note 10.
Court's power to reduce rate of interest in harsh and unconscionable bargains. See Note 7.
Interest on damages. See Note 2.
Interest on legacies. See Note 9.
Interest when allowed and disallowed. See Note 6.
Notice. See Note 12.
Post diem interest. See Note 9.
"Reasonable." See Notes 3 and 4.
Separate suit for interest. See Note 17.
Stipulation amounting to penalty. See Note 7.
Stipulation for enhanced interest. See Note 7.
Suit for unliquidated damages. See Note 2.

1. Scope of the section. — This section provides for the award of interest in cases of money decrees. It applies only —

(a) where the decree is *for the payment of money*, and

(b) as regards interest *after the date of the suit.*

The award of interest under decrees for the enforcement of a mortgage or charge is provided for in O. 34 R. 11. As regards interest *prior to the date of suit*, it is a matter of *substantive* law and is outside the scope of this section.[1]

The section classifies the interest awardable after the date of the suit into two classes —

(a) Interest on the *principal* sum adjudged from the date of suit to date of decree.

(b) Interest on the *aggregate* sum of the principal sum and interest, from date of decree to date of realisation or to such earlier date as the Court thinks fit.

There is no analogy between the award of interest under this section and the award of mesne profits under O. 20 R. 12. The former may be awarded as an inducement to prompt satisfaction of the decree and as a penalty for non-compliance with it. Such interest is no part of the claim or relief as in the case of mesne profits.[2]

Future interest which is awardable under this section is really in the nature of damages granted by the Court on account of the plaintiff being kept out of the money due to him under the decree.[3]

2. "Decree for the payment of money." — For a full discussion as to what is a "decree for the payment of money," see section 73, Note 6.

The Madras High Court has held that the word "money" is not confined to an *ascertained sum* but will include also unliquidated damages and that interest on such damages can be awarded under this section.[1] The same view has been taken by the Bombay High Court[2] and by the Oudh and Sind Judicial Commissioners' Courts.[3] In another case, however, the Bombay High Court has decided that no interest can be allowed

Section 34 — Note 1

1. ('10) 7 Mad L Tim 108 (108) (DB).
('20) 7 AIR 1920 Cal 737 (739): 32 Cal L Jour 239 (253) (DB).
† ('38) 25 AIR 1938 P C 67 (70) : I L R (1938) 2 Cal 72 : 32 Sind L R 374 (PC).
('31) 18AIR1931Nag161(164):27 Nag L R 312 (DB).
('36) 23 AIR 1936 Rang 141 (143). (In suit for accounts of moneys received by the defendant, interest before the date of suit may be awarded.)
[*See also* ('13) 35 All 378 (379).
('74) 6 N W P H C R 358 (362, 363, 365) (FB).]
2. ('06) 33 Cal 1232 (1235) (DB).
3. ('33) 20 AIR 1933 Lah 352 (354) : 14 Lah 591.

Note 2

1. ('26) 13 AIR 1926 Mad 1021 (1023) (DB). (Interest from date of suit.)
2. ('40) 27 AIR 1940 Bom 369 (377) : ILR (1941) Bom 71 (DB). (Granting of interest on damages after date of suit is in the discretion of Court.)
('25) 12 AIR 1925 Bom 547 (556). (Interest from date of suit was decreed.)
3. ('11) 9 Ind Cas 221 (222) (Oudh). (Suit for compensation for use and occupation.)
('31) 18 AIR 1931 Sind 121 (124) : 25 Sind L R 104 (DB). (From date of suit.)

on damages before judgment.[4] In *Crewdzon* v. *Ganesh Das*,[5] Mr. Justice Mookerjee was of opinion that interest *pendente lite* cannot be awarded when the claim is for an unliquidated amount of damages. A contrary view, however, has been taken in a later case of the Calcutta High Court in which it has been held that the Court has power to award interest on damages, but that in such cases the Court should *state its reasons* for so doing.[6]

Suppose a decree for possession is passed in A's favour against B. The decree directs that A should pay a certain amount to B before recovering possession. The decree cannot be said to be a decree for the payment of money in favour of B. This section will not apply to such a case. Hence, the question whether the Court is entitled to allow interest to B on the amount in case it is not paid within the time fixed by the decree is not a matter under this section.[7]

3. Award of interest under the section is a matter of discretion. — The award of interest under this section after the date of suit is entirely in the discretion of the Court.[1] This discretion is not excluded either by the fact that there is an agreement to pay a certain rate of interest till realisation,[2] or by there being no contract to pay any interest,[3] or by the fact that the plaint does not claim interest,[4] or by the rule of *damdupat*.[5] It is not necessary for the award of interest in the decree that the judgment should have made any reference to it.[6] To hold otherwise would render the words "in the decree" a mere surplusage, for it does not require a rule of procedure to enable a Court to embody in its decree a relief granted by the judgment.[7]

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4. ('31) 18 AIR 1931 Bom 386 (387) (DB).
5. ('20) 7 AIR 1920 Cal 737 (739).
6. ('24) 11 AIR 1924 Cal 637 (638) (DB).
7. *See* ('42) 29 AIR 1942Mad 156 (159) (DB). (In the circumstances of this case it was held that the Court was not entitled to allow interest on the amount required to be paid by the plaintiff as a condition precedent of his getting possession under the decree.)

Note 3

1. ('42) 29 AIR 1942 P C 61 (64) : I L R (1942) Kar P C 157 (PC).
('41) 28 AIR 1941 Pat 255 (258): 20 Pat 481 (FB). (Interest from date of suit to date of appeal cannot be included so as to bring the subject-matter of appeal to the appealable value.)
('40) 27 AIR 1940 Bom 369 (377) : I L R (1941) Bom 71 (DB). (Interest on damages from date of suit is discretionary with Court.)
('39) 26 AIR 1939 Pat 323 (329, 333) (DB).
('28) 15 AIR 1928 Lah 954 (956) (DB).
('31) 18 AIR 1931 P C 104 (107): 58 Cal 1281 : 58 Ind App 141 (PC).
('32) 19 AIR 1932 All 245 (246).
('32) 19 AIR 1932 All 128 (130) : 53 All 54 (DB).
('86) 12 Cal 569 (579) (FB).
('70) 14 Suth W R 62 (62) (DB).
('32) 19 AIR 1932 Lah 312 (314) (DB).
('15) 2 AIR 1915 Lah 113 (114) : 1915 Pun Re No. 22 (DB).
('36) 23 AIR 1936 Nag 28 (29) : 31 Nag L R Sup 121. (Debtor paying certain amount to creditor during pendency of insolvency and before order of adjudication—Application by receiver subsequently appointed claiming refund of amount—Court has power to grant interest under S. 34, C. P. C., from application for refund till realisation. NOTE. — S. 34 will apply to such a case by virtue of S. 5 of the Provincial Insolvency Act.)
('29) 16 AIR 1929 Nag 6 (8).
('04) 17 C P L R 38 (40).
('19) 6 AIR 1919 Oudh 248 (249) : 22 Oudh Cas 287 (289). (It is not excluded by S. 141 of the Oudh Rent Act.)
Also see Notes 4 and 16.
2. ('42) 29 AIR 1942 P C 61 (64) : I L R (1942) Kar P C 157 (PC).
('86) 12 Cal 569 (579) (FB).
('78) 3 Bom 202 (203) (DB).
('91) 18 Cal 164 (180) : 17 Ind App 201 (PC).
('83) 32 Cal 582 : 9 Cal W N 421 (437) (DB).
3. † ('24) 11 AIR 1924 Nag 348 (352).
('35) 22 AIR 1935 Cal 347 (356) : 62 Cal 175 (DB).
4. ('43) 30 AIR 1943 Nag 240 (242) (DB). (Question of interest is one for the discretion of the Court under S. 34(1), C. P. C., and not a matter of substantive law which must be pleaded.)
('42)29 AIR 1942 Oudh 332(333): 17 Luck 677 (DB). (Claim under the U. P. Encumbered Estates Act.)
('95) 17 All 511 (517) : 22 Ind App 199 (201) (PC).
('32) 19 AIR 1932 Bom 319 (325, 326) (DB).
('34) 21 AIR 1934 All 805 (807) (DB).
('31) 18 AIR 1931 Bom 549 (549): 55 Bom 657(DB).
('21) 8 AIR 1921 Lah 125 (126) : 2 Lah 256 (DB).
('36) 23 AIR 1936 Pat 191 (192) (DB).
Also see O. 7 R. 7 Note 2.
5. ('24) 11 AIR 1924 Nag 348 (353).
('25) 12 AIR 1925 Nag 193 (194).
†('29) 16 AIR 1929 Nag 355 (356).
6. † ('85) 7 All 755 (756) (DB).
('16) 3 AIR1916 All 303(304)(DB).(Interest on costs.)
7. ('93) 15 All 121 (122, 123) (DB). (However, if the claim for interest is disallowed by judgment it cannot be added in decree later on.)

The discretion under this section must, however, be exercised on sound judicial principles[8] and, when so exercised, it will not be interfered with in appeal.[9] Ordinarily, future interest should not be refused except for sufficient reasons,[10] such as the wrongful conduct of the party,[11] or the award of a high rate of interest upto date of suit.[12]

Where the lower Court has not considered the question of interest at all, the Appellate Court may grant it.[13]

Section 141 of the Oudh Rent Act, which provides that an under-proprietor or tenant shall be liable to pay interest on the arrears of rent at the rate of twelve annas *per cent. per mensem* (now see S. 146 of the U. P. Tenancy Act, 1939, which provides for one anna per rupee per annum simple interest), does not control the discretion vested in the Court under this section to allow future interest at such rate as the Court deems reasonable.[14] See also the undermentioned cases.[15]

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8. ('19) 6 AIR 1919 Cal 144 (150) : 23 Cal W N 336 (344) (DB).
('81) 3 All 91 (107) : 7 Ind App 196 (PC). (Inordinate and unusual rate of interest ought not to be allowed.)
('30) 17 AIR 1930 Lah 733 (734, 735) (DB). (The discretion must be reasonable.)
('21) 8 AIR 1921 Pat 367 (369) (DB).

9. ('42) 29 AIR 1942 P C 61 (64): ILR (1942) Kar P C 157 (PC). (6% interest proper.)
('41) 1941 Nag L Jour 591 (592, 593) (DB). (Lower Court not allowing interest owing to erroneous view of law that interest was not allowable in view of S. 15, C. P. Debt Conciliation Act — No exercise of discretion—Appellate Court can interfere — In this case, the appellate Court also disallowed interest.)
('39) 26 AIR 1939 Pat 323 (330) (DB). (Trial Court refusing to grant *pendente lite* and future interest on the ground that interest claimed prior to suit was excessive though it could not be relieved against as not being unfair under the Usurious Loans Act — Discretion is wisely exercised and appellate Court will not interfere.)
('25) 12 AIR 1925 P C 280 (288) : 5 Pat 135 : 52 Ind App 418 (PC).
('22) 9 AIR 1922 P C 46 (48) (PC).
('35) 22 AIR 1935 Cal 39 (68) : 61 Cal 711 (DB).
('32) 19 AIR 1932 Lah 25 (26) (DB). (Interest at contract rate allowed.)
('25) 12 AIR 1925 Lah 308 (309) (DB).
('23) 10 AIR 1923 Lah 513 (514) (DB).
('33) 20 AIR 1933 Oudh 128 (129) : 8 Luck 315 (DB).
('32) 19 AIR 1932 Oudh 255 (263) : 8 Luck 40 (DB).
('38) 25 AIR 1938 Pat 600 (603) : 17 Pat 350 (DB). (Court of appeal will not interfere with the discretion exercised by the trial Court merely on the ground that reasons for the award or refusal to award such interest have not been given.)
('37) 24 AIR 1937 Pat 628 (632) : 16 Pat 557 (DB). (Circumstance justifying omission to award not referred to by Court—Interference on appeal merely on this ground is not justified.)
('35) 22 AIR 1935 Pat 306 (341) : 14 Pat 70 (DB). (Where the lower Court did not award interest under this Section on the ground that the suit was considerably delayed by the plaintiff, it was held by the High Court that the lower Court was right in not allowing interest *pendente lite* but was wrong in not allowing future interest.)
[*See* ('35) 22 AIR 1935 Lah 307 (311). (*Held* that the appellate Court could grant interest *pendente lite* though lower Court had refused it.)]

10. ('43) 30 AIR 1943 Nag 240 (242, 243) (DB). (No mention as to further interest though asked for in the plaint—No reasons recorded — Exercise of discretion is not proper and judicial and the appellate Court will interfere.)
('40) 27 AIR 1940 Bom 369 (378): ILR (1941) Bom 71 (DB). (Long delay under vexatious and oppressive circumstances in payment of contract money is good ground for granting interest — Mere fact that damages are awarded is no ground for refusing it.)
('19) 6 AIR 1919 Cal 144 (150) (DB).
('34) 21 AIR 1934 Lah 32 (33) (DB).
('28) 15 AIR 1928 Nag 115 (116).
('26) 13 AIR 1926 Nag 109 (115) : 22 Nag L R 49.
[*See* ('33) 20 AIR 1933 Lah 440 (441).
('32) 19 AIR 1932 Lah 312 (314). (Long delay in bringing suit is a circumstance which will weigh with the Court in not granting future interest.)]

11. ('79) 4 Cal 322 (326) (DB).
('14) 1 AIR 1914 Lah 326 (327) : 1914 Pun L R No. 199, p. 657 (DB). (Delay in trial due to plaintiff's erroneous act.)

12. ('39) 26 AIR 1939 Pat 323 (329, 330) (DB).
('93-1900) 1893-1900 Low Bur Rul 332.
('19) 6 AIR 1919 All 1 (5) : 42 All 230 (DB). (Compound interest charged — Total amount of such interest exceeding one-third of amount of claim — Future interest refused.)
('76) 25 Suth W R 323 (323) (DB). (Stipulation for compound interest — Award of 6 per cent. from date of suit held proper.)

13. ('27) 14 AIR 1927 Lah 679 (680) (DB).
('36) 23 AIR 1936 Lah 668 (669). (Judge not applying his mind to question of future interest—There is no exercise of discretion—Interest can be granted in appeal.)

14. ('34) 21 AIR 1934 Oudh 239 (240) : 10 Luck 357.

15. ('43) 47 Cal W N 645 (651). (Section 30 of Bengal Money-Lenders Act, controls the discretion of the Court under S. 34, C. P. Code.)
('42) 29 A I R 1942 Cal 610 (610). (Bengal Money-Lenders Act (X of 1940), S. 36 does not abrogate S. 34, C. P. C. — Court can allow interest for period between original money decree and decree passed under S. 36 (6) of that Act.)

4. Interest from date of suit to date of decree. — The plaintiff is not entitled *as of right* to the contract rate after suit.[1] The Court, as has been seen already, has full discretion over the matter.[2] As a rule, however, the Court should award the contract rate till date of decree except where it would be inequitable to do so.[3] In the case cited below,[4] the Court granted compound interest from the date of the suit to the date of the final decree in view of the fact that the plaintiff was long kept out of his money. Where interest at contract rate is refused, the Court should give its reasons for such refusal.[5] In an action, however, for dissolution of a partnership and for accounts, interest should ordinarily be allowed only from the date of final decree as it is impossible to say, before the final decree, if anything is due to the plaintiff co-partner.[6] But when on dissolution of partnership one of the partners retains in his hands assets of the partnership for his own purposes without accounting for them or their proceeds, interest is properly chargeable against such accounting partner even though he has not acted fraudulently.[7] Accordingly in *Hakim Rai* v. *Ganga Ram*[8] interest was granted against the former managing partner from the date of the institution of suit until realisation.

Interest awardable from the date of plaint to the date of the decree should be only upon the *principal* sum and not on the whole amount including interest claimed by the plaintiff.[9]

5. Interest from date of decree to date of payment. — This is also within the discretion of the Court.[1] As a rule, however, the interest after the date of the decree

('41) 1941 Nag L Jour 591 (592) (DB). (Section 15 of the C. P. Debt Conciliation Act does not fetter the discretion of the Court to award interest under this section except as to the rate of interest.)
('35) 22 AIR 1935 All 505 (506) (FB). (Case under S. 225 of Agra Tenancy Act of 1926.)
('35) 22 AIR 1935 Pat 98 (101) : 14 Pat 400. (Mortgage—Interest from date of decree to date of realisation is not governed by Santhal Parganas Regulation (S. 6 speaking something like rule of "damdupat") but by S. 34.)

Note 4

1. † ('16) 3 AIR 1916 Mad 918 (918) (DB). (Dissenting from 12 Mad 485 which can be considered to be no longer good law.)
('24) 11 AIR 1924 Mad 33 (37) (DB).
('81) 3 All 91 (107) : 7 Ind App 196 (PC).
('35) 22 AIR 1935 Cal 39 (68) : 61 Cal 711 (DB).
('32) 19 AIR 1932 Lah 312 (314): 16 Lah 476(DB).
† ('36) 23 AIR 1936 Pat 191 (193) (DB).
2. ('22) 9 AIR 1922 P C 46 (48) (PC).
('13) 37 Bom 326 (338) : 40 Ind App 68 (PC).
('05) 32 Cal 582 : 9 Cal W N 421 (437).
('32) 19 AIR 1932 Lah 312 (314). (Absence of specific claim in plaint — No bar to granting of interest.)
('30) 17 AIR 1930 Lah 733 (734, 735).
('30) 17 AIR 1930 Mad 721 (723) : 53 Mad 475.
('38) 25 AIR 1938 Pat 600 (603) : 17 Pat 350.
[*See* ('34) 21 AIR 1934 Lah 93 (94).]
See also Note 3 above.
3. ('41) 28 AIR 1941 Pat 276 (280) (DB). (Suit to enforce mortgage which provided for interest at 13½ per cent. per annum compound interest — Court awarded 9 per cent. per annum simple interest.)
('26) 96 Ind Cas 310 (311) (Lah).
('25) 12 AIR 1925 Cal 268 (269).
('15) 2 AIR 1915 All 313 (314).
('35) 22 AIR 1935 Cal 39 (68) : 61 Cal 711.
('20) 7 AIR 1920 Cal 881 (881).
('13) 18 Ind Cas 747 (748) (Cal).
('30) 17 AIR 1930 Lah 733 (734).
('32) 19 AIR 1932 Mad 109 (110) : 55 Mad 458.
('18) 5 AIR 1918 Mad 558 (560).
('18) 5 AIR 1918 Oudh 224 (224).
('14) 1 AIR 1914 Oudh 289 (290).
('34) 21 AIR 1934 Pat 134 (139) : 13 Pat 200.
('33) 20 AIR 1933 Pat 207 (208).
[*See* ('35) 18 Nag L Jour 323 (324). (In the absence of any cogent reason, interest *pendente lite* should be allowed in suits other than mortgage suits. When the plaint contains a prayer for such interest from the date of plaint, the Court is not justified in ignoring the same; in the absence of any agreement to the contrary the Court should allow future interest at the Court rate.)]
Also see Note 3.
4. ('36) 23 AIR 1936 Rang 141 (144).
5. ('16) 3 AIR 1916 Mad 918 (918).
[*See also* ('31) 18 AIR 1931 Nag 91 (93).]
6. ('30) 17 AIR 1930 P C 185 (187) : 58 Cal 208 : 57 Ind App 245 : 24 Sind L R 328 (PC).
('32) 19 AIR 1932 Sind 126 (127): 26 Sind L R 385.
7. ('42) 29 AIR 1942 P C 61 (64) : I L R (1942) Kar P C 157 (PC).
('15) 2 AIR 1915 P C 116 (118) : 42 Cal 914 : 42 Ind App 91 (PC).
8. ('42) 29 AIR 1942 P C 61 (64) : I L R (1942) Kar P C 157 (PC).
9. ('43) 30 AIR 1943 Mad 216 (217) (DB).

Note 5

1. 2 Hyde 106 : Cor 12.

will be granted at a lower rate than that allowed for the period before the date of the decree. The reason is that the plaintiff getting the *security* of a decree has his interest reduced in the generality of cases.[2] But there is nothing to prevent a Court from granting, in a proper case, the contract rate of interest upto realisation.[3] Where interest at 24 per cent. was granted upto the date of decree, the Lahore High Court refused further interest after the date of the decree.[4]

The interest granted under this head is referred to in the section as "further interest" and is awardable on the aggregate of the principal and interest as on the date of the decree;[5] but it is not *compound* interest but only interest on a fixed sum declared to be due by the decree.[6]

In cases of execution sales the date of confirmation of sale is the date of realisation of the decree amount. Hence, where interest is allowed upto date of realisation the judgment-debtor is liable to pay interest upto the date of confirmation of sale only and not thereafter unless it is shown that the judgment-debtor has been guilty of any act which has the effect of preventing or postponing the actual payment to the judgment-creditor.[7]

6. Interest prior to suit — General. — It has been already seen that interest prior to suit is a matter of substantive law and is outside the scope of the section.[1] It will be useful, however, to briefly note the principles governing the award of such interest.

The right to interest, prior to suit, arises in one of the four following ways :

(1) *Agreement* express or implied between the parties (see Note 7).

(2) Mercantile usage (see Note 8).

(3) Statutory provisions[2] (see Note 9).

(4) Interest may be also allowed as damages in some cases (see Note 10).

No interest can be allowed on *damages* for any period prior to suit.[3] Nor,

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('33) 20 AIR 1933 Lah 352 (353, 354): 14 Lah 591.
('35) 22 AIR 1935 Cal 39 (68) : 61 Cal 711 (DB). (No contract to pay interest—Interest awarded as damages—*Held* that post-decree interest at same rate ought not to be awarded.)
('75) 23 Suth W R 309 (310) (DB).
('69) 11 Suth W R 455 (456) (DB).
('35) 18 Nag L Jour 323 (324). (In the absence of any reasons to the contrary Court should allow future interest at Court rate.)
('38) 25 AIR 1938 Pat 600 (603): 19 Pat 202 (DB).
('35) 22 AIR 1935 Pesh 58 (59). (Transaction between bank and firm — Rate charged rather below than above ordinary rate — Future interest to be granted.)
('36) 23 AIR 1936 Rang 141 (144) (DB). (Courts are entitled to give interest in their discretion. This can be given under S. 34, C. P. C., and also under S. 73, Contract Act.)
See also Note 3 and Note 4.

2. ('41) 28 AIR 1941 Pat 276 (280) (DB).
('91) 18 Cal 164 (180) : 17 Ind App 201 (PC).
('33) 20 AIR 1933 Lah 1011 (1013) (DB).
('81) 3 All 91 (107) : 7 Ind App 196 (PC).
('69) 11 Suth W R 455 (456) (DB).
(1883) 25 Ch D 338 (349, 350), In re Sneyd, Ex parte Fewings.

3. ('99) 5 Cal W N 653 (654) (DB).
('34) 21 AIR 1934 Bom 86 (89) (DB). (Court has jurisdiction to give compound interest after decree.)
('35) 22 AIR 1935 P C 165 (168) : 63 Cal 1 : 62 Ind App 265 (PC). (The stipulated rate of interest can be awarded up to the date of realisation or actual payment and a debtor should not be allowed to keep the money of his creditor at a low rate of interest by merely bringing an unsuccessful appeal.)
('14) 1 AIR 1914 Oudh 289 (290).

4. ('28) 15 AIR 1928 Lah 811 (811) (DB).

5. ('35) 22 AIR 1935 Cal 39 (67) : 61 Cal 711 (DB).

6. (1864) 1 Suth W R (Misc) 15 (15) (DB).

7. ('42) 29 AIR 1942 Mad 442 (443, 444) (DB).

Note 6

1. See Note 1.

2. ('42) 29 AIR 1942 Sind 165 (166) : ILR (1942) Kar 346 (DB).
('38) 25 AIR 1938 P C 67 (70) : ILR (1938) 2 Cal 72 : 32 Sind L R 374 : 65 Ind App 66 (PC).
('18) 5 AIR 1918 P C 53 (56) : 40 All 497 (PC).

3. ('70) 7 Bom H C R A C 89 (98) (DB).
('32) 19 AIR 1932 Oudh 165 (167) : 8 Luck 35 (DB).
('31) 18 AIR 1931 Bom 386 (387) (DB).
('85) 11 Cal 221 (226) (DB).
('30) 17 AIR 1930 Lah 374 (378) (DB).

unless there is a contract to the contrary, will any but simple interest be allowed as a general rule.[4]

7. Agreement express or implied to pay interest. — The Usury Laws Repeal Act, XXVIII of 1855, section 2, has abolished all usury laws, and consequently where there is a stipulation to pay interest at a particular rate, that rate must be allowed, however high it may be.[1] The Court has no *discretion* in the matter as it has in the case of interest *pendente lite*.[2] There are however certain exceptions to the above rule —

(1) Where the circumstances under which the agreement is entered into are such as to render it void or voidable under the Contract Act, e.g., fraud or undue influence or want of free consent, the rate agreed upon will not be enforced.[3]

(2) Where the rate agreed upon amounts to a *penalty*, it will not be enforced, but the Court has power to grant reasonable compensation instead under S. 74 of the Contract Act.[4] The Court's equitable jurisdiction to grant relief

('33) 20 AIR 1933 Oudh 259 (260, 261) (DB). (Suit for damages—Interest thereon prior to suit should not be awarded.)
('32) 19 AIR 1932 Sind 9 (16) : 26 Sind L R 167.
('31) 18 AIR 1931 Sind 121 (124) : 25 Sind L R 104 (DB). (Agreement or mercantile usage, if relied upon, must be proved.)
('11) 5 Sind L R 192 (218): 15 Ind Cas 757 (768) (DB).
(1893) 1893 A C 429 (437), London Chatham and Dover Ry. Co. v. South Eastern Ry. Co. (Damages for detention of debt.)
[*See also* ('66) 4 Bom H C R A C 55 (56).]

4. ('05) 7 Bom L R 772 (790).
('33) 20 AIR 1933 Mad 171 (172).
('04) 28 Bom 371 (377) (DB). (Courts do not lean towards compound interest.)
[*See also* ('29) 16 AIR 1929 Pat 340 (341). (No compound interest can be allowed unless there is a contract, express or implied.)]

Note 7

1. ('84) 6 All 63 (64) (DB).
('20) 7 AIR 1920 Cal 881 (881) (DB).
('66) 11 Moo Ind App 120 (127) (PC).
('89) 1889 All W N 167 (167).
('19) 6 AIR 1919 Cal 413 (414) : 23 Cal W N 980 (981) (DB). (30 per cent. allowed.)
('06) 10 Cal W N 640 (642) (DB).
† ('04) 31 Cal 233 (239) (DB).
('03) 7 Cal W N 876 (877) (DB).
† ('02) 29 Cal 823 (825, 826) (DB).
('83) 9 Cal 309 (314) (DB).
('74) 21 Suth W R 352 (357) (DB). (Interest at 75 per cent. allowed.)
('73) 20 Suth W R 317 (327).
('66) 6 Suth W R 254 (255).
('01) 1901 Pun L R No. 151, page 383.
('82) 1882 Pun Re No, 40. (36 per cent.)
('79) 1879 Pun Re No. 145.
('77) 1877 Pun Re No. 5.
('02) 25 Mad 343 (346) (DB).
('88) 1 C P L R 57 (57).
('25) 12 AIR 1925 Oudh 535 (535) (DB).
[*See* ('93) 15 All 339 (352) : 20 Ind App 116 (PC).]

2. ('70) 15 Suth W R 396 (397) (DB).

3. ('99) 2 C P L R 23 (24). (Pressure of money—75 per cent. compound interest held unconscionable.)
('89) 1889 Pun Re No. 135.
('07) 29 All 303 (306, 307) (DB). (Transaction so unconscionable as to amount to a want of free consent.)
('03) 25 All 284 (285) (DB).
('87) 9 All 228 (229) (DB). (Pressing necessity — High rate of compound interest — Ample security —Long delay in suing.)
† ('87) 9 All 74 (81) (DB).
('84) 1884 All W N 280 (281) (DB).
('07) 31 Bom 348 (352). (Unconscionable transaction relieved under S. 16 of the Contract Act.)
('78) 3 Bom 131 (133) (DB).
('66) 4 Bom H C R A C 202 (205) (DB). (Terms extortionate and unfair.)
† ('13) 17 Cal L Jour 221 (225) (DB).
('06) 33 Cal 683 (688) (DB).
('06) 10 Cal W N 640 (642) (DB).
('02) 29 Cal 823 (825, 826) (DB).
('98) 2 Cal W N 333 (335) (DB).
('86) 12 Cal 225 (239) : 12 Ind App 215 (PC).
('77) 2 Cal 202 (207, 208) (DB). (Rate exhorbitant —Consideration grossly inadequate — Nothing to show defendant understood transaction.)
('74) 21 Suth W R 352 (357) (SB).
('73) 20 Suth W R 317 (327) (DB).
('79) 1879 Pun Re No. 145.
('79) 1879 Pun Re No. 110.
('77) 1877 Pun Re No. 5.
(1862) 1 Mad H C R 81 (82) (DB).
('90) 3 C P L R 48 (49).
('88) 1 C P L R 57 (57).
('18) 5 AIR 1918 Oudh 320 (321) : 21 Oudh Cas 265 (267).
('99) 2 Oudh Cas 209 (212) (PC).
[*See also* ('18) 5 AIR 1918 P C 249 (251) : 1918 Pun Re No. 124 (PC). (Contract not unconscionable within S. 16 of the Contract Act—Award of interest not interfered with.)]

4. ('40) 27 AIR 1940 Sind 68 (73) (DB). (Interest at enhanced rate on default is not necessarily penal.)

against penalty is not excluded by the Usury Laws Repeal Act (XXVIII of 1855).[5] As to what are penal stipulations enabling the Court to interfere, see S. 74 of the Contract Act and the illustrations thereto.

(3) Where the rate agreed upon, though not amounting to penalty, is *excessive and* the transaction between the parties is *substantially unfair*, the Court can, under S. 3 of the Usurious Loans Act of 1918, re-open the transaction, take an account between the parties and relieve the debtor of all liability in respect of any excessive interest.[6]

The agreement to pay interest may be an *implied* one, and the above principles would equally apply to such agreements.[7] An agreement to pay interest can be implied from the course of dealings between the parties.[8] Where there is an implied agreement that interest will be charged, a reasonable interest will be allowed.[9] The mere fact that the debt is a fixed amount and has been frequently demanded will not, however, give rise to an implied contract to pay interest.[10]

8. Mercantile usage. — Where there is no stipulation, express or implied, to pay interest, it will still be granted if it is allowed by mercantile usage in transactions of the kind in question.[1] The reason is that the transaction will be considered to have been entered into in view of and importing the mercantile usage.[2]

9. Right to interest under statutory provisions. — Even in the absence of any stipulation or trade usage, a right to interest may arise where it is allowed by statute. Thus, S. 80 of the Negotiable Instruments Act (XXVI of 1881) provides that where no rate is *specified* in a negotiable instrument, the Court shall award interest at 6 per cent. per annum notwithstanding any agreement relating to interest between the parties.[1] Similarly, Ss. 351 to 353 of the Succession Act (XXXIX of 1925) provide for payment of

[*See* ('39) 26 AIR 1939 Mad 481 (481, 482) (DB). (Mortgage deed providing for payment of mortgage debt by instalments — In case of default in payment of instalment, entire amount remaining due to become due and compound interest at 12 per cent. per annum payable — Stipulation for compound interest held in the nature of penalty and not binding on mortgagor—Court granted 12 per cent. per annum simple interest.)]

5. † ('73) 10 Bom H C R 382 (385) (DB).
† ('93) 17 Bom 106 (112, 114) (FB).
('75) 6 N W P H C R 358 (362, 363, 365) (FB).
('69) 6 Bom H C R A C 7 (7) (DB).
† ('15) 2 AIR 1915 Cal 796 (799): 42 Cal 652 (661) (DB).
('06) 10 Cal W N 1020 (1023) (DB).
('04) 31 Cal 138 (141).
† ('99) 26 Cal 300 (306) (DB).
('98) 2 Cal W N 333 (334) (DB)
('98) 2 Cal W N 234 (237) (DB).
('73) 20 Suth W R 317 (327) (DB).
('73) 19 Suth W R 271 (272) (DB).
('06) 29 Mad 491 (496) (DB).

6. ('30) 17 AIR 1930 Cal 776 (777).
('32) 19 AIR 1932 Lah 252 (253) : 13 Lah 512 (DB).
('33) 20 AIR 1933 Nag 224 (225).
('31) 18 AIR 1931 All 662 (662) : 53 All 776 (DB). (Section 79, Negotiable Instruments Act, does not exclude the jurisdiction conferred by the Usurious Loans Act, S. 2, sub-s. (3).)
('29) 16 AIR 1929 Pat 340 (341) (DB).
[*See also* ('33) 20 AIR 1933 Bom 297 (297, 298).]

7. ('94) 1894 Pun Re No. 36. (Implied contract — Neither Act XXXII of 1839 nor Act XXVIII of 1855 prevents the recovery of the rate agreed.)
('30) 17 AIR 1930 Lah 985(991): 12 Lah 239 (DB).
('31) 18 AIR 1931 Lah 457 (461) (DB).

8. (1900) 2 Ch 548 (551), Willmat v. Gardiner.
(1893) 1893 App Cas 429 (440), London Chatham Dover Ry. Co. v. South Eastern Ry. Co.
(1905) 1 Ch 307 (314), Re Duncan.
('32) 19 AIR 1932 Cal 521 (522): 59 Cal 662 (DB).
(1864) 1 Suth W R 136 (136) (DB). (Parties treating debt as bearing interest.)

9. ('72-92) 1872-1892 Low Bur Rul 294.
('05) 27 All 361 (363) (DB).

10. ('66) 1866 Pun Re No. 51.

Note 8

1. † (1861) 9 Moo Ind App 256 (266) (PC).
(1859) 7 Moo Ind App 263 (282) (PC).
(1851) 5 Moo Ind App 109 (136) (PC).
(1865) 4 Suth W R 85 (85). (Interest is claimable on hundis drawn at 111 days' sight by the usage of native bankers at Moorshidabad.)
[*See* ('31) 18 AIR 1931 Sind 121 (124) : 25 Sind L R 104. (Mercantile usage has to be proved.)]
2. (1861) 9 Moo Ind App 256 (267) (PC).

Note 9

1. See S. 80 of the Negotiable Instruments Act.
('38) 25 AIR 1938 P C 67 (70) : I L R (1938) 2 Cal 72 : 32 Sind L R 374 (PC).
[*See also* ('31) 18 AIR 1931 Cal 140 (141): 58 Cal 290.

interest at 4 per cent. per annum on general legacies remaining unpaid, in certain cases, and 6 per cent. per annum in other cases.[2] Again, S. 1 of the Interest Act (XXXII of 1839) enacts that the Court shall award interest at a rate not exceeding the *current* rate on all *debts or "sums certain"* —

(1) where such sums are payable by virtue of a *written instrument* at a *certain time*, from the time when the sums were payable,

or

(2) where such sums are payable otherwise, from the time when *demand for payment* shall have been made in *writing* so that such demand shall give notice to the debtor that interest will be claimed from the date of such demand until payment.[3]

The "*sums certain*" do not include *provisional* payments to be made by one party to another.[4] Nor does it include unliquidated damages[5] or unascertained sums.[6]

('29) 16 AIR 1929 Pat 365 (366).]

2. ('02) 25 Mad 361 (365) (DB).
('06) 29 Mad 155 (160) (DB).

3. ('42) 29 AIR 1942 Pat 417 (419). (Suit for arrears of tax by Municipality — Notice of demand as required by S. 123, Bihar and Orissa Municipal Act, not served on defendant — Interest prior to suit not allowed. AIR 1930 Pat 189, followed.)
('42) 29 AIR 1942 Sind 165 (166): ILR (1942) Kar 346 (DB). (Conditions required by S. 1, Interest Act, not fulfilled—No interest can be ordered.)
('41) 28 AIR 1941 All 43 (48): ILR (1940) All 739 (DB). (Suit for arrears of maintenance—Claim not based upon written instrument — No demand for payment made in writing—Interest not allowed.)
(1854) 6 Moo Ind App 232 (249) (PC).
('30) 17 AIR 1930 Bom 444 (445) (DB).
('19) 6 AIR 1919 All 51 (52). (No agreement in writing — No demand in writing — No interest is claimable.)
('04) 26 All 299 (309): 7 Oudh Cas 116: 31 Ind App 116 (PC).
(1887) All W N 287 (287). (Printed heading in bill that interest will be charged is sufficient demand.)
('31) 18 AIR 1931 Cal 140 (144): 58 Cal 290.
('20) 7 AIR 1920 Cal 737 (739) (DB).
(1900) 27 Cal 814 (818) (DB).
('99) 26 Cal 955 (960, 961) (DB). (Date of payment need not be mentioned in the document.)
('98) 25 Cal 54 (57). (Certificate of Administrator-General admitting a debt is not a "written instrument" within the Section.)
('76) 24 Suth W R 457 (459) (DB). (No demand— Interest can only be given from the date of the suit.)
('68) 1 Beng L R (O C) 41 (41).
('33) 20 AIR 1933 Lah 212 (212).
('32) 19 AIR 1932 Lah 616 (618): 13 Lah 516 (DB).
('15) 2 AIR 1915 Lah 181 (184) (DB). (No agreement in writing — No demand in writing — No interest is claimable.)
('13) 1913 Pun Re No. 30: 20 Ind Cas 299 (300).
('01) 1901 Pun L R No. 181, p. 466. (Demand for retrospective interest may imply demand for prospective interest.)
('33) 20 AIR 1933 Mad 320 (321): 56 Mad 391 (DB).
('21) 8 AIR 1921 Mad 76 (79) (DB).
('16) 3 AIR 1916 Mad 498 (499): 38 Mad 464 (465) (DB). (Debts include debts payable in kind.)
('16) 3 AIR 1916 Mad 127 (130) (DB).
('13) 21 Ind Cas 543 (544) (DB) (Mad). (Interest may be allowed on damages from date of a written demand for interest—It is not allowable legally on unliquidated damages.)
('08) 31 Mad 250 (251) (DB).
(1900) 23 Mad 41 (45). (Letter demanding payment with interest sufficient.)
('97) 20 Mad 481 (481) (DB). (Oral contract — No agreement or usage either.)
('76) 1 Mad H C R 369 (372) (DB).
('26) 13 AIR 1926 Nag 64 (65). (No written demand —Not entitled to interest.)
('23) 10 AIR 1923 Nag 197 (198): 19 Nag L R 24. (Cosharers not demanding share of profits.)
('19) 6 AIR 1919 Nag 62 (64). (No security; 1 per cent. per mensem is reasonable.)
('33) 20 AIR 1933 Oudh 259 (261) (DB).
('29) 16 AIR 1929 Oudh 420 (421) (DB).
('31) 18 AIR 1931 Pat 394 (402): 10 Pat 528 (DB).
('29) 16 AIR 1929 Pat 365 (366).
(1873) 15 Eq 394 (397), Alison, ex parte. (A summons is a demand.)
[But see ('14) 1 AIR 1914 Lah 147 (147): 1914 Pun Re No. 9: 20 Ind Cas 194 (194) (DB). (Printed headline in the tradesman's bill that interest would be charged on all arrears after a certain period is not such a demand as is contemplated by the Interest Act.)
('01) 1901 Pun Re No. 55. (Headlines in order form that interest will be charged is not sufficient demand.)]

4. (1893) 1893 App Cas 429 (436), London Chatham and Dover Ry. Co. v. South Eastern Ry. Co.
(1859) 7 Moo Ind App 263 (280) (PC) (Contingent contracts are not within the scope of the Act.)
('99) 26 Cal 955 (960) (DB).

5. ('70) 7 Bom H C R A C 89 (98) (DB). (Interest not to be awarded on unliquidated damages.)
('72) 9 Bom H C R 7 (11) (DB). (Do.)
('20) 7 AIR 1920 Cal 737 (739) (DB). (Depreciation in value of goods is not a debt or a sum certain.)
(1874) 18 Eq 154 (167), Hill v. South Staffordshire Ry. Co.

6. ('19) 6 AIR 1919 Mad 164 (165): 42 Mad 661 (DB). (Unascertained sum claimed as profits of trade.)

10. Interest as damages. — Where there is no agreement, express or implied, to pay interest, and it is not allowed by any statute or mercantile usage, no interest can be awarded *as interest*.[1] But it may be awarded as damages in proper cases.[2] Thus, interest may be awarded by way of damages in cases where money due is wrongfully withheld,[3] or where money is levied in execution of a decree or order subsequently reversed (See S. 144 Note 23), or where money is paid on behalf of others under compulsion.[4] In cases of breach of contract where the non-payment of money due is itself the breach of contract and nothing else is proved to make out the claim for compensation for such breach, no interest can be awarded in addition to the recovery of money withheld.[5] But, if by reason

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Note 10

1. ('42) 29 AIR 1942 All 96 (101) : ILR (1941) All 777 (DB). (Suit to recover haq-e-chabarum brought after confirmation of sale without undue delay — Interest by way of damages should not also be allowed.)
('41) 28 AIR 1941 All 43 (48) : I L R (1940) All 739 (DB). (Hindu widow's suit for arrears of maintenance — Interest prior to suit cannot be granted but *pendente lite* and future interest under S. 34 may be granted.)
('41) 28 AIR 1941 Pat 6 (9) (DB).
('40) 27 AIR 1940 Oudh 257 (259, 260) : 15 Luck 550 (DB).
('38) 25 AIR 1938 P C 67 (70) : I L R (1938) 2 Cal 72 : 32 Sind L R 374 : 65 Ind App 66 (PC).
('12) 16 Cal L Jour 264 (269, 270) (DB).
('32) 136 Ind Cas 719 (720) (DB) (Lah).
('34) 21 AIR 1934 Pat 99 (104) : 12 Pat 869 (DB). (Hindu widow's suit for maintenance—Not entitled to interest prior to suit but interest after suit under S. 34 may be granted.)
[*See also* ('78) 2 Cal L Rep 349 (351).]

2. ('42) 29 AIR 1942 P C 61 (64): ILR (1942) Kar P C 157 (PC). (Managing partner in possession of assets without accounting for them—Suit by co-partner two years after — Interest is chargeable against accounting defendant even though he has not acted fraudulently.)
('39) 26 AIR 1939 Mad 531 (537, 538): ILR (1939) Mad 776 (DB). (Claim for contribution—Interest allowed on equitable principles.)
† ('18) 5 AIR 1918 Cal 448 (449): 22 Cal W N 488 (490) (DB).
('23) 10 AIR 1923 Lah 632 (633): 4 Lah 406 (DB).
('16) 3 AIR 1916 P C 46 (48, 49) : 38 All 581 : 43 Ind App 294 (PC).
('15) 2 AIR 1915 P C 116 (118) : 42 Cal 914 : 42 Ind App 91 (PC).
('31) 18 AIR 1931 All 403 (404) (DB). (Interest awarded on equitable grounds.)
('91) 13 All 330 (336) (DB).
† ('35) 22 AIR 1935 Cal 347 (355): 62 Cal 175 (DB).
('35) 22 AIR 1935 Cal 39 (68) : 61 Cal 711 (DB).
('30) 17 AIR 1930 Cal 357 (360) : 57 Cal 953 (DB).
('01) 5 Cal W N 356 (360) (DB).
('78) 3 Cal 654 (661) : 5 Ind App 31 (PC).
('72) 17 Suth W R 179 (179) (DB). (In suit for contribution.)
† ('19) 6 AIR 1919 Mad 161 (164) : 42 Mad 661 (665, 667).
('95) 18 Mad 331 (335, 336) (DB).
('35) 22 AIR 1935 Oudh 170 (175) (DB). (Six per cent. is not excessive by way of damages.)
('28) 15 AIR 1928 Oudh 89 (92) (DB).
[*See also* ('32) 19 AIR 1932 All 505 (506).]
† [But see ('33) 20 AIR 1933 Pat 196 (199) : 12 Pat 216 (DB).]

3. ('02) 4 Bom L R 205 (211). (Interest on the amount of a policy of insurance after the date of a formal demand.)
('30) 129 Ind Cas 691 (698) (DB) (Lah).
('70) 14 Moo Ind App 209 (233) (PC).
('33) 20 AIR 1933 All 455 (456) (DB).
('33) 20 AIR 1933 All 186 (189) : 55 All 164 (DB).
('33) 20 AIR 1933 All 147 (149). (Premium payable in respect of a lease.)
('30) 17 AIR 1930 Cal 357 (360) : 57 Cal 953 (DB).
('19) 6 AIR 1919 Cal 538(539) (DB). (Sums collected by defendant and not accounted for. NOTE.— The Oudh Judicial Commissioner's Court has held that where a claim is not based on contract, interest cannot be allowed even as damages. See AIR 1926 Oudh 147 (147). The view is, it is submitted, open to question.)
('78) 1 Cal L Rep 236 (238) (DB).
('71) 16 Suth W R 297 (298) (DB).
(1865) 3 Suth W R 147 (151). (Interest may be claimed on the interest of Government promissory notes withheld by another.)
(1864) 1864 Suth W R Sup Vol 174 (174).
('35) 22 AIR 1935 Lah 775 (779). (Where a contractor has completed the work he has undertaken to do but his bill is unreasonably delayed, he is entitled to be compensated for the delay. Interest at 6 per cent., held was not excessive.)
('35) 22 AIR 1935 Lah 685 (686) (DB).
('35) 22 AIR 1935 Lah 552 (553) (DB).
('33) 20 AIR 1933 Mad 844 (845, 846).
[*See* ('43) 30 AIR 1943 Mad 62 (66) (DB). (Puisne encumbrancer in a suit to recover the surplus of the sale proceeds of the mortgaged property in the hands of prior mortgagee, can be allowed interest from the date of the plaint and not for the period before the suit, there being no evidence on record to show that the prior mortgagee after being appraised of the rights of the puisne encumbrancer withheld the money.)
('35) 22 AIR 1935 Mad 458 (459) (DB). (Partition suit dismissed for default — Subsequent suit — Plaintiff can get interest only from date of plaint.)]
[But see ('20) 7 AIR 1920 Cal 912 (913) : 31 Cal L Jour 348 (350).]

4. 2 Hay 278. (Payment of Government revenue.)
('03) 6 Oudh Cas 346 (350).
('81) 1881 P.R. No. 98. (Surety made to pay amount.)
5. ✣('33) 20 AIR 1933 Mad 729 (734) : 57 Mad 205 (DB).

of the breach the plaintiff has sustained special loss or damage for which the mere repayment of the amount due would not be adequate compensation, the Court can award interest as part of the damages.[6] A mere detention of a debt will not however entitle the creditor to interest by way of damages.[7] Nor will a claimant for contribution be awarded such interest if he has slept over his rights for a long time.[8] Similarly, where the dower to which a Mahomedan widow was entitled was fixed at a sum very much higher than the entire estate belonging to the husband, interest on the dower was refused.[9]

As to the *rate* of interest allowable as damages, see the undermentioned cases.[10]

11. Mortgage suits. — See Order 34, Rule 11.

12. Interest, whether payable after tender.— The general principle of the law of tender is embodied in S. 38 of the Contract Act under which, where a promisor has made an offer of performance to the promisee and the offer has not been accepted, the promisor is not responsible for non-performance. A tender of the amount due will stop the running of interest from the date of tender,[1] but it does not extinguish the debt.[2] But the tender must be a proper and a legal one. Thus, a tender contrary to the provisions of S. 61 of the Bengal Tenancy Act,[3] or a deposit in Court without notice to the opposite party,[4] or without getting a guardian *ad litem* appointed where the payee is a minor,[5] is not a proper tender.

A tender before suit, in order to be effectual, must be accompanied by a deposit after the institution of suit.[6] Otherwise, the creditor will be entitled to interest, at a

('29) 16 AIR 1929 Nag 170 (172) : 25 Nag L R 81. [*See* ('33) 20 AIR 1933 Lah 212 (212). ('33) 20 AIR 1933 Lah 127 (127).]

6. ('33) 20AIR 1933 Mad 729(734):57 Mad 205 (DB). [*See* ('33) 20 AIR 1933 Lah 556 (557).]

7. ('42) 29 AIR 1942 Oudh 311 (313) (DB).

('42) 29 AIR 1942 Sind 165 (166) : I L R (1942) Kar 346 (DB). (Suit for recovery of money due for work done—Defendants had withheld the money without any justification — *Held*, mere detention did not entitle the plaintiff to interest as damages unless there was agreement to pay interest or it is payable under trade usage having the force of law or under the provisions of any substantive law : AIR 1938 P C 67 : ILR (1938) 2 Cal 72 : 32 Sind L R 374 : 65 Ind App 66 (PC), followed.)

('41) 28 AIR 1941 All 43 (48) : ILR (1940) All 739 (DB). (Suit for arrears of maintenance — S. 73, Contract Act, cannot justify the awarding of interest merely because money has been detained and there is no proof of damage caused to the plaintiff because of the withholding of the maintenance.)

('41) 28 AIR 1941 Nag 273 (277, 278) : I L R (1942) Nag 294. (Claim for use and occupation of a house—Interest prior to suit not allowed.)

('38) 25 AIR 1938 P C 67 (70): ILR (1938) 2 Cal 72: 32 Sind LR 374 : 65 Ind App 66 (PC). (Illustration (n) to S.73, Contract Act, does not confer upon creditor a right to recover interest upon a debt when he is not entitled to it under any provision of law.)

† (1868) 2 Ch App 488 (491, 492), Turner v. Barkin Shaw.

('99) 21 All 223 (227): 26 Ind App 45 (PC). (Part of purchase money left unpaid as security for vendor satisfying incumbrance—Interest is not payable.)

('75) 23 SuthWR 325(327)(DB). (Agent's liability to pay interest on principal's money retained by him.)

('71) 16 Suth W R 148 (148) (DB). (Interest on balance of accounts in a suit therefor will not be allowed in the absence of agreement therefor.)

8. ('73) 19 Suth W R 98 (99) (DB). [*See also* ('30) 17 AIR 1930 Cal 385 (387) : 57 Cal 114.]

9. ('06) 3 Cal L Jour 541 (543) (DB).

10. ('26) 13 AIR 1926 Nag 363 (364). (6 per cent. may be a proper rate.)

('09) 13 Cal W N 118 (121). (Contribution suit — 12 per cent. was awarded.)

('17) 4 AIR 1917 Cal 188 (194) : 21 Cal W N 564 (570). (Restitution matter—Interest at 6 per cent. was considered proper.)

('23) 10 AIR 1923 Lah 632 (633) : 4 Lah 406.

('35) 22 AIR 1935 Mad 783 (783). (Restitution — 6 per cent. allowed.)

('05) 28 Mad 355 (357). (Restitution — 6 per cent. considered proper.)

Note 12

1. (1862) 1 Mad H C R 124 (126) (DB).

('07) 34 Cal 305 (321) (DB).

(1812) 3 Camp 296 (297), Dent v. Dunn.

('06) 2 Nag L R 62 (63). (Tender not proper — Interest will not cease to run.)

('07) 4 Low Bur Rul 108 (109).

2. ('07) 34 Cal 305 (321) (DB).

3. ('03) 7 Cal W N 720 (723) (DB).

4. ('71) 16 Suth W R 304 (304) (DB).

5. ('03) 27 Bom 23 (30) (DB).

6. ✣('92) 16 Bom 141 (149, 150).

✣('32) 19 AIR 1932 Mad 109(111): 55Mad458(DB).

('83) 9 Cal 33 (35, 37)(DB).

('15) 2 AIR 1915 Mad 210 (216): 38 Mad 959 (DB).

('07) 4 Low Bur Rul 108 (109).

† [But see ('26) 13 AIR 1926 Cal 310(311). (Refusal on tender; no deposit necessary.)]

Also see O. 24 R. 3, Note 2 which deals with tender after suit.

suitable rate, from the date of institution of the suit to the date of realisation.[7]

A tender must be unconditional[8] and of the full amount.[9] A deposit, however, made in full satisfaction of the debt, but accepted by the Court in part satisfaction only, will stop the running of interest on that part.[10] The rule that a tender of a part of the amount due must be treated as never made, applies only when it is *admitted* that a larger amount is due and not when it is *bona fide* asserted otherwise.[11] Where the judgment-debtor deposits the decree amount in Court, it has been held that he is not liable to pay interest on the decree amount from the date of the deposit to the date when the decree-holder has notice of the same.[12] Nor is he liable to pay interest after deposit though the decree-holder could not withdraw it pending appeal without furnishing security.[13]

See also the undermentioned case.[14]

13. Interest on mesne profits. — See Order 20 Rule 12.

14. Interest on arrears of rent. — In awarding interest on arrears of rent, no difference is made between rents paid in kind and those paid in money.[1] The mere omission to claim interest for past years at the stipulated rate cannot amount to a waiver of the landlord's right to recover at that rate.[2] For claims to interest under the various Tenancy Acts, see the undermentioned cases.[3] Where rent is charged on land, interest can be granted on the arrears of rent, on equitable grounds, although there are no words allowing interest in the instrument creating the charge.[4] In the undermentioned cases,[5] where neither a contract to pay interest on arrears of rent nor a custom under which such interest was payable was proved, it was held that no interest was payable on arrears of rent.

15. Interest on costs. — See Section 35.

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7. ('83) 9 Cal 33 (35, 37) (DB).
('07) 4 Low Bur Rul 108 (109).
8. ('78) 2 Cal L Rep 183 (184) (DB).
9. ('83) 9 Cal 33 (35, 37) (DB). (Amount insufficient to cover costs—Not a valid tender.)
('30) 17 AIR 1930 Oudh 208 (209).
('78) 3 Cal 468 (471, 472).
('67) 7 Suth W R 20 (20) (DB). (As to payment into Court by way of security until final decision. See O. 24 Rr. 1 to 4.)
('03) 6 Oudh Cas 135 (140, 141). (Section 84 of Transfer of Property Act.)
10. ('69) 12 Suth W R 50 (51) (DB).
11. ('92) 16 Bom 141 (149).
12. ('91) 1 Mad L Jour 534 (535) (DB).
[*See also* ('35) 22 AIR 1935 Mad 342 (344). (When deposit is made on the challenge of the plaintiff and in the presence of the plaintiff no notice is required.)]
13. ('29) 16 AIR 1929 Lah 316 (316).
14. ('35) 22 AIR 1935 Mad 988 (993).

Note 14

1. ('68) 10 Suth W R 209 (210) (DB).
2. ('99) 26 Cal 160 (162) (DB).
('81) 5 Cal 102 (104, 105) (DB).
3. (1862) 1862 Suth W R Sup 13 (13) (FB). (Section 67, Bengal Tenancy Act.)
(1900) 4 Cal W N 324 (326). (Do.)
('35) 22 AIR 1935 All 505 (506) (FB). (Under S. 225, Agra Tenancy Act (1926).)
('96) 18 All 240 (241).
('87) 9 All 185 (188).
('07) 11 Cal W N 110 (111).
('05) 32 Cal 258 (259, 260) (FB).
('03) 30 Cal 213 (215).
('02) 29 Cal 674 (677, 679).
('01) 28 Cal 227 (234).
('99) 26 Cal 523 (528) : 26 Ind App 41 (PC).
('99) 26 Cal 315 (317, 321). (Bengal Tenancy Act, Section 67.)
('99) 26 Cal 130 (131, 132).
('98) 2 Cal W N 525 (528).
('97) 24 Cal 37 (40).
('79) 4 Cal 594 (595). (Interest should be allowed from the time the rent becomes due.)
('71) 6 Beng L R App 119 (120).
('68) 10 Suth W R 166 (166). (Interest should be allowed from the time rent becomes due.)
('68) 9 Suth W R 495 (497).
(1865) 2 Suth W R (Act X) 88 (88). (Act VI of 1862 and Act X of 1859.)
('11) 9 Ind Cas 221 (222) (Oudh).
('04) 7 Oudh Cas 116 (120).
('02) 5 Oudh Cas 187 (189).
(1900) 3 Oudh Cas 108 (109).
(1900) 3 Oudh Cas 22 (30).
('98) 1 Oudh Cas 270 (272).
('98) 1 Oudh Cas 267 (269). (Oudh Rent Act.)
(1883) 10 Q B 371 (375), Duncombe v. The Brighton Club.
4. ('30) 17 AIR 1930 Mad 727 (731): 53 Mad 549 (DB). [But see ('33) 20 AIR 1933 Mad 613 (617) : 56 Mad 892 (DB).]
5. ('41) 28 A I R 1941 Pat 6 (9) (DB). (Claim for interest on arrears of ground rent and tangiana not based on contract—Interest not allowed.)
('35) 22 AIR 1935 Mad 794 (795).

16. Rule of damdupat. — This is a rule of Hindu law under which interest *exceeding the principal sum* cannot be recovered at any one time.[1] The rule has not been abrogated by any statutory enactment.[2] It is in force among Hindus[3] in the provinces of Bombay,[4] Sind[5] and Berar[6] and in the Presidency Town of Calcutta[7] but not in the mofussil of Bengal,[8] the Madras Presidency[9] and the Central Provinces.[10] The principal sum is the amount of the *current* debt though in renewal of a prior debt[11] and includes expenses incurred by a mortgagee for repairs.[12]

The rule applies even if the debt is repayable in *kind*[13] and does not prevent the conversion, by agreement, of arrears of interest into principal.[14] The rule is no answer to a claim for interest when the principal has been paid off.[15] It does not affect vested rights but only limits accruing rights[16] and being thus a rule of limitation it has nothing to do with the legality or otherwise of a contract.[17]

There is a difference of opinion as to whether the rule of *damdupat* applies to mortgage debts governed by the Transfer of Property Act. The Madras High Court has held that it does not.[18] The High Courts of Bombay,[19] Calcutta[20] and Nagpur[21] and the

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Note 16

1. ('77) 3 Bom 312 (332) (DB).
('96) 20 Bom 611 (615) (DB).
('13) 37 Bom 326 (338) : 40 Ind App 68 (PC).
('98) 22 Bom 513 (520) (DB).
†(1862) 1 Bom H C R A C 47 (49) (FB).
[*See also* ('68) 1888 Bom P J 317 (317).]
2. ('66) 3 Bom H C R A C 25 (28) (SB). (Regulation V of 1827, repealed by Act XXVIII of 1855 did not abrogate the rule of damdupat.)
('85) 9 Bom 233 (235) (DB). (Limitation Act XV of 1877.)
('07) 31 Bom 354 (365) (DB). (Interest Act XXXII of 1839.)
('79) 3 Bom 312 (332) (BB). (Usury Laws Repeal Act, XXVIII of 1855.)
('72) 9 Bom H C R 83 (85) (DB). (Do.)
(1865) 3 Bom H C R A C 23 (25) (DB). (Do.)
(1865) 3 Bom H C R A C 11 (18) (DB). (Do.)
('87) 14 Cal 781 (789) (SB). (Do.)
('81) 5 Cal 867 (868): 7 Cal L Rep 204 (205). (Contract Act, IX of 1872.)
('69) 12 Suth W R O C 9 (11) (DB). (Usury Laws Repeal Act, XXVIII of 1855.)
('03) 26 Mad 662 (670) (SB). (Contract Act, IX of 1872 — Applicability of the rule to Madras City assumed.)
3. ('78) 3 Bom 131 (132) (DB).
('31) 18 AIR 1931 Nag 144 (146): 27 Nag L R 144. (Mahomedan mortgagor assigning equity of redemption to Hindu—Rule inapplicable.)
('11) 35 Bom 199 (202). (Creditor's assignment to Parsee—Hindu debtor's right not affected.)
('97) 21 Bom 85 (87) (DB). (Hindu debtor assigning to non-Hindu — Rule inapplicable.)
('97) 21 Bom 38 (41) (DB). (Original creditor Mahomedan— Assignment to Hindu — Rule not applicable.)
('96) 20 Bom 611 (613) (DB). (One party not a Hindu—Rule inapplicable.)
('94) 18 Bom 227 (230). (Hindu creditor — Non-Hindu debtor—Rule inapplicable.)
('97) 1 Cal W N clxxviii. (Not applicable to a case between Hindu and Hindu converted to Christianity.)
4. ('97) 21 Bom 85 (87) (DB).
('72) 9 Bom H C R 83 (85) (DB).
5. ('08) 2 Sind L R 10 (10) (DB).
6. ('14) 1 AIR 1914 Nag 19(19);10 Nag L R 91(91).
7. ('83) 9 Cal 871 (872) (DB).
('75) 1 Cal 92 (94) (DB).
('94) 21 Cal 840 (843).
('87) 14 Cal 781 (787) (SB).
8. (1854) 6 Moo Ind App 289 (308) (P C). (In mofussil in Bengal, damdupat was in force by Regulation XV of 1793 and not as a rule of Hindu law.)
('83) 9 Cal 825 (827, 829) (DB). (Do.)
('98) 2 Cal W N 603 (605, 606) (DB).
('87) 14 Cal 781 (787) (SB).
('83) 9 Cal 871 (872) (DB).
('76) 1 Cal 92 (94) (DB).
9. ('1862) 1 Mad H C R 5 (6) (DB). (In Madras, damdupat was in force by Regulation XXXIV of 1802 and not as a rule of Hindu law.)
('71) 6 Mad H C R 400 (400) (DB). (Damdupat was in force by Regulation XXXIV of 1802—Repealed before this decision.)
[But see ('03) 26 Mad 662 (672) (SB). (Applicability of rule to Madras City assumed.)]
10. ('88) 1 C P L R 57 (57.)
11. †(1900) 24 Bom 305 (306) (DB).
12. ('88) 1888 Bom P J 317 (DB).
13. ('98) 22 Bom 761 (765) (DB).
14. (1900) 24 Bom 305 (310) (DB).
15. ('06) 30 Bom 452 (454) (DB).
('08) 2 Sind L R 10 (10).
16. ('06) 30 Bom 452 (454).
17. ('80) 5 Cal 867 (868) : 7 Cal L Rep 204.
18. ('03) 26 Mad 662 (670) (SB). (Applicability of rule to the city of Madras was assumed.)
19. ('77) 1 Bom 577 (580) (DB).
('78) 3 Bom 312 (333) (DB).
('11) 35 Bom 199 (203).
†(1900) 24 Bom 114 (119) (DB).
('96) 20 Bom 721 (727) (FB).
('91) 15 Bom 84 (85) (DB).
†('68) 5 Bom H C R A C 196 (198) (DB).
20. ('87) 14 Cal 781 (787, 791) (SB).
('16) 3 AIR 1916 Cal 542 (543) : 42 Cal 826 (829).
[But see (1865) 2 Suth W R 289 (290) (DB).]
21. ('28) 15 AIR 1928 Nag 126 (126).

Judicial Commissioner's Court of Sind[23] have held that it does. Where, however, the mortgagee has been placed in *possession* and is accountable for the rents and profits collected by him, towards interest due, it has been held that the rule is not applicable.[23] Under S. 33 of Ajmere Laws Regulation III of 1877 the rule applies only when the debtor is a *defendant* and not to suits brought by the mortgagor for *redemption*.[24]

The rule of *damdupat* ceases to operate after the date of suit,[25] the question of interest *pendente lite* being entirely in the discretion of the Court.[26] Thus, where A sues B for the recovery of Rs. 495 made up of Rs. 250 principal and interest Rs. 245, the Court may award interest *pendente lite* and up to the date of realisation, though the total amount of interest awarded by the decree exceeds the principal of Rs. 250. The rule applies only so long as the matter is in the realm of *contract*. It ceases to apply when the matter has passed into the realm of *judgment*.[27] In a mortgage suit the rule applies to the interest payable *till* the date *fixed in the decree* for the payment of the mortgage-money, but not to the interest that may be payable subsequently.[28]

17. Decree silent as to interest — Sub-section (2). — Where the decree does not provide for interest it will, under sub-s. (2) of this section, be deemed to have been refused,[1] unless it can be shown that the silence was due to oversight or mistake.[2] This will be so even if the decree is based upon a confession of judgment which provided

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22. ('11) 5 Sind L R 245 (246, 247) : 15 I.C. 824.
23. † (1900) 24 Bom 114 (119) (DB).
† ('96) 20 Bom 721 (728) (FB). (Overruling 15 Bom 625. But the *ratio decidendi* of the latter case viz., that the rents and profits appropriated may be deemed as payments towards interest and that if after such appropriation there is surplus interest exceeding the principal sum it is within the rule of damdupat, was not discussed by the Full Bench.)
('98) 22 Bom 86 (87) (DB).
('86) 1886 Bom P J 76 (DB).
✤(1865) 5 Bom H C R A C 196 (198).
('15) 2 AIR 1915 Nag 108 (108) : 12 Nag L R 1.
[*See also* ('28) 15 AIR 1928 Nag 126 (126). (In some cases where mortgagee is in possession the rule does not apply, in the sense of being of any effect, because payments made every year from income of property keep the amount of interest below amount of capital.)
('81) 1881 Bom P J 291.
('76) 1876 Bom P J 229.]
24. ('04) 26 All 354 (357) (DB).
25. ('98) 22 Bom 86 (87) (DB).
26. ('96) 22 Bom 86 (87) (DB).
('13) 37 Bom 326 (339) : 40 Ind App 68 (73) (PC).
('25) 12 AIR 1925 Bom 362 (362) (DB).
('25) 12 AIR 1925 Nag 193 (194).
Also see Note 3.
27. ('13) 40 Cal 710 (715).
('77) 1 Bom 73 (74) (DB). (Rule does not apply after decree.)
('06) 33 Cal 1269 (1276).
('96) 23 Cal 899 (906).
28. ('31) 18 AIR 1931 Nag 88 (89).
('30) 17 AIR 1930 Pat 442 (449) : 10 Pat 63 (DB).
('29) 16 AIR 1929 Nag 117 (117).
('21) 59 Ind Cas 121 (122) (Nag).
[*See* ('36) 23 A I R 1936 P C 63 (64, 65) : 15 Pat 210 : 63 Ind App 114 (PC).
('29) 16 A I R 1929 Nag 355 (356). (Where maximum limit of interest is reached before suit, Court has discretion under this Section to award interest from date of suit.)]
[But see ('22) 9 A I R 1922 Nag 155 (156) : 17 Nag L R 200.]

Note 17

1. ('43) 30 AIR 1943 Nag 240 (242) (DB).
('40) 27 AIR 1940 Mad 29 (30) (DB).
('13) 37 Bom 326 (339) : 40 Ind App 68 (P C).
('75) 1875 Bom P J 225 (DB).
('83) 5 All 589 (590, 591) : 1883 All W N 128 (128) (DB).
('71) 3 N W P H C R 319 (320) (DB).
('18) 5 A I R 1918 Cal 151 (153) : 27 Cal L Jour 576 (578) (DB). (S. 34, Cl. 2.)
('05) 32 Cal 494 (501) (DB). (Interest on costs.)
('96) 23 Cal 357 (360) (DB). (Do.)
('79) 5 Cal 27 (30, 31) (DB).
('77) 3 Cal 351 (352) (DB). (Interest on costs.)
('74) 21 Suth W R 195 (196) (DB). (Do.)
('72) 18 Suth W R 103 (104) (DB). (Do.)
('71) 16 Suth W R 302 (303) (DB). (Do.)
('70) 14 Suth W R 324 (324) (DB).
('68) 10 Suth W R 175 (175) (DB). (Bond under S. 52 of Act XVI of 1864, enforceable as decree — No provision for interest — No interest will be allowed.)
('13) 20 Ind Cas 319 (320) (DB) (Lah). (Decree silent —No oral agreement as to interest can be proved.)
('78) 1878 Pun Re No. 11.
('38) 25 AIR 1938 Mad 522 (523) (DB). (Decree for maintenance creating charge is decree for payment of money and S. 34, sub-clause (2) applies to it.)
('24) 11 AIR 1924 Mad 102 (103) (DB). (Decree silent as to interest on costs.)
[*See* ('36) 23 AIR 1936 Rang 141 (144) (Suit for account of moneys received by defendant — Interest before decree not claimed nor granted by Court in preliminary decree—It cannot be allowed in working out final decree.)]
Also see O. 34, R. 11, N. 2.
2. ('18) 5 A I R 1918 Low Bur 136 (137) : 9 Low Bur Rul 78 (81).

for interest.[3] Interest not awarded by the decree cannot, therefore, be awarded either in execution[4] or by way of amendment of the decree.[5] But interest can be granted in appeal. Thus, where the trial Court does not mention about further interest and no reasons are given for refusing the same, the Appellate Court will interfere as there is no proper or judicial exercise of discretion.[6] Where, however, the judgment-debtor, in consideration of the forbearance shown by the creditor, agrees in Court to pay him interest, the creditor, in virtue of such promise, is entitled to ask the Court to execute his decree for the decree amount with interest from the date of such promise.[7] Similarly, if interest is allowed in execution by way of *compromise*, the Appellate Court will not interfere.[8] In the under-mentioned case[9] where there was no provision for interest after the date fixed for the payment of a sum under a compromise decree, it was held that the decree-holder could claim *post diem* interest at the rate mentioned in the decree, as the rule that a compromise decree partakes of the nature of a contract was applicable to the case.

Where the Court awards interest but no *rate* is mentioned, the decree-holder will be entitled to interest at the court rate which is usually 6 per cent,[10] though it may differ according to particular circumstances of the case.[11] Where a Court has awarded interest by its decree at a particular rate, it cannot be reduced or denied in execution proceedings.[12]

Sub-clause (2) of the section was introduced by Act VII of 1888. In some of the cases arising under the old Code before the date of the said Act, it had been held that interest though not awarded by the decree could be granted later on in execution[13] or in a separate suit.[14] In view of this sub-section the said cases are no longer good law. Where however, the decree is not for a *definite sum* of money but is one for accounts and partition, S. 34 (2) does not apply and a suit for interest is not barred.[15]

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3. ('86) 1886 Pun Re No. 13.
4. ('26) 13 AIR 1926 Cal 505 (506): 53 Cal 42 (DB). (Case of a maintenance decree.)
(1900) 22 All 262 (264, 265) : 1900 All W N 57.
('82) 8 Cal 332 (335, 336) : 9 Ind App 1 (PC).
('68) 1868 Pun Re No. 81.
('34) 21 AIR 1934 Pat 192 (194) : 13 Pat 21 (DB).
('98) 22 Bom 42 (46) (DB).
('75) 24 Suth W R 193 (195) : 2 Ind App 219 (PC).
('74) 21 Suth W R 147 (147)(DB). (Interest on costs.)
('73) 20 Suth W R 477 (477) (DB).
('72) 18 Suth W R 253 (254) (DB).
('72) 17 Suth W R 19 (20) (DB).
('71) 15 Suth W R 415 (415) (DB).
('71) 15 Suth W R 335 (335) (DB).
('71) 6 BengLR App 33 (33)(DB). (Interest on costs.)
('66) 6 Suth W R Misc 109 (111) (FB).
('66) 5 Suth W R Misc 28 (28) (DB).
(1864) 1864 Suth W R Sup Misc 37 (37) (DB).
('31) 18 A I R 1931 Mad 650 (652) : 54 Mad 955 (FB). (Overruling AIR 1927 Mad 954.)
5. ('40) 27 A I R 1940 Mad 29 (30) (DB). (Decree in accordance with judgment not providing for further interest—Decree cannot be amended under S. 152 as there is no accidental slip or omission.)
('93) 15 All 121 (123) (DB).
6. ('43) 30 AIR 1943 Nag 240 (242, 243) (DB).
7. ('66) 5 Suth W R Misc 1 (2) (SB).
('84) 7 Mad 400 (401) (DB).
('12) 17 Ind Cas 936 (939) (DB) (Cal).
8. ('77) 3 Cal 602 (609) : 5 Ind App 78 (PC).
('77) 3 Cal 161 (173) : 4 Ind App 137 : 1877 Pun Re No. 1 (PC). (Parties agreeing to submit the matter to the discretion of the Court executing the decree.)
9. ('40) 27 AIR 1940 Mad 893 (896).
10. ('24) 11 AIR 1924 Mad 102 (102) (DB).
11. ('71) 7 Beng L R App 30 (31) (DB). (Various sums of money in part satisfaction of decree paid with interest at 12 per cent. for periods subsequent to the decree—*Held* that rate should be allowed.)
('73) 19 Suth WR 46 (47)(DB). (3 per cent. allowed.)
('72) 18 Suth WR 103 (103) (DB). (Court should see from other parts of decree or other papers on record what the rate of interest was intended to be given.)
('72) 17 Suth W R 414 (414) (DB). (12 per cent. being the usual rate was allowed.)
('67) 7 Suth W R 375 (376) (DB). (12 per cent.)
('80) 6 Cal L Rep 231 (233) (DB). (Usual rate allowed.)
12. ('73) 19 Suth W R 46 (47) (DB).
('79) 3 Cal L Rep 523 (524) (DB). (Delay in taking out execution is no ground for refusing interest awarded by decree.)
('94) 16 All 270 (273). (Decree under S. 88, Transfer of Property Act, providing for future interest — Order under S. 89 need not specifically mention interest.)
13. ('68) 10 Suth W R 60 (61) (DB). (Amendment of decree.)
('66) 5 Suth W R Misc 12 (13) (DB).
('72) 18 Suth W R 34 (34) (DB).
(1865) 2 Suth W R Misc 21 (21) (DB).
14. ('78) 3 Cal 602 (609) : 5 Ind App 78 (PC). (Followed in AIR 1926 Cal 505.)
15. ('25) 12 A I R 1925 Bom 406 (409) : 49 Bom 282 (DB).

18. Court-fee. — Section 11 of the Court-fees Act does not apply to the interest awarded by the decree under S. 34[1] and no additional court-fee is therefore payable on such interest.[2] In an appeal against a decree awarding a sum of money and future interest, no court-fee is payable on the interest *pendente lite* unless a specific ground of appeal is taken in respect of such award.[3]

COSTS

35. [Ss. 218 to 222.] (1) Subject to such conditions and limitations as may be prescribed,[2] and to the provisions of any law for the time being in force,[3] the costs of and incident to all suits[4] shall be in the discretion[5] of the Court, and the Court shall have full power to determine by whom[9] or out of what property[16] and to what extent[26] such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

Costs.

(2) Where the Court directs that any costs shall not follow the event,[7] the Court shall state its reasons in writing.

(3) The Court may give interest on costs[35] at any rate not exceeding six per cent. per annum, and such interest shall be added to the costs and shall be recoverable as such.

[1877, Ss. 219 and 220; 1859, S. 187, R. S. C., O. 65, R. 1; Jud. Act, 1890, S. 5.]

Synopsis

1. Scope and object of the section.
2. "Subject to such conditions and limitations as may be prescribed."
3. "Subject ... to the provisions of any law for the time being in force."
4. "Costs of and incident to all suits."
5. Costs are in the judicial discretion of the Court.
6. Discretion cannot be delegated.
7. Principle that costs shall follow the event.
8. Mortgage suits. See O. 34, R. 10.
9. By whom costs are to be paid — General.
10. Account suits.
11. Admiralty and vice-admiralty cases.
12. Arbitration cases.
13. Divorce cases.
14. Third persons, when can be made liable. See Note 9
15. Costs against Secretary of State.
16. Order for costs, out of estate, when to be made.
17. Administration suits.
18. Suits for construction of wills.
19. Suits by or against minors.
20. Official Liquidator and Official Assignee.
21. Partition suits.
22. Partnership suits.
23. Probate cases.
24. Representative suits.
25. Trust cases. See Note 16.
26. To what extent costs are to be paid.
27. Separate costs, when may be allowed.
28. Separate suit for costs.
28a. Court having no jurisdiction to try suit — Costs.
29. Appeal and second appeal against order as to costs.
30. Review of direction as to, or the taxation of costs.
31. Revision.
32. Letters Patent appeal.
33. Privy Council Appeal as to costs.
34. Right of contribution for costs payable under joint decree.
35. Interest on costs.
36. Claims to set off against costs. See O. 20 R. 6.
37. Enforcement of order or decree as to costs.
38. Enforcement of solicitor's lien for costs.
39. Construction of decree as to costs.

Note 18

1. ('05) 27 All 559 (561) (DB). (Mortgage decree.)
2. ('92) 17 Bom 41 (42) (DB).
('75) 12 Bom H C R 227 (228) (DB).
[*See* ('06) 33 Cal 1232 (1235).]
3. ('41) 28 AIR 1941 Pat 255 (258) : 20 Pat 481 (FB). (*Obiter.*)
('31) 21 AIR 1931 All 805 (807) : 57 All 71 (DB).

NOTE to the Synopsis. See the Notes indicated for the following topics :

Agency—Suits for. See Note 10.
Apportionment of costs. See Note 5.
Calculation of costs. See Note 26.
Co-defendants. See Note 9.
Costs when party withdraws from suit or appeal. See Note 39.
Disposal, *ex parte*—Question of costs not affected. See Note 7.
Disposal on preliminary and technical points — Rule as to costs. See Note 7.
Intervenor. See Note 5.
Land acquisition proceedings. See Note 3.
Meaning of : "Costs in the cause;" "Costs to abide the result;" "Costs to abide and follow the event." See Note 4.
"Costs incurred in lower Court" (in the appellate decree). See Note 39.
"Appeal allowed or dismissed with costs." See Note 39.
Nature and conduct of parties and costs. See Notes 5 and 7.
Party creating difficulty must pay costs. See Note 9.
Proportionate costs. See Note 26.
Refund of costs. See S. 144, Note 23.
Refusal of tender. See Note 7.
Salvage suits. See Note 11.
Stranger. See Note 9.
Successful party denied his costs — Court must record reason. See Note 7.
Successful party saddled with costs. See Note 7.
Taxation of costs between attorney and client — Method of enforcement. See Note 38.

1. Scope and object of the section.—The object of the section in awarding costs to a litigant is to secure to him the *expenses incurred by him* in the litigation[1] and not to enable him to make anything, in the way of gain or profit, over and above the expenses for maintaining or defending the action, nor to give exemplary damages or smart money, by way of *penalty or punishment* on the opposite party.[2]

The award of costs is entirely in the discretion of the Court[3] subject, however, "to such conditions and limitations as may be prescribed[4] and to the provisions of any law for the time being in force." (See Notes 2 and 3.)

2. "Subject to such conditions and limitations as may be prescribed." —"Prescribed" is defined as meaning prescribed by rules, and "rules" means rules and forms contained in the First Schedule or made under S. 122 or S. 125. See S. 2 (16) and section 2 (18).

The following are the rules which appear to limit the power of the Court to award costs under this section —

O. 11 R. 3 — Interrogatories.
O. 12 Rr. 2 and 4 — Proof of documents.
O. 21 R. 72 (3) — Setting aside auction sale.
O. 24 R. 4 — Deposit into Court.
O. 33 R. 10 — Pauper suit.
O. 33 R. 11[1] — Do.
O. 34 R. 10[2] — Mortgage suit.

Section 35 — Note 1

1. ('21) 8 AIR 1921 Cal 185 (191) : 48 Cal 427 (DB).
2. ('21) 8 AIR 1921 Cal 185 (191) : 48 Cal 427 (DB).
(1881) 17 Ch D 772 (773), Willmott v. Barber.
(1881) 18 Ch D 449 (459), Cockburn v. Edwards. (Cited in 26 Bom 221 (FB).)
3. (1900) 2 Bom L R 254 (260) (DB).
See for other cases Note 5.
4. ('37) 24 AIR 1937 Mad 145 (145). (Section 35 is subject to O. 33, R. 11 and Court cannot order costs of minor pauper plaintiff to be paid by next friend.)

Note 2

1. ('37) 24 AIR 1937 Mad 145 (145). (Next friend of minor pauper plaintiff cannot be ordered to pay costs.)
2. ('39) 26 AIR 1939 Mad 654 (656). (Mortgagee, unless disentitled by his conduct, can as of right claim that costs of suit should be added to mortgage money — Mortgagee deprived of his costs by Court has right to appeal—Provisions of S. 35 are inapplicable to mortgage suits covered by O. 34.)

3. "Subject . . . . to the provisions of any law for the time being in force." — The following are instances of laws which limit the discretion of the Court under this section :

Administrator-Generals Act (III of 1913).—Section 40 provides that a creditor suing the Administrator-General, shall be liable to pay the costs of the suit unless he had applied in writing to the Administrator-General, in the manner required by the section.[1]

Land Acquisition Act (I of 1894).—Section 27 provides that if the award of the Collector is not upheld, the costs shall be paid by the Collector except in the circumstances set forth in that section.[2] But where the award is upheld the Court has a discretion in the matter under S. 35, Civil Procedure Code.[3] (See S. 53 of the Land Acquisition Act.)

Presidency Small Cause Courts Act (XV of 1882).—Section 22 provides that in certain suits specified therein no costs shall be allowed to the plaintiff.[4]

Punjab Regulation of Accounts Act (I of 1930).—Under S. 3 of this Act, the Court is bound to disallow costs if the case falls within the purview of that section.[5]

Specific Relief Act (I of 1877).—Section 18 (d) provides that where the vendor sues for specific performance of the contract and the suit is dismissed on the ground of defect of title, the defendant (i. e., the purchaser) has a right to a return of his deposit (if any) with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest of the vendor in the property agreed to be sold. But the rule regarding costs under this section is not an absolute one independent of the conduct of the purchaser as defendant in the course of the suit brought for specific performance by the vendor. The Court can under S. 35 of the Civil Procedure Code, decline to award him costs in the light of his conduct in the suit, even though the vendor's suit is dismissed.[6]

See also the undermentioned decision.[7]

4. "Costs of and incident to all suits." — The costs incident to all suits include costs of applications in *suits*. Arbitration proceedings on a reference out of Court were held not to be proceedings in suits, and the costs incurred therein were not allowable under this section.[1] But where arbitration proceedings arose out of a reference made through the Court, it was held that costs could be allowed as costs of the proceedings incident to the suit.[2]

The High Court of Calcutta has, in the undermentioned case[3] held that the words "incident to all suits" are wide enough to cover costs incurred by party before the filing of the suit, but naturally or intimately connected with the suit. Thus, where a receiver

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Note 3

1. ('86) 12 Cal 357 (375)(DB). (Case under S. 34 of Act II of 1874 corresponding to the present S. 40.)
2. ('29) 16 AIR 1929 Bom 63 (65) : 53 Bom 178 (DB).
('14) 1 AIR 1914 Sind 149 (152) : 8 Sind L R 126 (132).
[*See* ('31) 18 AIR 1931 Bom 528 (528)(DB). (But S. 27 (2) is limited to the proceedings in the Courts of first instance, and does not apply to proceedings in higher Courts—Costs of such proceedings are in the discretion of those Courts.)]
3. ('41) 28 AIR 1941 Mad 198 (199, 200). (Collector's award confirmed — Court has jurisdiction to order trustee of religious institution personally to pay costs of Collector even though he (trustee) was not personally party to proceedings.)
('29) 16 AIR 1929 Bom 63 (64) : 53 Bom 178 (DB).
4. *See* ('96) 24 Cal 399 (402, 403) (SB).
5. ('37) 24 AIR 1937 Lah 58 (58).
('36) 23 AIR 1936 Lah 469 (470).
6. ('40) 27 AIR 1940 Mad 739 (743) (DB). (On some points contentions of purchasers were not true and they either had not the whole amount of money required to enable them to complete the contract or for some other reason they decided to resile from the contract.)
7. ('13) 30 AIR 1913 Mad 250 (251) (SB). (Legal Practitioners Act, 1879, Ss. 14, 15 — Subordinate Court, cannot award costs while dismissing complaint as vexatious—High Court can award costs.)

Note 4

1. ('28) 15 AIR 1928 Mad 370 (370) : 51 Mad 599.
2. ('40) 27 AIR 1940 Sind 190 (190): I L R (1940) Kar 31 (DB). (Court has power to award arbitrator's fees as part of the costs of arbitration.)
3. ('36) 40 Cal W N 762 (764).

appointed by a Court applied for leave to institute a suit and incurred costs, it was held that the Court had power to award such costs as costs incident to the suit.

When an application is disposed of, the Court may make *no order* as to costs incurred therein, or may make a specific order as to costs *at the time* of the disposal of the application or may *reserve it* for a future occasion.[4] In the last case it may pass an order in any of the following ways:

1. "Costs reserved."
2. "Costs to abide the result."
3. "Costs to follow the event."
4. "Costs to abide and follow the event."
5. "Costs to be costs in the cause."

In cases 1 and 2, it is in the *discretion* of the Court, at the hearing to award or not the costs of the application. In cases 3 and 4, the Court has *no discretion* in the matter and the *successful* party is entitled to the costs of the application.[5] In case 5 also the Court has no discretion in the matter, but the party *to whom the costs of the suit are awarded* is entitled to the costs of the application.[6]

Where the Court makes a *specific* order as to costs on an application, the *general* order for costs of the suit will not displace it.[7]

See also the cases cited below.[8]

5. Costs are in the judicial discretion of the Court. — Costs awardable under this section are in the discretion of the Court.[1] But it must be a *judicial* discretion exercised on sound legal principles[2] and not by caprice or chance or humour.[3] No hard and fast rule can, however, be laid down, the exercise of the discretion depending upon

4. ('95) 22 Cal 387 (391) (DB).
5. ('16) 3 AIR 1916 Mad 621 (621) : 39 Mad 476 (DB). (Affirming A I R 1914 Mad 304 : 39 Mad 476*n*.)
('19) 6 AIR 1919 Mad 795 (796) : 8 Mad L W 219 (220, 221).
6. † ('26) 13 AIR 1926 Bom 596 (598) : 50 Bom 430 (DB). (Overruling 25 Bom 230. The decision in AIR 1924 Bom 398 following 25 Bom 230 is also no longer good law.)
7. (82) 9 Cal 797 (801) : 10 Ind App 113 (PC).
8. ('36) 23 AIR 1936 Bom 310 (311) : 60 Bom 861 (DB). (Suit on original side of High Court — *Ex parte* application for injunction and motion for injunction which is subsequently heard are distinct matters and separate orders as to costs should be made.)
('36) 23 AIR 1936 Lah 705 (706). (Where a pleader is asked to admit the genuineness of a document in Court, he is entitled to consult his client. Simply because the pleader wants a short adjournment to receive proper instructions, the party should not be burdened with costs.)
('30) 17 AIR 1930 Oudh 171 (172) : 4 Luck 529. (Principles governing award of costs of adjournment stated.)
('28) 15 AIR 1928 Rang 306 (307) : 6 Rang 561 (DB). (Pauper plaintiff may be ordered to pay costs of adjournment.)

Note 5

1. ('07) 51 Sol Jour 32, Millen v. London County Council.
('02) 4 Bom L R 109 (115). (Not controlled by Judicial Officers' Protection Act.)
('78) 7 Bom 19 (33): 9 Ind App 86 (PC). (It is a sound rule not to vary an order as to costs when there is no substantial alteration in the lower Court's decree. Rules of the Supreme Court, Order 65 Rule 1.)
('03) 7 Cal W N 647 (649).
('85) 11 Cal 767 (776).
('29) 16 AIR 1929 Lah 129 (134) : 10 Lah 816 (DB).
† ('04) 27 Mad 341 (343) (DB).
(1913) 1 K B 587 (589), Kierson v. Thomson.
(1905) 49 Sol Jour 618, Lickhampton Quarries Co. v. Chelterham Rural District Council.
(1881) 18 Ch D 76 (84, 85), Dicks v. Yates.
(1887) 34 Ch D 24 (35), In re Mills Estate.
2. ('41) 28 AIR 1941 Oudh 91 (93) : 16 Luck 294. (Court is not justified in awarding costs in a case where the Court only corrected its own order passed under a misapprehension.)
('40) 27 AIR 1940 Mad 519 (520).
('29) 16 AIR 1929 Bom 63 (65) : 53 Bom 178 (DB). (If the Courts fail to exercise their discretion on principles then the appellate Court may vary their order.)
('33) 20 AIR 1933 Bom 304 (306) (DB).
✣(1891) 1891 App Cas 173 (179), Sharpe v. Wakefield. (Cited in 23 Bom 513.)
3. ('20) 7 AIR 1920 Cal 1009 (1013) : 24 Cal W N 352 (357) (DB).
('80) 5 Cal 259 (264, 265) (DB).
(1854) 6 Moo Ind App 53 (87) (PC).
† ('08) 33 Bom 334 (345) : 10 Bom L R 821 (834).
('66) 3 Mad H C R 113 (114, 115) (DB).
(1886) 17 Q B D 373 (376), Huxley v. West London Ex. Rly.

the circumstances of each particular case.[4] The circumstances will include the length of trial, the complicated questions involved, and the conduct of the parties both before and after suit.[5] But it will not include grounds which are not *relevant* to the action.[6]

The discretion under the section is very wide[7] and extends to disallowance of the costs of the successful party,[8] and even to make him pay the costs of the losing party,[9] and to apportion the costs between the parties.[10]

The following are the leading principles to be remembered in the exercise of the discretion under this section :

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2. ('42) 29 AIR 1942 All 233 (237) : I L R (1941) All 832 (FB). (Costs are often awarded on personal considerations — Sometimes they may be of penal nature.)
(1885) 29 Ch D 366(419), Badische Anilin v. Levinstein.
† ('28) 15 AIR 1928 Sind 173 (174). (Costs disallowed, as suit was based on an immoral contract.)
(1865) 10 Moo Ind App 229 (251) (PC). (Partial variation as to interest alone made — Privy Council gave no costs to either party.)
('92) 1892 All W N 215 (216) (DB). (Appeal against remand — Costs to abide result — Proper order.)
('81) 6 Cal 394 (406): 7 Ind App 240 (PC). (Plaintiff failed as to part of his appeal — The Privy Council gave no costs to either party.)
† (1865) 3 Suth W R P C 33 (36) (PC). (Appeal dismissed on wholly different grounds than those relied upon below — So no costs.)
('30) 17 AIR 1930 Lah 789 (791). (Wrong order passed *suo motu* — Court of revision in setting it aside ordered parties to bear their own costs.)
('18) 5 AIR 1918 Mad 816 (821): 5 Mad L W 672 (681) (DB). (*Bona fide* institution of proceedings by temple Committee—Plaintiff not to be penalized.)
(1885) 54 L J P 75 (75), The Friedeberg.

5. ('42) 29 AIR 1942 Mad 419 (420). (Appellant though successful not given costs as his conduct was reprehensible.)
('41) 28 AIR 1941 Oudh 447 (449) (DB). (Point regarding court-fees unncessarily contested and time of Court and Crown Counsel wasted—Special costs may be allowed.)
('41) 28 AIR 1941 Pat 416 (416) (DB). (Plaintiff claiming relief to which he was not entitled and relief granted—Appeal by defendant—Plaintiff not contesting appeal — *Held*, he should not be made liable for full costs of hearing of appeal.)
('40) 27 AIR 1940 Mad 739 (743) (DB). (Defendant in a suit for specific performance by the vendor may be refused costs though the suit may be dismissed.)
† ('21) 8 AIR 1921 Cal 185 (190, 191): 48 Cal 427 (DB).
('33) 20 AIR 1933 Rang 337 (338) (DB). (Case decided on preliminary point — No examination of witness and argument also not very long — *Held*, full *ad valorem* costs were excessive.)
('30) 17 AIR 1930 Bom 152 (152). (Refusal to furnish details except after suit is not misconduct.)
† ('25) 12 AIR 1925 Cal 569 (570) (DB). (Antecedent conduct.)
('12) 16 Cal W N 805 (810) (DB). (Conduct which led up to the litigation.)
('23) 10 AIR 1923 Pat 420 (422, 123) (DB). (Gross mismanagement leading to suit.)
† (1900) 1 Q B D 357 (362), Bostock v. Ramsay Urban District Council. (Conduct which led to the suit.)
(1877) 4 K & J 41 (44) : 70 E R 18 (19), Purser v. Darbey.
† (1866) 1 Ch App 137 (149), Caton v. Caton.
(1859) 6 H L C 633, Cranworth in Clarke v. Hart.

6. (1908) 24 T L R 25, Edmund v. Martell.

7. ('40) 27 AIR 1940 Mad 519 (520).
† ('20) 7 AIR 1920 Mad 567 (568) : 43 Mad 61 (DB).
('28) 15 AIR 1928 Nag 171 (171, 172). (Awarding greater or less costs than are normally applicable to particular suit—Reasons should be stated.)
('02) 1902 All W N 98 (98). (Court can vary amount of costs of adjournment granted.)
(1888) 36 W R (Eng) 257 (258), Neaves v. Spooner. (Discretion extends to quantum of costs also.)
† (1881) 17 Ch D 772 (774), Willmott v. Barber. (Court may order costs to be paid by parties in definite proportions, or it may order one party to pay to the other a fixed sum in lieu of taxed costs.)

8. ('92) 19 Cal 253 (266) : 19 Ind App 48 (PC).
('23) 10 AIR 1923 Oudh 8 (8). (Interest claimed very high—Costs disallowed.)
('10) 12 Cal L Jour 368 (375) (DB). (Failure to add a party entailing a remand will disentitle appellant to his costs.)
('68) 9 Suth W R 103 (104) (DB). (Special appeal —Appellant failing on certain points though decree modified on other points—Costs disallowed.)

9. ('42) 29 AIR 1942 Mad 478 (480, 481) (DB). (Plaintiff having reason for institution of suit — Suit dismissed—But defendant asked to pay plaintiff court-fee on plaint and half pleader's fees and directed to bear his own costs.)
(1880) 13 Ch D 228 (231), Fane v. Fane.
(1879) 4 Q B D 611 (612, 613, 614), Harris v. Patherick.
('34) 21 AIR 1934 All 948 (950). (Successful party guilty of delay ordered to pay costs of other side caused by such delay.)
('39) 26 AIR 1939 Bom 198 (200). (Offer of a proper compromise refused.)
('36) 23 AIR 1936 Cal 593 (618) (DB). (Pending suit affected by new enactment — Costs may be given to unsuccessful party provided his claim is a good one under the law as it was before the new enactment.)
('94) 21 Cal 680 (683) (DB).
('93) 20 Cal 762 (771) (SB). (Thus, the Court may allow to a party the costs of the appeal though costs in the original suit may follow the event.)

10. † (1863) 10 Moo Ind App 563 (576) (PC).
('28) 15 AIR 1928 Mad 16 (17). (Alienations set aside in a suit by reversioner — Costs of plaintiff must be proportionate to the value of the property.)

1. The successful party is entitled to his costs. In other words costs *follow the event*. See Note 7.

2. Where each party is partly successful, the Court should *apportion* the costs between them.[11]

3. A person wrongfully or unnecessarily made a party is entitled to his costs.[12] But a person who intervenes for no sufficient reason and defends the case separately should be made to bear his costs even if the plaintiff is unsuccessful in his action.[13]

4. When both parties are guilty of acts of *bad faith*, the proper order will be to deprive both of them of their costs.[14] Where, in the lower Court, each party was ordered to bear his own costs and only one of them appealed from the direction as to costs, the Appellate Court cannot order the appealing party to pay the costs of the non-appealing party incurred in the lower Court.[15]

5. In a test case there should be no order for costs.[16]

6. Discretion cannot be delegated.—The Court cannot delegate its discretion under this section to the Taxing Officer.[1]

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11. ('94) 17 Mad 293 (296) (DB).
('75) 24 Suth W R 69 (69) (DB). (Partial decree in favour of plaintiff—Saddling plaintiff with defendant's costs is not proper.)
('25) 12 AIR 1925 Cal 297 (299) (DB).
('23) 10 AIR 1923 Cal 306 (307) (DB). (The general practice in the mofussil is such.)
('71) 15 Suth W R 465 (467) (DB). (Plaintiff entitled to some part of his claim ought not to be deprived of the benefit of decree by such an order as to costs as would make him liable to the defendant for more than he would himself recover.)
('67) 7 Suth W R 159 (159) (DB).
† ('67) 7 Suth W R 127 (129) (SB).
1 Hay 277.
1 Hay 141.
('38) 25 AIR 1938 Nag 530 (534). (Costs should be proportionate to success and failure.)
('36) 23 AIR 1936 Oudh 52 (55) : 11 Luck 575 (DB). (Suit decreed for only portion of amount claimed — Plaintiffs are entitled only to proportionate costs.)

12. ('79) 4 Bom 619 (622).
('24) 11 AIR 1924 Mad 476 (478) (DB).
('91) 13 All 290 (295).
('74) 22 Suth W R 35 (36) (DB).
('69) 12 Suth W R 444 (445) (DB).
('69) 11 Suth W R 48 (48) (DB).
('69) 11 Suth W R 19 (19) (DB).
('68) 10 Suth W R 194 (195) (DB).
(1865) 2 Suth W R 152 (152) (DB).
† (1865) 2 Suth W R 33 (34) (DB).
('30) 17 AIR 1930 Mad 913 (913).
('30) 17 AIR 1930 Mad 195 (197). (Chairman, in an election petition, against whom no relief was asked.)
('01) 24 Mad 377 (386, 387) : 28 Ind App 46 (PC).
('82) 4 Mad 131 (136).
('36) 23 AIR 1936 Nag 285 (288) : I L R (1937) Nag 61.
[But see ('83) 1883 Bom P J 231 (231).
('29) 16 AIR 1929 Mad 738 (741) : 52 Mad 845 (DB). (Where no costs were allowed to a respondent made as an unnecessary party.)]

13. ('12) 29 AIR 1912 F C 27 (33) : I L R (1942) Kar F C 40 : I L R (1942) Lah 623 (FC). (As a usual rule an intervener is not entitled to costs.)
('41) 28 AIR 1941 F C 47 (52) : I L R (1941) Kar F C 25 : 1940 F C R 188 (FC). (Practice of Federal Court — No costs to an intervening Advocate-General.)
† ('21) 8 AIR 1921 Cal 222 (224): 48 Cal 352 (DB).
[*See also* ('96) 20 Bom 167 (171,172)(DB). (When the assignee decree-holder comes into the appeal of his own motion as respondent or actually supports the decree.)]

14. ('40) 27 AIR 1940 Oudh 266 (267). (Pre-emption suit — Defendant wrongly denying plaintiff's right and claiming value of improvements — —Plaintiff claiming pre-emption on less consideration than that found to be true by Court.)
('15) 2 AIR 1915 Lah 310 (310). (When both parties are guilty of making false allegations.)
('32) 19 AIR 1932 All 128 (130) : 53 All 54 (DB).
('29) 16 AIR 1929 All 134 (136, 137) (DB). (Parties not producing all material documents.)
('92) 19 Cal 253 (266) : 19 Ind App 48 (PC). (Plaintiff asking too much, defendant conceding too little.)
('87) 14 Cal 99 (108) : 13 Ind App 116 (PC). (Both parties advancing pleas far in excess of their legal rights.)
† ('37) 24 AIR 1937 Mad 223 (227) (DB). (Plaintiff and defendant both guilty of improper conduct — Plaintiff successful — Defendant ordered to pay to plaintiff the institution fee but each party ordered to bear his own costs in other respects.)
(1914) 2 Ch 653 (664), Petty v. Parsons. (Both parties taking unreasonable view as to their right.)
(1913) 82 L J K B 340 (344), Port of London Authority v. Cairu Line. (Both sides trying to avoid real question.)
† (1874) 18 Eq 556 (565), Mumford v. Stohwassar. (Both parties were guilty of negligence.)

15. ('29) 16 AIR 1929 Lah 177 (178).

16. ('39) 26 AIR 1939 Rang 432 (433): 1939 Rang L R 501.

Note 6

1. (1886) 35 W R (Eng) 545 (546), Lambton v. Parkinson.

7. Principle that costs shall follow the event. — The general rule is that a successful party is entitled to his costs unless he is guilty of *misconduct* or there is *other good cause* for depriving him of it.[1] A plaintiff who substantially succeeds in his case is within the rule, although he may not have got the precise form of relief he wanted[2] or the

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Note 7

1. ('43) 30 AIR 1943 Mad 122 (127) (DB). (Municipality should not be deprived of its costs because it has adopted distraint proceedings to recover tax instead of filing suit.)
('42) 29 AIR 1942 All 331 (333) : I L R (1942) All 745 (DB). (Suit contested—Fact that plaintiff did not issue notice to defendant before suit is no reason for refusing costs to plaintiff.)
('40) 27 AIR 1940 All 171 (172, 173) (DB). (Suit for pre-emption — Vendee becoming cosharer by reason of gift executed before suit—Suit dismissed — Defendant vendee is entitled to costs.)
('37) 24 AIR 1937 All 29 (32) (DB). (In previous suit plaintiff's guardian failing to disclose plaintiff's lunacy — Present suit for setting aside decree in previous suit—Suit decreed but plaintiff's guardian held not entitled to costs.)
('29) 16 AIR 1929 Bom 63 (65) ; 53 Bom 178 (DB). (Collector's award under Land Acquisition Act upheld but costs not granted to Government on ground that the extravagant demands by the claimants were due to the uncertainty of land market caused by a boom and its aftermath — *Held* no adequate reason for departing from the general rule.)
('85) 13 Ind App 20 (31) (PC).
(1854) 6 Moo Ind App 289 (308) (PC).
('31) 18 AIR 1931 All 23 (25) : 52 All 991 (DB). (Income-tax Reference.)
('21) 61 Ind Cas 112 (112) (All).
† ('19) 6 AIR 1919 All 453 (455) : 40 All 558 (562) (DB). (What is sufficient ground.)
('36) 23 AIR 1936 Bom 24 (29, 30) : 60 Bom 297. (Person disputing liability as contributory, failing —Costs of contest should be paid by him.)
('35) 22 AIR 1935 Bom 403 (407) : 60 Bom 193 (DB). (Corporation proposing to act illegally—Voter obtaining injunction against it — Voter should be awarded costs of petition and hearing.)
† ('23) 10 AIR 1923 Bom 265 (268) : 47 Bom 637 (DB).
('13) 15 Bom L R 130 (174, 175) (DB). (Plaintiff guilty of misconduct in commencing the suit or in the course of the trial can be deprived of his costs even if successful.)
('87) 11 Bom 272 (282). (Non-payment of earnest money into Court by the defendant—Defendant bound to pay costs of the suit.)
('39) 26 AIR 1939 Cal 387 (393) : I L R (1938) 2 Cal 492 (DB).
('99) 26 Cal 361 (370) (DB). (Notwithstanding respondent taking a long time to argue a futile preliminary objection that no appeal lies.)
('98) 25 Cal 187 (189) : 24 Ind App 191 (PC). (Though heard *ex parte*, successful respondent in appeal is entitled to his costs.)
('89) 16 Cal 173 (183, 184) : 15 Ind App 186 (PC).
† ('83) 9 Cal 797 (802) : 10 Ind App 113 (PC).
('78) 3 Cal 473 (484) (DB).
('66) 5 Suth W R 3 (7) (PC).
(1865) 2 Suth W R 33 (34) (DB). (As a general rule costs should be awarded as an indemnity against the expenses to which parties who have no interest in the suit are unnecessarily made co-defendants.)
('30) 122 Ind Cas 378 (379) (Lah).
('23) 10 AIR 1923 Lah 302 (302).
† ('21) 8 AIR 1921 Lah 104 (105). (Pre-emption suit—Vendee not denying pre-emptor's right, even prior to suit, is no ground for depriving him of right to costs ; see also O. 20 R. 14.)
('28) 15 AIR 1928 Mad 346 (348).
('26) 13 AIR 1926 Mad 1084 (1086) (DB). (The plaintiff suing a party not liable to be sued—The defendant should get his costs on the failure of the suit.)
('20) 7 AIR 1920 Mad 890 (892) (DB). (A maintenance suit by a pauper widow.)
† ('04) 27 Mad 341 (342).
† ('36) 23 AIR 1936 Peah 48 (51) (DB). (The mere existence of conflict of judicial opinion does not preclude a litigant from obtaining costs when successful.)
† ('37) 24 AIR 1937 Sind 159 (160) (DB). (Plaintiff guilty of misconduct—*Held*, he was entitled only to institution fees.)
('36) 23 AIR 1936 Sind 52 (53) (DB).
† (1913) 108 L T 416, Hudson v. De Halfert. (It is not a judicial exercise of the discretion to order a party who has been completely successful and against whom no misconduct was alleged to pay the costs of proceedings.)
(1913) 29 T L R 507, Levy v. Johnson.
(1903) 2 K B 756 (765), Civil Service Co-operative Society v. General Steam Navigation Co.
(1903) 1 K B 282 (284), Beaumont v. Senior.
(1902) 1 K B 625 (628), Andrew v. Grove. (A County Court Judge has no power to order a successful defendant to pay the costs of the plaintiff except those which have been caused by defendant's misconduct.)
(1893) 1 Q B D 564 (567, 568), Forster v. Farquhar.
✣ (1885) 14 Q B D 821 (826, 827), Lund v. Campbell.
(1884) 1 T L R 165, Pool v. Lewin.
(1883) 24 Ch D 231 (236, 237), Upman v. Forester.
✣ (1880) 15 Ch D 501 (504), Cooper v. Whittingham. (There may be misconduct in commencing the proceedings or some miscarriage in the procedure or other misconduct which will induce the Court to refuse the costs.)
[*See* ('32) 19 AIR 1932 Mad 779 (784) : 56 Mad 289. (Plaintiff's suit dismissed—Appeal also dismissed—Suit justified, but not appeal—Defendant given costs of appeal only.)
Ann. Pr. (1905), O. 65 R. 1, p. 943.
Supreme Court Practice, O. 65 R. 1.]
[*See also* ('36) 23 AIR 1936 Rang 316 (317). (Suit dismissed in trial Court but remanded in appeal — It is a fair order to direct that costs of appeal should abide the final result of the appeal.)]

2. ('94) 18 Bom 474 (494, 495) (DB).
† ('68) 9 Suth W R 61 (63).

whole of the amount claimed.[3] Similarly, when the plaintiff succeeds only on part of his claim but fails on the most important heads of controversy, the *defendant* will be entitled to the whole costs of the suit.[4] The fact that a party succeeded on a technical plea in bar,[5] such as limitation[6] or the Gaming Act,[7] or on the admissions[8] or mistakes[9] of the opposite party, or the fact that the witnesses of the successful party gave exaggerated[10] or false evidence,[11] or that the Court was not satisfied with them,[12] is not a ground to disallow costs. Similarly, the fact that the successful plaintiff refused to go to arbitration,[13] or refused a tender which the Court considers insufficient,[14] or failed to issue a notice to the defendant before suit,[15] or the fact that defendant remained *ex parte*,[16] or that the unsuccessful party had no previous information of the objection,[17] or that the unsuccessful party was led to institute proceedings through the error of Court,[18] is not a ground for disallowing costs to the successful party.

As has been seen already, the Court may disallow a successful party his costs if he is guilty of misconduct or there is other good cause for depriving him of it and the Court must give reasons in writing, for so depriving him of it.[19] The facts must show something

('10) 37 Cal 760 (779) (DB). (Respondent successful on all points except quantum of damages.)
('23) 10 AIR 1923 Lah 513 (514).
('15) 2 AIR 1915 Lah 346 (349) : 1915 Pun Re No. 71 (DB). (Pre-emptor is entitled to get his costs although the vendee succeeds in getting much more than what was offered by the pre-emptor.)
[*See* ('28) 15 AIR 1928 Bom 539 (545). (Suit for decree against defendant personally—Decree passed against assets of deceased in defendant's hands —Defence partly frivolous — In circumstances of case parties were ordered to bear their own costs.)]

3. ('20) 7 AIR 1920 Cal 1009 (1013) (DB).
† ('29) 16 AIR 1929 Lah 129 (135) : 10 Lah 816 (DB).
('16) 3 AIR 1916 Oudh 279 (281).

4. ('41) 28 AIR 1941 Mad 31 (32) : I L R (1941) Mad 300 (DB). (Defendant taking plaintiff's trade mark in ignorance and using it under *bona fide* though mistaken belief that he was acting within law—Plea of acquiescence succeeding—Defendant is entitled to his costs.)
(1893) 1 Q B D 564 (570), Forster v. Farquhar.
('66) 10 Moo Ind App 454 (476) (PC). (Slight modification as to the rate of interest in appeal not sufficient to deprive the respondents of the costs of appeal.)
('36) 23 AIR 1936 Cal 277 (279) (DB). (Plaintiff's claim found to be substantially false—Defendant's claim for set-off allowed in full—Award of costs to defendant and refusal to plaintiff is justified.)
('27) 14 AIR 1927 Cal 947 (949).
('32) 19 AIR 1932 Mad 470 (471) : 55 Mad 636. (Plaintiff given only half costs.)
(1912) 3 K B 174 (177), Mentors Ltd. v. Evans.
(1891) 2 Q B 194 (207), Roberts v. Jones.
[But see ('75) 14 Suth W R 312 (315) (DB).]

5. ('81) 6 Cal 418 (421) (DB). (Jurisdiction.)
('14) 1 AIR 1914 Cal 746 (751) (DB). (Do.)
† ('19) 6 AIR 1919 All 453 (455) : 40 All 558 (562) (DB). (Minority pleaded.)
('75) 5 N W P H C R 20 (23) (DB). (Suit is dismissed for multifariousness.)
('86) 12 Cal 271 (272) (DB). (Jurisdiction.)
('66) 1 Ind Jur (N S) 38. (Do.)
2 Hay 188 : Marsh 311. (Do.)

6. ('42) 29 AIR 1242 Mad 713 (714) (DB). (A plea of limitation is in no sense an unjust plea.)
(1906) 95 L T 145, Elms v. Hedges.

7. (1903) 72 J K B 152 (152), Granville v. Firth.

8. ('04) 27 Mad 341 (343).
('21) 8 AIR 1921 Lah 104 (105).

9. † ('91) 13 All 290 (295).

10. † (1904) 91 L T 132 (133), Lipman v. Pulman.

11. ('27) 14 AIR 1927 Mad 474 (475).

12. † (1913) 108 L T 416 (416), Hudsons Ltd v. De Halfert.

13. (1888) 5 T L R 88, Beckett v. Stiles.

14. (1886) 55 L T 161, Fennessay v. Day and Martin.
('77) 3 Cal 468 (472) (DB).
† ('39) 26 AIR 1939 Cal 131 (134) : I L R (1938) 2 Cal 337. (Plaintiff not accepting tender of part payment — Costs of suit cannot be refused — A creditor is under no obligation to reduce the costs of proceedings for the benefit of the debtor by accepting a tender of part payment and thus bringing the amount for which proceedings have to be taken within the jurisdiction of a less costly tribunal.)

15. ('42) 29 AIR 1942 All 331 (333): I L R (1942) All 745 (DB).

16. ✣ ('25) 12 AIR 1925 Cal 569 (570) (DB).

17. (1884) 27 Ch D 260 (268), Wittman v. Oppenheim.
(1883) 25 Ch D 182 (192), Goodhart v. Hyett.
('89) 11 All 328 (329) (DB). (Appellant had no previous notice of a preliminary objection as to maintainability of appeal.)

18. † ('86) 9 All 11 (19) (DB).

19. ('43) 30 AIR 1943 All 115 (123) (FB). (Duty of municipality to recover its taxes promptly—Its allowing taxes to accumulate for 12 years is a scandal—*Held*, entitled to arrears for 12 years but no costs allowed.)
('42) 29 AIR 1942 Cal 257 (260): ILR (1941) 2 Cal 556 (DB). (Where no reasons are given, Appellate Court can interfere.)
('42) 29 AIR 1942 Cal 180 (204) (DB). (Defendant against whom suit was dismissed asked to pay costs of plaintiff—No reasons given — *Held*, decree was wrong in respect to costs and plaintiff asked to pay costs of the defendants.)

which makes it more just that an exceptional order should be made than that the case should be left to the operation of the general rule.[20] The following instances will illustrate the grounds on which a successful party may be disallowed his costs :

(1) Where the action brought by the party is frivolous or vexatious.[21]

(2) Where he omits to make a clear statement of his case.[22]

('42) 29 AIR 1942 Mad 419 (420). (Appellant's conduct reprehensible — He was disallowed costs even though he succeeded in the appeal.)
('42) 29 AIR 1942 Mad 713 (714) (DB). (Mere reference to 'circumstances of case' with no further detail is not sufficient compliance with S. 35 (2).)
('39) 26 AIR 1939 Cal 387 (393) : I L R (1938) 2 Cal 492 (DB). (Where the lower Court refused costs to the successful party and no exceptional circumstances were pointed out to justify such refusal, the High Court allowed such costs.)
See Cyclopaedia of Law and Procedure, Vol. XI Heading "Costs," pages 27, 28.
('28) 15 AIR 1928 Oudh 224 (225) (DB).
('66) 1 Moo Ind App 470 (480) (PC). (No materials to exercise its discretion upon—Successful party is not to be deprived of costs.)
('21) 3 U P L R 55 (55) (All).
('91) 13 All 290 (295).
† ('25) 12 AIR 1925 Bom 527 (528, 529) (DB).
('18) 5 AIR 1918 Cal 180 (182) (DB).
(1865) 3 Suth W R 68 (69) (DB).
('16) 3 AIR 1916 Mad 575 (577, 578). (Reasons are necessary to assist the Appellate Court for considering the decision.)
('12) 23 Mad L Jour 638 (645) (DB). (The fact that questions of law raised are not easy of solution, is not a good ground for not allowing the costs of a successful litigant.)
('34) 21 AIR 1934 Oudh 10 (11) (DB). (Appeal successful—But appellant judgment-debtor evading satisfaction of decree—Costs in both Courts disallowed.)
('33) 20 AIR 1933 Rang 160 (161). (Plaintiff's conduct rendering the litigation necessary—Costs disallowed.)
(1903) 2 K B 756 (765), Civil Service Co-operative Society v. General Steam Navigation Co. (No materials to exercise its discretion upon—Successful party is not to be deprived of costs.)
(1893) 1 Q B 564 (569), Forster v. Farquhar.

20. † ('20) 7 AIR 1920 Cal 1009 (1013).
('34) 21 AIR 1934 Mad 224 (226).
(1855) 6 Moo Ind App 232 (250) (PC). (An irregularity in the lower Court in respect of the admission of evidence.)
('34) 21 AIR 1934 All 948 (950). (Defendant for the first time in his appeal producing a document on account of which the decree is reversed—Defendant though succeeding is liable for costs up to the date of production.)
† ('36) 23 AIR 1936 Bom 342 (343) (DB). (Suit on promissory note—Money produced in Court—Non-payment due to absence of succession certificate—Defendant is not liable for costs.)
† ('26) 13 AIR 1926 Bom 189 (195) (DB). (Rule that costs follow event may be departed from in a proper case according to the circumstances.)
('36) 23 AIR 1936 Cal 493 (496) : 63 Cal 1146. (Suit under S. 53 (2), Patents and Designs Act, for damages and injunction restraining defendant from infringing plaintiff's copyright — Costs—Plaintiff unable to prove claim for damages—Defendant giving unconditional undertaking not to infringe copyright — Plaintiff should ask for judgment in form of order embodying undertaking — Plaintiff failing to do so—He is not entitled to costs subsequently incurred.)
('18) 5 AIR 1918 Cal 180 (182) (DB).
('31) 134 Ind Cas 489 (490) (DB) (Lah). (Where the Court has derived no assistance from the counsel for appellants it can deprive the appellant of the costs of the appeal, even if the appeal is allowed.)
('30) 17 AIR 1930 Lah 240 (241). (Petitioner, though successful in revision, was ordered to pay respondent's costs as his carelessness occasioned the revision.)
('06) 1906 Pun L R No. 35, page 114 (116). (Successful plaintiff deprived of costs as only a third of his claim was decreed.)
('35) 22 AIR 1935 Mad 342 (344) (DB). (Defendants willing and prepared to pay to the plaintiffs on their obtaining probate or succession certificate or on their furnishing security.)
('36) 23 AIR 1936 Rang 419 (421) (DB). (No attempt to adjust differences out of Court — Defendant making deposit in Court — Costs to be awarded only on excess amount decreed.)
(1884) 13 Q B D 262 (267, 268), Jones v. Curling.
(1893) 1 Q B 564 (568), Forster v. Farquhar. (Misconduct is not the sole ground for not giving costs.)

21. (1883) 4 T L R 715, Macgregor v. Clay.
(1889) 5 T L R 272, Wood v. Cot.
('03) 25 All 287 (295) : 30 Ind App 66 (PC). (Mortgagor in suit for redemption baselessly pleaded entire discharge of the mortgage debt.)
('70) 2 N W P H C R 73 (75) (DB).
('90) 17 Cal 620 (630, 631) (DB). (Conduct of a suit made oppressive and suit itself instituted without demand.)
† ('76) 1 Cal 385 (388) (DB). (Suit for defamation.)
('05) 1905 Pun L R No. 72, p. 266 (268).
(1893) 1 Q B 564 (568), Forster v. Farquhar.
(1893) 68 L T 146, O'Connor v. Star Newspaper.
(1888) 6 T L R 738, Moore v. Gill.

22. ('42) 29 AIR 1942 Bom 95 (97) (DB). (Appeal allowed upon a point which was not argued before the lower Court whose decision so far as it goes was perfectly correct—Each party should bear its own costs of the appeal in the lower Court.)
('41) 28 AIR 1941 Oudh 485 (487). (Plaintiff's suit failing in lower Court on account of his mistake and inability to explain case.)
('05) 9 Cal W N 844 (847) (DB).
† ('33) 20 AIR 1933 All 216 (217) (DB). (Remand due to appellants not presenting case properly in lower Court — Costs of appeal were saddled on them.)

(3) Where the contentions are often changed.[23]
(4) Where he causes unnecessary delay in the conduct of the litigation.[24]
(5) Where he makes dishonest pleas and untrue statements.[25]
(6) Where he causes unnecessary matter to be printed in the record or introduces unnecessary things therein.[26]
(7) Where a proper tender[27] or the offer of a proper compromise[28] is refused.
(8) Where he is guilty of fraudulent conduct in inducing litigation.[29]

('22) 9 AIR 1922 P C 176 (178) (PC). (Failure to bring to the notice of the lower Court the proper statute.)
('82) 8 Cal 332 (337) : 9 Ind App 1 (PC). (Joinder of tenable with untenable grounds of appeal.)
('32) 19 AIR 1932 Lah 452 (455) : 13 Lah 375 (DB).
('31) 32 Pun L R 378 (379). (Counsel not assisting Court.)
('27) 14 AIR 1927 Lah 723 (724).
('26) 13 AIR 1926 Lah 464 (464).
('17) 4 AIR 1917 Lah 1 (3) : 1916 Pun Re No. 95 (DB). (Pleadings not clear.)
('30) 17 AIR 1930 Mad 218 (221) : 53 Mad 480 (DB). (Failure to present case properly in trial Court.)
('26) 13 AIR 1926 Mad 642 (643) (DB). (Failure to bring to Court's notice authorities on law.)
†('25) 12 AIR 1925 Oudh 561 (564, 565) : 28 Oudh Cas 203 (DB). (Grounds of appeal badly drafted.)
(1878) 8 Ch D 372 (374), Moet v. Pickering. (But the mode in which counsel argues the case is not a good cause.)

23. ('11) 33 All 344 (355, 356) : 14 Oudh Cas 133 : 38 Ind App 104 (PC).

24. ('40) 27 AIR 1940 Nag 8 (13) (DB). (Waste of time and money owing to failure to raise technical objection at the proper stage—Each party to bear its own costs.)
('70) 13 Moo Ind App 560 (572) (PC).
†('16) 3 AIR 1916 PC 110 (113) : 44 Cal 186 : 43 Ind App 249 (PC).
('31) 18 AIR 1931 P C 289 (293) : 55 Mad 93 : 58 Ind App 381 (PC). (Following AIR 1916 P C 110 : 44 Cal 186 : 43 Ind App 249 (PC).)
†('30) 17 AIR 1930 PC 42 (44) (PC). (Costs of Privy Council disallowed because of unexplained delay in prosecution of appeal.)
('22) 9 AIR 1922 P C 361 (364) (PC). (As it suited appellants for commercial reasons to delay the hearing of the *ex parte* appeal.)
('22) 9 AIR 1922 P C 17 (19) : 25 Oudh Cas 8 : 44 All 185 : 49 Ind App 60 (PC). (Dilatoriness.)
('21) 8 AIR 1921 P C 6 (7) : 45 Bom 718 : 48 Ind App 181 (PC). (Appeal to Privy Council — Appellant not allowing Privy Council to determine the suit finally—Costs were reserved though appellant successful.)
('34) 21 AIR 1934 All 948 (950). (Delayed production of document — Party guilty of delay, though successful, directed to pay costs of other side.)
('89) 11 All 372 (374).
('01) 25 Bom 230 (236) (DB). (Costs incurred consequent to failure of raising preliminary issues at proper time.)

('22) 65 Ind Cas 709 (710) (DB) (Cal).
('20) 7 AIR 1920 Cal 428 (433) (DB).
('04) 31 Cal 332 (339) : 31 Ind App 57 (PC).
('72) 17 Suth W R 358 (359) (DB).
('36) 23 AIR 1936 Pat 68 (70) (DB). (Party prolonging suit deliberately.)
[*See* ('33) 20 AIR 1933 All 853 (854). (Delay in making application.)]

25. ('41) 28 AIR 1941 Pat 404 (404, 405). (Defendant's setting up untrue plea in suit necessitating appeal — He was asked to pay cost of plaintiff-appellant.)
('17) 4 AIR 1917 P C 80 (84) (PC). (False allegations.)
†('16) 3 AIR 1916 Cal 675 (676): 43 Cal 190 (193). (Do.)
('78) 2 Bom 9 (19). (Applicant for letters of administration having concealed the existence of claims was ordered to pay the costs of the application.)
('15) 2 AIR 1915 Mad 210 (217): 38 Mad 959 (DB). (False allegations.)
('33) 20 AIR 1933 Pat 220 (223).
('25) 12 AIR 1925 Oudh 301 (303) (DB). (False allegations.)

26. ('19) 6 AIR 1919 P C 83 (84) : 47 Cal 415: 46 Ind App 299 (PC).
('84) 11 Cal 244 (250) : 12 Ind App 7 (PC). (Introduction of unnecessary and irrelevant matter.)
('85) 8 Mad 219 (229) : 12 Ind App 16 (PC). (Do.)

27. ('39) 26 AIR 1939 Cal 131 (134) : ILR (1938) 2 Cal 337. (But refusal by a creditor of tender of part payment is not a sufficient ground as a creditor is not bound to reduce costs by accepting such part payment.)
('18) 5 AIR 1918 Cal 464 (465) (DB).
('09) 4 Ind Cas 820 (820) : 1907-09 Upp Bur Rul, Contract Act, page 17. (Refusal of invalid tender is not misconduct.)
('79) 4 Cal 572 (575).
†('78) 3 Cal 468 (472) : 1 Cal L Rep 470 (472) (DB).
('81) 3 Mad 224 (229) (DB).
('35) 22 AIR 1935 Pat 101 (102). (Rent suit — Tender of correct amount by tenant—Landlord is not entitled to costs.)

28. (1886) 55 L T 161, Fennessy v. Day.
†('39) 26 AIR 1939 Bom 198 (202).

29. †('17) 4 AIR 1917 P C 80 (84) (PC).
(1886) 2 T L R 881, Sutcliffe v. Smith.
('85) 13 Ind App 20 (31) (PC). (Both parties used fabricated documents — No order as to costs was made.)
('10) 14 Cal W N 1031 (1033) (DB).
†('98) 25 Cal 371 (395) (SB).
('97) 24 Cal 265 (270).
('71) 16 Suth W R 291 (293) (DB).
('71) 15 Suth W R 348 (350) (DB).

(9) Where he acts unscrupulously or with malice or malevolence.[30]

(10) Where he raises objection at a very late stage.[31]

(11) Where he adopts a wrong procedure for vindicating his rights.[32]

(12) Where he abuses his right to select his own *forum*.[33]

(13) Where the case of the opposite party fails owing to the fact that the decision on the basis of which the case was filed was, subsequent to the institution thereof, overruled.[34]

(14) Everything which increases the litigation and the costs and which places an unnecessary burden on the opposite party is a good cause to deprive a party of his costs.[35]

(15) Where a suit has been necessitated by the conduct of a third party, e. g., a Returning Officer, each party may be ordered to pay his own costs.[36]

It has been seen already that the expression "costs shall follow the event" means that the party who, on the whole succeeds in the action, gets the general costs of the action; but where the action involves *several issues* and the costs of a particular issue can be *separated* from the costs of the suit, it is usual to allow them to the party who is successful on that issue irrespective of the ultimate result of the suit.[37]

('22) 9 AIR 1922 Oudh 271 (273) : 25 Oudh Cas 237.

30. † ('72) 18 Suth W R 14 (15) (DB).
('67) 2 Agra 351 (360) (SB).
('12) 15 Cal L Jour 162 (166) (DB).
('86) 12 Cal 18 (24) : 12 Ind App 137 (PC).
('30) 17 AIR 1930 Mad 154 (158) (DB). (Conduct not creditable or straightforward.)

31. ('40) 27 AIR 1940 Nag 8 (13) (DB). (Failure of suit on technical ground raised for the first time in appeal—Each party to bear its own costs.)
('29) 16 AIR 1929 Lah 246 (246). (Preliminary objection as to jurisdiction.)
('33) 20 AIR 1933 Lah 104 (104) : 15 Lah 78. (Appeal succeeding on objection not raised in lower Courts—Costs were disallowed.)
('70) 14 Moo Ind App 203 (208) (PC). (Where appeal was confined only to the validity of a vakalatnama.)
('33) 20 AIR 1933 All 120 (122) (DB). (Appeal successful on point of law not taken in Courts below —Parties were ordered to bear their own costs.)
('75) 12 Bom H C R 23 (49) (DB). (New point taken in appeal.)
('81) 6 Cal 406 (418). (Plea of *res judicata* taken very late after all the evidence was closed.)
('73) 19 Suth W R 22 (23). (Objection as to admissibility of document taken only in special appeal.)
('67) 7 Suth W R 490 (490) (DB). (Plea as to want of jurisdiction, taken in special appeal.)
('33) 20 AIR 1933 Rang 38 (39). (Failure of applicant's advocate to place his principal argument before Court—Costs disallowed.)
('29) 16 AIR 1929 Rang 148 (150) : 7 Rang 75 (DB). (Do.)
[*See* ('28) 15 AIR 1928 Bom 516 (520) : 52 Bom 640 (DB). (Succeeding on a new plea in second appeal.)]

32. ('82) 8 Cal 916 (919). (Irregularly preferring an appeal instead of making an application.)
('68) 9 Suth W R 296 (296). (Wrong institution of fresh suit instead of appealing from execution order.)
('22) 9 AIR 1922 P C 17 (19) : 25 Oudh Cas 8 : 44 All 185 : 49 Ind App 60 (PC).
('28) 15 AIR 1928 Bom 539 (545). (Suit filed as a summary suit when it ought to have been a regular suit.)
Cor 128. (Wrong institution of fresh suit instead of appealing from execution order.)

33. ✣(1891) 2 Q B 194 (203), Roberts v. Jones.
('21) 8 AIR 1921 Bom 34 (35): 45 Bom 1236 (DB).
('18) 5 AIR 1918 Lah 246 (247) : 1918 Pun Re No. 81 (DB). (Appellant selecting a wrong forum.)
(1891) 8 T L R 55, Hill v. Morris.

34. ✣('20) 7 AIR 1920 Mad 567 (568) : 43 Mad 61 (64) (DB).
† ('23) 10 AIR 1923 Bom 206 (206, 207) : 47 Bom 559 (DB).
('30) 17 AIR 1930 All 167 (168).
('90) 1890 All W N 183 (183) (DB).
1 Y and C Ch C 7 (12), Robinson v. Rosher.

35. † ('20) 7 AIR 1920 Cal 1009 (1013) : 24 Cal W N 352 (359) (DB).
('24) 11 AIR 1924 Mad 692 (693).
('24) 11 AIR 1924 All 808 (809) : 46 All 733 (DB). (Appeal dismissed as non-appealable—Respondent deprived of costs as order was bad on merits.)
('34) 21 A I R 1934 Mad 665 (669) (DB). (Circumstances showing that suit might have been avoided if plaintiff had availed himself of certain prior litigation—Costs of suit in first Court not allowed though costs of appeal allowed.)
† (1889) 14 App Cas 27 (32), Huxley v. West London Extension Ry. Co.

36. ('20) 7 A I R 1920 Cal 669 (673) : 47 Cal 521 (536, 537) (DB).

37. ('93) 20 Cal 762 (769, 770) (SB).
† ('33) 20 AIR 1933 Nag 49 (50) : 29 Nag L R 8.
✣(1918) 1918 App Cas 717 (728), Reid Hewit & Co. v. Joseph.
† (1885) 14 Q B D 821 (826), Lund v. Campbell.
(1884) 13 Q B D 598 (600), Goutard v. Carr.

8. Mortgage suits. — See Order 34 Rule 10.

9. By whom costs are to be paid—General. — As a general rule an order for costs can be made only against a party to the proceeding[1] and the Court is also bound to decide which of the parties shall bear the costs.[2] It is also a general rule that it is the unsuccessful party that will have to bear the costs.[3] Similarly, a party by whose act or by the act of whose counsel a difficulty has arisen, must pay the costs occasioned by that difficulty.[4] But the Court has a discretion in a proper case to order that each party should bear his own costs[5] or that one defendant should pay the costs of another defen-

('1882) 8 Q B D 648 (649), Abbot v. Andrews.
(1881) 6 Q B D 521 (523, 524), Gallis v. De Silva.
(1880) 5 Ex D 180 (183), Myers v. Defries.

Note 9

1. ('76) 2 Cal 233 (259) : 4 Ind App 23 (PC).
('73) 11 Beng L R 37 (39): 20 Suth W R 123 (DB).
† ('36) 23 AIR 1936 Lah 382 (384). (Bar Association declaring certain persons touts — Inquiry by District Judge thereon—Association invited to assist in inquiry—Persons not found touts—Association ordered to pay costs of inquiry to persons — Association held not party and hence order illegal.)
('30) 17 AIR 1930 Mad 195 (196). (Where no right to relief is alleged to exist against a party, he is not a proper party to the suit and an order should not be passed making him liable for costs, e. g., Chairman of Municipal Council in an election petition.)
('36) 23 AIR 1936 Pat 151 (151). (*Pro forma* defendant not to be ordered to pay costs.)
[*See also* ('83) 7 Bom 484 (486). (Under the last Code the words were, "Any other party to the suit," in S. 219 which are omitted now.)
(1838) 4 M & W 194 (196), Hyward v. Gifford.]

2. † ('74) 23 Suth W R 89 (90) (DB).
('36) 23 AIR 1936 All 127 (128). (Appeal allowed—All respondents contesting as well as non-contesting should be made liable for costs of appeal.)

3. ('66) 3 Mad H C R 113 (115) (DB).
('85) 12 Cal 179 (181) (DB). (A plaintiff thus cannot get costs against a person against whom he has no cause of action.)
('83) 9 Cal 797 (802) : 10 Ind App 113 (PC). (Appellant, whose claim was opposed in the lower Court on an entirely wrong ground was held entitled for the whole costs notwithstanding that he succeeded only partially.)
('36) 23 AIR 1936 Lah 607 (608) : 17 Lah 520 (DB). (Prior mortgagee suing his mortgagor impleading puisne mortgagee — Puisne mortgagee contesting claim — Costs can be saddled on all the defendants including puisne mortgagee.)
('31) 18 AIR 1931 Bom 551 (556) : 55 Bom 649 (DB).
('36) 162 Ind Cas 848 (849) (Nag). (Suit partly contested and partly non-contested — Order for costs against *ex parte* defendants only not justified.)
Also see S. 112, N. 8.

4. ('04) 30 Bom 173 (189): 6 Bom LR 790 (799) (DB).
† (1902) 1902 App Cas 465 (471), Neale v. Gordon Lennox.
('25) 12 AIR 1925 Bom 471 (472) (DB). (Privy Council appeal presented but not prosecuted—Costs of petition for leave to appeal to Privy Council are to be paid by appellant.)
('03) 27 Bom 124 (125) (DB). (Want of prosecution.)
('04) 6 Bom L R 301 (303).
† ('05) 32 Cal 62 (72) (DB). (Party securing dismissal of suit on untenable ground.)
2 Hyde 86 (88) : Bourke 238. (Costs attendant on adjournment occasioned by a transfer of case from the undefended to the defended board must be borne by the party making the application.)
('80) 4 Bom L R 818 (820) (DB). (The plaintiff not having pressed an essential issue which was not framed or tried and the Appellate Court having referred it back for trial, each party was made to bear his own costs.)
[*See* ('41) 28 AIR 1941 Pat 404 (404, 405). (In cases where a landlord deliberately misstates the area of the holding in respect of which he claims rent, it is only fair that he should bear the costs of the litigation—But where a purchaser from a co-sharer after partition files a suit for rent and states the area of the holding as given in the partition papers, he cannot be said to misstate the area deliberately.)
('40) 27 AIR 1940 Mad 547 (553) (DB). (Suit by widow for maintenance—Amount claimed not out of all proportion to amount found due — *Held*, defendant who unlawfully refused maintenance should be asked to bear the entire costs of the widow and his own costs.)
('40) 27 AIR 1940 Mad 519 (520). (Purchaser of mortgaged property undertaking with mortgagor to pay purchase money to mortgagee but failing to do so—Suit by mortgagee—Purchaser ordered to pay costs of suit.)]
[*See also* ('31) 18 A I R 1931 Cal 76 (78, 79) : 58 Cal 561. (New plaintiff added—Court should provide for costs of defendant being paid by that plaintiff who had no just claim.)]

5. ('43) 30 AIR 1943 Mad 231 (234). (Plaintiff entitled to relief on date of plaint but becoming not entitled due to subsequent events — Each party asked to bear his costs.)
('43) 30 AIR 1943 Pesh 65 (66) (DB). (Legal question not free from doubt — Both parties were directed to bear their own costs in all Courts.)
('42) 29 AIR 1942 Pesh 39 (40) (DB). (Each party directed to bear his own costs on the ground that difficult points of law were involved.)
('39) 26 AIR 1939 Rang 432 (433) : 1939 Rang LR 504. (In test cases there should be no order for costs.)
('34) 21 AIR 1934 Lah 262 (264) (DB). (Plaintiffs' case probably true — Suit dismissed by reason of technical defects — Each party asked to bear his costs.)

dant.[6] In exceptional cases, the Court may make even a stranger to a suit liable for the costs of the litigation,[7] as for instance, where the party on the record is a mere puppet in the hands of the stranger;[8] but great caution must be exercised before any such order is passed.[9] Where A and B claiming under separate and distinct causes of action join and sue X and the suit is decided in favour of A and against B, A is entitled to recover the whole costs of his suit from X and the latter can recover from B the costs occasioned by his joinder as co-plaintiff.[10] Again, where A and B jointly defend an action by X against them and the suit is decided in favour of A and against B, A is entitled to recover half the costs incurred in the joint defence from X.[11] Where X sues Y and Z in the *alternative* and a decree is passed against Z with costs, but the suit as against Y is dismissed, the Court has power to order Z to pay in addition to the costs payable by him to X, the costs of Y. The reason is that if it is reasonable to join both Y and Z because it is uncertain as to which of the two is the really guilty one, then the reasonable costs of the defendant who has succeeded in defending himself, should be borne by the man who is to blame.[12]

('38) 25 AIR 1938 Pat 613 (618) : 17 Pat 594 (DB). (Where a suit is dismissed but the defendant does not succeed in establishing his case the Court will not give him costs, but will order each party to bear his own costs.)

('36) 23 AIR 1936 Pat 570 (571) (DB). (Guardian for minor respondents dying during pendency of appeal — Court not appointing guardian *ad litem* under O. 32, R. 11—Appeal does not abate—Decree passed by such Court set aside and case remanded to it for retrial — But respondents held not liable for costs of appellant in second appeal — Each party to bear his own costs.)

('28) 15 AIR 1928 Cal 819 (820):56 Cal 507 (FB). (New question of law arising out of amendment of law—No order made as to costs on the issue.)

6. ('17) 4 AIR 1917 Sind 47 (52) : 11 Sind L R 1 (11). (Relief claimed against either of two defendants who were disputing their liability.)

†(1881) 17 Ch D 600 (610), Rudow v. Great Britain, etc., Assurance Society.

Marsh 608. (A defendant colluding with plaintiff will be ordered to pay costs of the co-defendant.)

('38) 25 AIR 1938 Mad 117 (124):ILR (1938) Mad 233. (In proper case, unsuccessful defendant can be ordered to pay successful defendant's costs directly.)

('30) 17 AIR 1930 Mad 913 (913). (Where parties are unnecessarily impleaded at the instance of the defendant, the Court can direct the latter to pay the costs of the added parties.)

('36) 23 AIR 1936 Nag 285 (288) : I L R (1937) Nag 61.

(1903) 2 K B 533 (539), Sanderson v. Blyth Theatre Co. (Where defendants are sued in the alternative a successful defendant may be given costs against the unsuccessful defendant.)

[But see ('08) 1908 Pun W R No. 57, p. 217.]

7. ('42) 29 AIR 1942 All 233 (234) : I L R (1942) All 832 (FB).

✣('41) 28 AIR 1941 Mad 750 (751) (DB). (Debt Conciliation Board passing order declaring debt to be discharged when it was acknowledged by the debtor, for mere non-appearance of creditor—Order quashed and Board directed to pay costs of creditor.)

✣('41) 28 AIR 1941 Mad 198 (199). (Collector's award confirmed — Trustee of Devasthanam who claimed a most extravagant sum asked to pay costs personally, even though he was not personally a party to the proceedings.)

('41) 28 AIR 1941 Mad 762 (762). (Assignee and assignor of decree both contesting appeal against decree by defendant—Appeal allowed—Assignee is liable for costs not only of appeal but also of trial Court even though he was no party to the suit.)

† ('34) 21 AIR 1934 Nag 250 (250):20 Nag L R 76.

('36) 23 AIR 1936 Pat 151 (152). (Suit against principal and *pro forma* defendants — Former admitting but latter unsuccessfully contesting suit —Latter can be appropriately saddled with costs.)

8. ('42) 29 AIR 1942 All 233 (234) : I L R (1942) All 832 (FB). (Suit by benamidar—Costs against real plaintiff can be granted.)

('12) 16 Ind Cas 381 (382) (DB) (Cal).

('84) 8 Bom 391 (394). (Improperly setting the Court in motion.)

✣('30) 17 AIR 1930 All 225 (241):52 All 619 (FB). (Costs can be awarded against non-parties, but section does not apply to misconduct of advocates.)

† ('83) 7 Bom 484 (486).

('72) 9 Beng L R 210 (213, 214).

('70) 14 Suth W R (O J) 1 (5).

('66) 1 Ind Jour (N S) 282.

('30) 17 AIR 1930 Mad 577 (579) : 53 Mad 708 (DB). (When he really represents the claimants.)

(1838) 4 M & W 194 (197), Hayward v. Giffard.

[*See also* ('31) 32 Pun L R 540 (542). (Person financing plaintiff added as co-plaintiff and ordered to pay costs.)]

Also see O. 32 R. 11 Note 4.

9. ('75) 22 Suth W R 35 (36).

✣[*See* ('42) 29 AIR 1942 All 233 (234):ILR (1942) All 832 (FB). (The Court will not, and cannot, award costs against a stranger without giving him an opportunity of being heard.)

('94) 21 Cal 904 (910). (Where a mortgagee, not a party to a partition suit, was charged with proportionate costs for having obtained a benefit under the decree.)]

10. (1886) 17 Q B D 625 (635), Viscount Gort v. Rowney.

11. (1903) 1 K B 282 (284), Beaumont v. Senior.

12. † (1914) 3 K B 181 (187), Besterman v. British Motor Cab Co. Ltd.

The words "by whom," as distinguished from "by which party" in this section give a large discretion in the matter of awarding costs and are wide enough to cover the case of a legal practitioner. A legal practitioner may be held liable for costs of the proceedings taken by him in appropriate cases, where the costs occasioned to his client are the direct result of an unjustifiable initiation and prosecution of the proceedings by him.[13] A solicitor who purports to act for a non-existing party is personally liable for the costs of the opposite party.[14]

10. Account suits. — In suits for accounts also, the general rule that costs follow the event applies.[1] It will follow the result of the account unless the defendant has falsely denied his liability to account.[2] Thus, where in a suit by a principal against an agent the latter denied the relationship itself, the Privy Council ordered him to pay the whole costs without regard to the result.[3]

The general rule as to costs in a suit for accounts is that they are to be given at the time of the *final* decree. Hence, where the preliminary decree completely omits to mention the subject of costs, it must be assumed that the Court intended to reserve the question of costs until the time of the final decree and the order of the Court which passed the final decree granting costs should be taken as meaning that the costs granted are the costs of the *whole* suit.[4]

The Court can, however, grant a decree for costs even at a preliminary stage where the defendant disputes his liability to account and contests the maintainability of the suit.[5] Where the plaintiff's valuation of the suit is not arbitrary, he can be awarded costs on the basis of his valuation of the suit.[6]

11. Admiralty and vice-admiralty cases. — Where, in an action of salvage, a ship is arrested and the bail asked for is found to be excessive, the promovents must pay the impugnants the costs of the excessive bail.[1]

12. Arbitration cases. — Where there is an award on a reference *through Court*, the Court has power to award costs of the arbitration, as costs of a proceeding incident to a suit.[1] But, where *all* the questions in dispute between the parties are referred

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† ('33) 20 AIR 1933 Bom 106 (107) : 57 Bom 589.
(1903) 2 K B 533 (538, 539), Sanderson v. Blyth Theatre Co.
(1907) 1 K B 264 (269), Bullock v. The London General Omnibus Co.
(1879) 11 Ch D 82 (86), Child v. Stenning. (He who was the person who caused the litigation or whose error or representation caused it ought to be the person to pay the costs of it.)
(1869) 4 C P 212 (223), Spedding v. Nevell.
(1861) 124 R R 530 (535) : 30 L J Q B 257, Pow v. Davis.
13. ('42) 29 AIR 1942 Oudh 279 (281) (DB). (Guardian entering into compromise on behalf of minor—Pleader with consent of guardian applying for review questioning compromise on his own behalf — Grounds wholly untenable to his knowledge — Application dismissed and pleader and guardian directed to pay costs jointly—Order held justified.)
14. †('33) 20 AIR 1933 Bom 317 (319, 322) : 58 Bom 1 (DB).

Note 10

1. 1 Bro P C 1 (2), Pitt v. Page. (But where the account is intricate or doubtful, there shall be no costs.)
(1718) 6 Vin Abr 367, p. 1 (23), Lyre v. Parnel.
(1718) 6 Vin Abr 365, p. 1 (18), East India Co. v. Ekins.
('30) 17 AIR 1930 All 72 (72). (Costs can be awarded even in the preliminary decree.)
('29) 16 AIR 1929 Cal 719 (723) (DB).
2. † ('87) 14 Cal 147 (159) : 13 Ind App 123 (PC).
('34) 21 AIR 1934 Pat 146 (147) (DB). (Question of costs must be decided at the time of final decree.)
('17) 4 AIR 1917 Cal 557 (558).
(1857) 24 Beav 207 (214), M. R. May v. Biggendon.
3. ('87) 14 Cal 147 (159) : 13 Ind App 123 (PC).
4. ('39) 26 AIR 1939 Lah 255 (256). (AIR 1934 Pat 146 followed.)
5. ('43) 30 AIR 1943 Pat 218 (227): 22 Pat 114 (DB).
6. ('43) 30 AIR 1943 Pat 218 (227) : 22 Pat 114 (DB). (Valuation based on report of auditor.)

Note 11

1. ('90) 17 Cal 84 (114) (DB).
(1900) 24 Bom 55 (65).

Note 12

1. ('40) 27 AIR 1940 Sind 190 (190) : ILR (1940) Kar 34 (DB). (Arbitrator's fees are part of costs of arbitration — Court can award arbitrator's fees under Para. 13 and S. 35.)
('12) 6 Sind L R 226 (227) (DB).

to arbitration, the arbitrator is thereby empowered to decide the question of costs which is one of the matters involved in the suit, and in such a case, the Court's discretion in the matter of costs would be removed by the award.[2] Where the Court holds that there is no valid reference to arbitration, it has no jurisdiction to pass an order as to costs of the award.[3]

13. Divorce cases. — The general rule is that in all matrimonial causes where the wife is shown to have no separate property of her own, the husband must pay the wife's costs or give adequate security for the same.[1] The rule is founded on the English law which gave the whole personal property of the wife to the husband and gave him also the income of her real property so that she was penniless. The Ecclesiastical Court, therefore, provided not only for the costs but also gave her alimony *pendente lite*.[2] The English law has been followed in India[3] except in the case of Mahomedans,[4] but the discretion of the Court is not taken away thereby[5] and in proper cases an order on the husband to pay costs may be refused.[6]

A decree for costs in a matrimonial cause cannot be executed until it is confirmed by the High Court.[7]

Costs will not be granted to the husband against a co-respondent when the former has condoned the adultery of the wife with the latter.[8] Costs granted to the husband against a co-respondent when damages are not asked for, will include costs as between attorney and client.[9]

14. Third persons, when can be made liable. — See Note 9.

15. Costs against Secretary of State. — The Secretary of State is, like any other party, liable to pay the costs where he is unsuccessful in the litigation.[1]

16. Order for costs, out of estate, when to be made. — Where a suit is instituted in good faith for the benefit of an estate, the costs of the suit will be ordered to be payable out of the estate.[1] Thus, in the case of suits by or against trustees, executors and administrators, the costs, where such persons are unsuccessful, are to be made

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2. ('36) 23 AIR 1936 Pesh 37 (37).
3. ('28) 15 AIR 1928 Mad 370 (370, 371) (DB).

Note 13

1. *See* Matrimonial Causes Rules, 1924, Rule 91, Published in Appendix I, The Yearly Practice of the Supreme Court by Chitty (1930).
2. (1881) 6 P D 119 (122), Robertson v. Robertson.
3. ('02) 29 Cal 619 (621, 622).
† ('86) 9 Mad 12 (13).
('22) 9 AIR 1922 All 504 (505) : 44 All 745 (FB).
('22) 9 AIR 1922 All 243 (243) (DB). (Though wife's defence fails husband has to pay costs.)
('14) 1 AIR 1914 Bom 211 (215) : 38 Bom 125 (152, 153) (DB). (Solicitor is entitled to have his costs paid out of the amount deposited by the husband to meet the costs of the wife.)
('95) 19 Bom 293 (296).
('30) 17 AIR 1930 Cal 558 (558, 559) : 57 Cal 1089. (The practice does not apply to suits under Cl. 12 of the Letters Patent and the High Court need not order such payment under this Section.)
('03) 30 Cal 631 (634). (Though her petition is dismissed order for costs may be made.)
('24) 11 AIR 1924 Mad 150 (150) (DB).
[But see ('80) 5 Cal 357 (362, 363) (DB).]
4. ('97) 21 Bom 77 (84).
5. ('87) 14 Cal 580 (583). (Husband pleading that he is without means—Enquiry may be directed.)
† ('31) 18 AIR 1931 Cal 206 (208) : 57 Cal 1350 (DB). (Wife's suit dismissed—Wife having sufficient separate property—Costs are within discretion of Court.)
6. ✠('17) 4 AIR 1917 Cal 65 (69) : 44 Cal 35 (SB). (Wife not denying adultery—Decree for dissolution —Wife wishing to prefer appeal—Husband cannot as a matter of right be asked to pay her costs.)
('33) 20 AIR 1933 Cal 388 (391) : 60 Cal 318 (DB). (There is no practice which requires the Court to make the husband pay the costs of an unsuccessful appeal by an unsuccessful wife.)
('31) 18 AIR 1931 Cal 206 (208) : 57 Cal 1350.
('35) 22 AIR 1935 Oudh 133 (139) : 10 Luck 627 (DB).
7. ('87) 1887 Pun Re No. 35, p. 75 (76).
8. ('01) 28 Cal 221 (222).
9. ('01) 28 Cal 84 (85).

Note 15

1. ('20) 7 AIR 1920 Pat 182 (185) : 5 Pat L Jour 321 (DB).

Note 16

1. (1864) 1 Suth W R Misc 1 (1).

payable out of the estate unless they are guilty of vexatious conduct or where by neglect or misconduct they have occasioned the institution of the suit.[2]

But unless the Court orders that the costs should come out of the estate, a person suing as trustee and incurring liability for costs is personally liable for such costs.[3] Where a suit abates on the death of the plaintiff by reason of the cause of action not surviving the death, the Court may order the costs to be paid out of the estate of the deceased plaintiff.[4] But where a suit abates on the ground that no representative of a deceased *defendant* has been brought on the record, the Court cannot award costs to the heirs of the deceased defendant against the plaintiff.[5]

Where in a suit on a mortgage a number of persons are impleaded as defendants, some of whom are discharged on the ground that they claim no interest in the mortgaged property, and the remaining defendants are in no way responsible for such discharge, the costs of the discharged defendants cannot be ordered to be paid out of the mortgaged estate, but should be ordered to be paid by the plaintiff.[6]

For other cases in which costs may be ordered to be paid out of the estate, see Notes 17 to 24.

17. Administration suits. — A plaintiff in an administration suit may be granted his costs out of the estate.[1] Where a person entitled either to a legacy or share

2. ('42) 29 AIR 1942 Bom 125 (128) : ILR (1942) Bom 293. (Suit by trustee not complying with S. 92, C. P. C. — He is not entitled to costs out of trust estate.)
('41) 28 AIR 1941 Bom 307 (309, 310). (Suit by plaintiff for declaration that deed of trust was void — Suit failed — Plaintiff ordered to pay costs of trustees—Trustees applied that in event of non-recovery of costs from plaintiff they should be directed to be paid out of trust estate—This was refused as trustees were guilty of misconduct.)
('39) 26 AIR 1939 Nag 274 (277) (DB). (Suit by executors on legal advice—Absence of malice—Executors cannot be asked to pay costs personally — Costs to be paid out of the estate.)
(1870) 5 Ch App 193 (202), Simpson v. Bathurst.
† (1881) 19 Ch D 140 (152, 153), Ex parte Wainwright; In re Wainwright.
† ('17) 4 AIR 1917 Cal 795 (796) (DB).
('98) 26 Cal 133 (139) (SB). (Costs for appointment of guardian for a minor.)
† ('85) 11 Cal 628 (632). (Trustee causing unreasonable delay in executing deed—He will be made to pay the costs of the suit for compelling him to execute it.)
('36) 23 AIR 1936 Mad 495 (497) (DB). (Trustees not having carried out the directions in will — Obstructive attitude throughout the litigation — They may be made personally liable for the costs.)
('25) 12 AIR 1925 Mad 194 (199). (Suit brought by trustee on account of ill-feeling towards defendant—Trustee should personally be made to bear the costs.)
('16) 3 AIR 1916 Mad 384 (384, 385). (Petition for sanction under S. 18, Religious Endowments Act.)
('13) 24 Mad L Jour 199 (204) (PC). (In a scheme suit the Privy Council ordered the trustees to bear the costs in the first instance to be recouped subsequently out of the estate.)
('29) 16 AIR 1929 Pat 401 (404) : 8 Pat 419 (DB). (Will held invalid for want of proper attestation—Costs ordered to be borne by estate.)
('31) 18 AIR 1931 Sind 17 (23) : 25 Sind L R 72 (DB).
(1885) 29 Ch D 348 (350), Hill v. Spurgeon.
(1889) 42 Ch D 674 (681), In re Weall; Andrews v. Weall.
†(1897) 2 Ch 190 (198), Christmas v. Jones. (Annual Practice, (1908) p. 923.)
(1878) 8 Ch D 492 (508), In re Chennell.
(1850) 21 Beav 426 (430), Ford v. Chesterfield.
(1879) 10 Ch D 468 (474), Sharp v. Lush.
[*See* ('30) 17 AIR 1930 Cal 397 (402) : 58 Cal 15. (Costs for appointment of guardian for a minor.)]

3. ('35) 22 AIR 1935 Mad 5 (5) (DB).
† ('34) 21 AIR 1934 All 793 (794).
('34) 21 AIR 1934 Mad 430 (431) : 58 Mad 160.

4. † ('20) 7 AIR 1920 Mad 289 (290) : 43 Mad 284 (287) (DB). (Power of Court to award costs is not restricted to O. 22 R. 3.)
('34) 21 AIR 1934 All 1 (4) : 55 All 687 (DB). (Appeal by two plaintiffs in a suit under S. 92—One of them dead and surviving appellant not solvent — Order for costs made against estate of deceased appellant.)

5. ('12) 22 Mad L Jour 439 (440).

6. ('34) 21 AIR 1934 Nag 264 (268) : 30 Nag L R 331 (DB).

Note 17

1. ('94) 21 Cal 832 (837).
† ('35) 22 AIR 1935 Bom 178 (181) : 59 Bom 397. (General principles as to when such costs may be ordered to come out of estate discussed.)
[*See* ('39) 26 AIR 1939 Rang 108 (109) : 1938 Rang L R 252. (Although the Official Referee has jurisdiction to give or deprive any person of costs of reference, he cannot direct that the costs are to be paid out of the property which is the subject-matter of the administration suit—Whether it is to be done or not is a matter for the Judge and not for the Official Referee.)]

encumbers it or does anything which causes additional expense beyond what is actually necessary for the due administration of the estate, the additional expense will be thrown upon the legacy or share. When therefore orders for costs are made in administration suits, the correct course is to make them in such a form that the person who has not *encumbered* his share shall be relieved as far as possible in the matter of costs created by the fact that another cosharer has assigned or encumbered his share.[2] Where a person intervenes in an administration suit for his benefit, it is not proper to make the claimant pay an additional bill of costs of the intervenor, where the character and scope of the suit was not changed by such intervention.[3]

The Administrator-General is in the position of an interpleader-plaintiff and is entitled to recover his costs from the losing claimant and, failing such recovery, from out of the estate.[4]

See also the undermentioned cases[5] as to when the costs of the Advocate-General appearing in an administration suit or a suit to construe a will may be ordered to be paid out of the estate.

18. Suits for construction of wills. — In suits for the construction of wills where such construction was necessitated by a reasonable doubt[1] or by difficulties caused by the testator himself,[2] costs will be usually made payable out of the estate.[3] Where the construction is not so difficult as to have required the assistance of the Court,[4] or where, though the suit is one ostensibly for the construction of a will, it is really one to oust a person in possession, and the plaintiff fails,[5] the estate will not be made liable for the costs. Where in a suit for the construction of a will, the Advocate-General appears in support of a bequest under the will in favour of a charity, his costs should be allowed out of the estate.[6]

19. Suits by or against minors. — Where a proceeding is conducted on behalf of a minor *bona fide*, but ends unsuccessfully, costs will, as a rule, be made payable out of the estate of the minor.[1] Where, however, the suit or proceeding is unnecessary or improper,[2] or the next friend or guardian is guilty of a breach of duty

2. ('29) 16 AIR 1929 Cal 477(478): 56 Cal 447(DB).
3. ('21) 8 AIR 1921 Cal 222 (224) : 48 Cal 352 (DB).
4. † ('86) 10 Bom 350 (357).
('86) 13 Cal 193 (196, 197) (DB). (No agreement between plaintiff and Administrator General that costs should come out of estate will be of any avail to the plaintiff, especially when the estate is not before the Court.)
5. ('36) 23 AIR 1936 Bom 13 (15).
('35) 22 AIR 1935 Bom 178 (181) : 59 Bom 397.

Note 18

1. ('89) 16 Cal 383 (396) : 16 Ind App 29 (PC).
('90) 17 Cal 122 (130) : 16 Ind App 166 (PC).
† ('36) 23 AIR 1936 Mad 388 (393, 397).
2. ('88) 15 Cal 725 (750) : 15 Ind App 127 (PC).
('32) 19 AIR 1932 P C 269 (275) : 60 Cal 554 : 59 Ind App 419 (PC).
('14) 1 AIR 1914 P C 149 (150) : 41 Cal 1007 : 41 Ind App 176 (PC).
('06) 3 Cal L Jour 224 (234, 235) (DB).
('14) 1 AIR 1914 Mad 304 (304): 39 Mad 476 (478).
('25) 12 AIR 1925 Sind 195 (201): 19 Sind LR 220.
3. ('09) 11 Bom L R 75 (81). (Attitude of respondents correct and that of petitioner justifiable — Costs of both were made payable out of estate.)
[*See also* ('35) 29 Sind L R 366 (374).]
4. ('94) 21 Cal 683 (694) (SB).
5. † ('97) 24 Cal 406 (412) (DB).
6. ('36) 23 AIR 1936 Bom 13 (15).

Note 19

1. ('39) 26 AIR 1939 Bom 350 (352). (Suit by next friend on behalf of minor dismissed with costs — No express direction in decree that next friend should pay costs—Estate of minor, if liable for costs.)
('76) 25 Suth W R 316 (316) (DB). (Guardian obtaining permission to sue in *forma pauperis* on behalf of a minor—Rejection of suit supplies no ground for throwing costs of the suit on guardian.)
(1814) 3 C & B 59, Oxford v. Churchill.
Trevelyan on Minors, Edn. 4, (1912), p. 282.
('34) 21 AIR 1934 Cal 474 (477) : 61 Cal 227.
[See however ('41) 28 AIR 1941 Cal 272 (286) : ILR (1940) 2 Cal 285. (The practice is to make the next friend personally liable for the costs and not the estate, unless the Court otherwise orders upon a consideration of the circumstances.)]
2. ('39) 26 AIR 1939 Bom 271 (277) : I L R (1939) Bom 396 (DB). (Suit by next friend not for benefit of minor — Next friend personally liable for costs both of minor plaintiff and defendant.)

or other improper conduct,[3] costs may be made payable by the next friend or guardian *personally*. The words "by whom" in S. 35 are wide enough to cover guardians and next friends.[4] In the case cited below,[5] it was held by the Bombay High Court that where a suit by a next friend on behalf of a minor is dismissed, the defendant is entitled to get his costs from the *next friend* irrespective of any question as to the suit being for the benefit of the minor, although the next friend can afterwards reimburse himself for such costs from the estate of the minor. As a *general* rule, a minor cannot be made to pay costs *personally*.[6]

Where some of the defendants to a suit are minor coparceners of a Hindu joint family, the Court may order that such defendants should be liable for costs only to the extent of their interest in the joint family property and should not be *personally* liable.[7]

See also O. 32, R. 1, Note 9 and O. 32, R. 11, Note 4.

20. Official Liquidator and Official Assignee. — The costs of an unsuccessful litigation incurred by a liquidator, whether in a voluntary or compulsory winding up, are payable to the party entitled, out of the assets of the company, in priority to the costs of the liquidation.[1] The costs incurred in a *bona fide* application by the liquidator will be a first charge on the estate.[2] See also the case cited below.[3]

A trustee in bankruptcy or the Official Assignee is personally liable for costs in the same way as any other party.[4] He should, as a general rule, get a guarantee of indemnity from the parties who set him in motion.[5] Otherwise, if the estate is insufficient to pay the costs in full, he would have to *personally* pay the deficiency.[6] The circumstance that he has obtained the leave of the Court would only entitle him to claim reimbursement out of the estate or from the creditors in whose interest he was acting, but will not take away the personal liability for the costs ordered.[7] In an appeal against an order of adjudication, the Official Assignee, if successful, is like any other party entitled to his costs.[8]

21. Partition suits. — A partition suit is brought generally for the benefit of all the parties to it and therefore as a rule it will not be right to require one of the parties alone to bear the costs of the litigation.[1] According to the Bombay and Calcutta

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Trevelyan on Minors, Edn. 4, (1912), p. 281.
('86) 10 Bom 248 (253) (DB).
('85) 11 Cal 213 (218, 219). (When a minor legatee by next friend sued without a proper order under O. 1, R. 8.).
† ('35) 22 AIR 1935 Mad 886 (887) : 59 Mad 415.
3. ✣('84) 8 Bom 391 (393, 394).
Trevelyan on Minors, Edn. 4, (1912), p. 282.
('29) 16 AIR 1929 Mad 782 (782) (DB). (Minor attaining majority but guardian continuing to represent him—Guardian is liable for costs.)
('30) 17 AIR 1930 All 577 (578) : 52 All 907 (DB). (Compensatory costs under S. 35A are costs.)
[But see ('81) 3 Mad 263 (264) (DB). (Where it was held that costs against a guardian cannot be awarded except under S. 458 (O. 32, R. 11).)
('29) 16 AIR 1929 All 18 (25) : 50 All 773 (DB).]
4. ('29) 16 AIR 1929 Mad 782 (782).
('34) 21 AIR 1934 Cal 474 (477) : 51 Cal 227.
[*See also* ('35) 22 AIR 1935 Mad 886 (887) : 59 Mad 415.]
5. † ('35) 22 AIR 1935 Bom 112 (119) : 59 Bom 35.
6. ('35) 22 AIR 1935 Bom 112 (118) : 59 Bom 35.
7. ('36) 162 Ind Cas 848 (849) (Nag).

Note 20

1. † ('28) 15 AIR 1928 Bom 252 (259) : 52 Bom 477 (DB).
2. ('99) 11 All 349 (360) (DB).
3. ('34) 21 AIR 1934 Lah 746 (748) (DB). (Creditor's application for liquidation of company made not *bona fide*—He should be saddled with costs.)
4. ✣('29) 16 AIR 1929 Mad 105 (106) : 52 Mad 263 (DB).
('32) 19 AIR 1932 All 288 (289) : 54 All 444 (DB).
('19) 6 AIR 1919 Cal 337 (339).
('31) 18 AIR 1931 Nag 143 (144).
(1880) 6 App Cas 482 (486), Pitts v. La Fontaine.
† (1874) 9 Ch App 479 (480). Ex parte Angerstein.
Halsbury's Laws of England, Vol. 2, p. 128, paragraph 218.
5. ('83) 7 Bom 484 (486).
6. ('83) 7 Bom 484 (486).
7. ('29) 16 AIR 1929 Mad 105 (108, 109) : 52 Mad 263 (DB).
8. ('90) 14 Bom 189 (195) (DB).

Note 21

1. ✣('93) 20 Cal 762 (769, 770) (SB).

High Courts, the parties to a partition suit will ordinarily have to bear their own costs up to the preliminary decree.[3] But the Bombay High Court has held that the institution fee should be borne proportionately by all the parties.[3] The Madras High Court has held that such costs should come out of the *estate* where neither party has been guilty of any unfair contention.[4] See also the case cited below[5] in which the objection to partition was based on a clause in the will (under which all the parties claimed) placing a restriction on partition and in which it was held by the Calcutta High Court that the defendant who raised the objection should not be made liable for the costs but that such costs should come out of the estate. According to the Patna High Court it is not correct to say that in partition suits parties should bear their costs up to the preliminary decree; the question would depend upon the nature of dispute raised in the partition suit.[6] Where, however, one party has been successful in a matter the costs of which are *severable* from the general costs of the suit, he will be entitled to such costs under the ordinary principle that a successful party is entitled to his costs.[7]

Of course, the Court has always a discretion to saddle a party with the costs of the suit where he unreasonably contests the plaintiff's right to claim a partition[8] or raises any other vexatious contentions.[9] Likewise the plaintiff will be saddled with costs if he brings the suit unjustifiably.[10] Where cosharers are made consenting defendants only to enable the plaintiff to obtain a complete decree for partition, it is the plaintiff that ought to pay the cosharers' costs of appearance.[11]

Where one of the parties to a partition suit bears all the costs which are to be borne by all the parties, the former is entitled to get the Court's order directing the others to pay their respective shares, but until such order is made execution cannot issue against them for such costs.[12]

As to instances of persons who may be entitled to apply for costs even though they are not parties to the partition suit, see the undermentioned case.[13]

22. Partnership suits. — The costs in partnership suits will ordinarily be made payable from the assets of the partnership except where there are no assets in which case the partners will have to bear it in proportion to their shares.[1] But when any partner denies the partnership or places obstacles to the taking of accounts, he will be made to pay the costs.[2] An order for costs out of the estate of a deceased partner will be invalid

('69) 12 Suth W R 160 (161).
(*See also* ('93) 1893 Bom P J 715 (725).)
2. ('15) 2 AIR 1915 Cal 618 (619) : 42 Cal 451 (453,454) (DB). (Such an order may be made even though some of the defendants have not appealed from the decree ordering costs to the plaintiff.)
('23) 10 AIR 1923 Bom 464 (466) (DB).
('36) 40 Cal W N 1237 (1246) (DB).
('15) 2 AIR 1915 Cal 357 (362). (*Held*, in the circumstances of the case that the plaintiff must pay the costs of the defendant.)
('10) 6 Ind Cas 109 (111) (DB) (Cal).
† ('09) 10 Cal L Jour 503 (516). (Defendant contested the right of the plaintiff to claim partition —Opposition of defendant unfounded—Defendant was ordered to pay the costs.)
('07) 34 Cal 878 (882) (DB).
('69) 3 Beng L R App 120 (121) (DB).
(*See also* ('35) 22 AIR 1935 Cal 792 (799).
('30) 17 AIR 1930 Pat 336 (336) : 9 Pat 733.)]
3. ('23) 10 AIR 1923 Bom 464 (466).
4. ('20) 7 AIR 1920 Mad 149 (150) (DB). (Dissenting from 34 Cal 878 and AIR 1915 Cal 618).
5. ('36) 40 Cal W N 1237 (1216).
6. ('42) 29 AIR 1942 Pat 76 (77) (DB).
7. ('93) 20 Cal 762 (769, 770).
8. † ('30) 17 AIR 1930 Lah 229 (230).
('09) 10 Cal L Jour 503 (516).
('36) 40 Cal W N 1237 (1246).
('31) 18 AIR 1931 Cal 573 (574).
9. ('13) 21 Ind Cas 746 (748) (Mad).
10. † (1863) 1 Hyde 122 (122).
11. ('70) 14 Suth W R 94 (95) (DB).
12. ('91) 18 Cal 199 (200).
13. ('41) 28 AIR 1941 Cal 144 (146, 147) : I L R (1940) 2 Cal 102. (Application for costs by (1) attorney of deceased plaintiff, (2) Commissioner for partition, (3) special referee appointed in the suit and (4) Commissioner's clerk—*Held*, all these persons though strangers to the suit were entitled to apply for costs and expenses incurred in the course of the partition suit.)

Note 22

1. ('81) 7 Cal 428 (434) (DB).
2. ('81) 7 Cal 428 (434) (DB).
('81) 6 Cal 811 (812).

where he has not been properly represented in the suit.[3]

23. Probate cases. — The costs of taking out probate must primarily come out of the residuary estate and allotment should be made for the same before distribution.[1] Where a plaintiff seeks to establish a will under which he has been given a legacy and where the will has not been attacked but the plaintiff is merely put to proof of it, the costs should be awarded to both parties from and out of the estate.[2] As in other cases, this rule may be departed from where the party is guilty of misconduct or there is other good cause for doing so.[3]

24. Representative suits. — The order for costs in a representative action should clearly specify whether it is the representative party alone or the representative and the parties represented by him that should bear the costs.[1] The power conferred by O. 22, R. 3 (2) on the Court of original jurisdiction to award costs against the estate of a deceased plaintiff may also be taken to be conferred on the Appellate Court.[2] In a representative suit involving a caste question the costs of both the plaintiff and the defendant may, in a proper case, be ordered to be paid out of the caste property.[3]

25. Trust cases. — See Note 16.

26. To what extent costs are to be paid. — The Court has full power to determine to what extent the costs in a suit or proceeding are to be paid,[1] but it cannot award any costs not *actually incurred* in the suit or proceeding.[2] Nor is a successful party entitled to anything more than the *necessary and reasonable* costs incurred in the litigation and costs cannot be considered to be reasonable if, by diligence, the expenditure thereof could have been avoided.[3] Where it is difficult to apportion costs between the

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3. ('92) 16 Bom 515 (517, 519).

Note 23

1. ('97) 21 Bom 75 (76) (DB).
('95) 19 Bom 770 (775) (DB).
[*See also* (1900) 4 Cal W N 600 (602). (High Court can order the awarding of costs in the lower Court—Case of revocation of probate.)]
2. ('41) 28 AIR 1941 Mad 502 (504) (DB).
3. (1900) 1900 Pun Re No. 63, p. 241 (275). (Caveator unreasonably protracting proceeding.)
('98) 25 Cal 553 (555). (Two wills—Separate probate taken out—Costs of probate of both wills were charged on estate.)
('10) 7 Ind Cas 301 (313, 314) (Bom). (Unfounded allegations and inimical attitude towards propounder.)
('09) 13 Cal W N 557 (563, 564). (A beneficiary who successfully resists an attempt by another beneficiary to prove a false will.)

Note 24

1. ('17) 4 AIR 1917 Bom 141 (148) : 42 Bom 556 (578).
2. ('82) 8 Cal 440 (441) (DB).
3. ('35) 22 AIR 1935 Bom 268 (282).

Note 25

1. ('42) 29 AIR 1942 Mad 713 (714) (DB). (In view of fact that suit was dismissed solely on an issue regarding limitation and other issues were left untried, defendant was not allowed his full costs but only fixed amount.)
('14) 1 AIR 1914 Lah 268 (269) : 1914 Pun Re No. 35 (DB). (No excessive costs to be awarded if plaint is rejected at an early stage.)
('96) 20 Bom 167 (172) (DB).
2. ('87) 1887 All W N 227 (228) (DB).
(1864) 1864 Suth W R Gap Misc 11 (12).
3. ('40) 27 AIR 1940 Lah 182 (182). (Where a party had actually paid diet money to the witnesses on certain occasions when the Court could not examine them there is no justification for disallowing costs incurred in that manner, especially when the summoning of those witnesses had been necessitated by a false plea raised by the opposite party.)
('94) 18 Mad 128 (129) (DB).
('32) 19 AIR 1932 Mad 408 (409). (Rate of maintenance modified—Costs to be proportionate on the amount awarded.)
('25) 12 AIR 1925 P C 169 (170) : 47 All 459 (PC). (Respondent lodging a case but absent at hearing — Appeal dismissed — Costs up to lodging should be allowed.)
('29) 16 AIR 1929 All 873 (874, 875) (DB). (Diet money of witnesses of plaintiff, though not examined if defendant has not disclosed his defence is correctly charged.)
('29) 16 AIR 1929 All 214 (218) : 51 All 509 (DB). (Plaintiff finding difficulty in valuing his claim — Claim allowed less — Plaintiff was allowed full costs.)
('68) 3 Agra (Rev) 5 (5) (DB). (Only legal stamp duty and not stamp duty levied under mistake will be allowed.)
† ('30) 17 AIR 1930 Bom 24 (27) : 54 Bom 62. (Travelling charges of witness are proper, though he is a defendant in the suit and his evidence is necessary.)
('25) 12 AIR 1925 Bom 432 (432) (DB). (When a suit is dismissed against several defendants costs should be taxed on the basis of suit valuation.)

parties in view of the peculiar nature of the disputes between the parties, each party may be allowed to bear his own costs.[4] Where a suit contains several distinct items against separate defendants, the amount of costs allowed to each depends upon the claims against them.[5] Where a suit against the Government is dismissed, costs should be taxed in the usual way without reference to any private arrangement between Government and its legal advisers with regard to their remuneration.[6]

Where a person is allowed to continue an appeal on an application under O. 22, R. 10, and the appeal is dismissed with costs, he is liable for the full costs of the respondents and not merely for the costs incurred after the date of his application under O. 22, R. 10.[7]

In a suit for damages or for maintenance, where the plaintiff cannot be expected to be meticulously accurate in making his claims, he should be given his full costs provided the claim is genuine and true and the amount claimed is not unreasonable or out of proportion to the amount that is found to be due.[8]

For the mode of taxing costs in various cases, see the taxing rules of the various High Courts and also the undermentioned cases.[9]

('21) 8 AIR 1921 Bom 71 (72) : 45 Bom 1177 (SB). (Such costs as are necessary to enable him to place his case properly before the Courts.)

('23) 10 AIR 1923 Cal 315 (315). (Travelling charges of witnesses are proper.)

† ('66) 5 Suth W R 63 (66) : 10 Moo Ind App 476 (PC). (Privy Council disallowed costs of unnecessary matter in record.)

('36) 23 AIR 1936 Lah 681 (681). (In awarding costs, the Court should not include the costs of witnesses who were summoned but were not produced at all.)

† ('28) 15 AIR 1928 Lah 800 (801). (Costs incurred in procuring attendance of witnesses can be included.)

('10) 1910 Pun L R No. 76, p. 230. (Full costs incurred in getting a just claim decreed.)

('69) 1869 Pun Re No. 41.

('28) 15 AIR 1928 Mad 216 (223) (DB).

('21) 8 AIR 1921 Mad 544 (545) : 43 Mad 898 (DB). (Actual amount paid to legal adviser in suits to enforce contracts of indemnity.)

('20) 7 AIR 1920 Mad 615 (618) : 38 Mad L Jour 470 (476) (DB). (In a suit for damages for breach of covenant for title, plaintiff can claim costs of litigation in which he was damnified.)

('11) 34 Mad 479 (481). (Costs incurred in compelling plaintiff's vendees to discharge debts undertaken.)

('24) 11 AIR 1924 Oudh 218 (222) (DB).

('14) 1 AIR 1914 Oudh 118 (122) (DB). (The court-fee paid on part of the claim subsequently withdrawn cannot be allowed as costs.)

4. ('11) 21 Mad L Jour 730 (742) (DB).

† ('29) 16 AIR 1929 Mad 493 (495) (DB). (Claim for moral damages — One hundredth of claim allowed—Conduct of defendants not satisfactory—Each party was ordered to bear his own costs.)

[*See also* ('42) 29 AIR 1942 PC 61 (64): ILR (1942) Kar PC 157 (PC). (After holding that both the appeal as well as the cross appeal should be dismissed, their Lordships held that the costs occasioned by the cross appeal must be considerably less than those occasioned by the appeal. In order, therefore, to avoid a double and a somewhat difficult taxation of costs with a set-off, justice will best be done by ordering the plaintiff-appellant to pay one half of the defendant's costs of the two appeals.)]

5. ('70) 13 Suth W R 320 (321) (DB).

† ('67) 7 Suth W R 300 (301) (DB). (Decree for possession jointly and equally against three parties—Each is liable for costs proportionate to his interest.)

6. ('94) 17 Mad 162 (165) (DB).

† ('16) 3 AIR 1916 Bom 258 (260) : 40 Bom 588 (597, 598).

('92) 15 Mad 405 (411).

✠ (1865) 34 Beav 584 (585), Raymond v. Lakeman. [*See also* ('66) 6 Suth W R Misc 35 (35).]

7. ('33) 20 AIR 1933 Mad 411 (413) : 56 Mad 469 (DB).

Also see O. 22 R. 10 N. 19.

8. ('40) 27 AIR 1940 Mad 547 (553) (DB). (Suit for maintenance by widow.)

('40) 27 AIR 1940 Mad 879 (880) : I L R (1941) Mad 255 (DB). (Suit for damages for defamation.)

9. ('43) 30 AIR 1943 Pat 218 (227) : 22 Pat 114 (DB). (Suit for accounts—Plaintiff's valuation not arbitrary but based on report of auditors — Costs can be awarded by calculating on that basis.)

('42) 29 AIR 1942 Bom 90 (91) : ILR (1941) Bom 606 (DB). (The Court normally does not interfere with the discretion of the Taxing Master as to quantum of costs allowed unless he has misdirected himself — If the costs are fixed merely upon the consideration of the length of time occupied by the hearing the Taxing Master can be said to have misdirected himself.)

('42) 29 AIR 1942 Mad 551 (552) (DB). (Major portion of claim admitted—Costs on uncontested scale should be granted on such claim and on contested scale on portion contested.)

('42) 29 AIR 1942 Oudh 392 (394). (Suit valued at Rs. 1280—Plaint returned for presentation to proper Court on ground that valuation was not proper and ought to have been Rs. 2396 — Defendants held entitled to costs on Rs. 1280 only.)

('41) 28 AIR 1941 Bom 192 (192) (DB). (Costs of the attorney are taxed on the scale allowed by Appendix E to Bombay High Court Rules, by analogy to that Appendix.)

('41) 28 AIR 1941 Pat 416 (416) (DB). (Respondent who had wrongly asked for and was granted relief to which he was not entitled not contesting appeal — *Held*, full hearing fee of appeal should not be granted to appellant.)

('40) 27 AIR 1940 Cal 390 (390, 391): I L R (1940) 2 Cal 97. (It is the practice of the Calcutta High Court to allow only costs on the Small Cause Court scale where the plaintiff might have sought his remedy in the Small Cause Court but has chosen to bring his suit in the High Court. In this case, it was held that the suits were rightly filed in the High Court and further that costs on High Court scale were actually less than the costs on the Small Cause Court's scale.)

('39) 26 AIR 1939 Bom 266 (270) (DB). (Each successful defendant is entitled to costs on basis of suit valuation and not on basis of what each defendant's interest might be in suit itself : A I R 1925 Bom 432 followed.)

('35) 22 AIR 1935 Mad 791 (792) (DB). (Practice of the Madras High Court is that the bill of costs should be filed in time i. e. within 3 months of the date of the appellate decree — Delay of six years due to gross negligence of party held should not be excused.)

('30) 17 AIR 1930 All 437 (437, 438) (DB). (Remand for re-trial — Only one set of costs on account of both hearings in trial Court.)

('68) 9 Suth W R 288 (289) (DB). (Usual scale allowable to defendant depends on what plaintiff claims against him.)

('97) 21 Bom 42 (45) (DB). (Pleaders' fees will depend on percentage on the maintenance awarded to widows in a partition suit.)

('36) 23 AIR 1936 All 652 (653). (Pleader's fees — Application for inclusion in decree of certain amount as pleader's fees — Judge has to be satisfied that payment has been made before amount is included in decree.)

('36) 23 AIR 1936 All 489 (492) (DB). (Receiver as legal practitioner conducting his own case—Legal fees cannot be taxed as costs.)

('10) 5 Ind Cas 121 (121) (DB) (All). (In a suit which is withdrawn and not contested at all, the Court is right in awarding only half the pleader's fee as costs to the defendant.)

('80) 1 All 709 (710) (DB). (Pre-emption suit.)

('38) 25 AIR 1938 Bom 10 (14, 15) (DB). (Proceedings in moffassil Courts—Taxation of costs—Duty of Taxing Officer in cases of doubt—Bombay High Court Rules (O. S.), Rule 767.)

('36) 23 AIR 1936 Bom 272 (273) : 60 Bom 696 (DB). (Bombay Pleaders Act, S. 20 (c) — Parties engaging two pleaders before appeal is actually heard, but not before date fixed in notice under O. 41 R. 12, C. P. Code — Parties are entitled to fees of two pleaders.)

('35) 22 AIR 1935 Bom 439 (446) (DB). (Pleader's fees — Suit for administration and distribution of fund alleged to be trust—Plaintiff not asking and valuing his own share but praying for administration and distribution of the whole — He must pay pleaders' fees on whole amount to be fixed at market value of securities in which the fund is invested at the date of the suit.)

('35) 22 AIR 1935 Bom 119 (120) (DB). (A person cannot appear in two different capacities by separate solicitors or separate counsel and claim costs in two capacities from the unsuccessful party.)

('25) 12 AIR 1925 Bom 355 (356).

('09) 33 Bom 667 (668). (Attorney and client.)

('09) 33 Bom 256 (257, 258) (DB). (Appeal in probate matter—Pleader's fee is Rs. 30.)

('08) 32 Bom 428 (432) (DB). (Attorney's costs for business not transacted in Court—Rule 544 of the High Court Rules does not empower the Court to order costs to be paid.)

('08) 32 Bom 262 (271). (Long cause—Two counsel — Costs.)

('31) 18 AIR 1931 Cal 523 (523, 524) : 58 Cal 505. (It is an objectionable practice to assess junior counsel's fees according to their market value — There must be a recognized scale and the scale followed in England, viz., two thirds of the senior counsel's fees may be followed in India.)

('24) 11 AIR 1924 Cal 874 (875) (DB). (Calcutta High Court Rules, App. Side Rules, R. 25, Ch. IX.)

('21) 8 AIR 1921 Cal 185 (192) : 48 Cal 427 (DB). (Award of costs as in an important cause—Reasons should be given.)

('09) 36 Cal 493 (501) (DB). (Refreshers—Calcutta High Court Rules.)

('07) 6 Cal L Jour 453 (456).

('02) 29 Cal 595 (602). (An attorney is not entitled to any reward for services rendered to his client beyond his just and fair professional remuneration.)

('02) 29 Cal 63 (67, 68). (Where a client discharges his attorney, the latter is entitled to his costs, but where attorney discharges himself, he has no such right.)

('99) 26 Cal 769 (771). (Attorney — Taxation of costs.)

('99) 26 Cal 465 (508) (SB). (Suit for damages against Railway Company—Costs should be allowed as between attorney and client.)

('97) 24 Cal 891 (894). (Costs of two counsel allowed.)

('95) 22 Cal 952*n* (953*n*). (Refreshers — Calcutta High Court Rules.)

('95) 22 Cal 943 (950, 952). (Attorney's costs for business not transacted in Court—Rule 544 of the High Court Rules does not empower the Court to order costs to be paid.)

('86) 12 Cal 551 (553). (Attorney and client — Refreshers — Calcutta High Court Rules.)

('71) 7 Beng L R App 50 (51). (Attorney and client.)

('70) 14 Suth W R 255 (257) (DB).

('70) 14 Suth W R 143 (144) (DB). (Case remanded on payment of all costs—Costs will include stamp on plaint and pleader's fee for second trial.)

('69) 2 Beng L R 249 (251) (DB). (Application to file an award—Costs should be as in a regular suit.)

('67) 8 Suth W R 55 (55). (Pleader's fee.)

('66) 5 Suth W R 91 (95) : 10 Moo Ind App 563 (PC). (Plaintiff recovering a less amount than what he claimed is entitled only to proportionate costs.)

27. Separate costs, when may be allowed. — Separate costs should not be allowed to *defendants* if their defence is a *common* one.[1] The filing of separate written statements, if unnecessary, will not affect the rule.[2] Where the defences raised are, however, different, separate costs can be awarded,[3] but not where separate appearances of defendants are found unreasonable.[4]

The expression "suit dismissed with costs" in a decree means that the plaintiff is to pay the costs of the defendants; and if there are more defendants than one, who appear separately, all the defendants are entitled to their costs separately under such an order.[5]

(1900) 1900 Pun Re No. 9, p. 31 (33). (Defendant's second appeal rejected summarily — Costs of the plaintiff to be calculated as per the decree of the Court of first appeal.)
('35) 22 AIR 1935 Mad 904 (907) (DB). (Where vakalatnama filed for a party after judgment is accepted, the decree will be drafted on the footing that the party was represented at the time of the argument.)
('35) 22 AIR 1935 Mad 874 (875). (Suit decided on preliminary point—Suit not heard on merits—Ad valorem pleader's fees not to be awarded.)
('30) 17 AIR 1930 Mad 479 (483). (Maintenance suit — Plaintiff was granted a little less than the amount claimed—Defendant may not be awarded costs on part disallowed.)
('25) 12 AIR 1925 Mad 1235 (1236). (Mad. Civ. Rules of Practice, R. 278 (b).)
('92) 15 Mad 405 (410). (Company employing standing solicitors at fixed salary—Costs must be paid at that rate.)
('25) 12 AIR 1925 Oudh 432 (433) : 28 Oudh Cas 217. (Pleader's fee allowed only on amount decreed.)
('36) 23 AIR 1936 Pesh 196 (197). (A person, who although otherwise qualified, is not enrolled as a lawyer, cannot be treated as a lawyer for purpose of awarding costs, and the person whom he represents as an agent in a suit cannot be given pleader's fee according to the rules.)
('25) 12 AIR 1925 Sind 275 (280). (Where suit is overvalued, costs will be taxed only on the proper valuation.)
('74) 22 Suth W R 338 (339) (DB). (Vakils fees in appeal in suit to set aside adoption.)

Note 27

1. ('42) 29 AIR 1942 Oudh 392 (394). (Different defences raised by defendants — But suit was disposed of on one ground which was common to all.)
('42) 29 AIR 1942 Cal 257 (260): ILR (1941) 2 Cal 556 (DB). (Defendants filing joint memo of appeal —Appeal allowed—Court cannot award separate sets of pleaders' fee for appeal.)
† ('32) 19 AIR 1932 PC 13 (21):59 Ind App 1 (PC).
('87) 9 All 205 (210) (DB).
('72) 17 Suth W R 188 (188) (SB).
('69) 11 Suth W R 270 (271) (DB).
('66) 6 Suth W R 108 (109) (DB).
† (1865) 2 Suth W R 60 (61) (DB). (Members of the same family living in the same place, when sued together on a common cause of action.)
('1864) 1 suth W R 139 (139).
('25) 12 AIR 1925 Mad 1235 (1236).
† ('33) 20 AIR 1933 Oudh 242 (246) (DB).
Marsh 95 : 1 Hay 162.
('39) 26 AIR 1939 Rang 108 (111) : 1938 Rang L R 252. (Defendants impleaded in administration suit relating to trust as trustees and having identical interest are entitled to one set of costs only.)
('34) 21 AIR 1934 Rang 259 (260) (DB).
[But see ('32) 19 AIR 1932 All 337 (340) : 54 All 490 (DB).]
2. (1859) S D N W P 349.
[See however ('43) 30 AIR 1943 Sind 23 (24) : I L R (1942) Kar 153. (Attachment by two judgment-creditors—Two separate applications under O. 21, R. 58—Each judgment-creditor forced to appear separately and no association of any kind between them — Objection dismissed — *Held*, though questions were common, two sets of costs should be allowed.)]
3. ('42) 29 AIR 1942 Bom 81 (82) : I L R (1942) Bom 163.
('42) 29 AIR 1942 Bom 284 (288, 289): ILR (1942) Bom 782 (DB). (Defendant having independent case engaging separate pleader is entitled to separate costs.)
('41) 28 AIR 1941 Bom 307 (309). (Party can adopt any attitude — He need not engage same counsel as that of co-defendant or co-plaintiff and he is entitled to costs.)
('41) 28 AIR 1941 Oudh 251 (252) : 16 Luck 697 (DB). (Respondent engaging counsel who was present at hearing of appeal—Costs awarded against him though he said he did not oppose appeal.)
('16) 3 AIR 1916 Mad 575 (577, 578).
('33) 20 AIR 1933 All 466 (468).
('87) 9 All 655 (659) (DB).
(1900) 27 Cal 860 (891). (When separate salvage actions are consolidated separate costs are payable.)
† ('69) 11 Suth W R 19 (19) : 2 Beng L R A C 168.
('69) 11 Suth W R 36 (38) (DB). (The defences of a zamindar and patnidar are separate and they are entitled to separate costs.)
('66) 6 Suth W R 324 (324). (When several defendants are charged with an act of joint misappropriation each can, if successful, claim separate pleader's fee.)
('29) 16 AIR 1929 Oudh 536 (538) (DB).
(1859) S D N W P 1.
4. ('41) 28 AIR 1941 Bom 16 (16) : I L R (1940) Bom 837 (DB). (Expression "suit dismissed with costs" means all defendants appearing separately are entitled to their costs separately.)
5. ('42) 29 AIR 1942 Bom 284 (288) : ILR (1942) Bom 782 (DB).
('42) 29 AIR 1942 Bom 81 (82): ILR (1942) Bom 163.
('41) 28 AIR 1941 Bom 16 (17) : ILR (1940) Bom 837 (DB).

Where there are several *plaintiffs*, they cannot be allowed separate costs even if they are represented by separate pleaders.[6]

28. Separate suit for costs. — Where a Court has jurisdiction to pass an order as to costs and makes no order as to costs,[1] or awards a particular amount,[2] a subsequent suit to recover the costs incurred *but not awarded* will be barred on the principle of *res judicata*. There is a conflict of opinion as to whether, when the Court in the prior proceeding had *no jurisdiction* to order costs, a subsequent suit will lie for its recovery. In *Mahram Das* v. *Ajudhia*,[3] Mahmood, J., expressed the opinion that an independent suit will lie. In *Ram Das* v. *Mahammad Faqir*,[4] a later case, Mears, C. J., held that no such suit will lie, as it is not one for malicious prosecution, and as, treating it as a suit for damages, the damages are in law too remote to furnish any cause of action.

Where costs are awarded by an *executable* decree or order, no suit will lie to recover the costs so *awarded* as the same will be barred by the provisions of S. 47.[5] But where costs are awarded by a decree or order which is *not executable* an independent suit upon the judgment to recover the amount will lie.[6]

The rules set forth above apply, however, only to the recovery of costs as between *party and party*. They do not interfere with the right of enforcing by suit a contract between a pleader and his client as to the fees payable,[7] or the right of a commissioner appointed by Court at the request of the plaintiff, to sue the plaintiff for his fees,[8] or the recovery by suit of sums advanced by the plaintiff to the *guardian ad litem* of a minor to conduct his defence.[9]

A suit for costs against a third person on the ground that he was the mover of, and had an interest in the suit, does not, however, lie in the absence of malice and want of probable cause.[10]

28a. Court having no jurisdiction to try suit — Costs. — The fact that the Court has no jurisdiction to try the suit is no bar to the exercise of the power under this section. Thus, the Court returning a plaint for presentation to the proper Court can direct the plaintiff to pay the costs of the other side.[1]

('39) 26 AIR 1939 Bom 338 (338): ILR (1939) Bom 478 (DB). (AIR 1924 Bom 317 distinguished on ground that it was decided before the issue of High Court Civil Circular of 1925.)

6. ('39) 26 AIR 1939 Rang 108 (111) : 1938 Rang L R 252.
[*See* ('71) 8 Bom H C R A C 241 (244).]

Note 28

1. ('78) 2 Bom 360 (362) (DB).
('08) 1908 All W N 18 (19). (Execution of decree—Objection to attachment successful, but costs not allowed—Costs of objection not recoverable in separate suit.)
('87) 9 All 474 (476).
('07) 11 Cal W N cclxiii.
(1864) 1864 Suth W R Gap 247 (247) (DB). (Costs of receiver appointed in execution.)
('67) 3 Mad H C R 341 (342).
2. (1807) 1 Camp 151 (152), Hathaway v. Barrow.
(1827) 4 Bing 160 (162), Jenkins v. Biddulph.
† ('86) 8 All 452 (461) (DB).
('76) 1 Bom 467 (468) (DB).
('32) 19 AIR 1932 Lah 257 (258): 13 Lah 551 (DB).
(1844) 13 M & W 47 (51), Doe v. Filliter.
(1836) 2 Bing N C 534 (537), Grace v. Morgan.
3. ('86) 8 All 452 (461).
('70) 6 Mad H C R 192 (193, 194) (FB).
[*See also* ('06) 28 All 475 (476).]
4. ('22) 9 AIR 1922 All 143 (144).
[*See also* ('90) 14 Bom 100 (101). (Costs incurred in defending criminal proceedings.)
('02) 15 C P L R 129 (130) (Do).]
5. ('32) 19 AIR 1932 Lah 257 (257, 258): 13 Lah 551.
† ('25) 12 AIR 1925 Mad 279 (280) : 48 Mad 482.
('02) 24 All 288 (291).
6. ('25) 12 AIR 1925 Mad 279 (280, 281): 48 Mad 482.
('06) 33 Cal 560 (564). (Suit on order for costs awarded by Insolvency Court is maintainable.)
7. ('94) 21 Cal 85 (91, 92).
8. ('82) 4 Mad 399 (401) (DB).
Also see O. 26, R. 15, N. 1.
9. ('99) 22 Mad 314 (316) (DB).
10. ('42) 29 AIR 1942 All 233 (234, 237) : I L R (1942) All 832 (FB). (Question of costs of particular suit is a matter incidental to that suit—Separate suit for costs not maintainable.)
('78) 2 Cal 233 (260) : 4 Ind App 23 (PC).

Note 28a

1. ('42) 29 AIR 1942 Mad 35 (35). (But it has no power to direct that the payment of costs should be condition precedent to the filing of the suit in the proper Court.)

29. Appeal and second appeal against order as to costs. — The question of appealability of a direction as to costs may be discussed under three heads —

(1) where the direction is contained in a *non-appealable order*,

(2) where the direction is contained in an *appealable order*, and

(3) where the direction is contained in a *decree*.

(1) *Where the direction is contained in a non-appealable order.* — The order itself not being appealable, the direction as to costs contained therein will not also be appealable.[1] Thus, no appeal will lie from a direction as to costs made in an order granting an adjournment of a case.[2]

(2) *Where the direction is contained in an appealable order.*—The direction as to costs in this case will be appealable on the grounds mentioned below under the third heading.[3] But no *second* appeal will lie inasmuch as the appealable order in which the direction is contained is itself not open to second appeal.[4]

(3) *Where the direction is contained in a decree.*—It has been seen that the award of costs is entirely within the *judicial discretion* of the Court. An appeal from a direction as to costs will, therefore, lie only —

(a) where the Court has *not exercised* any real discretion in making the direction,[5] or

(b) where the exercise of discretion is not *judicial*, that is, based on sound and well established legal principles; in other words, where the direction as to costs *involves a matter of principle*,[6] or

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Note 29

1. ('18) 5 AIR 1918 Upp Bur 14 (14) : 3 Upp Bur Rul 61 (62). (Order as to costs in an order under S. 24, C. P. Code.)
† ('32) 19 AIR 1932 Mad 714 (715).
('98) 21 Mad 421 (422). (Direction for costs in order permitting plaintiff to withdraw suit under the Religious Endowments Act.)
[But see ('73) 20 Suth W R 123 (125).]

2. ('82) 8 Cal 91 (94) (DB).
('15) 2 AIR 1915 Mad 1222 (1223).
[*See* ('06) 2 Nag L R 49 (49). (The same will be the case with a direction for costs in a non-appealable decree such as compromise decree.)]

3. ('22) 9 AIR 1922 All 90 (90) : 44 All 209 (DB).
('92) 16 Bom 241 (242) (DB).
('84) 8 Bom 368 (370) (DB).
('86) 12 Cal 271 (272) (DB).
('82) 8 Cal 91 (94, 95) (DB).
('07) 31 Mad 328 (329). (Appeal as to costs in an award under Land Acquisition Act.)

4. See Section 104.

5. ('40) 27 A I R 1940 Mad 620 (621). (Discretion exercised by trial Court should not be interfered with in absence of sufficient grounds.)
('39) 26 AIR 1939 Bom 271 (277) : I L R (1939) Bom 396 (DB). (Order of lower Court savouring of vindictiveness.)
† (1903) 2 K B 756 (765), Civil Service, etc. v. G. S. Navigation Co.
('71) 8 Bom H C R A C 100 (102) (DB). (Where the discretion is exercised with care, no appeal will lie.)
('25) 12 AIR 1925 Cal 1085 (1086) (DB). (Do.)
('18) 5 AIR 1918 Cal 180 (182) (DB).
('14) 1 AIR 1914 Oudh 231 (232).

6. ('43) 30 AIR 1943 Mad 122 (127) (DB). (Reasons given for departing from usual rule not legally correct—Interference in appeal.)
('42) 29 AIR 1942 Cal 257 (260) : I L R (1941) 2 Cal 556 (DB). (No reasons given for depriving successful party of his costs.)
('42) 29 AIR 1942 Pesh 39 (40) (DB). (Discretion rightly exercised—No interference.)
('40) 27 AIR 1940 Mad 519 (520). (Before a decision in regard to costs is reversed, it must be shown that the order has been made contrary to a proper exercise of discretion and general principles of law.)
('40) 27 AIR 1940 Mad 589 (589). (The appellate Court cannot consider matter of costs as if it had been trying the suit itself—It has only to see whether the trial Court has exercised discretion properly.)
('40) 27 AIR 1940 Oudh 310 (312) : 15 Luck 526. (Appellate Court exercising sound discretion—Appeal from appellate decree as to costs only is incompetent.)
('39) 26 AIR 1939 Pat 517 (518) (DB). (No error as to principle — No interference by appellate Court.)
('39) 26 AIR 1939 Mad 654 (655).
('20) 7 A I R 1920 Pat 622 (625): 5 Pat L Jour 472 (480, 489) (FB).
('33) 20 AIR 1933 All 299 (301) (DB).
('31) 18 AIR 1931 All 126 (128) (DB).
('24) 11 AIR 1924 All 794 (795).
† ('19) 6 AIR 1919 All 453 (455) : 40 All 558 (562) (DB). (Reasons could be examined by appellate Court.)
('05) 1905 All W N 75 (76) (DB).

(c) where the direction as to costs is based on a *misapprehension of fact or law.*[7]

No appeal will lie in respect of an order as to costs in other cases.[8]

† ('91) 13 All 290 (294, 295).
✻('29) 16 A I R 1929 Bom 63 (65) : 53 Bom 178 (DB).
('23) 10 A I R 1923 Bom 37 (39) (DB). (Where reasons are given and principle adopted is not wrong, no interference.)
('25) 12 AIR 1925 Bom 432 (432) (DB). (Taxation of costs—Mode of—No appeal lies.)
('11) 13 Bom L R 1061 (1095) (DB).
('10) 12 Bom L R 621 (631) (DB). (A defendant cannot be asked to bear the costs of an unsuccessful co-defendant or of a co-defendant who does not contest.)
('09) 11 Bom L R 1187 (1192). (If reasons are not recorded for varying the general rule.)
✠(1900) 2 Bom L R 254 (255) (DB).
('98) 22 Bom 164 (167, 168) (DB).
('84) 8 Bom 368 (370) (DB).
('21) 8 AIR 1921 Cal 156 (156) (DB).
('20) 7 AIR 1920 Cal 1009 (1013).
('20) 7 AIR 1920 Cal 423 (424) : 47 Cal 67 (70).
† ('18) 5 AIR 1918 Cal 526 (527) (DB).
('18) 5 AIR 1918 Cal 307 (311) (DB). (A party succeeding on a particular issue must always get his costs on that issue.)
('16) 3 AIR 1916 Cal 126 (135) (SB).
('07) 34 Cal 878 (880) (DB).
('05) 9 Cal W N 584 (590).
† ('03) 7 Cal W N 647 (649).
('01) 28 Cal 567 (570) (DB).
('86) 12 Cal 179 (181) (DB).
('85) 11 Cal 359 (361).
('76) 1 Cal 385 (388) (DB). (Discretion duly exercised —No appeal.)
('67) 7 Suth W R 208 (208).
✠('66) 6 Suth W R 187 (188, 189) (FB).
(1864) 1864 Suth W R 146 (147). (Court must be satisfied that there has been a miscarriage of justice.)
('33) 20 AIR 1933 Lah 585 (587) (DB). (Discretion exercised — Reasons given — No interference in appeal.)
('22) 9 AIR 1922 Lah 229 (230). (No interference where reasons for varying the rule were sound.)
('15) 2 AIR 1915 Lah 166 (166) : 1915 Pun L R No. 65, p. 185. (If there are no sufficient reasons to vary the rule.)
('12) 1912 Pun L R No. 118, p. 354 (355).
('66) 1866 Pun Re No. 4, p. 4 (7).
('69) 1869 Pun Re No. 31.
('37) 24 AIR 1937 Mad 810 (810) (DB).
('35) 22 AIR 1935 Mad 874 (875). (Question of principle involved—Ad valorem pleaders' fees allowed though suit not tried on merits.)
('33) 20 AIR 1933 Mad 224 (224).
('16) 3 AIR 1916 Mad 575 (577).
† ('14) 1 AIR 1914 Mad 418 (420) (DB).
('12) 15 Ind Cas 202 (202) (Mad). (Where reasons given to vary the rule are unsatisfactory.)
(1862) 1 Mad H C R 74 (74).
('33) 20 AIR 1933 Nag 49 (49) : 27 Nag L R 307.
('26) 95 Ind Cas 446 (447) (Nag). (Discretion exercised properly—No appeal.)
('18) 5 AIR 1918 Nag 185 (185). (Mortgage suit—Costs may be ordered against mortgagor personally where the mortgage bond provides for it.)
† ('15) 2 AIR 1915 Nag 65 (66) : 11 Nag L R 189 (191). (If there are no sufficient reasons to vary the rule.)
('34) 21 AIR 1934 Oudh 259 (260). (Exercise of discretion by trial Court in judicial manner should not be interfered with by Appellate Court. If it so interferes High Court can interfere in second appeal.)
('33) 20 A I R 1933 Oudh 455 (457) : 9 Luck 22 (DB).
('26) 13 AIR 1926 Oudh 35 (35).
('25) 12 AIR 1925 Oudh 699 (699, 700) (DB).
('24) 11 AIR 1924 Oudh 110 (110).
† ('05) 8 Oudh Cas 251 (252, 253) (DB).
('36) 23 AIR 1936 Pat 151 (151). (On a question of costs only an appeal will lie where a question of principle is involved or where a wrong principle has been followed.)
('34) 21 AIR 1934 Pat 397 (398).
('19) 6 AIR 1919 Pat 257 (258).
('21) 8 AIR 1921 Upp Bur 20 (21) : 4 Upp Bur Rul 8.
('13) 6 Sind LR 226(227): 19 Ind Cas 611 (611) (DB).
(1907) 24T LR 25:(26), Edmund v. Martell. (If order is based on grounds not open.)
[But see (1865) 2 Suth W R 33 (34) (DB). (Discretion duly exercised—No appeal.)]
Also see Ss. 100 & 101, Note 16.

7. ('39) 26 AIR 1939 Mad 654 (655).
✠('92) 16 Bom 676 (682) (DB).
('17) 4 AIR 1917 Bom 18 (19) : 42 Bom 327 (332). (To disallow costs to plaintiff who has succeeded and when there is no misconduct.)
('20) 7 AIR 1920 Cal 1009 (1013).
† ('30) 17 AIR 1930 Lah 234 (234).
('35) 22 AIR 1935 Mad 342 (344) (DB).
('34) 21 AIR 1934 Mad 73 (74). (Where it overlooks plain provision of law it can be interfered with.)
('37) 24 AIR 1937 Oudh 282 (283) : 13 Luck 171 (DB). (Discretion exercised based on an erroneous view of the law.)
('25) 12 AIR 1925 Oudh 699 (699, 700) (DB).
NOTE.—A direction based on a misapprehension is really not an exercise of discretion at all. It is really not necessary in such a case that the Court should have also acted contrary to principles. The interpretation of 16 Bom 676 and 22 Bom 164 as being in conflict with the Calcutta decision in AIR 1920 Cal 423 does not appear to be correct.
(1885) 28 Ch D 549 (551), In re Gilbert.
(1879) 4 Q B D 611 (613), Harris v. Petherick.

8. ('37) 24 AIR 1937 Mad 40 (44) : I L R (1937) Mad 479 (DB). (Question is not what appellate Court considers right but whether there are grounds justifying interference with lower Court's discretion.)
('36) 23 AIR 1936 Pat 68 (70) (DB).
('36) 23 A I R 1936 Pat 513 (520) : 15 Pat 510 (DB).

As a general rule, it will be assumed that the Court has exercised its discretion properly.[9]

Where an appeal is preferred both against the substantive portion of the decree and the direction as to costs, but the appeal against the substantive portion is subsequently abandoned, the appeal against direction for costs can nevertheless be heard.[10]

Where costs have been awarded jointly against A and B, and A acquiesces in the order, B cannot in an appeal question the validity of the order as to costs passed against A.[11]

A *second* appeal will lie in respect of a direction as to costs where a second appeal will lie from the decree itself, that is, where it is contrary to law or opposed to well established principles.[12] See also S. 100. But the Court in second appeal will not examine the reasons or review the discretion exercised.[13]

[*See* ('37) 24 AIR 1937 Sind 159 (160). (Trial Court not awarding costs, as plaintiff unable to establish his case — Appellate Court though not interfering with decision on other points awarding costs—Order of appellate Court, held, could not stand as it had no jurisdiction to interfere with the discretion exercised by the trial Court.)

9. ('14) 1 AIR 1914 Mad 418 (420) (DB).
(1900) 2 Bom L R 254 (260).
(1899) 2 Ch 467 (472), Bew v. Bew.

10. ('92) 16 Bom 241 (242) (DB).
† ('30) 17 AIR 1930 Bom 445 (447) (DB). (But not when it is impossible to grant relief without challenging the main order.)

11. ('42) 29 AIR 1942 Oudh 279 (281) (DB). (Costs ordered against minor's guardian and pleader personally — Pleader acquiescing — Appeal by guardian — Guardian held could not question validity of order against pleader.)

12. ('40) 27 AIR 1940 Mad 620 (621). (Lower appellate Court wrongfully interfering with exercise of discretion by trial Court — High Court will interfere in second appeal.)
('40) 27 AIR 1940 Mad 589 (589). (Second appeal lies where lower Courts apply wrong principles or there is error of law in awarding costs.)
('39) 26 AIR 1939 Mad 654 (655, 656). (Mortgage suit—Mortgagee deprived of costs without finding of misconduct as required under O. 34, R. 10 — Order can be interfered with in second appeal.)
('26) 27 Pun L R 391 (393).
('19) 6 AIR 1919 Cal 947 (947) (DB).
('26) 13 AIR 1926 All 419 (420)
('19) 6 A I R 1919 All 214 (216) : 41 All 254 (257, 258) (DB).
✠('93) 15 All 333 (333, 334).
('71) 8 Bom H C R A C 100 (102) (DB).
('67) 4 Bom H C R A C 41 (42). (Improper exercise of discretion alone is not a good ground.)
('21) 8 AIR 1921 Cal 604 (605) (DB).
('03) 30 Cal 536 (538) (DB). (No reasons were given for awarding full costs to plaintiff when a portion of the amount claimed was alone decreed.)
† ('03) 7 Cal W N 647 (648). (Where a successful defendant had been deprived of his costs.)
('66) 1866 Suth W R 187 (188, 189).
(1864) 1864 Suth W R 215 (216) (DB). (Question how costs have been awarded is not a matter for special appeal.)
('30) 17 AIR 1930 Lah 229 (230).
('20) 7 AIR 1920 Lah 164 (164).
('20) 2 Lah L Jour 310 (311, 312). (When findings and issues are in favour of defendant, she must have costs.)
('19) 6 AIR 1919 Lah 418 (418).
('18) 5 AIR 1918 Lah 247 (247). (Arbitrary exercise —Second appeal lies.)
('12) 1913 Pun Re No. 47 : 17 Ind Cas 418 (418). (Second appeal lies where costs are assessed on erroneous principle.)
('83) 1883 Pun Re No. 21, p. 43 (49).
('80) 1880 Pun Re No. 23, p. 51. (Costs awarded on an amount not decreed.)
('17) 4 AIR 1917 Mad 876 (877) (DB). (Exercise of discretion sound—No second appeal lies.)
('03) 13 Mad L Jour 210 (210) (DB). (Costs awarded on an amount not decreed.)
('31) 18 AIR 1931 Oudh 9 (10) : 6 Luck 378.
('29) 16 A I R 1929 Oudh 406 (412) : 6 Luck 497 (FB).
('23) 10 A I R 1923 Oudh 155 (155, 156):25 Oudh Cas 385.
('23) 10 A I R 1923 Oudh 114 (117) : 27 Oudh Cas 64. (Where Sub-Judge in interfering with Munsif's discretion gave no reason.)
✠('03) 6 Oudh Cas 52 (55, 57). (An order of an appellate Court as to costs is "contrary to law," within the meaning of S. 100, C. P. Code, not only when the Court's discretion has been exercised contrary to law, in the ordinary sense, but also when that discretion has been exercised in such circumstances as would justify the correction of the order by the Appellate Court had it been passed by a Court of original jurisdiction.)
('03) 6 Oudh Cas 39 (39, 40). (Grounds must show substantially the error of law or procedure.)
('36) 23 AIR 1936 Pat 151 (151). (Where *pro forma* defendants were ordered to pay costs.)
† ('20) 7 A I R 1920 Pat 622 (624) : 5 Pat L Jour 472 (480, 489) (FB).
('19) 6 AIR 1919 Pat 257 (258).
Also see Ss. 100 & 101, N. 16.

13. ('12) 15 Ind Cas 429 (429, 430) (FB) (Low Bur).
('03) 13 Mad L Jour 210 (210).
('12) 13 Ind Cas 201 (203) (Cal).
('76) 25 Suth W R 22 (22) (DB). (No interference with discretion in second appeal.)

Power of the appellate Court.—Order 41 Rule 33 authorises an appellate Court to pass any decree or order which ought to have been passed by the trial Court. Thus, it can, where necessary, pass an order of costs in favour of a person who was a party to the suit in the trial Court but was not a party to the appeal.[14]

Where an appeal against a summary dismissal of an appeal succeeds, costs are generally allowed throughout to the successful appellant and those costs include the costs of the appeal in the lower Court which was summarily dismissed.[15]

30. Review of direction as to, or the taxation of costs. — A Court can, in proper cases review a direction as to costs, but unless a strong case is made out it will be reluctant to do so.[1] As to the taxation of the costs, it is in the discretion of the Taxing Master and the Courts will not interfere with it on review unless the taxation has proceeded on an erroneous principle.[2]

31. Revision. — A mistake committed by a Court on the point of costs is hardly a ground for revision.[1] Nor will a bare failure to exercise a judicial discretion as to costs justify an interference in revision. The High Court will not interfere in revision unless it is satisfied that the discretion has been exercised arbitrarily. (See S. 115, Note 20.)

32. Letters Patent Appeal. — An order of a single Judge, merely as to costs is not a "judgment" within the meaning of Cl. 15 of the Letters Patent so as to give a right of appeal to a Division Bench of the High Court,[1] but when such order is incidental to a "judgment," an appeal will lie.[2] The question that no costs should have been awarded by the First Appellate Court cannot be raised in Letters Patent Appeal when such point has not been urged before the single Judge.[3]

33. Privy Council appeal as to costs. — The Privy Council is not a taxation tribunal, and will only deal with such matters as to taxation of costs, by way of appeal from the judgment of the Registrar upon items to which objections were taken before him. Where objections as to the taxation of costs were not raised before the Registrar of the High Court, they will not be considered by the Board.[1] It is very rarely that the Privy Council interferes with the discretion of the Appellate Courts in India in a matter merely of costs.[2]

('15) 2 A I R 1915 Lah 378 (379) : 1915 Pun Re No. 62 (DB). (A second appeal cannot be allowed merely because the lower Appellate Court has directed the plaintiff to pay the defendant's costs.)

14. ('42) 29 AIR 1942 Cal 257 (260):I L R (1941) 2 Cal 556 (DB).

('39) 26 AIR 1939 Bom 271 (277) : I L R (1939) Bom 396 (DB). (Order of costs against next friend modified even though he had not appealed.)

15. ('39) 26 AIR 1939 Bom 493 (494).

Note 30

1. † ('22) 9 AIR 1922 Pat 1 (1, 2) : 6 Pat L Jour 284 (DB).

('26) 13 AIR 1926 Bom 367 (367) (DB). (District Court can order as to method of taxation of costs after disposal of the case on appeal.)

2. ('42) 29 AIR 1942 Bom 90 (93) : I L R (1941) Bom 606 (DB). (Case under Bombay High Court Rules (Original Side).)

('07) 9 Bom L R 1014 (1016, 1017).

('96) 20 Bom 301 (303, 304).

† ('26) 13 AIR 1926 Bom 18 (22, 23) : 50 Bom 69 (DB). (Principle wrong—Taxing Master's opinion was reviewed.)

('21) 8 AIR 1921 Bom 87 (87) : 45 Bom 1234.

† ('08) 32 Bom 262 (267).

[*See* ('30) 17 AIR 1930 Bom 536 (537). (Bombay High Court (Original Side) Rules—Application for review of taxation under R. 531 cannot be entertained unless objection was already taken under Rule 529.]

Note 31

1. ('28) 15 AIR 1928 Lah 800 (803).

('30) 17 AIR 1930 Mad 72 (74).

Note 32

1. ('07) 17 Mad L Jour 569 (569) (FB).

2. † ('14) 1 AIR 1914 Mad 418 (419) (DB).

3. ('42) 29 AIR 1942 Pat 317 (319) (DB).

Note 33

1. ('28) 15 AIR 1928 P C 238 (238, 239) (PC).

('32) 19 AIR 1932 P C 13 (21) : 6 Luck 556 : 59 Ind App 1 (PC).

2. ('32) 19 AIR 1932 P C 13 (21):6 Luck 556:59 Ind App 1 (PC).

34. Right of contribution for costs payable under joint decree. — Where A and B join and sue C and the suit is dismissed with costs and such costs are paid by A alone, he will be *prima facie* entitled to claim contribution from B for his share of the costs on the ground that since they have joined together of their own will to institute the suit, there is an implied contract that both should contribute towards the expenses.[1] This rule will however apply only to a *bona fide litigation*.[2] Where A and B join together and bring a suit against C which is false to their own knowledge, and the suit is dismissed with costs, A and B are in the position of joint tort-feasors and there is no right of contribution between them.[3]

Where, on the other hand, C sues A and B and the suit is decreed with costs, and A, after paying the whole costs sues B for contribution, the principles applicable are somewhat different. A and B do not join of their own accord but are pushed into the same boat as co-defendants by C. No implied contract to contribute can be presumed, and therefore there is no right of contribution between A and B unless there is an express contract or some *equity* between them, which gives a right of contribution.[4] Where the parties stand on an equal footing,[5] as for instance, the defendants in a partition suit,[6] the fact that one judgment-debtor has been compelled to pay the entire amount due, in itself may constitute such an equity. But where the defences of A and B are separate and antagonistic,[7] or where, though the defences are joint, they have colluded or conspired together and raised false defences, there is no right of contribution between them.[8]

A plaintiff sued two persons, A and B. A admitted the claim of the plaintiff. B contested the suit and after contest the suit was decreed with costs against both. B paid the total amount of the cost and sued A for contribution of his proportionate share. It was held that it was open to A to set up the defence that inasmuch as the costs in that suit were incurred solely by the action of B, B had no right in equity to call on him for payment of a share of the costs.[9]

If *one* only of several persons jointly liable for a debt is sued and is compelled to satisfy the entire debt and the costs of the suit, it has been held that he can only call on the others to contribute in respect of the *debt* and not in respect of the costs.[10]

Note 34

1. † ('23) 10 AIR 1923 All 67 (70, 71) : 45 All 99 (DB).
('24) 11 A I R 1924 Oudh 48 (49) : 26 Oudh Cas 196.
('21) 8 AIR 1921 All 372 (373, 374) : 43 All 77 (DB).
('11) 9 Ind Cas 1023 (1023) (Mad).
2. ('20) 7 AIR 1920 Pat 815 (816) (DB).
('10) 7 Ind Cas 268 (269) (Mad).
('10) 7 Mad L Tim 194 (195).
3. ('23) 10 AIR 1923 All 67 (70, 71) : 45 All 99.
† ('20) 7 AIR 1920 Pat 185 (186) (DB).
4. ('23) 10 AIR 1923 All 60 (70, 71) : 45 All 99.
('12) 22 Mad L Jour 406 (408) (DB). (Even if there is a contract, plaintiff cannot claim a charge on the defendant's property for the amount to be contributed.)
† ('10) 32 All 585 (588) (DB).
('32) 19 AIR 1932 Mad 146 (147).
5. ('21) 8 AIR 1921 Oudh 128 (129) : 24 Oudh Cas 148 (DB). (Overruling 10 Oudh Cas 108.)
('67) 7 Suth W R 300 (301) (DB).
('34) 21 AIR 1934 Cal 709 (710) : 61 Cal 864. (Parties equally interested in defending suit by third party and having common defence should equally bear the costs decreed against them.)
[*See* ('32) 19 AIR 1932 All 383 (384).)]
6. ('03) 26 Mad 373 (375).
('24) 11 AIR 1924 Bom 318 (320) : 48 Bom 351 (DB).
('19) 6 AIR 1919 All 17 (17).
† ('30) 17 AIR 1930 Bom 506 (507) : 55 Bom 91. (Where plaintiff pays decretal amount in execution of decree for costs against him and other defendants, he is entitled to contribution from other defendants.)
7. ('23) 10 AIR 1923 All 67 (70, 71) : 45 All 99 (DB).
† ('18) 5 AIR 1918 All 328 (329) : 40 All 672 (673, 674) (DB).
('97) 19 All 462 (461) (DB).
8. (97) 24 Cal 330 (334) (DB).
[*See* ('30) 17 AIR 1930 Lah 49 (50). (In this case, contribution was decreed although it was alleged that the defence in the prior suit was false.)]
9. ('37) 24 AIR 1937 All 227 (228).
10. † ('75) 6 N W P H C R 192 (196) (DB).
[*See also* ('15) 2 AIR 1915 Cal 649 (650) : 19 Cal W N 1183 (1186) (DB). (Co-heir is not bound to bear his share of the expenses of litigation about common property.)]

35. Interest on costs. — The general principles as to the award of interest by the Court will equally apply to the award of interest on costs also. See Note 3 on S. 34. Even where the *judgment* is silent as to interest on the costs awarded, the decree may grant it.[1] But if the decree is also silent as to costs, it cannot be granted in execution.[2] Where the decree awards interest but no *rate* is mentioned, the costs will bear interest at the Court rate of 6 per cent. until realisation.[3]

Where a plaintiff obtains a decree with interest on costs, the defendant being declared entitled to set off on account of his costs, the interest should be calculated on the amount due to the plaintiff after deduction of the amount set off.[4]

Interest should not be allowed until the costs have been *actually incurred*. Thus, interest cannot be allowed on costs from the *date of suit*[5] but only from the date of the decree or order.[6]

Where the Privy Council reversed the decree of the High Court and restored that of the trial Court which awarded interest on costs, the proper construction of the decree of the Privy Council is that interest ought to be allowed on the costs of the trial Court and not, in the absence of a specific direction to that effect, on the costs in the High Court.[7]

36. Claims to set-off against costs. — See Order 20 Rule 6.

37. Enforcement of order or decree as to costs. — The portion of S. 220 of the old Code relating to execution has been omitted. See now S. 36, whereunder all provisions relating to execution of decrees apply to execution of orders also. The undermentioned cases[1] were all under the old S. 220. A decree in a probate case directing that the costs of both the parties should be paid out of the estate cannot be executed by one party against the other, but the proper course is to sell or mortgage a sufficient portion of the estate to pay off the costs of the parties.[2] Where a District Judge while acting under a scheme of management of a charitable institution made an order as to costs, it was held that the order was made by him as a *persona designata* and not as a *Court* and that the order was not executable in a Civil Court.[3]

38. Enforcement of solicitor's lien for costs. — The solicitor's lien for costs is governed, in the High Courts in India by the English law, under which a solicitor has a lien for his costs on any funds or sum of money reserved for, or which became payable to his client in the suit.[1] It has been held by the High Court of Bombay that it has a

Note 35

1. ('16) 3 AIR 1916 All 303 (304) (DB).
See also Note 3 on Section 34.
2. See Note 17 on S. 34.
3. ('10) 14 Cal W N 1093*n* (1095*n*).
('71) 21 Suth W R 411 (411).
4. ('70) 13 Suth W R 138 (139).
5. ('21) 60 Ind Cas 345 (346) (Lah).
6. *See* ('16) 3 AIR 1916 All 303 (304).
(1894) 1 Ch 413 (419, 420), Taylor v. Roe.
7. ('21) 63 Ind Cas 709 (710) (DB) (Cal).

Note 37

1. ('91) 18 Cal 199 (200).
('68) 3 Mad H C R 341 (342).
('89) 12 Mad 120 (122).
('10) 5 Ind Cas 480 (481) (Cal).
('07) 34 Cal 860 (862). (Costs of an application for leave to appeal to His Majesty in Council.)
('06) 10 Cal W N 234 (236).
('66) 5 Suth W R Misc 4 (4).
2. ('14) 1 AIR 1914 Cal 827 (828).
3. ('42) 29 AIR 1942 Bom 97 (98) (DB).

Note 38

1. ('39) 26 AIR 1939 Bom 250 (252) : I L R (1939) Bom 307 (DB). (Solicitor can recover his taxed costs by summary proceeding from amount deposited as security for costs.)
('86) 10 Bom 248 (253).
('24) 11 AIR 1924 Mad 793 (795) (DB). (Court gave a charge for attorney's fees on the property of the client.)
† ('32) 19 AIR 1932 Bom 363 (365).
('31) 18 AIR 1931 Cal 734 (734) : 58 Cal 1034 (DB). (Privy Council appeal — Solicitors in England can claim payment from money deposited as security for costs.)
('31) 18 AIR 1931 Mad 183 (184). (Solicitor has a lien for his costs on fruits of judgment recovered by his exertion and cannot be defeated by third party's attachment.)

summary jurisdiction over its suitors for the purpose of enforcing that lien,[2] though it will not be exercised when the circumstances would make it unfair to any of the parties, or would compel the Court to go into complicated questions of fact especially when charges of fraud or collusion are made.[3] Nor is the summary remedy available to enforce the lien against the client's *representative*[4] though it is executable in the ordinary way under the Code.[5] The High Court of Calcutta has, on the other hand, held that the lien cannot be enforced in a summary application but only in a regular suit[6] especially in cases where charges of collusion and fraud are made.[7]

See also Order 8, Rule 6, Note 16.

39. Construction of decree as to costs. — Where a decree is passed with "usual costs and interest," it means all costs incurred from the commencement of the proceeding until the final decree.[1] The words 'appeal allowed with costs' would mean the costs of the Appellate Court and not of the original Court as well.[2] But where the order was "the order of the lower Court is upheld, the appeal dismissed, the appellant to pay the costs," it was held that the costs of the lower Court also were recoverable under that decree.[3] The words "costs in proportion" mean costs in proportion to the amount decreed or dismissed.[4] The words "costs incurred in the lower Court" mean costs specified in the decree appealed against.[5]

Where there are several defendants and there is no specific direction for separate costs, only a *single* set of costs will be payable[6] and the defendants will be jointly and severally liable thereon.[7]

A Court cannot import into the decree for costs anything which is not expressly or by necessary implication specified therein.[8]

Where A obtained a decree with costs against B and on appeal B was allowed to withdraw from the appeal and was dismissed from the suit, no order being made as to the costs of the appeal, it was held that the order of the Appellate Court was not to absolve the defendant from his liability for costs under the decree of the first Court.[9]

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2. ('09) 30 Bom 27 (33).
('91) 16 Bom 152 (157).
3. ('05) 7 Bom L R 547 (556).
[*See* ('92) 16 Bom 152 (158).]
4. ('92) 16 Bom 152 (158).
5. ('93) 17 Bom 514 (517).
('92) 16 Bom 152 (154).
6. ('94) 21 Cal 85 (91, 92). (Application held could be renewed after establishing claim by suit.)
('81) 7 Cal 401 (402).
('08) 35 Cal 171 (174). (Limitation is three years under Art. 84, Sch. II, Limitation Act, and an order of taxation does not operate as a stay of suit.)
[But see ('20) 7 AIR 1920 Cal 122 (124) : 46 Cal 1070.
('71) 9 Beng L R App 19 (19).]
[See however ('41) 28 AIR 1941 Cal 144 (146) : I L R (1940) 2 Cal 102. (Attorney of deceased party held entitled to apply in the suit for his costs to be paid by the receiver appointed in the suit.)]
7. (1900) 27 Cal 269 (271). (Dissenting from 25 Cal 887.)

Note 39

1. ('73) 19 Suth W R 152 (153) (DB).
[*See also* ('39) 26 AIR 1939 Lah 255 (256). (Final decree in suit for accounts — Costs granted are costs of whole suit.)]
2. ('12) 15 Cal L Jour 658 (660) (DB).
('07) 1907 Pun L R No. 50, page 175.
('77) 1877 Pun Re No. 45, page 112.
3. ('83) 5 All 589 (590, 591) (DB).
('84) 6 All 48 (49, 50).
('71) 16 Suth W R 266 (267). (Semble.)
4. (1865) 4 Suth W R Misc 9 (10).
('80) 7 Cal L Rep 114 (115) (DB).
5. † ('78) 2 Cal L Rep 152 (153) (DB).
('10) 14 Cal W N 556 (558) (DB).
6. ('78) 2 Cal L Rep 152 (153, 154).
('24) 11 AIR 1924 Bom 317 (318) : 48 Bom 348.
('35) 22 AIR 1935 Pat 41 (41, 42).
Also see O. 20, R. 6 N. 6.
7. ('23) 10 AIR 1923 Pat 215 (216) (DB).
Also see O. 45, R. 4 N. 4.
8. ('78) 2 Cal L Rep 504 (506).
('27) 14 AIR 1927 Cal 906 (907).
† ('30) 17 AIR 1930 Cal 465 (466) : 57 Cal 469. (Costs—Consent decree—Provision that each party should bear his costs—If it is intended to supersede the previous interlocutory orders for costs, that fact should be stated specifically in the final decree.)
('72) 18 Suth W R 111 (112).
9. ('12) 16 Ind Cas 381 (382) (DB) (Cal).
('23) 10 AIR 1923 Bom 206 (206, 207) : 47 Bom 559 (562). (When suit was withdrawn.)

See also the undermentioned decisions[10] bearing on the construction of decrees as to costs. If a judgment includes costs, it implies costs allowed by the rules. If costs which are not permissible under the rules are included in the decree, the decree is not in accordance with the judgment and it is the duty of the Court to correct the decree so as to make it in conformity with the judgment.[11] See also Note 4.

35A. (1) If in any suit or other proceeding, not being an appeal, any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, if the objection has been taken at the earliest opportunity and if it is satisfied of the justice thereof, may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector by the party by whom such claim or defence has been put forward, of costs by way of compensation.

Compensatory costs in respect of false or vexatious claims or defences.

(2) No Court shall make any such order for the payment of an amount exceeding one thousand rupees or exceeding the limits of its pecuniary jurisdiction, whichever amount is less:

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887, and not being a Court constituted under that Act, are less than two hundred and fifty rupees, the High Court may empower such Court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees:

Provided, further, that the High Court may limit the amount which any Court or class of Courts is empowered to award as costs under this section.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.

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10. ('30) 17 AIR 1930 Oudh 167 (168) : 5 Luck 595. (Foreclosure decree—Order for costs does not import personal liability.)
[*See* ('37) 1937 Mad W N 292 (293). (Personal liability—Order giving right to party to recover costs from another party and making costs a first charge on sale proceeds of particular property — Personal liability not taken away.)]

11. ('35) 22 AIR 1935 Cal 619 (620) : 63 Cal 181 (DB).

Synopsis

1. Legislative changes.
2. Scope and object of the section.
2a. Applicability of section to proceedings under Provincial Insolvency Act.
3. Appeal.
4. Revision.

1. Legislative changes. — This section was added by S. 2 of Act IX of 1922, and by the provisions of that Act, this section will only come into operation where the Government of the particular province has duly notified to that effect. It has been brought into force in Bombay, Bengal, the United Provinces, Bihar, Orissa, Central Provinces, Assam, Punjab and Sind.

2. Scope and object of the section. — This section is an exception to the general principle on which S. 35 is based, namely, that the award of costs to a litigant is to secure to him the expenses *incurred* by him in the litigation and not to enable him to get smart money by way of *penalty* or *punishment* on the opposite party; see Notes 1 and 26 on S. 35. In order that this section may apply, the following conditions must exist[1]—

(1) The claim or defence must be *false* or *vexatious*.[2]

(2) It must be false or vexatious to the knowledge of the party raising it.

(3) Such claim or defence must have been *disallowed* or *withdrawn* or *abandoned* in whole or in part.[3]

(4) Objection must have been taken at the *earliest possible* opportunity.[4]

The awarding of compensatory costs under this section is not obligatory in every case where a false claim or defence is put forward and objection is taken at an early opportunity. The Court may refuse to grant compensatory costs if in the circumstances of a case it considers it not proper to grant such costs.[5]

An order under this section has to be passed after recording reasons for holding the claim or defence to be false or vexatious.[6]

The words "not being an appeal" show that the provisions of the section are applicable only to *suits* and *proceedings* but not to *appeals*. It has been held by the Calcutta High Court that the section seems to apply only to the *original* hearing of suits and other proceedings and that it does not also apply to revision proceedings before the

Section 35A — Note 2

1. † ('31) 18 AIR 1931 Lah 509 (510).
2. ('36) 23 AIR 1936 Oudh 67 (72) : 11 Luck 486 (DB).
('37) 24 AIR 1937 Pat 477 (479). (Suit against Secretary of State and others filed in Civil Court by witness in criminal case for recovery of additional expenses — Suit neither false nor vexatious but only misconceived—S. 35A has no application.)
3. ('31) 18 AIR 1931 Lah 509 (510). (Dismissal of suit for default after warnings, and on account of reprehensible conduct on part of plaintiff amounts to abandonment.)
† ('30) 17 AIR 1930 Nag 133 (134). (Judge trying suit has same powers as Small Cause Court from which Court suit was transferred.)
4. ('43) 30 AIR 1943 Mad 286 (288). (Court has no power to award compensatory costs in absence of objection taken by a party.)
('26) 13 AIR 1926 Lah 472 (472).
5. ('38) 25 AIR 1938 All 266 (271) : I L R (1938) All 370 (DB). (Valuation of suit Rs. 1300. Counsel's fee of Rs. 2275 allowed to successful plaintiff —*Held*, allowing of compensatory costs was not proper.)
6. ('43) 30 AIR 1943 Mad 286 (288). (Where the Court merely says, "having regard to the contentions raised, I think that this is a case in which the plaintiff is entitled to some compensation," that is not a sufficient recording of the reasons for holding the defence to be false or vexatious to the knowledge of the defendant).

High Court, so that the High Court has no power to award compensatory costs in respect of such proceedings.[7]

2a. Applicability of section to proceedings under Provincial Insolvency Act. — This section applies to proceedings under the Provincial Insolvency Act.[1] It is immaterial that the section was not in existence at the time of the passing of the Provincial Insolvency Act (V of 1920).[2]

3. Appeal. — An order for compensation under this section is appealable under S. 104 cl. (ff). But where the original Court has refused or omitted to award compensatory costs, the Appellate Court cannot, in view of the provisions of O. 41 R. 33 award such costs. An order for compensatory costs under this section passed by a Small Cause Court is appealable to the District Judge under S. 24 of the Provincial Small Cause Courts Act,[1] though such an order will not be appealable under the Code.

4. Revision. — An order for compensatory costs in a case to which this section does not apply is one without jurisdiction and can be set aside by the High Court in revision.[1]

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7. ('38) 42 Cal W N 658 (659).

Note 2a

1. ('35) 22 AIR 1935 Nag 207 (208) : 31 Nag L R 365. (S. 76, Provincial Insolvency Act, does not prohibit Court from acting under this section.)
2. ('35) 22 AIR 1935 Nag 207 (208): 31 Nag L R 365.

Note 3

1. ('26) 13 AIR 1926 All 554 (555).

Note 4

1. ('37) 24 AIR 1937 Pat 477 (479).

PART II.

EXECUTION

GENERAL

36. The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.

Application to orders.

[Compare 1882, S. 649, para. 1.]

Synopsis

1. Legislative changes.
2. Principle and scope of the section.
3. "Execution," meaning of.
4. "Orders."
5. What decrees may be executed. See Section 38.
6. Who may apply for execution. See O. 21 R. 11.
7. Against whom execution may be had. See O. 21 R. 11.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Amended decrees and forms. See S. 38.
Executability of orders like decrees does not make the former decrees. See Note 2.
Execution of order. See Note 4.
Mesne profits, decree or order for. See S. 38.
Mode of execution. See Note 3.

1. Legislative changes. — Under the last paragraph of S. 220 of the old Code an order for costs not forming part of a decree, could be executed as if it were a decree for money. The provisions of Chap. XIX dealing with execution of decrees were applied to the execution of other orders also, by reason of the fact that a 'decree-holder' was defined in S. 2 of the Code as including a person in whose favour an order was passed and a 'judgment-debtor' as including a person against whom an order capable of execution was passed. This section now makes it quite clear that the provisions relating to decrees shall, so far as they are applicable, be deemed to apply to the execution of orders. It is based upon the last paragraph of S. 220 and S. 649 of the old Code[1] but is of very much wider application.[2]

2. Principle and scope of the section. — The principle underlying the provisions of this section is that every Court has an inherent power to have its orders *carried out*, as otherwise the orders would be a mere farce.[1]

The fact that the provisions applicable for the execution of decrees apply to the execution of orders, does not make such orders "decrees" for all purposes. Thus, where

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Section 36 — Note 1

1. Section 649 of the old Code was as follows: "The rules contained in Chapter XIX shall apply to the execution of any judicial process for the arrest of a person or the sale of property or payment of money, which may be desired or ordered by a Civil Court in any civil proceeding."
2. ('25) 12 AIR 1925 Cal 57 (58, 59) : 52 Cal 269 (DB). (Order directing payment of remuneration to Commissioner is executable as a decree.)

Note 2

1. † ('07) 34 Cal 860 (862) (DB).
('21) 8 AIR 1921 Pat 152 (154) : 6 Pat L Jour 304 (DB).
('10) 6 Ind Cas 386 (387) (DB) (Cal).

a non-appealable order, such as an order for costs, is sought to be executed and on objection being raised thereto the matter is decided under S. 47 (which will apply by reason of S. 36), such decision will not be appealable as a "decree." The reason is, that the order for costs being itself not appealable an order passed in execution of that order cannot also be appealable.[2]

The High Court of Madras has, in the undermentioned case,[3] held that such an order would not be one under S. 47 at all. It is submitted that this view is not correct in view of the clear wording of S. 36 to the effect that *the provisions of the Code relating to the execution of decrees* shall apply to the execution of orders.[4] The High Court of Calcutta has, on the other hand, held[5] that S. 47 would apply to such a case, but has proceeded on the assumption that because the objection to the execution of the order was dealt with under S. 47, an appeal necessarily lies from the order. This view also, it is submitted, is not correct for the reason set forth above.

The provisions of the Code relating to the execution of decrees apply to the execution of orders only in *so far as such provisions are applicable to such orders*. Thus, it is provided by O. 16, R. 4 that in default of payment of the expenses of a witness, the Court may order the same to be levied by attachment and sale of the *moveable property* of the debtor. Such an order cannot, by reference to this section, be executed as if it were a decree, by attachment and sale of the *immovable* property of the debtor. (See Order 16, Rule 4, Note 4.)

3. "Execution," meaning of. — Execution is the enforcement of decrees and orders by process of Court, so as to enable the judgment-creditor to recover the fruits of the judgments.[1] The rateable distribution of the proceeds of an execution sale among a number of rival decree-holders is a mode of *execution* and hence S. 73 which deals with such rateable distribution is a provision which applies to the execution of orders by virtue of this section.[2] The modes in which the Courts can execute their decrees and orders are set forth in this Part and elaborated in Order 21. The functions of an executing Court are judicial and not merely ministerial.[3]

4. "Orders." — This section is applicable to all orders which can be included in the definition of the term "order" in S. 2, cl. (14),[1] and is not limited to orders made under the Code.[2] Thus, a payment order under S. 186 of the Companies Act is to be

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2. ('19) 6 AIR 1919 Mad 23 (23) (DB).
3. ('15) 2 AIR 1915 Mad 1222 (1223) (DB).
4. ('25) 12 AIR 1925 Cal 57 (58,59): 52 Cal 269 (DB).
5. ('25) 12 AIR 1925 Cal 57 (58,59): 52 Cal 269 (DB).

Note 3

1. ('82) 9 Cal 773 (776, 777) (DB).
2. ('41) 28 AIR 1941 Lah 273 (273, 274) : I L R (1942) Lah 460 (DB).
3. ('70) 7 Bom H C R A C 37 (41) (DB).

Note 4

1. ('89) 12 Mad 120 (122). (Order for costs of the day.)
('15) 2 AIR 1915 Mad 1222 (1223) (DB). (Orders granting day costs.)
† ('31) 21 AIR 1934 Bom 452 (457) : 59 Bom 10.
('93) 17 Bom 514 (517) (SB). (Order obtained by attorney against his client for payment of costs.)
('84) 8 Bom 511 (524) (DB). (Judgment entered up under S. 86 of the Indian Insolvent Act.)
('25) 12 AIR 1925 Cal 57 (58, 59) : 52 Cal 269 (DB). (Dissenting from 10 Cal W N 234 and holding that an order made after the dismissal of a partition suit directing the plaintiff to deposit in Court a certain sum of money as remuneration for work done by the commissioners of partition is an order within the meaning of S. 2, cl. (14) and that it may be executed as a decree.)
('10) 6 Ind Cas 386 (387) (DB) (Cal). (Order for recovery of amount drawn by Court Commissioner in excess of his dues.)
('36) 23 AIR 1936 Lah 696 (698) (DB). (Order passed in execution proceedings.)
('19) 6 AIR 1919 Mad 894 (895) (DB). (Court sale subsequently set aside—Order for refund of money to purchaser.)
('25) 12 AIR 1925 Rang 189 (191) : 2 Rang 673 (DB). (Order under O. 20 R. 11 (2) can be executed as if it were a decree.)
('26) 13 AIR 1926 Sind 119 (120) : 20 Sind L R 216. (Order under O. 21 R. 6.)
('21) 8 AIR 1921 Sind 13 (15) : 15 Sind L R 11 (DB). (Order for costs subsequent to decree.)
2. † ('34) 21 A I R 1934 Bom 452 (457) : 59 Bom 10. (Section applies to order on a notice of motion passed by a chartered High Court.)

regarded as equivalent to a decree and enforceable as such by reason of S. 199 of that Act.[3] But, an order under S. 34, cl. (e) of the Guardians and Wards Act directing the guardian of a minor to pay a certain sum out of the minor's estate for the marriage expenses of a dependent of the minor is not executable as a decree.[4] The reason is that such an order is only in the nature of a direction to the guardian over whom the Court has control, to pay a certain sum of money out of the funds of the minor in discharge of the liability of the minor's estate. There is no *adjudication* by the Court in such a case on the relative claims of parties, and hence, such an order cannot be said to be a 'decision' within the meaning of S. 2, cl. (14). Similarly, it has been held that an order under the Guardians and Wards Act directing the guardian to bring in the money which is due from him upon a proper scrutiny of account is not executable as a decree. The reason given is that the Guardians and Wards Act provides a special procedure of enforcing orders passed under it by proceeding under S. 45 of that Act.[5]

An order for costs passed by a District Judge not in his judicial capacity but as a *persona designata* under a scheme framed by a Court for regulating and managing a charitable institution is not capable of execution under this Code.[6]

5. What decrees may be executed. — See Section 38.

6. Who may apply for execution. — See Order 21, Rule 11.

7. Against whom execution may be had. — See Order 21, Rule 11.

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37. [S. 649, para. 2.] The expression "Court which passed a decree," or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,— Definition of Court which passed a decree.

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

[1877, S. 649; 1859, S. 296.]

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. Where the decree has been passed in the exercise of appellate jurisdiction.
4. Where the Court of first instance has ceased to exist.
5. Where the Court of first instance has ceased to have jurisdiction to execute the decree.

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3. ('41) 28 AIR 1941 Lah 273 (274): I L R (1942) Lah 460 (DB).
('18) 5 AIR 1918 Lah 211 (212): 1918 Pun Re No. 92.

4. ('18) 5 AIR 1918 Mad 389(391):41Mad241(DB).

5. ('42) 29 A I R 1942 Pat 422 (424, 425): 21 Pat 223 (DB).
[But see ('25) 12 AIR 1925 All 457 (457).]

6. ('42) 29 AIR 1942 Bom 97 (98) (DB).

NOTE to the Synopsis. See the Notes indicated for the following topics :
"Court which passed a decree." See Note 2.
Decree for money. See Note 5.
"Deemed to include." See Note 2.
Distribution of business by District Judge. See Note 5.
Transfer of area in which the judgment-debtor lives. See Note 5.
Special class of persons — Jurisdiction over. See Note 5.

1. Legislative changes.

(1) The words "In relation to the execution of decrees" are new.
(2) In cl. *(a)* the words "has been passed in the exercise of appellate jurisdiction" have been substituted for the words "is passed in appeal."
(3) In cl. *(a)* the words "the Court of first instance" have been substituted for the words "the Court which passed the decree against which the appeal was preferred."

2. Scope and object of the section.—Under S. 38 of the Code a decree may be executed either —

(1) by the Court which passed the decree, or
(2) by the Court to which it is sent for execution.

This section defines the expression "Court which passed the decree" *as including* the Courts mentioned in cls. *(a)* and *(b)*. The object of the section is to avoid the cumbrous procedure which would result, if the Court which *actually* passed the decree be held to be the only Court which could execute it.[1] The word "include" shows that the definition is only in extension of the literal meaning of the expression and that it does not exclude the Court which *actually* passed the decree.[2] The following Courts thus fall under the definition :

(1) The Court of first instance which *actually* passed the decrees.
(2) The Court of first instance in the case of *appellate* decrees.
(3) Where the Court of first instance has *ceased to exist*, the Court which would have jurisdiction to try the suit at the time of execution.
(4) Where the Court of first instance has *ceased to have jurisdiction to execute* the decree, the Court which, at the time of execution, would have had jurisdiction to try the suit.

3. Where the decree has been passed in the exercise of appellate jurisdiction. — Under S. 649 para. 2 of the old Code, where a decree was passed in the exercise of *appellate* jurisdiction, the Court that could execute the decree was *the Court which passed the decree against which the appeal was preferred.* Thus, where a decree was passed in *second* appeal, the *first* Appellate Court was the Court to execute the decree. Under the present section it is the Court of *first instance* that is to execute the decree. Even an appellate decree of the Privy Council should be executed only by the Court of

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Section 37 — Note 2

1. ('08) 35 Cal 974 (978) (DB).
2. ('20) 7 AIR 1920 Mad 427 (433) : 42 Mad 821 (FB).
('32) 19 AIR 1932 Mad 260 (262).
('01) 28 Cal 238 (241) (DB).
('88) 15 Cal 667 (669) (DB).
('81) 6 Cal 513 (518) (DB).
[But see ('42) 29 AIR 1942 Cal 321 (322, 323) : ILR (1942) 1 Cal 289 (DB). (The word "includes" as used in the section though it extends the meaning of the expression "Court which passed the decree" in one sense, does in another sense restrict it. The effect of the words is to exclude, under the circumstances specified in cls. (a) and (b) of the section, the original Court and substitute for it another Court which for purposes of the section is to be regarded as the only Court which passed the decree.)]

first instance and not by the High Court to which the decree is transmitted by the Privy Council.[1]

See also the undermentioned cases.[2]

4. Where the Court of first instance has ceased to exist. — A Court ceases to exist —

(1) if it is *abolished*.[1] But it can be revived[2] and on such revival becomes again the same Court which passed the decree, and cannot be taken to have ceased to exist;[3]

(2) if a special jurisdiction vested in it has been withdrawn after decree.[4] Thus, a Court vested with the powers of a Court of Small Causes ceases to exist as a Court of Small Causes when those powers are withdrawn.[5]

A Court does not cease to exist for the purposes of this section —

(1) by ceasing to have *local* jurisdiction after decree,[6]

(2) by the *pecuniary* limits of its jurisdiction being altered,[7]

(3) by getting a different *designation* though with the same local and pecuniary jurisdiction,[8]

(4) by a *different officer* presiding over it,[9] and

(5) by a removal of its *headquarters* to another place within the same jurisdiction.[10]

5. Where the Court of first instance has ceased to have jurisdiction to execute the decree. — It is a general principle of law that when once a Court gets jurisdiction to entertain a suit it does not ordinarily lose such jurisdiction by reason of subsequent events.[1] Thus, it does not cease to have jurisdiction by reason of the following facts :

Note 3

1. ('14) 1 AIR 1914 Mad 222 (224) : 38 Mad 832 (DB).
2. ('39) 26 AIR 1939 Mad 483 (484) : ILR (1939) Mad 520 (DB). (Application to scale down decree debt and amend it accordingly under S. 19 of the Madras Agriculturists' Relief Act (IV of 1938) must be made to the Court of first instance—Expression 'Court which passed the decree' has the same meaning as in this section in view of Ss. 19 and 20 of that Act.)

('36) 23 AIR 1936 Oudh 5 (6) : 11 Luck 511 (DB). (Application under sections 5 and 30 of the United Provinces Agriculturists Relief Act, XXVII of 1934 —Application must be made to Court of first instance and the words 'Court which passed the decree' must be interpreted in the same way as in this Section.)

Note 4

1. ('81) 6 Cal 513 (518) (DB).
('67) 7 Suth W R 124 (125) (DB).
2. ('26) 13 AIR 1926 Pat 209 (210) : 4 Pat 688 (DB).
3. ('26) 13 AIR 1926 Pat 209 (210) : 4 Pat 688.
4. *See* ('19) 6 AIR 1919 Pat 237 (238). (Court invested with the power of a "Court" under the Land Acquisition Act.)
5. ('96) 19 Mad 445 (447, 448) (DB).
6. ('81) 6 Cal 513 (515) (DB).
('01) 28 Cal 238 (240, 241) (DB).
7. ('16) 3 AIR 1916 Pat 3 (3) : 2 Pat L Jour 113 (DB).
8. ('40) 27 AIR 1940 Lah 97 (98). (Decree passed by District Judge, Dera Ismail Khan—On passing of Frontier Courts Regulation, Court of District Judge becoming Court of Senior Subordinate Judge — Application for execution based on transfer certificate granted by District Judge (new style) is incompetent.)

('15) 2 AIR 1915 Oudh 170 (170). (Munsif's Court substituted for Sub-Judge's Court.)

9. ('26) 13 AIR 1926 Pat 209 (210) : 4 Pat 688 (DB).
10. ('81) 6 Cal 513 (515, 519) (DB). (Though it may thereby have ceased to have jurisdiction to execute the decree.)

Note 5

1. ('86) 10 Bom 200 (202) (DB). (Decree for money —Amount due under decree increased by accumulation of interest, beyond the pecuniary limits of the jurisdiction of the Court —It does not cease to have jurisdiction.)

('82) 6 Bom 582 (583). (Do.)

('14) 1 AIR 1914 Bom 180 (181) : 38 Bom 662 (DB). (It was argued that Court which passed a decree "ceases to have jurisdiction to execute it" because after the passing of the decree a party (e. g., Court of Wards) is added in execution who had he been a party when the suit, wherein the decree was passed, was instituted would have deprived the Court of its jurisdiction—*Held* that notwithstanding the fact the Court could proceed with execution.)

(1) the transfer to a different Court by the Provincial Government of the area in which the property in respect of which the decree was passed is situated[2] or the area in which the judgment-debtor lives,[3] or

(2) the transfer by the District Judge of the business of the Court to another Court.[4]

But where the Political Agent at Kolhapur who had jurisdiction only over *Sirdars* passed a decree against a *Sirdar* and the latter thereafter died leaving heirs who were *not Sirdars*, it was held that the Political Agent's Court "ceased to have jurisdiction to execute" the decree.[5] In the undermentioned case[6] it was held by the Madras High Court, on a consideration of the Government notifications relating to the question, that on the Court of the Subordinate Judge of Berhampore becoming a Court within the jurisdiction of the newly constituted Province of Orissa, it ceased to have jurisdiction to execute a decree passed by it while it had been in the Presidency of Madras but that the Court did not cease to *exist*. In *Lachman Pundeh* v. *Maddan Mohan Shye*[7] it was held that the expression "ceased to have jurisdiction to execute" was intended to "meet such a case as the following : for example, where an Additional or Subordinate Judge attached to more than one district, having passed a decree in one district, leaves such district and sits in another district under the provisions of S. 15 of the Bengal Civil Courts Act, such Additional or Subordinate Judge is a Court. Where such a Court is sitting in a district other than that in which the decree was passed, it has not ceased to *exist*, but it has *ceased to have jurisdiction to execute* that particular decree."

It is now settled by a consensus of judicial opinion that where a decree is passed in respect of a certain property and subsequent thereto the area within which such property is situate is transferred to the jurisdiction of another Court, the Court *which actually passed the decree* nevertheless does not cease to have jurisdiction to execute it and can therefore *entertain an application* for execution thereof.[8] But it cannot *sell the*

('33) 20 AIR 1933 Cal 684 (687) (DB).
('33) 20 AIR 1933 Lah 687 (687) : 14 Lah 457. (Mortgage decree for sale in respect of properties both within and without jurisdiction—Court has jurisdiction to sell in execution properties outside jurisdiction.)
('16) 3 AIR 1916 Pat 3 (3) : 2 Pat L Jour 113. (Specially empowered Munsif of Court *A* passing decree for over Rs. 1000—Succeeding Munsif having jurisdiction up to Rs. 1000 does not lose jurisdiction to execute the decree passed by his predecessor.)
Also see Note 8 on Section 17.
2. ('07) 30 Mad 537 (539) (DB).
See also the cases in foot-note (8).
3. See the cases in foot-note (8).
4. † ('98) 25 Cal 315 (316, 319) (DB).
(1900) 27 Cal 272 (274, 275) (DB).
('95) 22 Cal 871 (874, 875) (DB).
† ('21) 8 A I R 1921 Pat 152 (154) : 6 Pat L Jour 304 (DB).
[*See also* ('42) 29 AIR 1942 Cal 321 (323) : ILR (1942) 1 Cal 289 (DB). (Assignment of business to another by District Judge under S. 13 (2) of Bengal, Agra and Assam Civil Courts Act is only arrangement for distribution of civil business and cannot in any way curtail jurisdiction of Court which passed the decree.)]
5. ('93) 17 Bom 162 (164) (DB).
6. ('39) 26 AIR 1939 Mad 463 (464) (DB).
7. ('81) 6 Cal 513 (519) (DB).
8. ('42) 29 AIR 1942 Cal 321 (323): ILR (1942) 1 Cal 289 (DB). ("Jurisdiction" to execute refers to competency to *entertain* application for execution though transfer of decree to another Court may be necessary for effective execution.)
('25) 12 AIR 1925 Bom 414 (414) (DB). (A I R 1920 Mad 427 : 42 Mad 821 (FB) approved.)
('34) 21 AIR 1934 Pat 192 (194) : 13 Pat 21 (DB).
† ('31) 18 A I R 1931 Cal 312 (316, 317, 318) : 58 Cal 832 (DB).
('08) 35 Cal 974 (978) (DB).
('01) 28 Cal 238 (240, 241) (DB).
('96) 20 Cal 105 (106) (DB).
† ('81) 6 Cal 513 (515, 519) (DB).
('35) 22 AIR 1935 Mad 935 (935).
*('20) 7 A I R 1920 Mad 427 (433) : 42 Mad 821 (FB). (This must be deemed to have overruled the decisions in AIR 1914 Mad 162 : 37 Mad 462 ; AIR 1915 Mad 602 ; AIR 1918 Mad 401 ; A I R 1917 Mad 257 in so far as they held that the original Court cannot even entertain an application for execution.)
('19) 6 AIR 1919 Mad 192 (193): 42 Mad 461 (DB). (This was a case in which a mortgage decree was passed by a Court which had no territorial jurisdiction but which was established in aid of other Courts.)
('28) 107 Ind Cas 195 (197) (Nag).
('06) 9 Oudh Cas 281 (283).

property which is situate outside the local limits of its jurisdiction.[9]

There is a conflict of opinion as to whether, in the circumstances set forth above, *the Court to which the local area is transferred* can *also entertain an application* to execute the decree. The High Court of Calcutta[10] has held that it can. But the Madras High Court has held that such Court cannot execute the decree unless the Court which passed the decree has sent it for execution to it. But at the same time, that High Court has held that the Court to which the area has been transferred has *inherent* jurisdiction to execute the decree and so the absence of an order of transfer by the Court which passed the decree will not make its orders null and void.[11]

In *Seeni Nadan* v. *Muthusami*,[12] Wallis, C. J., expressed an opinion (though it was *obiter*) that S. 150 of the Code conferred upon the Court of transfer jurisdiction to entertain an application for execution. This view has been taken in the undermentioned decision of the Madras High Court,[13] by the Oudh Judicial Commissioner's Court[14] and by the Bombay High Court also.[15] On the other hand, it was held in later decisions of the Madras High Court[16] that the Court of the transferred area has no jurisdiction to entertain the application for execution. The difference of opinion is due to the different interpretations of S. 150. (See Note 2 on S. 150.) It is respectfully submitted that this last view is correct. Under S. 37 *(b)* a "Court which passed a decree" will include a Court other than that which actually passed it, only where the latter ceases to exist or ceases to have jurisdiction to execute the decree. If the jurisdiction of the Court which actually passed the decree *does not cease* by reason of the property dealt with by it being transferred to the jurisdiction of another Court, the Court of the transferred area is not a "Court which passed the decree." Under S. 38 of the Code, a decree may be executed either by the "Court which passed the decree" or by the Court to which it is sent for execution. It follows, therefore, that the Court of the transferred area cannot entertain an application for execution of the decree. The mere fact that a temporary Court is established for a certain period and is thereafter continued cannot deprive that Court of its character of the Court which passed the decree. Hence, such Court has jurisdiction to entertain an application for the execution of the decree.[17]

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9. ('08) 35 Cal 974 (978)(DB). (No. It should transfer it to the proper Court.)
('93) 20 Cal 105 (106) (DB). (No. It should transfer the decree to the Court having jurisdiction.)
†('90) 17 Cal 699 (703, 704)(FB). (No. In this case the facts show that the suit itself was instituted in a Court having no territorial jurisdiction : 15 Cal 667 overruled.)
('81) 6 Cal 513 (515, 519) (DB). (No. Should not order sale but transfer it to Court having territorial jurisdiction.)
('27) 14 A I R 1927 Mad 627 (629) : 50 Mad 882 (DB). (No jurisdiction to sell—Case of a mortgage suit—View of Venkatasubbarao,J., holding contrary in A I R 1926 Mad 421 : 49 Mad 746 criticised. NOTE.—AIR 1927 Mad 627 : 50 Mad 882 is overruled by A I R 1932 Mad 418 : 55 Mad 801 (SB) on another point.)
('24) 11 AIR 1924 Mad 457 (457) (DB). (No. Transfer under S. 39 is obligatory.)
('20) 7 AIR 1920 Mad 505 (506, 508): 43 Mad 135 (DB). (No Transferee Court losing territorial jurisdiction.)
'17) 4 AIR 1917 Mad 272 (273). (Suit for partition —It cannot execute the decree, but should transfer it to the Court having territorial jurisdiction.)
('30) 17 AIR 1930 Oudh 305 (308, 309) (DB). (No.)

10. ('81) 6 Cal 513 (515, 519) (DB).
('01) 28 Cal 238 (240, 241) (DB). (Distinguishing 25 Cal 315.)

11. ('43) 30 AIR 1943 Mad 449 (450, 453) (DB).

12. ('20) 7 AIR 1920 Mad 427 (432) : 42 Mad 821 (FB).

13. ('24) 11 AIR 1924 Mad 32 (32) (DB).

14. ('06) 9 Oudh Cas 281 (283).

15. ('25) 12 AIR 1925 Bom 414 (414) (DB).

16. †('32) 19 AIR 1932 Mad 418 (419) : 55 Mad 801 (SB). (The transferee Court can execute only after transmission of decree : AIR 1927 Mad 627 : 50 Mad 882 overruled.)
†('28) 15 AIR 1928 Mad 746 (751). (Dissenting from AIR 1927 Mad 627 : 50 Mad 882. Approved in A I R 1932 Mad 418 : 55 Mad 801 (SB).)
('35) 22 AIR 1935 Mad 935 (935).
[*See also* ('19) 6 AIR 1919 Mad 192 (193) : 42 Mad 461.]

17. ('35) 22 AIR 1935 Mad 849 (849) : 58 Mad 1009 (DB).

Where the Court is one and the same but is presided over by several Judges, the decree passed by one can be executed by the other. Section 37 (*b*) does not apply to such a case.[18]

See also section 38, Note 1.

COURTS BY WHICH DECREES MAY BE EXECUTED.

38. [S. 223, para. 1.] A decree[5] may be executed[2] either by the Court which passed it,[3] or by the Court to which it is sent for execution.[4]

Court by which decree may be executed.

[1877, S. 223, para. 1; 1859, Parts of Ss. 285 and 286.]

Synopsis

1. Scope and object of the section.
2. "May be executed."
3. Court which passed the decree. See Section 37.
4. Powers of Court to which decree is sent for execution. See Sections 41 and 42 and Order 21 Rule 16.
4a. Powers of transferor Court after transfer of decree. See Section 42, Notes 1 and 3, etc.
5. What decrees may be executed.
6. Territorial jurisdiction.
7. Pecuniary jurisdiction.
8. Executing Court, if can go behind decree.
9. Executing Court may construe decree.
9a. Executing Court may declare decree to be incapable of execution.
9b. Power of executing Court to fix order in which mortgaged properties are to be sold.
9c. Power of executing Court under rent decree.
9d. Power of executing Court to enforce agreements between parties in course of execution proceedings. See Section 47, Note 41.
10. Simultaneous executions.
11. Execution proceedings and res judicata.

NOTE to the Synopsis. See the Notes indicated for the following topics:

Inconsistent decisions in execution. See S. 11 Note 100.

Interest or mesne profits when added exceeding jurisdiction. See Note 7.

1. Scope and object of the section. — Under this section a decree may be executed[1]—

(a) by the "Court which passed the decree"[2] which is defined in S. 37, or

(b) by the Court to which it is sent for execution. See S. 39.

A Court which is neither the Court which passed the decree nor the Court to which the decree is transferred for execution cannot, as a general rule, execute the decree.[3] There are, however, some exceptions. A decree may be executed also by the Court to which the execution proceedings may be transferred under the provisions of S. 24.[4] Again, it has been held[5] that where there are two independent Courts within the same territorial

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18. ('41) 73 Cal L Jour 351 (353) (DB).
('19) 6 AIR 1919 Pat 367 (369) (DB).

Section 38 — Note 1

1. ('12) 35 Mad 588 (590).
('22) 9 AIR 1922 Nag 189 (191).
2. ('35) 22 A I R 1935 Mad 849 (850): 58 Mad 1009 (DB). (Temporary Court established for one year and continued thereafter — Its character as Court passing the decree is not lost and it can execute the decrees passed by it in the previous year.)
3. ('36) 23 A I R 1936 Pat 615 (616): 15 Pat 439 (DB).
4. † ('25) 12 AIR 1925 All 276 (277): 47 All 57 (DB).
('95) 22 Cal 871 (874) (DB). (Jurisdiction conferred on a Court by an order of transfer under S. 24, C. P. Code, transferring the suit for trial to it does not necessarily terminate as soon as the decree is passed.)
[*See* ('81) 5 Bom 680 (681) (DB). (*Held* that District Judge has power to withdraw an application for execution of a decree.)]
5. ('19) 6 AIR 1919 Pat 367 (369) (DB).
[*See also* ('09) 4 Ind Cas 510 (511) (Cal).
('35) 22 AIR 1935 Pat 468 (469).]

limits having *concurrent jurisdiction*, it is open to either of the Courts to execute the decree of the other. Under S. 63, where a property is attached in execution of decrees of more Courts than one, the Court of the highest grade is the Court by which the property should be sold. Under O. 21 R. 16 an application for execution by the transferee of a decree can be made only to the Court which passed the decree. (See O. 21 R. 16, Note 12.)

Where a Court has, at the time of the presentation of an execution petition, no jurisdiction over it or could only exercise its jurisdiction irregularly, the Court is not bound to dismiss the execution petition if it afterwards obtains jurisdiction.[6]

Sections 38, 39, 41, 42, 45 and 46 of the Code apply to the Arakan Hills. See the Arakan Hill Tracts Laws Regulation, I of 1916, Schedule I.

2. "May be executed." — For the meaning of the term 'execution', see Note 3 on Section 36.

3. Court which passed the decree. — See Section 37.

4. Powers of Court to which decree is sent for execution.—See Sections 41 and 42 and O. 21 R. 16.

4a. Powers of transferor Court after transfer of decree. — See Section 42 Notes 1 and 3; S. 46 Note 1 ; O. 21 R. 10, Note 6 ; R. 16, Note 12 ; R. 22, Note 14 and R. 28, Note 1.

5. What decrees may be executed. — Where a decree is *reversed* or *modified* or *affirmed* on appeal, the only decree capable of execution is the appellate decree.[1] In exceptional cases, however, where the appellate judgment does not even affirm the decree of the lower Court, but *simply dismisses* the appeal, the general rule that the appellate decree alone is the one to be executed does not apply and the Courts should allow execution of the decree of the original Court.[2]

[But see ('41) 73 Cal L Jour 351 (354, 355) (DB). (If two Subordinate Judges have the same local jurisdiction assigned to them, it is certainly competent for the District Judge to distribute the business among the two officers, but that would not empower the District Judge to make any order in contravention of S. 38, C. P. Code, and direct that the decree passed by one of the officers could be executed by the other.)]

6. ('34) 21 AIR 1934 Mad 283 (286) : 57 Mad 793 (DB).

Note 5

1. ('33) 20 AIR 1933 Lah 859 (859). (Preliminary and final decree obtained — Final decree sought to be executed — Preliminary decree modified in appeal by a compromise—Original final decree is not executable and a fresh final decree must be obtained.)

✣('72) 14 Moo Ind App 465 (489, 490, 491) (PC).

† ('01) 23 All 152 (158) : 27 Ind App 209 (PC). (Appeal to Privy Council—Decree to be executed is that of the Privy Council.)

('98) 20 All 493 (495, 496).

('91) 13 All 394 (395).

('89) 11 All 346 (347).

† ('89) 11 All 314 (318) (FB).

✣('89) 11 All 267 (274) (FB).

✣('82) 4 All 376 (379) (FB).

† ('30) 17 AIR 1930 Bom 225 (227) (DB). (Cases turning on limitation cited.)

('14) 1 AIR 1914 Bom 132 (134) : 39 Bom 175 (DB).

('98) 22 Bom 500 (506) (DB).

('95) 19 Bom 258 (260) (DB).

('30) 17 AIR 1930 Cal 308 (310) (DB).

('17) 4 AIR 1917 Cal 417 (419) (DB). (Dismissal under O. 41, R. 11.)

('18) 5 AIR 1918 Cal 133 (134) (DB).

('98) 25 Cal 311 (313) (DB). (But where appellate decree simply dismisses lower Court's decree, time for redemption fixed by latter not extended — *Obiter*.)

('95) 22 Cal 467 (472) (DB).

('93) 20 Cal 551 (556) (DB). (Appeal to Privy Council —Decree to be executed as that of the Privy Council.)

('82) 8 Cal 218 (224) (FB).

('75) 23 Suth W R 57 (58) (DB).

† ('71) 7 Beng L R 704 (714) (FB).

('92) 15 Mad 170 (171) (DB).

† ('31) 18 AIR 1931 Pat 27 (29):9 Pat 829 (DB).(Application to execute trial Court's decree mentioning affirmance on appeal—Sufficient compliance.)

('18) 5 AIR 1918 Pat 260 (261) : 3 Pat L Jour 116 (DB). (Appeal to Privy Council—Decree to be executed as that of the Privy Council.)

[*See* ('33) 20 AIR 1933 P C 68 (70) : 60 Cal 662 : 60 Ind App 83 (PC).

('12) 39 Cal 925 (929) : 14 Ind Cas 299 (300).]

2. ✣('21) 8 AIR 1921 Low Bur 37 (42) : 11 Low Bur Rul 163 (DB).

('14) 1 AIR 1914 P C 65 (66) : 36 All 284 : 41 Ind App 104 (PC). (Dismissal for default of prosecution.)

('14) 1 AIR 1914 P C 66(67) : 36 All 350 (PC).(Do.)

('91) 15 Bom 370 (373) (DB). (Appeal withdrawn — Original decree alone can be executed.)

('06) 1906 Pun Re No. 48, p. 172 (179, 184) (FB).

('24) 11 AIR 1924 Cal 830 (832) : 51 Cal 715. (Dismissal for default of prosecution.)

† ('17) 4 AIR 1917 Cal 728 (730): 44 Cal 954 (DB). (Do.)

Where the appellate decree affirms the lower Court's decree with all its specifications, it would be competent to the executing Court to look at the latter decree for information as to its contents.[3] But it is always desirable that the appellate decree should embody so much of the lower Court's decree as it is intended to affirm, as this avoids the necessity for reference to the superseded decree.[4]

A purely declaratory decree is not capable of execution and a decree originally capable of execution may subsequently become incapable of execution.[5] The question whether a decree is executable has to be settled primarily upon the form of the language of the decree itself. The test to ascertain whether a decree is executable is whether there is a direct and definite order to a definite person to do or to refrain from doing a definite thing.[6]

Every decree to be executed must, as a rule, be a *subsisting* decree.[7]

6. Territorial jurisdiction. — As a general rule territorial jurisdiction is a condition precedent to a Court executing a decree,[1] and neither the Court which passed the decree[2] nor the Court to which it is sent for execution[3] can execute it in respect of property lying outside its territorial jurisdiction. To this rule, however, there are certain exceptions :

(1) Where the suit is instituted, under S. 17, in Court A in respect of properties situated within the jurisdiction of Courts A and B, the decree passed in the suit can be

('69) 4 Mad H C R 32 (39) (DB). (Do.)
[*See also* ('42) 29 AIR 1942 Oudh 84 (87) (DB). (Execution of trial Court's decree — Execution stayed under O. 41, R. 5—Appeal dismissed and stay order discharged — Decree-holder can apply to execution Court to resume execution proceedings — Fresh application is not necessary even where trial Court's decree is affirmed— The trial Court's decree is not wiped out for all purposes.)]

3. ('84) 6 All 48 (49) (DB).
† ('82) 4 All 376 (378) (FB).
('85) 7 All 366 (368, 369) (DB).
('83) 5 All 589 (590) (DB). (Costs of lower Court awarded although not specified in appellate decree.)

4. † ('73) 14 Moo Ind App 465 (492) : 10 Beng L R 101 (114) (PC).

5. ('13) 19 Ind Cas 375 (376) (All). (Where a decree gives a life estate to *A* and he dies before execution is taken out, it becomes incapable of execution.)
('34) 21 AIR 1934 Cal 402 (404) : 61 Cal 148. (Decree embodying the contract between parties is a declaratory decree.)
('95) 19 Bom 546 (549) (DB). (Decree superseded by agreement—No execution.)
('95) 22 Cal 903 (908). (Decree creating charge—Remedy by way of suit.)
('95) 22 Cal 859 (863, 864) (DB). (Do.)
('98) 2 Cal W N 33 (33). (Do.)
('21) 8 AIR 1921 Lah 376 (377).
('82) 4 Mad 219 (220) (DB). (Decree incapable of execution being too indefinite.)
('07) 2 Mad L Tim 94 (95). (Decree directing performance of puja and giving honours etc., is a declaratory decree.)
('26) 13 AIR 1926 Nag 158 (160) : 21 Nag L R 148. (Part capable of execution if independent, is executable.)
('34) 21 AIR 1934 Pesh 3 (4). (The insertion of a clause that decree may be executed cannot change its nature.)
[*See also* ('80) 5 Cal L Rep 176 (178).]
Also see S. 47 Note 33.

6. † ('34) 21 AIR 1934 Mad 680 (680, 681).
[*See also* ('42) 29 AIR 1942 Oudh 1 (3) : 17 Luck 249 (DB). (Compromise decree—Executability—If the compromise is mentioned in the operative part of the decree it is capable of execution.)
('41) 28 AIR 1941 Oudh 587 (589, 590) : 17 Luck 121 (DB). (Where an award made a rule of Court provided that in default of payment of the instalments the entire balance would become immediately due and in lieu thereof the property hypothecated was to be deemed as foreclosed and the rights of the judgment-debtor were to be deemed extinguished from that date, it was held that such decree was not purely a declaratory one and could be executed.)]

7. ('03) 30 Cal 718 (721) (DB).
('06) 29 Mad 175 (176) (DB). (Attachment when *ex parte* decree had been set aside—Void.)
('33) 20 AIR 1933 Lah 859 (859). (Preliminary decree and final decree — Appeal from preliminary decree and compromise modifying such decree — Final decree as such cannot be executed unless fresh final decree is obtained.)

Note 6

1. ('29) 16 AIR 1929 Lah 645 (646).
2. ('29) 16 AIR 1929 Cal 818 (818): 57 Cal 67 (DB).
('81) 7 Cal 410 (412) (DB).
† ('30) 17 AIR 1930 Cal 502 (503,504): 57 Cal 964 (DB). (Rule has primary reference to execution as defined in S. 51 *(b)* and not applicable to sales by receivers.)
‡ ('11) 39 Cal 104 (109) : 11 Ind Cas 417 (418) (DB).
('91) 18 Cal 526 (530) (DB).
✠ ('90) 17 Cal 699 (703) (FB).
(1862) 1 Hyde 136 (139).
('32) 19 AIR 1932 Pat 148 (149) : 11 Pat 473 (DB).
Also see S. 17 Note 8.
3. ('39) 26 AIR 1939 Pat 532 (533): 18 Pat 670 (DB).

executed by Court A even in respect of properties situated within the jurisdiction of Court B. The reason is that where a Court has *acquired* jurisdiction in a suit, such jurisdiction will *continue* in execution proceedings also.[4] Court A can also send the decree for execution to Court B and the latter Court can then execute the decree against such property.[5]

(2) Where subsequent to the passing of a decree by Court A in respect of certain properties, the territory within which such properties are situate is transferred to the jurisdiction of Court B, Court A, nevertheless, does not cease to have jurisdiction to execute the decree and can *entertain an application* for execution.[6] But it cannot *sell* the property or order its delivery to the decree-holder.[7]

(3) Where an application for execution pending in one Court is transferred by the High Court under S. 24 to another Court in another district, the latter Court gets jurisdiction to execute the decree in its entirety and thus obtains the same territorial jurisdiction as the former Court for purposes of executing that decree.[8]

(4) Where a single revenue-paying estate is situate within the jurisdiction of Court A and of Court B, Court A can execute a decree for money passed by it by attachment and sale of the whole property.[9]

(5) The salary of a public officer or of a servant of a railway company or of a local body may be attached by a Court although the disbursing officer is outside the limits of its local jurisdiction.[10]

7. Pecuniary jurisdiction.—It has been observed in Note 5 on S. 6 that where a Court has jurisdiction at the time of the institution of a suit, it does not lose it by any change in the value of the subject-matter after the institution, and that it can pass a decree in such a suit for an amount even exceeding its pecuniary jurisdiction. It follows that the Court can execute the decree even when the decretal amount *plus* the interest or mesne profits exceeds the limits of its pecuniary jurisdiction.[1]

See also Note 5 on section 39.

8. Executing Court, if can go behind decree.—An executing Court cannot go behind the decree.[1] In other words, the jurisdiction of the Court executing a decree

('20) 7 AIR 1920 Mad 505 (506): 43 Mad 135 (DB).
('18) 5 AIR 1918 Mad 17 (17) (DB).
[But see ('38) 25 AIR 1938 Pat 237 (238) (DB).]

4. ('42) 29 A I R 1942 Lah 123 (124). (Power of executing Court—Mortgage decree—Sale of mortgaged property even though property is beyond jurisdiction can be ordered—But Court has discretion in matter : A I R 1933 Lah 687 ; 22 Cal 871 relied on.)
† ('87) 14 Cal 661 (668) (DB). (Suit on mortgage.)
('92) 19 Cal 13 (15) (DB). (Do.)
✣('39) 26 AIR 1939 Cal 403 (409) : I L R (1939) 1 Cal 493. (Mortgage decree for sale — S. 39 does not compel transfer of decree.)
('94) 21 Cal 639 (641) (DB). (Suit on mortgage.)
('16) 3 AIR 1916 Mad 632 (632) (DB).
('28) 107 Ind Cas 195 (197) (Nag) (Where business of Court transferred under S. 150.)
('25) 12 AIR 1925 Pat 139 (139, 140) (DB). (Suit on mortgage.)
[*See also* ('02) 1902 Pun Re No. 8, p. 30 (35).]
Also see S. 17, Note 8.

5. ('18) 5 AIR 1918 Lah 63 (64) : 1918 Pun Re No. 43.
6. See Note 5 on S. 37.

[*See also* ('39) 26 AIR 1939 Rang 433 (434): 1939 Rang L R 587. (Court can issue notice to judgment-debtor living outside its own jurisdiction if an application has been made for attachment of his property inside the jurisdiction of the Court.)]
7. See Note 5 on S. 37.
8. ('42) 29 AIR 1942 Oudh 1 (8): 17 Luck 219 (DB).
9. See O. 21, R. 3.
('86) 12 Cal 307 (312) (DB).
('83) 12 Cal L Rep 404 (406) (DB).
('82) 8 Cal 703 (705) (DB).
[*See also* ('78) 2 Cal L Rep 334 (336). (The sale of part of single taluq in two districts is void.)]
10. See O. 21, R. 48, Note 1.

Note 7

1. ('86) 10 Bom 200 (202) (DB).
('33) 20 AIR 1933 Sind 128 (128) (DB). (Such a decree can be transferred for execution to another Court with like powers.)
('12) 40 Cal 56 (61): 15 Ind Cas 252 (254) (DB).
('94) 21 Cal 550 (554) (DB).
('39) 26 AIR 1939 Rang 115 (117): 1939 Rang L R 134 (DB).

Note 8

1. ('12) 34 All 321 (322):14 Ind Cas 506 (507) (DB).

must be determined with reference to and is circumscribed by the directions contained in the decree. It has no power to go behind it or question its legality or correctness.[2] (See also S. 47 Note 29.) This is based on the principle that a proceeding to enforce a

('32) 19 AIR 1932 Bom 483 (483). (Decree against father and sons without any restriction. Sons cannot in execution plead that execution against them must be restricted to their interest in the family property.)
('38) 25 AIR 1938 P C 98 (100) : 32 Sind L R 401 (PC). (In execution proceedings, the question as to whether the view of the Court which passed the decree is right or wrong is no longer open.)
('35) 22 AIR 1935 All 269 (271) (DB).
('33) 20 AIR 1933 All 113 (114) (DB).
('31) 18 AIR 1931 All 38 (40) (DB). (Decree on mortgage — Question as to legality of mortgage cannot be gone into in execution.)
('20) 7 AIR 1920 All 129 (131) : 42 All 544 (DB). (But it can recognize a discharge subsequent to decree.)
('18) 5 AIR 1918 All 96 (96) : 40 All 659 (DB).
('14) 1 AIR 1914 All 230 (231).
('98) 1898 All W N 17 (17).
('32) 19 AIR 1932 Bom 462 (463).
('22) 9 AIR 1922 Bom 195 (196) : 46 Bom 243 (DB). (Objection that a defendant was not impleaded in appeal and as such decree could not be executed adversely to him does not lie.)
('03) 5 Bom L R 1036 (1040).
('87) 11 Bom 537 (539) (DB). (Decree against property—Personal execution cannot be taken.)
('26) 13 AIR 1926 Cal 109 (110) (DB).
† ('15) 2 AIR 1915 Cal 122 (123) (DB).
('12) 15 Ind Cas 735 (738) (Cal). (A term of compromise not embodied in decree — Execution only as decree stands.)
('08) 8 Cal L Jour 20 (25) (DB). (Objection that property in a mortgage decree for sale does not belong to the judgment-debtor—Invalid.)
('04) 31 Cal 179 (182) (DB). (Pre-decree agreement cannot be set up in answer to execution.)
('36) 23 AIR 1936 Lah 704 (704) : 17 Lah 187 (DB). (Decree against all defendants—Objection by one of the defendants that he is not personally liable cannot be entertained by the executing Court.)
('35) 22 AIR 1935 Lah 549 (550). (Mortgage decree regarding certain property against father — Sons cannot object that the property was their personal property and not liable under the mortgage by the father.)
('31) 18 AIR 1931 Lah 545 (545).
('32) 19 AIR 1932 Lah 529 (530). (Decree ordering sale of property—Plea in execution that land being that of agriculturist cannot be sold by virtue of the provisions of the Punjab Alienation of Land Act cannot be taken; but see however A I R 1933 Lah 397 (399).)
('26) 99 Ind Cas 999 (1000) (Lah).
('38) 25 AIR 1938 Mad 809 (809). (Decree not showing minor as not properly served—Decree must be executed as it stands.)
† ('37) 24 AIR 1937 Mad 134 (136) : I L R (1937) Mad 329 (DB). (Decree for sale of mortgaged property—Judgment-debtor alleging that property is not liable to sale being inalienable — Executing Court is not entitled to enquire into plea : A I R 1935 Mad 647 reversed.)
('33) 20 AIR 1933 Mad 175 (176) (DB). (Personal decree against one member of a Hindu family — No decree against others — Decree-holder cannot prove in execution that the decree was against the defendant as manager.)
('32) 19 AIR 1932 Mad 557 (558). (Terms of compromise in compromise decree beyond scope of suit — Plea of non-executability cannot be raised in execution—Appeal against decree is remedy.)
('25) 12 AIR 1925 Mad 270 (271).
('20) 7 AIR 1920 Mad 183 (187) : 43 Mad 786 (DB).
('06) 29 Mad 314 (317) (DB).
('02) 25 Mad 537 (539) (DB).
('01) 24 Mad 665 (669) (DB).
('93) 3 Mad L Jour 220 (221) (DB).
('25) 12 AIR 1925 Nag 361 (362).
('32) 19 AIR 1932 Pat 184 (185) (DB). (Decree giving personal relief against defendant—He cannot plead in execution that there is no personal liability.)

2. ('43) 30 AIR 1943 Nag 165 (165) : I L R (1943) Nag 293 (DB). (Decree based on award — Validity of decree cannot be questioned on ground of want of registration of award.)
('42) 29 AIR 1942 Pat 264 (265) (DB). (Major judgment-debtor described as minor in decree — Executing Court must execute decree as it finds it —It cannot treat decree as nullity.)
('41) 28 AIR 1941 Lah 131 (133, 134) : I L R (1941) Lah 659 (DB). (Executing Court cannot question the correctness or propriety of amendment of decree — That is function of appellate Court.)
('41) 28 AIR 1941 Rang 163 (165) : 1941 Rang L R 90 (DB).
('41) 28 AIR 1941 Sind 166 (168) : I L R (1941) Kar 72 (DB).
('40) 27 AIR 1940 Sind 150 (150) : I L R (1941) Kar 79 (DB).
('40) 27 AIR 1940 Bom 277 (278) : I L R (1940) Bom 633.
('40) 27 AIR 1940 Mad 628 (629). (Decree challenged as being one against an unregistered partnership—Objection requiring investigation and not appearing on face of decree cannot be gone into.)
('40) 27 AIR 1940 Lah 7 (8). (Extraneous matters included in a decree without objection by defendant — The executing Court cannot refuse to execute decree on ground that it was extraneous to the subject matter of the suit.)
('29) 16 AIR 1929 Cal 650 (651) (DB). (Execution of amended decree — Question of propriety of amendment cannot be gone into.)
('26) 13 AIR 1926 Cal 1179 (1180) (DB). (Execution of final decree in mortgage suit—Executing Court cannot challenge validity of final decree on ground that no preliminary decree had been passed.)
('28) 1928 Mad W N 227 (227). (e. g. on the ground of want of proper representation of minor.)
('32) 19 AIR 1932 Cal 517 (520) (DB). (Decree ordering sale—Saleability of the properties cannot be questioned in execution — Remedy is appeal against decree.)

judgment is *collateral* to the judgment, and, therefore, no inquiry into its regularity or validity can be permitted in such a proceeding.[3] It follows that the executing Court must execute the decree as it stands and according to its terms.[4] It cannot enter into

('38) 25 AIR 1938 P C 98 (100) : 32 Sind L R 401 (P C).
('37) 24 AIR 1937 All 513 (514) (DB).
('33) 20 AIR 1933 All 649 (652) : 55 All 775 (FB). (Part of compromise not relating to suit but Court holding that it relates to suit and passing decree thereon—Decree is not nullity and cannot be questioned in execution.)
('31) 18 AIR 1931 All 746 (747) (DB). (Executing Court cannot refuse to execute on ground of some irregularity committed in the suit before the decree was passed.)
('15) 2 AIR 1915 All 57 (58) : 37 All 278 (DB).
('98) 20 All 337 (338, 339) (DB).
('70) 6 N W P H C R 98 (98, 99) (DB). (It cannot see whether a minor was or was not properly represented.)
('07) 1907 All W N 286 (286) (DB).
† ('35) 22 AIR 1935 Bom 95 (96) (DB). (Decree against property — Contention that it cannot be sold in execution cannot be raised.)
('33) 20 AIR 1933 Bom 298 (301, 302)(DB). (Party not taking objection to recording of a compromise cannot in execution question the legality of the compromise.)
('21) 8 AIR 1921 Bom 228 (228) : 45 Bom 503 (DB).
('35) 22 AIR 1935 Cal 631 (634): 63 Cal 92 (DB).
('33) 20 AIR 1933 Cal 496 (497, 498) (DB). (Executing Court cannot consider whether the decree as it stands is defective or faulty.)
✠('33) 20 AIR 1933 Cal 85 (89): 60 Cal 191. (Decree against person under disability without proper representation cannot be challenged on that ground in execution)
('25) 12 AIR 1925 Cal 203 (203) (DB). (Objection that the decree sought to be executed was passed against a wrong person.)
('20) 7 AIR 1920 Cal 103 (104) (DB).
† ('17) 4 AIR 1917 Cal 844 (845): 44 Cal 627 (DB). (e. g. an objection, that it was passed against a lunatic or minor not properly represented.)
('15) 2 AIR 1915 Cal 122 (123) (DB).
('10) 8 Ind Cas 26 (28) (DB) (Cal). (Objection that a decree was passed against an infant represented by his mother as his guardian *ad litem* in contravention of O. 32 R. 4.)
('02) 6 Cal W N 796 (798) (DB).
('34) 21 AIR 1934 Lah 438 (439) : 15 Lah 772 (DB).
('33) 20 AIR 1933 Lah 46 (46) (DB). (Award made rule of Court—Decree not a nullity on the face of it—Executing Court cannot go behind decree.)
('32) 19 AIR 1932 Lah 534 (534) : 14 Lah 6 (DB).
('32) 19 AIR 1932 Lah 529 (530). (Plea that property being of an agriculturist cannot be sold, cannot be raised for first time in executing Court when decree orders sale of that property.)
('26) 99 Ind Cas 535 (536) (Lah). (Execution of award—Validity of award, if can be gone into.)
('24) 11 AIR 1924 Lah 448 (448) : 5 Lah 54 (DB). (A minor not properly represented.)
('20) 7 AIR 1920 Lah 79 (80). (But executing Court must decide about executability of decree.)
('13) 1913 Pun Re No. 68, Page 254 (256).
('38) 25 AIR 1938 Mad 144 (144)(DB). (Final decree providing for sale of a particular item to discharge prior mortgage debt — Executing Court cannot question such direction.)
† ('35) 22 AIR 1935 Mad 598 (599).
('34) 21 AIR 1934 Mad 40 (44): 57 Mad 426. (Executing Court cannot refuse to execute award under the Co-operative Societies Act unless it is apparent on the face of it that it is passed without jurisdiction.)
('33) 20 AIR 1933 Mad 197 (198).
('16) 3 AIR 1916 Mad 20 (22) : 39 Mad 570 (DB).
('82) 4 Mad 324 (325) (DB). (Objection that suit was not sustainable cannot be taken.)
('37) 20 Nag L Jour 6 (7) (DB). (Court executing award cannot question correctness of award.)
† ('18) 5 AIR 1918 Oudh 105 (108).
('36) 23 AIR 1936 Pat 93 (94, 95) : 15 Pat 51 (DB). (Court executing final decree cannot investigate whether application for final decree was time barred.)
('34) 21 AIR 1934 Pat 426 (427).
† ('34) 21 AIR 1934 Pat 203 (204): 13 Pat 17 (DB). (Compromise decree — Objection as to one of the terms being outside the scope of the suit cannot be entertained by executing Court — Remedy is by way of review or appeal.)
('33) 20 AIR 1933 Pat 161 (163) : 12 Pat 77 (DB). (Where Court passing mortgage decree definitely lays down order in which properties are to be sold, executing Court cannot ignore this order and change it.)
('32) 19 AIR 1932 Pat 237 (238) (DB).
('32) 19 AIR 1932 Pat 184 (185) (DB).
('29) 118 Ind Cas 143 (144) (DB) (Pat).
('25) 12 AIR 1925 Pat 516 (517) (DB). (Objection that suit was not sustainable cannot be taken.)
('17) 4 AIR 1917 Pat 140 (141) (DB). (e. g. an objection that it was passed against a lunatic or minor not properly represented.)
('16) 3 AIR 1916 Low Bur 36 (36) (DB).
('33) 20 AIR 1933 Sind 130 (131) (DB).
† ('11) 5 Sind L R 71 (74) : 11 Ind Cas 192 (195).

Compare foot-note (18).

3. ('40) 27 AIR 1940 Mad 628 (629, 631).
('40) 44 Cal W N 392 (393). (Objection that decree was passed without jurisdiction — Investigation necessary to determine its validity — Executing Court cannot entertain objection.)
✠('17) 4 AIR 1917 Cal 844 (847) : 44 Cal 627 (DB).

4. ('42) 29 AIR 1942 Sind 60 (61) : I L R (1941) Kar 563 (DB). (Decree for mesne profits cannot be challenged in execution on ground that plaintiff decree-holder in partition suit in which it was passed was in joint possession.)
† ('98) 20 All 397 (399) (DB).
('84) 7 All 194 (196) (DB). (Cannot execute before the period fixed in the decree.)

a criticism of the decree,[5] or give relief against its rigour,[6] or add to or alter the decree[7]

('35) 22 AIR 1935 All 359 (360) (DB). (Decree against minor plaintiffs — Guardian of the minor not shown in decree as party — Decree cannot be executed against the guardian.)
('34) 21 AIR 1934 All 793 (794). (Suit between trustee and stranger—Decree granting costs against trustee—No direction how to be executed—Trustee personally liable.)
† ('33) 20 AIR 1933 All 743 (744) (DB). (Execution Court cannot consider language of preliminary decree if it is at variance with final decree, and cannot order sale of entire mortgaged property when decree directs sale of only half of the mortgaged property.)
('22) 67 Ind Cas 753 (753, 754) (All).
('15) 2 AIR 1915 All 57 (58) : 37 All 278 (DB).
('70) 2 N W P H C R 59 (60) (DB). (Allowing payment in instalments.)
('83) 5 All 53 (54) (DB). (Whether the decree contained a direction for mesne profits or whether the payments made were right or wrong could not be considered.)
† ('32) 19 AIR 1932 Bom 462 (463). (Decree against defendants 1 and 2 only — Executing Court must execute it against defendants 1 and 2 and not against defendant 3.)
('87) 11 Bom 537 (539) (DB). (As where it directed the recovery of the money from the property mortgaged.)
('82) 1882 Bom P J 284 (284) (DB). (Objection that property in a mortgage decree for sale cannot be sold does not lie in execution.)
('70) 13 Suth W R 123 (124) (DB).
✠ ('34) 21 AIR 1934 Lah 438 (439) : 15 Lah 772 (DB). (Decree directing sale of mortgaged property —Executing Court cannot refuse to sell.)
('34) 21 AIR 1934 Lah 115 (116) : 15 Lah 326. (Decree for payment of money — Judgment-debtor cannot in execution prove that he was sued only as member of joint family and was minor when debt was contracted.)
† ('22) 67 Ind Cas 740 (740) (DB) (Lah).
('26) 13 AIR 1926 Mad 1144 (1144). (Question of marshalling decided in judgment cannot be reopened in execution.)
† ('26) 13 AIR 1926 Mad 113 (113) (DB). (Objection that execution cannot proceed against certain assets liable under decree does not lie.)
('21) 8 AIR 1921 Mad 85 (86) (DB).
† ('16) 3 AIR 1916 Mad 795 (798) (DB).
('14) 1 AIR 1914 Mad 170 (170) (DB). (Cannot refuse execution against person when decree directs.)
† ('87) 10 Mad 283 (288) (FB).
('86) 9 Mad 80 (82) (DB).
('15) 2 AIR 1915 Oudh 142 (143). (Can entertain an objection impugning the right of the decree-holder to proceed against any property other than that charged in the decree.)
('37) 24 AIR 1937 Pat 618 (619) (DB).
('25) 12 AIR 1925 Sind 318 (319) (DB). (Partition cannot be ordered in execution where decree granted only declaration.)
† ('10) 4 Sind L R 244 (246) : 10 Ind Cas 975 (976, 977) (DB).
[*See also* ('36) 23 AIR 1936 Lah 448 (449).]

5. † ('87) 11 Bom 528 (532) (DB).
('24) 11 AIR 1924 Nag 378 (381).
6. ('01) 28 Cal 353 (361) : 28 Ind App 57 (PC).
† ('32) 19 AIR 1932 Pat 237 (238) (DB). (Decree granting interest—Executing Court cannot refuse interest.)
('93-1900) 1893-1900 Low Bur Rul 375.
('35) 22 AIR 1935 Sind 140 (141) (DB). (Decree allowing instalments made rule of Court—Execution Court cannot grant relief by allowing further instalments.)
7. ('40) 27 AIR 1940 Bom 10 (11) : I L R (1939) Bom 708. (Description of property clear but incorrect in decree—Executing Court cannot rectify it.)
✠ ('74) 2 Ind App 219 (228): 24 Suth W R 193 (195) (PC).
('33) 20 AIR 1933 Pat 161 (163) : 12 Pat 77 (DB). (Mortgage decree laying down order in which properties are to be sold—Executing Court cannot sell the properties in a different order.)
† ('22) 9 AIR 1922 All 27 (28) : 44 All 350 (DB).
('19) 6 AIR 1919 All 193 (194) : 41 All 517 (DB).
('15) 2 AIR 1915 All 233 (234). (Even if the decree is ambiguous.)
('69) 1 N W P H C R 198 (199) (DB).
('09) 2 Ind Cas 296 (297) (Bom). (Adding to.)
('05) 29 Bom 79 (81) (DB). (Cannot order court-fee not required in decree.)
† ('02) 26 Bom 707 (710) (DB).
('91) 15 Bom 644 (646) (DB). (Enlarging time for payment by allowing further time under preliminary decree.)
('83) 13 Bom 106 (109) (DB). (Extension of period of redemption.)
(1864) 2 Bom H C R A C 101 (103) (DB).
('35) 22 AIR 1935 Cal 619 (620) : 63 Cal 181. (Where the executing Court and the Court which passed the decree are one and the same, the Court can amend the decree in the course of the execution.)
('35) 22 AIR 1935 Cal 245 (246) (DB).
('34) 21 AIR 1934 Cal 793 (794) (DB).
('26) 97 Ind Cas 576 (576) (Cal). (Agreement contemporaneous with decree not to execute decree cannot be pleaded in execution.)
† ('22) 9 AIR 1922 Cal 311 (313) (DB).
('17) 4 AIR 1917 Cal 288 (289) (DB). (Or amend.)
† ('12) 15 Ind Cas 719 (720) (Cal).
('01) 28 Cal 353 (361) : 28 Ind App 57 (P C).
('82) 8 Cal 332 (336) : 9 Ind App 1 (P C).
† ('78) 3 Cal 161 (170, 171) : 4 Ind App 137 (P C).
('71) 16 Suth W R 275 (275). (Even by consent of parties.)
('68) 9 Suth W R 387 (388). (Alteration in amount of the decree.)
2 Hay 113 : Marsh 244. (Alter amount.)
† ('27) 14 AIR 1927 Lah 894 (895) (DB). (Execution against person cannot be denied contrary to decree.)
('13) 1913 Pun Re No. 68: 18 Ind Cas 48 (49) (DB). (Fixing period for redemption not fixed in decree.)
('37) 24 AIR 1937 Mad 109 (109) : 1936 Mad W N 1375 (1376) (DB). (Decree silent about interest — Agreement to pay interest in execution — Executing Court cannot enquire into such agreement and modify the decree.)

even in the light of subsequent events,[8] or correct errors,[9] or grant a relief not contemplated by the decree,[10] such as allowing costs or interest or mesne profits,[11] or question the right of the person whose name is on the record to execute the decree.[12] Nor can it go into the question whether the decree was a valid one[13]

† ('35) 22 AIR 1935 Mad 429 (430) (DB).
('34) 21 AIR 1934 Mad 40 (42, 44) : 57 Mad 426. (Registrar of Co-operative Societies is a Court — Executing Court cannot refuse to execute the award nor could it amend it in any way.)
('87) 10 Mad 283 (288) (FB). (Cannot extend scope of decree.)
('37) 24 AIR 1937 Nag 120 (121): ILR (1937) Nag 344.
('24) 11 AIR 1924 Oudh 434 (435) : 21 Oudh Cas 218. (Or amend by directing a set-off.)
('16) 3 AIR 1916 Oudh 338 (339). (Cannot add premia paid by decree-holder after decree to a Fire Insurance Company to save the property.)
† ('26) 13 AIR 1926 Pat 411 (412) (DB).
('24) 11 AIR 1924 Pat 263 (264) : 3 Pat 221 (DB). (Decree for sale—Executing Court cannot require surrender of possession before ordering execution.)
('09) 3 Sind L R 137 (139) (DB).
[*See* ('97) 19 All 480 (481).
('33) 20 AIR 1933 Cal 627 (629) : 60 Cal 753. (Executing Court and Court passing decree same —Amendment made by Court not objectionable.)
('24) 11 AIR 1924 Nag 419 (421): 22 Nag LR 121).]
[*See also* ('41) 28 AIR 1941 Cal 530 (532) : ILR (1941) 2 Cal 402 (DB). (An order made under S. 36 (6) (a) (i) of the Bengal Money-lenders Act, either granting or refusing a prayer for reopening a decree does not come under S. 47, C. P. Code.)]
Also see Section 132, Note 9.

8. † ('16) 3 AIR 1916 Cal 923 (923) (DB).
('68) 10 Suth W R 95 (96) (DB).

9. ('69) 1 N W P R C R 168 (170) (DB).
('70) 2 N W P H C R 184 (185) (DB).
('86) 8 All 377 (380) (DB). (No power to amend.)
('22) 9 AIR 1922 Mad 186 (186) (DB). (No power even to amend obvious error in the decree.)
† ('35) 22 AIR 1935 Oudh 57 (58): 10 Luck 508 (DB).

10. ('42) 29 AIR 1942 Pat 196 (197) (DB). (When there is a distinct issue raised on a point in the suit, and the issue is decided against a party, it is not open to that party to obtain by execution what has been expressly denied to him by the decision in the suit.)
('41) 28 AIR 1941 Pat 566 (572) (DB). (The executing Court has no jurisdiction to hold a sale in contravention of the terms of the decree.)
† ('26) 94 Ind Cas 212 (212) (Lah)
('35) 22 AIR 1935 All 186 (187). (The Court has no jurisdiction to make any inquiry in execution as to the amount of prospective damages after the case has been decreed — The fact that the decree directs that the matter would be taken up in execution proceeding cannot invest the execution Court with jurisdiction which is not given to it by the Code or by any other law and therefore the execution Court is barred from adopting that procedure)

11. ('22) 9 AIR 1922 All 27 (28) : 44 All 350 (DB). (Award of costs not in decree.)
† ('77) 3 Cal 161 (171): 4 I.A. 137 (PC). (Interest.)
✠ ('81) 8 Cal 332 (335, 336) : 9 Ind App 1 (PC). (Interest on mesne profits.)
('75) 2 Ind App 219 (228): 24 Suth W R 193 (195) (PC). (Interest not awarded in decree.)
('71) 16 Suth W R 302 (303) (DB). (Interest on costs when not mentioned in the decree.)
('70) 13 Suth W R 11 (13) (DB).
('17) 4 AIR 1917 Mad 212 (213). (Ascertaining the amount due to a puisne mortgagee who did not defend the suit.)
('83) 5 All 53 (54) (DB). (Mesne profits.)
('25) 12 AIR 1925 Pat 807 (809, 810) : 4 Pat 440 (DB). (Future interest.)
Also see O. 20, R. 12, Note 9.

12. See O. 21, R. 16.
(1900) 27 Cal 488 (491) (DB).
('74) 21 Suth W R 219 (219, 220) (DB).
† ('74) 21 Suth W R 141 (142) (DB).
('71) 6 Beng L R App 66 (66).
† ('14) 1 AIR 1914 Mad 222 (224) : 38 Mad 832 (DB). (Where the High Court transmits a decree of the Privy Council to the District Court the decree of which was appealed against, the District Court could recognize a transfer of the decree by permitting the transferee to execute it as the position of the District Court in the circumstances cannot be compared to that of Court executing transferred decrees.)

13. ('93) 15 All 334 (335).
✠ ('01) 23 All 181 (190) : 28 Ind App 35 (PC).
('37) 24 AIR 1937 All 567 (568): ILR (1937) All 761.
('31) 18 AIR 1931 All 38 (40) (DB).
† ('24) 11 AIR 1924 All 689 (689): 46 All 571 (DB). (Overruled on another point in AIR 1933 All 252: 55 All 334 (FB).)
('87) 10 All 130 (132, 133).
('21) 8 AIR 1921 Bom 301 (302) (DB). (Decree on award—Validity of award cannot be questioned.)
✠ ('96) 22 Bom 475 (479) (DB).
('87) 11 Bom 528 (532) (DB).
('66) 2 Bom H C R 103 (105). (It cannot see whether award of interest after decree is legal or not.)
† ('11) 10 Ind Cas 532 (534) (DB) (Cal).
('10) 8 Ind Cas 26 (27, 28) (DB) (Cal).
('06) 4 Cal L Jour 475 (475) (DB).
('04) 31 Cal 922 (927) (DB).
('02) 6 Cal W N 796 (798) (DB).
('79) 4 Cal L Rep 97 (98, 99).
('70) 13 Suth W R 312 (313) (DB).
✠ ('36) 23 AIR 1936 Mad 618 (622, 623) : 59 Mad 642 (DB). (Validity of decree cannot be questioned in execution proceedings on the ground of guardian's interest being adverse to that of minor.)
† ('35) 22 AIR 1935 Mad 236 (238): 58 Mad 752 (DB).
('32) 19 AIR 1932 Mad 7 (8). (Not to enquire if judgment-debtor was a lunatic not properly represented.)
('09) 32 Mad 429 (439) (DB).
('07) 30 Mad 402 (405) (DB).
('04) 28 Mad 26 (27, 28) (DB). (Validity of personal decree cannot be questioned.)
('96) 19 Mad 249 (253) : 23 Ind App 32 (PC).

or was obtained by fraud.[14]

But, can an executing Court question the *jurisdiction* of the Court which passed the decree? Under S. 225 of the old Code corresponding to O. 21 R. 7 it was held in some cases that *the Court to which a decree was sent for execution* was not precluded from entertaining any objection as to the jurisdiction of the Court which passed the decree.[15] The words "or of the jurisdiction of the Court which passed it" which occurred in S. 225 have now been omitted in O. 21 R. 7. It has now been held that the result of this omission is that the *transferee* Court cannot question the jurisdiction of the transferor Court which passed the decree.[16]

But where the execution Court is the very Court which passed the decree, it has been generally held that a question of *territorial* or *pecuniary* jurisdiction of the Court which passed the decree cannot be allowed to be raised in execution proceedings before it,[17] but that a question as to the jurisdiction of the Court in other matters rendering the decree a nullity can be entertained even by the executing Court.[18] The Calcutta High

('89) 12 Mad 503(504)(DB). (It cannot see whether the compromise by minor was by leave of Court or not.)
('25) 12 AIR 1925 Nag 377 (378).
('38) 25 AIR 1938 Pat 594 (596) (DB).
[*See also* ('36) 23 AIR 1936 Lah 442 (442, 443). (Court executing award under Co-operative Societies Act cannot question validity of award.)]
Also see S. 47, Note 29 and S. 151, Note 2.

14. ('91) 15 Bom 307 (308) (DB).
('86) 9 Mad 80 (82, 83) (DB).
† ('31) 18 AIR 1931 All 92 (94) : 53 All 125 (DB). (Collusion.)
('06) 30 Bom 101 (107, 108) (DB).
See however O. 21, R. 7.

15. For cases, see O. 21, R. 7, Note 4.

16. For cases, see O. 21, R. 7, Note 4.

17. ('42) 29 AIR 1942 Pat 152 (155, 156) (DB). (Objection as to undervaluation of suit not taken in trial or appellate Court cannot be taken in execution proceedings.)
('41) 28 AIR 1941 Nag 36 (45, 52, 60): ILR (1941) Nag 1 (FB). (Objection as to territorial jurisdiction of Court passing decree held could not be raised in execution as it was waived— Principle of S. 21 applies to execution proceedings.)
('40) 27 AIR 1940 Sind 150 (150, 153) : ILR (1941) Kar 79 (DB). (Decree based on award—Territorial jurisdiction of Court which passed decree cannot be questioned in execution.)
('33) 20 AIR 1933 Cal 85 (87, 89) : 60 Cal 191.
✠ ('20) 7 AIR 1920 Mad 1019 (1023, 1024): 43 Mad 675 (FB).
✠ ('31) 18 AIR 1931 Rang 252(257): 9 Rang 480(FB).
('27) 14 AIR 1927 Bom 83 (84): 50 Bom 839 (DB).
('37) 24 AIR 1937 Cal 430 (431) (DB).
† ('32) 19 AIR 1932 Cal 380 (381) (DB). (Objection as to the territorial jurisdiction of the Court passing the decree.)
('75) 24 Suth W R 363 (364). (Objection to jurisdiction was taken in the transferee Court.)
('34) 21 AIR 1934 Lah 804 (805). (Objection as to undervaluation or overvaluation of suit.)
† ('32) 19 AIR 1932 Lah 289 (290):13 Lah 25 (DB).
('04) 27 Mad 118 (119, 120) (DB).
('37) 24 AIR 1937 Oudh 379(381):13 Luck 340(DB).
('35) 22 AIR 1935 Oudh 358(360):11 Luck 187 (FB).
('34) 21 AIR 1934 Pat 240 (242) : 13 Pat 290 (DB).
('38) 25 AIR 1938 Pesh 77 (78) (DB).
† ('35) 22 AIR 1935 Pesh 142 (143).
[*See also* ('40) 27 AIR 1940 Lah 280 (280, 281). (Executing Court can only question the decree of a Court on the ground of lack of inherent jurisdiction and cannot question it on the ground of illegal exercise of jurisdiction or a material irregularity in the exercise of jurisdiction.)]

18. ('42) 29 AIR 1942 Lah 237 (238) (DB). (Executing Court can enquire whether Court which passed decree had inherent jurisdiction and can refuse to execute decree if it was without jurisdiction — Liquidator's order under S. 42 (2) (b), Co-operative Societies Act, stands on no higher footing —Executing Court can refuse to execute it if it was without jurisdiction: AIR 1940 Lah 280, Reversed.)
('42) 29 AIR 1942 Lah 129 (131) (DB). (Executing Court can decide whether Court or arbitrators had inherent jurisdiction to pass decree or award—For this purpose it can hold the necessary inquiry.)
('40) 27 AIR 1940 Lah 280 (280, 281).
('40) 27 AIR 1940 Mad 628 (629).
† ('40) 27 AIR 1940 Sind 150(152,153):ILR(1941) Kar 79 (DB). (An executing Court can inquire into and decide that a decree is a nullity not on the ground of jurisdiction but because a decree passed is not a decree at all such as in the case of a decree against a person who is dead or is a decree in arbitration proceedings under the Arbitration Act which is no decree at all.)
('33) 20 AIR 1933 All 163 (165) (DB). (Decree in a suit of a nature not cognizable by Civil Court —Decree *ultra vires* and not executable.)
('33) 20 AIR 1933 All 751 (752) (DB).
('18) 5 AIR 1918 All 226 (237) : 40 All 423 (DB). (Decree against dead person.)
('86) 8 All 377 (380) (DB). (Decree in accordance with judgment amended without notice—Objection as to non-executability of decree can be taken in execution.)
† ('95) 17 All 478 (482) (DB). (Decree against dead person.)
('31) 18 AIR 1931 Bom 295 (296). (Executing Court can question the decree on patent want of jurisdiction.)
† ('29) 16 AIR 1929 Nag 357 (357, 358) : 26 Nag L R 60 (DB). (Do.)

Court has, however, broadly held in some decisions[19] that an executing Court can refuse to execute a decree on the ground that it was passed by a Court having no jurisdiction. Such a broad statement would not be correct. (See also NOTES 29, 30 and 31 on S. 47). It has been held in some decisions that where there is an express prohibition by any enactment against the sale of any property in execution, the executing Court cannot sell such

('09) 4 Ind Cas 137 (137, 138) (DB) (Bom). (Case adjourned for argument—In the meanwhile plaintiff died—Decree in favour of plaintiff is a nullity.)
('39) 43 Cal W N 271 (272) (DB).
† ('32) 19 AIR 1932 Cal 9 (10, 11) : 58 Cal 1018 (DB). (Award under Arbitration Act—No decree can be passed thereon—If passed, it is a nullity.)
('30) 17 AIR 1930 Cal 327 (328) : 57 Cal 931 (DB). (Decree against dead person.)
('13) 20 Ind Cas 506 (506) (DB) (Cal). (Do.)
('10) 5 Ind Cas 523 (524) (DB) (Cal). (Do.)
('79) 3 Cal L Rep 192 (193). (Do.)
('38) 25 AIR 1938 Lah 515 (519) (DB).
('38) 25 AIR 1938 Lah 129 (133) (DB).
('34) 21 AIR 1934 Lah 623 (624). (Absence of inherent jurisdiction — Decree nullity — Executing Court can refuse to execute.)
('35) 22 AIR 1935 Mad 417 (418) (DB).
('33) 20 AIR 1933 Mad 362 (363). (Want of jurisdiction not apparent on the face of decree—Executing Court cannot go into a disputed question of fact regarding want of jurisdiction.)
('26) 13 AIR 1926 Mad 429 (430). (Decree against minor not represented in suit is a nullity and can be questioned in execution.)
('16) 3 A I R 1916 Mad 656 (656) : 38 Mad 682. (Decree against dead person.)
('03) 26 Mad 31 (33) (DB). (Objection to execution on ground of compromise decree being opposed to public policy, i. e., decree for sale of an office—See O. 23, R. 3.)
† ('36) 23 A I R 1936 Nag 1 (3) : 31 Nag L R Sup 57 (FB).
('35) 22 AIR 1935 Nag 235 (236) : 31 Nag LR 403 (DB). (Decree against minor not represented by guardian ad litem is nullity — Its validity can be questioned in execution proceedings.)
('33) 20 A I R 1933 Nag 211 (212, 213) (DB). (Want of jurisdiction must be patent on the face of the decree.)
('38) 25 AIR 1938 Oudh 213 (214) (DB).
('35) 22 AIR 1935 Oudh 358 (360) : 11 Luck 187 (FB).
('35) 22 AIR 1935 Oudh 57 (58) : 10 Luck 508 (DB).
('34) 21 AIR 1934 Oudh 75 (84, 85) : 9 Luck 435 (FB). (Want of inherent jurisdiction.)
('37) 24 AIR 1937 Pat 618 (619) (DB).
('36) 23 AIR 1936 Pat 303 (305) (DB). (If a Court gives personal decree against a puisne mortgagee behind his back and when there is no prayer for the personal decree, the puisne mortgagee is entitled to object in execution proceedings that the decree is not capable of execution.)
('34) 21 AIR 1934 Pat 145 (146) (DB). (Registrar's decision under the Co-operative Societies Act being a nullity—Execution Court can refuse to execute the same.)
† ('19) 6. AIR 1919 Pat 430 (431) : 4 Pat L Jour 240 (FB). (Decree against dead person.)
('33) 20 AIR 1933 Rang 121 (127) : 11 Rang 125. (Burma Co-operative Societies Act, Ss. 47 and 49 —Application for execution of order of liquidator in Civil Court — Civil Court is entitled to see the legality of the order.)
('12) 5 Sind L R 260 (263) : 15 Ind Cas 832 (833). (Decree against dead person.)
[*See* ('42) 29 A I R 1942 Lah 260 (263) : I L R (1942) Lah 307 (FB). (Partition decree drawn up without proper stamp cannot be said to be no decree at all, although it cannot be executed till the proper stamp is supplied.)]
[But see ('41) 28 AIR 1941 Rang 163 (165) : 1941 Rang L R 90 (DB). (Although a decree passed without inherent jurisdiction can be declared *ab initio* null and void if proceedings in that behalf are taken as provided by law, the executing Court cannot challenge the validity of the decree if the party affected thereby fails to take such proceedings.)
('23) 10 AIR 1923 All 141 (144) : 45 All 198 (DB). (Where it was held that where a final decree is objected to on the ground that preliminary decree was passed against a dead person, the Court cannot treat the decree as a nullity.)
† ('30) 17 A I R 1930 Bom 141 (144) : 54 Bom 96 (Death of guardian ad litem —No fresh guardian —Decree not a nullity—Only an irregularity.)
† ('17) 4 AIR 1917 Cal 844 (847) : 44 Cal 627 (DB). (Question was assumed to be one of regularity or validity of the decree and not of jurisdiction.)
('36) 23 AIR 1936 Lah 766 (767).
('32) 19 AIR 1932 Lah 291 (292). (Decree against firm on reference by one partner — Executing Court cannot enter into question of its validity even though nullity.)
('26) 13 AIR 1926 Mad 128 (128). (Not clear as to what kind of jurisdiction was in question.)
('32) 19 A I R 1932 Mad 7 (8). (Case of a lunatic unrepresented.)
('15) 2 AIR 1915 Mad 683 (684) (DB). (Observations were obiter as it was held that actually there was no absence of jurisdiction.)
('36) 23 AIR 1936 Rang 87 (88) : 14 Rang 94 (SB).]

19. ('42) 29 A I R 1942 Cal 496 (497, 498) : I L R (1942) 1 Cal 149.
('25) 12 A I R 1925 Cal 907 (909) : 53 Cal 166 (FB). (The observation in AIR 1922 Cal 136 to the contrary must be taken to be no longer law.)
('37) 66 Cal L Jour 33 (35).
† ('37) 24 AIR 1937 Cal 481 (482).
[*See* ('31) 18 AIR 1931 Cal 546 (548). (An execution Court can only go into the question of the validity of the decree which is before it for execution upon questions of jurisdiction, namely pecuniary, territorial or personal jurisdiction — The question as to whether an appeal is competent or not to a higher Court cannot be gone into in the execution proceedings.)]
[*See also* ('38) 25 AIR 1938 Cal 575 (576).
('37) 24 AIR 1937 Cal 565 (568).
('33) 20 AIR 1933 Cal 267 (268). (A case under the Co-operative Societies Act.)]

property although the decree may direct such sale.[20] In the undermentioned case[21] the Madras High Court held that the same principle was also applicable to cases where the objection as to inalienability was taken on the ground of public policy. But it has been held that where the want of jurisdiction is not apparent on the face of the decree, the party in execution cannot raise a disputed point of fact which, if his contention is true, would have deprived the Court of its jurisdiction to pass a decree in that matter.[22]

The executing Court is not precluded from finding out whether any decree had been passed at all, and merely because something is written on a decree form it does not necessarily make it a decree. Hence, where there is no judgment to support the so-called decree which is merely something written on a decree form, the decree is a complete nullity and the executing Court can disregard it.[23]

In the undermentioned case,[24] a suit which under the provisions of the Agra Tenancy Act was cognizable exclusively by a Revenue Court was instituted in a Civil Court. It was held by a Full Bench of the Allahabad High Court that where in such a case no objection was taken in the trial Court or if taken was disallowed, the objection could not again be raised in the execution proceedings. The decision proceeded on the view that the effect of the provisions of the Agra Tenancy Act was to make such objection analogous to the objection to the place of suing under S. 21 of the Code.

Although compromise and consent decrees also cannot be challenged by the executing Court,[25] such decrees are subject, like contracts between the parties, to the exercise of powers of a Court of equity to relieve against forfeiture and penalties.[26] For a fuller discussion of the subject, see O. 23 R. 3, Note 27; see also S. 47, Note 79.

Where the executing Court has to decide upon a question of fact which is inadequately *recited* in the decree but about which there is no adjudication in the decree, it can examine the record and ascertain for itself what the actual facts are.[27]

9. Executing Court may construe decree. — Although an executing Court cannot go behind a decree, but must execute it as it stands, yet, when the terms of a

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20. ('43) 30 AIR 1943 Bom 54 (55,56): I L R (1943) Bom 19 (DB). (Execution in contravention of S. 1 Bombay Bhagdari and Narwadari Tenures Act, V of 1862.)
('40) 27 AIR 1940 Mad 628 (629, 630). (Obiter).
('21) 8 AIR 1921 All 118 (119) : 43 All 547 (SB). (S. 20 of Agra Tenancy Act.)
('34) 21 AIR 1934 Lah 609 (609). (Decree in contravention of S. 16, Punjab Alienation of Land Act.)
† ('33) 20 AIR 1933 Lah 397 (399) (DB). (Case under Punjab Alienation of Land Act.)
[But see ('31) 18 AIR 1931 Lah 545 (545). (Decree in contravention of Punjab Alienation of Land Act.)]
21. ('37) 24 AIR 1937 Mad 918 (921).
22. ('42) 29 AIR 1942 Pat 152 (155) (DB).
('40) 27 AIR 1940 Mad 628 (631).
† ('40) 27 AIR 1940 Sind 150 (150) : ILR (1941) Kar 79 (DB). (An executing Court cannot go behind an award filed in Court with consent of the parties and question its validity when on the face of it, it is not a nullity, even if the Court filing it had no territorial jurisdiction.)
('40) 44 Cal W N 392 (393). (Where it is not apparent but requires some investigation, the executing Court cannot entertain the objection. A I R 1925 Cal 907 : 53 Cal 166 (F B) distinguished.)
('37) 24 AIR 1937 Mad 134 (136) : I L R (1937) Mad 329 (DB).
† ('33) 20 AIR 1933 Mad 362 (363).
[But see ('37) 24 AIR 1937 Mad 918 (921). (No distinction to be made between cases where evidence is necessary and cases where no evidence is necessary to decide the point.)]
23. ('38) 25 AIR 1938 Rang 372 (375) (DB).
24. † ('34) 21 AIR 1934 All 609 (611, 613, 614) : 57 All 1 (FB).
25. ('40) 27 AIR 1940 Lah 46 (46). (Consent decree—Amount payable in instalments—Default clause — Executing Court will not grant relief against forfeiture.)
('14) 1 AIR 1914 Bom 127 (127) (DB).
('07) 31 Bom 15 (22) (FB).
26. ('16) 3 AIR 1916 Cal 391 (392) (DB).
† ('14) 1 AIR 1914 Mad 18 (18) (DB).
('35) 22 AIR 1935 All 862 (868): 58 All 230 (DB).
('37) 24 AIR 1937 Nag 413 (415). (Court has jurisdiction to set aside such decree on any ground which would invalidate an agreement between parties.)
('37) 24 AIR 1937 Pat 542 (544) : 16 Pat 395 (DB). (But a Court of Equity will refuse to aid a defaulter if the forfeiture is wilful or is the result of gross negligence.)
See also Note 79 on S. 47 Note 27 on O. 23, R. 3 and S. 48 for a full discussion.
27. ('21) 8 AIR 1921 Pat 360 (361) : 5 Pat L Jour 402 (DB).

decree are ambiguous, it can construe the decree to ascertain its precise meaning.[1] For this purpose, it is competent to the executing Court to refer not only to the judgment but also to the pleadings in the case.[2] The Court should, if possible, adopt such a construction as will make the decree in accordance with law.[3] So also, the Court must adopt a construction which will make the decree in conformity with the judgment.[4] See also Note 76 on S. 47.

9a. Executing Court may declare decree to be incapable of execution. — Where a decree affecting immovable property is compulsorily registrable but is not registered, the executing Court can declare that the decree is not capable of execution. In doing so, it cannot be said to go behind the decree.[1] Where a partition decree is drawn up without proper stamp and the executing Court without objection proceeds to execution, there is no lack of inherent jurisdiction in the executing Court but there is an illegality or error affecting its jurisdiction. Once the proper stamp is supplied, the execution application instead of being struck off, might proceed as from that date. But this would not validate the proceedings that had taken place before the proper stamp was supplied.[2]

9b. Power of executing Court to fix order in which mortgaged properties are to be sold. — Where a mortgage decree itself fixes the order in which the mortgaged properties are to be sold, the executing Court cannot go behind the decree and sell the properties in a different order.[1] But where the mortgage decree does not fix any

Note 9

1. ('89) 16 Cal 173 (183) : 15 Ind App 186 (PC).
† ('96) 18 All 344 (347) (SB).
('17) 4 AIR 1917 P C 197 (200) (PC).
('80) 2 All 497 (498) (FB).
† ('25) 12 AIR 1925 Cal 1243 (1243). (To ascertain what was decreed.)
('09) 4 Ind Cas 56 (57) (DB) (Cal).
('74) 22 Suth W R 330 (331) (DB). (Identity of subject of decree may be ascertained in execution.)
('71) 16 Suth W R 171 (172) (DB). (Do.)
('33) 20 AIR 1933 Lah 505 (506). (Decree passed on basis of award should be construed in the light of the award only.)
† ('29) 16 AIR 1929 Lah 437 (438).
('35) 22 AIR 1935 Mad 660 (662) (DB). (Decree not providing for payment of interest but not worded as to be free from ambiguity — Construction that rights are reserved by decree-holder possible — Interest can be allowed in execution.)
† ('35) 22 AIR 1935 Mad 576 (577). (Decree for declaration that decree-holder has rights as Periathanakkar and injunction that defendants should not interfere with the decree-holder's exercise of such rights—Rights not specifically mentioned in decree —Subsequent dispute as to whether certain act of defendants amounts to interference of decree-holder's rights—Executing Court has power to deal with it.)
('38) 25 AIR 1938 Pat 195 (196) (DB). (The Court can ascertain the property which is the subject of decree and for this purpose it is entitled to look at paramount description of property and abide by it.)
('30) 17 AIR 1930 Pat 536 (537) : 9 Pat 499 (DB).
[*See* ('32) 19 AIR 1932 Oudh 77 (78) : 7 Luck 421. (Language of decree plain—Court cannot look at its judgment to interpret decree.)]
2. ('42) 29 AIR 1942 Pat 196 (197) (DB). (Court interpreted the decree by reference to judgment and the plaint.)
('37) 24 AIR 1937 Mad 118 (121). (The judgment can always be referred to in interpreting decree—*Obiter*.)
('95) 5 Mad L Jour 230 (231).
† ('33) 20 AIR 1933 Lah 41 (42) : 14 Lah 230.
('99) 3 Cal W N 637 (645) (SB).
('17) 4 AIR 1917 Mad 154 (156) (DB).
('26) 13 AIR 1926 Nag 480 (482). (Decree read along with terms of award.)
('35) 22 AIR 1935 Oudh 39 (40) : 10 Luck 416.
('32) 19 AIR 1932 Oudh 77 (78) : 7 Luck 421. (Reference to judgment may be made only if the decree is ambiguous.)
('30) 17 AIR 1930 Oudh 366 (367) (DB).
† ('32) 19 AIR 1932 Pat 12 (13) (DB).
('31) 18 AIR 1931 Pat 177 (178) : 10 Pat 305 (DB)
('29) 16 AIR 1929 Pat 746 (747).
('27) 14 AIR 1927 Pat 141 (141) (DB).
('20) 7 AIR 1920 Pat 118 (119) (DB).
[*See* ('41) 28 AIR 1941 Pat 566 (569) (DB).
('40) 27 AIR 1940 Bom 277 (278) : I L R (1940) Bom 633. (To determine whether the executing Court has jurisdiction to execute a particular decree concise statements, prayers of plaint and judgment can be looked at.)]
3. ('01) 23 All 220 (226) : 28 Ind App 28 (PC).
('97) 19 All 174 (179) (DB).
('99) 21 All 361 (373) (FB).
('03) 5 Bom L R 802 (803) (DB). (Must be construed fairly and reasonably.)
('69) 12 Suth W R 99 (100). (But executing Court cannot construe decree differently from the expressed intention of the decree.)
4. ('30) 17 AIR 1930 Mad 458 (460) (DB).

Note 9a

1. ('37) 24 AIR 1937 All 282 (284).
[But see (10) 42 Bom L R 1123 (1129). (Decree on award — Question of registerability of award and decree cannot be raised in execution proceedings.)]
2. ('42) 29 AIR 1942 Lah 260 (263, 264) : I L R (1942) Lah 307 (FB).

Note 9b

1. † ('33) 20 AIR 1933 Pat 161 (163) : 12 Pat 77 (DB).

order in which the mortgaged properties are to be sold, the executing Court has the power to prescribe such order.[2]

9c. Power of executing Court under rent decree. — A Court executing a rent decree has no jurisdiction to refuse execution of the decree against the property of the judgment-debtor other than the tenure in arrears or to direct that the decree-holder must proceed in the first instance against the tenure in arrears.[1]

Where a Rent Reduction Officer, having jurisdiction in the matter, reduces the rent due under a decree the executing Court cannot ignore his order and execute the decree as it stood originally.[2]

9d. Power of executing Court to enforce agreements between parties in course of execution proceedings. — See Section 47, Note 41.

10. Simultaneous executions. — There is nothing in law to prevent the simultaneous execution of decrees in more than one Court,[1] although it is a matter for the discretion of the Court to permit or refuse concurrent execution[2] and in practice concurrent execution is not generally carried out.[3] But a decree cannot be executed against the *same property* in more than one Court.[4]

Where the Court at A sends a decree for execution to the Court at B within whose jurisdiction the property to be proceeded against is situate, and an application for *sale* of such property is made to Court A it has been held by the Privy Council in the undermentioned case[5] that it was not made to a "proper Court" within the meaning of Art. 182 of the Limitation Act. (See also the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 182, Note 89.) The reason is that Court A cannot, as has been seen in S. 37, *sell* immovable property situate outside its territorial jurisdiction and an application to that Court for sale of such properties cannot be deemed to be an application made to a "proper Court." The decision does not touch the question of the maintainability of simultaneous execution applications. On the strength of the said decision, it was, however, held in the undermentioned cases[6] that simultaneous executions are not

2. ('31) 18 AIR 1931 All 657 (658, 659) (DB). (Final decree silent about the order in which the mortgaged properties may be sold — Executing Court may and ought to prescribe the order.)

Note 9c

1. † ('35) 22 AIR 1935 Cal 544 (544) (DB).
2. ('41) 28 AIR 1941 Pat 390 (393) (DB). (Reduction of rent under Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, IX of 1938 —If the order is wholly without jurisdiction, the executing Court can ignore it.)

Note 10

1. † ('40) 27 AIR 1940 Sind 11 (13) : I L R (1940) Kar 46 (DB).
('17) 4 AIR 1917 All 129 (130).
† ('72) 14 Moo Ind App 529 (540) (PC).
† ('36) 23 AIR 1936 All 655 (656) (DB). (AIR 1917 All 129 followed.)
('29) 16 AIR 1929 Bom 418 (419) : 53 Bom 844. (Dissenting from AIR 1922 Bom 359.)
('35) 22 AIR 1935 Cal 268 (270) (DB). (Court has jurisdiction to execute its decree and at the same time send it to another Court for simultaneous execution.)
('05) 1 Cal L Jour 315 (318) (DB).
† ('82) 8 Cal 687 (690) (DB).
('30) 17 AIR 1930 Lah 199 (201). (Transfer of decree—Transferor Court can execute decree.)
('87) 1887 Pun Re No. 83, p. 174 (175).
('28) 15 AIR 1928 Mad 1154 (1156) (DB). (Different properties.)
('17) 4 AIR 1917 Mad 591 (591) (DB).
† ('37) 24 AIR 1937 Nag 305 (307) : I L R (1937) Nag 440 (DB).
('27) 14 AIR 1927 Nag 367 (367) : 23 Nag L R 126. (Transfer of decree to Court A — Application to Court which passed the decree could be made to transfer the same decree to Court B.)
('27) 14 AIR 1927 Rang 258 (261) : 5 Rang 397 (DB).
2. † ('21) 8 AIR 1921 Low Bur 25 (26) : 11 Low Bur Rul 15.
('69) 1869 Pun Re No. 49.
[*See also* ('29) 16 AIR 1929 Cal 529 (530) : 56 Cal 1176. (In ordering simultaneous execution, oppression should be avoided by prescribing proper safeguards.)]
3. ('23) 10 AIR 1923 Pat 224 (224, 225) : 2 Pat 328 (DB).
('82) 8 Cal 687 (690) (DB). (Power should be sparingly exercised.)
('34) 21 AIR 1934 Rang 231 (232) (DB).
4. ('09) 3 Ind Cas 105 (108) (DB) (Cal).
5. ('16) 3 AIR 1916 P C 16 (18) : 39 Mad 640 : 43 Ind App 238 (P C).
Also see O. 21 R. 10, Note 6.
6. ('23) 10 AIR 1923 Pat 384 (384) : 2 Pat 247 (DB).
('25) 12 AIR 1925 All 276 (277) : 47 All 57 (DB).
('22) 9 AIR 1922 Bom 359 (360) : 47 Bom 56 (DB). (Dissented from, in A I R 1929 Bom 418.)

permissible in two Courts. It is submitted that the latter view is not correct. Their Lordships' observations in the Privy Council case, during the course of the argument, that the tendency of the Code is against concurrent executions, appear to have influenced the decisions of the High Courts. But the observations must be taken to refer to concurrent executions against the *same property*.

See for further Notes O. 21 R. 21 ; see also section 42, Note 3.

11. Execution proceedings and res judicata. — Where an executing Court decides upon the construction of a decree in a particular manner, the decision is binding between the parties in subsequent execution proceedings though not as *res judicata* yet on general principles as an interlocutory judgment in the suit. See Note 23 on S. 11.

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39. [S. 223, paras. 2 & 3.] (1) The Court which passed a decree[3] may, on the application of the decree-holder, send it for execution to another Court,[5] —

Transfer of decree.

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain,[6] within the local limits of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court,[7] or

(c) if the decree directs the sale or delivery of immoveable property[8] situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers[9] for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

[1877, S. 223, paras. 2 and 3; 1859, Parts of Ss. 285 and 286. See Section 20, O. 21 Rr. 35, 36, 82 to 103 and Order 34.]

Synopsis

1. Legislative changes.
2. Scope and applicability of the section.
3. "Court which passed a decree"
4. "Decree-holder." See Section 2 (3), Note 2.
5. When and to what Court a decree may be sent for execution.
6. Residence outside jurisdiction —Clause (a).
7. Having property outside jurisdiction — Clause (b).
8. Decree for sale or possession of property outside jurisdiction—Clause (c).
9. Court considering that execution should be in another Court — Clause (d).
10. Transfer of small cause decree for execution.
11. Jurisdiction of transferring Court after transfer. See Section 42, Notes 1 and 3.
12. Step-in-aid of execution.
13. Jurisdiction of transferee Court. See Notes 6 and 7 on Section 38 and Notes 1 and 3 on Section 42.
14. Madras Village Courts Act (I of 1889).
15. Simultaneous execution. See Note 10 on Section 38.
16. Appeals from orders under this section.
17. Notice of transmission.
18. Form of application under the section.

('36) 23 AIR 1936 Oudh 64 (65) (DB). (Property to be sold situated in two districts—Decree transferred for sale of property outside jurisdiction — During pendency of such application, another application to Court which passed the decree for sale of property situated within jurisdiction—Not competent.)

('25) 12 AIR 1925 Oudh 428(428):29 Oudh Cas 84.

('39) 26 AIR 1939 Pat 289 (290) (DB). (Section 39 is disjunctive.)

[But see ('23) 10 AIR 1923 Pat 224 (224, 225) : 2 Pat 328 (DB).]

NOTE to the Synopsis. See the Notes indicated for the following topics :

"Another Court." See Note 5.
Award. See Note 3.
Court to which decree is sent for execution. See Note 13.
Execution Court — Going behind decree. See Section 38, Note 8.
Transferee Court —Jurisdiction of — When ceases See Note 13.
Jurisdiction of executing Court. See Notes 6, 7 and 8.
Limitation—Questions of. See Note 12.
"May." See Note 2.
Power of transferring Court. See Notes 5 and 11.

1. Legislative changes. — The words "*or delivery*" in clause (*c*) of sub-section (1) and "*of competent jurisdiction*" in sub-section (2) are new.

2. Scope and applicability of the section. — Section 38 provides that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. This section lays down the conditions under which a decree can be so sent. The use of the word "may" shows that the section is directory and not mandatory[1] and gives the Court a *discretion* either to execute the decree itself or to send it to another Court for execution.[2] (See also Note 7.)

The test of the applicability of the section is to see whether the Code regulates the procedure of both the transferor and the transferee Courts.[3] Where there is no power to make a transfer at all, the proceedings of the transferee Court will be void *ab initio*.[4]

A transfer under this section must be of the *whole* decree and not only a part thereof.[5] Nor can the transfer be for a *limited purpose only*.[6] Clauses (a), (b) and (c) of sub-s. (1) only define the circumstances under which a decree may be transferred for execution to another Court and do not in any way restrict or limit the powers of the Court to which a decree is transferred. Hence, the mere fact that a decree has been transferred to another Court on the ground of the judgment-debtor having immovable property within the jurisdiction of such Court, does not preclude such Court from *arresting* the judgment-debtor.[7]

Where a decree of a trial Court has become merged in that of the Appellate Court, the latter decree is the only decree which can be transferred under this section.[8]

An award filed in Court under S. 11 of the Arbitration Act of 1899 was enforceable under S. 15 of that Act as if it were a decree of the Court and therefore it could be transferred under this section for execution as a decree.[9] But S. 201 of the Companies

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Section 39 — Note 2

1. ('92) 19 Cal 13 (15, 16) (DB).
† ('39) 26 AIR 1939 Cal 403 (409) : I L R (1939) 1 Cal 493 (DB). (The fact that a portion of the mortgaged property is outside its territorial jurisdiction does not oust the jurisdiction of the Court to sell it and a transfer need not necessarily be made.)
('37) 24 AIR 1937 Cal 570 (572) (DB).
2. ('39) 26 AIR 1939 Cal 651 (654, 655) (DB). (Discretion must be exercised in a judicial manner.)
('88) 15 Cal 667 (670) (DB).
¶[*See* ('68) 9 Suth W R 346 (347). (Under the Code of 1859 it was held that it was only where a decree could not be executed by the Court which passed it that it could be sent to another Court for execution.)]
3. † ('07) 34 Cal 576 (581, 582) (DB). (Decree passed by a Court established under the Benares Family Domains Regulation VII of 1828.)
('37) 24 AIR 1937 Cal 557 (558) : I L R (1937) 2 Cal 734. (Not necessary that the whole of the Civil Procedure Code should be applicable to the transferee Court.)
4. ('06) 33 Cal 451 (456) (DB). (Transfer of a certificate under Public Demands Recovery Act (Bengal Act I of 1895) — No power. In so far as the decision holds that the transfer is unauthorised under the circumstances mentioned therein, it is submitted that it is not correct—The High Court of Madras in an analogous case had held a contrary view : *see* ('98) 8 Mad L Jour 1 (3).)
5. ('17) 4 AIR 1917 Pat 70 (71) (DB). (Transfer of the share of only one of the decree-holders is irregular.)
('35) 22 AIR 1935 Cal 118 (119) (DB).
6. ('17) 4 AIR 1917 Pat 221 (222) (DB). (Transfer only to enable the decree-holder to share in rateable distribution.)
7. ('38) 25 AIR 1938 Mad 27 (28).
Also see Note 7 and O. 21 R. 10, Note 6.
8. ('33) 20 AIR 1933 Mad 872 (873).
9. ('31) 18 AIR 1931 Nag 170 (171) : 27 Nag L R 386.

Act, 1913, provides for its own procedure and it is not necessary that an order passed under the Companies Act should be transferred by the Court which made it to the Court which is asked to enforce it; it is enough if a certified copy of the order is produced before the latter Court.[10]

Under this section, the decree itself is to be sent for execution to another Court. The section does not permit the transfer of a pending execution proceeding to another Court.[11]

This section has been applied to Arakan Hills. See Arakan Hill Tracts Laws Regulation, 1916 (I of 1916), schedule I.

3. "Court which passed a decree." — An award passed under rules framed under S. 43 of the Bombay Co-operative Societies Act is enforceable, on application to any Civil Court having jurisdiction, as a *decree* of such Court. Such Court, therefore, has power to transfer it for execution to another Court.[1] The same principles hold good as regards awards filed under S. 11 of the Indian Arbitration Act, 1899.[2] See section 37.

4. "Decree-holder." — See Section 2 (3), Note 2.

5. When and to what Court a decree may be sent for execution. — Section 38 read with this section shows that the Court which passed the decree is primarily the Court to execute the decree, but that such Court may send the decree for execution to another Court either on the *application* of the decree-holder or of its *own motion* if certain conditions are satisfied. Where the transfer is made on an *application* by the decree-holder, one of the conditions in cls. (a) to (d) of sub-s. (1) must be satisfied.[1] Where it is made on the Court's *own motion* the conditions in sub-s. (2) must be satisfied namely, that it must be made to a *subordinate* Court of *competent jurisdiction*.[2] It has been held by the High Courts of Bombay[3] and Nagpur,[4] the Judicial Commissioner's Court of Peshawar[5] and the Chief Court of Lower Burma[6] that the competency of the Court under sub-s. (2) of this section must be determined by reference to its competence to try a suit of valuation similar to the suit in which the decree was passed. But the High Court of Lahore[7] has held that the words "competent jurisdiction" refer to competence to deal with the *decree* and not to competence to try the *suit* in which the decree was passed.

As regards transfer under sub-s. (1), that sub-section does not expressly provide that the transfer should be made to a Court of competent jurisdiction. Hence, the Madras High Court has held that the sub-section creates a special jurisdiction and permits the

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[*See also* ('34) 21 AIR 1934 Pesh 107 (109). (Award cannot be transferred for execution to any Court except the Court of a District Judge.)]

10. ('43) 30 AIR 1943 Sind 89 (90) : I L R (1942) Kar 504 (DB).

11. ('39) 26 AIR 1939 Bom 468 (470).

Note 3

1. ('22) 9 AIR 1922 Bom 377 (377, 378) : 46 Bom 128 (DB).

2. ('21) 8 AIR 1921 All 199 (201) : 43 All 391 (DB).
('31) 18 AIR 1931 Nag 170 (171) : 27 Nag L R 386. (The Arbitration Act need not be in force in the local area of the transferee Court.)

Note 5

1. ('39) 41 Pun L R 186 (187).

2. ('27) 14 AIR 1927 Pat 38 (40) : 5 Pat 714 (DB).
('07) 17 Mad L Jour 616 (617). (Transfer may be ordered on an application for execution—No separate application for transmission necessary.)
('98) 8 Mad L Jour 1 (3) (DB). (Misrepresentation of facts required under sub-s. (1) (b) discovered after transfer – Transfer not invalid.)

3. ('40) 27 AIR 1940 Bom 277 (279): I L R (1940) Bom 633. (A second class subordinate Judge who has no jurisdiction to try a suit filed in the High Court can have no jurisdiction to execute the decree in that suit, although the decree is only a decree for costs for an amount which is within his jurisdiction.)
('88) 12 Bom 155 (157) (DB).

4. ('40) 1940 Nag L Jour 244 (251) (DB).

5. ('34) 21 AIR 1934 Pesh 107 (109) (DB).

6. ('11) 12 Ind Cas 27 (28) (Low Bur.)

7. ('39) 26 AIR 1939 Lah 258 (258) : I L R (1939) Lah 551. (Award filed under Arbitration Act can be sent to Court in place to which the Arbitration Act does not apply.)

transfer of a decree for execution to another Court irrespective of its pecuniary jurisdiction. In other words, according to the Madras High Court, a decree can be transferred under sub-s. (1) to another Court for execution even though the amount or value of the decree exceeds the pecuniary limits of the jurisdiction of such Court.[8] The general trend of decisions of the other High Courts is to the effect that the provisions of this section are controlled by S. 6 and that a decree cannot be transferred under sub-s. (1) for execution to another Court if the amount or value of the decree exceeds its pecuniary jurisdiction.[9] The Calcutta and Patna High Courts have further taken the view that the value of the *suit* in which the decree was passed must be within the pecuniary limits of the jurisdiction of the Court to which the decree is proposed to be sent.[10] But the Allahabad High Court has differed from this view and has held that it is enough if the amount of the *decree* is within such limits.[11]

A decree cannot be sent, under this section, for execution to a Court not in British India except in the cases mentioned in S. 45.[12] But it is not necessary that the transferee Court should be of the same *kind* as the transferor Court.[13] Thus, a Civil Court may transfer its decree to a Revenue Court and *vice versa*.[14]

As to the procedure to be followed by the transferor Court in sending a decree for execution to another Court, see O. 21, R. 6 and as to the procedure that is to be followed by the transferee Court, see O. 21, R. 7. See also Note 1 on S. 42.

6. Residence outside jurisdiction — Clause (a). — Under clause (a) it is sufficient if it is shown that the judgment-debtor resides within the jurisdiction of the Court to which the transfer is sought. The decree-holder is not bound to state the *mode* in which the decree is sought to be executed, i. e., whether against the person or property of the judgment-debtor.[1] Where a prohibitory order is to be served on the garnishee of the judgment-debtor, the decree may be transferred to the Court within whose jurisdiction the garnishee resides.[2]

7. Having property outside jurisdiction — Clause (b). — The jurisdiction of a Court is circumscribed by and is co-extensive with its territorial limits. Where property sought to be attached is *bona fide* outside the jurisdiction of the Court which passed the decree, that Court cannot attach it but must transfer the case to the Court

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8. ✠('14) 1 AIR 1914 Mad 206 (206) (DB).
('10) 5 Ind Cas 955 (155) (DB) (Mad).
('94) 17 Mad 309 (313, 314).
✠('84) 7 Mad 397 (399) (DB).
[*See also* ('92) 15 Mad 345 (347) (DB). (Transfer of decree from Munsiff's Court to Small Cause side of Subordinate Judge's Court — *Held*, latter Court could execute decree.)]

9. ✠('40) 27 AIR 1940 Cal 161 (161) (DB).
('10) 37 Cal 574 (577) (DB).
('01) 1901 Pun Re No. 9 p. 35 (39)(FB). (1887 Pun Re No. 31 Overruled. Madras view dissented from.)
('89) 16 Cal 465 (467) (DB).
[*See also* ('20) 7 A I R 1920 Cal 275 (276) (DB). (Equality in pecuniary jurisdiction of the second Court is not sufficient to override the general rule that Courts of limited pecuniary jurisdiction may not entertain execution proceedings in suits in excess of the limit.)]

10. ('36) 23 AIR 1936 Pat 177 (178) (DB).
('22) 9 AIR 1922 Pat 188 (189) : 1 Pat 651 (DB).
('89) 16 Cal 457 (461 to 463) (DB). (Different sections in the Code referred to bear out the view that the jurisdiction conferred by S. 223 must be considered as qualified by the last clause of S. 6.)

11. ('40) 27 AIR 1940 All 331 (334) : I L R (1940) All 318 (DB). (AIR 1939 All 57: I L R (1939) All 97 dissented from.)

12. See Section 45.

13. ('92) 15 Mad 345 (347) (DB). (A decree passed in the exercise of ordinary jurisdiction of one Court sent to another Court exercising small cause jurisdiction.)
('39) 26 AIR 1939 Cal 600 (601) : I L R (1939) 1 Cal 233 (235) (DB). (Decree in a suit excepted from cognisance of Small Cause Court can be transferred to a Small Cause Court for execution.)

14. ✠('83) 9 Cal 295 (303) : 9 Ind App 174 (PC).
('11) 10 Ind Cas 538 (539) (DB) (Cal).
† ('09) 36 Cal 252 (254): 1 Ind Cas 933 (934) (DB).
('10) 13 Oudh Cas 119 (122): 6 Ind Cas 994 (995) (DB).
[*See also* ('72) 17 Suth W R 471 (472).]
[But see ('94) 16 All 496 (497, 498) (DB).]

Note 6

1. ('29) 16 AIR 1929 Cal 529 (529, 530) : 56 Cal 1176 (DB).

2. † ('11) 39 Cal 104 (108, 109): 11 I.C. 417 (419) (DB).

within whose local jurisdiction the property is situated.[1] Similarly, the decree of a temporary Court, which has no local jurisdiction, must be transferred for execution to the Court which has local jurisdiction over suits in respect of such property.[2] The word 'may' used in this section does not mean that, in such a case it is in the discretion of the Court which passed the decree either to execute the decree itself or transfer it to another Court; it should send the decree to the Court having territorial jurisdiction.[3]

Where it is alleged by the decree-holder applying for transfer that the properties within the jurisdiction of the Court are not sufficient to satisfy the decree, it is enough if the allegations are supported by an affidavit or some other evidence on which the Court can reasonably rely. It is not necessary that the Court should go through the process of sale in order to find out whether in fact the proceeds will be sufficient to satisfy the decree.[4]

When a decree is transmitted for execution to another Court, the presumption is that the decree was intended to be executed against properties within the jurisdiction of the latter Court and not against properties situated within the jurisdiction of the transmitting Court.[5] Similarly, it has been held that where a decree is transferred for execution to another Court on the ground that one of the judgment-debtors has no property within the local limits of the Court which passed the decree and has property within the local limits of the jurisdiction of the other Court, the decree cannot be executed against another judgment-debtor who does not fulfil that condition.[6] But it has been held by the Madras High Court in the undermentioned case[7] that the fact that a decree has been transferred to another Court under cl. (b) of this section on the ground of the judgment-debtor having property within the jurisdiction of such Court, does not preclude such Court from arresting the judgment-debtor.

8. Decree for sale or possession of property outside jurisdiction — Clause (c). — See also Note 6 on S. 38. Clause (c) includes also cases where the Court passing the decree has subsequently lost territorial jurisdiction.[1] This clause recognises the transferee Court as having inherent jurisdiction to sell or deliver properties situate within its territorial limits, but that jurisdiction is to be invoked by the machinery provided by this section.[2] Thus, the transferee Court cannot execute the decree unless the Court which passed the decree has sent it to the former Court for execution.[3]

Note 7

1. ('18) 5 AIR 1918 Pat 126 (127) : 4 Pat L Jour 141 (DB).
('32) 19 AIR 1932 Cal 213 (214) : 59 Cal 199 (DB). (Person and property of judgment-debtor outside jurisdiction.)
('29) 16 AIR 1929 Cal 818 (818) : 57 Cal 67 (DB). (Properties outside jurisdiction cannot be sold though attached before judgment.)
('73) 19 Suth W R 434 (436) (DB). (Though the original Court ought to have sold the properties within its jurisdiction before ordering a transfer, a transfer without doing so, is not without jurisdiction.)
('73) 19 Suth W R 307 (308) (DB). (Decree may be transferred where it cannot be completely executed by sale of the property within jurisdiction.)
[*See also* ('39) 26 AIR 1939 Pat 532 (533): 18 Pat 670 (DB). (Court to which decree was transferred for execution selling property outside its territorial jurisdiction — *Held*, it had no jurisdiction to sell : A I R 1918 Pat 126 : 4 Pat L Jour 141 relied on.)]
2. ('17) 4 AIR 1917 Mad 272 (273) (DB).
3. ('32) 19 AIR 1932 Cal 213 (214, 215) : 53 Cal 199 (DB).
4. ('35) 22 AIR 1935 Cal 268 (270) (DB).
5. ('24) 11 AIR 1924 Mad 144 (144) (DB).
6. ('36) 23 AIR 1936 Cal 521 (523) : 63 Cal 1210.
7. ('38) 25 AIR 1938 Mad 27 (29).
Also see Note 2 and O. 21, R. 10, Note 6.

Note 8

1. ('43) 30 AIR 1943 Mad 449 (453)(DB).
('81) 6 Cal 513 (519, 520) (DB).
2. ('43) 30 AIR 1943 Mad 449 (453) (DB).
3. ('43) 30 AIR 1943 Mad 449 (452, 453) (DB). (But absence of an order is merely an irregularity in the assumption of jurisdiction by transferee Court — Judgment-debtor not having objected in the first instance was held to have waived it: AIR 1932 Mad 418 : 55 Mad 801 (SB) followed.)

Where properties mortgaged are within the jurisdiction of more than one Court and one of such Courts has passed a decree for sale, the Court which has passed the decree is entitled to sell the properties outside its jurisdiction also and it is not bound to transfer the decree to the Court having territorial jurisdiction over such property.[4] The reason is that as observed in Note 2, the section is only directory and not mandatory.

In the undermentioned case,[5] a decree was passed by the Bombay High Court for the sale of property in Karachi and the property was also sold by the Bombay High Court and purchased by the decree-holder himself. The decree-holder was obstructed in obtaining possession of the property. Thereupon the Bombay High Court transferred the decree to the Karachi Court for removal of the obstruction. On a contention being raised that removal of obstruction was not, properly speaking, *execution* of the decree and that therefore the decree could not be transferred to the Karachi Court, it was held that the decree being one for sale of property within the jurisdiction of another Court, the case came within cl. (c) of S. 39 and that as the auction purchaser was the decree-holder himself the proceeding for the removal of obstruction was a proceeding in execution (within S. 47) and hence the decree could be properly transferred for 'execution' under cl. (c) of S. 39.

9. Court considering that execution should be in another Court — Clause (d). — The jurisdiction of a Court transferring a decree for execution to another Court is not confined to cases in which there is no property within the jurisdiction of the Court which passed the decree sufficient to satisfy the decree. The Court can, under cl. (d), make an order of transfer if it "considers for any other reason that the decree should be executed by such other Court."[1] It was doubted in the undermentioned case[2] whether this clause enables a Subordinate Judge within whose jurisdiction the property attached is situate, to transfer the decree for execution to the Small Cause Court.

10. Transfer of small cause decree for execution. — A Court of Small Causes has no jurisdiction to execute a decree against immovable property or to sell moveable property outside its jurisdiction. It must transfer the decree under this section to a Court having jurisdiction.[1] For purposes of a transfer under this section, the small cause side and the original side of the same Court should be regarded as different Courts.[2]

As to decrees passed under the Presidency Small Cause Courts Act, see S. 8 and the undermentioned case.[3]

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4. † ('39) 26 AIR 1939 Cal 403 (409) (DB).
5. ('36) 23 AIR 1936 Sind 11 (13) : 30 Sind L R 290 (DB).

Note 9

1. ('39) 26 AIR 1939 Cal 651 (654, 655) (DB). (Property within its jurisdiction sufficient to satisfy decree — Still under special circumstances Court may transfer decree for execution to another Court — Court must record its reasons for such transfer.)
('25) 12 AIR 1925 Oudh 481 (481, 482) : 28 Oudh Cas 199 (DB).
2. ('94) 18 Bom 61 (64) (DB).

Note 10

1. ('41) 28 AIR 1941 Lah 109 (113) : ILR (1941) Lah 670 (DB). (Same Judge holding office both of Judge Small Causes Court, and as Judge on regular side — He can on decree-holder's application or otherwise transfer Small Cause Court decree to regular side for attachment and sale of immovable property. AIR 1938 Pesh 70 dissented from.)
('31) 132 Ind Cas 208 (208) (DB) (Lah).
('29) 16 AIR 1929 Lah 398 (398).
('25) 12 AIR 1925 Mad 1179 (1181) (DB).
('19) 6 AIR 1919 Mad 264 (265) (DB).
('09) 31 All 1 (2) (DB).
('71) 16 Suth W R 227 (228) (DB).
('72) 18 Suth W R 123 (124) (DB).
† ('84) 6 All 243 (248) (FB).
('78) 2 Bom 532 (534) (DB).
('77) 1 Bom 82 (86) (DB).
('79) 3 Cal L Rep 558 (560) (DB).
[But see ('38) 25 AIR 1938 Pesh 70 (72) (DB). (Small cause decree cannot be executed against immovable property even after transfer of decree.)]
2. ('78) 1 All 624 (625) (DB).
† ('84) 8 Bom 230 (234) (DB).
('85) 9 Bom 237 (241) (DB).
[*See* ('05) 1905 Pun L R No. 3 p. 35 (35). (A Munsif invested with small cause jurisdiction cannot *suo motu* transfer the execution of a small cause decree to the original side.)]
[*See also* ('85) 8 Mad 8 (9). (A decision under S. 20 of Act XI of 1865.)]
Also see Section 73, Note 8.
3. ('28) 15 AIR 1928 Cal 265 (266) (DB).

11. Jurisdiction of transferring Court after transfer.—See S. 42, Notes 1 and 3.

12. Step-in-aid of execution. — As to when an application for transfer of a decree for execution will be an application to take a step-in-aid of execution, see Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 182.

13. Jurisdiction of transferee Court.—See Notes 6 and 7 on S. 38 and Notes 1 and 3 on S. 42.

14. Madras Village Courts Act (I of 1889).—A District Munsif, receiving by transfer a decree of a Village Court under S. 66 or S. 67 of Act I of 1889 has no power to transfer the same to another District Munsif's Court under S. 39 of the Code. The reason is that the Village Courts Act supplies, in itself, a complete code of procedure for suits in the Village Courts and the provisions of the Code are not applicable to them except as provided for by the Amending Act II of 1920.[1]

15. Simultaneous execution. — See Note 10 on Section 38.

16. Appeals from orders under this section. — An order rejecting an application for transfer falls under S. 47 of the Code and is appealable as a decree.[1] So also is an order of the transmitting Court refusing to decide objections to the executability of the decree, on the ground that they should be decided by the transferee Court.[2]

17. Notice of transmission. — A Court is bound to issue notice to the judgment-debtor before transmission and hear his objections as to the executability of the decree.[1] But where, according to the practice of the Calcutta and Bombay High Courts on the original side, the order of transmission is passed by the Master or Registrar of the High Court, such order is only a *ministerial* act and no notice is necessary.[2]

18. Form of application under the section. — An application under this section for transmission of a decree for execution to another Court is not required to be in any particular form as in the case of an application for execution under O. 21, R. 11. It is sufficient if the application contains sufficient particulars of the decree to be transferred.[1] A mere clerical error in writing the application will not invalidate it.[2]

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40. Where a decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province.

Transfer of decree to Court in another province.

Note 14

1. ('23) 10 AIR 1923 Mad 651 (652) : 46 Mad 734 (DB).

Note 16

1. ('04) 8 Cal W N 575 (577) (DB).
Also see Section 47 Note 71a.
2. ('28) 15 A I R 1928 Rang 40 (41) : 5 Rang 775 (DB).

Note 17

1. † ('29) 16 AIR 1929 Mad 199 (200) (DB).
('17) 4 AIR 1917 Pat 70 (71) (DB).
('26) 13 AIR 1926 Mad 411 (412) (DB).
('24) 11 A I R 1924 Mad 673 (674) : 47 Mad 641 (DB).
('30) 17 A I R 1930 Oudh 305 (308, 309) (DB). (Transferor Court is proper Court to decide.)
[But see ('35) 22 A I R 1935 Lah 508 (509) : 17 Lah 13 (DB). (Transfer is a ministerial act.)
('36) 23 AIR 1936 Mad 99 (99) (DB). (Do.)]
2. ('16) 3 A I R 1916 Cal 488 (493) : 43 Cal 903 (FB).
('27) 14 AIR 1927 P C 73 (76): 54 Cal 500: 54 Ind App 129 (P C).
('37) 24 AIR 1937 Bom 365 (368): ILR (1937) Bom 691.
[But see ('28) 15 A I R 1928 Rang 40 (42) : 5 Rang 775 (DB). (Where the transmission order of the High Court after notice (but *ex parte* because of the absence of the judgment-debtor after notice) was held to be a ministerial act — The decision cannot be supported in law.)]

Note 18

1. ('37) 24 AIR 1937 All 397 (399).
('39) 26 AIR 1939 Oudh 118 (120) (DB). (An application may be in the form of an application under O. 21, R. 11.)
('35) 22 AIR 1935 Pat 485 (486) (DB).
2. ('37) 24 AIR 1937 All 397 (399).

1. Manner of execution by transferee Court. — This section is new and has been inserted in view of the powers given to the High Courts to alter or add to the rules under the Code.

The *manner of execution* is that of the Court which executes the decree, under the rules in force in its own province[1] or district,[2] where in different districts of the same province different modes are prescribed; but the question whether the execution of the transferred decree is barred by limitation is to be decided according to the law of the Court which passed the decree.[3]

The section applies only when the "transferor" and the "transferee" Courts are both regulated by the provisions of the Code of Civil Procedure.[4]

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41. [S. 223, para. 4.] The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure.

Result of execution proceedings to be certified.

[1859, S. 294; 1877, S. 223 (4).]

Synopsis

1. Scope and object of the section.
2. "Shall certify."
3. Jurisdiction of transferee Court, how long continues. See Note 3 on Section 42.

1. Scope and object of the section. — The Court to which a decree is sent for execution must, on the determination of the proceedings in that Court, certify to the Court which passed the decree the result of those proceedings.[1] This certification is a very important act as its effect is to determine the jurisdiction of the transferee Court.[2] This section has been applied to Arakan Hills. See Arakan Hill Tracts Laws Regulation, (I of 1916), schedule I.

2. "Shall certify." — In *Shivlingappa* v. *Shidmallappa*,[1] Macleod, C. J., held that there must be a formal certification by the transferee Court to the transferor Court and that the fact of certification should not be left open to inferences to be drawn from entries in the register of suits of the transferor Court showing the result of the proceedings in the transferee Court. In an earlier case,[2] where a decree on the small cause side had been transferred to the original side of the same Court for execution and the result of the proceedings in execution was entered in the small cause suit register, the same learned Chief Justice however held that the requirements of S. 41 were "clearly"

Section 40 — Note 1 Also see O. 21, R. 9, N. 3.

1. ('38) 25 AIR 1938 Lah 126 (128) : ILR (1938) Lah 264 (DB).
2. ('07) 31 Bom 5 (9) (DB).
3. ('42) 29 AIR 1942 Pat 128 (129) (DB). (Decree passed by Presidency Small Cause Court transferred to another Court for execution — S. 48, C. P. C., will not apply to such decree.)
('90) 17 Cal 491 (497).
('97) 24 Cal 473 (491) (SB).
('11) 11 Ind Cas 216 (216, 217) (DB) (Cal).
† ('13) 36 Mad 108 (111, 112).
('08) 31 Mad 24 (27) (DB).
('36) 23 AIR 1936 Pat 104 (105): 15 Pat 356 (DB). (*Obiter.*)
4. ('88) 12 Bom 230 (231) (DB).
('07) 34 Cal 576 (580, 582) (DB).
('88) 15 Cal 365 (370) (DB).
('36) 23 A I R 1936 Pat 150 (150) (DB). (The Civil Procedure Code does not apply to Panchayat Court —It has no power of transfer of its decree for execution to the Civil Court.)

Section 41 — Note 1

1. ('09) 9 Cal L Jour 239 (243) (DB).
2. † ('24) 11 AIR 1924 Bom 359 (359, 360) (DB).

Note 2

1. ('24) 11 AIR 1924 Bom 359 (359) (DB).
2. ('23) 10 AIR 1923 Bom 371 (371) (DB).

satisfied. It is submitted with respect that the view taken in the later case is the correct one.

The mere sending of a certificate by the transferee Court to the Court which passed the decree does not oust the jurisdiction of the transferee Court to further execute the decree. The jurisdiction of the transferee Court continues until *a copy of the decree* together with the full satisfaction or non-satisfaction certificate is returned.[3] An order by the transferee Court that the result of part satisfaction of the decree may be communicated to the transferor Court[4] or a report by the former Court to the latter of the facts relating to an arrangement come to between the decree-holder and the judgment-debtor,[5] is not such a certificate as is contemplated by the section and does not determine the jurisdiction of the transferee Court. But when the transferee Court dismissed the execution case and directed that the transferor Court should be informed of it and a copy of this order was actually filed in the latter Court with the application of the decree-holder asking for a transfer to another Court, it was held that this was sufficient compliance with the requirements of the section.[6]

Where the transferee Court dismisses the execution case on the ground that an objection as to limitation is a valid one, and sends back the case to the transferor Court with the requisite certificate, but the objection as to limitation is disallowed on appeal, the transferee Court can get back the records and proceed with the execution. The position is the same as if no certificate of the manner of execution had been sent under this section to the transferor Court.[7]

3. **Jurisdiction of transferee Court, how long continues.** — See Note 3 on Section 42.

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42. [S. 228.] The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

Powers of Court in executing transferred decree.

[1887, S. 228; 1859, S. 294; see O. 21 R. 9 and Sch. III, C. P. C.]

Synopsis

1. Powers of Court executing transferred decree.
2. Pecuniary limits of the jurisdiction of the transferee Court. See S. 39, Note 5.
2a. Territorial jurisdiction of the transferee Court. See S. 38, Note 6.
3. Jurisdiction of transferee Court, how long continues.
3a. Powers of transferor Court after transfer of decree. See Note 3.
4. Law of limitation applicable to transferred decree. See Section 40, Note 1.
5. "Shall be subject to the same rules in respect of appeal."

1. **Powers of Court executing transferred decree.** — A decree transferred to a Court for execution is to be regarded as a decree of that Court for the purposes of execution and the transferee Court has the same powers as it would have, if the decree

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3. ('37) 24 AIR 1937 All 474 (475). (AIR 1916 PC 16 : 39 Mad 640 : 43 Ind App 238 (PC) Rel. on.)
4. ('38) 25 AIR 1938 All 412 (413) (DB).
5. ('37) 24 AIR 1937 All 766 (768) (DB).
6. ('37) 24 AIR 1937 Cal 557 (559) : I L R (1937) 2 Cal 734 (DB).
7. ('20) 7 AIR 1920 Pat 128 (129) (DB).

had been passed by itself.[1] Thus, O. 21, R. 53 (4) confers the power of attaching a decree in execution on the Court which *passed* the decree to be executed. But by virtue of this section, the power can be exercised by the Court to which the decree is *sent* for execution.[2] The Court to which a decree is sent for execution will not execute the decree until a regular application is made to it under O. 21, R. 11,[3] except where the decree-holder has already made an application for execution to the Court which has passed the decree.[4] The expression "powers in executing such decree" means "powers in *carrying out the purpose of executing the decree.*"[5] The transferee Court cannot question the legality or propriety of the order of the transferor Court directing execution.[6] Thus, it cannot entertain an objection that the execution of the decree was barred by limitation when the order for execution was passed,[7] though, where the decree is simply transferred without any order for execution having been passed,[8] or where the transferor Court has expressed an opinion

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Section 42 — Note 1

1. ('72) 3 N W P H C R 168 (170) (DB).
('24) 11 AIR 1924 All 700 (700) : 46 All 560 (DB). (Transferee Court can entertain objections preferred to it.)
('38) 25 AIR 1938 All 654 (655). (Court to which decree is transferred under S. 39 for execution can execute it for larger amount than that specified in the certificate of transfer — It is the decree which is the guide and not the certificate.)
('06) 31 Bom 5 (8, 9) (DB).
('82) 6 Bom 582 (583) (DB). (Can enquire into the validity of a mortgage lien on property which has been attached by its order on a transferred decree.)
('74) 11 Bom H C R A C 19 (21). (Can issue notice under O. 21 R. 22.)
('25) 12 AIR 1925 Cal 213 (216) (DB). (Court transmitting the decree is not the Court to decide objections on the part of the judgment-debtor, such as that the decree is incapable of execution or that execution is barred by limitation — The Court of execution must determine such objections.)
('11) 10 Ind Cas 538 (539) (DB) (Cal). (Can execute the decree by arrest even though the decree could not be so executed by the Court which passed it.)
('80) 5 Cal 448 (449, 450) (DB). (Can certify payment.)
('69) 11 Suth W R 557 (558) (DB). (Can determine claims of third parties.)
('38) 25 AIR 1938 Lah 593 (593) : I L R (1938) Lah 624. (Can execute the decree against the surety.)
('34) 21 AIR 1934 Lah 117 (118). (Can refuse to execute decree on the ground that it was passed against deceased person.)
('21) 8 AIR 1921 All 199 (201) : 43 All 394 (DB). (Is competent to determine the question whether *S* was a member of the firm in an application under O. 21 R. 50 (2).)
('31) 18 AIR 1931 Lah 507 (508). (Do.)
('29) 16 AIR 1929 Lah 228 (230) (Do.)
('26) 98 Ind Cas 855 (856) (DB) (Lah). (Do.)
('25) 12 AIR 1925 Sind 293 (294) : 19 Sind L R 1. (Do.)
('12) 17 Ind Cas 323 (328, 329) (Mad). (Can exercise powers under O. 21 R. 53, Cl. 1 (b).)
('31) 18 AIR 1931 Nag 170 (171) : 27 Nag L R 386. (The executability by transferee Court of the decree on an award is not affected by the Arbitration Act not being in force in the place where it is sought to be executed.)
('27) 14 AIR 1927 Oudh 112 (112) : 1 Luck 46 (DB). (Can attach salary of public officer under O. 21 R. 48.)
('13) 7 Sind L R 19 (21) : 20 Ind Cas 540 (541) (DB). (Can order restitution under S. 144.)
[*See also* ('38) 25 AIR 1938 Mad 27 (28).
('18) 5 AIR 1918 Mad 645 (647). (As to power of transferee Court to decide application under O. 21 R. 50, see Notes on O. 21 R. 50.)
('36) 23 AIR 1936 Sind 11 (13) : 30 Sind L R 290.]
Also see S. 144 N. 17.
2. ('40) 27 AIR 1940 Pat 557 (558, 559) : 19 Pat 832 (DB). (The powers under O. 21 R. 53 (4) are powers exercisable in executing a decree.)
3. ('24) 11 AIR 1924 Nag 413 (414).
('10) 35 Bom 103 (109) (DB). (An order for transmission of the decree for execution to another Court is not an order for execution of the decree nor is an application for transmission, an application for execution.)
4. ('24) 11 AIR 1924 Pat 120 (121) : 2 Pat 909 (DB).
('31) 18 AIR 1931 Cal 312 (316) : 58 Cal 832 (DB). (Power to order stay of execution is not exercise of power to carry out execution.)
5. ('36) 23 AIR 1936 Rang 184 (187).
6. ('30) 17 AIR 1930 Lah 143 (144). (Execution cannot be refused because part of the decree alone was transferred.)
('34) 21 AIR 1934 Mad 266 (266) (DB).
('85) 7 All 330 (333) (DB).
('97) 21 Bom 456 (458) (DB).
('80) 5 Cal 736 (737) (DB).
('75) 23 Suth W R 154 (155) (DB).
('32) 19 AIR 1932 Pat 168 (169) : 11 Pat 94 (97) (DB). (Transferee's name brought on record and decree transferred—Transferee Court cannot question transferee's right to execution.)
† ('37) 24 AIR 1937 Rang 477 (480) : 1937 Rang L R 287.
('36) 23 AIR 1936 Rang 271 (273) : 14 Rang 550.
Also see O. 21, R. 26, Note 1.
7. † ('90) 15 Bom 28 (29, 30) (DB).
('30) 17 AIR 1930 Lah 118 (119).
('75) 24 Suth W R 151 (152) (DB).
('74) 21 Suth W R 330 (331) (DB).
('29) 16 AIR 1929 Mad 199 (199, 200) (DB). (AIR 1924 Mad 673 : 47 Mad 641 ; AIR 1926 Mad 411 ; 1928 Mad W N 152 relied on.)
('27) 14 AIR 1927 Nag 31 (32).
8. ('75) 7 N W P H C R 115 (117) (DB).

on the question of limitation but without hearing the judgment-debtor on the point,[9] it has power to decide whether the execution is barred by limitation. It cannot transfer the decree to another Court for execution[10] or stay execution of the decree except under the provisions of O. 21, R. 26 so as to enable the parties to get the objections decided by the transferor Court.[11] As to whether it can decide the liability of a third person under O. 21, R. 50, sub-r. (2) as a partner of a firm, see O. 21, R. 50, Note 5.

Just as the transferor Court cannot, as an executing Court, go behind the decree, the transferee Court also cannot go behind the decree or add to or vary its terms,[12] but must execute the decree as it stands.[13] Where the decree-holder dies after the date of transfer, his legal representative must apply to the Court which passed the decree for substitution of his name on the record. (See Notes on O. 21, R. 16.) Similarly, where a judgment-debtor dies after the date of transfer, the application to implead his legal representatives must be made to the Court which passed the decree.[14] There was a conflict of decisions as to whether the transferee Court also could entertain and dispose of the application. All the High Courts except the High Courts of Calcutta and Lahore held that the proper Court to apply is only the Court which passed the decree.[15] The Calcutta[16] and Lahore[17] High Courts, on the other hand, held that the application can be made even to the transferee Court. They further held that even if it be assumed that the application should be made only to the transferor Court, the making of an application to the transferee Court, even if objected to by the judgment-debtor, is only an irregularity in procedure curable by S. 99.[18] The High Court of Madras was, however, of opinion that the non-compliance with the rule that the application should be made to the Court which passed the decree, *if objected to at the proper time* is not a mere irregularity though if not so objected to, is an irregularity curable under S. 99.[19] The Privy Council has reconciled

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('94) 16 All 390 (393) (DB).
† ('30) 17 AIR 1930 All 699 (700) : 52 All 1024. (Court having application to execute made to it is bound to decide questions of limitation *suo motu*.)
('07) 1907 All W N 65 (66): 4 All L Jour 142 (143) (DB).
('11) 11 Ind Cas 216 (217) (DB) (Cal).
† ('96) 23 Cal 39 (43) (DB). (Dissenting from 13 Beng L R App 30.)
('86) 13 Cal 257 (262) (DB).
('82) 8 Cal 916 (917) (DB).
('80) 5 Cal 897 (901).
('74) 21 Suth W R 292 (293) (DB).
✣ ('68) 10 Suth W R 10 (12) (FB).
('67) 7 Suth W R 19 (19) (DB).
('66) 5 Suth W R Misc 14 (14) (DB).

9. ('35) 22 AIR 1935 Nag 131 (132): 31 Nag L R 333.

10. ('38) 25 AIR 1938 Mad 113 (114) : ILR (1938) Mad 326 (DB).

11. ('36) 23 AIR 1936 Rang 184 (187).
[*See* ('86) 13 Cal 257 (261) (DB).]
Also see O. 21, R. 26, Note 1.

12. ✣ ('31) 18 AIR 1931 Rang 252 (256) : 9 Rang 480.
† ('34) 21 AIR 1934 Rang 165 (166) : 12 Rang 320 (DB). (Transferee Court has no power to pass instalment order under O. 20, R. 11 (2).)
('31) 18 AIR 1931 All 92 (94) : 53 All 125 (DB). (Decree if collusively obtained.)
('87) 11 Bom 528 (532) (DB). (Cannot refuse execution because too much has been left for the executing Court to do.)
('70) 13 Suth W R 330 (330) (DB). (Cannot correct.)

13. See the cases in foot-note 12.
[*See also* ('78) 3 Cal 512 (513, 514).]

14. See section 50.
('40) 27 AIR 1940 Cal 171 (173) : I L R (1939) 2 Cal 173.
('30) 17 AIR 1930 Cal 614 (615, 616) : 57 Cal 1137 (DB). (Death of decree-holder.)
('30) 17 AIR 1930 Sind 16 (17) (DB). (Until disposal of that petition, proceedings in transferee Court will be suspended.)
[*See also* ('25) 12 AIR 1925 Cal 213 (216).]

15. ('95) 17 All 431 (432).
('94) 18 Bom 224 (226) (DB).
('26) 13 AIR 1926 Mad 411 (412) (DB).
✣ ('05) 28 Mad 466 (471) (FB).
('23) 10 AIR 1923 Nag 195 (197). (Such application can be made to the Court which is actually executing decree.)
('20) 7 AIR 1920 Nag 174 (175).
Also see S. 50, Note 13.

16. † ('95) 22 Cal 558 (561) (DB).
('09) 1 Ind Cas 57 (58, 59) (DB) (Cal).

17. † ('26) 13 AIR 1926 Lah 34 (35) (DB).
('97) 1897 Pun Re No. 70, page 317 (321, 324).

18. See the cases in foot-notes 16 and 17.

19. ('05) 28 Mad 466 (472) (FB).
('07) 17 Mad L Jour 300 (301) (DB). (Objection not pressed.)
('16) 3 AIR 1916 Mad 33 (34, 36) : 38 Mad 1076 (DB).
('02) 12 Mad L Jour 24 (32, 33) (DB).

the apparent conflict by holding that while an application for substitution of legal representatives should be made to the Court which passed the decree, the non-compliance with the rule is only an irregularity in procedure which, if acquiesced in by a party, cannot be challenged by him later on.[20]

The transferee Court cannot question the jurisdiction of the Court which passed the decree.[21] Under the old S. 225 corresponding to O. 21 R. 7, the words "or of the jurisdiction of the Court which passed it" occurred. This gave rise to a conflict of opinion as to whether the transferee Court can go into the question of jurisdiction of the Court which passed it. The said words have now been removed, thus setting the conflict at rest.[22] But the Court to which the decree is sent for execution can enter into the question of its own jurisdiction to execute the decree and for this purpose it is entitled to look at the judgment, plaint and the concise statement in the suit.[23]

Where it is brought to the notice of the transferee Court that the decree sought to be executed has, subsequent to the transfer, *ceased to exist*[24] or is satisfied out of Court,[25] the Court is bound to go into the question and if the allegation is correct, should refuse to proceed with the execution.

Where a decree has been transferred to another Court and that Court certifies its failure to execute the same, it is only the Court which passed the decree and not the latter that is competent to grant a certificate of non-satisfaction to the decree-holder in order to enable him to execute the decree in another Court.[26]

2. Pecuniary limits of the jurisdiction of the transferee Court.—See Section 39, Note 5.

2a. Territorial jurisdiction of the transferee Court. — See Section 38, Note 6.

3. Jurisdiction of transferee Court, how long continues.—The transferee Court retains its jurisdiction over the execution proceedings until it certifies to the Court which passed the decree in the manner set forth in S. 41[1] or until the execution has been withdrawn from it.[2] Where, therefore, a decree has been executed by it partly, an application for further execution can be made to it without obtaining a fresh certificate under O. 21 R. 6 from the transferor Court.[3] It is not bound to send the certificate as soon as one application for execution fails. The failure should be *complete* and not partial.[4]

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20. *('28) 15 AIR 1928 PC 162 (164): 55 Ind App 227 : 3 Luck 314 (PC). (Confirming A I R 1925 Oudh 448 : 28 Oudh Cas 330.)
[*See* ('31) 18 AIR 1931 All 320 (322) (DB). (Following AIR 1928 P C 162 : 3 Luck 314 : 55 Ind App 227 (PC).)]
[*See also* ('41) 28 AIR 1941 Pat 139 (139, 140):19 Pat 838 (DB). (Section 99 applies.)]
21. See O. 21 R. 7, Note 4.
('40) 27 AIR 1940 Bom 277 (278) : I L R (1940) Bom 633.
22. See O. 21 R. 7, Note 4.
23. ('40) 27 AIR 1940 Bom 277 (278): I L R (1940) Bom 633.
24. ('27) 14 AIR 1927 Rang 104 (105) : 4 Rang 562 (DB).
25. ('80) 5 Cal 448 (449, 450) (DB).
[But see ('70) 1870 Pun Re No. 51.]
Also see O. 21, R. 2, Note 15.
26. ('34) 21 AIR 1934 Lah 330 (331).

Note 3

1. ('40) 27 AIR 1940 Cal 171 (173) : I L R (1939) 2 Cal 173.
*('98) 20 All 129 (131, 132) (DB).
('32) 19 AIR 1932 Pat 286 (287): 11 Pat 513 (DB).
('24) 11 AIR 1924 Bom 359 (359, 360) (DB).
('23) 10 AIR 1923 Bom 396 (396) (DB).
† ('09) 13 Cal W N 533 (540) (DB).
('14) 1 AIR 1914 Mad 435 (435, 436): 37 Mad 231: 15 Ind Cas 738 (741) (DB).
('29) 16 AIR 1929 Oudh 76 (77): 4 Luck 209 (DB). (Jurisdiction to issue fresh process for execution ceases after issue of certificate—But jursdiction to decide questions arising in respect of anything done in the course of execution proceeding remains.)
2. ('40) 27 AIR 1940 Cal 171 (173) : ILR (1939) 2 Cal 173.
('26) 13 AIR 1926 Bom 271 (272) : 50 Bom 439 (DB). (The Court which transfers its decree for execution to another Court has also the power to call back the decree.)
3. ('83) 1883 All W N 247 (248).
('09) 1 Ind Cas 57 (61) (DB) (Cal). (It has jurisdiction to entertain successive applications for execution.)
('75) 23 Suth W R 225 (226) (DB).
('01) 4 Oudh Cas 333 (338).
('31) 18 AIR 1931 Pat 27 (30) : 9 Pat 829 (DB).
4. ('23) 10 AIR 1923 Bom 396 (396) (DB).

The mere fact that the execution petition is struck off for some informality does not determine its jurisdiction in the matter[5] and it can review its order striking off the petition[6] or revive the execution proceedings.[7]

After the issue of the certificate under S. 41 the transferee Court ceases to have jurisdiction to receive execution petitions or to do anything further in the matter[8] except to decide objections in respect of anything done in the course of the execution proceedings which were pending before it.[9] The Nagpur Judicial Commissioner's Court, has, however, held that its jurisdiction does not cease even after a certificate is sent under that section and that it can therefore entertain a fresh application for execution without another transfer under O. 21 R. 6 from the transferor Court.[10] (See also Notes on section 41.)

But the fact that execution has been transferred to another Court does not deprive the transferor Court of all control over the execution proceedings.[11] Thus, it can determine objections as to the executability of the decree[12] or a point of limitation.[13] It can sanction an agreement for payment of the decree in instalments[14] and decide who are the legal representatives of the judgment-debtor[15] and entertain an application to execute the decree against them.[16] It can also recognise an assignment of the decree,[17] or stay the execution of the decree,[18] or entertain application under S. 73 for rateable distribution,[19] or

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5. ('09) 1 Ind Cas 57 (61) (DB) (Cal). (6 Suth W R Misc 47 must be deemed to have been impliedly overruled by 10 Suth W R 46.)
('97) 1897 Pun Re No. 70 page 317.
† ('98) 20 All 129 (132) (DB).
('26) 13 AIR 1926 Pat 274 (275) : 5 Pat 398.
[*See also* ('66) 1866 Suth W R Misc 47 (48). (Jurisdiction of transferee Court ceases on case being struck off for default.)]

6. ('68) 10 Suth W R 46 (50) (FB).

7. ('68) 10 Suth W R 46 (50) (FB).
('09) 9 Cal L Jour 239 (243) (DB). (Attachment effected by transferee Court and thereafter certificate sent to Court which passed the decree — Re-transfer again to that Court under O. 21 R. 6 — Attachment is revived.)

8. ('25) 12 AIR 1925 All 179 (179).
('33) 20 AIR 1933 Lah 149 (150).
('39) 43 Cal W N 412 (415) (DB).
('99) 3 Cal W N ccxi.
('30) 17 AIR 1930 Lah 508 (511).
('26) 13 AIR 1926 Mad 1209 (1209).
('26) 13 AIR 1926 Pat 274 (275) : 5 Pat 398 (DB).
('37) 24 AIR 1937 Rang 406 (407) (DB).

9. ('29) 16 AIR 1929 Oudh 76 (79) : 4 Luck 209 (DB).

10. ('22) 9 AIR 1922 Nag 210 (212) : 18 Nag L R 178 (DB).

11. ('40) 27 AIR 1940 Cal 171 (173) : ILR (1939) 2 Cal 173.
('40) 27 AIR 1940 Sind 11 (13) : ILR (1940) Kar 46 (DB). (Court which passed the decree can execute it though the copy of decree with the certificate of non-satisfaction has not been returned by the transferee Court.)
('05) 1 Cal L Jour 315 (318) (DB).
(1900) 13 C P L R 169 (170).
† ('85) 7 All 73 (76) (DB). (Per Mahmood, J.)
† ('29) 16 AIR 1929 Bom 418 (419) : 53 Bom 844 (DB). (Concurrent execution can be had before receipt of certificate from transferee Court, which is only a formality.)
('36) 23 AIR 1936 Cal 267 (269) (DB).
('34) 21 AIR 1934 Lah 728 (729) : 16 Lah 80 (DB).
('38) 25 AIR 1938 Mad 113 (114) : I L R (1938) Mad 326 (DB).
('18) 5 AIR 1918 Mad 669 (670) (DB). (Decree for sale on mortgage transferred — Transferee Court cannot pass personal decree under O. 34 R. 6.)
('11) 36 Mad 108 (111): 11 Ind Cas 635 (636) (DB).
† ('39) 26 AIR 1939 Pat 144 (145) : 17 Pat 617 (DB).
('22) 9 AIR 1922 Pat 301 (303) : 1 Pat 328 (DB). (Decree not actually sent to transferee Court — Transferor Court does not lose jurisdiction to execute decree.)

12. ('29) 16 AIR 1929 Mad 199 (200) (DB).
('27) 14 AIR 1927 Nag 31 (32).

13. ('41) 28 A I R 1941 Rang 56 (58, 59) : 1940 Rang L R 725 (DB). (Court which passed the decree and also the Court to which it is sent for execution both have jurisdiction to decide a question of limitation and it is merely the question of convenience or of priority of application which determines the Court which shall decide such question.)
('86) 13 Cal 257 (262) (DB).
† ('39) 26 AIR 1939 Pat 144 (145) : 17 Pat 617 (DB).

14. ('90) 12 All 571 (574, 577) (DB). (Case under S. 257A of the old Code.)
('96) 20 Mad 378 (383) (DB). (Do).

15. ('26) 13 AIR 1926 Mad 411 (412) (DB).

16. ('09) 9 Cal L Jour 239 (244) (DB).
† ('05) 28 Mad 466 (471) FB).

17. ('33) 20 AIR 1933 Mad 110 (111, 112) (DB).
('79) 2 All 283 (283) (DB).
('31) 18 AIR 1931 Lah 690 (690, 691). (Transferee Court cannot do so.)

18. (05) 28 Mad 466 (471) (FB).
('39) 26 AIR 1939 Pat 144 (145): 17 Pat 617 (DB).

19. ('05) 1 Cal L Jour 315 (318) (DB).
('34) 21 AIR 1934 Lah 113 (113).
('03) 25 All 443 (444) (DB).

pass an order transferring the decree to another Court,[20] or recall the execution proceeding from the transferee Court,[21] or make an order for simultaneous execution by another Court.[22] As to whether an application *for execution* made to the transferor Court before a certificate is received from the transferee Court under S. 41 is an application made to a "proper Court" within the meaning of Art. 182 (5) of the Limitation Act, see the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 182, Note 89.

Where, in accordance with O. 21, R. 6 (2) as added by the Allahabad High Court, a certificate of transfer and a copy of decree are handed over to the decree-holder to be taken to the Court to which they are to be sent, he can either take them to the transferee Court or return them to the Court which issued them; in the latter case the Court which passed the decree becomes again seized of the matter and can start execution itself or grant a new certificate of transfer.[23]

As to the power of the Court to entertain an application after the *property* in respect of which the decree was passed is transferred to the jurisdiction of another Court, see section 37, Note 5.

As to the maintainability of simultaneous executions, see S. 38, Note 10.

3a. Powers of transferor Court after transfer of decree. — See Note 3.

4. Law of limitation applicable to transferred decree. — See Section 40, Note 1.

5. "Shall be subject to the same rules in respect of appeal." — An order in execution passed by the transferee Court will be appealable, where, if the decree had been passed by itself, such order would be appealable. Thus, where a small cause decree is transferred to the original side for execution and an appealable order is passed in execution by the Court of transfer, such order would be appealable notwithstanding that the *decree transferred* is itself not appealable.[1] But the transfer of the decree cannot alter the *nature of the suit*[2] and the provisions of S. 102 will control this section with the result that in the case of suits of a small cause nature, no *second* appeal will lie.[3]

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20. ('27) 14 AIR 1927 Rang 258 (261): 5 Rang 397 (DB).
('78) 3 Cal 512 (513) (DB).
('74) 21 Suth W R 337 (338) (DB).
('87) 1887 Pun Re No. 83, page 174 (175).
('79) 1879 Pun Re No. 129, page 377 (381) (FB).
('28) 15 AIR 1928 Mad 493 (494) (DB).
See Note 17 on Section 39.
See also Note 10 on Section 38.
[But see ('28) 15 AIR 1928 Rang 40 (42): 5 Rang 775 (DB). (This decision, it is submitted, is not correct — Though it purports to follow the Privy Council decision in A I R 1927 P C 73 it is based on an incorrect view of facts in the Privy Council case.)]

21. ('39) 26 AIR 1939 Pat 144 (145) : 17 Pat 617 (DB).

22. ('39) 26 AIR 1939 Pat 144 (145) : 17 Pat 617 (DB).
[*See also* ('38) 25 AIR 1938 Mad 113 (114) : I L R (1938) Mad 326. (Section 42 does not empower transferee Court to order simultaneous execution.)]

23. ('36) 23 AIR 1936 All 369 (369) (DB).

Note 5

1. ('41) 28 AIR 1941 Pat 624 (624). (Order of transferee Court that Small Cause Court decree is barred by time is appealable—No revision lies.)
('40) 44 Cal W N 587 (589). (Small Cause Court decree transferred to Subordinate Judge with small cause powers—Application for execution against immovable property of judgment-debtor — Subordinate Judge in dealing with it acts in exercise of ordinary jurisdiction and not small cause jurisdiction—Order refusing to stay the execution of a Small Cause Court decree is appealabe.)
('90) 12 All 581 (586, 587).
† ('09) 31 All 1 (2) (DB).
('16) 3 AIR 1916 All 293 (294).
† ('28) 15 AIR 1928 Bom 534 (537) : 53 Bom 46.
('21) 8 AIR 1921 Cal 242 (243) (DB).
('15) 2 AIR 1915 Cal 237 (237) (DB). (Order directing arrest of surety in execution of small cause decree.)
('73) 19 Suth W R 131 (132) (DB).
('05) 1905 Pun L R No. 3 p. 33 (35).
('25) 12 AIR 1925 Mad 1179 (1180) (DB). (Section 42 in an amended form is made applicable to the Madras Small Cause Courts Act and does not govern transfers by the City Small Cause Court to the Moffussil Munsif's Court — The latter will be governed by S. 42, C. P. Code.)
('19) 6 AIR 1919 Mad 264 (265) (DB).
('88) 11 Mad 130 (132).
2. ('90) 12 All 579 (580) (DB).
3. ('18) 5 AIR 1918 Mad 1368 (1368).
('11) 12 Ind Cas 959 (960) (DB) (Mad).
('27) 14 AIR 1927 All 740 (740).
('26) 13 AIR 1926 All 161 (162).

Where a decree passed by the High Court is transferred to the Court of a Subordinate Judge for execution, an appeal from the decision of the executing Court will lie to the District Judge and not to the High Court.[4]

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43. [S. 229.] Any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend, or by any Court established or continued by the authority of the [a][Central Government or the Crown Representative] in the territories of any foreign Prince or State, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in British India.

Execution of decrees passed by British Courts in places to which this Part does not extend or in foreign territory.

[1877, S. 229; 1859, S. 284.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Governor-General in Council."

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Courts established or continued by authority of the Central Government or the Crown Representative in the territories of any foreign Prince or State.
4. Limitation applicable to foreign decrees. See Section 44, Note 6.

1. Legislative changes. — The words "any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend" are new. See Note 2.

2. Scope of the section. — Under the old Code only the decrees of British Courts in *foreign territory* could, under this section, be executed within the jurisdiction of any Court in British India. A decree of a Court in a scheduled district in British India, to which the Code was not made applicable, could not be executed by another British Indian Court.[1] The addition of the words "any decree passed. . . . . extend" in the present section makes it clear that the section applies to Courts in areas in British India to which the Code does not apply.

3. Courts established or continued by authority of the Central Government or the Crown Representative in the territories of any foreign Prince or State. — The words "the Central Government or the Crown Representative" have been substituted for the words "the Governor-General in Council" by the Adaptation of Indian Laws Order, 1937. The Court of the Political Agent at Sikkim is situated in a foreign territory and was held to be a Court "established or continued by the authority of the Governor-General in Council" within the meaning of this section, and a decree of that Court was held executable by a British Indian Court.[1] The Court of the Dewan

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('07) 11 Cal W N 861 (862) (DB).
('98) 25 Cal 872 (874) (DB).
[*See also* ('18) 5 AIR 1918 Mad 921 (921).]
Also see S. 24 Note 15; S. 47 Note 84 and S. 102 Note 4.

4. ('40) 27 AIR 1940 Bom 277 (279) : ILR (1940) Bom 633. (It is no argument that because the District Judge held that the second class Sub-Judge had no jurisdiction, as the subject matter of the suit filed in the High Court was beyond its jurisdiction, the appeal would lie to the High Court.)

Section 43 — Note 2

1. ('88) 15 Cal 365 (370).

Note 3

1. ('11) 38 Cal 859 (861) (DB).

Ahilkar of Cooch Behar is situated in a foreign territory but was not established or continued by the authority of the Governor-General in Council.[2] The Court of the Native Commissioners of Kondh situated within the family domains of the Maharajah of Benares was held to be a Court established by the authority of the Governor-General in Council, though *not* situated in foreign territory as the family domains of the Maharajah of Benares are in British India. This section does not therefore apply to the execution of the decrees of such Court.[3]

4. Limitation applicable to foreign decrees. — See Section 44, Note 6.

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44. The Provincial Government may by notification in the Official Gazette declare that the decrees of any Civil or Revenue Courts in any Indian State, not being Courts established or continued by the authority of the Central Government or of the Crown Representative, or any class of such decrees, may be executed in the Province as if they had been passed by Courts of British India.

Execution of decrees passed by Courts of Indian States.

[1908, S. 44 ; 1882, S. 229B.]

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Notifications.
4. British Indian Courts, if and when can refuse to execute foreign decrees.
4a. Burma Courts, if can execute decrees of Courts in Indian States.
5. Foreign judgments. See Section 13.
6. Limitation and procedure.

1. Legislative changes. — The section was substituted by the Government of India (Adaptation of Indian Laws) Order, 1937. The previous section gave the power of notification under this section to the Governor-General in Council whereas under the new section the power is given to the Provincial Government. Again, the previous section applied to Courts situated in the territories of any Native Prince or State in alliance with His Majesty whereas the new section refers to Courts situated in any "Indian State."

2. Scope of the section.—This section applies to a *particular* class of foreign Courts, namely those situated within the territories of any "*Native* Prince or State" (now an Indian State) while S. 43 applies to British Courts, situated in the territories of "*any foreign* Prince or State."

3. Notifications. — For notifications issued under this section, see Appendix IV.

4. British Indian Courts, if and when can refuse to execute foreign decrees. — A decree of a Native State (now an Indian State) notified under this section does not thereby cease to be a foreign decree.[1] The section merely alters the *procedure* for enforcing the foreign judgment of a Native State.[2] It does not bar any objections being

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2. ('70) 13 Suth W R 154 (155) (DB).
3. ('07) 34 Cal 576 (582, 583) (DB).

Section 44 — Note 4

1. ('41) 28 AIR 1941 Cal 64 (65) : ILR (1941) 1 Cal 171 (DB).
('91) 15 Bom 216 (219, 221). (Objection on ground of fraud—For right of suit, see Notes on S. 13.)
('38) 25 AIR 1938 Cal 511 (517) : 63 Cal 1033.
2. ('25) 12 AIR 1925 Mad 788 (789).
('15) 2 AIR 1915 Mad 486(488): 39 Mad24(47)(FB).
('38) 25 AIR 1938 Cal 511 (517) : 63 Cal 1033.

raised in execution which are open in suits on foreign judgments.[3] Thus, the judgment-debtor is not precluded from questioning the jurisdiction of the Court passing the decree[4] or from objecting that the decree was obtained by fraud.[5] See also O. 21, R. 7, Note 5.

A British Indian Court is not bound under this section to order execution of the decree in all cases.[6] It can refuse to execute the decree not only on the grounds specified in Ss. 13 and 14[7] but also on other valid grounds as well.[8]

When foreign decrees are sought to be executed in British Indian Courts, as an invariable rule, notice ought to be issued to show cause against execution.[9]

As to whether *suits* are maintainable on judgments of Native States (now an Indian State) notified under this section, see the undermentioned cases.[10]

4a. Burma Courts, if can execute decrees of Courts in Indian States.— Before the separation of Burma from India there were notifications under the section, by which the decrees of Indian States could be executed in Burma.[1] By para. 9 of the Burma Laws Adaptation Order, 1937 and Ss. 148 and 149 of the Government of Burma Act, the said notifications will be in force even after the separation of Burma on 1st April 1937, unless altered or repealed by the Legislature or other competent authority. Consequently, it was held in the undermentioned case[2] that the decree of a Court in the Pudukkottah State, in respect of which a notification under this section had been issued, could be executed by the Courts in Burma.

5. Foreign judgments. — See Section 13.

6. Limitation and procedure. — The rules as to limitation and procedure applicable to the execution of a decree of a foreign Court, are those prescribed by the law of British India and not those prescribed by that of the foreign State.[1] See also the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., S. 11, Note 2 and Art. 182, Note 95.

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3. ('17) 4 AIR 1917 Mad 780 (782) : 39 Mad 733 (FB).
('31) 18 A I R 1931 All 689 (691) : 53 All 747 (DB).
('35) 22 AIR 1935 Lah 551 (551). (Words "as if they had been passed by Court of British India" do not control operation of S. 13 (a).)

4. 4('15) 2 AIR 1915 Mad 486 (487) : 39 Mad 24 (30) (FB). (But if he voluntarily submits to jurisdiction he cannot question it in execution.)
('25) 12 AIR 1925 Cal 955 (956) (DB).
† ('16) 3 AIR 1916 Bom 307 (308) : 40 Bom 551 (DB). (Decree *in absentum*.)

5. ('91) 15 Bom 216 (219, 220).

6. ('15) 2 AIR 1915 Mad 486 (486, 487) : 39 Mad 24 (30) (FB). (Objection to jurisdiction.)

7. ('17) 4 AIR 1917 Mad 780 (782) : 39 Mad 733 (FB).
('33) 20 AIR 1933 Mad 112 (113) (DB). (Ex parte foreign decree *in personam* against British subject not residing there at date of action will not be executed by British Courts.)
('37) 24 AIR 1937 Mad 97 (99).
('34) 21 AIR 1934 Mad 434 (434) : 57 Mad 824 (DB). (Decree of foreign Court against resident in British India — Decree can be executed in British India only if defendant submits to jurisdiction of foreign Court before judgment.)

8. ('25) 12 AIR 1925 Mad 788 (790).
('87) 14 Cal 546 (550) (DB). (Executing Court can refuse to execute unless the record of the Native Court is properly certified.)

9. ('25) 12 AIR 1925 Mad 788 (789).

10. ('41) 28 AIR 1941 Cal 64 (65) : ILR (1941) 1 Cal 171 (DB). (The creditor has the option of bringing an action in domestic tribunal on the foreign judgment which he has recovered or of bringing in a domestic tribunal a suit upon the original cause of action.)
('15) 2 AIR 1915 Mad 486 (488) : 39 Mad 24 (FB). (Per Sesbagiri Iyer J.)

Note 4a

1. As an example, see Notification 4395—1/A dated 8-12-04 Page 476 of Vol. III of General Statutory Rules and Orders 3rd Edn., 1926.
2. ('38) 25 AIR 1938 Rang 352 (353) : 1938 Rang L R 463 (DB).

Note 6

1. ('87) 14 Cal 570 (571) (DB). (Limitation — Art. 182 of the Indian Limitation Act.)
('16) 3 AIR 1916 Bom 200 (201) : 40 Bom 504 (DB). (Do.)
('78) 2 Mad 337 (338) (DB). (Civil procedure — A judgment against the legal representative of the debtor—Execution confined to assets in hand.)

[a]**44A.** (1) Where a certified copy of a decree of any of the superior Courts of the United Kingdom or any reciprocating territory has been filed in a District Court, the decree may be executed in British India as if it had been passed by the District Court.

Execution of decrees passed by Courts in the United Kingdom and other reciprocating territory.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (*a*) to (*f*) of section 13.

Explanation 1. — "Superior Courts," with reference to the United Kingdom, means the High Court in England, the Court of Session in Scotland, the High Court in Northern Ireland, the Court of Chancery of the County Palatine of Lancaster and the Court of Chancery of the County Palatine of Durham.

Explanation 2. — "Reciprocating territory" means any country, or territory, situated in any part of His Majesty's Dominions [b][* * *] which the [c][Central Government] may, from time to time, by notification in the [d][Official Gazette], declare to be reciprocating territory for the purposes of this section; and "superior Courts," with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 3. — "Decree," with reference to a superior Court, means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, and

(*a*) with reference to superior Courts in the United Kingdom, includes judgments given and decrees made in any Court in appeals against such decrees or judgments, but

(*b*) in no case includes an arbitration award, even if such award is enforceable as a decree or judgment.

a. This section was inserted by the Code of Civil Procedure (Amendment) Act, 1937 (VIII of 1937), Section 2.

b. The words "or in India" repealed by the Government of India (Adaptation of Indian Laws) Order, 1937.

c. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Governor-General in Council."

d. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Gazette of India."

Synopsis

1. Scope and object of the section.
1a. Decree falling within exceptions (a) to (f) of Section 13.
2. Explanation 3.
3. Notifications. See Appendix IV.

1. Scope and object of the section. — Under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, provision is made for the extension of Part I of the Act by Order in Council to His Majesty's Dominions outside the United Kingdom and also for the specification by such Order in Council of the Courts which shall be deemed to be "superior Courts" within the meaning of the Act. On the Act being extended to British India, the decrees of the Courts in British India which may be deemed to be "superior Courts" for the purpose of the Act may be executed in the United Kingdom. This section is intended to reciprocate the policy contained in the above Act and to be part of a reciprocal arrangement under which on the one part decrees of British Indian Courts should be executable in the United Kingdom and on the other, decrees of Courts in the United Kingdom and other notified areas should be executable in British India.[1]

1a. Decree falling within exceptions (a) to (f) of Section 13. — Under sub-s. (3) the burden is upon the judgment-debtor to establish that the decree falls within the exceptions to S. 13, for instance, that it has not been given on the merits of the case.[1]

2. Explanation 3. — This explanation has been added to the section with two objects in view, viz., to include a Court of Appeal in the United Kingdom among "superior Courts" and to define decrees so as to assimilate the meaning of the term to that applicable to the corresponding British statute (S. 10, Foreign Judgments (Reciprocal Enforcement) Act, 1933).[1]

3. **Notifications.** — See Appendix IV.

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[a]**45.** So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in any Province to send a decree for execution to any Court established or continued by the authority of the Central Government or of the Crown Representative in the territories of any foreign Prince or State to which the Provincial Government has by notification in the Official Gazette declared this section to apply.

Execution of decrees in foreign territory.

[1908, S. 45; 1882, S. 229A.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original Section 45.

Synopsis

1. Execution of decrees of British Indian Courts in foreign territory.
2. Notifications.
3. "Any foreign Prince or State."
4. Step-in-aid of execution.

Section 44A — Note 1

1. *Vide* Statement of Objects and Reasons, Gazette of India Part V, p. 24, dated 16th February 1935.

Note 1a

1. ('43) 30 AIR 1943 Cal 42 (44) (DB). (Agent claiming his commission to the knowledge of the Principal — Latter absent and not represented at hearing—Claim awarded—No appeal nor application to set aside decree—*Held* that principal failed to satisfy that decision was not on merits.)

Note 2

1. *Vide* Report of the Select Committee.

1. Execution of decrees of British Indian Courts in foreign territory. — This section deals with cases converse to those dealt with by Ss. 43 and 44. It deals with the execution of decrees of *British Indian Courts* in *foreign* territory. But in order to send a decree of a British Indian Court for execution to a Court in foreign territory it is necessary that the transferee Court should be one —

(1) which is established or continued by the authority of the Central Government or the Crown Representative in such foreign territory, *and*

(2) to which the Governor-General in Council (now the Provincial Government) has, by notification, declared this section to apply.[1]

In the absence of either of these conditions a British Indian Court has no jurisdiction to send its decrees for execution to a Court not situate in British India.[2] The reason why the Code is silent as to the execution of decrees of British Indian Courts by the Courts of Native States is that the Indian Legislature has no power to legislate for foreign Courts.[3] But by treaty arrangements decrees of British Indian Courts may be executed in Courts of Native States.[4]

2. Notifications. — See Appendix IV. This section applies to Arakan Hills. See Arakan Hill Tracts Laws Regulation, 1916 (I of 1916), Schedule I.

3. "Any foreign Prince or State." — The Courts contemplated by this section are Courts in the Native Indian States in alliance with the British Government.[1]

4. Step-in-aid of execution. — As to whether an application to a British Indian Court to send its decree to the Court of a Native State between which and the British Courts reciprocity prevails, is an application to take a step-in-aid of execution, see the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Article 182, Note 95.

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46. (1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

Precepts.

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree :

Section 45 — Note 1

1. ('42) 29 AIR 1942 Pesh 49 (49) (DB). (Court of the Political Agent at Quetta is established by the Governor-General in Council.)
('18) 5 AIR 1918 Mad 580 (583) : 40 Mad 1069 (1077) (FB).
('29) 16 AIR 1929 Sind 45 (46): 23 Sind L R 205 (DB).
('11) 38 Cal 859 (860) : 11 Ind Cas 442 (442) (DB). (Court of Political Agent at Sikkim — Established by authority of the Governor-General in Council.)
As to whether Berar Courts are British Indian Courts established in foreign territory, *see*: ('41) 28 AIR 1941 Nag 36 (46, 47): ILR (1941) Nag 1 (FB).
2. ('18) 5 A I R 1918 Mad 605 (605) : 32 Mad L Jour 487 (488).
('02) 29 Cal 400 (402) (DB).
('88) 12 Bom 230 (231) (DB).
('19) 6 AIR 1919 Low Bur 4 (4) (DB).
3. ('18) 5 A I R 1918 Bom 236 (239): 42 Bom 420 (429) (DB).
('29) 16 AIR 1929 Sind 45 (46) : 23 Sind L R 205 (DB). (Attachment before judgment—Property in Dutch territory—Mandate issued to British Consul there cannot be maintained.)
4. ('18) 5 AIR 1918 Mad 580 (584) : 40 Mad 1069 (1077) (FB).

Note 3

1. ('42) 29 AIR 1942 Pesh 49 (50) (DB). (Khan of Qualat is foreign or Indian Prince within the meaning of S. 311, Government of India Act — Quetta being part of his State is within territory of foreign Prince or State.)
('29) 16 AIR 1929 Sind 45 (46) : 23 Sind L R 205 (DB).

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

Synopsis

1. Attachment by precept.
2. Powers of Court to which precept is sent.
3. Application under the section is not one for execution.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Object of the Section. See Note 1.
Precept can be issued even after decree is transferred. See Note 1.
"Unless the period of attachment is extended." See Note 1.
Validity of precept if can be challenged by Court to which it is sent. See Note 2.

1. Attachment by precept.—The section is new and its object is to enable the attachment of the property of the judgment-debtor in another Court in order to prevent the judgment-debtor from alienating or otherwise dealing with it to the detriment of the decree-holder till proper proceedings for the sale of the property in pursuance of an application can be taken.[1] It is for this reason that the effect of the attachment in pursuance of the precept is limited to two months and power is given to the Court which passed the decree to extend the time in order to meet the contingencies which may arise due to the delay in transferring the decree to the Court to which the precept is sent.[2] No such attachment, therefore, can continue for more than two months unless the period is *renewed* by order of the Court which passed the decree or unless the decree is *transferred for execution* to the attaching Court and the decree-holder has applied for the sale of the property.[3] An order for a permanent attachment is not one contemplated by this section.[4] When an application for extending the period of the attachment is made before the expiry of the two months but the order extending the time is passed *after* the expiry of the period, the order will relate back to the date of the petition and will have a retrospective effect.[5]

Where a precept is applied for under this section, it is not open to the Court issuing it to attach such property itself;[6] the Court to which the precept is issued must attach the property and wait for an application for execution being made by the attaching creditor.[7]

The transfer of a decree for execution does not put an end to the jurisdiction of the parent Court.[8] Its jurisdiction continues for certain purposes of which S. 46 is one and therefore it can issue a precept even after the decree is transferred for execution.[9] The Court to which the decree is transferred for execution is not competent to issue a precept

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Section 46 — Note 1

1. ('40) 27 AIR 1940 Cal 26 (28) : I L R (1939) 2 Cal 370. (An attachment under this section is merely a step taken to facilitate execution ; it is not a step taken in the proceedings in execution.)
('36) 23 AIR 1936 Lah 486 (487, 488).
('27) 14 AIR 1927 Cal 581 (588) (DB).
('31) 18 AIR 1931 Rang 279 (280) : 9 Rang 561.
('11) 10 Ind Cas 794 (795) (Low Bur).
2. ('36) 23 AIR 1936 Lah 486 (488).
3. ('36) 23 AIR 1936 Lah 486 (487).
4. ('36) 23 AIR 1936 Lah 486 (488).
5. ('17) 4 AIR 1917 Mad 591 (592) (DB).
6. *See* ('40) 27 AIR 1940 Rang 34 (36) : 1939 Rang L R 624. (Court of Small Causes, Rangoon attaching debt at Mandalay—*Held* that Mandalay being outside jurisdiction of Small Causes, Rangoon attachment was illegal.)
7. ('33) 20 AIR 1933 All 844 (845) (DB).
8. See Section 42, Note (3).
9. ('27) 14 AIR 1927 Cal 581 (588) (DB).

as S. 46 enables a decree-holder to apply for a precept only to *the Court which passed the decree.*[10]

This section applies to matters which arise after a decree has been passed; hence it cannot be invoked in aid of an application for attachment before judgment under O. 38, Rule 5.[11]

No attachment can be effected under this section where the properties are situated outside British India.[12]

This section applies to Arakan Hills — See the Arakan Hill Tracts Laws Regulation, 1916 (I of 1916), Schedule I.

2. Powers of Court to which precept is sent. — It has been held that when a precept sent by Court A for the attachment of property in the custody of Court B, is received by Court B, the attachment takes effect from the date when the precept is received by Court B. The refusal of Court B to acknowledge the attachment cannot affect the validity of an attachment which is otherwise good.[1] Nor can the Court to which the precept is sent vest itself with jurisdiction to question the validity of the precept. It has only to carry out the precept. If any variation is to be made, it is the *issuing* Court which is competent to make it.[2] But the former Court has inherent powers to deal with all matters that may incidentally arise in connection with the attachment proceedings. It may thus stay execution if the judgment-debtor deposits the decree amount in Court or furnishes security for payment thereof.[3]

3. Application under the section is not one for execution. — An application for an attachment under this section cannot be regarded as an application *for execution* entitling a decree-holder to rateable distribution of assets under S. 73 of the Code.[1] An order issuing a precept under this section is therefore not an order directing execution and the attachment under the precept is not an attachment in execution proceedings. There must be an application for execution in the proper form after an attachment under a precept and it is only upon such application that execution can issue.[2]

QUESTIONS TO BE DETERMINED BY COURT EXECUTING DECREE.

47. [S. 244.] (1) All questions[4] arising[6] between the parties[7] to the suit in which the decree was passed, or their representatives,[17] and relating to the execution, discharge or satisfaction of the decree,[28] shall be determined[73] by the Court executing the decree[74] and not by a separate suit.[72]

Questions to be determined by the Court executing decree.

(2) The Court may, subject to any objection as to limitation[93] or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding[82] and may, if necessary, order payment of any additional court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.[27]

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10. ('26) 13 AIR 1926 Sind 157 (158).
11. ('41) 28 AIR 1941 All 212 (215).
12. ('31) 18 AIR 1931 Lah 723 (724) : 13 Lah 206 (DB).

Note 2

1. ('35) 22 AIR 1935 Lah 914 (915).
2. ('27) 14 AIR 1927 Cal 581 (588) (DB).
3. ('26) 13 AIR 1926 Lah 433 (433, 434).

Note 3

1. ('26) 13 AIR 1926 Cal 249 (250) (DB).
2. ('40) 27 AIR 1940 Cal 26 (28) : ILR (1939) 2 Cal 370.

Explanation. — For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed,[8] are parties to the suit.

[1877, S. 244 : 1861, S. 11 ; 1859, S. 283. See S. 2, cl. (2); Ss. 50, 52, 144, 145.]

Synopsis

1. Legislative changes.
2. Scope, object and applicability of the section.
3. Applicability to proceedings under other Acts.
4. Question must be one arising 'between the parties' to the suit in which the decree is passed or their representatives.
5. Parties arrayed on the same side.
6. "Arising," meaning of.
7. "Parties to the suit," meaning of.
8. Plaintiff whose suit is dismissed and defendant against whom suit is dismissed — Explanation.
8a. Person against whom suit abates.
9. Surety under section 145.
10. Government in proceedings under Order 33.
11. Custodian of attached property.
12. Unnecessary party. See Note 8.
13. Intervenor.
14. Trespassers.
15. Party sued in a representative capacity.
16. Question as to who is a party can be decided by the executing Court.
17. "Representative," who is.
18. Decree-holder becoming auction-purchaser. See Note 19.
19. Auction-purchaser—Position of.
20. Transferee from auction-purchaser.
21. Transferee from a party.
22. Purchaser from party to suit in which injunction has been granted affecting such property.
23. Official Assignee or Official Receiver.
23a. Liquidator of company.
24. Transferee of decree.
25. Attaching creditor.
25a. Judgment-debtor under attached decree.
26. Surety for the performance of a decree.
27. Question as to who is the representative must be determined by the Court—Clause (3).
28. Question must relate to execution, discharge or satisfaction of the decree.
29. Question as to validity of the decree.
30. Question as to the existence of the decree.
31. Pre-decree matters.
32. Matters subsequent to the decree. See Notes 33 to 71.
33. Decree incapable of execution.
34. Questions arising between the preliminary and final decrees.
35. Question as to excess or deficient execution.
36. Question of damages for acts done under cover of execution.
37. Question as to seizure of wrong property.
38. Question of mesne profits.
39. Question of restitution of property taken in execution, when the decree is amended, varied or reversed. See Notes 3 to 6 and 30 on Section 144.
40. Question of adjustment of decree. See O. 21, R. 2.
41. Agreement against execution of decree.
42. Contribution among judgment-debtors.
43. Mal-administration of estate of deceased judgment-debtor.
44. Stay of execution.
45. Question of liability of certain property to attachment and sale.
46. Question, if property attached belongs to judgment-debtor.
47. Question, if debts were contracted without legal necessity or tainted with immorality or that the attached property is self-acquired or ancestral. See Notes on Section 53.
47a. Question as to binding character of debt on other brothers where decree is obtained against elder brother.
48. Question as to the transferability of the property proceeded against.
49. Question between decree-holder and judgment-debtor in which auction-purchaser is interested.
50. Question between the execution purchaser and a party or his representative.

51. Setting aside sales in execution.
52. Decree obtained by fraud.
53. Fraud in execution proceedings.
54. Fraud anterior to sale. See Note 53.
55. Fraud in publishing and conducting the sale.
56. Other grounds for setting aside sale. See Notes 57 to 71.
57. Property not saleable. See Note 45.
58. Reversal of decree.
59. Amendment of decree after sale. See Notes 39 and 58 and Notes 4, 13, 30 and 33 on section 144.
60. Ex parte decree set aside after sale.
61. Want of notice under O. 21, Rr. 16, 22 and 66.
62. Purchase by decree-holder without permission.
63. Setting aside sale on deposit.
64. Judgment-debtor having no saleable interest.
65. Sale in contravention of the Transfer of Property Act.
66. Sale in contravention of stay order.
67. Sale in contravention of injunction order.
68. Sale not warranted by decree.
69. Sale under time-barred decree.
70. Sale without jurisdiction.
71. Other grounds for setting aside sale.
71a. Miscellaneous.
72. "Shall be determined by the Court executing the decree and not by a separate suit."
73. "Determined," meaning of.
74. "Court executing the decree," meaning of.
75. Powers of the executing Court. See Notes on section 38 generally.
76. Power to construe decree.
77. Rules of construction of decree.
78. Power to go behind decree. See Note 8 on section 38 and Note 29.
79. Power to grant relief against forfeiture and penalty.
80. Costs.
81. Interest.
82. Court may treat a proceeding as a suit or vice versa—Sub-section (2).
83. Objection as to limitation, when to be considered.
84. Appeal.
85. Forum of appeal.
86. Interlocutory orders in execution proceedings.
86a. Parties to proceedings under section.
87. Revision.
88. Limitation.

NOTE to the Synopsis. See the Notes indicated for the following topics:

Accession to hypotheca to be decided in execution. See Note 71a.
Attached property. See Note 21.
Claim by auction-purchaser for refund of purchase-money. See Note 71a.
Conditional decree for possession in a pre-emption suit—Conditions satisfied—Possession claimable in execution—Separate suit barred. See Note 71a.
Defaulting purchaser at execution sale. See Notes 7, 50 and 71, also O. 21 R. 71.
Dispossession subsequent to private possession under a previous decree. See Note 35. See also Section 11.
Execution of rent decree. See Note 3.
Exonerated parties. See Note 8.
First decree for redemption barred — Second suit lies. See Note 34.
Head of a mutt appointed under a decree. See Note 33.
Karnavan of a Malabar tarwad. See Note 7.
Legality of execution proceedings. See Note 71a.
Legatees. See Note 17.
Objections by judgment-debtor in respect of delivery of possession to the purchaser. See Note 19.
Objections by legal representative of deceased person. See Notes 46 and 47.
"Parties"—Minors—Not properly represented. See Note 7.
Parties in several capacities. See Notes 7, 15 and 46.
Question as to waste committed by judgment-debtor subsequent to decree for possession. See Note 71a.
Questions not covered by the section. See Note 71a.
Questions that do not relate to execution, discharge or satisfaction under this section. See Note 71a.
Receiver in representative capacities. See Note 7; also see Section 52.
Res judicata in execution proceedings. See S. 11.
Sales in contravention of Bengal Tenancy Act. See Note 21.
Suit by attaching creditor for illegal disposal of attached property. See Note 14.
Suits by non-impleaded subsequent mortgagee for payment of surplus sale proceeds. See Note 5.
Suits for damages for removal of materials by the parties to a suit after sale and before delivery of possession. See Note 86; also Note 71a.
Suits for enforcing mere declaratory decrees. See Note 33; also Note 71a.
Suit for redemption after a decree for the same could not be executed. See Note 33.
Theory of substitution of securities applicable to execution. See Note 71a.
Transferees of occupancy holdings. See Note 21.
Transferee *pendente lite*. See Notes 17, 21.
Unregistered transferees of an occupancy holding. See Note 17.
Valuation of appeal for jurisdiction. See Note 85; also Note 18 on Section 96.

1. Legislative changes.

(a) Sub-sections (2) and (3) and the Explanation are new. The provision in sub-s. (2) for treating a proceeding under the section as a suit or *vice versa* is a recognition of a principle decided by a series of decisions under the old Code. See Note 32.

Under sub-s. (3) the executing Court shall itself determine the question as to who is the representative of a party and has no such option to refer the question to a separate suit as it had under the old Code. See Note 27.

The Explanation was expressly enacted to set at rest a conflict of opinion as to whether a defendant against whom a suit was dismissed, was a party to the suit within the section. See Note 8.

(b) Clauses (a) and (b) and the words "or to stay the execution thereof" in cl. (c) have been omitted. Separate provisions have been made for the determination of questions regarding mesne profits and interest by the decree itself and not in execution. See Note 38 and O. 20, R. 12. As to the stay of execution of decrees, see Note 44.

(c) In S. 244 of the old Code there was no numbering of the sub-sections, each clause being dependent on the previous one. Under S. 47 the sub-sections have been numbered separately. The object of the numbering seems to be to make the several sub-sections independent of each other and to make them each readable by itself.[1]

2. Scope, object and applicability of the section. — This section, like S. 11, has been enacted for the purpose of checking needless litigation[1] and with a view to enable parties to obtain adjudication of questions relating to execution without unnecessary expense or delay, which a fresh trial might entail.[2] The rule of *res judicata*, however, deals with the finality of a decision of a Court on matters actually or constructively in issue before it and bars a *fresh trial of any kind* of such questions in subsequent proceedings between the parties; while S. 47 deals with the *enforcement* of such decisions and enacts that the questions specified in the section shall be *tried in execution* and not by a separate *suit*.[3] In other words, where there is an *executable* judgment, no *suit* lies for the enforcement thereof, or for the determination of the questions specified in the section.[4] The object of the section being to save unnecessary expense and delay and to

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Section 47 — Note 1

1. ('16) 3 AIR 1916 Cal 471 (472).

Note 2

1. ('72) 18 Suth W R 185 (188) (PC).
('09) 31 All 82 (87) : 1 Ind Cas 416 (419) (FB).
('82) 6 Bom 7 (8) (DB).
('98) 22 Bom 463 (466) (FB).
('93) 17 Bom 49 (52) (DB).
('25) 12 AIR 1925 Cal 1258 (1259) (DB).
('09) 4 Ind Cas 121 (122) (DB) (Cal).
('17) 4 AIR 1917 Mad 177 (177) (DB).
('93) 16 Mad 447 (449) (DB).
('92) 15 Mad 226 (228) (DB).
('90) 13 Mad 504 (507) (DB).
2. ('40) 27 AIR 1940 Pat 420 (422) : 19 Pat 524 (DB).
('94) 21 Cal 437 (444, 450, 458) (SB).
('90) 17 Cal 769 (773) (FB).
3. See the cases in foot-note (4).
4. ('42) 29 AIR 1942 Mad 588 (590). (Where a creditor obtains a decree for recovery of his debt against the assets of the deceased, in the hands of his legal representative, but instead of proceeding to execute his decree under S. 52, C. P. Code, files a separate suit to have the estate of the debtor administered, the Court will not pass a decree for administration of the estate.)
('41) 28 AIR 1941 Pat 95 (96) : 20 Pat 86 (DB). (A decree awarding future maintenance can be executed for arrears of such future maintenance and no fresh suit is necessary. Where the decree contains an express provision that certain property would be ear-marked for future maintenance and that arrears of future maintenance can be realised by sale of that property, it is not a mere money decree, but is itself a decree for sale, and future maintenance when falling due can be recovered in execution without further suit. It can be executed against a purchaser of the property with notice, though he is not a party to the suit itself.)

afford relief to parties finally, cheaply and speedily without the necessity of a fresh suit,[5] it must be construed as liberally as the language would reasonably admit of.[6] It embraces all matters connected with the execution of an existing decree, between the parties or their representatives and covers all questions relating to the execution, discharge or satisfaction of the decree.[7] It does not matter whether such questions arise before or

('41) 28 AIR 1941 Pat 70 (75, 76) : 20 Pat 223 (DB). (A simple money decree can be enforced by execution, and a suit based upon such a decree will not lie. The fact that such a decree cannot be executed by reason of S. 60A of the Bengal Court of Wards Act, leave of the Court not having been obtained or accorded is not an inherent defect in the decree itself which renders it incapable of execution.)
('25) 12 AIR 1925 P C 34 (35) : 52 Cal 314 : 52 Ind App 79 (PC).
('34) 21 AIR 1934 Cal 327 (327) : 60 Cal 1467. (Money decree creating charge on property—Separate suit to enforce charge is not maintainable.)
(1864) 10 Moo Ind App 203 (211) (PC).
('90) 13 All 98 (100) (DB).
('35) 22 AIR 1935 Pat 222 (224). (Suit for possession under lease — Decree—Order for delivery — Subsequent suit for demolition of building not maintainable.)
('39) 26 AIR 1939 Pat 260 (261) (DB). (If execution of decree for possession is barred by limitation, fresh suit by decree-holder for same purpose is also barred — Mere inundation of land does not amount to dispossession of judgment-debtor or constructive possession of decree-holder so as to create fresh right to sue.)
('37) 24 AIR 1937 Pesh 3 (4) (DB). (S. 47 applies to execution of decrees of the Privy Council.)
('66) 1 Agra 93 (96) (DB).
('03) 5 Bom L R 1036 (1040). (Rights under a consent decree.)
('86) 10 Bom 461 (467) : 13 Ind App 66 (PC).
('73) 10 Bom H C R 433 (434) (DB).
('30) 17 AIR 1930 Cal 586 (587). (Possession through Court or out of Court not got in execution for want of steps—Suit barred.)
('23) 10 AIR 1923 Cal 252 (255) (DB). (A decree which merely declares the rights of the parties is incapable of execution. A separate suit lies in such a case to enforce the rights declared by the decree.)
('78) 3 Cal 30 (35, 37, 38) (FB).
('21) 8 AIR 1921 Lah 394 (395). (Decree for possession in a mortgage suit obtained — No further suit for possession lies unless it can be shown that possession was obtained under the decree and the judgment-debtor had been subsequently dispossessed.)
('17) 4 AIR 1917 Lah 11 (12).
('93) 1893 Pun Re No. 16.
('94) 17 Mad 343 (355) : 21 Ind App 71 (PC).
('70) 6 Mad H C R 13 (14). (Decree for possession of land with crops — Claim for both in execution and suit.)
('70) 5 Mad H C R 375 (377).
('70) 5 Mad H C R 185 (188).
('69) 4 Mad H C R 453 (458).
('30) 17 AIR 1930 Nag 17 (18).
Also see S. 11, Note 2.

No suit will lie even if the execution of the decree is barred by limitation; see the following cases :
('21) 8 AIR 1921 All 369 (372) : 43 All 170.
('20) 2 Lah L Jour 724 (727).
('16) 3 AIR 1916 All 163 (164) : 38 All 509.
('82) 4 All 481 (481). (3 N W P H C R 62 followed.)
('68) 3 Agra 383 (383) (FB).
('68) 3 Agra 381 (382) (FB).
('19) 6 AIR 1919 Bom 34 (35) : 43 Bom 703.
('82) 6 Bom 7 (8).
('82) 5 Bom 382 (384).
('69) 6 Bom H C R A C 231 (234).
('27) 14 AIR 1927 Cal 411 (412) : 54 Cal 524. (Decree for khas possession not executed — Suit barred.)
('06) 33 Cal 679 (681, 682).
('97) 24 Cal 473 (487, 489, 491).
('82) 10 Cal L Rep 258 (262).
('78) 1 Cal L Rep 254 (255).
('76) 25 Suth W R 372 (373).
('75) 23 Suth W R 407 (407).
('73) 20 Suth W R 412 (413).
('30) 17 AIR 1930 Lah 74 (75). (Final decree for redemption — Payment made by decree-holder—Execution barred by limitation — Second suit for redemption or possession is barred.)
('25) 12 AIR 1925 Mad 279 (280) : 48 Mad 482.
('18) 5 AIR 1918 Mad 370 (371) : 41 Mad 641.
[*See* ('38) 25 AIR 1938 Pat 41 (42) : 16 Pat 748. (Suit to recover money recovered under subsisting decree does not lie—AIR 1923 P C 167 : 46 Mad 895 : 50 Ind App 301 (PC) followed.)]
[*See also* ('16) 3 AIR 1916 Cal 661 (664).]
Also see Note 33.

5. † ('92) 19 Cal 683 (689) : 19 Ind App 166 (P C).
('04) 31 Cal 737 (741) (DB).
('36) 23 AIR 1936 Cal 537 (539).
('15) 2 AIR 1915 P C 88 (89) (PC).
('73) 20 Suth W R 162 (162) (DB).
[*See also* ('01) 24 All 209 (210, 211).
('36) 23 AIR 1936 Mad 636 (638).]

6. ('20) 7 AIR 1920 Mad 324 (330) : 43 Mad 107 (FB).
('24) 11 AIR 1924 Nag 246 (247) : 20 Nag L R 90.
('36) 23 AIR 1936 Pat 289 (294):15 Pat 545 (DB).
('85) 7 All 73 (78) (DB).
('22) 9 AIR 1922 Bom 370 (374):46 Bom 529 (DB).
('07) 34 Cal 642 (648, 654, 659) (FB).
('06) 33 Cal 857 (860) (DB).
('97) 24 Cal 473 (492) (SB).
(1900) 23 Mad 55 (59) (DB).
('22) 9 AIR 1922 Pat 572 (572) (DB).

7. ('27) 14 AIR 1927 Cal 106 (108) : 53 Cal 837 (DB).
('10) 34 Bom 575 (581) : 7 Ind Cas 940 (943).
('37) 24 AIR 1937 All 407 (409) (DB). (But the section ought to be so interpreted as not to render redundant the other provisions contained in the Code.)

after the decree has been executed[8] and the fact that an alternative remedy by suit is provided in certain circumstances[9] or that an application was made under another provision of the Code,[10] does not prevent the section from being applied for the decision of the questions falling within its scope. The section does not make any distinction between a money-decree and a mortgage-decree[11] or between the Court which passed the decree and the Court executing it, inasmuch as both qualifications may be possessed by the same Court.[12]

But in order that the section may apply, the following three conditions must be satisfied :

(1) the question must be one arising *between the parties* to the suit in which the decree is passed, or their representatives,

(2) it must relate to the *execution, discharge or satisfaction* of the decree[13] (see Notes 4 and 28) and

(3) the order must be one passed by the Court *executing* the decree.[14]

The section applies to the execution of decrees of the Privy Council.[15] The mere fact that an application is made in the execution proceedings is not sufficient to attract the operation of this section when the question for determination does not fall within its purview.[16]

The section does not apply to the decrees of foreign Courts[17] or to the Ganjam and Vizagapatam Agency Tracts.[18]

3. Applicability to proceedings under other Acts. — It has been seen in Note 2 that in order that section 47 may apply, one of the essential requisites is that the question must relate to execution, discharge or satisfaction of a decree. Where, therefore, an order passed in proceedings under the provisions of other Acts is enforceable under the provisions of those Acts *as if it were a decree*, S. 47 will apply.[1] Thus, it has been

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('85) 7 All 641 (643) (DB).
('36) 23 AIR 1936 Cal 409 (412) : I L R (1937) 1 Cal 57 (DB). (Execution Court can allow set off even in cases not strictly covered by O. 21, R. 19.)
('90) 17 Cal 711 (718) (FB).

8. ('99) 2 Oudh Cas 366 (371).
† ('95) 17 All 478 (480) (DB).
('33) 20 AIR 1933 All 429 (431) (DB).
('02) 24 All 291 (294) (DB).
('36) 23 AIR 1936 Lah 725 (727).
('38) 25 AIR 1938 Nag 363 (364).

9. ('16) 3 AIR 1916 Mad 1008 (1010) (DB).

10. ('42) 29 AIR 1942 Pat 146 (147) (DB). (The mere fact that the decree-holder has described the application as under another provision will not take it out of the scope of this section.)
('16) 3 AIR 1916 Cal 471 (472) (DB).
('26) 13 AIR 1926 Mad 968 (969). (Application made under O. 21, Rr. 99 and 101.)
† ('35) 22 AIR 1935 All 183 (185) (DB). (To see whether application comes under S. 47, substance of application must be examined and not heading given to it by party.)

11. ('29) 16 AIR 1929 Lah 762 (763).

12. ('85) 7 All 73 (76) (DB).

13. ('15) 2 AIR 1915 Cal 137 (138) (DB).
('12) 13 Ind Cas 365 (367) (DB) (Cal).
('10) 7 Ind Cas 769 (770) (DB) (Cal).
('02) 6 Cal W N 279 (283) (DB).
('38) 25 AIR 1938 Lah 4 (5). (Amendment of decree is not a matter falling under this section — No appeal lies from order amending decree.)
('21) 8 AIR 1921 Mad 612 (615) (DB).

14. ('41) 28 AIR 1941 Cal 530 (532) : ILR (1941) 2 Cal 402 (DB). (Order under S. 36 (6) (a) (i) of Bengal Money-lenders Act is not passed by the Court as an *executing* Court.)
('40) 27 AIR 1940 Bom 10 (11) : ILR (1939) Bom 708. (Order by the Court which passed the decree refusing to amend decree is not one passed by the executing Court under S. 47 and hence not appealable.)

15. ('37) 24 AIR 1937 Pesh 3 (4) (DB).

16. ('41) 28 AIR 1941 Cal 530 (532) : ILR (1941) 2 Cal 402 (DB). (Order on application, under S. 36 (6)(a)(i) of Bengal Money-lenders Act is not appealable as an order under this section.)

17. ('13) 20 Ind Cas 704 (707) (DB) (Mad). (Per Sundara Iyer, J.)

18. ('07) 30 Mad 280 (281) (DB).
('11) 36 Mad 128 (130) : 12 Ind Cas 73 (74) (DB).
('23) 10 AIR 1923 Mad 114 (114) (DB).

Note 3

1. ('06) 1906 Pun Re No. 53 : 1906 Pun L R No. 103, p. 322. (Order under Land Acquisition Act.)
('33) 20 AIR 1933 Mad 305 (306) : 56 Mad 712. (The words in S. 70 of the Madras Hindu Religious Endowments Act attract the operation of S. 47.)

held that an award filed under S. 11 of the Indian Arbitration Act, 1899, being under S. 15 enforceable as if it were a decree, section 47 will apply to proceedings in execution thereof.[2] (Now see S. 17, Arbitration Act, 1940.) As to cases of orders under other Acts to which section 47 does not apply, see the undermentioned cases.[3]

Before the enactment of the present Code, and the incorporation therein of the provisions of the Transfer of Property Act relating to orders absolute for sale or foreclosure of mortgaged property, the question arose whether, when such an order absolute has been made, any question that may arise as to such an order is not one relating to the execution of the decree within the meaning of S. 244 of the old Code. There was a conflict of opinion on the matter among the several High Courts.[4] The question is not of any importance now under the present Code.

('38) 25 AIR 1938 All 124 (125). (Order passed under S. 47 in execution under Agra Tenancy Act, is not decree—Second appeal from such order does not lie.)
('32) 19 AIR 1932 All 92 (94) : 53 All 715. (Order of ejectment under S. 80, Agra Tenancy Act, 1926.)
('35) 22 AIR 1935 Cal 89 (89). (Bengal Tenancy Act, S. 173 (3).)
('28) 15 AIR 1928 Cal 202 (203). (Order under S. 173, Bengal Tenancy Act.)
('97) 24 Cal 707(710):1 CalWN 534(536) (DB). (Do).
('07) 34 Cal 787 (808). (Order under Public Demands Recovery Act; not following 29 Cal 73; 29 Cal 94; 6 Cal W N 331 and distinguishing 6 Cal W N 630; 2 Cal L Jour 504. But see 5 Cal L Jour 638 (641); 10 Ind Cas 532 (535) (Cal).)
('06) 33 Cal 84 (91). (Order under Public Demands Recovery Act (Act I (B C) of 1897.)
('05) 32 Cal 691 (696). (Do.)
('03) 7 Cal W N 591 (593). (Order under S. 13, Bengal Tenancy Act.)
('02) 6 Cal W N 190 (191). (Decree under S. 13, Bengal Tenancy Act.)
('86) 12 Cal 511 (513). (Decree under S. 53, Registration Act XX of 1866.)
('26) 13 AIR 1926 Lah 547 (547). (Award under Co-operative Societies Act—Enforceable as a decree of Court.)
('27) 14 AIR 1927 Mad 440 (440, 441). (Order under S. 77, Madras Estates Land Act.)
('35) 22 AIR 1935 Pat 227 (228). (Bengal Tenancy Act, S. 148A.)
('21) 8 AIR 1921 Sind 29 (32) : 15 Sind L R 47. (Order under S. 22, Dekkhan Agriculturists' Relief Act.)
[*See also* ('14) 1 AIR 1914 Cal 177 (177). (Order under S. 173, Bengal Tenancy Act.)
Section 6, cl. (4) of the Malabar Compensation for Tenants' Improvements Act. (Madras Act I of 1900.)]

2. ('21) 8 AIR 1921 Sind 132 (133): 16 Sind L R 245.
('34) 21 A I R 1934 Lah 49 (50). (Order rejecting application for enforcement of award is appealable. The fact that a plea that the award was without jurisdiction has been raised does not preclude the applicability of this Section.)
('29) 16 AIR 1929 Lah 228 (229).

3. ('42) 29 AIR 1942 Cal 230 (232): ILR (1941) 2 Cal 366. (Section 47 does not apply to the Court of a Deputy Collector under the Bengal Rent Act. A party aggrieved by an order passed by that Court in execution proceedings has, therefore, the remedy of a suit.)
('42) 29 AIR 1942 Cal 324 (325) : I L R (1942) 1 Cal 354. (Application for reopening decree under Bengal Money-lenders Act is not one under S. 47.)
('41) 1941 O W N 848 (848). (Ejectment under S. 61 of Oudh Rent Act cannot be set aside on objection under S. 47.)
('39) 26 AIR 1939 Mad 942 (942) (DB). (An order under S. 20 of the Madras Agriculturists' Relief Act refusing stay of execution is not an appealable order under S. 47, C. P. Code.)
('39) 26 AIR 1939 Mad 796 (797) (DB). (Order under S. 23 of Madras Agriculturists' Relief Act—S. 47 does not apply and therefore no appeal lies.)
('88) 15 Cal 179 (183). (Proceedings under the Bengal Landlord and Tenant Protection Act, X of 1859.)
('10) 7 Ind Cas 387 (388) (Cal). (Do.)
('70) 13 Suth W R 34 (35). (Do.)
('04) 26 All 149 (151). (Decree of Revenue Court under N. W. P. Act XII of 1881.)
('36) 23 AIR 1936 All 451 (451). (Order in proceedings under S. 79, Agra Tenancy Act, although falls within S. 47 is an order and not a decree.)
('30) 17 A I R 1930 Cal 302 (303). (Order under S. 174, Bengal Tenancy Act.)
('96) 1 Cal W N 30 (30). (Do.)
('27) 14 AIR 1927 Pat 177 (177, 178) : 6 Pat 366. (Order under S. 227 (3), Orissa Tenancy Act.)
[*See* ('34) 21 A I R 1934 All 192 (192). (Order under S. 47 in proceedings governed by Agra Tenancy Act is not decree — See S. 248 of the Agra Tenancy Act.)]
[*See also* ('36) 23 AIR 1936 All 868 (869). (Order under Agra Tenancy Act is appealable as an order and not as a decree.)
('09) 1 Ind Cas 304 (305) (Cal). (*Held* doubtful.)
('98) 3 Cal W N 344 (345). (A proceeding under S. 174 of the Bengal Tenancy Act is not a proceeding for the execution of a decree.)
('28) 15 AIR 1928 Mad 1107 (1107). (Order under S. 192, Estates Land Act.)]
[But see ('79) 1879 Pun Re No. 126, p. 371. (Order under Land Revenue Act XXXIII of 1871, Punjab, now repealed by Act XVII of 1877.
('12) 13 Ind Cas 365 (367). (Order under S. 174, Bengal Tenancy Act.)]

4. *The following cases held that it is* :
('01) 24 All 179 (184).
('90) 12 All 61 (62) (FB).

4. Question must be one arising 'between the parties' to the suit in which the decree is passed or their representatives. — This, as has been said before, is one of the essential conditions for the applicability of the section. The words 'between the parties' do not necessarily mean parties on *opposite sides* as plaintiff and defendant, but mean parties *opposed to each other* in the suit. See NOTE 5. Where a question for decision does not arise between the parties to the suit as explained above or their representatives, it cannot be decided under this section.[1] On the other hand, all questions that arise between such parties or their representatives and relating to the execution, discharge or satisfaction of the decree must be decided under this section and not by a separate suit.[2] The fact that persons other than the decree-holder and the judgment-debtor are also parties to the proceedings is immaterial.[3]

('92) 14 All 520 (520).
('91) 13 All 278 (280) (FB).
('08) 31 Mad 354 (358).
('02) 25 Mad 244 (265, 269, 288) (FB).
('01) 4 Oudh Cas 123 (126).
The following cases held that it is not :
('02) 29 Cal 651 (653).
('98) 25 Cal 133 (134, 135).
('04) 6 Bom L R 1043 (1049).
('09) 4 Ind Cas 121 (122) (Cal).
('04) 8 Cal W N 102 (104).
('02) 29 Cal 644 (646).
('94) 21 Cal 818 (823).

Note 4

1. ('42) 29 AIR 1942 Oudh 281 (282). (Dispute between attaching creditor of a decree and purchaser of that decree from decree-holder.)
('41) 28 AIR 1941 Lah 450 (451) : I L R (1942) Lah 483. (Section 47 does not apply to a dispute between the decree-holder and the Court auctioneer who was not a party to the suit regarding the latter's commission.)
('40) 27 AIR 1940 Sind 251 (253) : I L R (1940) Kar 447 (DB). (Dispute between prior purchaser applying under O. 21 R. 89 and auction purchaser.)
('29) 16 AIR 1929 Mad 850 (851, 852).
('34) 21 A I R 1934 Lah 478 (479). (Two decree-holders proceeding against same property—Decision by executing Court that one is not entitled to priority over other is no bar to regular suit for establishing priority.)
('23) 10 AIR 1923 All 292 (292).
('23) 10 AIR 1923 Bom 450 (450, 451).
('20) 7 AIR 1920 Bom 223 (223) : 44 Bom 977.
('88) 12 Bom 80 (85).
('07) 6 Cal L Jour 437 (440).
('03) 8 Cal W N 230 (231).
('96) 1 Cal W N 114 (117).
('85) 11 Cal 150 (152, 153).
('68) 10 Suth W R 93 (93, 94).
('16) 3 AIR 1916 Lah 301 (302).
('76) 1876 Pun Re No. 75.
('36) 23 AIR 1936 Mad 733 (739). (Dispute between the decree-holder auction-purchaser and stranger, as to delivery of possession.)
('27) 14 AIR 1927 Mad 240 (241).
('17) 4 AIR 1917 Mad 217 (217).
('16) 3 AIR 1916 Mad 430 (430).
('97) 20 Mad 487 (489). (Question between judgment-debtor and auction-purchaser—Decree-holder not being interested in or affected by it.)
('96) 19 Mad 331 (334).
('25) 12 AIR 1925 Nag 288 (289).
('33) 20 AIR 1933 Oudh 146 (147).
('14) 1 AIR 1914 Oudh 359 (359) : 17 Oudh Cas 374.
('19) 6 AIR 1919 Pat 454 (464).
('17) 4 AIR 1917 Pat 337 (338) : 2 Pat L Jour 219.
('16) 3 AIR 1916 Pat 315 (316). (Question between a party and his partner.)
[*See also* ('99) 22 Mad 372 (377).]

2. *See the following cases* :
('24) 11 AIR 1924 All 752 (752).
('99) 21 All 356 (358).
('88) 10 All 570 (576). (Question as to legality of purchase by judgment-debtors of right of some of the decree-holders.)
('28) 15 AIR 1928 Bom 534 (536) : 53 Bom 46.
('23) 10 AIR 1923 Bom 381 (382).
('09) 33 Bom 39 (43): 1 Ind Cas 459 (459) (DB). (No substantial distinction in regard to questions arising in execution between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree.)
('99) 23 Bom 237 (242, 244).
('81) 5 Bom 673 (677) (FB).
('16) 3 AIR 1916 Cal 471 (472).
('15) 2 AIR 1915 Cal 570 (571).
('10) 6 Ind Cas 414 (414) (Cal). (Suit for declaration that only one of the judgment-debtors alone is liable under the decree cannot be maintained.)
('07) 11 Cal W N 239 (241).
('97) 24 Cal 473 (478, 492) (FB).
('26) 13 AIR 1926 Lah 165 (165, 166) : 7 Lah 1. (Execution sale confirmed — Suit by one of the judgment-debtors that property was not saleable does not lie.)
('19) 6 AIR 1919 Lah 430 (432) : 1 Lah L Jour 230 (230, 231).
('02) 1902 Pun Re No. 8.
('36) 23 AIR 1936 Mad 733 (739).
('16) 3 AIR 1916 Mad 521 (522) : 39 Mad 584. (Legal representatives of receiver — Liability of.)
('12) 15 Ind Cas 224 (224) (Mad).
('93) 16 Mad 447 (449).
('84) 7 Mad 255 (258).
('22) 9 AIR 1922 Nag 189 (191).
Also see Note 49.

3. ('41) 28 AIR 1941 Cal 264 (265). (Order of an executing Court refusing to stay a proceeding under S. 174 of the Bengal Tenancy Act in spite of a notice under S. 34 of Bengal Agriculturists' Debtors Act is an order relating to execution, and

The section does not confer on the decree-holder any right of proceeding in execution against persons who are not judgment-debtors under the decree except as provided by S. 50.[4] As to whether a representative not falling under S. 50 can be made a party to the execution proceedings either by the Court *suo motu* or on his own application, see Notes on O. 22, R. 10. See also S. 145 and Notes thereon.

5. Parties arrayed on the same side.—The words 'between the parties' do not necessarily mean parties ranged on *opposite sides* as plaintiff and defendant but mean parties *opposed to each other* in the suit.[1] Thus, in a partition suit, parties who are co-defendants are often arrayed against each other. In such a case a question between them relating to the execution of the decree may fall within S. 47.[2] But it is necessary that the *opposite side* should be interested in the question raised between parties on the same side. Thus, a dispute between joint decree-holders will be a dispute 'between parties' if the *judgment-debtor* is interested in such dispute but not otherwise.[3] Similarly, a dispute between co-judgment-debtors will be a dispute between parties if the *judgment-creditor* is interested in such dispute[4] but not otherwise.[5]

Illustrations.

1. *A* obtains a mortgage decree in respect of four items against *B* and *C*, *B* being a subsequent mortgagee of items 1, 2 and 4 and *C* the purchaser of item 3 after *A*'s mortgage. *B* applies that item 3 should be sold first and that items 1, 2 and 4 should be sold only if the proceeds of the sale of item 3 prove insufficient to discharge the decree. Is the question thus raised between *B* and *C* a question 'between the parties to the suit?' Yes, inasmuch as the question is one affecting the *decree-holder's right* in execution.[6]

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although the auction-purchaser is a party to the proceeding, it is still an order which comes within S. 47, C. P. Code)

('41) 28 AIR 1941 Cal 357 (360) : I L R (1941) 1 Cal 363 (DB). (On receipt of application for attachment Court allowing strangers to object even before ordering attachment — Objection raised by judgment-debtor also — Order deciding objection falls under this section.)

4. ('36) 23 AIR 1936 Mad 870 (871). (Decree-holder impleaded a purchaser after decree of the charged properties, in his execution application — *Held* not entitled to.)

Note 5

1. † ('13) 19 Ind Cas 448 (448, 449) (DB) (Mad).
('34) 21 AIR 1934 Pat 627 (628) (DB).
('32) 19 AIR 1932 Cal 126 (128, 129) : 59 Cal 117 (DB). (Puisne mortgagee and mortgagor defendants in suit on first mortgage—Interest opposed to each other—They are parties.)
('37) 24 AIR 1937 Lah 592 (593).
('36) 23 AIR 1936 Lah 116 (119) (DB).
('25) 12 AIR 1925 Mad 353 (354).
('24) 11 AIR 1924 Mad 518 (519) (DB).
† ('24) 11 AIR 1924 Mad 365 (365) (DB).
('27) 14 AIR 1927 Rang 45 (46) : 4 Rang 418 (DB).
2. (13) 19 Ind Cas 448 (448, 449) (DB) (Mad).
('33) 20 AIR 1933 All 57 (58, 59) : 54 All 1031 (DB).
3. ('43) 30 AIR 1943 Mad 407 (408) (DB).
('97) 29 Mad 183 (183) (DB). (For contribution of decree-amount.)
('92) 2 Mad L Jour 14 (15). (Do.)
('37) 24 AIR 1937 Cal 177 (178).
('72) 17 Suth W R 415 (415) (DB).
('71) 17 Suth W R 136 (137) (DB).
('27) 14 AIR 1927 Pat 288 (289) : 6 Pat 386 (DB). (Right to compensation money.)
[But see ('37) 24 AIR 1937 Cal 730 (731): I L R (1938) 1 Cal 175. (In this case, the interest of the judgment-debtor was not affected by dispute between rival decree-holders for rateable distribution — Yet it is held that the dispute is under Section 47.)]
4. ('13) 19 Ind Cas 448 (448, 449) (DB) (Mad). (Co-judgment-debtors.)
('25) 12 AIR 1925 Mad 353 (354).
('24) 11 AIR 1924 Mad 365 (366) (DB). (Co-judgment-debtors.)
('79) 4 Mad 285 (286) (DB). (Judgment-debtor and representative of another judgment-debtor)
('13) 18 I.C. 312 (314) (Oudh). (Co-judgment-debtors.)
('27) 14 AIR 1927 Rang 45 (46) : 4 Rang 418 (DB). (Defendant and assignee of co-defendant.)
5. ('17) 4 AIR 1917 Mad 218 (219) (DB). (Co-judgment-debtors.)
('95) 18 All 106 (106, 107). (Co-judgment-debtors — Suit for contribution.)
('07) 29 All 207 (209, 210) (DB). (Judgment-debtor and representative of co-judgment-debtor.)
('85) 7 All 681 (686) (DB). (Co-judgment-debtors.)
('84) 6 All 12 (13) (DB).
('29) 16 AIR 1929 All 291 (292) : 51 All 752 (DB).
('35) 22 AIR 1935 Mad 714 (715).
('07) 1 Sind L R 172 (174, 175) (DB). (Representatives of judgment-debtor — Mortgagee of judgment-debtor and auction-purchaser.)
[*See also* ('39) 26 AIR 1939 Lah 137 (139). (Question between judgment-debtor and person alleged to be surety.)]
6. ('13) 19 Ind Cas 448 (448) (DB) (Mad). (It was held that the matter did relate to execution of the decree.)

2. *A* obtains a money decree against *B* and *C* and a receiver is appointed in execution to recover the decree-amount from out of certain properties belonging to *B* and *C*. After a certain portion of the decree amount is thus recovered, *C* pays up the balance thus completely discharging the decree. *B* thereupon applies for delivery of the property in the hands of the receiver, *jointly* to *B* and *C* and not to *C* alone as claimed by the latter. Here the decree having been satisfied, the *decree-holder* has absolutely no interest in the dispute between *B* and *C*. The question is therefore not one "between the parties to the suit" and Section 47 does not apply.[7]

3. *A* and *B* obtain a *joint* decree against *C*. By virtue of an alleged power of attorney by *B* in favour of *A*, the latter applies to execute the whole decree to the exclusion of *B*. Here the *judgment-debtor* *C* is in no way interested in the solution of the dispute between *A* and *B* and the question is not therefore one "between the parties to the suit."[8]

The Judicial Commissioner's Court at Nagpur has, however, held that a question is not within S. 47 unless it is one between parties ranged on *opposite sides* as decree-holder and judgment-debtor.[9] It is submitted that this view is not correct.

A question between two *rival decree-holders* for rateable distribution of the assets of a judgment-debtor or for other reliefs is not a question between the parties to any suit inasmuch as neither of them was a party to the suit brought by the other.[10] If, however, the question raised between them *affects the judgment-debtor*, the question will be one also between the decree-holder who raises the question and the judgment-debtor, that is, between the parties to the suit.[11] A question between a party and *his own representative* is not one between the parties to a suit.[12] Similarly, a dispute as between the representatives

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('24) 11 AIR 1924 Mad 365 (365) (DB) (Do).
[But see ('29) 16 AIR 1929 All 291 (293) : 51 All 752 (DB).]

7. ('17) 4 AIR 1917 Mad 218 (219) (DB).

8. ('72) 17 Suth W R 136 (137) (DB). (Approved in A I R 1924 Mad 518.)
('24) 11 AIR 1924 Mad 518 (519) (DB).
('99) 23 Bom 623 (625) (DB).
[*See* ('31) 18 AIR 1931 Rang 24 (24).]

9. ('25) 12 AIR 1925 Nag 186 (187) : 21 Nag L R 34.

10. ('41) 28 AIR 1941 Rang 113 (114) : 1940 Rang L R 718 (DB).
('31) 18 AIR 1931 Bom 252 (253, 254).
('34) 21 AIR 1934 Lah 478 (479). (Two decree-holders proceeding against same property — Decision by executing Court that one is not entitled to priority over other is no bar to a regular suit for establishing priority.)
('07) 1907 All W N 201 (201). (Rival claims to surplus sale proceeds between the subsequent mortgagees.)
('92) 14 All 210 (211) (DB).
('31) 18 AIR 1931 Bom 350 (351) : 55 Bom 473 (DB).
† ('15) 2 AIR 1915 Cal 658 (659) : 42 Cal 1 (DB).
('09) 36 Cal 130 (132) : 1 Ind Cas 783 (784) (DB)
('69) 9 Suth W R 514 (516) (FB).
('68) 9 Suth W R 223 (230) (FB).
(1865) 2 Suth W R Misc 41 (42) (DB).
('36) 23 AIR 1936 Lah 181 (181).
('32) 19 AIR 1932 Lah 96 (96). (Rateable distribution between rival decree-holders not affecting judgment-debtor.)
('29) 113 Ind Cas 776 (777) (Lah).
('36) 23 AIR 1936 Mad 136 (137) : 59 Mad 399 (DB). Judgment-debtor not interested in the dispute.)
('26) 13 AIR 1926 Mad 1104 (1105).
('25) 12 AIR 1925 Mad 1265 (1266).
('24) 11 AIR 1924 Mad 97 (98).
('22) 9 AIR 1922 Mad 99 (99) (DB).
('16) 3 AIR 1916 Mad 792 (793) : 38 Mad 221
('85) 8 Mad 494 (495).
('36) 23 AIR 1936 Oudh 277 (277) : 12 Luck 720 (DB).
('21) 8 AIR 1921 Pat 401 (402) : 5 Pat L Jour 415 (DB).
('36) 23 AIR 1936 Pesh 52 (53).
('37) 24 AIR 1937 Rang 134 (135) (DB).
('31) 18 AIR 1931 Rang 56 (58) : 8 Rang 485.
('29) 16 AIR 1929 Rang 198 (200).
[*See also* ('06) 33 Cal 92 (96, 97). (Decree satisfied — Nothing to be executed between the parties — Suit by non-impleaded subsequent mortgagee for surplus sale proceeds.)
('19) 6 AIR 1919 Mad 949 (949). (Rival auction-purchaser.)]

11. † ('18) 5 AIR 1918 Mad 1322 (1321) (DB).
('11) 12 Ind Cas 911 (912) (DB) (Bom).
('39) 26 AIR 1939 Bom 112 (114) : ILR (1939) Bom 133 (DB).
[*See also* ('35) 22 AIR 1935 Lah 302 (303) : 16 Lah 990. (Orders deciding matter in execution although ostensibly relating to rateable distribution is appealable.)]

12. ('41) 28 AIR 1941 Cal 251 (252) : ILR (1940) 2 Cal 226. (Judgment-debtor and auction-purchaser.)
('41) 28 AIR 1941 Mad 161 (170) : I L R (1941) Mad 138 (FB).
('09) 31 All 82 (93, 94) : 1 Ind Cas 416 (423) (FB). (Judgment-debtor and auction-purchaser.)
† ('08) 30 All 379 (383) (DB). (Do.)
('21) 8 AIR 1921 Mad 81 (82) (DB). (Do.)

of the same party will not fall within this section.[13]

Where a decree gives two independent reliefs against two sets of defendants one set cannot be considered parties to the suit in any question that arises between the decree-holder and the other set of defendants relating to the execution of that portion of the decree which has been passed against such set.[14]

6. "Arising," meaning of. — The words "all questions arising" should be read as meaning "all questions *directly* arising."[1] Further they do not mean only such questions as are *actually raised* in the execution proceedings; for if it were so, a party, by not raising a particular question in execution proceedings, might retain the right to bring a separate suit in order to agitate that question. The words only mean that the questions must be such as would relate to or affect the rights of partiss to the suit.[2] The words arising 'between the parties to the suit' contemplate their having continued to be parties to the suit up to the stage at which the question arises.[3] In other words, they indicate that the person raising the question should be either a party or a representative of the party to the suit *at the time* when the question is raised.[4]

7. "Parties to the suit," meaning of. — Except where a person sues or is sued in a *representative* capacity,[1] the expression 'parties to the suit' is restricted to *de facto* parties admitted rightly or wrongly as parties *on the record*.[2] A person against

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('37) 24) AIR 1937 All 742 (747): I L R (1937) All 921 (FB). (The dispute between a decree-holder purchaser and a judgment-debtor is not a dispute between parties to the suit within the meaning of S. 47, C. P. C.)
('02) 24 All 519 (520) (DB). (Assumed.)
† ('01) 25 Bom 631 (635). (Do.)
('80) 5 Cal 592 (593) (DB). (Decree-holder and assignee of a part of the decree.)
† ('37) 24 AIR 1937 Lah 465 (467) : ILR (1937) Lah 162 (DB). (Decree-holder and assignee of the decree.)
('37) 24 AIR 1937 Lah 347 (348). (Question between judgment-debtor and auction-purchaser.)
('87) 1887 Pun Re No. 12. (Assumed.)
('21) 8 AIR 1921 Nag 59 (60) (Do.)
('35) 22 AIR 1935 Oudh 272 (273) : 11 Luck 26. (Question between decree-holder and person attaching decree.)
('30) 17 AIR 1930 Rang 281 (282)(DB).(Assumed).
('18) 5 AIR 1918 Sind 63 (64) : 11 Sind L R 74. (Decree-holder and his transferee.)
[*See also* ('35) 22 AIR 1935 Lah 609 (610). (Question as to validity of assignment of decree is one between the decree-holder and the assignee and not one between the parties to the suit.)]

13. ('41) 28 AIR 1941 Lah 342 (342).
('41) 28 AIR 1941 Mad 161 (170) : I L R (1941) Mad 438 (FB).
('34) 21 AIR 1934 All 730 (730) (DB).
('98) 25 Cal 49 (52) (DB). (Two representatives of decree-holder.)
† ('36) 23 AIR 1936 Lah 116 (120) (DB).
('27) 14 AIR 1927 Mad 1025 (1025, 1026) (DB). (Assignee of decree-holder and attaching creditor of decree-holder.)
('26) 13 AIR 1926 Mad 691 (691) (DB). (Assignee of decree and person holding charge over decree.)
('34) 21 AIR 1934 Pat 627 (628) (DB).
('32) 19 AIR 1932 Pat 329 (330) (DB). (Dispute as to extent of shares as between several heirs of deceased decree-holder is not within section.)
[But see ('37) 24 AIR 1937 Oudh 365 (366) : 13 Luck 237 (DB).]
Also see Note 27.

14. ('96) 19 Mad 331 (334).
✠ ('01) 23 All 346 (348, 353) (DB). (Case law discussed.)
[*See also* ('74) 22 Suth W R 392 (393).]
[But see ('31) 18 AIR 1931 Bom 114 (118). (Where one defendant is also interested in the reliefs granted against the other, section applies.)]

Note 6

1. ('84) 7 All 170 (174) (FB). (Per Duthoit J.)
2. ('27) 14 AIR 1927 Cal 106 (109) : 53 Cal 837 (DB).
3. ('28) 15 AIR 1928 Mad 276 (276) (DB). (Defendant's name struck off before the passing of the decree. He cannot agitate any question relating to the decree in execution proceedings under S. 47 as he is not a party to the decree.)
4. ✠ ('31) 18 AIR 1931 All 490 (494, 495, 499) : 54 All 25 (FB). (Defendant died before the decree. His legal representatives not brought on record are not parties to the suit.)

Note 7

1. *See* ('27) 14 AIR 1927 Mad 1043 (1050) : 51 Mad 46 (FB).
2. ('78) 2 Cal L Rep 545 (546) (DB). (A person substituted as legal representative of deceased judgment-debtor in execution becomes a party entitled to appeal.)
('34) 21 AIR 1934 All 699 (700). (Suit on bond — Person impleaded as defendant on ground that he had no right to amount due under bond is not pro forma defendant but party within S. 47.)
('17) 4 AIR 1917 All 460 (461) : 39 All 47 (DB).
('87) 1887 Pun Re No. 97.
[*See* ('13) 16 Oudh Cas 350 (353) : 20 Ind Cas 898 (899).]

whom no relief is claimed and no decree is passed but who has been impleaded as a party to the suit must be deemed to be a party to the suit within the meaning of the section.[3] A person, whose name is not on the record as a party at the time the decree is passed, does not become a party by acquiring, subsequent to the decree, an interest in the disputed property,[4] or by applying for execution,[5] or by objecting to a sale in execution[6] or by applying to set aside sale under O. 21, R. 89.[7] On the other hand, a party *on the record* does not cease to be a party because he is not impleaded as a party in the appeal in which the final decree was passed.[8] A party, however, whose name is *struck off from the record*, ceases to be a party to the suit.[9] The following persons have been held not to be parties to the suit within the meaning of the section:

(a) A person who applies to be impleaded as a party but whose application is refused.[10]

(b) A minor,[11] a ward of the Court of Wards,[12] or a lunatic,[13] who is not properly represented by a guardian *ad litem*.

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3. ('40) 27 AIR 1940 Mad 881 (881, 882). (Mortgage suit — Subsequent purchaser impleaded as party to suit but not made party to application for personal decree — Claim by purchaser to property attached in execution of personal decree — *Held* purchaser was party and his claim came within Section 47.)
('39) 26 AIR 1939 Lah 207 (208).

4. ('68) 3 Agra 193 (193) (DB). (Interest acquired by gift.)

5. † ('77) 2 Cal 327 (335) : 4 Ind App 66 (PC).
('78) 3 Cal 371 (373, 374) (DB). (Applicant has no right of appeal against order refusing application for execution.)

6. (1865) 2 Suth W R Misc 56 (56) (DB).
('30) 17 AIR 1930 Mad 538 (539) : 53 Mad 581 (DB).
('09) 31 All 599 (604) : 3 Ind Cas 24 (25) (DB).
('86) 8 All 626 (634, 635) (DB).
('89) 1889 Pun Re No. 63.
('86) 10 Mad 53 (54, 55) (DB).

7. ('40) 27 AIR 1940 Sind 251 (253) : ILR (1940) Kar 447 (DB). (A second mortgagee, not being joined in a suit on the first mortgage, applying by virtue of a private sale from mortgagor, under O. 21, R. 89 to set aside the sale in execution of decree obtained by the first mortgagee.)

8. ('93) 17 Bom 49 (53) (DB).
[*See also* ('19) 6 AIR 1919 Pat 396 (397). (Party to decree not impleaded in execution proceedings continues to be a party.)]

9. ('25) 12 AIR 1925 Nag 118 (118).
('21) 8 AIR 1921 Mad 559 (560) (DB). (Person impleaded without notice—Name removed without his participating in proceedings — Person is not party.)
('19) 6 AIR 1919 All 377 (378) (DB).
('28) 15 AIR 1928 Mad 276 (276) (DB).
('18) 5 AIR 1918 Mad 123 (125) : 41 Mad 418 (FB). (Claim abandoned against particular defendant—His name should be struck out.)
See Note 8 for a full discussion of this portion of the subject.

10. ('74) 13 Beng L R App 17 (18) (DB).

11. ('42) 29 AIR 1942 Lah 129 (131) (DB). (Decree or award against minor—Execution of—Executing Court can decide whether Court or arbitrators had jurisdiction to pass decree or award—For this purpose it can hold inquiry as to whether minor was really minor and whether he was properly represented or not — It can treat application as suit if necessary.)
('42) 29 AIR 1942 Pat 279 (281) (DB). (Suit on handnote against members of joint Hindu family — Minor defendants not represented by guardian —Decree not passed against them—Decree passed against their fathers — In such a case suit cannot be said to be dismissed against the minor defendants — Decree can be executed against joint family property including minors' shares.)
('40) 27 AIR 1940 All 256 (258) : ILR (1940) All 344. (Even where there is an order appointing a person as guardian.)
('09) 36 Ind App 168 (175) : 31 All 572 : 3 Ind Cas 864 (866) (PC).
('09) 31 All 599 (604) : 3 Ind Cas 24 (25) (DB).
('13) 35 All 487 (494) : 40 Ind App 182 : 21 Ind Cas 288 (292) (PC).
('05) 1905 All W N 122 (123) (DB).
('13) 18 Ind Cas 859 (861) (DB) (Cal).
('12) 13 Ind Cas 414 (415) : 15 Cal L Jour 3 (4) (DB).
('22) 9 AIR 1922 Lah 447 (448). (Affidavit not filed in support of petition to appoint guardian—Latter not appearing — Minor is not represented.)
('16) 3 AIR 1916 Mad 33 (34, 35) : 38 Mad 1076 (DB). (But where a minor is properly represented he will of course be a party.)
[*See* ('27) 14 AIR 1927 Mad 209 (210) (DB).
('94) 17 Mad 316 (336, 337) (DB).
('26) 13 AIR 1926 Nag 267 (268, 269). (Mere absence of formal order appointing guardian *ad litem* is not absence of representation.)]

12. (1900) 27 Cal 242 (257) (DB).

13. ('19) 6 AIR 1919 All 409 (412) (DB).
†('17) 4 A I R 1917 Cal 844 (847) : 44 Cal 627 (DB).
('30) 17 AIR 1930 Pat 480 (484) (DB). (Lunatic not properly represented cannot object to execution of decree under this section.)
[*See also* ('17) 4 AIR 1917 Pat 140 (141) (DB).]
Also see O. 32, R. 15 N. 6.

(c) The next friend of a minor plaintiff[14] or the guardian *ad litem* of a minor defendant.[15]

(d) A Commissioner appointed in a suit.[16]

(e) A *benamidar*.[17]

(f) A bidder at an execution sale.[18]

(g) A defaulting purchaser at an execution sale.[19]

(h) A successful claimant.[20]

(i) A garnishee.[21]

(j) A trustee under a deed executed by a party.[22]

(k) A transferee of a decree or of a portion thereof.[23]

Where a person sues or is sued in a *representative* capacity, all persons represented by the party on record must be deemed to be parties also.[24] But they will be only deemed to be parties in the *capacity in which they were so represented*. They can in no sense be deemed to be parties in *any other capacity*, especially if such capacity is adverse to the person who represented them.[25] Thus, where the *karnavan* of a Malabar *tarwad* is sued as representing the *tarwad*, the other members of the *tarwad* will be represented by the *karnavan* merely in respect of their interest as *members of the tarwad*; in their *individual* capacity, they cannot be represented by the *karnavan* and cannot be deemed to be parties to the suit constructively.[26]

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14. (1900) 23 Mad 73 (81) (DB).

15. ('35) 22 AIR 1935 All 359 (360) (DB).

16. ('24) 11 AIR 1924 All 122 (123).
(1900) 10 Mad L Jour 241 (242) (DB).
[*See also* ('82) 4 Mad 399 (401).]
[But see ('25) 12 AIR 1925 Cal 57 (59) : 52 Cal 269 (DB).]
Also see O. 26, R. 15, N. 1.

17. ('26) 13 AIR 1926 Mad 1081 (1081).
('20) 7 AIR 1920 Bom 90 (93) : 44 Bom 352 (DB).
('98) 20 All 539 (542) (DB).
('19) 6 AIR 1919 Cal 921 (921) (DB).
('97) 25 Cal 49 (52, 53) : 2 Cal W N 76 (78) (DB).

18. ('20)7 AIR1920Mad911(914):42 Mad 776 (DB).

19. ('11) 7 Nag L R 134 (135):12 Ind Cas 360(361).
('90) 1890 All W N 85 (86) (DB).
[But see ('22) 9 AIR 1922 All 200 (201, 202):44 All 266 (FB).]

20. ('11) 36 Mad 128(130):12 Ind Cas 73(74) (DB).

21. ('43) 22 Pat 278 (280). (Order under O. 21, R. 63H (Patna Amendment.))
('29) 16 AIR 1929 Mad 850 (851).
('36) 23 AIR 1936 Rang 77 (79, 80): 13 Rang 722. (Official Assignee only in the role of a garnishee is no party to the suit.)
[*See* ('35) 22 AIR 1935 Lah 26 (27). (The High Court of Lahore has framed a new R. 63A in O. 21 whereby a garnishee is deemed to be a party to the suit within the meaning of this Section.)]

22. ('04) 27 Mad 7 (9) (DB).

23. ('91) 14 Mad 478 (479) (DB).
('03) 26 Mad 264 (265) (DB).
('05) 28 Mad 64 (65, 66) (DB).

24. ('42) 29 AIR 1942 Mad 62 (65) (66). (Debts—Joint family — Decree against manager on promissory note—Debt incurred for family necessity —Execution against entire family properties — Question of liability of other members not parties to suit be gone into in execution.)
('40) 27 AIR 1940 Mad 165 (166, 167). (Karnavan of a Malabar tarwad sued in his capacity as its manager.)
('19) 6 AIR 1919 Mad 1110 (1112) (DB). (Where the decree is in effect against the tarwad the fact that the karnavan was not specially impleaded in his representative capacity will not make it the less binding on the tarwad.)
('07) 4 All L Jour 117 (120, 121) (DB). (Hindu widow represents the estate — Reversioners, if brought on the record, are parties.)
('96) 23 Cal 454 (459) (DB). (Do.)
('85) 11 Cal 45 (51) (DB). (Suit against Hindu widow—Adopted son will be deemed to be a party and a claim by the latter is one under the Section.)
('37) 24 A I R 1937 Mad 610 (614, 618) : I L R (1937) Mad 880 (FB). (Hindu father sued as representative of joint family represents his sons.)
('36) 23 AIR 1936 Pat 319 (320). (Where decree is against a junior member of joint family, burden of proof is on decree-holder to show that the judgment-debtor was sued in a representative capacity.)
('25) 12 AIR 1925 Pat 179 (180) : 4 Pat 172 (DB). (Objection by General Manager of the Court of Wards on behalf of the ward who was a party, is objection by the ward himself through the Manager.)
[*See also* ('33) 20 A I R 1933 Oudh 102 (104). (Decree against assets of Hindu grandfather — Debt not illegal or immoral—Execution against son as manager binds other sons and grandsons.)]

25. † ('27) 14 AIR 1927 Mad 1043 (1050) : 51 Mad 46 (FB).
[*See also* ('90) 17 Cal 57 (64, 65).]

26. ('27) 14 AIR 1927 Mad 1043 (1050) : 51 Mad 46 (FB). (Overruling 30 Mad 215 and 24 Mad 658.)
[*See also* ('87) 10 Mad 117 (120).]
[But see ('04) 14 Mad L Jour 137 (138) (DB).]

In the undermentioned case,[27] it was held that where certain persons are sued as the legal representatives of a deceased person and a decree is obtained against them, another person who also claims to be a legal representative of the deceased cannot be regarded as a party to the suit.

Where a person is impleaded as a party to a suit in one capacity and he raises in execution proceedings an objection in a different capacity, such objection will not fall within this section.[28]

8. Plaintiff whose suit is dismissed and defendant against whom suit is dismissed—Explanation. — Under the old Code, there was a conflict of opinion as to whether such a person was a party to the suit, the Allahabad[1] and Calcutta[2] High Courts holding that he was not and the High Courts of Bombay,[3] Madras[4] and the Judicial Commissioner's Court of Nagpur[5] holding that he was. The conflict has now been set at rest by the addition of the explanation to the section. Under the present Code, therefore, a plaintiff, whose suit has been dismissed and a defendant against whom a suit has been dismissed are nevertheless parties to the suit for the purpose of this section.[6]

Even under the present Code, a difference of opinion has arisen as to whether a party who has been *exonerated* from the suit *on the ground of misjoinder of parties*, but whose name has not been actually struck off from the record is a party to the suit for the purposes of the section. It has been held by the High Court of Madras[7] that where a Court finds that a party has been improperly impleaded, resulting in a *misjoinder of parties*, the proper procedure is to *strike out* the name of the party from the record and that the mere fact that the Court failed to do its duty but merely "exonerated" such party from the suit or dismissed the suit against him cannot place the party in a worse position than a party in respect of whom the Court does adopt the correct procedure; a party, therefore, who is exonerated from the suit, or against whom the suit is dismissed

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27. ('36) 23 A I R 1936 Sind 166 (167) : 30 Sind L R 170 (DB).

28. † ('36) 23 AIR 1936 Mad 733 (744, 745) (DB).

Note 8

1. ('10) 32 All 321 (324): 5 Ind Cas 496 (497) (DB).
('01) 23 All 346 (354).
('96) 18 All 52 (53).
('93) 1893 All W N 67 (68).
('89) 11 All 74 (77, 78).
('99) 2 Oudh Cas 51 (55).

2. ('03) 30 Cal 134 (141).
('02) 29 Cal 696 (698, 699).
('68) 10 Suth W R 191 (192).
('67) 7 Suth W R 361 (362).

3. ('93) 17 Bom 49 (52, 53).

4. (1900) 23 Mad 361 (366) (FB). (Overruling 15 Mad 226.)
('99) 22 Mad 131 (133).
('85) 8 Mad 473 (475, 477).

5. ('04) 17 C P L R 178 (190).
('02) 15 C P L R 106 (111).

6. ('28) 15 AIR 1928 All 234 (235) (A I R 1918 All 397 followed ; A I R 1926 All 745 Distinguished.)
('33) 20 AIR 1933 All 57 (58) : 54 All 1031. (Exonerated party continues to be party to suit.)
('25) 12 AIR 1925 All 328 (330). (Do.)
('24) 11 AIR 1924 All 313 (313).
('19) 6 AIR 1919 All 192 193).
('18) 5 AIR 1918 All 397 (398).
('23) 10 AIR 1923 Bom 381 (381).
('38) 25 AIR 1938 Cal 113 (114) : I L R (1938) 1 Cal 280.
('21) 8 AIR 1921 Cal 242 (244).
('24) 11 AIR 1924 Lah 589 (590).
('30) 17 AIR 1930 Mad 12 (14, 15).
('28) 113 Ind Cas 547 (548) (Mad).
('27) 14 AIR 1927 Mad 253 (254).
('25) 12 AIR 1925 Mad 1133 (1134).
('20) 7 AIR 1920 Mad 206 (208).
('18) 5 AIR 1918 Mad 1368 (1368).
('18) 5 AIR 1918 Mad 321 (322).
('18) 5 AIR 1918 Mad 123 (125) : 41 Mad 118 (FB).
('16) 3 AIR 1916 Mad 1008 (1010).
('29) 16 AIR 1929 Nag 179 (179, 180).
('36) 23 AIR 1936 Pat 552 (553). (Plaintiff abandoning claim against a defendant and suffering his suit to be dismissed against him.)
('29) 16 AIR 1929 Pat 472 (472).
('29) 16 AIR 1929 Pat 141 (144) : 8 Pat 717.
('25) 12 AIR 1925 Pat 482 (483).
('31) 18 AIR 1931 Rang 314 (316).
Also see Note 45.

7. ('30) 17 AIR 1930 Mad 817 (820) : 54 Mad 81 (FB). (A I R 1926 Mad 484 : 49 Mad 494 overruled and A I R 1918 Mad 911 : 40 Mad 964 Approved.)
('33) 20 AIR 1933 Mad 435 (436) (DB).
('10) 8 Ind Cas 161 (161) (DB) (Mad).
('39) 26 AIR 1939 Mad 280 (281) (DB).
('37) 24 AIR 1937 Mad 268 (270) (DB).

on the ground of *misjoinder of parties*, is in the same position as if his name is *struck off* from the record and is not a party to the suit within the meaning of S. 47. The High Court of Rangoon has followed the view of the High Court of Madras.[8] See also the undermentioned cases of the other High Courts.[9] On the same principle it has been held that where a person has been *properly* impleaded as a party, but the plaintiff does not wish to proceed against him or is unable to prove his claim against him, the proper procedure is to *dismiss* the suit against him and not to *strike out* his name from the record. If, however, his name is wrongly "struck off," it has been held by the High Court of Madras that, he nevertheless does not cease to be a party to the suit.[10] But the High Court of Lahore has taken a contrary view and has held that in such a case the question whether this section applies or not must be determined with regard to the order in the form as actually framed, viz., *striking off* and not with regard to the form in which it should have been framed.[11] It is proper for the executing Court, when such questions arise, to consider not only the decree itself but the judgment and the pleadings also and see whether, upon the facts of the case, the parties, though the suit was dismissed against them, remained parties to the suit.[12]

8a. Person against whom suit abates. — In the undermentioned case,[1] a person was added as a defendant to the suit. But on his death, his legal representatives were not brought on the record. It was held that such legal representatives could not be impleaded as joint judgment-debtors in the execution proceedings.

9. Surety under Section 145.—Under S. 145, a surety against whom execution has been taken out is a party within the meaning of S. 47 only *for the purposes of appeal.*[1] Beyond this he cannot be deemed to be a party within the meaning of this section.[2] Hence, if he seeks to get his bond cancelled on the ground of fraud,[3] or applies

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8. ('27) 14 AIR 1927 Rang 137 (138) : 5 Rang 110 (DB).
Also see O. 1, R. 10, N. 33.
9. ('42) 29 AIR 1942 Pat 432 (434) : 21 Pat 601 (DB). (Persons claiming by title paramount in mortgage suit.)
('27) 14 AIR 1927 All 378 (379) : 49 All 379 (DB).
('33) 20 AIR 1933 Nag 246 (247). (If such person's name is retained he is a party — Not a party only when his name is struck off.)
('74) 21 Suth W R 346 (347) (DB).
('26) 13 AIR 1926 Lah 202 (202, 203).
('15) 2 AIR 1915 Lah 323 (324).
('19) 6 AIR 1919 Nag 120 (121) : 15 Nag L R 146.
('82) 8 Cal 402 (418) (DB).
10. ('26) 13 AIR 1926 Mad 687 (689) (DB).
11. ('34) 21 AIR 1934 Lah 737 (738).
12. ('30) 17 AIR 1930 Mad 817 (820) : 54 Mad 81 (FB).

Note 8a

1. ('36) 23 A I R 1936 Pat 110 (110) (DB). (A I R 1934 All 1027 followed.)

Note 9

1. ('42) 29 AIR 1942 Nag 107 (108) : ILR (1942) Nag 779. (Surety made party to execution proceedings—Defence raised and decided—He cannot raise it again in separate suit — His remedy is by way of appeal.)
('39) 26 AIR 1939 Sind 360(360): ILR (1939) Kar 769 (DB). (Bar of second appeal under S. 102 — Bar applies to appeal against orders passed in execution proceedings against surety.)
('25) 12 AIR 1925 All 344 (345) (DB).
('24) 11 AIR 1924 All 105 (106) : 45 All 649 (DB).
('88) 1888 All W N 13 (13) (DB).
('86) 1886 All W N 38 (38) (DB).
('80) 2 All 604 (612) (FB).
('32) 19 AIR 1932 Bom 77 (77, 78).
('01) 3 Bom L R 549 (553) (DB).
('15) 2 AIR 1915 Cal 237 (237) (DB).
('71) 15 Suth W R 538 (540) (DB).
('67) 8 Suth W R 24 (25) (DB).
('37) 24 AIR 1937 Lah 658 (660) : ILR (1938) Lah 140 (DB).
('34) 21 AIR 1934 Lah 538 (539). (Surety not appealing — Order against him becomes final.)
('28) 15 AIR 1928 Lah 181 (183) (DB).
('86) 1886 Pun Re No. 104.
('38) 25 AIR 1938 Mad 215 (216).
('03) 13 Mad L Jour 484 (484, 485) (DB).
('35) 22 AIR 1935 Rang 39 (41).
('17) 4 AIR 1917 Upp Bur 16 (17) : 2 Upp Bur Rul 103.
2. † ('19) 6 AIR 1919 P C 55 (58) : 42 All 158 : 22 Oudh Cas 212 : 46 Ind App 228 (PC).
('28) 15 AIR 1928 All 527 (528, 529) : 51 All 346 (DB).
('35) 22 AIR 1935 All 373 (374).
('37) 24 AIR 1937 Lah 658 (660) : ILR (1938) Lah 140 (DB). (Declaratory suit by surety that decree is adjusted by judgment-debtor is maintainable.)
('31) 18 AIR 1931 Rang 206(207): 9 Rang 434 (DB).
3. ('20) 7 AIR 1920 Mad 75 (77) : 43 Mad 325 (DB). (28 Mad 117 not followed.)

for discharge on the fulfilment of the condition imposed,[4] he can proceed only by way of suit and not under section 47.

The surety can be proceeded against either by way of execution[5] or by a suit;[6] but if he is proceeded against in execution, he becomes a judgment-debtor and must contest his liability in the execution proceeding itself.[7] But if he has not been made a party to the execution proceedings the surety can bring a separate suit to decide his liability under the surety bond.[8]

Under the old Code a person who became a surety after the decree was passed was held not to be a party so as to attract the remedy by way of execution.[9] But now the distinction no longer holds good.

See also Note 11 on S. 145,

10. Government in proceedings under Order 33. — Under the Code of 1882, it was held by the High Courts of Bombay and Madras that the Government in proceedings relating to pauper suits was not a party to the suit within S. 47.[1] The Allahabad High Court, on the other hand, held a contrary view.[2] Order 33 R. 13 was newly added in the present Code to set this conflict at rest. Under that rule it is provided that all matters arising between the Government and any party to the suit under Rr. 10, 11 or 12 of O. 33, "shall be deemed to be questions arising between the parties to the suit within the meaning of S. 47." A Collector applying under O. 33 for payment of court-fee in pauper suits is now a party within S. 47 and an order on his application is one under the section.[3]

See also O. 33 R. 13.

11. Custodian of attached property. — Whether the custodian of attached property under O. 21 R. 43 is a "party" for any purpose depends upon the question whether he can be proceeded against in execution under S. 145 of the Code as a surety. If he can be so proceeded against, the principles mentioned in Note 9 will apply. Otherwise they will not apply. There is a conflict of opinion as to whether he can be proceeded against under S. 145 as a surety, for which see Note 4 on S. 145.

12. Unnecessary party. — See Note 8.

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4. ('93) 15 All 183 (184, 185).

5. ('42) 29 AIR 1942 Nag 107 (108) : ILR (1942) Nag 779.
('39) 26 AIR 1939 All 463 (466) : ILR (1939) All 538 (DB). (Security bond — *Held* that it was not a mortgage — Property given as security can be proceeded against in execution.)
† ('24) 11 AIR 1924 Nag 258 (263) : 20 Nag L R 93 (DB).
('20) 7 AIR 1920 Low Bur 58 (59): 10 Low Bur Rul 236 (DB).
('09) 4 Ind Cas 1005 (1005) (Lab).
('21) 8 AIR 1921 Nag 130 (131). (Suit for damages for wrongful detention of moveables entrusted to plaintiff as sapurdar not barred by S. 47—Can be treated as an application.)
[But see ('32) 19 AIR 1932 Lah 324 (325). (Suit by defendant against sapurdar for rent of premises of defendant where defendant's attached goods remained—Not maintainable.)]

6. ('42) 29 AIR 1942 Nag 107 (108) : ILR (1942) Nag 779.
('11) 36 Bom 42 (46, 47):12 Ind Cas 549(550)(DB).
('35) 22 AIR 1935 All 373 (374).

7. ('42) 29 AIR 1942 Nag 107 (108) : ILR (1942) Nag 779.
('30) 17 AIR 1930 Lah 399 (400).
('25) 12 AIR 1925 Lah 618 (618).
('42) 29 AIR 1942 All 260 (260) (DB). (If a question arises in the Court executing the decree whether a person is liable under the provisions of S. 145 it is the executing Court alone which has jurisdiction to decide that question.)

8. ('42) 29 AIR 1942 Nag 107 (108) : ILR (1942) Nag 779.

9. ('87) 1887 Pun Re No. 99.
('71) 1871 Pun Re No. 62.

Note 10

1. ('82) 6 Bom 590 (592).
('94) 18 Bom 454 (456).
('91) 15 Bom 77 (78).
('08) 23 Mad 73 (81).

2. ('91) 13 All 326 (329).
('96) 18 All 419 (421).
('87) 9 All 64 (67).

3. ('19) 6 AIR 1919 Pat 99 (101) : 4 Pat L Jour 166 (DB).
('11) 35 Bom 448 (450) : 12 Ind Cas 29 (30) (DB).

13. Intervenor. — An intervenor who is impleaded as a party will, of course, be a party to the suit within the meaning of S. 47.[1] But a person who pays down money to avoid an attachment of his properties wrongly identified as a judgment-debtor's is not a party and cannot claim his money back in execution under this section.[2]

14. Trespassers. — The word "parties" in the section, as has been seen in Note 7, means parties to the suit and *on the record*. So, a third party who, at the instigation of the judgment-debtor, obstructs the decree-holder in getting possession of the property,[1] or who violates the rights of the attaching decree-holder by cutting and carrying away the crops on the attached land,[2] is not a party to the suit within the meaning of the section, and consequently a claim for possession or for damages against such person must be enforced only by way of *suit* and not in execution.

15. Party sued in a representative capacity. — A person actually made a party to a suit cannot be said to be not a party thereto merely because he is sued in a *representative* capacity.[1] On the other hand, his right in *every capacity*, whether representative or individual, must be deemed to be the rights of a party to the suit within the meaning of S. 47 and should be determined in execution and not by a separate suit.[2]

As regards the position of persons who were represented by a party to the suit, see Note 7.

16. Questions as to who is a party can be decided by the executing Court. — When, during the execution of a decree, the question arises as to who is a party to the suit or whether a person is such a party, the executing Court can and should itself decide the question. Thus, where an objection is taken that a certain person was not a party to the suit at the time of decree and therefore it is not open to the executing Court to issue process against his legal representative, the executing Court can and must determine the question under the section.[1] Similarly, where a decree has been obtained by a *benamidar* and execution is sought to be obtained by the true owner and the judgment-debtor challenges the ownership of the latter, the question as to who is the party to the suit, within the meaning of the section, entitled to execute, ought to be decided under this section by the executing Court.[2] For the purpose of deciding the said questions, it is proper for the Court to consider not only the decree itself but the judgment and the pleadings in the case also.[3]

Note 13

1. *See* ('67) 8 Suth W R 114 (115).
2. ('16) 3 AIR 1916 Sind 22 (22) : 9 Sind L R 213 (DB).
('26) 13 AIR 1926 Oudh 64 (64).
2. ('40) 27 AIR 1940 Rang 27 (29).
†('27) 14 AIR 1927 Mad 1043 (1050) : 51 Mad 16 (FB).
[*See also* ('31) 18 AIR 1931 Bom 114 (118).]
[But see ('33) 20 AIR 1933 Mad 152 (153) : 56 Mad 453 (DB). (Application for sale of charged properties—Interim Receiver appointed under the Provincial Insolvency Act applying under S. 52 of that Act—*Held*, the question is not within S. 47 as the Receiver could not be deemed to have represented the defendant.)]

Note 14

1. ('98) 2 Cal W N 311 (314) (DB).
[*See also* ('36) 23 AIR 1936 Mad 733 (740). (Dispute between decree-holder purchaser and third party in possession is not within the section.)]
2. ('07) 30 Mad 413 (417) : 17 Mad L Jour 334 (336) (DB).

Note 15

1. ('40) 27 AIR 1940 Rang 27 (28). (Person joined as legal representative of a deceased defendant.)
† ('72) 18 Suth W R 185 (188) (PC).
('19) 6 AIR 1919 Cal 623 (624) (DB).
('09) 3 Ind Cas 764 (764) (DB) (Bom).
('90) 17 Cal 57 (64) (DB).
('69) 11 Suth W R 368 (368) (DB).
('86) 1886 Pun Re No. 88.
('17) 4 AIR 1917 Mad 168 (169) (DB).

Note 16

1. ('17) 4 AIR 1917 Pat 623 (623) : 2 Pat L Jour 192 (DB).
2. ('28) 15 AIR 1928 Cal 835 (836) (DB).
[But see ('31) 18 AIR 1931 Rang 24 (24) (DB). (But a suit by principal against agent for transfer of the decree in his name not barred.)]
3. ('30) 17 AIR 1930 Mad 817 (818) : 54 Mad 81 (FB).

17. "Representative," who is.—The word 'representative' in the section has a much wider meaning than the words "legal representative" used in S. 50,[1] inasmuch as it includes not only a legal representative[2] but any representative-in-interest, i. e., any transferee of the interest of a party whether by assignment, succession or otherwise,[3] who so far as such interest is concerned, is *bound by the decree.*[4] In *Ajodhya Roy* v. *Hardwar*

Note 17

1. ('42) 29 AIR 1942 Mad 714 (715).
('05) 28 Mad 466 (470) (FB).
('35) 22 AIR 1935 Lah 306 (307) (DB).
('36) 23 AIR 1936 Mad 870 (871).
('39) 26 AIR 1939 Nag 183 (184) (DB).

2. ('20) 7 AIR 1920 Mad 324 (332) : 43 Mad 107 (FB).
† ('39) 26 AIR 1939 Nag 183 (184) : I L R (1939) Nag 548 (DB).
('36) 23 AIR 1936 Pat 126 (128). (Person in possession as intermeddler is representative.)
† ('35) 22 AIR 1935 Sind 214 (215) : 29 Sind L R 251 (DB).

3. ('42) 29 AIR 1942 Mad 714 (715).
('41) 28 AIR 1941 Pat 95 (98) : 20 Pat 86 (DB). (Auction-purchaser.)
('40) 27 AIR 1940 Pat 615 (615) (DB).
('40) 42 Bom L R 1123 (1132). (Representative includes a transferee by operation of law.)
† ('09) 1 Ind Cas 213 (214) (DB) (Cal).
† ('26) 13 AIR 1926 Cal 798 (808) : 53 Cal 781 (FB).
† ('04) 26 All 447 (460, 461, 463) (FB). (An auction-purchaser of property in a sale under simple money decree is a 'representative.')
('38) 25 AIR 1938 Cal 390 (392): ILR (1938) 2 Cal 125 (DB). (Usufructuary mortgagee from the judgment-debtor is his representative.)
('36) 23 AIR 1936 Cal 67 (68) (DB). (Person obtaining property of judgment-debtor agreeing to pay his decretal debt — Right of decree-holder to proceed against him by way of execution application.)
('30) 17 AIR 1930 Cal 586 (588). (Purchaser from the decree-holder auction-purchaser.)
('35) 22 AIR 1935 Lah 306 (307) (DB). (Purchaser of the equity of redemption.)
✠ ('33) 20 AIR 1933 Lah 352 (353) : 14 Lah 591.
('04) 28 Mad 119 (122) (DB).
('39) 26 AIR 1939 Nag 183 (184) : I L R (1939) Nag 548 (DB).
† ('34) 21 AIR 1934 Pat 413 (419): 13 Pat 735 (DB).
† ('18) 5 AIR 1918 Pat 306 (307) (DB). (Representative includes a purchaser of a party's interest.)
[*See also* ('01) 24 Mad 689 (692).]

4. ('42) 29 AIR 1942 Pat 369 (370).
('41) 28 AIR 1941 Mad 161 (174) : ILR (1941) Mad 438 (FB). (Patanjali Sastri, J.—The term 'representative' in S. 47 should be understood as merely referring to one who stands in the shoes of another and as meaning more or less the same thing as the expression 'claiming under' used in other sections of the Code, e. g., S. 11, S. 146.)
('40) 27 AIR 1940 Pat 615 (616). (Mortgagee decree-holder purchasing property in execution sale under his own decree is representative of the judgment-debtor-mortgagor.)
('39) 43 Cal W N 1100 (1101) (DB). (Person purchasing property subject to a charge created by security bond executed during execution proceedings in favour of decree-holder.)
† ('26) 13 AIR 1926 Cal 798 (808) : 53 Cal 781 (FB).
✠ ('97) 24 Cal 62 (73) (FB).
('37) 24 AIR 1937 Cal 565 (567) (DB).
('36) 23 AIR 1936 Cal 590 (592). (Decree on mortgage obtained collusively—Other person obtaining decree against mortgagor and attaching mortgaged property—Mortgage decree is nullity—Such other person is not affected by mortgage decree and cannot be regarded as representative of mortgagor.)
('36) 164 Ind Cas 375 (375) (Cal). (Transferee from judgment-debtor or auction-purchaser is representative of judgment-debtor only if decree binds him.)
('34) 21 AIR 1934 Cal 827 (828): 61 Cal 1068 (DB). (Previous auction-purchaser of the property re-attached in execution of another decree is not representative of judgment-debtor under S. 47, as his interests are not affected by the decree.)
('31) 18 AIR 1931 Cal 202 (204) (DB). (Person not bound by decree—Not a representative—Relationship of landlord and tenant ceasing to exist — Mortgagee of tenure is not a representative of judgment-debtor.)
('26) 13 AIR 1926 Cal 356 (357) (DB). (Mortgagee of patni interest is representative of the judgment-debtor patnidar.)
('16) 3 AIR 1916 Cal 661 (662) (DB). (Decree against the sons of the defendant as his representatives not binding on executrices who are the real representatives.)
('08) 7 Cal L Jour 299 (300) (DB).
('07) 5 Cal L Jour 80 (87) (DB).
† ('39) 26 AIR 1939 Nag 183 (184) : I L R (1939) Nag 548 (DB).
('36) 23 AIR 1936 Nag 163 (166): ILR (1936) Nag 172. (Contract to sell property —Subsequent attachment — Vendee in pursuance of contract to sell is not representative of vendor within meaning of S. 47 as he is not bound by the decree.)
('38) 25 AIR 1938 Pat 478 (479) (DB). (A purchaser from a sharer in a partition decree is bound by the decree.)
('36) 23 AIR 1936 Pat 561 (562): 15 Pat 414 (DB). (Purchaser of entire occupancy holding at certificate sale under the Public Demands Recovery Act for arrears of rent is not a representative of the occupancy tenant within the meaning of S. 47, C. P. Code, as he is not bound by a decree that is passed against the vendor in respect of the property purchased by the vendee.)
† ('34) 21 AIR 1934 Pat 413 (419) : 13 Pat 735. (Person not bound by decree.)
† ('35) 22 AIR 1935 Sind 214 (215) : 29 Sind L R 251 (DB). (Person attaching money lying in Court to the credit of the judgment-debtor and getting the money subject to the conditions under which it was lying in Court held to be representative of the judgment-debtor.)

Roy,[5] their Lordships of the Calcutta High Court observed as follows :

> "To determine, therefore, whether a particular person is a representative of a party to the suit, the two tests to be applied are, *first*, whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit, has, by act of parties or by operation of law, vested in the person who is sought to be treated as representative, and, *secondly*, if there has been any devolution of interest, whether, so far as such interest is concerned, that person is *bound by the decree.*"

It is not necessary that the transfer of the interest should be *after decree*; it may be before the decree, in which case the circumstances must be such that the transferee is bound by the decree.[6] Thus, a transferee of property during the pendency of suit concerning that property will be affected by the doctrine of *lis pendens* and will be bound by the decree; he will therefore be a representative of the party whose interest has been transferred.[7]

The following persons have been held to be representatives of parties within the meaning of this section —

(a) A devisee of the decree-holder.[8]

(b) A legatee[9] or universal donee.[10]

(c) A person taking the judgment-debtor's share in joint property by survivorship.[11]

(d) A second-mortgagee defendant paying off the first-mortgagee plaintiff and stepping into his shoes.[12]

The following are not representatives of parties within tne meaning of the section —

(a) An unrecorded cosharer in a tenancy is not a representative of the recorded tenant.[13]

(b) A rival decree-holder is not a representative of the judgment-debtor.[14]

(c) A person claiming adversely to the debtor is not a representative of the debtor.[15]

The section refers only to *de facto* representatives admitted as such on the record and does not include persons who claimed to be admitted as such representatives but whose application was refused.[16] Nor does the word "representative" include a person

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5. ('09) 1 Ind Cas 213 (214) (DB) (Cal). (Followed in AIR 1933 Lah 352 : 14 Lah 591.)
6. ('05) 32 Cal 1031 (1034, 1035) (DB). (Dissenting from 12 Cal 458.)
† ('97) 24 Cal 62 (75) (FB). (Transfer after decree.)
✣('90) 12 All 313 (317) (FB).
('23) 10 AIR 1923 Cal 345 (350) (DB).
† ('39) 26 AIR 1939 Nag 183 (184) : ILR (1939) Nag 548 (DB). (Transferee of interest of judgment-debtor after decree is his representative.)
[*See also* ('99) 3 Cal W N 276 (277, 278). (Representative means the representative of a party to the suit and not one to the execution proceedings only.)]
7. ('39) 26 AIR 1939 Mad 944 (945).
See Note 21.
8. ('99) 23 Bom 536 (538).
9. *See* ('27) 14 AIR 1927 Rang 273 (274) : 5 Rang 393.
10. ('30) 17 AIR 1930 Oudh 268 (270).
11. ('07) 34 Cal 642(648):5 Cal L Jour 491 (495,504) (FB).
[*See also* ('31) 18 AIR 1931 Sind 84(87): 26 Sind L R 51. (Person taking property in partition.)]
12. ('32) 19 AIR 1932 Cal 126 (129) : 59 Cal 117. (Puisne mortgagee—Defendant purchaser.)
('99) 9 Mad L Jour 177 (179).
13. ('10) 7 Ind Cas 769 (771) (Cal).
14. ('26) 13 AIR 1926 Mad 1104 (1105).
[*See also* ('34) 21 AIR 1934 Nag 201 (203) : 30 Nag L R 240. (Liquidator proceeding against judgment-debtor is not his representative in connexion with proceedings in execution of another decree against the same judgment-debtor.)]
15. ('06) 1906 All W N 62 (63).
See also the following cases :
('71) 16 Suth W R 307 (308).
('86) 14 Cal 316 (320).
('11) 9 Ind Cas 194 (195) (Cal). (Claim by purchaser in sale under a prior mortgage decree.)
('05) 8 Oudh Cas 370 (373, 374, 378).
('17) 4 AIR 1917 Upp Bur 4 (4) : 2 Upp Bur Rul 133. (Mortgagee from judgment-debtor objecting to attachment under O. 21, R. 58.)
16. ('87) 1887 Pun Re No. 97.

brought on the record not *as a representative* but in some other capacity.[17]

18. Decree-holder becoming auction-purchaser. — See Note 19.

19. Auction-purchaser — Position of. — There has been a conflict of opinion among the several Courts as to whether the auction-purchaser is a representative of the judgment-debtor. The High Courts of Calcutta,[1] Madras[2] and Allahabad[3] have held that a stranger purchaser in execution of a simple *money decree* is a representative of the judgment-debtor. The High Courts of Bombay[4] and Lahore[5] and the Chief Court of Lower Burma,[6] on the other hand, hold that he is not the representative of *any* of the parties to the suit. The decisions of the High Court of Patna,[7] the Chief Court of

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17. ('88) 10 All 479 (484) (DB). (Person brought on the record as having realised a part of the assets of a deceased debtor.)
('93) 1893 All W N 106 (107) (DB). (Widow of judgment-debtor brought on the record only as his wife.)
('21) 63 Ind Cas 762 (763) (DB) (Cal).
('23) 10 AIR 1923 Nag 149 (150).

Note 19

1. †('97) 24 Cal 62 (77) (FB). (Overruling 16 Cal 355 and 8 Suth W R 304.)
('34) 21 AIR 1934 Cal 827 (828) : 61 Cal 1068 (DB). (Not a representative unless he is bound by decree.)
('36) 164 Ind Cas 375 (375) (Cal). (Auction-purchaser of interest of judgment-debtor is his representative only if he is bound by the decree.)
† ('10) 7 Ind Cas 55 (58) (DB) (Cal).
† ('09) 4 Ind Cas 326 (326) (DB) (Cal).
† ('07) 11 Cal W N 495 (496) (DB).
† ('05) 32 Cal 1031 (1034, 1035) (DB).
('04) 9 Cal W N 134 (136, 137) (DB).
('98) 2 Cal W N 429 (431) (DB).
[But see ('94) 21 Cal 825 (826). (No longer law in view of the ruling in 24 Cal 62 (FB).)
('93) 20 Cal 236 (239). (Do.)
('86) 13 Cal 326 (330). (Do.)]

2. ('41) 28 AIR 1941 Mad 161 (170) : ILR (1941) Mad 438 (FB).
†('20) 7 AIR 1920 Mad 324 (333): 43 Mad 107 (FB).
† ('33) 20 AIR 1933 Mad 166 (167):56 Mad447(DB).
('24) 11 AIR 1924 Mad 889 (890) (DB).
('20) 7 AIR 1920 Mad 943 (944) (DB).
('20) 7 AIR 1920 Mad 626 (627) (DB).
('19) 6 AIR 1919 Mad 358 (359).
('18) 5 AIR 1918 Mad 672 (673) (DB).
('05) 28 Mad 119 (122) (DB).
[But see *the following cases which are no longer law in view of ('20) 7 AIR 1920 Mad 324 (333, 334) : 43 Mad 107 (FB)* :—
('12) 14 Ind Cas 836 (836) (Mad). (Auction-purchaser is a representative of decree-holder.)
('07) 30 Mad 507 (509). (Do.)
('19) 6 AIR 1919 Mad 581 (581) : 41 Mad 467. (Not a representative of decree-holder.)
('17) 4 AIR 1917 Mad 664 (665). (Auction-purchaser not a representative.)
('10) 34 Mad 417 (418,421): 8 Ind Cas 429 (430,431). (Auction-purchaser cannot be a representative of both the parties — Per Krishnasami Aiyar, J., *obiter*.)]

3. † ('38) 25 AIR 1938 All 651 (652).
† ('36) 23 AIR 1936 All 479 (481) (DB).
† ('04) 26 All 447 (461, 463) (FB).
('05) 27 All 155 (157) (DB).
('08) 30 All 379 (383, 384) (DB).
('07) 29 All 275 (276) (DB).
('06) 28 All 337 (339) (DB).
('06) 1906 All W N 87 (87) (DB).
('05) 2 All L Jour 265 (267) (DB).
('77) 1 All 240 (248) (FB).
[But see *the following cases which are no longer law in view of the Full Bench ruling in 26 All 447* :—
(1900) 22 All 450 (451).
('83) 5 All 452 (455, 456) (FB).
('97) 19 All 140 (141).
(1900) 1900 All W N 42 (43).]

4. ('40) 27 AIR 1940 Bom 210 (214) : ILR (1940) Bom 370.
† ('23) 10 AIR 1923 Bom 214 (215) (DB).
('20) 7 AIR 1920 Bom 30 (30) : 44 Bom 551 (DB).
† ('18) 5 AIR 1918 Bom 231 (232) : 42 Bom 411 (DB). (Not a representative of judgment-debtor.)
('10) 7 Ind Cas 457 (458) (DB) (Bom).
('01) 25 Bom 631 (635) (DB). (Not a representative of decree-holder.)
† ('91) 15 Bom 290 (292) (DB).
† ('89) 13 Bom 34 (37) (DB).
[*See* ('40) 42 Bom L R 1123 (1134). (A purchaser of the judgment-debtor's property at a sale under the Bombay Land Revenue Code for arrears due under a toll contract is not a representative of the judgment-debtor.)]

5. ('34) 21 AIR 1934 Lah 105 (105).
('25) 12 AIR 1925 Lah 176 (177).
('19) 6 AIR 1919 Lah 176 (176).
('87) 1887 Pun Re No. 12 p. 23 (27).
[But see ('36) 23 AIR 1936 Lah 18 (20) (DB).]

6. ('11) 9 Ind Cas 472 (473, 474) (Low Bur).
† ('09) 5 Low Bur Rul 85 (87): 3 Ind Cas 713 (714).
[*See also* (1900) 1 Low Bur Rul 22 (23).]

7. ('42) 29 AIR 1942 Pat 369 (370). (Is a representative if he is bound by the decree—*A* purchasing judgment-debtor's property in execution of his decree obtained in suit to which *B* was not party—*B* putting same property to sale in execution of his decree against same judgment-debtor — *A* cannot object to execution under S. 47 as he cannot be said to be judgment-debtor's representative within Section 47.)
('41) 28 AIR 1941 Pat 95 (98) : 20 Pat 86 (DB). (Representative of judgment-debtor.)
('41) 28 AIR 1941 Pat 612 (613). (Auction-purchaser purchasing holding subject to a rent-charge is a representative of the judgment-debtor.)

Oudh[8] and the Court of the Judicial Commissioner of Nagpur[9] are conflicting: some, holding that he is a representative of the judgment-debtor, others, holding that he is not a representative of any of the parties, and yet others, holding that he is a representative of the *decree-holder*. It is submitted that the first mentioned view is correct on principle. The purchaser in execution of a *mortgage* decree is a representative of the mortgagor.[10] There is a conflict of decisions as to whether such a purchaser is a representative of both the mortgagor and the mortgagee. It has been held, in the undermentioned cases,[11] that a sale under a mortgage decree passes to the purchaser, the interest of the *mortgagor* as well as of the *mortgagee*, and that the purchaser is, consequently, the representative of *both* the mortgagor and the mortgagee. In a Full Bench case of the Allahabad High Court, Sulaiman, C. J., has, however, expressed the view that the auction-purchaser does not purchase the *mortgagee's* interest also in the execution sale, but gets the mortgagee's right by virtue of the doctrine of *subrogation*.[12] It is submitted that the former view is correct. Whether, in any particular case, he is to be considered the representative of the judgment-debtor or of the decree-holder, is a question which depends upon the nature of the dispute involved in the enquiry.

Illustrations.

1. In execution of a money-decree obtained by *A*, *B* purchased the property of the judgment-debtor. The sale was set aside on an application by the judgment-debtor under O. 21 R. 90, and the purchase-money returned to *B*. On appeal, however, the lower Court's order was reversed, and the sale was confirmed. *B* having failed to return the purchase money, *A* filed a suit against *B* for the *recovery of the purchase money*. It was held that the suit was barred by this section. (*Rahim Uddin* v. *Ram Lal*.[13])

2. *R* executed five mortgage-deeds hypothecating different portions of his property in favour of *M*. *M* brought a suit on foot of all the mortgages and obtained a consolidated decree for sale for the whole amount. After obtaining an order absolute, *M* applied for sale of the properties in execution. Meantime, *G*, the plaintiff who had purchased a portion of the properties in execution of a simple *money* decree against R objected to the sale but his objection was disallowed. He, thereupon, brought the present suit for the determination of the same question. It was held that the suit was barred by this section. (*Guljari Lal* v. *Madho Ram*.[14])

('24) 11 AIR 1924 Pat 367 (368) (DB). (Purchasers of mortgaged property in a revenue sale—*Held*, representatives of judgment-debtor.)
('17) 4 AIR 1917 Pat 495 (496) : 2 Pat L Jour 361 (DB). (Not a representative of the parties.)

8. ('11) 14 Oudh Cas 89 (93): 10 Ind Cas 722 (724). (Representative of judgment-debtor.)
('15) 2 AIR 1915 Oudh 134 (135). (Not a representative of either.)
('28) 15 AIR 1928 Oudh 442 (445, 446) : 3 Luck 719 (DB). (Depends upon the nature of the question in dispute. In this case, held representative of judgment-debtor.)
('09) 12 Oudh Cas 175 (181) : 3 Ind Cas 586 (588) (DB). (Not a representative of decree-holder.)
[*See also* ('18) 5 AIR 1918 Oudh 379 (385). (An auction-purchaser, even if the decree-holder, is representative of the judgment-debtor.)]

9. ('22) 9 AIR 1922 Nag 189 (191). (Representative of judgment-debtor.)
('23) 10 AIR 1923 Nag 161 (162). (Not a representative of judgment-debtor.)
('26) 13 AIR 1926 Nag 68 (70). (Representative of decree-holder.)
('24) 11 AIR 1924 Nag 328 (330): 20 Nag LR 179. (Representative of decree-holder for the purpose of an adjudication between judgment-debtor and auction-purchaser.)

10. † ('37) 24 AIR 1937 Nag 59 (59) : ILR (1937) Nag 156.
† ('38) 25 AIR 1938 Rang 250 (251) : 1938 Rang L R 583 (DB). (Decree-holder purchaser.)
('24) 11 AIR 1924 Sind 101 (103,104): 17 Sind LR 73.

11. ('26) 13 AIR 1926 All 457 (459) (DB).
† ('29) 16 AIR 1929 Rang 183 (183).
('22) 9 AIR 1922 All 495 (496) : 44 All 488 (DB).
('32) 19 AIR 1932 Cal 126 (131): 59 Cal 117 (DB).
† ('93) 16 Mad 121 (125, 126) (DB).
('77) 2 Mad 108 (112) (DB).
[*See also* ('96) 20 Bom 390 (393).]
[But see ('21) 8 AIR 1921 Mad 420 (421). (Mortgage decree purchaser is in the same position as a money decree purchaser.)
('09) 12 Oudh Cas 45 (51).]
Also see O. 34, R. 5, Note 19.

12. † ('31) 18 AIR 1931 All 466 (480) : 53 All 1023 (FB).
('37) 24 AIR 1937 All 742 (746): I L R (1937) All 921 (FB.) (AIR 1931 All 466 : 53 All 1023 (FB) followed.)

13. ('05) 27 All 155 (157).

14. †('04) 26 All 447 (461) (FB).

In the first of the above cases, it will be seen that B is the representative of the judgment-debtor and the question of the return of the purchase money is one relating to the *satisfaction* of the decree. The question is, therefore, one falling within S. 47 and a separate suit is barred. In the case mentioned in illustration 2 above, G having purchased the interest of R, is his representative, and the question raised by him is one relating to the *execution* of the decree. Section 47 therefore applies and the suit is barred. So far, the case of a *stranger purchaser* has been dealt with. Where, however, the *decree-holder himself* becomes the purchaser in execution of a decree obtained by him, it has been held by the High Courts of Madras[15] and Calcutta,[16] the Chief Court of Oudh[17] and the Courts of the Judicial Commissioners of Nagpur[18] and Sind,[19] that he retains his character of a party to the suit and does not divest himself of his character as such by reason of his having become the purchaser. A question, therefore, arising between the decree-holder-purchaser and the judgment-debtor in respect of the purchase, is, according to this view, one "between the parties to the suit." On the other hand, the High Courts of Allahabad,[20] Bombay,[21] Lahore[22] and Patna[23] hold that there is no distinction between a decree-holder-purchaser and a stranger purchaser and that the fact of his being a party to the suit is only an accident which will not have the effect of making his position better or worse than that of a stranger purchaser. The observations of the Judicial Committee of the Privy Council in the undermentioned case[24] seem to support the view of the High Courts of Madras, etc., though it is not clear from the report of the decision that this aspect of the question was before their Lordships' mind. But, where the representative character

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15. ('43) 30 AIR 1943 Mad 318 (321).
(1900) 26 Mad 740 (741) (DB).
† ('05) 28 Mad 87 (89, 90) (DB).
('36) 23 AIR 1936 Mad 571 (572).
† ('26) 13 AIR 1926 Mad 857 (858) (DB).
† ('16) 3 AIR 1916 Mad 430 (432) (DB).
† ('01) 25 Mad 529 (532) (DB).
('98) 21 Mad 416 (416, 417) (DB).

16. † ('26) 13 AIR 1926 Cal 798 (803) : 53 Cal 781 (FB).
(1900) 27 Cal 34 (36) (DB).
† ('27) 14 AIR 1927 Cal 57 (60) (DB).
[*See also* ('32) 19 AIR 1932 Cal 414 (416, 417).
('08) 7 Cal L Jour 436 (438).
('04) 31 Cal 737 (742).

17. † ('28) 15 AIR 1928 Oudh 199 (202) : 3 Luck 182 (FB).
[But see ('18) 5 AIR 1918 Oudh 379 (385) (DB).]

18. ('40) 27 AIR 1940 Nag 372 (375).
† ('17) 4 AIR 1917 Nag 24 (25).
('18) 5 AIR 1918 Nag 102 (103).
✠ ('38) 25 AIR 1938 Nag 212 (215, 216) : I L R (1938) Nag 583 (DB).
('35) 22 AIR 1935 Nag 30 (31) : 31 Nag L R 217.

19. ('25) 12 A I R 1925 Sind 171 (173) : 18 Sind L R 34 (DB).

20. ✠ ('09) 31 All 82 (90) : 1 Ind Cas 416 (423, 424) (FB). (Overruling 30 All 72; 5 All L Jour 285 and 3 All L Jour 234.)
('09) 2 Ind Cas 454 (455) (All). (Transferee from stranger auction-purchaser; 31 All 82 followed.)
† ('28) 15 AIR 1928 All 368 (370) : 50 All 670 (DB).
('28) 15 AIR 1928 All 363 (364) : 50 All 686 (DB).
('25) 12 AIR 1925 All 703 (704).
('25) 12 AIR 1925 All 236 (236) : 47 All 304 (DB). (Claim by judgment-debtor for recovery of wrong or excessive property sold to a stranger purchaser more than 3 years after sale—Not tenable; 31 All 82 followed.)
('23) 10 AIR 1923 All 470 (471) : 45 All 96 (DB).
('14) 1 AIR 1914 All 467 (468) (DB).
('01) 23 All 476 (478).
('96) 18 All 36 (37).
('95) 17 All 222 (224, 225) (FB).

21. ('20) 7 AIR 1920 Bom 90 (93) : 44 Bom 352 (DB).
† ('20) 7 AIR 1920 Bom 223 (223) : 44 Bom 977 (DB).
('24) 11 AIR 1924 Bom 429 (431) : 48 Bom 550 (FB). (Overruling 35 Bom 452.)

22. ('40) 27 AIR 1940 Lah 230 (233): ILR (1941) Lah 91 (DB). (Mortgagee decree-holder in execution of his decree bringing property to sale and purchasing it himself—Suit by him for possession against person claiming under judgment-debtor is not between parties to suit relating to execution and is not barred by S. 47.)
† ('30) 17 AIR 1930 Lah 363 (363).
('29) 119 Ind Cas 226 (226) (Lah).
('19) 6 AIR 1919 Lah 16 (18) : 1919 Pun Re No. 121.
('18) 5 AIR 1918 Lah 204 (205, 206) : 1918 Pun Re No. 8 (DB).

23. ('16) 3 AIR 1916 Pat 216 (217, 218) : 1 Pat L Jour 232 (FB).
('30) 17 AIR 1930 Pat 311 (312, 313) : 9 Pat 775 (DB).
✠ ('31) 18 AIR 1931 Pat 241 (252, 255) : 10 Pat 670 (FB). (Same case after Full Bench answer, see AIR 1932 Pat 80 (86) : 10 Pat 670.)
[But see ('25) 12 AIR 1925 Pat 478 (479) : 4 Pat 726 (DB). (Decided without reference to Full Bench and other cases.)]

24. ('17) 4 AIR 1917 P C 121 (123) : 41 Mad 403 : 45 Ind App 54 (PC).

of the decree-holder-purchaser comes in question in a *distinct proceeding*, his character as decree-holder in one execution proceeding can have no effect on his position in another and he will be in the same position as a stranger purchaser.[25]

In applying the principles stated above to cases of disputes between the auction-purchaser and the judgment-debtor arising in proceedings relating to *delivery of possession*, two questions may arise —

(1) whether an appeal will lie from an order in such an enquiry, and

(2) whether the dispute can be agitated in a separate suit.

The answer to the questions depends upon firstly, whether the question is one "between the parties," and, secondly, whether it relates to the *execution*, *discharge* or *satisfaction* of the decree. All the Courts are agreed that, where the purchaser is a *stranger*, he can, apart from the summary remedy provided by O. 21, Rr. 95 to 102, agitate the matter in a *separate suit* and that if he avails himself of such summary remedy, no appeal would lie from an order passed in such proceedings.[26] The reason is that if the purchaser is *not at all* a representative of the judgment-debtor (as has been held in some decisions referred to above), the question is not one between the parties, and, even if he *is* a representative of the judgment-debtor, still, the question is only one between the *judgment-debtor and his representatives*, and consequently is not one "between the parties." (See Note 7.) But when the *decree-holder is the purchaser*, the question is one "between the parties." Further, according to the High Courts of Madras[27] and Calcutta[28]

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25. † ('20)7AIR1920Mad 324(333): 43Mad 107 (FB). ('36) 163 Ind Cas 602 (604) (Nag). (Mortgagee decree-holder—Purchaser is representative of judgment-debtor in proceedings for execution of rent decree against mortgagor.)
('38) 25 AIR 1938 Pat 216 (220)(DB). (Decree-holder purchaser is representative of judgment-debtor in execution proceeding against same judgment-debtor by another decree-holder.)
('36) 23 AIR 1936 Pat 289 (293): 15 Pat 545 (DB). (Decree-holder purchaser is representative of judgment-debtor in regard to another decree-holder executing against same judgment-debtor.)

26. ('41) 28 AIR 1941 Mad 161 (170): ILR (1941) Mad 438 (FB). (Suit for possession by auction-purchaser against private purchaser from judgment-debtor is not barred by S. 47—25 Mad 383; A I R 1933 Mad 598 ; 56 Mad 808; A I R 1934 Mad 181 : 57 Mad 457 overruled.)
('08) 31 Mad 177 (178) (DB).
† ('28) 15 AIR 1928 Mad 806 (809).
('26) 13 AIR 1926 All 730 (732).
† ('26) 13AIR1926 All 509(509,510) (Overruled on another point; see AIR 1935 All 243: 57 All 658.)
('24) 11 AIR 1924 All 856 (857).
('87) 14 Cal 644 (649) (DB).
† ('86) 12 Cal 169 (173) (DB). (9 Cal 602 followed.)
('21) 8 AIR 1921 Mad 81 (82) (DB).
† ('21) 8 AIR 1921 Nag 59 (60) (DB).
† ('11) 14 Oudh Cas 70 (73) : 10 Ind Cas 714 (715) (DB).
† ('30) 17 AIR 1930 Pat 311 (313): 9 Pat 775 (DB).
[But see ('21) 8 AIR 1921 Mad 420 (421) (DB). (Submitted wrongly decided ; see also AIR 1928 Mad 806.)]
Also see O. 21, R. 95, Note 8.

27. ('43) 30 AIR 1943 Mad 318 (321).
† ('05) 28 Mad 87 (89, 90) (DB).
('27) 14 AIR 1927 Mad 288 (290, 291) : 50 Mad 403 (DB). (Suit by decree-holder purchaser for possession of the property purchased is barred by this section.)
† ('39) 26 AIR 1939 Mad 369 (370): I L R (1939) Mad 456 (SB). (Reversing AIR 1936 Mad 571 on another point.)
('36) 23 AIR 1936 Mad 571 (572).
('33) 20 AIR 1933 Mad 569 (570).
('25) 12 AIR 1925 Mad 1198 (1199).
('20) 7 AIR 1920 Mad 979 (980) (DB).
('16) 3 AIR 1916 Mad 1008 (1010) (DB).
('05) 28 Mad 119 (121) (DB).
('03) 26 Mad 740(741):13 Mad L Jour 237(238) (DB).
† ('02) 25 Mad 529 (532) (DB).
('01) 24 Mad 185 (188) (DB).
[*See also* ('28) 15 AIR 1928 Mad 1270 (1270).]
[But see ('33) 20 AIR 1933 Mad 482 (484) : 57 Mad 844.
('96) 6 Mad L Jour 256 (258).
('92) 15 Mad 226 (228) (DB).
('84) 7 Mad 592 (594) (DB).]

28. ✠('26) 13 AIR 1926 Cal 798 (803, 807) : 53 Cal 781 (FB).
('30) 17 AIR 1930 Cal 586 (588).
('34) 21 AIR 1934 Cal 541 (542) (DB).
('33) 20 AIR 1933 Cal 680 (680) : 60 Cal 832 (DB). (Between decree-holder purchaser and judgment-debtor under O. 21, R. 100. A I R 1926 Cal 795 : 53 Cal 606 (FB).)
('33) 20 AIR 1933 Cal 311 (311, 312) (DB). (Dismissal of application for possession made by decree-holder purchaser—Appeal lies).
† ('32) 19 AIR 1932 Cal 126 (128): 59 Cal 117 (DB).
† ('13) 20 Ind Cas 874 (875, 876) (DB) (Cal).
('04) 31 Cal 737 (742) (DB).
(1900) 27 Cal 34 (38) (DB).

and the Courts of the Judicial Commissioners of Nagpur,[29] Sind[30] and Peshawar[31] a question relating to *delivery of possession* is one relating to the execution, discharge or satisfaction of the decree. They proceed on the view that, so far as the decree-holder is concerned, his decree cannot be said to be *satisfied* until he has either obtained the sale proceeds or possession of the property which represent the money for which he obtained his decree. The High Courts of Allahabad,[32] Bombay,[33] Patna,[34] Lahore[35] and Rangoon[36] and the Chief Court of Oudh[37] hold, on the other hand, that, upon the judgment-debtor's property being sold and the amount due under the decree being realised, the *decree is fully executed, discharged and satisfied*, and no question relating to the execution, discharge or satisfaction of the decree remains to be considered, and that, whether or not the auction-purchaser obtains possession of the property sold is

[*See* ('39) 43 Cal W N 1091 (1092).
('34) 21 AIR 1934 Cal 277 (278) : 60 Cal 140. (Under certain circumstances case held not to fall within the section.)]
[But see *the following cases which are no longer law in view of the Full Bench ruling in AIR 1926 Cal 798 : 53 Cal 781* :—
(1940) 44 Cal W N 827 (828). (Section 47 can only apply where a dispute arises between the parties to the suit; it does not apply where the contest is between the parties to the suit and also a stranger. A suit by the decree-holder auction-purchaser for possession of property against the judgment-debtor and another person who claims that he had purchased that property from the judgment-debtor before the attachment proceeding is not barred by the section.)]
('25) 12 AIR 1925 Cal 1250 (1250).
('23) 10 AIR 1923 Cal 345 (348, 351).
('19) 6 AIR 1919 Cal 368 (369).
('19) 6 AIR 1919 Cal 85 (85).
('15) 2 AIR 1915 Cal 137 (139).
('97) 1 Cal W N 658 (658, 659).]

29. ('27) 14 AIR 1927 Nag 294 (295).
('17) 4 AIR 1917 Nag 24 (25).
† ('38) 25 AIR 1938 Nag 212 (215) : I L R (1938) Nag 583 (DB).
('33) 20 AIR 1933 Nag 369 (370). (Application by decree-holder purchaser under R. 95—Resistance offered — Application under R. 97 held barred by limitation — Fresh application for possession by decree-holder purchaser held not barred—But suit would be barred.)
[But see ('32) 19 AIR 1932 Nag 140 (141) : 28 Nag L R 250.]

30. † ('25) 12 AIR 1925 Sind 171 (173) : 18 Sind L R 34 (DB).
('36) 23 AIR 1936 Sind 11 (13) : 30 Sind L R 290 (DB).

31. ('36) 23 AIR 1936 Pesh 85 (86) (DB).

32. ✠('09) 31 All 82 (92, 93, 94) : 1 Ind Cas 416 (424, 428) (FB).
('07) 29 All 463 (466).
✠('37) 24 AIR 1937 All 742 (750) : ILR (1937) All 921 (FB).
('18) 5 AIR 1918 All 405 (405) : 40 All 216 (DB).
('08) 30 All 231 (234, 235) (DB). (Symbolical possession given—Fresh suit for actual possession lies.)
('06) 28 All 722 (723) : 1906 All W N 213 (214) (DB). (Do.)
('02) 24 All 519 (520) (DB). (Objection by judgment-debtor that house on land did not pass and should not have been delivered to auction-purchaser, not within the section.)

33. † ('24) 11 AIR 1924 Bom 429 (431) : 48 Bom 550 (FB). (Overruling 35 Bom 452.)
('24) 11 AIR 1924 Bom 527 (528) (DB).
('30) 17 A I R 1930 Bom 375 (377) : 54 Bom 479 (DB).
('23) 10 AIR 1923 Bom 62 (62): 46 Bom 914 (DB). (Suit by judgment-debtor against stranger purchaser for recovery of land wrongly sold.)
('98) 22 Bom 939 (944) (DB).

34. † ('16) 3 AIR 1916 Pat 216 (216): 1 Pat L Jour 232 (FB).
('30) 17 A I R 1930 Pat 311 (312, 313) : 9 Pat 775 (DB).
('38) 177 Ind Cas 692 (693) (DB) (Pat).
✠('31) 18 AIR 1931 Pat 241 (243 to 247, 252, 255, 261 to 263) : 10 Pat 670 (FB). (Same case after F B answer. See AIR 1932 Pat 80 (86).)
('30) 17 AIR 1930 Pat 308 (310) : 9 Pat 332 (DB).
('29) 16 AIR 1929 Pat 559 (560) (DB).
† ('19) 6 A I R 1919 Pat 297 (304) : 4 Pat L Jour 716.
('18) 5 AIR 1918 Pat 546 (547).
('18) 5 AIR 1918 Pat 395 (396) : 3 Pat L Jour 571 (DB).
[But see ('25) 12 AIR 1925 Pat 478 (479): 4 Pat 726 (DB). (Decided without reference to the F B in AIR 1916 Pat 216 : 1 Pat L Jour 232.)]

35. ('40) 27 AIR 1940 Lah 230 (233) : ILR (1941) Lah 91 (DB).
† ('18) 5 AIR 1918 Lah 204 (206) : 1918 Pun Re No. 8.
('39) 26 A I R 1939 Lah 211 (212) : I L R (1939) Lah 295 (DB). (AIR 1937 Lah 145 disapproved.)
('29) 16 AIR 1929 Lah 121 (122).
('20) 7 AIR 1920 Lah 159 (160) : 1 Lah 134 (DB).
('19) 6 A I R 1919 Lah 16 (18) : 1919 Pun Re No. 121.
[But see ('37) 24 AIR 1937 Lah 145 (146).
('35) 22 AIR 1935 Lah 144 (145).
('88) 1888 Pun Re No. 58 p. 142 (143).]

36. † ('30) 17 AIR 1930 Rang 61 (62) : 8 Rang 162 (DB).
('30) 17 AIR 1930 Rang 281 (282).
('36) 23 AIR 1936 Rang 298 (299).

37. † ('28) 15 A I R 1928 Oudh 199 (203) : 3 Luck 182 (FB).
('16) 3 A I R 1916 Oudh 111 (112) : 18 Oudh Cas 345.

wholly immaterial for the purposes of the decree. The result is that, according to the former view, where a decree-holder purchases the property in court-auction, his remedy for recovery of possession from the judgment-debtor is only by way of an application under O. 21, R. 95, and a separate suit would be barred. Also, an order passed in execution upon a question relating to delivery of possession between himself and the judgment-debtor would be appealable as a decree under S. 96 read with S. 2, cl. (2). According to the latter view, the purchaser has an additional remedy by way of suit and no appeal would lie from an order passed in execution proceedings with respect to a dispute between the purchaser and the judgment-debtor either on the view that it is not a question relating to execution, discharge or satisfaction of a decree or on the view that the matter is not one between the parties or their representatives. Where the decree-holder purchaser obtains possession under the sale and is thereafter dispossessed again by the judgment-debtor, a suit for possession by the decree-holder is not barred under this section, inasmuch as the matter in dispute in such a case arises after the satisfaction of the decree and does not relate to the execution, discharge or satisfaction of the decree.[38] A dispute between the decree-holder purchaser and a *third party* in possession will not come within this section.[39]

As to cases in which the auction-purchaser is interested in a dispute between the decree-holder and the judgment-debtor, see Note 49.

20. Transferee from auction-purchaser. — The High Courts of Calcutta[1] and Madras[2] have held that a transferee from a decree-holder purchaser is a representative of the decree-holder. A contrary view has been held by the Chief Court of Lower Burma.[3] The High Court of Madras has also held in the undermentioned case[4] that the purchaser from a decree-holder purchaser, under a *money* decree is the representative of the *judgment-debtor* for the purpose of an enquiry into a question relating to the execution of a distinct decree affecting the same property.

21. Transferee from a party. — The term 'representative' includes, as has been seen already in Note 17, the transferee of the interest of a party who, *so far as such interest is concerned, is bound by the decree.* A transferee from a party may be bound by the decree against such party, on any of the following grounds and will consequently be his representative within the meaning of section 47 —

(1) Where the suit is one in which any right to immovable property is directly and specifically in question and the transferee gets a transfer of such property *pendente lite.*[1] See S. 52 of the Transfer of Property Act, 1882.

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38. ('36) 23 AIR 1936 Rang 298 (299).
39. ('36) 23 AIR 1936 Mad 733 (740) (DB).

Note 20

1. ('30) 17 AIR 1930 Cal 586 (588).
2. † ('26) 13 AIR 1926 Mad 857 (858) (DB).
('04) 28 Mad 87 (89): 14 Mad L Jour 474 (477)(DB).
[But see ('16) 3 AIR 1916 Mad 430 (430) (DB).]
3. † ('22) 9 A I R 1922 Low Bur 18 (22) : 11 Low Bur Rul 17.
4. ('20) 7 AIR 1910 Mad 324(333) : 43 Mad 107 (FB).
[But see ('09) 4 Ind Cas 1067 (1068) (DB) (Mad). (Vendee from auction-purchaser in a rent suit — Not a representative — Not entitled to object in execution of another decree.)]

Note 21

1. † ('38) 25 AIR 1938 Bom 367 (369): ILR (1938) Bom 649 (DB).
† ('37) 24 AIR 1937 PC 260 (261): 31 Sind L R 652 (PC). (Affirming AIR 1933 All 201 : 55 All 235.)
† ('37) 24 AIR 1937 Mad 580 (581).
('36) 23 AIR 1936 All 479 (480) (DB). (Subsequent mortgagee during pendency of suit on first mortgage is representative of mortgagor.)
† ('34) 21 AIR 1934 Cal 145 (146) (DB). (Lessee from judgment-debtor pending suit.)
('06) 10 Cal W N 240 (241). (Purchaser from tenant during a rent suit.)
('26) 13 AIR 1926 Mad 968 (969).
('04) 26 All 101 (104) (DB). (Transfer when execution proceeding was pending.)
('33) 20 AIR 1933 All 201 (202) : 55 All 235 (DB).
(1900) 22 All 380 (381) (DB).
† (1900) 22 All 243 (246, 247) (DB). (A mortgagee who takes a mortgage during the pendency of a suit by a prior mortgagee is a representative of the mortgagor defendant.)

It was, however, held by Mr. Justice Oldfield in the undermentioned case,[2] that where it is found in the suit that the transferor *had no title at all which he could transfer*, the transferee *pendente lite* is not his representative. Mr. Justice Ramesam dissented from this view. It is submitted that the view of Mr. Justice Oldfield cannot be supported on principle. It has been held by the High Court of Bombay that a transferee *pendente lite* cannot be a representative of the transferor within the meaning of S. 47 for the purpose of *attacking the decree-holder's right to sue*.[3]

(2) Where properties have been *attached* in execution of a money-decree and the transfer is of an interest in such properties pending *attachment*.[4] See section 64.

(3) Where the transfer is made by the judgment-debtor under O. 21 R. 83.[5]

(4) Where the transfer is made by the judgment-debtor of an occupancy holding *which is not transferable by custom*.[6]

(5) Where the transfer is made by the judgment-debtor of a holding, in respect of which a rent decree has been obtained by the landlord under S. 148A of the Bengal Tenancy Act (VIII of 1885).[7]

(6) A person who becomes owner, by process of law, of property mortgaged to him by a deed of conditional sale is a representative of his mortgagor.[8]

A transferee, in the following cases, will not be bound by the decree against the transferor, in respect of the interest transferred and is, therefore, not his representative —

(1) Where the suit does not relate to any property and the transfer is made by the judgment-debtor of properties, which have *not been attached* in execution of the decree in such suit or the attachment of which has been set aside.[9]

('94) 1894 All W N 145 (145) (DB).
('98) 22 Bom 939 (944) (DB). (Lis continues up to date of sale.)
('09) 3 Ind Cas 791 (792) (DB) (Cal). (Do.)
('28) 15 AIR 1928 Cal 94 (96) : 54 Cal 1064 (DB).
('26) 13 AIR 1926 Cal 356 (357) (DB).
('14) 1 AIR 1914 Cal 828 (829) : 41 Cal 418 (DB).
('12) 13 Ind Cas 542 (544) (DB) (Cal).
('07) 11 Cal W N 312 (314) (DB).
('02) 29 Cal 813 (822) (DB).
('89) 16 Cal 355 (364) (DB).
('86) 12 Cal 458 (463) (DB).
('27) 14 AIR 1927 Lah 905 (906).
('08) 4 Mad L Tim 85 (85) (DB).
('07) 30 Mad 507(509):17 Mad L Jour 291(293) (DB).
('18) 5 AIR 1918 Nag 102 (103).
('20) 7 AIR 1920 Pat 710 (711) (DB).
[*See also* ('99) 21 All 20 (22) (DB). (Purchaser of property under attachment.)]
[But see ('32) 19 AIR 1932 Cal 423 (424) (DB). (Partition suit—Transferee impleaded—Consent decree between sharers, but not against transferee — Transferee, though representative, cannot be proceeded against in execution unless impleaded under O. 22, R. 10 in execution.)]

Also see Note 17.

2. ('21) 8 AIR 1921 Mad 559 (560) (DB).
3. ('28) 15 AIR 1928 Bom 65 (66): 52 Bom 208 (DB).
4. ('39) 43 Cal W N 1091 (1092, 1093). (Purchaser during attachment before judgment.)

('99) 21 All 20 (22) (DB).
† ('97) 19 All 332 (333) (DB).
† ('01) 28 Cal 492 (498) (DB). (Lease pending attachment—Ijardar of property is a representative.)
† ('26) 13 AIR 1926 Lah 134 (135) : 6 Lah 544 (DB).
('32) 19 AIR 1932 Mad 86 (89): 55 Mad 495 (DB). (Reversing AIR 1927 Mad 450.)
('10) 34 Mad 450 (451) : 7 Ind Cas 418 (419) (DB).
('07) 17 Mad L Jour 321 (321) (DB).
† ('97) 20 Mad 378 (383) (DB).
Also see S. 64 Note 2.

5. ('01) 23 All 116 (118) (DB).
6. † ('18) 5 AIR 1918 Pat 483 (484) : 3 Pat L Jour 579 (DB).
('29) 16 AIR 1929 Pat 227 (228).
('21) 64 Ind Cas 124 (125) (DB) (Cal).
('15) 2 AIR 1915 Cal 268 (271) (DB).
† ('15) 2 AIR 1915 Cal 242 (248): 42 Cal 172 (FB).
('09) 3 Ind Cas 39 (40) (DB) (Cal).
('37) 24 AIR 1937 Pat 562 (563).
[But see ('09) 3 Ind Cas 461 (462) (DB) (Cal).]

7. ('17) 4 AIR 1917 Pat 597 (597, 598) : 2 Pat L Jour 478 (DB).
† ('05) 32 Cal 1031 (1034) (DB).
('28) 15 AIR 1928 Cal 94 (95, 96) : 54 Cal 1064 (DB).
('07) 11 Cal W N 312 (314) (DB).

8. ('94) 16 All 284 (285) (DB).
9. ('41) 28 AIR 1941 Pat 394 (394) (DB). (Transfer by judgment-debtor before attachment.)

(2) Where the transfer is made by a party before the institution of the suit against him.[10]

(3) X mortgages an absolute occupancy land governed by the C. P. Tenancy Act, 1920, first to M and then a portion to S. In execution of a decree obtained by S on his mortgage, the portion is sold and the landlord G deposits the value of the portion sold in Court under S. 6 of the Tenancy Act and obtains possession. G is not the representative of S in respect of a decree obtained by M against S and others in respect of his mortgage, inasmuch as, on the deposit under the Tenancy Act, the mortgage attaches to the *deposited amount* and not to the property transferred.[11]

22. Purchaser from party to suit in which injunction has been granted affecting such property. — A purchaser of property from a party to a suit in which an injunction has been granted affecting such property is not the representative of that party inasmuch as the injunction does not run with the land and the purchaser cannot claim the benefit of the order of injunction.[1]

23. Official Assignee or Official Receiver.—The Official Assignee or Official Receiver, *claiming property on behalf of the creditors of an insolvent* judgment-debtor is not a "representative" of the judgment-debtor within the meaning of the section.[1] See also Note 59 on section 11.

A receiver in insolvency may represent both the creditors and the insolvent according to the circumstances of the case.[2]

('39) 26 AIR 1939 Bom 496 (498).
('26) 13 AIR 1926 Lah 131 (135) : 6 Lah 544 (DB). *(Obiter).*
('90) 1890 Pun Re No. 151 p. 495 (496).
† ('39) 26 AIR 1939 All 264 (267, 268) : I L R (1939) All 354 (DB). (Transfer by judgment-debtor before attachment.)
('09) 32 All 129 (131) : 4 Ind Cas 406 (407) (DB). (Attachment subsequently set aside.)
('18) 5 AIR 1918 Mad 142 (142) (DB). (Do.)
(1900) 1900 All W N 107 (108).
✣('94) 16 All 286 (291).
('88) 10 All 1 (4) (DB). (Implied.)
('83) 5 All 94 (97) (DB).
('67) 2 Agra 380 (381) (DB).
('21) 8 AIR 1921 Bom 45 (46) : 45 Bom 812 (DB).
('13) 21 Ind Cas 938 (940) (DB) (Cal).
† (11) 9 Ind Cas 307 (308) (DB) (Cal).
('02) 6 Cal W N 127 (128) (DB).
('12) 1912 Pun Re No. 64 : 14 Ind Cas 40 (42, 43) (DB).
('17) 4 AIR 1917 Mad 705 (705) (DB).
('20) 7 AIR 1920 Nag 205 (205).
('21) 8 AIR 1921 Pat 189 (190).
[*See also* ('30) 17 AIR 1930 Mad 688 (692): 53 Mad 750. (It must be shown that the decree is binding upon him.)
('19) 6 AIR 1919 Pat 454 (464).]

10. ('97) 1 Cal W N 114 (117) (DB).
('81) 7 Cal 403 (405) (DB).
('75) 2 Suth W R Misc 13 (14, 15) (SB).
('17) 4 AIR 1917 Lah 388 (389).

11. ('30) 17 AIR 1930 Nag 199 (200): 26 Nag L R 187.

Note 22

1. ('08) 32 Bom 181 (184) : 10 Bom LR 18 (20) (DB). See Note 18 on Section 50 also.

Note 23

1. ('41) 28 AIR 1941 Mad 262 (264) (DB). (Official Receiver objecting to attachment of judgment-debtor's property.)
('32) 19 AIR 1932 Cal 203 (204) : 35 Cal W N 971 (973) (DB). (Interim receiver applying to the Court under O. 21 R.90 to set aside the sale—Such receiver is not a representative of the judgment-debtor.)
('25) 12 AIR 1925 Mad 688 (688).
('08) 30 All 486 (487) (DB).
✣('85) 7 All 752 (755) (DB).
('97) 21 Bom 205 (219).
('36) 23 AIR 1936 Cal 573 (574) : I L R (1937) 1 Cal 264.
† ('02) 29 Cal 428 (432) (FB). (Overruling 28 Cal 419.)
('35) 22 AIR 1935 Mad 151 (152) : 58 Mad 403 (DB). (Application for release from attachment on the ground that property has vested in him.)
[*See also* ('36) 23 AIR 1936 Sind 2 (3) : 30 Sind L R 288.]

2. ('41) 28 AIR 1941 Mad 606 (607) (DB). (Where in execution of a decree against certain insolvent debtors, properties belonging to them are sold without impleading the Official Receiver or serving a notice on him under O. 21, R. 22, C. P. Code, an application by the Official Receiver to have the sale set aside on the ground of non-observance of O. 21, R. 22, C. P. Code, falls under S. 47.)
('35) 22 AIR 1935 Cal 503 (504) : 62 Cal 457 (DB).
[*See* ('42) 29 AIR 1942 Mad 415 (415) : I L R (1942) Mad 614 (DB). (Question between decree-holder and receiver in insolvency—Receiver in insolvency held representative of judgment-debtor.)]

23a. Liquidator of company. — The liquidator of a co-operative society claiming priority over a mortgagee of the judgment-debtor who has obtained a decree on the mortgage and is seeking to execute the decree is not a representative of the judgment-debtor and an order of the executing Court allowing the claim of such liquidator is not one under this section.[1]

24. Transferee of decree. — Under O. 21, R. 16 the transferee of a decree, by assignment in writing, or by operation of law, may apply to execute the decree and the decree may be executed in the same manner as if the application were made by the decree-holder. The transferee in such a case is a representative of the decree-holder within the meaning of S. 47.[1] So is a transferee from such a transferee.[2] A mere transfer of a portion of the *property* comprised in a decree for possession is, however, not equivalent to the transfer of the *decree* and the transferee is therefore not the representative of the decree-holder.[3] The expression "transferee of a decree" includes a transferee of a portion of the decree also.[4] A *collusive* transfer of the decree is no transfer at all and the transferee in such a case cannot be regarded as the representative of the decree-holder.[5] Similarly, the transfer of a right of the plaintiff during the pendency of the suit in which he subsequently obtains a decree, is not the transfer of the decree, and the transferee is not the representative of the decree-holder within the meaning of section 47.[6]

25. Attaching creditor. — Under O. 21, R. 53, cl. (3), the holder of a decree, sought to be executed by the attachment of another decree, shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof. Such an attaching creditor will therefore be a representative of the decree-holder within the meaning of S. 47. (See O. 21, R. 53, Note 10.)

25a. Judgment-debtor under attached decree. — Where in execution of a decree obtained by A against B, a decree obtained by B against C is attached, C cannot be

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[*See also* ('43) 30 AIR 1943 Mad 199 (202) (DB). (Although in a sense a receiver may be regarded as a representative of all the parties interested in the litigation in which he is appointed the individual rights of the creditors as a class do not vest in him.)]

Note 23a

1. ('34) 21 AIR 1934 Nag 201 (203) : 30 Nag L R 240.

Note 24

1. † ('99) 26 Cal 250 (252) (DB).
('19) 6 AIR 1919 All 337 (337) : 41 All 432 (DB).
('06) 28 All 613 (614) (DB).
('04) 1 All L Jour 61 (63) (DB).
✠('94) 16 All 483 (492) (DB).
('91) 1891 All W N 87 (88) (DB).
('88) 10 All 354 (358) (DB). (Assignee from the plaintiff in a pre-emption suit for refund of money deposited on dismissal of suit.)
('87) 9 All 46 (48) (DB). (Point conceded.)
('35) 22 AIR 1935 Bom 298 (302) : 59 Bom 417 (DB). (Decree obtained by Hindu widow—Widow remarrying and forfeiting estate—The heir entitled to the decree on such forfeiture is a transferee by operation of law of the decree.)
† ('87) 11 Bom 506 (512) (DB). ("By operation of law" includes 'by operation of equity.')
('85) 9 Bom 141 (145) (DB).
('21) 8 AIR 1921 Cal 74 (75) (DB). (Sale in court auction of property with arrears of rent — Decree for rent obtained by judgment-debtor pending suit must also be deemed to be transferred by operation of law.)
('10) 7 Ind Cas 55 (58) (DB) (Cal).
('06) 33 Cal 857 (860) (DB).
('03) 7 Cal W N 54 (56) (DB).
(1900) 27 Cal 670 (672) (DB).
('86) 12 Cal 610 (612) (DB).
('67) 8 Suth W R 197 (197) (DB).
('38) 25 AIR 1938 Mad 78 (79). (Assignee applying under O. 21 R. 16 — Transfer recognised after hearing objections of judgment-debtor and execution ordered to proceed—Separate suit questioning transfer as sham is barred—Remedy is appeal.)
('26) 13 AIR 1926 Mad 691 (691) (DB).
('09) 33 Mad 62 (64) : 3 Ind Cas 938 (939) (DB).
† ('02) 15 C P L R 69 (72).
(1900) 3 Oudh Cas 32 (35). (*Obiter.*)
('25) 12 AIR 1925 Pat 449 (450) : 4 Pat 120 (DB).
2. (1900) 27 Cal 670 (672) (DB).
3. ('24) 11 AIR 1924 Bom 426 (427) (DB).
4. See the cases cited in foot-note (1).
5. ('18) 5 AIR 1918 Cal 510 (510) (DB).
6. ('27) 24 AIR 1927 Sind 78 (83) : 22 Sind L R 1. Also see O. 21 R. 16 N 3.

considered a representative of B. An objection therefore by C to A's application for sale of the attached decree is not within this section.[1]

26. Surety for the performance of a decree. — A person who has not rendered himself *personally* liable for the performance of a decree is neither a party nor the representative of a party within the meaning of S. 47.[1] See Note 9 and section 145.

27. Question as to who is the representative must be determined by the Court—Clause (3). — It has been seen in Note 16 that the question as to who is a party to the suit or whether a person is such a party is to be determined by the Court in execution. Order 22, R. 5 enacts that where a question arises as to whether any person is or is not the *legal representative* of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court. Clause (3) of this section provides that where a question arises as to whether a person is, or is not, the *representative* of a party, such question *shall* for the purposes of this section, be determined by the Court. Under the old Code it was competent to the Court either to stay execution of the decree and refer the parties to have the question determined by a *separate* suit or to itself determine the question.[1] The present section makes it obligatory upon the executing Court to determine the question for itself.[2] The words "for the purposes of this section" in sub-s. (3) clearly show that sub-s. (3) is not independent of, but is ancillary to sub-s. (1) and therefore comes into operation only when there is a question arising between the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decree. It does not, therefore, apply to a case in which the question is between rival representatives of one party, the other party not having any interest in the question.[3]

Note 25a

1. ('04) 26 All 136 (138) (DB).

Note 26

1. ('19) 6 AIR 1919 P C 55 (58) : 42 All 158 : 46 Ind App 228 : 22 Oudh Cas 212 (PC).

Note 27

1. ('87) 1887 Pun Re No. 97 p. 220 (223).
('02) 5 Oudh Cas 133 (135). (Section indicates only a suit and not an appeal therefrom.)
('08) 1908 All W N 92 (92).
('99) 21 All 316 (319, 320).
('97) 19 All 142 (143).
('91) 13 All 290 (294). (Person decided as not legal representative can appeal as to costs disallowed.)
('99) 23 Bom 536 (538).
('09) 2 Ind Cas 695 (697) (Cal).
('99) 26 Cal 250 (252).
('89) 16 Cal 1 (6).
('06) 16 Mad L Jour 27 (28).
('05) 28 Mad 357 (358).
('98) 8 Mad L Jour 37 (38).
('98) 21 Mad 388 (390).
2. ('26) 13 AIR 1926 All 681 (682) : 48 All 429 (DB).
('34) 21 AIR 1934 Oudh 337 (341) (DB). (Appellate stage in proceedings under S. 47—Question whether particular person is legal representative must be decided by Appellate Court.)
('36) 23 AIR 1936 All 479 (480) (DB).
('35) 22 AIR 1935 All 183 (184) (DB).
('35) 22 AIR 1935 Bom 298 (302) : 59 Bom 417 (DB).
('38) 25 AIR 1938 Cal 818 (820) (DB). (If, however, the question does not arise in execution proceedings and is neither raised nor determined, a suit by such person as representative is not barred by section 47.)
('36) 164 Ind Cas 375 (375) (Cal).
('28) 15 AIR 1928 Cal 835 (836) (DB).
('12) 16 Ind Cas 975 (977) (DB) (Cal).
('13) 1913 Pun Re No 14 : 15 Ind Cas 25 (26) (DB).
('29) 117 Ind Cas 122 (123) (Mad).
('26) 13 AIR 1926 Mad 536 (537).
('26) 13 AIR 1926 Mad 411 (412) (DB).
('20) 7 AIR 1920 Mad 191 (191) (DB).
('15) 2 AIR 1915 Mad 799 (799) (DB).
('39) 26 AIR 1939 Nag 147 (148): ILR (1939) Nag 165 (DB).
('29) 16 AIR 1929 Pat 232 (232) (DB)
('23) 10 AIR 1923 Pat 149 (150) (DB).
('17) 4 AIR 1917 Pat 623 (623) : 2 Pat L Jour 192 (DB)
('35) 22 AIR 1935 Rang 174 (176) (DB).
('26) 13 AIR 1926 Sind 113 (113, 114) : 21 Sind L R 20 (DB).
('18) 5 AIR 1918 Sind 63 (63) : 11 Sind L R 74 (DB).
NOTE.—As to when an appeal does not lie see S. 50 Note 5.
3. ('42) 29 AIR 1942 Bom 309 (309) : ILR (1942) Bom 822. (It applies where there is a dispute between one party and a representative of another party about the latter's right to represent the deceased party's estate, and a decision on the question by the executing Court will operate as *res judicata* in a subsequent suit between the same parties. O. 22, R. 5, C. P. Code, does not govern such a case.)

A transferee of the decree being a representative of the decree-holder,[4] the question whether there has been a transfer of the decree,[5] or whether such transfer is *benami* for another,[6] or is a valid transfer,[7] can be decided by the executing Court for the purpose of deciding as to whether the alleged transferee is the representative of the decree-holder or as to who is the real representative.

28. Question must relate to execution, discharge or satisfaction of the decree. — The expression 'relating to the execution' has not been defined by the Legislature probably with the intention of leaving it flexible; it is comprehensive enough to include any question, the order in respect of which furthers, hinders or affects the manner of the carrying out of the execution of the decree.[1] It would apply as well to a dispute arising in relation to the execution of a decree after it had been executed, as it would to a dispute relating to the execution of a decree before it had been executed.[2] As to the classes of questions relating to execution, discharge or satisfaction of the decree, see Notes 29 to 71a. Where there are several judgment-debtors under a decree and execution is taken out against some of them as regards their shares in the property, there being no question as to the execution, discharge or satisfaction of the decree as between the decree-holder and the *other* judgment-debtors, any objection raised by the latter to the execution will not be covered by this section.[3] An order under S. 36 (6) (a) (1) of the Bengal Money-Lenders Act of 1940 re-opening or refusing to re-open a decree does not come under section 47.[4]

29. Question as to validity of the decree. — The executing Court must execute the decree as it stands. It cannot question the correctness or the validity of the decree (see Note 8 on S. 38 for a full discussion). The question as to the validity of the decree is not one in execution, or about discharge or satisfaction of the decree and can be gone into only by way of a separate *suit* and not in execution.[1]

('42) 29 AIR 1942 Oudh 281 (282). (Attaching creditor of a decree challenging the right of purchaser of that decree to execute it—The dispute is between rival representatives of the decree-holder of the attached decree.)
† ('33) 20 AIR 1933 Bom 396 (397, 398): 57 Bom 641 (DB). (No appeal lies against decision of such question.)
('34) 21 AIR 1934 All 730 (730) (DB). (Do.)
† ('36) 23 AIR 1936 Lah 116 (119) (DB).
('35) 22 AIR 1935 Lah 384 (384).
Also See Note 5.

4. See Note 23.

5. ('39) 70 Cal L Jour 124 (125) (DB). (Order dismissing application for execution by assignee — Appeal lies.)
('94) 16 All 483 (492) (DB).
('25) 12 AIR 1925 All 578 (579) : 47 All 365 (DB).
(1900) 27 Cal 670 (672) (DB).
('02) 25 Mad 545 (545) (DB).

6. ('27) 14 AIR 1927 Mad 903 (906): 51 Mad 219 (DB).
('16) 3 AIR 1916 Cal 471 (472) (DB).
('31) 18 AIR 1931 Lah 545 (546).
[But see ('07) 6 Cal L Jour 749 (750) (DB).]

7. ('37) 24 AIR 1937 All 63 (64). (Question whether transfer of attached decree is a valid one can be gone into by the executing Court.)
† ('38) 25 AIR 1938 Nag 267 (268) : I L R (1939) Nag 54.
[But see ('35) 22 AIR 1935 Lah 609 (610) (DB). (Reversing A I R 1934 Lah 328.)]

Note 28

1. ('42) 29 AIR 1942 Cal 428 (428). (Bengal Non-agricultural Tenancy (Temporary Provisions) Act (IX of 1940), S. 4—Order holding judgment-debtor entitled to benefits of Act relates to execution of decree and falls within S. 47.)
('42) 29 AIR 1942 Cal 342 (342). (Application for holding that decretal amount is paid off in view of Bengal Money-lenders Act is one under S. 47.)
('41) 28 AIR 1941 Cal 530 (532) : I L R (1941) 2 Cal 402 (DB). (*Obiter.*)
† ('88) 15 Cal 187 (193) (DB).
† ('11) 12 Ind Cas 745 (749) (DB) (Cal).
('35) 22 AIR 1935 All 126 (127).
('76) 5 Cal L Rep 45 (48) (DB).
('28) 15 AIR 1928 Mad 276 (277) (DB).
[*See also* ('39) 26 AIR 1939 Cal 651 (654) (DB). (Judgment-debtor can prefer objections under S. 47 at any stage of execution proceedings—Objection should be determined on its merits unless particular objection has been adjudicated upon earlier.)

2. See Note 2.

3. ('35) 22 AIR 1935 Pesh 5 (7).

4. ('41) 28 AIR 1941 Cal 530 (532) : ILR (1941) 2 Cal 402 (DB).

Note 29

1. ('43) 30 AIR 1943 Nag 165 (165) : ILR (1943) Nag 293 (DB). (Decree based on award—Validity cannot be questioned on ground of want of registration of award.)

('42) 29 AIR 1942 Sind 60 (61) : ILR (1941) Kar 563 (DB). (Decree for mesne profits cannot be challenged in execution on ground that plaintiff decree-holder in partition suit in which it was passed was in joint possession.)
('41) 28AIR1941 Rang 163 (165) : 1941 Rang L R 90.
('40) 27 AIR 1940 Sind 150 (150) : I L R (1941) Kar 79 (DB). (Validity of award cannot be questioned on the ground of want of territorial jurisdiction.)
('39) 26 AIR 1939 Mad 867 (874) : I L R (1940) Mad 123 (DB). (Suit against father on mortgage of ancestral land—Sons not impleaded — Sons desiring to challenge decree or mortgage on basis of which decree is passed cannot do so in execution proceedings.)
('30) 17 AIR 1930 All 826 (830) (DB).
('30) 17 AIR 1930 All 628 (630) : 52 All 217 (DB).
('29) 16 AIR 1929 All 252 (253) (DB).
† ('26) 13 AIR 1926 All 475 (476) : 48 All 574 (DB).
('25) 12 AIR 1925 All 652 (652, 653) : 47 All 900 (DB). (Saleability decided upon by trial Court — Executing Court cannot question.)
('09) 31 All 45 (47) : 1 Ind Cas 704 (704) (DB). (Decree for sale of mortgaged property — Persons made parties to execution proceedings as legal representatives of deceased judgment-debtor cannot contend that the mortgage was not valid.)
('05) 2 All L Jour 460 (463) (DB).
† ('99) 21 All 277 (279) (DB).
('31) 18 AIR 1931 Bom 554 (555): 55 Bom 649 (DB).
('27) 14 AIR 1927 Bom 156 (157) (DB).
('22) 9 AIR 1922 Bom 31 (32) : 46 Bom 635 (FB).
('21) 8 AIR 1921 Bom 301 (302) (DB). (Decree passed on an award.)
† ('21) 8 AIR 1921 Bom 229 (229) : 45 Bom 946 (DB).
† ('98) 22 Bom 473 (479) (DB).
('96) 1896 Bom P J 520 (520) (DB).
('89) 1889 Bom P J 371 (DB).
† ('35) 39 Cal W N 1284 (1288). (Mortgage suit — Final decree passed after death of defendant without substitution of heirs—Suit by heirs to set aside final decree and sale in execution not barred.)
('31) 18 AIR 1931 Cal 546 (548) (DB).
('26) 13 AIR 1926 Cal 109 (110) (DB).
('25) 12 AIR 1925 Cal 276 (277) (DB).
('25) 12 AIR 1925 Cal 203 (203) (DB).
('22) 9 AIR 1922 Cal 571 (572) (DB).
† ('20) 7 AIR 1920 Cal 883 (884) (DB).
('20) 7 AIR 1920 Cal 103 (104) (DB). (Objection to the sale of certain properties ordered by a mortgage decree.)
† ('15) 2 AIR 1915 Cal 122 (123) (DB).
('12) 15 Ind Cas 436 (437, 438) (DB) (Cal).
('12) 14 Ind Cas 7 (7, 8) (DB) (Cal).
('11) 10 Ind Cas 536 (537) (DB) (Cal).
† ('11) 10 Ind Cas 532 (534) (DB) (Cal).
('10) 8 Ind Cas 26 (28) (DB) (Cal).
('07) 5 Cal L Jour 328 (331) (DB).
('06) 4 Cal L Jour 475 (475) (DB). (Proceedings under the Section pre-suppose and proceed upon the footing of the existence and validity of a decree.)
('04) 32 Cal 265 (267) (DB).
('81) 6 Cal 777 (782) (DB).
('75) 23 Suth W R 127 (128) (DB).
('31) 18 AIR 1931 Lah 602 (603) (DB).
('31) 18 AIR 1931 Lah 545 (545). (Decree directing sale of certain land — Objection that land belongs to agriculturist cannot be raised in executing Court.)
('26) 13 AIR 1926 Lah 547 (547).
('21) 8 AIR 1921 Lah 384 (385).
† ('20) 7 AIR 1920 Lah 79 (80).
('13) 1913 Pun Re No. 68 : 18 Ind Cas 48 (49) (DB).
('37) 24 AIR 1937 Mad 268 (270) (DB). (Question as to binding nature of compromise decree.)
('35) 22 AIR 1935 Mad 598 (599). (Mortgage decree giving personal relief simultaneously—Its correctness cannot be questioned in execution.)
('33) 20 AIR 1933 Mad 197 (198).
('32) 19 AIR 1932 Mad 41 (43) : 54 Mad 345 (DB). (Scheme decree — New trustees to execute — No objection at or before decree—Objection cannot be raised in execution.)
† ('32) 19 AIR 1932 Mad 7 (7, 8).
('25) 12 AIR 1925 Mad 218 (219) (DB). (Compromise decree.)
('22) 9 AIR 1922 Mad 186 (186) (DB). (Executing Court—No power to amend the decree.)
('18) 5 AIR 1918 Mad 607 (608) (DB). (Combined decree in a mortgage suit though irregular cannot be questioned during execution proceedings.)
('16) 3 AIR 1916 Mad 20 (22) : 39 Mad 570 (DB).
('15) 2 AIR 1915 Mad 449 (451) (DB).
('11) 12 Ind Cas 689 (690) (Mad).
† ('07) 30 Mad 402 (405) (DB).
('07) 30 Mad 26 (27) (DB).
('04) 27 Mad 118 (120) (DB).
('25) 12 AIR 1925 Nag 377 (378).
† ('24) 11 AIR 1924 Nag 419 (421) (DB).
† ('24) 11 AIR 1924 Nag 81 (82) : 20 Nag L R 24.
† ('26) 93 Ind Cas 32 (32) (Oudh).
('12) 14 Ind Cas 29 (31) (DB) (Oudh).
† ('36) 23 AIR 1936 Pat 552 (552, 553) (DB).
('30) 17 AIR 1930 Pat 480 (482, 483) (DB).
† ('26) 13 AIR 1926 Pat 202 (204) : 4 Pat 696 (DB).
('25) 12 AIR 1925 Pat 625 (631) : 4 Pat 510 (DB).
('25) 12 AIR 1925 Pat 516 (517) (DB).
† ('24) 11 AIR 1924 Pat 504 (505) (DB).
('23) 10 AIR 1923 Pat 375 (378) : 2 Pat 538 (DB).
('17) 4 AIR 1917 Pat 425 (428) (DB).
('17) 4 AIR 1917 Pat 275 (276) (DB).
† ('31) 18 AIR 1931 Rang 252 (256): 9 Rang 480 (FB).
('29) 16 AIR 1929 Rang 275 (275) (DB). (Correctness of decree cannot be called in question in execution.)
('22) 9 AIR 1922 Low Bur 22 (25) (DB).
('16) 3 AIR 1916 Low Bur 36 (36) (DB).
('10) 8 Ind Cas 610 (610) (DB) (Low Bur).
('11) 5 Sind L R 71 (77) : 11 Ind Cas 192 (194).
('10) 4 Sind L R 1 (2) : 7 Ind Cas 583 (584).
[*See also* ('41) 28 AIR 1941 Lah 402 (407): I L R (1942) Lah 603 (DB). (Decree attached—In appeal from decree, compromise effected and suit dismissed—Attaching creditor not succeeding in getting himself made party to appeal—Proper remedy for him is by suit and not by application under Section 47.)]

Also see Note 46 and O. 32, R. 7 N. 20.

30. Question as to the existence of the decree. — It has been seen in Note 8 on S. 38, that a question of *territorial* or *pecuniary* jurisdiction of the Court which passed the decree cannot be allowed to be raised in execution proceedings, but that a question as to jurisdiction of the Court in other matters rendering the decree a *nullity* can be entertained even by the executing Court. Thus, a question whether a decree is a *nullity* and not in existence by reason of the fact that it was passed by a Court without jurisdiction[1] or that it was passed against a dead person,[2] is a question which can be entertained in execution. Similarly, the executing Court can see whether the decree to be executed is a *subsisting and operative* decree capable of execution.[3] Similarly, again, the executing Court can, in a case where a decree is *lost or destroyed*, find out what are the terms of the decree or whether the decree was in existence.[4] See Note 8 on S. 38 for a full discussion.

As to whether the want of proper representation of a minor against whom a decree has been passed can be gone into by the Court executing such decree, see O. 32 R. 3, Note 5.

But, though the executing Court can go into the question of jurisdiction or of the existence of the decree, the question cannot be regarded as one "relating to the execution, discharge or satisfaction, of the decree" within the meaning of S. 47 and the refusal of the executing Court to execute the decree on the ground of want of jurisdiction will not bar a separate suit by the aggrieved party or operate as *res judicata*.[5]

31. Pre-decree matters. — There is a conflict of opinion on the question whether a Court executing a decree can, under this section, entertain an objection to the

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Note 30

1. ('42) 29 AIR 1942 Lah 129 (131) (DB). (Validity of award under Co-operative Societies Act.)
('40) 27 AIR1940 Mad 628(629). (The want of jurisdiction must be apparent on the face of the decree.)
('39) 18 Pat 719 (721) (DB).
† ('95) 17 All 478 (482) (DB).
('27) 14 AIR 1927 Cal 578 (578) (DB).
† ('29) 16 AIR 1929 Lah 449 (451) (DB).
('28) 15 AIR 1928 Lah 829 (830).
('27) 14 AIR 1927 Lah 651 (652).
† ('25) 12 AIR 1925 Lah 494(494): 6 Lah 313(DB).
('03) 26 Mad 31 (33)(DB). (Consent decree effecting transfer of emoluments opposed to public policy.)
† ('29) 16 AIR 1929 Nag 357(358):26 NagLR60(DB).
('38) 25 AIR 1938 Oudh 213 (214) (DB). (Decree against person who is not a party to the suit.)
† ('35)22AIR1935Oudh358(360): 11 Luck 187(FB).
('35) 22 AIR 1935 Oudh 57(58) : 10 Luck 508(DB).
[*See also* ('42) 29 AIR 1942 Cal 496 (498): I L R (1942) 1 Cal 149. (Decree whether w thout jurisdiction—Executing Court can refer to plaint.)]
[But see ('41) 28 AIR 1941 Rang 163(165): 1941 Rang L R 90. (Executing Court cannot challenge the validity of the decree if the party affected thereby fails to take such proceedings as are provided by law to declare the decree *ab initio* null and void.)
('32) 19 A I R 1932 Lah 291 (292). (Reference to arbitration by one partner — Even if decree is nullity, executing Court cannot go behind it.)]
2. ('42) 1942 Nag L Jour 338 (339). (Executing Court is not going behind the decree in such a case but is considering whether there is a decree or not.)
('40) 27 AIR 1940 Sind 150 (152,153) : ILR(1941) Kar 79. (In such a case the decree is a nullity not because the particular Court had no jurisdiction, but because no Court at all had jurisdiction.)
('35) 22 AIR 1935 Cal 130 (131) (DB).
('35) 22 AIR 1935 Lah 439 (439): 17 Lah 32 (DB).
('21) 8 AIR 1921 All 404 (404) : 43 All 328 (DB).
('18) 5 AIR 1918 All 226 (227) : 40 All 423 (DB).
('27) 14 AIR 1927 Bom 53 (54) (DB).
('21) 8 AIR 1921 Lah 219 (220) (DB).
('28) 15 AIR 1928 Pat 272 (272) : 7 Pat 331 (DB).
3. ('41) 28 AIR 1941 Cal 530 (532) : I L R (1941) 2 Cal 402 (DB). (*Obiter.*)
† ('13) 19 Ind Cas 630 (632) (DB) (Cal).
('11) 11 Ind Cas 280 (283) (DB) (Cal).
('98) 25 Cal 175 (177, 178) (DB).
('67) 8 Suth W R 506 (506) (DB).
('38) 25 AIR 1938 Rang 372 (375) (DB). (Decree passed without a judgment is a complete nullity.)
† ('31) 18 AIR 1931 Rang 252(256):9Rang480(FB).
[*See also* ('41) 28 AIR 1941 Oudh 587 (589) : 17 Luck 121 (DB). (Objection as to the executability of the decree might well have been raised at the time when the decree was made a rule of Court and at the time when the decree was put in execution. But after the decree was fully satisfied and possession of the property under the terms of the decree has actually been delivered to the decree-holder, no such objection by application under S. 151 can be raised.)]
4. ('86) 1 Agra 78 (78) (DB).
(1864) 1864 Suth W R Gap 378 (379) (DB).
5. †('31) 18 AIR 1931 All 490 (496, 499) : 54 All 25 (FB).
('72) 11 Beng L R 149 (157). (Question as to existence of a valid decree against estate of a deceased is not one relating to execution.)
('04) 28 Bom 378(382)(DB). (Decree transferred for execution — Transferee Court declining owing to want of jurisdiction in trial Court—Not appealable.)

execution of the decree, based on an arrangement between the parties *prior* to the date of the decree. The High Courts of Calcutta,[1] Lahore,[2] Rangoon[3] and Nagpur[4] have held that it cannot. The High Courts of Allahabad[5] and Bombay[6] have held broadly that it can. The High Court of Madras has expressed divergent views on the question. One group of cases hold that an agreement *postponing the execution of a decree for a time* is a matter that can be gone into in execution, notwithstanding the fact that the effect of postponing execution will be virtually to *vary* the terms of the decree.[7] This view is based mainly on the long course of decisions in the Madras Presidency to that effect. Another group of cases hold that except in cases of agreements *relating to execution*,[8] a pre-decree arrangement which *attacks the decree itself* cannot be gone into in execution on the broad ground that it would be most dangerous to allow the decree itself to be attacked in execution.[9] Thus it has been held that where a final decree in a mortgage suit says that the hypotheca or a sufficient portion thereof shall be sold, a person who propounds an agreement that certain items of the hypotheca should not be sold is clearly attacking the decree and hence such an agreement cannot be pleaded in bar of execution of the mortgage decree.[10]

Note 31

1. ('04) 31 Cal 179 (182) (DB).
('02) 6 Cal W N 796 (798) (DB).
† ('35) 22 AIR 1935 Cal 177 (178) : 62 Cal 421 (DB). (But there is no bar to a suit for injunction being brought, restraining the decree-holder from executing his decree.)
('30) 17 AIR 1930 Cal 356 (356) (DB).
† ('02) 29 Cal 810 (812) (DB).

2. ('27) 14 AIR 1927 Lah 894 (895) (DB). (Agreement against personal execution amounts to variation of the decree.)
('22) 67 Ind Cas 753 (754) (Lah). (Discharge antecedent to decree.)
† ('37) 24 AIR 1937 Lah 537 (540) : ILR (1937) Lah 209 (DB).
[*See* ('21) 8 AIR 1921 Lah 248 (249) : 1 Lah 445. (Decree supersedes prior compromise.)]

3. † ('26) 13 AIR 1926 Rang 140 (141, 142) : 4 Rang 118. (Agreement prior to decree that decree was not to be executed for its full amount.)
('27) 14 AIR 1927 Rang 48 (48).
('28) 15 AIR 1928 Rang 36 (37) : 5 Rang 685 (DB). (Agreement prior to decree not to execute it.)

4. ('15) 2 AIR 1915 Nag 128 (129) : 11 Nag L R 110. (Agreement prior to decree not to execute it.)
† ('38) 25 AIR 1938 Nag 265 (266). (Decree on award—Judgment-debtor paying after award but before decree—Amount cannot be given credit in execution.)
('29) 16 AIR 1929 Nag 339 (340).

5. ('09) 2 Ind Cas 608 (609) (DB) (All).

6. ✣ ('96) 22 Bom 463 (468) (FB).
('73) 10 Bom H C R 361 (365) (DB). (Agreement to execute the decree in a particular manner.)
('34) 21 AIR 1934 Bom 370 (372) : 58 Bom 610 (DB).

7. ✣ ('18) 5 AIR 1918 Mad 1174 (1178) : 40 Mad 233 (FB).
† ('26) 13 AIR 1926 Mad 582 (583) : 49 Mad 513 (DB).
('18) 5 AIR 1918 Mad 1314 (1315) (DB). (Executing Court can go into question of tender alleged to be made before suit and refuse interest to decree-holder.)
('31) 18 AIR 1931 Mad 26 (27, 28). (Where an agreement is anomalous in character, i. e., while in point of time it is post-decree, in point of character and intention it is pre-decree, having been executed in ignorance of the fact that a decree had already been passed, it should be treated as a pre-decree agreement.)
† ('25) 12 AIR 1925 Mad 591 (592). (Not to execute against one of the judgment-debtors.)
('24) 11 AIR 1924 Mad 611 (611) (DB).
('17) 4 AIR 1917 Mad 310 (311) : 39 Mad 541 (DB).
('10) 8 Ind Cas 1071 (1072) (DB) (Mad). (Agreement not to enforce decree does not affect validity of decree.)
[*See also* ('39) 26 AIR 1939 Mad 867 (874) : ILR (1940) Mad 123. (Section 47 applies to matters which arise after a decree has been passed and not to those which were in existence even at the time when the suit was instituted.)]

8. ('42) 29 AIR 1942 Mad 734 (735): I L R (1943) Mad 225 (DB). (Pre-decree arrangement that decree when obtained should not be executed.)
('42) 29 AIR 1942 Mad 460 (461). (A pre-decretal arrangement between the plaintiff and one defendant, compelling the decree-holder to take out execution as against the other defendants before he proceeds either for the balance or for the whole of the decree amount against particular defendant can be pleaded in bar of execution.)
('35) 22 AIR 1935 Mad 860 (862, 863) : 58 Mad 994 (FB). (Agreement not to execute can be pleaded in execution.)

9. ✣ ('31) 18 AIR 1931 Mad 399 (403) : 54 Mad 184 (DB). (Attempt to reconcile the conflict.)
('20) 7 AIR 1920 Mad 124 (124) : 43 Mad 725 (DB). (Pre-decree agreement to treat decree as in part inexecutable.)
† ('30) 17 AIR 1930 Mad 673 (674).
('23) 10 AIR 1923 Mad 619 (620) (DB).
('19) 6 AIR 1919 Mad 948 (948) (DB). (Agreement not to obtain decree not to be gone into.)
[*See also* ('21) 8 AIR 1921 Mad 616 (616). (Agreement prior to suit not pleaded in suit.)]
Also see O. 23 R. 3 N. 15.

10. ('42) 54 Mad L Jour 157 (158) (DB).

An application for attachment before judgment in a suit for money was amicably settled by consent of parties. Under this compromise the defendant handed over certain goods to the plaintiff. The latter was to sell them and keep the net sale proceeds with himself and in case a decree was passed in his favour appropriate them towards the decree. It was held that this agreement implied that the defendant was to get a fair price for the goods handed over and the executing Court, in order to determine to what amount the defendant was entitled to credit on account of the goods, could enter into an inquiry as to their fair price and no separate suit was necessary for the purpose.[11]

32. Matters subsequent to the decree. — See Notes 33 to 71.

33. Decree incapable of execution. — As has been seen in Note 2, this section bars a suit to enforce an executable judgment. But to admit of an application under the section, the decree must not only be subsisting but also be one *capable of being executed*[1] and the question whether a decree is capable or incapable of execution is, as has been seen in Note 30, pre-eminently one coming under this section[2] and a decision on such a question is a decree.[3] Thus, a judgment-debtor is not debarred from raising a plea that the decree has become incapable of execution by reason of subsequent legislation.[4] A decree which merely declares the rights of parties and does not direct *any act to be done*, in other words, a decree in which no definite order is made which the Court contemplates enforcing by execution, is merely a declaratory decree which is incapable of being executed and only a separate *suit* and not an application under this section will lie to enforce the rights so declared by the decree.[5] Similarly, a decree which does not provide for a certain relief though it declares a right to such relief is one not capable of

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[But see ('38) 25 AIR 1938 Mad 456 (457) : ILR (1938) Mad 451 (DB). (Such an agreement does not attack the decree.)]

11. ('41) 28 AIR 1941 Sind 103 (106): ILR (1941) Kar 227 (DB).

Note 33

1. ('11) 1 Upp Bur Rul 66 : 10 Ind Cas 991 (992).
[*See also* ('15) 2 AIR 1915 All 120 (121). (Appellate judgment granting a relief—Not incorporated in decree.)
('27) 14 AIR 1927 Rang 82 (82). (Decree for possession of land — Demolition of superstructure cannot be effected in execution.)]

2. ('42) 29 AIR 1942 Mad 748 (750). (Plea of inexecutability of decree does not go behind decree.)
('43) 30 AIR 1943 Sind 11 (15) : I L R (1942) Kar 326 (DB). (Do.)
('95) 17 All 478 (482): 1895 All W N 109 (110)(DB).
('33) 20 AIR 1933 Lah 41 (41) : 14 Lah 230.

3. ('15) 2 AIR 1915 Mad 197 (198) : 37 Mad 29 : 12 Ind Cas 664 (666) (DB).

4. ('41) 28 AIR 1941 Mad 126 (127).

5. ('43) 30 AIR 1943 Sind 11 (14, 16) : ILR (1942) Kar 326 (DB). (Declaratory or executory — Test — Decree to be taken as a whole — Directions as to rights to be ascertained in future on the happening of uncertain events—Not executable.)
† ('15) 2 AIR 1915 All 61 (61) : 37 All 97 (DB).
('33) 20 AIR 1933 All 269 (272) : 55 All 346 (FB). (Appellant giving security for stay of execution of decree in another suit — *Held*, order directing security is not executable.)
('69) 1 N W P H C R 154 (156) (DB).
('67) 2 Agra 23 (24) (DB).
('88) 12 Bom 416 (418) (DB).
('85) 9 Bom 108 (110) (DB).
('36) 64 Cal L Jour 55 (57).
† ('23) 10 AIR 1923 Cal 252 (255) (DB).
('10) 7 Ind Cas 487 (488) (DB) (Cal).
('97) 2 Cal WN 33 (33, 34). (Decree creating charge in default of payment—Suit to enforce charge, not execution.)
('95) 22 Cal 903 (908). (Do.)
('95) 22 Cal 859 (864) (DB). (Do.)
('94) 21 Cal 784 (789) : 21 Ind App 89 (PC).
('71) 14 Suth W R 485 (486) (DB).
('30) 17 AIR 1930 Lah 110 (111).
('28) 15 AIR 1928 Mad 474 (475) (DB).
('25) 12 AIR 1925 Mad 1260 (1261, 1262) (DB).
('12) 13 Ind Cas 618 (618) (Mad).
('07) 2 Mad L Tim 94 (94, 95) (DB).
('84) 7 Mad 80 (82) (DB).
('82) 4 Mad 219 (220) (DB).
('29) 16 AIR 1929 Nag 34 (35) (DB).
('27) 14 AIR 1927 Oudh 457 (460) (DB).
('05) 8 Oudh Cas 361 (370) (DB).
('03) 6 Oudh Cas 239 (212, 215) (DB).
('98) 1 Oudh Cas 289 (300).
('35) 22 AIR 1935 Pesh 119 (121) (DB). (Decree declaring sum to be due from defendant to plaintiff.)
('34) 21 AIR 1934 Pesh 64 (66) (DB). (Declaratory decree does not become executory merely because there is a direction in it that the money could be recovered by execution.)
('25) 12 AIR 1925 Sind 318 (319) (DB).
('13) 7 Sind L R 192 (194) : 24 Ind Cas 861 (862) (DB).
Also see S. 11 N. 115 and S. 38 N. 5.

being executed.[6] Thus, a partition decree without actually allotting shares or a decree for joint possession is incapable of being executed; a suit, and not an application under S. 47, is the proper remedy to obtain a partition by metes and bounds.[7] So also, where a relief could not be obtained,[8] in execution, or where the decree is vague and indefinite,[9] or where the decree becomes incapable of execution by events subsequent to the decree,[10] or where the decree is fully executed,[11] or where a fresh suit is ordered,[12] or where an order is passed not in judicial capacity,[13] the decree is incapable of execution. Scheme-decrees

6. ('96) 1896 Bom P J 483 (484) (DB).
('90) 1890 Bom P J 72 (72).
('05) 27 All 325 (333):32 Ind App 123:2 Cal L Jour 173 (178) (PC).
('02) 7 Cal W N 158 (159) (DB).
('15) 2 AIR 1915 Lah 207 (207).
('19) 6 AIR 1919 Mad 100 (103):42 Mad 90 (DB).
('19) 6 AIR 1919 Mad 63 (64) (DB).
('29) 16 AIR 1929 Nag 34 (36) (DB).
('88) 17 C P L R 62 (66). (Case under S. 87, T. P. Act.)

7. ('42) 29 AIR 1942 Bom 44 (46) : I L R (1942) Bom 14 (DB). (In the case of property paying revenue to Government, the Court only directs that the plaintiff is entitled to partition, which alone it is competent to do. The matter then rests with the Collector to effect partition. Whether it is regarded as a declaratory decree or as the final decree of the Court, there is nothing for the parties to do in execution, and S. 47 will not apply. A fresh suit for partition is not also barred by *res judicata*.)
† ('99) 1899 All W N 124 (125) (DB).
('28) 15 AIR 1928 Bom 365 (366) (DB).
† ('04) 6 Bom L R 35 (37) (DB).
('19) 6 AIR 1919 Cal 994 (995) (DB).
('16) 3 AIR 1916 Cal 170 (171) (DB).
† ('20) 7 AIR 1920 Lah 159 (160):1 Lah 134 (DB). (Suit by auction purchaser of share of coparcener in joint Hindu family.)
('31) 1931 Mad W N 1176 (1176).
('30) 1930 Mad W N 1051 (1053). (Symbolical possession alone got under prior decree—Suit for actual possession not barred.)
('27) 14 AIR 1927 Mad 952 (953) (DB).
('26) 13 AIR 1926 Mad 232 (233). (Suit by mortgagee.)
('16) 3 AIR 1916 Mad 430 (430) (DB). (Suit by assignee of decree-holder auction-purchaser of undivided share.)
('10) 7 Ind Cas 558 (559) (DB) (Mad).
('06) 29 Mad 294 (295, 296) (DB).
† ('26) 13 AIR 1926 Pat 151 (155) (DB).
[*See also* ('42) 29 AIR 1942 Mad 364 (365). (Partition decree entitling defendant to be put in possession of property allotted to him on payment of necessary court-fee—Defendant is not obliged to pay court-fee and seek possession in execution of partition decree—He can file separate suit—S. 47 is no bar.)]
[But see ('27) 14 AIR 1927 Cal 411 (412) : 54 Cal 524 (DB). (Decree for khas possession — No steps for execution taken for khas possession — Suit barred.)]

8. ('06) 9 Oudh Cas 7 (16, 17) : 32 Ind App 329 : 28 All 1 (PC).
('05) 27 All 325 (333) : 32 Ind App 123 (PC).
[*See also* ('30) 17 A I R 1930 Mad 364 (370). (Decree for money—Question of pledge of jewels not raised—Raisable in separate suit.)]

9. ('16) 3 AIR 1916 All 62 (62) (DB).
('16) 3 AIR 1916 All 323 (324) (DB). (Decree directing sale of the right, interest and title of the judgment-debtor reserving the prior mortgagees' rights over the property is not vague.)

10. ('13) 19 Ind Cas 376 (376) (All).
('02) 24 All 44 (52) (FB).
('20) 7 AIR 1920 All 129 (131):42 All 544 (DB). (Decree in this case was held to have not become incapable of execution.)
('05) 28 All 1 (18) : 32 Ind App 229 (PC).
('30) 17 AIR 1930 Bom 132 (134) : 54 Bom 162.
('94) 18 Bom 495 (504).
('93) 20 Cal 260 (263, 264) (DB).
('24) 11 AIR 1924 Lah 615 (616). (Decree in this case was held to have not become incapable of execution.)

11. ('36) 23 AIR 1936 Pat 416 (417). (Once a decree has been entered as satisfied execution cannot be taken out for any sum which may have been left out so long as the order of satisfaction stands—A I R 1929 Cal 670; AIR 1933 Bom 364 : 57 Bom 468 followed.)
('97) 1 Cal W N 708 (710).
('75) 12 Bom H C R 163 (165).
('10) 5 Ind Cas 148 (149) (Cal). (Proper course, if there had been any mistake, would be for the decree-holder to come in review.)
('36) 23 AIR 1936 Cal 400 (401). (Judge passing order recording full satisfaction of decree—Suit for rectification not barred by S. 47.)
('89) 10 Cal 538 (541). (Proper course, if there had been any mistake, would be for the decree-holder to come in review.)
('71) 16 Suth W R 269 (269).
('29) 16 AIR 1929 Lah 121 (122, 123).
('24) 11 AIR 1924 Lah 634 (634).
('20) 7 AIR 1920 Lah 65 (65).
('14) 1 AIR 1914 Lah 427 (427) : 1914 Pun Re No. 42.
('01) 1901 Pun Re No. 63 at p. 206. (Proper remedy held was application for review.)
('71) 6 Mad H C R 304 (306).
('11) 1 Upp Bur Rul 66 : 10 Ind Cas 991 (993).
('05) 1905 Upp Bur Rul C. P. C. 36.
('07) 1 Sind L R 172 (175).

12. ('04) 27 All 254 (256, 257):1 All L Jour 649 (651).
('25) 12 AIR 1925 All 240 (240). (Suit by decree-holder specifically directed to file by an order under O. 21, R. 58.)

13. ('42) 29 AIR 1942 Bom 97 (98) (DB). (Order for costs by District Judge as *persona designata*, acting under a scheme of management framed by Court.)

under S. 92, Civil Procedure Code, generally are declaratory, but it cannot be laid down as a general rule that all scheme-decrees are always declaratory and can never be executable. The question whether a decree framing a scheme is executable or not depends upon the language and on the scope of the decree or of that particular part of the decree in respect of which the question arises. For a discussion of this subject, see S. 92, Note 31.

As to cases wherein the decrees were held not incapable of execution, see the undermentioned cases.[14]

34. Questions arising between the preliminary and final decrees. — Where provision is made under the Code, as in suits on mortgage or for partition or for administration of an estate, for the passing of preliminary and final decrees, matters arising after, and out of, the preliminary decree, but before the final decree, are not matters relating to the execution, discharge or satisfaction of any decree, inasmuch as the matters in controversy in the suit are not completely disposed of, the only decree finally

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14. ('42) 29 AIR 1942 Oudh 1 (3, 4): 17 Luck 249 (DB). (Decree declaring amount due to plaintiff and providing that amount will be paid in manner provided in compromise which formed part of decree — Decree held not merely declaratory but capable of execution.)
('41) 28 AIR 1941 Oudh 587 (589) : 17 Luck 121. (Award made rule of Court — Judgment-debtor to pay Rs. 1015 to decree-holder by instalments — Immovable property hypothecated for creditor's satisfaction to remain so until liability fully satisfied—On default of any instalment, entire balance to become immediately payable and entire hypothecated property to be deemed to have been sold in favour of decree-holder who was given right to take proprietary possession of same and rights of judgment-debtor to be entirely extinguished — Decree held not declaratory but executable.)
('39) 26 AIR 1939 Oudh 281 (284). (Decree for maintenance made payable at end of certain month every year — On failure, decree-holder entitled to realize payment out of person and property of defendant—Decree is not merely declaratory.)
('14) 1 AIR 1914 Sind 61 (61) : 8 Sind L R 58. (Award decree directing plaintiff to pay Rs. 500 to defendant and thereupon to eject him from a certain house is capable of execution.)
('14) 1 AIR 1914 Oudh 268 (268). (Decree providing for realization of maintenance from the person and property of the defendants is executable.)
('39) 26 AIR 1939 Bom 114 (115). (Order simply directing award to be filed — No judgment recorded — Order is not executable as decree.)
('14) 1 AIR 1914 Cal 775 (775). (Decree for possession giving boundaries and the property identifiable — Decree cannot be said to be incapable of execution.)
('67) 7 Suth W R 372 (373). (Decree for possession of land — No mention of house — Objection by judgment-debtor that house is not on land decreed —Question is one under S. 47.)
('35) 22 AIR 1935 Mad 576 (577). (Decree declaring right to hereditary office — Question whether any act of defendant is an interference with the right declared must be dealt with in execution and not by separate suit.)
('12) 14 Ind Cas 588 (589) (Mad). (Decree directing demolition of a wall is executable.)
('10) 6 Ind Cas 681 (681) (Mad). (Declaration of right to keys — *Held* capable of execution.)
('37) 24 AIR 1937 Nag 151 (152) : I L R (1937) Nag 153. (Decree in subsequent suit affecting rights of parties to previous decree — Previous decree not reversed or varied — Such decree is executable.)
('30) 17 AIR 1930 Nag 17 (18). (Decree creating charge on house not subject of suit — Decree is capable of execution.)
('20) 7 AIR 1920 Nag 40 (42). (A decree is not incapable of execution merely because it omits to specify the shares of the judgment-debtor in the property decreed, if the decree-holder has secured possession.)
('30) 17 AIR 1930 Oudh 302 (303). (Compromise decree in a partition suit allowing monthly maintenance—Decree omitting the date when payments were to begin—Other party to realise the amount from person or property—Decree *held* executable.)
('23) 10 AIR 1923 Oudh 160 (160). (Decree while decreeing plaintiff's claim for cancellation of bond in suit, giving right to defendant to recover certain sum from plaintiff's property — Defendant *held* could execute it.)
('37) 24 AIR 1937 Pat 654 (655). (Maintenance decree in favour of Hindu widow— Decree declaring charge on property — Decree to be treated as one for sale and executable as such—Where charge is created by decree separate suit is necessary to enforce charge.)
('30) 17 AIR 1930 Pat 536 (537) : 9 Pat 499. (Where execution has already taken place it would be anomalous to say that the decree is incapable of execution.)
('26) 13 AIR 1926 Pat 31 (31, 32) : 4 Pat 693. (Decree creating charge on house not subject of suit —Decree is capable of execution.)
('21) 8 AIR 1921 Pat 360 (362) : 5 Pat L Jour 402. (Nature of claim as set forth in plaint inadequately decided in recital part of decree — Execution permitted.)
('37) 24 AIR 1937 Pesh 48 (49). (Award decree — Arbitrator finding that specific sum was due to mortgagee and that he was entitled to immediate possession—Decree is executable.)

determining the suit and as such executable being the *final decree*. Thus, an order directing accounts to be taken in an administration suit,[1] or an order appointing or refusing to appoint a commissioner for effecting a partition in a partition suit,[2] or an order on an application for final decree,[3] or for making absolute a decree *nisi* for sale, foreclosure or redemption of a mortgage,[4] is an order passed in the *suit* itself and does not come under this section. Where a preliminary decree for redemption in a mortgage suit is passed and allowed to be barred by time without the decree being made final, the section is no bar to a fresh suit for redemption.[5] Where after a preliminary decree for sale on a mortgage but before the final decree, an application for execution was made but the sale was actually held after the final decree, it was held that the sale was not void.[6]

35. Question as to excess or deficient execution. — Where in execution of a decree, land not included in or covered by the decree[1] or which is in excess of the decree,[2] is sold to or taken possession of by the *decree-holder*, the proper remedy for the judgment-debtor to recover the whole or the excess land is by an *application* under this section and not by a separate *suit*, as the matter is one in execution between the parties to the suit. Where, however, such possession is taken by the decree-holder, not through the officer of the Court but by his *own act*, the judgment-debtor is not barred by S. 47 from bringing a suit to recover land thus wrongly taken as the possession could not be

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Note 34

1. ('83) 9 Cal 773 (776, 777) (DB).
2. ✠('97) 24 Cal 725 (735, 738, 739) (FB).
('16) 3 AIR 1916 Mad 809 (810) (DB).
[*See also* ('05) 28 Mad 127 (128). (Contention presumed to be correct.)]
3. ('25) 12 AIR 1925 Nag 132 (133) : 22 Nag L R 110.
('19) 6 AIR 1919 All 14 (15) : 42 All 170 (DB).
† ('19) 6 AIR 1919 Mad 709 (709) : 42 Mad 52 (DB).
4. ('09) 33 Bom 273 (277) : 2 Ind Cas 296 (296).
5. See for fuller discussion of the subject, Notes 40 and 116 on S. 11.
[*See also* ('18) 5 AIR 1918 Bom 1 (2) : 43 Bom 334.
('14) 1 AIR 1914 Bom 200 (201) : 39 Bom 41.]
[But see ('19) 6 AIR 1919 Bom 34 (35) : 43 Bom 703. (Decree before T. P. Act came into force.)]
6. ('42) 29 AIR 1942 Pat 343 (344). (Order deciding objection raised by judgment-debtor to sale is appealable.)

Note 35

1. ('16) 3 AIR 1916 All 104 (105, 106) : 38 All 339 (DB).
('03) 25 All 343 (346) (DB).
('88) 12 Bom 449 (453) (DB).
('28) 15 AIR 1928 Cal 865 (867) (DB).
('27) 14 AIR 1927 Cal 614 (615) : 54 Cal 419 (DB).
('08) 12 Cal W N 1027 (1028) (DB).
('95) 22 Cal 483 (485) (DB).
('74) 22 Suth W R 435 (435) (DB).
('33) 20 AIR 1933 Mad 569 (570).
('28) 15 AIR 1928 Lah 936 (937).
('26) 13 AIR 1926 Mad 968 (969).
('70) 5 Mad H C R 185 (189) (DB).
('38) 25 AIR 1938 Nag 193 (194) : ILR (1939) Nag 521.
('24) 11 AIR 1924 Nag 246 (247) : 20 Nag L R 90.
('24) 11 AIR 1924 Nag 122 (123).
('01) 7 Oudh Cas 213 (215) (DB).
('19) 6 AIR 1919 Pat 141 (142) (DB).
('99) 2 Upp Bur Rul 249.
('25) 12 AIR 1925 Sind 126 (126) : 19 Sind L R 302 (DB).
[But see ('23) 10 AIR 1923 All 470 (471) : 45 All 96 (DB).]
2. ('40) 27 AIR 1940 All 78 (78). (Party to execution proceedings not challenging sale under provisions of S. 47 on ground that sale certificate included more property than that covered by mortgage decree — Sale confirmed and sale certificate granted—Separate suit for possession is not maintainable.)
† ('22) 9 AIR 1922 P C 252 (253) : 48 Ind App 155 : 44 Mad 483 (PC).
† ('25) 12 AIR 1925 All 551 (552).
('06) 3 All L Jour 601 (602).
('03) 26 All 152 (154) : 1903 All W N 208 (209). (Decree ordering sale of undefined rights and interests — Property sold in execution alleged to be in excess of share of judgment-debtor — Sale not objected to at the time — Suit to recover *held* not maintainable.)
('07) 6 Cal L Jour 527 (529) (DB).
('70) 14 Suth W R 39 (40) (DB).
('30) 17 AIR 1930 Mad 12 (13).
† ('19) 6 A I R 1919 Mad 269 (271) : 42 Mad 753 (FB).
('12) 13 Ind Cas 133 (134) (DB) (Mad).
† ('38) 25 AIR 1938 Nag 276 (281).
('28) 15 AIR 1928 Rang 215 (217).
[But see ('02) 24 All 519 (520) : 1902 All W N 144 (145) (DB).
('30) 17 AIR 1930 All 865 (866) (DB). (But where he has an opportunity to appear and raise the question but does not do so, he cannot afterwards raise the question either under S. 47 or by a suit.)
('29) 16 AIR 1929 Lah 121 (122). (Question between auction-purchaser and judgment-debtor.)
('29) 16 AIR 1929 Pat 391 (392) (DB). (Do.)]
Also see Note 68.

said to have been taken in *execution* of a decree.[3] Similarly, where moneys are improperly realised by a *third party* in defiance of an order of injunction, the question is not one between the parties and is not within the section.[4] But moneys unduly or wrongly realised by the decree-holder as due under a decree,[5] or surplus sale proceeds or jewels wrongly seized,[6] or moveables misappropriated,[7] are recoverable only under this section and not by a separate suit. Similarly, where the decree-holder, who has realised smaller sums in full satisfaction owing to mistake or the misrepresentation of the judgment-debtor, wants to claim the balance, the question as to the deficient execution is one relating to the execution of the decree, and a separate suit in respect thereof is barred.[8]

36. Question of damages for acts done under cover of execution. — Where damages result from acts done under cover of execution proceedings, a separate suit for the recovery of such damages lies. The question is not one relating to the execution, discharge or satisfaction of the decree itself but is one outside the decree.[1] A suit for damages for fraudulent execution of a decree will similarly not be barred by S. 47.[2]

37. Question as to seizure of wrong property. — On the same principle as that mentioned in Note 36, the question of the liability of the plaintiff for *loss* sustained by wrongful seizure of property in execution is not within the section.[1]

38. Question of mesne profits. — As observed in Note 1 one of the changes in the section is the omission of the provisions relating to mesne profits contained in cls. (a) and (b) of S. 244 of the old Code. Under that Code, where the decree awarded mesne profits, the amount had to be ascertained only in execution proceedings and not in suit,[1] a suit for such ascertainment being maintainable only where the *decree was silent* as to the mesne profits.[2] Under the present Code, however, the amount must be ascertained under O. 20 R. 12 by the decree itself and not in execution.[3] An enquiry as to mesne profits

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3. ('73) 12 Beng L R 201 (208) (DB).
('69) 12 Suth W R 85 (86) (DB).
('04) 7 Oudh Cas 213 (215) (DB).
('25) 12 AIR 1925 Pat 376 (378) (DB).
[*See also* ('11) 11 Ind Cas 200 (201) (Cal). (Overpayment by judgment-debtor out of Court.)]
4. ('05) 27 All 378 (380) (DB).
5. † ('30) 17 AIR 1930 P C 86 (90) (PC).
('95) 17 All 478 (481) (DB).
('86) 1886 All W N 38 (38) (DB).
('78) 2 All 61 (62, 63) FB).
('67) 2 Agra 45 (46) (DB).
† ('20) 7 AIR 1920 Bom 208 (209) : 44 Bom 97.
† ('28) 15 AIR 1928 Cal 776 (777).
('78) 4 Cal L Rep 577 (579, 580).
('71) 15 Suth W R 160 (161).
('04) 1904 Pun Re No. 45 at p. 141.
† ('22) 9 AIR 1922 Pat 166 (167) : 1 Pat 336.
6. ('97) 2 Cal W N 429 (431).
('75) 23 Suth W R 207 (207). (Refund of sale-proceeds since decree was compromised).
('04) 14 Mad L Jour 295 (296).
(1900) 23 Mad 55 (58).
7. ('16) 3 AIR 1916 Pat 308 (309).
8. ('01) 5 Cal W N 627 (629).
('82) 6 Bom 148 (150).
[*See* ('42) 29 AIR 1942 Cal 451 (452) (DB). (Court had power to reopen execution proceedings and to continue them.)]

Note 36

1. ('07) 6 Cal L Jour 527 (529) (DB).
[*See also* ('06) 28 All 72 (73).
('69) 11 Suth W R 516 (516).
('08) 31 Mad 37 (39, 40).]
[But see ('18) 5 A I R 1918 Mad 94 (96) (DB). (Section 6 of the Malabar Compensation for Tenants Improvements Act makes the question of damages one under S. 47.)
('99) 2 Oudh Cas 315 (318).]
2. ('14) 1 AIR 1914 Mad 640 (640).

Note 37

1. ('67) 2 Agra 105 (106) (DB).
('71) 3 N W P H C R 187 (187) (DB). (Moveables.)
('67) 7 Suth W R 45 (45) (DB). (Do.)

Note 38

1. ('01) 23 All 152 (157) : 27 Ind App 209 (228) (PC).
('75) 1875 Pun Re No. 72 at P. 182.
2. ('74) 2 Ind App 219 (228) : 24 Suth W R 193 (197) (PC).
('99) 23 Bom 536 (538) : 1 Bom L R 36 (37).
('95) 19 Bom 532 (538, 539).
('02) 6 Cal W N 672 (674).
('95) 22 Cal 501 (505).
('90) 17 Cal 968 (971).
('70) 4 Beng L R A C 111 (113, 114).
('02) 1902 Pun Re No. 29 at p. 115.
('90) 1890 Pun Re No. 60 at p. 161 (DB).
('15) 2 AIR 1915 Upp Bur 18 (19) : 1915 Upp Bur Rul 2nd Qr. p. 81.
3. ✤ ('31) 18 AIR 1931 Pat 1 (4) (DB).
('38) 25 AIR 1938 Bom 320 (321). (The correct procedure under the present Code is for the Court to direct an inquiry as to mesne profits, and then pass a final decree found due on the inquiry.)

therefore, under the present Code, is not a proceeding in execution but a proceeding in continuation of the original suit,[4] except in those cases where the decree for mesne profits was passed under the old Code. In the latter case, the application as to mesne profits is a proceeding in execution and not in the suit itself even though it was filed after the new Code had come into force.[5]

39. **Question of restitution of property taken in execution, when the decree is amended, varied or reversed.** — See Notes 3 to 6 and 30 on Section 144.

40. **Question of adjustment of decree.** — See Order 21, Rule 2.

41. **Agreement against execution of decree.** — In Note 31, agreements against execution entered into *before* the passing of the decree have been dealt with. Where, after the passing of the decree, the parties enter into an agreement against execution of the decree, the question whether such an agreement can be pleaded as a bar to execution depends upon the nature af the agreement and the intention of the parties. If it is clearly the intention of the parties to abandon the decree and to enter into a new and different contract in supersession of the decree, the contract may form the basis of a subsequent suit and the section is no bar.[1] Where, however, the agreement does not so supersede the decree but is merely pleaded as a bar to execution, the executing Court can inquire into and decide the matter under the section,[2] subject to the provisions of O. 21,

('37) 24 AIR 1937 Mad 879 (881). (But if the decree does not direct an inquiry about mesne profits but only recognises the right to it, a separate suit for that purpose is not barred.)

4. ('23) 12 AIR 1925 All 588 (589):47 All 543(DB).
('29) 16 AIR 1929 Mad 785 (786).
[*See* ('10) 6 Ind Cas 648 (649) (Lah).]
[*See also* ('26) 13 AIR 1926 Pat 141 (141, 142) : 5 Pat 223.]

In the following cases though decided under the old Code, application for assessment of mesne profits was held to be an application in the suit :—

('03) 25 All 385 (387).
('12) 15 Ind Cas 709 (710) (Cal).
('10) 5 Ind Cas 387 (388) (Cal).
('76) 25 Suth W R 270 (270).

5. ('21) 8 AIR 1921 Pat 185 (186) (DB).
('21) 8 AIR 1921 Bom 404 (404) : 45 Bom 819 (DB).
('14) 1 AIR 1914 Mad 526 (531) : 37 Mad 186 : 18 Ind Cas 586 (590, 591, 592) (DB).

Note 41

1. ('81) 3 All 781 (786) (DB).
† ('33) 20 AIR 1933 Pesh 53 (55) (DB).
† ('37) 24 AIR 1937 P C 256 (259) : 64 Ind App 302 : ILR (1938) 1 Cal 66 : 31 Sind L R 637 (PC). (AIR 1935 Cal 596 : 62 Cal 28 reversed.)
('95) 19 Bom 516 (519) (DB).
('02) 1902 Pun Re No. 98.
('85) 1885 Pun Re No. 51.
('04) 14 Mad L Jour 359 (366, 367) (DB). (Agreement securing some additional benefit.)
[*See* ('33) 20 AIR 1933 Mad 838 (839).]

2. ('13) 30 AIR 1943 Pesh 29 (31) (DB). (The granting of time and instalments by the decree-holder to the judgment-debtor for payment of the decretal amount does not amount to a novation of contract and has not the effect of extinguishing the decree so as to render it inexecutable.)
('42) 29 AIR 1942 Pesh 13 (14). (Decree fixing monthly maintenance—Agreement by decree-holder giving up portion of maintenance is not novation.)
('42) 29 AIR 1942 Rang 57 (59) : 1941 Rang L R 767 (DB). (An agreement whose effect is not to discharge the decree forthwith is a matter to be dealt with under S. 47.)
('40) 27 AIR 1940 All 423 (424) : ILR (1940) All 536 (DB). (Compromise entered into in the execution proceeding by which decretal money was made payable in eight yearly instalments — *Held* compromise was enforceable in execution proceedings.)
('40) 27 AIR 1940 All 270 (271) : I L R (1940) All 377 (FB).
('40) 27 AIR 1940 All 107 (108). (Compromise converting the original decree into a decree for payment by instalments—*Held* decree-holder could not put his decree into execution until judgment-debtor had defaulted in paying the instalments.)
('39) 26 AIR 1939 Sind 343 (349) : ILR (1939) Kar 725 (DB). (Terms which have reference to and affect the execution, discharge and satisfaction of the decree.)
('84) 6 All 228 (230) (DB).
('84) 6 All 16 (17) (DB). (Agreement to give time.)
('13) 20 Ind Cas 874 (875, 876) (DB) (Cal). (Do.)
('35) 22 AIR 1935 All 364 (365).
('82) 4 All 240 (242) (DB).
('12) 13 Ind Cas 204 (205) (DB) (Mad).
('82) 8 Mad L Jour 193 (194) (DB). (Agreement by decree-holder auction-purchaser not to take delivery of possession for consideration—Agreement *held* could be set up in execution.)
[*See* ('37) 24 AIR 1937 Pat 672 (672). (Under the peculiar terms of the compromise (postponing date of confirmation of sale under mortgage decree), *held*, executing Court had no option but to confirm sale on the date mentioned and had no power to compel the parties to comply with the terms of the compromise.)]
[*See also* ('83) 1883 All W N 93 (96) (FB).]

R. 2, where such an agreement amounts to an *adjustment* of the decree.[3] In *Oudh Commercial Bank Ltd.* v. *Bind Basni Kuer*,[4] their Lordships of the Privy Council observed as follows :

> "If it appears to the Court acting under S. 47 that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under S. 47. In such a case, to say that the creditor may, perhaps, have a separate suit, is to misread the Code, which, by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing Court."

42. Contribution among judgment-debtors. — Where one of two or more judgment-debtors purchases the decree in full[1] or in part,[2] or is compelled to pay the whole of the decree amount himself in execution,[3] a suit by such judgment-debtor against others for contribution is not barred, as such a question cannot be said to relate to matters in execution, discharge or satisfaction of the decree between the parties to the suit within the meaning of the section. As regards the general right to sue for contribution of costs paid under a decree, see Note 34 on section 35.

43. Maladministration of estate of deceased judgment-debtor. — Where a decree-holder, unable to realise the decree amount out of the estate of a deceased judgment-debtor, raises a question as to the *maladministration* of the estate by the executors, the matter is one which involves a much wider question than one merely relating to the execution of the decree and cannot be decided under this section. A suit will, therefore, lie against the executors for the administration of the estate and for an account on the footing of maladministration.[1]

44. Stay of execution. — Under the old Code, there was a difference of opinion as to whether a question of *stay* of execution of a decree is one relating to the execution of the decree, one group of cases holding that it is,[1] and another, that it is not.[2] In order to remove this conflict, the words "or to the stay of execution thereof" were inserted in cl. (c) of S. 244 by Act VII of 1888, after which the trend of decisions was uniform in holding that such questions are within the section.[3] The words "or to the stay of execution thereof" were, however, omitted from S. 47 of this Code and the omission has again created a conflict of views in the various High Courts. The different views may broadly be classified as follows :

(1) The question of stay of execution is clearly a matter *relating to the execution* of the decree and that the decision on such a question is a *decree* and is therefore appealable.[4]

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3. ('13) 20 Ind Cas 874 (876) (DB) (Cal).
4. ('39) 26 AIR 1939 P C 80 (86) : 14 Luck 192 : ILR (1939) Kar 136 (PC). (AIR 1932 All 273 : 54 All 573 (FB) approved.)

Note 42

1. ('68) 9 Suth W R 230 (231) (FB).
2. ('88) 15 Cal 187 (193, 194) (DB).
3. ('96) 18 All 106 (107).
('98) 21 Mad 45 (46) (DB). (Contribution for costs of execution paid.)

Note 43

1. ('08) 35 Cal 1100 (1103) (DB). (24 Cal 173 explained.)

Note 44

1. ('84) 7 All 73 (78).
('88) 12 Bom 279 (280).
('88) 12 Bom 30 (31).
('86) 13 Cal 111 (112).
('86) 12 Cal 621 (625).
('81) 7 Cal 733 (735).
2. ('83) 9 Cal 214 (215).
('05) 29 Bom 71 (73). (12 Bom 279 doubted.)
3. ('98) 22 Bom 463 (472).
('01) 31 Cal 373 (375, 376).
('01) 28 Cal 734 (735, 736).
(1900) 23 Mad 568 (570).
('08) 2 Sind L R 21 (25).
('88) 10 All 389 (394). (Following 7 All 73.)
4. ('30) 17 AIR 1930 Lah 187 (190) : 11 Lah 402.

(2) Such a question is one relating to execution but the decision thereon cannot be said to be one "on the rights of the parties" and consequently cannot amount to a *decree* and is therefore not appealable.[5]

(3) The question relates to execution; but whether an order of stay will amount to a decree depends on the question whether it conclusively determines the rights and liabilities of the parties in regard to the execution of the decree. Thus, an order staying execution on the ground that it is barred permanently or temporarily under a certain special statute will be a decree and appealable as such.[6]

(4) The question does not relate to execution at all within the meaning of this section.[7]

The first three views are consonant with the theory that the omission of the words in S. 47 by the Legislature was by reason of their being considered superfluous and a surplusage.[8] The last view proceeds on the assumption that the omission was deliberate and intended to show that they should not be considered to be within the section. It is submitted with respect that the last view is not correct. Reference to the history of the enactment is not a legitimate method of interpreting a section where there is no ambiguity of any kind and there is nothing in the language of the section to show that a stay of execution is not a matter *relating to execution*.

It has been held by the High Court of Madras that it is only where the order in question as to stay of execution is passed by the *Court executing the decree* that the matter will come under S. 47. An order for stay by the Appellate Court in an appeal from the decree is not one within section 47.[9]

('27) 14 AIR 1927 Lah 915 (915).
('25) 12 AIR 1925 Lah 69 (69).
('24) 11 AIR 1924 Lah 671 (672).
('24) 11 AIR 1924 Lah 631 (631).
('24) 11 AIR 1924 Lah 602 (603).
('23) 10 AIR 1923 Lah 514 (515).
('22) 9 AIR 1922 Lah 480 (480).
† ('20) 7 AIR 1920 Low Bur 138 (139) : 10 Low Bur Rul 326.

5. ('31) 18 AIR 1931 All 129 (130, 131) (DB). (Order temporarily staying execution and merely deciding mode in which execution was to proceed —Order not appealable.)
('29) 16 AIR 1929 All 85 (85) (DB). (Order of executing Court rejecting application for stay of sale does not amount to final adjudication and is not appealable.)
('24) 11 AIR 1924 All 808 (808, 809, 811) : 46 All 733 (DB).
† ('41) 28 AIR 1911 Oudh 609 (610). (Stay order under S. 7, U. P. Encumbered Estates Act, being order under S. 47, C. P. C., is appealable under S. 271, U. P. Tenancy Act, although not being a decree, it is not appealable under C. P. C.)
† ('15) 2 AIR 1915 Cal 122 (124). (Order refusing to stay execution is not an order under S.47 which has the characteristics of a decree under S. 2.)
('14) 1 AIR 1914 Cal 149 (149) : 41 Cal 160 : 20 Ind Cas 72 (72) (DB).
† ('11) 12 Ind Cas 745 (748, 750) (DB) (Cal).
('28) 106 Ind Cas 890 (891) (Lah). (Order for security to stay execution.)
('18) 5 AIR 1918 Mad 1174(1177): 40 Mad 233(FB). (Per Abdul Rahim Offg. C.J., Phillips J. Contra.)
('17) 4 AIR 1917 Mad 310 (311) : 39 Mad 541(DB).
('36) 23 AIR 1936 Oudh 369 (370) (DB).
('25) 12 AIR 1925 Rang 225 (225) : 3 Rang 255 (DB). (Order relating to sufficiency of security *held* not appealable.)
[*See also* ('39) 26 AIR 1939 Mad 942 (942) (DB). (Question of stay under S. 20, Madras Agriculturists' Relief Act is not between the parties but between applicant and Court and hence S. 47 does not apply.)
('26) 13 AIR 1926 Cal 830 (830).
('28) 106 Ind Cas 866 (866, 867) (Lah).]

6. † ('40) 27 AIR 1940 All 326 (328) : ILR (1940) All 517 (FB).
('40) 27 AIR 1940 Cal 257 (258, 259): ILR (1940) 1 Cal 393 (DB). (Stay under Bengal Agricultural Debtors Act.)
('40) 44 Cal W N 587 (588).

7. ('24) 11 AIR 1924 All 794 (795).
('33) 20 AIR 1933 Nag 84 (85) : 29 Nag L R 121.
('21) 8 AIR 1921 Bom 208 (208) : 45 Bom 241 (DB).
('20) 7 AIR 1920 Cal 71 (72) (DB).
('27) 14 AIR 1927 Lah 852 (853). (Following AIR 1921 Bom 208 : 45 Bom 241.)
('27) 14 AIR 1927 Lah 235 (235).
('22) 9 AIR 1922 Lah 400 (400).
('38) 25 AIR 1938 Rang 317 (317, 318): 1938 Rang L R 580 (DB).
('31) 18 AIR 1931 Rang 221 (222) : 9 Rang 351.

8. ('17) 4 AIR 1917 Mad 310 (311) : 39 Mad 541 (DB).

9. ('15) 2 AIR 1915 Mad 41 (41) (DB).

45. Question of liability of certain property to attachment and sale. — All objections to attachment and sale in execution of a decree raised *between parties* to the suit or their representatives on the ground that the properties are *not liable to be attached*,[1] or are *not saleable* in execution of that decree,[2] are matters coming within the section[3] and a separate *suit* in respect thereof will be barred. But such an objection

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Note 45

1. ('25) 12 AIR 1925 All 594 (595) (DB).
('34) 21 AIR 1934 Pat 281 (282).
('35) 22 AIR 1935 All 364 (366).
('38) 25 AIR 1938 Cal 162 (163).
† ('38) 25 AIR 1938 Cal 113 (114) : ILR (1938) 1 Cal 280 (DB).
('28) 15 AIR 1928 Cal 94 (95, 96) : 54 Cal 1064 (DB).
† ('27) 14 AIR 1927 Cal 106 (108) : 53 Cal 837 (DB).
('23) 10 AIR 1923 Cal 344 (344).
('21) 8 AIR 1921 Cal 242 (244) (DB).
('39) 26 AIR 1939 Lah 256 (257).
('35) 22 AIR 1935 Lah 942 (943).
('30) 17 AIR 1930 Lah 628 (628). (Objection that the land of judgment-debtor could not be attached as he was agriculturist — On an adverse decision the judgment-debtor filed a separate suit for this purpose—It was dismissed.)
('29) 16 AIR 1929 Lah 778 (779) (DB).
('34) 21 AIR 1934 Mad 435 (435) : 57 Mad 822 (DB).
('32) 19 AIR 1932 Mad 86 (89) : 55 Mad 495 (DB).
('12) 17 Ind Cas 126 (126) (DB) (Mad). (Objections to attachment must be raised in execution proceedings.)
† ('39) 26 AIR 1939 Nag 183 (184, 186) : I L R (1939) Nag 548 (DB).
('38) 25 AIR 1938 Pat 216 (220) (DB).
('36) 23 AIR 1936 Pat 268 (270) (DB). (Person against whom suit is dismissed is party.)
[*See* ('40) 27 AIR 1940 Lah 67 (67). (Objection under O. 21, R. 58 by party to suit — Objection summarily dismissed without enquiry as collusive — Second application under S. 47 is not barred.)
[*See also* ('09) 2 Ind Cas 105 (106) (All).]
[But see ('32) 19 AIR 1932 Mad 169 (169). (Question of truth of debt attached not for executing Court.)]

2. ('43) 30 AIR 1943 Pat 75 (76): 21 Pat 774 (DB). (Not saleable under S. 60 (1) (c).)
('41) 28 AIR 1941 Cal 251 (252) : I L R (1940) 2 Cal 226. (*Obiter* — Property of judgment-debtor sold in spite of notice under S. 34, Bengal Agricultural Debtors Act—Judgment-debtor can apply under S. 47 for declaration that sale does not affect his title.)
('39) 26 A I R 1939 Sind 142 (144) : I L R (1939) Kar 398 (DB). (Objection based on S. 29, Sind Encumbered Estates Act, by the heirs of mortgagor judgment-debtor.)
(1900) 22 All 108 (110) (DB). (Suit by judgment-debtor to set aside sale in execution by Collector—Suit barred under this section.)
('27) 14 AIR 1927 All 574 (575) (DB).
('35) 22 AIR 1935 All 1016 (1017) : 58 All 360 (DB).
('35) 22 AIR 1935 All 678 (682) : 58 All 98 (DB).
('35) 22 AIR 1935 All 588 (589) (DB).
('21) 8 AIR 1921 All 118 (119) : 43 All 547 (FB). (Sale of occupancy holding — Objection based on S. 20, Agra Tenancy Act.)
('18) 5 AIR 1918 All 278 (279) (DB). (Ex-proprietary rights.)
('88) 1888 All W N 155 (155). (Not saleable under S. 245 of the old Code.)
('86) 8 All 146 (147, 148) (FB). (Not saleable under S. 9 of the U. P. Rent Act.)
('84) 6 All 448 (449) (DB). (Do.)
('84) 6 All 393 (395) (DB). (Do.)
('85) 7 All 641 (643) (DB).
('31) 18 AIR 1931 Bom 446 (447) (DB). (Not saleable under S. 60, C. P. Code.)
('95) 19 Bom 328 (331) (DB). (Service vatan.)
('91) 1891 Bom P J 207 (DB). (Not saleable under S. 266 of the old Code.)
('17) 4 AIR 1917 Cal 672 (672) (DB). (Sale of occupancy holding.)
('11) 10 Ind Cas 417 (420) (DB) (Cal). (Do.)
('10) 7 Ind Cas 48 (48) (DB) (Cal).
('09) 4 Ind Cas 121 (122) (DB) (Cal).
('05) 9 Cal W N 972 (972). (Judgment-debtor having no saleable interest in the property.)
(1900) 27 Cal 415 (416) (FB). (Sale of occupancy holding.)
(1900) 27 Cal 187 (189) (DB).-(Do.)
('99) 26 Cal 727 (731) (DB). (Do. 8 All 146 followed.)
† ('89) 16 Cal 603 (606) (DB).
† ('39) 26 AIR 1939 Lah 113 (114, 115, 116) : ILR (1939) Lah 103.
('31) 18 AIR 1931 Lah 141 (142). (Order refusing to sell agricultural land but ordering temporary alienation.)
('30) 17 AIR 1930 Lah 628 (628). (Debtor an agriculturist.)
('16) 3 AIR 1916 Mad 727 (727).
('93) 16 Mad 447 (449) (DB). (If the proceeding sought to be set aside relates to the execution and the consent is between the parties to the suit the specific ground on which the proceeding is impeached is not material within the meaning of S. 244 (now S. 47).)
† ('38) 25 AIR 1938 Nag 558 (559).
('35) 22 AIR 1935 Nag 30 (31, 32) : 31 Nag L R 217.
('31) 18 AIR 1931 Oudh 45 (49) : 6 Luck 452. (Property claimed as wakf.)
('30) 17 AIR 1930 Oudh 256 (258) (DB). (Want of sanction under S. 20 of the Oudh Laws Act.)
('25) 12 AIR 1925 Oudh 618 (619) : 28 Oudh Cas 175 (DB). (Judgment-debtor having no saleable interest in the property. 8 All 146 followed.)

3. ('42) 29 AIR 1942 Lah 153 (155) : ILR (1942) Lah 559 (FB). (Property not liable to attachment and sale under cl. (c) of the proviso to S. 60, C. P. Code.)

preferred by a *third party* does not come within this section[4] and a separate *suit* by him in respect thereof will not be barred.[5] A person against whom a suit has been dismissed is a party to the suit within the meaning of this section and hence, an objection by such person will be covered by this section.[6] An objection raised by a judgment-debtor not in his private capacity but in a representative capacity as shebait of an idol on the ground of the property belonging to the idol, will be one by a stranger and not by a party to the suit and as such will not be covered by this section.[7] As to whether an order on such objection by a party, and therefore coming under the section, is *appealable* as a decree, see Note 84.

Where a puisne mortgagee who is impleaded as a party to a suit on a prior mortgage objects to the sale of the mortgaged property on the ground that it belongs to him, his objection being one which attacks the decree itself, does not relate to the execution, discharge or satisfaction of the decree and hence is not covered by this section.[8] But an objection by him that the sale should not be unconditional so as to conclude his rights can be entertained by the executing Court under this section.[9]

See also Notes 1 and 24 on O. 21, R. 58.

46. Question, if property attached belongs to judgment-debtor. — Where, in execution of a *money decree*, properties in the hands of the legal representative of the debtor are attached, and the representative objects to the attachment on the ground that the property is *his own* and not that of the debtor,[1] or that he has a charge

('41) 28 AIR 1941 Pat 240 (241) (DB). (An objection by the holder of a Ghatwali tenure that the tenure is not saleable by reason of S. 60 can be raised under S. 47.)
('37) 24 AIR 1937 Pat 562 (563). (Purchaser of non-transferable holding dispossessed in execution of rent decree against transferor can apply under Section 47.)
('29) 16 AIR 1929 Pat 472 (472) (DB). (A defendant against whom a suit is dismissed is nevertheless party to the suit.)
('29) 16 AIR 1929 Pat 141 (144) : 8 Pat 717.
('38) 25 AIR 1938 Rang 250 (251) : 1938 Rang L R 583 (DB). (Mortgagee decree-holder purchasing mortgaged property in execution of his own decree is representative of judgment-debtor.)

4. ('29) 16 AIR 1929 Pat 141 (144) : 8 Pat 717.
('36) 23 AIR 1936 Sind 2 (3) : 30 Sind L R 288 (DB). (Receiver objecting to attachment of moneys in his hands.)
[*See* ('43) 30 AIR 1943 Cal 56 (57). (Objection to attachment taken by mortgagee of property, styled as under S. 47 really comes under O. 21 R. 58 and can be disposed of under that rule.)]

5. ('36) 23 AIR 1936 Cal 573 (574) : I L R (1937) 1 Cal 264.
('37) 24 AIR 1937 Lah 313 (314).
[*See* ('31) 18 AIR 1931 Cal 202 (204).]

6. ('23) 10 AIR 1923 Bom 381 (381) (DB).
† ('38) 25 AIR 1938 Cal 113 (114): I L R (1938) 1 Cal 280 (DB).
('39) 43 Cal W N 371 (373) (DB). (Mortgage suit—Some of defendants sued in personal capacity and as shebaits—Decree passed against them in personal capacity— Suit dismissed against them as shebaits— Such defendants are parties to suit—Objection by them to sale on ground that property is debutter is under this section.)

† (1900) 23 Mad 361 (366).
('26) 13 AIR 1926 Oudh 64 (64).
('29) 16 AIR 1929 Pat 472 (472).
('29) 16 AIR 1929 Pat 141 (142): 8 Pat 717.
Also see Note 8.

7. ('36) 23 AIR 1936 Pat 256 (257).
[*See also* ('36) 23 AIR 1936 Mad 733 (744, 745). (Party impleaded in suit in one capacity and objecting in execution proceedings in another capacity—Objection is not one within this section.)]
[But see ('42) 29 AIR 1942 Sind 14 (15) : I L R (1941) Kar 474 (DB). (Judgment-debtor objecting because property held by him as mutwalli—Case comes within S. 47 and not O. 21, R. 58—Simple question of validity of wakf can be decided in execution proceedings.)
('39) 26 AIR 1939 Sind 22 (23). (Judgment-debtor contending that properties held by him are wakf properties—S. 47 applies.)]

8. ('36) 23 AIR 1936 Pat 552 (553) (DB).

9. ('36) 23 AIR 1936 Pat 552 (553) (DB).

Note 46

1. ('41) 28 AIR 1941 Sind 142 (144) : ILR (1941) Kar 211 (DB).
('29) 16 AIR 1929 All 602 (603) : 51 All 878.
† ('34) 21 AIR 1934 Mad 621 (622) (DB).
('37) 24 AIR 1937 All 97 (98).
† ('35) 22 AIR 1935 All 183 (184) (DB).
('28) 15 AIR 1928 All 704 (705).
('23) 10 AIR 1923 All 115 (116).
('17) 4 AIR 1917 All 460 (461): 39 All 47 (DB). (17 Cal 711 followed.)
('09) 3 Ind Cas 495 (496) (DB) (All).
('06) 28 All 51 (53, 54) (DB).
('99) 21 All 323 (328) (DB).
('99) 1899 All W N 24 (24) (DB).
† ('90) 12 All 313 (321, 324, 327) (FB).
('90) 12 All 73 (78) (DB).

or lien thereon,[2] the question is one in execution of the decree between a party and a representative of the opposite party and is within the section. Similarly, where a person is sued as the legal representative of a deceased person, an objection raised by such legal representative on the ground that the property attached belongs to him and not to the deceased, will come within this section as raising a question between *the parties* to the suit.[3] But, where he objects, not on his own behalf, *but as representing third parties, or as trustee*,[4] the objection is really one by such third parties and falls under O. 21, R. 58, and not under this section. See also O. 21, R. 58 and Notes thereon.

('87) 9 All 605 (608).
('85) 7 All 733 (734) (DB).
('85) 7 All 547 (549, 550) (DB).
('82) 4 All 190 (192).
† ('34) 21 AIR 1934 Bom 296 (297) : 58 Bom 513 (DB).
('28) 15 AIR 1928 Bom 534 (536) : 53 Bom 46 (DB).
('10) 34 Bom 546 (551) : 7 Ind Cas 457 (458 459) (DB).
('04) 6 Bom L R 697 (699) (DB).
('96) 1896 Bom P J 847 (847) (DB).
('85) 9 Bom 458 (460) (DB).
('35) 22 AIR 1935 Cal 14 (14).
('34) 21 AIR 1934 Cal 258 (259).
('28) 115 Ind Cas 353 (353) (DB) (Cal).
('21) 8 AIR 1921 Cal 242 (244) (DB).
('16) 3 AIR 1916 Cal 814 (814) (DB). (Following 17 Cal 711.)
('15) 2 AIR 1935 Cal 275 (276) (DB). (Do.)
('12) 16 Ind Cas 385 (386) (DB) (Cal). (Do.)
('12) 16 Ind Cas 255 (255) (Cal). (Decree against the legal representative)
(1900) 27 Cal 34 (36) (DB).
†('90) 17 Cal 711 (714, 718, 721) (FB).
('89) 16 Cal 1 (7, 8) (DB).
('73) 12 Beng L R 65 (71) (DB).
('73) 20 Suth W R 162 (162) (DB).
('71) 15 Suth W R 163 (164) (DB).
('30) 17 AIR 1930 Lah 1068 (1070). (Decree against mortgagor's legal representative claiming independent interest and objecting to sale of that interest—To be decided in execution.)
('27) 14 AIR 1927 Lah 895 (896).
† ('21) 8 AIR 1921 Lah 173 (175) (DB).
('87) 1887 Pun Re No. 47 at p. 103.
('37) 24 AIR 1937 Mad 108 (108).
('35) 22 AIR 1935 Mad 923 (925).
('03) 26 Mad 501 (502) (DB).
('94) 17 Mad 399 (400) (DB). (Objection to sale.)
('83) 7 Mad 255 (257, 258) (DB).
('82) 5 Mad 391 (393, 394) (DB).
† ('39) 26 AIR 1939 Nag 147 (149) : I L R (1939) Nag 165 (DB).
('31) 18 AIR 1931 Nag 27 (28). (Objection to sale.)
('26) 13 AIR 1926 Nag 476 (480).
('93) 6 C P L R 4 (5).
('33) 20 AIR 1933 Oudh 473 (474). (If legal representative proves his possession the onus is on the decree-holder to prove that the property belongs to debtor.)
('29) 16 AIR 1929 Oudh 21 (21).
('26) 13 AIR 1926 Oudh 64 (64).
('05) 8 Oudh Cas 405 (408) (DB).
('98) 1898 Oudh Cas Sup Vol 60 (65). (S. 244 (now S. 47, C.P.C.) makes no distinction between representatives brought on record before and representatives brought on record after the decree.)
† ('34) 21 AIR 1934 Pat 188 (190) (DB).
('22) 9 AIR 1922 Pat 572 (573) (DB).
('37) 24 AIR 1937 Pesh 82 (83). (Objection in such a case can be raised even after sale.)
('34) 21 AIR 1934 Rang 127 (128).
('28) 15 AIR 1928 Rang 29 (30) : 5 Rang 659.
† ('27) 14 AIR 1927 Rang 273 (274) : 5 Rang 393 (DB).
('24) 11 AIR 1924 Rang 323 (325, 326) : 2 Rang 168 (DB).
† ('31) 18 AIR 1931 Sind 84 (87) : 25 Sind L R 374 (DB). (Ss. 47 and 53 can be extended even to property which comes into legal representative's hand by partition before judgment-debtor's death.)
[*See* ('41) 28 AIR 1941 Mad 28 (29) : I L R (1941) Mad 203 (FB).]
[*See also* ('86) 1886 Bom P J 250 (251).
('19) 6 AIR 1919 Cal 623 (624) (DB). (A separate suit by legal representative to set aside sale does not lie — Objection ought to have been taken under Section 47. Objection that the property belonged to legal representative and not to the deceased judgment-debtor hence not liable to be sold.)]
[But see ('39) 26 A I R 1939 Pat 354 (355, 356) (DB).
('25) 12 AIR 1925 Sind 156 (158) (DB).]
Also see S. 52 N. 14.

2. ('29) 16 A I R 1929 Lah 762 (763). (Section 47 is not restricted to money decrees but covers all decrees.)
('09) 2 Ind Cas 432 (432) (DB) (Mad).
('03) 1903 Pun L R No. 20 (DB). (Lien.)

3. ('39) 26 AIR 1939 Lah 256 (257).
('38) 25 A I R 1938 Mad 731 (733) : I L R (1938) Mad 1080 (DB).
('31) 21 AIR 1934 Mad 621 (622) (DB).
('31) 21 AIR 1934 Rang 127 (128).

4. ('16) 3 AIR 1916 Mad 789 (789) (DB).
('88) 15 Cal 437 (445) (DB).
('28) 15 AIR 1928 All 392 (393) : 50 All 801.
† ('21) 11 AIR 1924 All 183 (184). (As mutawalli of wakf.)
('06) 28 All 644 (646).
('06) 1906 All W N 157 (157, 158) (DB).
('06) 3 All L Jour 370 (371).
('85) 7 All 36 (37) (DB). (Objection as a wakif.)
('80) 2 All 752 (753) (DB).
† ('98) 23 Bom 237 (242, 243) (DB).
† ('15) 2 AIR 1915 Cal 327 (331) : 42 Cal 440 (DB). (As a shebait of an idol.)
('13) 20 Ind Cas 790 (791, 792) (DB) (Cal). (Do.)
('11) 39 Cal 298 (302) : 12 Ind Cas 163 (164) (FB).

Where, in execution of a *mortgage decree*, the mortgage properties are brought to sale, and the legal representative of the judgment-debtor objects on the ground that the property is not that of the judgment-debtor or that it could not have been validly mortgaged by him, the objection is really one which *attacks the decree itself* which directs the sale of the properties. Such an objection, therefore, cannot be gone into by the executing Court, but should be raised in a separate suit.[5] But, where in execution of a mortgage decree, properties *not mortgaged* are brought to sale as part of the mortgaged properties, the objection of the legal representative that such properties are his own properties will fall under this section.[6]

47. Question, if debts were contracted without legal necessity or tainted with immorality or that the attached property is self-acquired or ancestral. — See Notes on Section 53.

47a. Question as to binding character of debt on other brothers where decree is obtained against elder brother. — Where a suit on a promissory note is filed against the eldest brother (in a joint Hindu family) as a personal claim and a decree is obtained, the question of the binding character of the debt as against the other members of the joint family who are not sons or descendants of the judgment-debtor cannot be gone into in execution proceedings.[1]

48. Question as to the transferability of the property proceeded against. — Where application is made to execute a decree for money by the attachment

('08) 12 Cal W N 308 (309) (DB).
('07) 11 Cal W N 145 (147) (DB).
† ('02) 6 Cal W N 663 (667) (SB). (A separate suit by a shebait to set aside the sale of debutter property was held maintainable.)
('02) 6 Cal W N 63 (64, 65) (DB).
('90) 17 Cal 57 (65) (DB). (As a shebait of an idol.)
('87) 1887 Pun Re No. 12 at p. 127 (DB).
('18) 5 AIR 1918 Mad 1140 (1140) (DB).
('08) 31 Mad 125 (126) (DB). (Objection as a trustee.)
† (1900) 23 Mad 193 (202) (FB). (Do.)
† ('39) 26 AIR 1939 Nag 183 (185) : ILR (1939) Nag 548 (DB).
('30) 17 AIR 1930 Nag 293 (294) : 27 Nag L R 10.
('11) 12 Ind Cas 411 (411) (DB) (Oudh). (Objection as a trustee of the property for religious purposes.)
('22) 9 AIR 1922 Pat 196 (196) : 1 Pat 637 (DB).
[But see ('89) 1889 Pun Re No. 9 at p. 18 (DB). (The question whether the attached property is of the judgment-debtor is one relating to execution.)
† ('27) 14 AIR 1927 Oudh 120 (120, 122) : 2 Luck 145 (DB).]

5. ('41) 28 A I R 1941 Mad 898 (902, 903): I L R (1942) Mad 271 (FB). (Mortgage decree or decree for specific performance by execution of sale deed — Execution proceedings — Person impleaded as legal representative of deceased party cannot question decree — He is not bound to have his own claims to property in suit decided in execution proceedings—He can file separate suit to establish his claims : 7 Mad 255, Overruled.)
('40) 27 A I R 1940 Rang 161 (162) : 1940 Rang L R 402.
('99) 12 C P L R 73 (77).
('32) 55 Cal L Jour 114 (119) (DB). (Sons of mortgagor also impleaded in suit—Decree—Saleability of property in decree cannot be questioned in execution.)
† ('32) 19 AIR 1932 All 49 (50) (DB). (Mortgagor's legal representative pleading rights under a paramount title acquired before final decree but not provided for therein cannot be raised in execution.)
('12) 14 Ind Cas 7 (8) (DB) (Cal).
† ('39) 26 AIR 1939 Lah 178 (179, 180): ILR (1939) Lah 493 (DB). (Reversing AIR 1939 Lah 51.)
('35) 22 AIR 1935 Lah 549 (550).
† ('09) 32 Mad 429 (440, 441): 2 I. C. 18 (23) (DB). (Dissenting from 7 Mad 255 which was however approved by the Privy Council on another point.)
[*See also* ('29) 16 AIR 1929 All 291 (293): 51 All 752 (DB). (Order imposing conditions on the order of sale of properties fixed by decree.)]
('35) 22 AIR 1935 Bom 95 (96) (DB). (Mortgage decree on mullanki land — Objection taken in execution that it is not saleable, and not taken at the trial of suit — Objection cannot be allowed in execution.)
('29) 16 AIR 1929 Rang 275 (275) (DB).
[But see ('36) 23 AIR 1936 Mad 675 (677) (DB). (Question of paramount title can be raised under Section 47).]
[See however ('39) 26 AIR 1939 Sind 142 (144): I L R (1939) Kar 398 (DB). (Mortgage decree against zamindar within S. 29, Sind Encumbered Estates Act—Judgment-debtor dying during pendency of execution—Objection by judgment-debtor's representative that decree is not executable after judgment-debtor's death lies under S. 47.)]
Also see Notes 29 and 64.
6. ('39) 26 AIR 1939 All 368 (369) : I L R (1939) All 385 (DB).

Note 47a

1. ('35) 22 AIR 1935 Mad 145 (146) (DB).

and sale of an occupancy holding, the judgment-debtor is entitled under this section to raise the question that the holding is not saleable according to custom or usage and to have that question determined in execution proceedings.[1] See also Note 45.

49. Question between decree-holder and judgment-debtor in which auction-purchaser is interested. — A question relating to execution, discharge, or satisfaction of the decree "between the parties" must be determined under this section.[1] The fact that the auction-purchaser is interested in such a question does not take it out of the section.[2] In *Prosunna Kumar Sunyal* v. *Kalidas Sunyal*,[3] their Lordships of the Privy Council observed as follows :

> "When a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser who is no party to the suit is interested in the result, has never been held a bar to the application of the section."

As to what is a question between the parties, see Note 5.

50. Question between the execution purchaser and a party or his representative. — As to disputes between a defaulting purchaser and a party to the suit, see O. 21, R. 71.

As to questions relating to delivery of possession, see Note 19.

51. Setting aside sales in execution. — As between the judgment-debtor and a decree-holder an objection to the sale in execution of the decree or an application to set it aside is one in execution and must be determined in execution and not by a separate suit.[1] But the power to set aside the sale, in cases where the grounds for so

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Note 48

1. ('07) 11 Cal W N 83 (85) (DB). (Objection to sale.)
† (1900) 27 Cal 187 (189) (DB). (Do).
('35) 22 AIR 1935 All 588 (589) (DB).
('86) 8 All 146 (148) (FB).
('97) 24 Cal 355 (358) (DB). (Objection to sale.)
('10) 7 Ind Cas 48 (48) (DB) (Cal). (Application to set aside sale.)
('20) 7 AIR 1920 Pat 710 (710) (DB). (Objection to sale.)
[But see ('84) 8 Bom 185 (187) (DB). (Where property to be sold is specified in the decree, the sale cannot be objected to on the ground of its non-transferability in execution proceedings.)
† ('03) 7 Cal W N 607 (608) (DB).
('20) 7 AIR 1920 Pat 715 (715) (DB). (Doubted.)]

Note 49

1. ('03) 26 Mad 740 (741) : 13 Mad L Jour 237 (238) (DB). (Decree-holder himself auction-purchaser.)
('93) 16 Mad 447 (449) (DB). (Do.)
Also see Note 4.
2. ('42) 29 A I R 1942 Pat 244 (246) : 21 Pat 233 (DB). (The question whether a certain property can be sold in execution in contravention of S. 12-A of the Chota Nagpur Encumbered Estates Act is essentially one between judgment-debtor and decree-holder and cannot be raised in a separate suit although such suit may be brought not against the decree-holder but against the auction-purchaser at the sale and though it may be assumed that the auction-purchaser is not a representative either of the judgment-debtor or of the decree-holder.)
('41) 28 AIR 1941 Lah 327 (331).
('41) 28 AIR 1941 Mad 606 (607) (DB). (Insolvent judgment-debtor—Property sold without notice to official receiver under O. 21, R. 22—Official Receiver applying to have sale declared void—Application falls under S. 47.)
('41) 28 AIR 1941 Pat 566 (570) (DB).
✠('92) 19 Cal 683 (688, 689): 19 Ind App 166 (PC).
('21) 8 AIR 1921 Mad 420 (422) (DB). (Following A I R 1920 Mad 324 : 43 Mad 107 (FB)—Question raised by judgment-debtor against auction-purchaser in which judgment-debtor and decree-holder are adversely interested is within the Section.)
('34) 21 AIR 1934 Lah 105 (106). (Do.)
† ('17) 4 AIR 1917 P C 121 (123) : 41 Mad 403 : 45 Ind App 54 (PC).
('10) 7 Ind Cas 457 (458) (DB) (Bom). (Judgment-debtor not allowed to attack sale by way of defence to suit for possession by auction-purchaser.)
('09) 3 Ind Cas 763 (764) (Bom).
('07) 31 Bom 207 (215).
('28) 15 AIR 1928 Cal 865 (866).
('99) 26 Cal 539 (544).
('37) 24 AIR 1937 Mad 779 (781). (Execution sale set aside — Application by auction-purchaser for refund of purchase money—Question is one under this section.)
('28) 15 AIR 1928 Mad 806 (807).
('10) 34 Mad 417 (418, 420) : 8 Ind Cas 429 (429).
3. ✠('92) 19 Cal 683 (688, 689).

Note 51

1. ('41) 28 AIR 1941 Cal 58 (60) : I L R (1940) 2 Cal 334.
† ('11) 34 Mad 417 (418).
('10) 34 Bom 546 (551, 552): 7 Ind Cas 457 (458, 459).

setting it aside fall within O. 21, Rr. 89, 90 or 91, is circumscribed by those provisions.[2] To hold otherwise would be to render those provisions superfluous so far as parties to the suit or their representatives are concerned. An application to set aside a sale on grounds *not within the purview of those provisions* must be dealt with under this section independently of those provisions.[3]

52. Decree obtained by fraud. — A question whether a decree was obtained by fraud or collusion is not one which relates to the execution of the decree but one which affects its very subsistence and *validity* and such a question can only be raised by a separate suit.[1] See also Note 29 and S. 38, Note 8. Therefore, where not only the sale is impugned as being fraudulent, but the very decree in execution of which the sale took place is impeached as having been obtained by fraud, the section is not a bar to a suit to set aside the sale thereunder.[2] (See also S. 9, Note 61.)

53. Fraud in execution proceedings. — Where a judgment-debtor impeaches the validity of an execution sale, not on the ground of fraud in the *publishing* and *conducting* of the sale, but on the ground of fraud in execution proceedings which *preceded and led up* to the sale, the question, as between the parties, is one falling within this section and not under O. 21, R. 90.[1]

54. Fraud anterior to sale. — See Note 53.

('05) 1905 All W N 55 (56).
('98) 20 All 254 (256, 258).
† ('34) 21 AIR 1934 Nag 21 (27) : 31 Nag L R 67. (Application by judgment-debtor to set aside sale —Application made against decree-holder and auction-purchaser not made party—Application is one under this section.)
('13) 16 Oudh Cas 225 (228) : 21 Ind Cas 570 (571).
('05) 8 Oudh Cas 254 (256).
('31) 18 AIR 1931 Pat 97 (98).
[See however ('39) 26 AIR 1939 Lah 405 (406): I L R (1939) Lah 116 (DB). (Objection under S. 47, C. P. Code, to the effect that the sale should be set aside, cannot be taken after the confirmation of the sale the reason being that no execution proceedings are pending after confirmation.)]

2. ('39) 26 AIR 1939 Nag 241 (242) (DB). (A judgment-debtor when he applies to set aside a sale cannot be said to apply under S. 47 when there is the specific provision in O. 21, R. 90 — The fact that the auction-purchaser is made a party will not affect the question.)
('36) 23 A I R 1936 Lah 969 (971). (Sale attacked on ground of material irregularity in conduct or publication of sale — O. 21, R. 90, and not S. 47, applies.)

3. ('41) 28 AIR 1941 Pat 566 (570)(DB). (Material irregularity or fraud committed otherwise than in publishing or conducting execution sale — Sale should be set aside under S. 47.)
[*See* ('37) 21 AIR 1937 All 407 (409, 410).]

Note 52

1. ('10) 7 Ind Cas 11 (14) (All).
† ('96) 23 Cal 639 (641).
('20) 7 AIR 1920 Lah 164 (164).
('16) 3 AIR 1916 Mad 792 (793) : 38 Mad 221.
('89) 12 Mad 503 (504).
† ('86) 9 Mad 80 (83).
('99) 12 C P L R 82 (83, 84, 85).

2. † ('14) 1 AIR 1914 P C 72 (73) : 42 Cal 244 : 41 Ind App 267 (PC).
('02) 29 Cal 395 (400) : 29 Ind App 99 : 6 Cal W N 473 (477) (PC).
('01) 28 Cal 475 (478, 479) (PC).
('01) 5 Cal W N 559 (560, 561).
(1900) 27 Cal 197 (200).
('99) 26 Cal 326*n* (332*n*).
('97) 24 Cal 546 (551).
† ('97) 21 Cal 605 (608).

Note 53

1. ('41) 28 AIR 1941 Pat 566 (570) (DB).
('11) 10 Ind Cas 625 (625) (Cal).
('17) 4 AIR 1917 Low Bur 80 (81).
('06) 28 All 681 (682, 683).
('05) 27 All 702 (703).
('02) 24 All 239 (241).
('01) 23 All 478 (480).
('09) 33 Bom 698 (702) : 4 Ind Cas 253 (254).
('85) 9 Bom 468 (471).
('82) 6 Bom 148 (150).
('26) 13 AIR 1926 Cal 1219 (1220).
('18) 5 AIR 1918 Cal 171 (173). (Fraudulent suppression of process.)
('16) 3 AIR 1916 Cal 109 (110).
('09) 3 Ind Cas 116 (117) (Cal).
('07) 5 Cal L Jour 328 (331).
('06) 33 Cal 84 (90, 91) : 10 Cal W N 130 (133).
('02) 6 Cal W N 283 (285).
('02) 6 Cal W N 279 (281). (Fraud alleged to be on the part of the auction-purchaser.)
('01) 28 Cal 116 (118).
(1900) 4 Cal W N 538 (540).
('99) 26 Cal 539 (542).
('99) 26 Cal 324 (331) : 3 Cal W N 399 (400).
('99) 3 Cal W N cclxxxiii. (Notes of cases.)
('98) 2 Cal W N 691 (693).
('92) 19 Cal 683 (689) : 19 Ind App 166 (PC).
('90) 17 Cal 769 (772, 777) (FB).
('84) 10 Cal 410 (412).

55. Fraud in publishing and conducting the sale. — As has been seen in Note 51, the question of setting aside an execution sale on any ground is, as between the parties, one falling under this section. This would, therefore, include an application to set aside a sale for fraud in publishing and conducting the sale.[1] The question, however, whether such an application falls within the terms of O. 21, R. 90 is important because if it does, the Court cannot, except under the conditions specified in that rule set aside the sale. (See Note 51.) It is also important for the purpose of determining whether it is a *decree* or only an *appealable order*. For, if it is one covered by O. 21, R. 90, it is only an appealable order though it may fall under S. 47 also, inasmuch as S. 2, cl. (2) enacts that the word "decree" includes the determination of any question within S. 47 but does not include any adjudication *from which an appeal* lies as an appeal from an order.[2] The word "fraud" was absent in S. 311 of the old Code corresponding to O. 21, R. 90 of the present Code, and, in the absence thereof, it was held that an application to set aside a sale on the ground of fraud could only come under S. 244 (now S. 47) and not under S. 311.[3] Under the present Code, however, O. 21, R. 90 covers such cases[4] though the provisions of the new Code cannot retrospectively affect the character of an order passed under the old Code and take it out of the section.[5]

An application to set aside a sale on *grounds not within* O. 21, Rr. 90 and 91 falls, as has been seen in Note 51, under S. 47 only and the order on such application is appealable as a decree.[6] See Order 21, Rule 90, Note 10.

56. Other grounds for setting aside sale. — See Notes 57 to 71.

57. Property not saleable. — See Note 45.

58. Reversal of decree. — As has been seen in Note 51, the question between the parties of *setting aside the sale* on any ground (including the ground of reversal or variation of the decree) is one in execution falling within this section. As to whether a claim for restitution of properties taken in execution of such a decree is one in execution of the decree or not, see Notes 30 and 33 on section 144.

59. Amendment of decree after sale. — See Notes 39 and 58 and Notes 4, 13, 30 and 33 on Section 141.

60. Ex parte decree set aside after sale. — Where a property is sold in execution of an *ex parte* decree and purchased by the decree-holder and the decree is

('30) 17 AIR 1930 Mad 489 (489). (Omission to serve notice of sale proclamation.)
('80) 2 Mad 264 (270).
('18) 5 AIR 1918 Oudh 379 (385).
('21) 8 AIR 1921 Pat 54 (57).
('19) 6 AIR 1919 Pat 396 (398).
[*See also* ('41) 28 AIR 1941 Lah 327 (331).
('36) 40 Cal W N 428. (Mortgage decree — Execution sale — Suit for declaration of invalidity on ground of wrongful and fraudulent inclusion of properties not comprised in the mortgage—Suit not maintainable.)
('05) 32 Cal 957 (960, 961): 1 Cal L Jour 476 (480, 481) (FB).
('38) 25 AIR 1938 Lah 690 (691). (Application under O. 21, R. 89 fraudulently removed and Court not passing orders thereon — Question of fraud cannot be agitated in a separate suit.)]

Note 55

1. ('31) 18 AIR 1931 Pat 97 (98).
2. ('42) 29 AIR 1942 All 257 (258) : ILR (1942) All 237.
3. ('05) 27 All 702 (703) : 2 All L Jour 469 (470).
('04) 31 Cal 385 (390) (DB).
('99) 26 Cal 539 (540, 544, 545) (DB).
('89) 26 Cal 324 (326, 331) (DB).
('92) 19 Cal 341 (344, 345) (DB).
('91) 18 Cal 139 (143) (DB).
('82) 5 Mad 217 (219) DB).
4. ('11) 9 Ind Cas 135 (135, 136) (DB) (Cal).
('29) 16 AIR 1929 Nag 130 (131) : 25 Nag L R 53.
('28) 15 AIR 1928 All 354 (354).
('31) 18 AIR 1931 Rang 179 (180) (DB).
[*See* ('28) 15 AIR 1928 Lah 444 (444).]
5. ('12) 16 Ind Cas 690 (691) (DB) (Cal).
6. ('19) 6 AIR 1919 Pat 396 (398) (DB).
† ('37) 24 AIR 1937 All 407 (410) (DB). (Application to set aside sale on the ground of its being null and void.)
('36) 23 A I R 1936 Lah 573 (574). (Order setting aside sale for want of jurisdiction to sell property without attachment—Second appeal lies.)
[*See also* ('21) 11 AIR 1924 Mad 778 (779).]

subsequently set aside under O. 9, R. 13, an application under this section and not a suit is the remedy to *set aside the sale.*[1] See Note 51.

61. Want of notice under O. 21, Rr. 16, 22 and 66. — An objection against a sale in execution of a decree on the ground that no notice was served on the judgment-debtor under O. 21, R. 22[1] and an application to set it aside on that ground is one falling under the section. As to the effect of an omission to issue notice under O. 21, R. 66, see O. 21, R. 90, Note 14. Where, however, such notice is not necessary the question cannot be considered to be one under the section.[2] The question of the irregularity or illegality of a notice under O. 21 R. 16, and its effect upon execution proceedings and sale is, as between the parties, one that must be determined under this section.[3]

62. Purchase by decree-holder without permission.—A judgment-debtor seeking to set aside a sale of his land on the ground that the decree-holder has purchased it without permission to bid, must proceed only under this section and not by a suit.[1]

63. Setting aside sale on deposit. — Under the old Code, an order under S. 310A (O. 21 R. 89) was not appealable *as an order* and it was held that a question of setting aside a sale on deposit of the decree amount was, as between the parties, one under S. 244 (now S. 47) of the Code, and open to second appeal. Under the present Code, however, such an order is only an *appealable order* and, though it may be one under S. 47 also, is not a decree open to second appeal. See O. 21 R. 89, Note 29.

64. Judgment-debtor having no saleable interest. — Order 21 R. 91 enacts that a *purchaser* at the execution sale can apply to have the sale set aside on the ground that the judgment-debtor had no saleable interest in the property sold. Obviously, such an application is not one between parties to the suit and does not lie under S. 47.[1] A *judgment-debtor* seeking to set aside the sale on the ground that he had no saleable interest cannot do so under O. 21 R. 91. Nor can he, as against the *auction-purchaser*, do so under S. 47, as the question is not one between parties to the suit.[2] As against the decree-holder, however, such an application will clearly fall under S. 47 and a fresh suit will be barred in respect of such relief.[3] But where the sale is in execution of a *mortgage*

Note 60

1. (1900) 27 Cal 810 (813, 814) (DB).
(1900) 27 Cal 197 (200) (DB).
('09) 31 All 364 (366) : 1 Ind Cas 744 (744) (DB).
('20) 7 AIR 1920 Bom 12 (12) : 44 Bom 702 (DB).
('19) 6 A I R 1919 Bom 175 (176) : 43 Bom 235 (DB).
('07) 6 Cal L Jour 102 (104) (DB).
† ('99) 3 Cal W N 6 (7) (DB).
† ('98) 25 Cal 175 (177, 178) (DB).
Also see S. 144, N. 34.

Note 61

1. ('41) 28 AIR 1941 Pat 566 (571) (DB).
('26) 13 AIR 1926 Cal 539 (540) (DB).
('18) 5 AIR 1918 Cal 771 (172) (DB).
('31) 18 AIR 1931 All 145 (146) (DB).
('81) 3 All 424 (426) (DB).
† ('31) 18 AIR 1931 Cal 555(556): 58 Cal 825(DB).
('12) 40 Cal 45 (49) : 15 Ind Cas 506 (507) (DB).
('11) 9 Ind Cal 584 (585) (DB) (Cal).
† ('10) 5 Ind Cas 390 (393, 394) (DB) (Cal).
('93) 21 Cal 19 (22, 23) (DB).
('30) 17 AIR 1930 Mad 12 (15).
† ('24) 11 AIR 1924 Mad 431 (436, 437) : 47 Mad 288 (FB).
('26) 13 AIR 1926 Pat 397 (397) (DB).
('24) 11 AIR 1924 Pat 67 (68) (DB).
2. ('24) 11 AIR 1924 Pat 111 (112): 2 Pat 916 (DB).
3. † ('20) 7 AIR 1920 Lah 251 (253).

Note 62

1. † ('22) 9 AIR 1922 P C 336 (338) : 49 Ind App 312 : 1 Pat 733 (P C).
('01) 23 All 478 (480) (DB).
(1900) 22 All 108 (110) (DB).
('98) 22 Bom 271 (277) (DB).
('87) 11 Bom 588 (590) (DB).
('32) 19 AIR 1932 Cal 672 (674) : 59 Cal 956 : 36 Cal W N 125 (126, 127) (DB). (Receiver having no special leave to bid.)
('28) 15 AIR 1928 Lah 666 (667) (DB).
('12) 17 Ind Cas 126 (126) (DB) (Mad).
('93) 16 Mad 287 (289) (DB).
('82) 5 Mad 217 (219).

Note 64

1. ('09) 3 Ind Cas 438 (439) (DB) (Cal).
2. ('83) 1883 All W N 218 (218) (DB).
('24) 11 AIR 1924 All 273 (274).
[*See also* ('85) 7 All 641 (644).]
3. ('83) 1883 All W N 218 (218) (DB).

decree, an objection that the judgment-debtor had no saleable interest in the property is really an attack on the decree itself and cannot be gone into by the executing Court.[4]

65. Sale in contravention of the Transfer of Property Act.—A sale of property in contravention of the provisions of O. 34 of this Code can be set aside, as between the parties to the suit, only by an application under this section and not by a suit. See O. 34 R. 14, Note 7.

66. Sale in contravention of stay order. — An application to set aside a sale held in contravention of a stay order is as between the parties to the suit one under this section.[1] But where the original application for stay as well as the order for stay is without jurisdiction, as where an application was made to the original Court after the transfer of the decree to the Collector for execution under S. 68 of the Code, an application to set aside the sale on the ground of its being one in contravention of the stay order is not one under section 47.[2]

67. Sale in contravention of injunction order.—Where a judgment-debtor seeks to set aside the sale on the ground that it was held during the pendency of a temporary injunction, his remedy, if any, is by an application under this section and not by a separate suit.[1] It has been held that where a sale takes place in contravention of an express direction of the Court, the latter has an *inherent* power to set it aside *suo motu*.[2]

68. Sale not warranted by decree. — The proper procedure to set aside a sale on the ground that it is not warranted by the terms of the decree or that it was held in contravention of the directions contained therein is, as between the parties to the suit, by an application under this section and not by a suit.[1]

69. Sale under time-barred decree. — A separate suit does not lie to set aside a sale in execution of a decree on the ground that at the time of execution it was barred by time; the remedy as between the parties to the suit is by an application under this section.[1] See also Order 21, Rule 92, Note 2.

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4. ('40) 27 AIR 1940 Rang 161 (162) : 1940 Rang L R 402. (Final mortgage decree—Application by mortgagee for sale—Death of mortgagor—Objection by legal representative on ground that property solely belonged to him and mortgagor had no interest therein—Objection held did not fall within ambit of S. 47—Proper remedy is by way of suit.)
('26) 13 AIR 1926 Pat 202 (204) : 4 Pat 696 (DB).
('29) 16 AIR 1929 Rang 275 (275) (DB).
Also see Note 46.

Note 66

1. ('42) 29 AIR 1942 Pat 146 (147). (Section 47 applies though application is described as one under O. 21, R. 90.)
† ('26) 13 AIR 1926 All 457 (459) (DB).
('24) 11 AIR 1924 All 698 (699) (DB).
2. ('28) 15 AIR 1928 Bom 189 (190) : 52 Bom 290 (DB).
[*See* ('40) 27 AIR 1940 Nag 372 (375). (Under S. 11 of Central Provinces Money-lenders Act, application for stay of execution lies to civil Court even after transfer of decree to Collector for execution — Sale by Collector sought to be declared void on ground of its being in contravention of stay order by civil Court—Application falls under Section 47.)]

Note 67

1. ('05) 2 All L Jour 694 (696) (DB).
2. ('31) 18 AIR 1931 Lah 344 (344): 12 Lah 602 (DB).
† ('33) 20 AIR 1933 Mad 399 (400, 401).
Also see O. 21 R. 92, Note 2.

Note 68

1. ('25) 12 AIR 1925 All 551 (552) (DB).
('75) 24 Suth W R 452 (452) (DB).
('28) 15 AIR 1928 Mad 140 (141) (DB).
('17) 4 AIR 1917 Mad 877 (879) (DB).
† ('12) 13 Ind Cas 133 (134) (DB) (Mad).
('28) 15 AIR 1928 Rang 215 (217).
[*See also* ('41) 28 AIR 1941 Pat 566 (572) (DB). (In performance of its duty of executing a decree the executing Court has no jurisdiction to hold a sale in contravention of the terms of the decree.)
('23) 10 AIR 1923 Bom 62 (62) : 46 Bom 914 (DB). (Property not subject to mortgage was so shown by plaintiff through mistake — Property was included in the decree and was sold under it—Sale is not nullity.)]
[But see ('25) 12 AIR 1925 All 236 (237) : 47 All 304 (DB). (Sale can be set aside under O. 21, R. 90.)]
Also see Note 35.

Note 69

1. ('13) 21 Ind Cas 938 (943) (DB) (Cal).

70. Sale without jurisdiction. — Even where the sale is held without jurisdiction,[1] as where, at the time of the sale the judgment-debtor is dead,[2] or the property is outside the territorial jurisdiction of the Court,[3] a party seeking to set aside the sale on that ground must do so under this section.

71. Other grounds for setting aside sale. — A judgment-debtor may seek to set aside an execution sale on grounds other than the ones set out above in Notes 54 to 70. The following are some of the cases in which only an *application* under this section lies and not a separate suit —

(a) Where the receiver of an insolvent's estate seeks to set aside an execution sale on the ground of a prior adjudication of the debtor.[1]

(b) Where the Official Receiver of an insolvent's estate seeks to set aside an execution sale of insolvent's property on the ground of want of notice to him under Order 21, Rule 22.[2]

(c) An objection by the judgment-debtor to the sale founded on a misdescription of the terms of the decree in the execution application.[3]

(d) An objection by the judgment-debtor that the execution sale was void on the ground that the auction-purchaser, the liquidator of the decree-holder company, was not competent to bid for, and purchase, any property as liquidator under law.[4]

(e) An objection that the sale in execution was void because the previous sanction for such sale of a particular authority necessary in the case was not obtained.[5]

(f) Where the decree-holder seeks to set aside a sale on the ground of material irregularity in that the permission granted to him to bid has been modified behind his back.[6]

(g) Where the sale is sought to be set aside on the ground of failure of the purchaser to make the deposit of 25 per cent. required under O. 21, R. 84.[7]

(h) Where it is sought to be set aside on the ground that the decree has been satisfied before the sale.[8]

(i) Where the decree-holder seeks to set aside the sale on the ground that the decree-holder's own property was sold by mistake instead of that of the judgment-debtor.[9] See also O. 21, R. 64, Note 6.

('78) 23 Suth W R 257 (258) (DB).
('73) 20 Suth W R 5 (6) (DB).
('70) 13 Suth W R 273 (274, 275) (DB).

Note 70

1. ('41) 28 AIR 1941 Pat 566 (568) (DB).
2. ('15) 2 AIR 1915 Cal 268 (271) (DB).
('90) 12 All 440 (446) (FB).
3. ('24) 11 AIR 1924 All 261 (262, 263) : 46 All 153.
('90) 17 Cal 699 (704) (FB).

Note 71

1. ('17) 4 AIR 1917 Mad 924 (925) (DB).
† ('35) 22 AIR 1935 Cal 503 (504):62 Cal 457 (DB). (The receiver is the representative of both the insolvent and his creditor.)
2. ('41) 28 AIR 1941 Mad 606 (607) (DB).
3. ('98) 8 Mad L Jour 115 (116).
4. ('28) 15 AIR 1928 Lah 666 (667) (DB).
5. ('42) 29 AIR 1942 Mad 509 (510) (DB).
6. ('25) 12 AIR 1925 Oudh 381 (382).
7. ('89) 16 Cal 33 (36, 39) (DB).
('11) 9 Ind Cas 66 (67) (DB) (Cal). (Failure to pay the amount makes the sale void.)
8. (1900) 22 All 86 (88) (DB). (Suit by decree-holder and judgment-debtor against auction-purchaser.)
('94) 16 All 5 (8) (DB).
('11) 36 Bom 156 (163):12 Ind Cas 911 (912) (DB).
('13) 21 Ind Cas 938 (942) (DB) (Cal).
('11) 9 Ind Cas 452 (452) (Low Bur).
[*See also* ('97) 21 Bom 463 (464). (*Bona fide* purchaser—Sale cannot be set aside.)
('10) 37 Cal 107 (116) (DB). (*Bona fide* purchaser —Sale cannot be set aside on ground of satisfaction of decree if the same is not certified to Court.)]
9. † ('28) 15 AIR 1928 Cal 865 (867) (DB).
[But see ('22) 9 AIR 1922 Mad 63 (63) (DB). (Remedy is by a separate suit.)]

(*j*) Where the sale is sought to be set aside on the ground that the petition to set aside the sale was compromised behind the applicant's back and in fraud of his rights,[10] or by the judgment-debtor's son without authority.[11]

(*k*) Where a receiver appointed under O. 40, R. 1 purchases the property in court-sale in the capacity of decree-holder without obtaining *special* leave for that purpose, even though he has obtained leave under O. 21, R. 72.[12]

71a. Miscellaneous. — Apart from the particular classes of questions relating to the execution, discharge or satisfaction of the decree, discussed in Notes 29 to 71, the following have also been held to be questions coming within the section:

(1) A question as to the legality of the procedure or the jurisdiction of the executing Court to order a sale.[1]

(2) An order deciding whether a decree is time-barred or not.[2]

(3) An order directing execution to issue or refusing to execute a decree.[3]

(4) An order recognising, or refusing to recognise, an assignment of a decree,[4]

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10. ('09) 3 Ind Cas 116 (117) (DB) (Cal).
11. ('02) 24 All 209 (210, 211) (DB).
12. ('32) 19 AIR 1932 Cal 672 (674) : 59 Cal 956 (DB).
[*See also* ('43) 30 AIR 1943 Mad 414 (414). (Receiver—Purchase by, of property under his receivership — Sale should be set aside on grounds of public policy—Sale whether by Court or Official Receiver is immaterial.)]
Also see O. 40, R. 1, Note 28.

Note 71a

1. ('29) 16 AIR 1929 Lah 449 (452) (DB).
('30) 17 AIR 1930 Mad 414 (415). (Objection regarding defect of attachment.)
('20) 7 AIR 1920 Lah 443 (444).
† ('20) 7 AIR 1920 Oudh 21 (22) (DB).
('28) 15 AIR 1928 Rang 40 (41):5 Rang 775 (DB). (Refusal of the transmitting Court to decide executability of decree and leaving it to the executing Court.)

2. ('24) 11 AIR 1924 Pat 683 (685, 686) (DB).
('29) 16 A I R 1929 All 287 (287) : 51 All 640 (DB).
('13) 21 Ind Cas 938 (940) (DB) (Cal).
('14) 1 AIR 1914 Lah 415 (416) : 1913 Pun Re No. 110 (DB).
('36) 23 AIR 1936 Mad 801 (801) (DB).
('27) 14 AIR 1927 Mad 842 (843) (DB).

3. ('15) 2 AIR 1915 Cal 238 (239) (DB).
('15) 2 AIR 1915 Mad 197 (198) : 37 Mad 29 : 12 Ind Cas 664 (666) (DB).
('15) 2 AIR 1915 P C 88 (89) (P C). (Disallowing judgment-debtor's objections to execution.)
('14) 1 AIR 1914 All 288 (289). (Do.)
('88) 1888 All W N 245 (246). (Do.)
('01) 28 Cal 81 (83) (DB). (Do.)
('83) 9 Cal 872 (874) (DB). (Do.)
('13) 19 Ind Cas 921 (922) (DB) (Lah). (Do.)
('16) 3 AIR 1916 Upp Bur 1 (2) : 2 Upp Bur Rul 119. (Order refusing to execute.)
('27) 14 AIR 1927 All 574 (575) (DB). (Do.)
('03) 25 All 443 (445) (DB).
('87) 9 All 229 (229):1887 All W N 19 (20) (DB). (Refusal to execute for the amount claimed.)
('83) 5 All 212 (213, 214) (DB). (Order requiring succession certificate before execution.)
('83) 7 Bom 301 (302) (DB). (Refusal of an order under O. 21, R. 21.)
('37) 24 AIR 1937 Cal 425 (426) (DB). (Order directing execution to proceed.)
('09) 1 Ind Cas 284 (284, 285) (DB) (Cal).
('29) 16 AIR 1929 Lah 390 (390). (Order holding that amount due under an instalment decree did not fall due under a default clause.)
('24) 11 AIR 1924 Lah 604 (604, 605). (Refusal to execute against the person of the judgment-debtor.)
('20) 7 AIR 1920 Lah 117 (118) (DB).
('35) 22 AIR 1935 Mad 647 (648).
('08) 31 Mad 406 (408) (DB).
('94) 17 Mad 394 (395) (DB). (An order under O. 21 R. 15 allowing one of several decree-holders to apply for execution.)
('26) 13 AIR 1926 Pat 202 (203) : 4 Pat 696 (DB). (On the ground that property comprised in the decree not saleable.)
('22) 9 AIR 1922 Pat 59 (60) (DB).
('36) 23 AIR 1936 Pesh 46 (47) (DB). (Order refusing execution and directing the filing of a fresh application.)
('17) 4 AIR 1917 Low Bur 179 (179) : 8 Low Bur Rul 300 (DB). (Refusal to execute a decree against a partner obtained against a firm.)

4. ('02) 25 Mad 545 (545) (DB).
('16) 3 AIR 1916 Cal 471 (472) (DB).
(1900) 27 Cal 670 (672) (DB).
('22) 9 AIR 1922 Lah 396 (397).
† ('38) 25 AIR 1938 Mad 78 (79).
('17) 4 AIR 1917 Mad 605 (606, 607) (DB).
('17) 4 AIR 1917 Mad 293 (294):40 Mad 299 (DB). (Order recognizing assignment and allowing execution is a decree.)
('15) 2 AIR 1915 Mad 1138 (1140) (DB).
('10) 6 Ind Cas 199 (199) (DB) (Mad).
('25) 12 A I R 1925 Pat 449 (450) : 4 Pat 120 (DB).
[*See* ('68) 10 Suth W R 144 (145) (DB).]
[But see ('35) 22 AIR 1935 Lah 609 (610) (DB). (Reversing AIR 1934 Lah 328.)
('29) 16 AIR 1929 Lah 51 (52) (DB).]

provided the dispute is not one merely between the decree-holder and his alleged assignee.[5]

(5) The determination of a question in execution as to who is the legal representative of a party to the suit.[6] (See also Note 27.)

(6) An order on an application for transfer of a decree.[7]

(7) An order directing mortgaged properties to be sold in a particular order.[8]

(8) All questions regarding liability to attachment and sale.[9]

(9) A question relating to the enforcement of reliefs granted by a decree.[10]

(10) An order for arrest of, or an order refusing to arrest, or an order deciding the legality or otherwise of the arrest of a judgment-debtor.[11]

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5. *See* ('41) 28 AIR 1941 Mad 161 (170) : ILR (1941) Mad 438 (FB). (Impliedly overruling 25 Mad 383.)

6. ('25) 12 AIR 1925 All 578 (579) : 47 All 365 (DB).
('26) 98 Ind Cas 783 (783) (Mad).

7. ('40) 27 AIR 1940 Cal 161 (162) (DB). (Objection to the *ex parte* order for transfer under S. 39 can be raised under S. 47, even though appeal from that order is time barred.)
('39) 26 AIR 1939 Cal 651 (654) (DB). (Order on objection by judgment-debtor to transfer of decree comes under S. 47.)
('04) 8 Cal W N 575 (577) (DB).
[*See* ('25) 12 AIR 1925 Oudh 481 (481) : 28 Oudh Cas 199 (DB). (*Quære* : Whether an order granting transfer falls under S. 47.)]
Also see S. 39 Note 16.

8. ('26) 13 AIR 1926 Mad 834 (835) (DB).
('24) 11 AIR 1924 Mad 365 (366) (DB).
('08) 7 Cal L Jour 270 (272) (DB).
('78) 4 Cal L Rep 27 (28) (DB).
('25) 12 AIR 1925 Pat 484 (485) (DB).

9. ('05) 9 Cal W N 972 (972) (DB).
('34) 21 AIR 1934 Nag 82 (82, 83): 30 Nag L R 135.
('76) 1 All 668 (669, 675) : 5 Ind App 87 (PC). (Appeal from order misconstruing a decree lies.)
('09) 1 Ind Cas 78 (78) (DB) (All). (Order under Section 63.)
('33) 20 AIR 1933 Bom 185 (186) (DB).
('17) 4 AIR 1917 Cal 182 (182) (DB). (Order under Section 63.)
('14) 1 A I R 1914 Cal 828 (829) : 41 Cal 418 (DB).
('97) 24 Cal 473 (487, 489) (SB).
('20) 7 AIR 1920 Lah 117 (118) (DB).
('26) 13 AIR 1926 Oudh 193 (194) (DB).
('17) 4 AIR 1917 Oudh 96 (99) (DB).
('08) 11 Oudh Cas 41 (42) (DB). (Order under S. 63.)
('23) 10 AIR 1923 Pat 134 (134) (DB).
('20) 7 AIR 1920 Sind 14 (15) : 13 Sind L R 210 (DB).
Also see Note 45.

10. ('27) 14 AIR 1927 Cal 411 (412) : 54 Cal 524 (DB). (Unexecuted decree for possession — Fresh suit for possession barred by S. 47.)
('22) 9 AIR 1922 Pat 407 (407) : 1 Pat 157 (DB). (Do.)
† ('21) 8 AIR 1921 All 369 (372) : 43 All 170 (DB). (Do.)
('96) 1896 All W N 69 (70) (DB).
('88) 1888 All W N 230 (231) (DB). (Decree declaring maintenance must be enforced in execution.)
('78) 2 Bom 494 (497) (DB). (Do.)
('98) 26 Cal 441 (447) (Do.)
† ('92) 19 Cal 139 (146) (FB). (Do.)
('72) 15 Suth W R 128 (129) (DB). (Do.)
('89) 12 Mad 183 (186) (DB). (Do.)
('87) 9 All 33 (34) (DB). (Decree declaring maintenance must be enforced in execution — Decree for maintenance by payment of a fixed rate per mensem, stands exactly on the footing of a decree ordering payment by instalments.)
('87) 1887 All W N 193 (193) (DB).
('22) 9 AIR 1922 Bom 380 (381) : 46 Bom 226 (DB). (Working out equities in partition decrees.)
('03) 5 Bom L R 648 (650) (DB). (Do.)
('26) 13 AIR 1926 Oudh 230 (231). (Do.)
('11) 9 Ind Cas 1034 (1037) (DB). (Cal).
('69) 1869 Pun Re No. 24.
('06) 29 Mad 181 (182) (DB).
('70) 6 Mad H C R 13 (14, 15) (DB).
('25) 12 AIR 1925 Nag 239 (240).
('31) 18 AIR 1931 Pat 296 (298).
('85) 9 Bom 108 (110) (DB). (Decree should contain directions for paying future maintenance.)
[But see ('94) 16 All 179 (181) (DB). (Decree did not fix any time for payment of future maintenance — Separate suit maintainable.)]

11. ('09) 32 All 3 (7) : 3 Ind Cas 46 (46, 47) (DB). (Order for arrest.)
('24) 11 AIR 1924 Lah 360 (360). (Do.)
('35) 22 AIR 1935 All 364 (366).
('37) 24 AIR 1937 Lah 706 (707).
('22) 9 AIR 1922 Lah 259 (259). (Refusing to arrest.)
('19) 6 AIR 1919 Lah 15 (16) : 1 Lah 77 (DB). (Do.)
('95) 1895 Pun Re No. 69, page 338. (Order for arrest.)
('24) 11 AIR 1924 Mad 900 (900) (DB). (Deciding legality of arrest.)
('17) 4 AIR 1917 Mad 187 (187) (DB). (Do.)
('10) 5 Ind Cas 909 (910) (DB) (Mad). (Do.)
('98) 21 Mad 29 (30) (DB). (Do.)
('36) 23 AIR 1936 Rang 367 (367).
[But see ('29) 16 AIR 1929 Rang 161 (161) : 7 Rang 110. (If objection is not taken and decided there is no decision of a question under this section.)]
Also see S. 55 N. 18 and O. 21, R. 40 N. 9.

(11) An order enforcing a decree under O. 21, R. 32.[12]

(11a) An order on an application under O. 21, R. 42 for attachment before final decree.[13]

(12) A question relating to restitution of property or refund of money.[14] [There, however, seems to be a conflict of decisions on this point. See section 144, Note 33.]

(13) An order deciding whether anything is due under a decree.[15]

(13a) An order regarding the right of the decree-holder to obtain a further sum by way of interest upon the decretal amount.[16]

(13b) An order on an application seeking reduction of the decretal amount under section 8 of the U. P. Debt Redemption Act of 1940.[17]

(14) An order determining a question relating to the satisfaction of a decree.[18]

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12. ('19) 6 AIR 1919 Mad 1071 (1071) (DB).
('19) 6 AIR 1919 Cal 674 (675) : 46 Cal 103 (DB).
('14) 1 AIR 1914 All 105 (106).
('31) 18 AIR 1931 Pat 179 (180, 181) (DB). (Decree for specific performance of sale — No express provision for delivery of possession in decree — Executing Court can order possession as incidental relief.)
[*See also* ('67) 7 Suth W R 372 (373) (DB).)]
Also see O. 21, R. 32, Note 9.

13. ('41) 28 AIR 1941 Cal 357 (360) : ILR (1941) 1 Cal 363 (DB).

14. ('05) 28 Mad 355 (356) (DB).
('33) 20 AIR 1933 All 429 (430, 431) (DB).
('98) 8 Mad L Jour 276 (277) (DB).
† ('23) 10 AIR 1923 All 394 (396):45 All 369 (FB). (Order for restitution passed under S. 151, C. P. Code.)
† ('31) 18 AIR 1931 Cal 779 (781) (DB). (Do.)
('22) 9 AIR 1922 All 190 (190) (DB).
('04) 1904 All W N 55 (55) (DB). (Refund of money taken by decree-holder under decree since annulled.)
('02) 24 All 291 (293, 294) (DB). (Refund of sale proceeds to auction-purchaser from decree-holder on setting aside sale.)
('81) 10 Cal L Rep 573 (576, 577) (DB). (Suit by decree holder for money refunded to auction-purchaser—Insolvency of judgment-debtor — Barred by this section.)
('31) 18 AIR 1931 Mad 588 (589, 590). (Restitution of possession includes removal of obstruction to possession put up subsequent to original decree.)
('12) 14 Ind Cas 836 (836) (DB) (Mad).
† ('39) 26 AIR 1939 Nag 101 (102) : I L R (1939) Nag 492. (Defendant applying for refund of surplus left after satisfying decree.)
('23) 10 AIR 1923 Oudh 16 (17, 18).
[*See* ('40) 27 AIR 1940 Sind 191 (192). (Refund of money deposited under protest by third person to save his property from being wrongfully attached—Separate suit not necessary.)
('85) 11 Cal 362 (365).]
[But see ('30) 17 AIR 1930 Bom 132 (134) : 54 Bom 162. (Claim for refund of money paid under a decree on ground of subsequent events — S. 47 no bar.)
('17) 4 AIR 1917 Mad 217 (217) (DB). (Refund of poundage fee to third party auction-purchaser under O. 21 R. 93 — Not a question under this section.)]

15. † (1900) 22 All 243 (246) (DB).
('06) 3 Cal L Jour 276 (279) (DB).
('25) 12 AIR 1925 Cal 948 (949) (DB). (Claim for interest omitted in execution application.)
('36) 23 AIR 1936 Lah 725 (727). (That the application purports to be one under S. 151, C. P. C. does not take it out of the purview of S. 47.)
('02) 26 Mad 237 (238) (DB).
('87) 10 Mad 367 (368) (DB).

16. ('42) 29 AIR 1942 Mad 442 (443) (DB).

17. ('42) 29 AIR 1942 All 394 (396) : ILR (1943) All 48 (FB).

18. ('42) 29 AIR 1942 Cal 451 (452) (DB). (Application to reopen execution proceeding on the ground that decree-holder's pleader was misled by judgment-debtor's agent in giving credit in excess of that to which judgment-debtor was entitled.)
('42) 29 AIR 1942 Mad 260 (265): ILR (1942) Mad 360. (Decree-holder becoming legal representative of judgment-debtor—Claim of rateable distribution along with other decree-holders — Though S. 73 may not apply decree-holder is entitled to contend under S. 47 that the assets must be first available for his own decree debt and that only the balance should be available for the other decree-holders.)
('42) 29 AIR 1942 Cal 342 (342). (Application by judgment-debtor for dismissal of execution case on full satisfaction in view of Bengal Money-lenders Act comes under S. 47.)
('40) 27 AIR 1940 Mad 458 (461) (DB).
('99) 22 Mad 182 (186) (DB).
('34) 21 AIR 1934 Cal 761 (761) (DB). (Sum paid in satisfaction not given credit — Objection falls under this section and decision thereon is appealable.)
('30) 17 AIR 1930 PC 86 (90) (PC).
('18) 5 AIR 1918 All 339 (341) (DB).
('35) 22 AIR 1935 Cal 645 (645) (DB). (Application to reopen satisfaction entered up—Question is one under Section 47.)
('32) 19 AIR 1932 Cal 414 (416) (DB). (Plaintiff advancing money to receiver under orders of Court —Recovery of such amount from judgment-debtor is a question under this section.)
('29) 16 AIR 1929 Cal 670 (671, 672) (DB). (But mistake arising out of negligence of party is no valid ground.)

(15) Disputes between the decree-holder and judgment-debtor under S. 50 and section 52.[19]

(16) Question of compensation payable by a judgment-debtor in possession in respect of waste committed by him.[20]

(17) An order enlarging, or refusing to enlarge, time for payment prescribed by a decree.[21]

(18) A question as to what was sold at an execution sale or as to the legality of the sale.[22]

(19) A question as to discharge of a receiver.[23]

(20) Enquiry regarding substituted share of judgment-debtor's property or accretions to his property.[24]

('10) 8 Ind Cas 4 (5) (DB) (Cal). (Order distributing sale proceeds between first and second mortgagees.)
('01) 5 Cal W N 627 (629) (DB). (Application to re-open execution proceeding on the ground that satisfaction was reported by mistake.)
('75) 23 Suth W R 156 (157) (DB).
('36) 23 AIR 1936 Lah 562 (564) (DB). (Decision in an application by the mortgagor-judgment-debtor under O. 34, R. 5 depositing money in execution before confirmation of sale.)
('34) 21 AIR 1934 Lah 535 (536). (Decree consigned to record room as satisfied on decree-holder being given cheques — Cheques not cashed — Suit on basis of cheques is barred — Jurisdiction of executing Court to consider matter is not taken away.)
('33) 20 AIR 1933 Lah 361 (362).
(1900) 1900 Pun Re No. 40, page 147.
† ('24) 11 AIR 1924 Oudh 104 (106) : 26 Oudh Cas 345. (Question whether payment under a pre-emption decree was made in time.)
('98) 1898 Pun Re No. 38, page 134. (Do.)
('92) 1892 Pun Re No. 67, page 245. (Question arising in execution of pre-emption decree.)
('79) 1879 Pun Re No. 32, page 95. (Do.)
('35) 22 AIR 1935 Mad 464 (465) (DB). (Order directing party to make a payment is one in execution.)
† ('19) 6 AIR 1919 Mad 840 (841) (DB). (Question of decree-holder entering satisfaction while decree under attachment.)
('08) 31 Mad 354 (361) (DB).
† ('38) 25 AIR 1938 Nag 363 (364).
('13) 18 Ind Cas 312 (313) (Oudh).
(1900) 3 Oudh Cas 371 (383, 384) (DB).
('34) 21 AIR 1934 Pat 202 (202). (Order on application to set aside order recording satisfaction of decree.)
('32) 19 AIR 1932 Rang 54 (55) (DB). (Order under O. 20, R. 11 directing payment in instalments. AIR 1926 Rang 192 : 4 Rang 247 Followed.)
('29) 16 AIR 1929 Rang 191 (192). (Do.)
[*See also* ('36) 23 AIR 1936 Cal 537 (539). (Purchase of the equity of redemption of one of the several mortgaged properties or of share of the properties included in the mortgage decree by the mortgagee decree-holder before his execution does not amount to *pro tanto* satisfaction of the decree.)]
[But see ('82) 4 All 420 (422) (DB). (Whether in a pre-emption decree, amount was deposited in time is not under S. 47.)
('14) 1 AIR 1914 Oudh 147 (148) : 17 Oudh Cas 14 : 21 Ind Cas 193 (194). (Do.)
('08) 11 Oudh Cas 144 (146, 147). (Do.)
('15) 2 AIR 1915 Oudh 171 (172). (Order passed under O. 20 R. 14 cl. (1), not within this section.)]

19. ('95) 17 All 245 (250, 251) (DB).
('27) 14 AIR 1927 Rang 127 (127) : 5 Rang 44 (DB).
('18) 5 AIR 1918 Lah 182 (183, 184).
('25) 12 AIR 1925 Nag 380 (381).
('30) 17 AIR 1930 Oudh 268 (270) (DB).
('37) 24 AIR 1937 Rang 531 (533).

20. ('23) 10 AIR 1923 Bom 391 (392) (DB).
† ('33) 20 AIR 1933 Mad 825 (832) : 57 Mad 49 (DB).
('25) 12 AIR 1925 Bom 385 (385) (DB).
('35) 22 AIR 1935 Lah 170 (171). (Damage caused to mortgaged property before confirmation of sale.)
('35) 22 AIR 1935 Mad 280 (281) (DB). (Partition decree awarding property to a party — Such property damaged between date of decree and date of possession — Execution Court should assess the damages.)
('06) 2 Oudh Cas 315 (318). (Forcible appropriation of crops under attachment by decree-holder.)
('24) 11 AIR 1924 Pat 362 (364) (DB).
[But see ('33) 20 AIR 1933 Lah 168 (168). (*Obiter.*)
('37) 24 AIR 1937 Mad 879 (881). (Do.)]

21. ('02) 26 Bom 121 (124, 125) (DB). (Decree for redemption.)
('13) 35 All 116 (119) : 18 Ind Cas 14 (15) (DB).
('14) 1 AIR 1914 All 288 (289).
('24) 11 AIR 1924 Oudh 179 (179).
[*See also* ('29) 16 AIR 1929 Lah 141 (141). (Order under O. 21 R. 40 within S. 47.)]
[But see ('16) 3 AIR 1916 Mad 694 (695) : 39 Mad 876 (DB).
('27) 14 AIR 1927 Rang 311 (312) : 5 Rang 615 (DB). (Case of specific performance.)]

22. ('10) 7 Ind Cas 91 (92) (DB) (Cal).
('88) 10 All 570 (576) : 1888 All W N 231 (233). (Legality of private sale was in question.)

23. ('18) 5 AIR 1918 Pat 60 (61) : 3 Pat L Jour 513 (DB). (Receiver appointed during execution proceedings.)
('80) 5 Bom 45 (48) (DB). (Receiver for management of estate appointed by a decree.)
Also see S. 51 N. 9.

24. ('22) 9 AIR 1922 P C 54 (55) : 1 Pat 378 : 49 Ind App 139 (PC).

(21) Questions relating to the enforcement of security or relating to orders requiring security under O. 41, R. 5.[25]

(21a) Question whether the decree-holder is entitled to set off under O. 21, R. 18.[26]

(22) As to questions under O. 21, R. 71 and S. 73, see Notes thereon.

(23) As to application by decree-holder purchaser for refund of purchase money where the sale is set aside in a separate suit, see Note 4 on O. 21, R. 93.

(24) Questions as to the absence of or irregularity in the attachment of the property to be sold.[27]

(25) Question relating to payments by instalments under O. 20, R. 11, as amended in Madras, Nagpur and Rangoon.[28]

(26) Question whether an instalment decree is executable in its entirety by reason of default in payments.[29]

(27) Question as to the liability of the family property in execution of a decree obtained against the manager representing the *tarwad*.[30]

The following have been held to be *questions not relating to execution, discharge or satisfaction of the decree* :

(1) An order made by a Court exercising a power given to it by a provision in a scheme framed in a scheme suit.[31]

(2) Questions relating to the rights of a third party subrogated to the rights of a mortgagee decree-holder by payment at the instance of the mortgagor.[32]

(3) A mortgagor's right to possession as against the mortgagee, who is entitled under a decree to be in possession till his debt is paid off.[33]

(4) An objection by a prior mortgagee to the sale of the mortgaged property in execution of puisne mortgagee's decree.[34]

('17) 4 AIR 1917 Pat 253 (257) : 2 Pat L Jour 496 (DB).
('25) 12 AIR 1925 P C 86 (88) : 52 Ind App 137 : 49 Bom 233 (PC). (Accretions.)
('29) 16 AIR 1929 Oudh 263 (264, 265) (DB).
('17) 4 AIR 1917 Pat 126 (127, 128) : 3 Pat L Jour 339.

25. ('18) 5 AIR 1918 Mad 442 (442) : 41 Mad 327 (DB).
('30) 17 AIR 1930 Pat 108 (109, 110) : 8 Pat 801 (DB). (AIR 1919 PC 55: 42 All 158: 46 Ind App 228: 22 Oudh Cas 212 (PC) followed.)
('82) 8 Cal 477 (478) (DB).
('34) 21 AIR 1934 Rang 231 (232). (*Obiter.*)

26. ('42) 29 AIR 1942 Pat 197 (198) (DB).

27. ('41) 28 AIR 1941 Lah 327 (331) (DB). (Irregularity for want of proper representation of a minor in the execution proceeding.)
('30) 17 AIR 1930 Mad 414 (415).

28. ('26) 13 AIR 1926 Rang 192 (192) : 4 Rang 247.
('32) 19 AIR 1932 Rang 54 (55) (DB).

29. ('29) 16 AIR 1929 Lah 390 (391).

30. ('40) 27 AIR 1940 Mad 165 (166, 167).

31. ('41) 28 AIR 1941 Cal 618 (621) (DB).
('25) 12 AIR 1925 P C 155 (156) (PC).
('26) 13 AIR 1926 Mad 130 (130) (DB).
('26) 13 AIR 1926 Bom 167 (167) (DB). (Power exercised by District Judge as *persona designata*.)
('27) 14 AIR 1927 Mad 1110 (1110) (DB).
[*See* ('38) 25 AIR 1938 Rang 363 (364) (DB). (Orders passed merely for carrying out a scheme are orders in execution and appealable under S. 47 —AIR 1925 P C 155 (PC) distinguished.)]
[But see ('14) 1 AIR 1914 Low Bur 226 (228) (DB).]

32. ('25) 12 AIR 1925 Mad 129 (130, 131).
('05) 27 All 400 (402) (DB).
† ('05) 27 All 325 (332, 333) : 32 Ind App 128 (PC).
('22) 9 AIR 1922 Lah 358 (360) (DB).
[*See* ('32) 19 AIR 1932 All 49 (50) (DB). (Questions as to priority of mortgages more for suits than for execution proceedings.)]
[*See also* ('09) 31 All 364 (366) : 1 Ind Cas 744 (744) (DB).]
[But see ('10) 37 Cal 282 (284) : 5 Ind Cas 142 (143). (But the rights of a prior mortgagee-defendant getting subrogated must be decided in execution.)]

33. ('16) 3 AIR 1916 Cal 43 (44) (DB). (Mortgagee in possession in pursuance of a decree for ejectment —Suit for redemption not barred by S. 47.)
('98) 20 All 506 (510) (DB).
('04) 6 Bom L R 1100 (1101) (DB).
('75) 12 Bom H C R 160 (162).

34. ('27) 14 AIR 1927 Mad 431 (432) (DB).
('25) 12 AIR 1925 Nag 185 (185, 186).

(5) The enforcement of a right under a decree which merely *declares* it.[35]

See also the undermentioned cases.[36]

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35. ('14) 1 AIR 1914 All 103 (103, 104). (Declaration that defendant must vacate when plaintiff desires.)
('28) 15 AIR 1928 Bom 365 (366) (DB).
('36) 164 Ind Cas 921 (925) (DB) (Cal).
[*See also* ('06) 23 All 72 (73). (Decree-holder making construction in excess of decree—Application for demolition under S. 47 does not lie.)
('05) 2 All L Jour 573 (575). (Do.)]

36. ('43) 1943 P W N 45 (46, 47) (DB). (Application to amend plaint in mortgage suit, decree and sale certificate to correct description of properties —Order rejecting falls under S. 47.)
('42) 29 AIR 1942 Lah 153 (160) : I L R (1942) Lah 559 (FB). (Order for sale under O. 21, R. 66, C.P. Code, determining rights and liabilities between decree-holder and judgment-debtors falls under Section 47.)
('41) 28 AIR 1941 Mad 235 (238) : I L R (1941) Mad 261 (FB). (Proceedings under S. 19, Madras Agriculturists Relief Act, cannot be regarded as proceedings in execution and therefore S. 47, C. P. Code can have no application : AIR 1940 Mad 418 approved.)
('41) 28 AIR 1941 Mad 810 (811) (DB). (A partial reduction of the amount payable under a decree by the wiping out of the interest amounts to an amendment of the decree and cannot be said to fall under S. 47, C. P. Code, as it is not a matter relating to execution of the decree : A I R 1941 Mad 235 : I L R (1941) Mad 261 (FB) applied.)
('41) 28 AIR 1941 Pat 408 (409) (DB). (Order setting aside execution sale for want of stamps is one under this section.)
('41) 28 AIR 1941 Pesh 8 (8). (Order declining to interfere on application under S. 9, N. W. F. P. Agriculturists Debtors' Relief Act is not decision under S. 47 — No appeal from such order.)
('40) 27 AIR 1940 Bom 10 (11):I L R (1939) Bom 708. (Property wrongly described in decree—Application to Court passing the decree to amend the same—Matter does not relate to execution of decree — Order refusing amendment not an order under Section 47.)
('40) 27 AIR 1940 Cal 82 (83). (Compromise decree providing for execution of a lease deed by defendant—Question as to specific performance of lease comes within S. 47.)
('40) 27 AIR 1940 Cal 161 (162) (DB). (Order of transfer under S. 39, C. P. Code, is one under S. 47.)
('40) 27 AIR 1940 Lah 59 (61) (DB). (Order confirming sale set aside—Application by auction-purchaser for compensation for improvements—Order on such application is not under S. 47—The question is between auction purchaser and judgment-debtor and does not relate to execution, discharge and satisfaction of the decree.)
('40) 27 AIR 1940 Mad 54 (55). (Order setting terms of sale proclamation — No decision as to rights or liabilities of parties — Order not under S. 47.)
('40) 27 AIR 1940 Mad 296 (297). (Instalment mortgage bond — Default clause giving right to sue for whole amount on default in payment of two consecutive instalments—Default—Suit for over-due instalments only—Decree for sale—Objection in execution that sale should not be subject to remaining balance—*Held*, objection not really one to manner of execution so much as to decree and therefore could not be raised in execution.)
(40) 27 AIR 1940 Nag 336 (337) : I L R (1942) Nag 131. (Decree on mortgage—Defendant failing to pay amount decreed and plaintiff put in possession as per decree—Subsequent suit by defendant for possession alleging satisfaction of mortgage out of income barred as the suit is based on the decree and not on the original transaction.)
('39) 26 AIR 1939 Mad 796 (797) (DB). (Order under S. 23, Madras Agriculturists Relief Act — No appeal lies, as question does not relate to execution, discharge or satisfaction.)
('39) (1939) 2 M L J 609 (609) (DB). (Order on an application under S. 19 of the Madras Agriculturists' Relief Act, made while no proceedings in execution are pending is not appealable.)
('11) 9 Ind Cas 823 (823) (Lah). (Order of Court staying issue of warrant of attachment on judgment-debtor's representation that he would pay the amount within a particular time.)
('33) 20 AIR 1933 Pat 248 (249). (Partition decree among cosharers giving plaintiff right to realize certain rents — Another cosharer collecting it — Separate suit for such rent is not barred.)
('69) 13 Moo Ind App 69 (76) (PC). (Claim for damages in respect of property purchased not barred by prior litigation.)
('37) 24 AIR 1937 All 635 (636) (DB). (Decision of a claim in accordance with O. 38, R. 8 is not one under S. 47.)
('29) 16 AIR 1929 All 666 (666) (DB). (Extending time fixed by a decree not a decision under S. 47, and hence not appealable.)
('14) 1 AIR 1914 All 440 (441). (Suit for declaration of title under a prior decree for pre-emption not barred by S. 47.)
(1900) 1900 All W N 135 (136) (DB). (Decree for possession—Judgment-debtor not allowed to set up claim for maintenance in execution proceedings.)
('95) 17 All 243 (244) (DB). (Order striking off execution but maintaining attachment.)
('39) 26 AIR 1939 Bom 182 (183):ILR (1939) Bom 389 (DB). (An order refusing to direct the value of the property to be stated in the sale proclamation under O. 21, R. 66 is not a decree under S. 47 and is not appealable.)
('31) 18 AIR 1931 Bom 295 (296, 297). (Extraneous terms forming consideration for a compromise decree—Executable.)
('39) 26 AIR 1939 Cal 334 (335). (Court receiving notice, after sale, under the Bengal Agricultural Debtors Act—Question whether sale should be set aside is one under S. 47.)
('37) 24 AIR 1937 Cal 211 (212) : I L R (1937) 1 Cal 781 (DB). (An objection by the judgment-debtor that a scheme sanctioned by the Court under S. 153 of the Companies Act has superseded the decree which has, therefore, become incapable of execution, relates to the execution or discharge of the decree and consequently comes within S. 47.)

72. "Shall be determined by the Court executing the decree and not by a separate suit." — All objections that can be raised in execution under this section "shall be determined by the Court executing the decree and not by a separate suit."[1] The words "by a separate suit" have given rise to a conflict of decisions as to

('36) 164 Ind Cas 802 (803) (Cal). (Where the execution proceedings taken in the Civil Court in pursuance of an award under the Co-operative Societies Act are set aside, and the Court passes an order under S. 151, C. P. Code, remitting the award to the arbitrator for rectification of certain errors therein, the order is not one falling under S. 47.)

('33) 20 A I R 1933 Cal 668 (672) : 60 Cal 801. (Trusts—Creditor of trustee—Right of subrogation to trustee's right of indemnity can be decided in suit by creditor against trustee, but not in execution.)

('25) 12 AIR 1925 Cal 286 (288). (Enforcement of provisions in a compromise decree extraneous to the subject-matter of suit is by separate suit though such provisions form consideration for compromise.)

('19) 6 AIR 1919 Cal 806 (807) (DB). (Order merely allowing a payment directed by the decree.)

('13) 19 Ind Cas 904 (905) (DB) (Cal). (Order allowing decree-holder to withdraw execution proceedings.)

('12) 16 Ind Cas 543 (545) (DB) (Cal). (Application by minor after majority to set aside sale on the ground of negligence of guardian.)

('08) 7 Cal L Jour 436 (438). (Refusal to grant sale certificate.)

('06)) 4 Cal L Jour 211 (219) (DB). (Question whether a person has acquired a valid title in sale.)

(1900) 4 Cal W N 39 (40) (DB). (Order on an application for review of an order dismissing an execution case for non-payment of process fees.)

('23) 10 AIR 1923 Pat 180 (183 (DB). (Do.)

('99) 26 Cal 529 (531) (DB). (Order amending a sale certificate.)

('97) 20 Mad 487 (489) (DB). (Do.)

('38) 25 AIR 1938 Lah 214 (215, 216) (DB). (Application for temporary alienation of judgment-debtor's land — Mortgage created and mortgagee given possession though he had not paid the money —Decree recorded as fully satisfied by mortgage— Subsequent suit by decree-holder against mortgagee for the money not barred, as question was not one relating to execution, discharge or satisfaction of decree.)

('38) 25 A I R 1938 Lah 4 (5). (Amendment of decree under Ss. 151 and 152.)

('27) 14 AIR 1927 Lah 337 (337). (Order setting aside confirmation of sale.)

('24) 11 AIR 1924 Lah 405 (407) (DB). (Infringement of right declared by a decree — S. 47 does not apply.)

('18) 5 AIR 1918 Lah 63 (63): 1918 Pun Re No. 43. (Order amending a decree.)

('14) 1 AIR 1914 Lah 24 (25): 1914 Pun Re No. 12 (DB). (Suit against prior mortgagee for redemption and for possession against mortgagor decreed in favour of subsequent mortgagee —Subsequent suit for possession against mortgagor on the ground that redemption money had been paid not barred —Section 47.)

('07) 1907 Pun Re No. 5, p. 30. (Section 47 bars a regular suit where question relating to execution is raised *bona fide*.)

('38) 25 A I R 1938 Mad 307 (313) (DB). (Decree in partition suit not engrossed on proper non-judicial stamp — Decree-holder applying to executing Court for having decree engrossed on proper stamp —Order of executing Court is not one under S. 47.)

('36) 23 A I R 1936 Mad 733 (742, 743) (DB). (Question of paramount title cannot be raised in proceedings for execution of mortgage decree.)

('28) 15 AIR 1928 Mad 296 (297). (Application by plaintiff for payment of money deposited by petitioner when applying for setting aside *ex parte* decree.)

('18) 5 AIR 1918 Mad 914 (915) (DB). (Refusal of an application for cheque.)

('08) 31 Mad 37 (39, 40). (Claim for damages in respect of property purchased.)

('30) 17 AIR 1930 Nag 199 (200): 26 Nag L R 187. (Landlord acquiring the interest of judgment-debtor under S. 6, C. P. Tenancy Act, was held not to represent the judgment-debtor within the meaning of S. 47.)

('23) 10 AIR 1923 Nag 327 (328). (Whether crops passed in a pre-emption decree which was silent about this.)

('29) 16 AIR 1929 Oudh 309 (310) (DB). (Application for withdrawal of money in Court was treated as application for execution.)

('39) 26 AIR 1939 Pat 242 (243) (DB). (Decree-holder attaching surplus profits of ghatwal estate raising objections to certain items in the estimate of receipts and expenditure of the estate — Order passed on objections in appealable.)

('23) 10 AIR 1923 Pat 44 (44, 45) (DB). (Question of contribution as between defendants in a mortgage suit.)

('38) 25 AIR 1938 Rang 292 (293) (DB). (Application under O. 21 R. 22 falls under this Section.)

Note 72

1. ('15) 2 AIR 1915 P C 88 (89) (PC).

('33) 20 AIR 1933 Mad 825 (833) : 57 Mad 49 (DB). (Section is mandatory—Court has no discretion to refer parties to suit in respect of a matter falling under the Section.)

('71) 3 N W P H C R 62 (63).

† ('31) 18 AIR 1931 Bom 114 (118).

('20) 7 AIR 1920 Cal 537 (538) (DB).

('01) 28 Cal 492 (495, 496).

('02) 1902 Pun Re No. 8, page 30.

('33) 20 AIR 1933 Mad 340 (341). (Party to suit cannot evade this rule by joining with a stranger.)

† ('33) 20 AIR 1933 Mad 166 (167) : 56 Mad 447 (DB). (When once the Court finds that resort to S. 47 is the proper remedy it has no option but to decide; it cannot refer the parties to a suit.)

✠ ('31) 18 AIR 1931 Rang 117 (121): 9 Rang 305 (FB).

whether the bar of suit applies only where the questions are raised by a party *as plaintiff* in a suit, or whether it applies to such questions raised in *defence* to a suit as well. The High Court of Calcutta has held that the section bars a plea in *defence* also on the ground that the words "shall be determined by the Court executing the decree" give *exclusive jurisdiction* over the matter to the Court executing the decree, and cannot be merely construed to mean that the executing Court must determine it *if it is raised* in the course of execution proceedings.[2] The High Court of Bombay,[2a] the Judicial Commissioner's Court of Nagpur,[2b] and the Chief Court of Oudh[3] have held the same view. But it has been held by the Calcutta High Court that where the defendant has been kept out of knowledge of the execution proceedings, until after the suit has been brought, by the fraud of the decree-holder, he could raise such objections by way of defence to the suit.[4]

The High Court of Madras has, on the other hand, held that the bar is not applicable to pleas in defence.[5] It has followed the undermentioned case of the Calcutta High Court[6] which held that the words "by a separate suit" cannot be taken to mean "in a separate suit." In view of the fact, however, that the said case of the Calcutta High Court has been overruled by a later Full Bench of that Court,[7] the Madras decisions will have to be reconsidered. A separate suit is not barred where under the provision of any special law a remedy by suit is available.[8]

It has been held that a plea that a suit is barred under this section can be raised for the first time in appeal as it is a pure question of law.[9]

Where a person has successfully opposed an application under S. 47 on the ground that that section did not apply, he cannot subsequently raise a plea in a suit brought by the applicant that the suit was barred by S. 47.[10]

The emphasis under the section is not on the word "determine" but on the Court by which the question is to be determined. So, when a question arises whether the Court deciding an objection to execution after the decree-holder has expressed his desire to withdraw his application for execution acts under this section, the section cannot furnish a direct answer. But it has been held that notwithstanding the decree-holder's desire to withdraw the application for execution, the Court's decision comes under this section.[11]

73. **"Determined," meaning of.** — The word "determined" shows that the questions contemplated by the section are to be *finally* disposed of and the effect of the word is therefore to give the Court executing the decree jurisdiction to dispose of finally such questions by granting appropriate relief.[1]

2.‡('29) 16 AIR 1929 Cal 374 (379) : 57 Cal 403 (FB). (Overruling 24 Cal 355; 26 Cal 946; 7 CWN 67; 4 Ind Cas 168; AIR 1922 Cal 311—The decision in AIR 1929 Cal 247 : 56 Cal 467 to the contrary must also be considered to be no longer law.)
† ('27) 14 AIR 1927 Cal 106 (108): 53 Cal 837 (DB). [*See also* ('11) 10 Ind Cas 90 (93) (Cal).]

2a. ('10) 7 Ind Cas 457 (458) (Bom). (Judgment-debtor not allowed to raise objection to sale by way of defence to suit.)

2b. ('31) 18 AIR 1931 Nag 27 (28, 29).

3. ('39) 1939 A W R (CC) 94 (95).

4. ('32) 19 AIR 1932 Cal 825 (827) : 59 Cal 1242 (DB).
('29) 16 AIR 1929 Cal 247 (249): 56 Cal 467 (DB).

5. † ('21) 8 AIR 1921 Mad 279 (280) (DB).
† ('09) 32 Mad 242 (252): 1 Ind Cas 221 (222, 226) (FB).
('09) 1 Ind Cas 193 (194) (DB) (Mad).

6. ('97) 24 Cal 355 (357) (DB).

7.‡('29) 16 AIR 1929 Cal 374 (379): 57 Cal 403 (FB).

8. ('41) 1941 Oudh W N 848 (848) (BR). (Ejectment under S. 61 of the Oudh Rent Act cannot be set aside by an objection under S. 47, C. P. Code.)

9. ('39) 26 AIR 1939 Mad 867 (874): ILR (1940) Mad 123 (DB).
[But see ('36) 161 Ind Cas 43 (45) (DB) (Nag).]

10. ('38) 25 AIR 1938 Lah 525 (526).
('29) 16 AIR 1929 Nag 79 (80).

11. ('43) 30 AIR 1943 Pesh 67 (69).

Note 73

1. ('40) 27 AIR 1940 Pat 420 (422) : 19 Pat 524 (DB).
('14) 1 AIR 1914 Mad 91 (93).

74. "Court executing the decree," meaning of. — "The Court executing the decree" means only the Court executing the decree *at the time when the application is made.* Therefore, it does not include the Court which has executed the decree and has thereby become *functus officio*,[1] or an Appellate Court.[2] A Collector executing a decree transferred to him is not a "Court executing a decree" within the meaning of this section.[3] The Court which sends the decree to the Collector remains "the Court executing the decree" and hence a question coming under this section can be entertained by such Court even after the decree has been transferred to the Collector for execution.[4] The words "the Court executing the decree" do not restrict the applicability of the section to proceedings initiated by the decree-holder. The section also applies to proceedings initiated by the judgment-debtor.[5] See also Note 2 on section 70.

75. Powers of the executing Court. — See Notes on Section 38 generally.

76. Power to construe decree. — Where there is no ambiguity in the terms of a decree the Court is bound to interpret it according to its plain meaning and cannot ignore its terms or assume mistake on the part of the parties.[1] Where, however, there is any *ambiguity* in the decree, the executing Court may, and should, construe the decree in order to ascertain its precise meaning[2] and, for this purpose, it may refer to the judgment and the pleadings in the case.[3] In construing an appellate decree, the pleadings and the decree of the *trial* Court may be referred to,[4] but not the statements in the judgment of the first Court which are not based on pleadings.[5] See also Note 9 on section 38.

Note 74

1. ('84) 10 Cal 538 (540) (DB).
(1900) 23 Mad 377 (380) (DB). (Includes applications made by the judgment-debtor.)
('71) 6 Mad H C R 304 (306).
2. ('15) 2 AIR 1915 Mad 41 (41) (DB).
((05) 29 Bom 71 (73) (DB).
3. † ('25) 12AIR 1925 All 146(149): 47 All217(DB).
('38) 25 AIR1938 Oudh 188 (189): 14 Luck 213(DB).
Also see O. 21 R. 92 Note 11.
4. † ('38) 25 AIR 1938 Oudh 188 (189).
5. (1900) 23 Mad 377 (380, 382) (DB).

Note 76

1. ('10) 6 Ind Cas 75 (76) (DB) (All).
† ('16) 3 AIR 1916 All 207 (208) (DB).
✠('23) 77 Ind Cas 167 (168, 169) (DB) (Cal).
('18) 5 AIR 1918 Cal 245 (246) (DB).
† ('17) 4 AIR 1917 Cal 288 (289) (DB).
('30) 17 AIR 1930 Lah 589(591). (Wording of the decree clear—Decree cannot be interpreted in the light of the reasoning or phraseology in the judgment.)
('25) 12 AIR 1925 Lah 470 (471).
('24) 11 AIR 1924 Lah 696 (698) (DB).
† ('18) 5 AIR 1918 Mad 1287 (1292):40Mad259(FB).
('87) 11 Bom 537 (539) (DB).
('32) 19 AIR 1932 Oudh 77 (78) : 7 Luck 421. (Language of decree plain — Court cannot look at its judgment to interpret decree.)
('84) 6 All 30 (33) (DB).
(1865) 4 Suth W R Misc 20 (20) (DB).
('72) 17 Suth W R 19 (20) (DB).
† ('25) 12 AIR 1925 Pat 291 (293) (DB).
('91) 18 Cal 108 (110) (PC).
('76) 1 Bom 158 (162) (DB).
('11) 12 Ind Cas 334 (335) (DB) (Mad). (Principle applies whether decree is declaratory or executory.)
2. ('30) 17 AIR 1930 Mad 688 (690):53Mad750(DB).
('24) 11 AIR 1924 All 690 (690) (DB). (Can correct palpable mistake.)
('07) 9 Bom L R 1361 (1362).
† ('87) 16 Bom 659 (661) (FB). (Redemption suit.)
† ('84) 10 Cal 1092 (1094) (DB). (But where terms of decree are uncertain, any inquiry or evidence in execution to ascertain the same is barred.)
('30) 17 AIR 1930 Oudh 302 (303). (The question whether a decree is or is not a purely declaratory decree can only be decided by examination of the decree itself.)
('98) 1 Oudh Cas 22 (27) (DB).
3. ('42) 29 AIR 1942 Pat 196 (197) (DB).
✠('21) 8 AIR 1921 Cal 699 (700) (DB).
('31) 18 AIR 1931 Cal 511 (513) (DB).
('31) 18 AIR 1931 Mad 328 (331): 54 Mad 532(DB).
('35) 22 AIR 1935 Oudh 39 (40, 41): 10 Luck 416.
('30) 17 AIR 1930 Oudh 366 (367) (DB).
('30) 17 AIR 1930 Pat 536 (538) : 9 Pat 499 (DB).
('29) 16 AIR 1929 Pat 746 (747).
† ('21) 8 AIR 1921 Pat 360 (362) (DB).
('91) 13 All 343 (344) (DB).
('94) 18 Bom 542 (545) (DB).
('92) 19 Cal 159 (172) : 18 Ind App 165 (PC). (When a decree simply dismissed a suit, it is necessary to look at the pleadings and judgment to see what were the points actually heard and decided.)
† ('12) 13 Ind Cas 82 (83) (DB) (Cal).
('71) 15 Suth W R 530 (530) (DB).
('73) 19 Suth W R 343 (344) (DB).
('90) 13 Mad 313 (315) (DB).
('91) 14 Mad 29 (30, 32) (DB).
('98) 21 Mad 344 (351) : 25 Ind App 102 (PC).
('16) 3 A I R 1916 Mad 520 (521) (DB). (Mortgage decree drawn up as money decree by mistake — Decree can be amended.)
('87) 11 Bom 177 (179) (DB).
4. ('20) 7 AIR 1920 Pat 192 (194).
5. ('12) 14 Ind Cas 130 (131) (Oudh).

S. 38, Note 8 and O. 23, R. 3, Note 27.) The principle, however, will not apply where the decree is not based on any compromise. The effect of relieving against the penal clauses in such cases will be to attack the *validity* of the decree and cannot, therefore, be done by the Court executing the decree.[3] The High Court of Bombay has, however, held in the undermentioned cases[4] that the executing Court can give relief to a party to the decree against the consequences of his default in not observing the obligations imposed upon him by the decree.

An *award* is not a compromise or a contract and an executing Court cannot modify it on the ground of giving relief against a penalty imposed by it.[5]

80. Costs. — An objection to the execution of the decree as regards costs, on the ground that the objectors were not liable to pay the same under the decree, is one under S. 47.[1] See as to costs generally Note 28 on section 35.

81. Interest. — The question of payment of interest by way of compensation in cases of restitution of money ordered to be refunded on an execution sale being set aside is one within the section.[1] See also S. 34 generally and Note 23 on S. 144. Where a decree of Court which awards mesne profits under O. 20, R. 12 of the Code is silent as to interest, it is not open to the executing Court to fix the rate of interest and execute the decree allowing interest. See section 34, Note 17.

82. Court may treat a proceeding as a suit or vice versa — Sub-section (2). — As has been observed in Note 1, this sub-section is new and gives legislative sanction to the practice followed under the old Code. A Court can, under this sub-section, treat a proceeding under the section as a suit, or a suit as a proceeding.[1] The rule is intended to obviate the injustice that might be caused to the parties by mistake in the initiation of proceedings[2] and to avoid a valid claim being defeated on technical

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('25) 12 AIR 1925 Mad 264 (264).
† ('33) 20 AIR 1933 All 252 (254) : 55 All 334(FB).
('16) 3 AIR 1916 Cal 391 (392) (DB).
† ('31) 18 AIR 1931 Lah 696 (699) (DB).
('29) 16 AIR 1929 Lah 390 (390).
('25) 12 AIR 1925 Lah 180 (181).
('01) 24 Mad 265 (271) (DB).
[*See* ('33) 20 AIR 1933 Lah 23 (24). (Power to relieve is not unrestricted — Court cannot interfere with effect of default if as a result thereof decree-holder merely seeks to take away concession allowed to judgment-debtor.)
('30) 17 AIR 1930 Pat 234 (236) (DB). (Court can consider whether party has not, by his own action, forfeited his rights under the decree.)
('31) 18 AIR 1931 Sind 42 (43) : 25 Sind L L 279 (DB). (Stipulation that in default of one instalment whole amount would be due is not penal.)]

3. ('10) 4 Sind L R 1 (2) : 7 Ind Cas 583 (584).
4. ('25) 12 AIR 1925 Bom 404 (405) (DB).
('22) 9 AIR 1922 Bom 170 (171): 46 Bom 463 (DB).
5. ('25) 12 AIR 1925 Lah 180 (181).

Note 80

1. ('28) 109 Ind Cas 203 (204) (Oudh)

Note 81

1. ('09) 31 All 551 (556) : 36 Ind App 197 : 13 Oudh Cas 180 : 3 Ind Cas 798 (799) (PC).
[*See also* ('27) 14 AIR 1927 Mad 927 (928, 929) (DB).]

Note 82

1. ('40) 27 AIR 1940 Nag 92 (94) (DB). (Agreement registered under S. 12, C. P. Debt Conciliation Act (II of 1933), can be treated as decree— Court has power to treat suit for specific performance of the agreement as proceedings in execution.)
('07) 29 All 348 (350, 351) (DB).
('27) 14 AIR 1927 Cal 614 (615) : 54 Cal 419 (DB).
('26) 13 AIR 1926 All 387 (388) : 48 All 362 (DB).
('13) 35 All 243 (245) : 19 Ind Cas 622 (623) (DB).
('12) 16 Ind Cas 543 (544) (DB) (Cal).
('05) 32 Cal 332 (335) (SB).
† ('87) 14 Cal 605 (609) (DB).
('13) 18 Ind Cas 700 (700) (DB) (Lah).
('30) 17 AIR 1930 Mad 12 (13, 14).
('16) 3 AIR 1916 Mad 655 (655) (DB).
('16) 3 AIR 1916 Mad 429 (429) (DB).
('14) 1 AIR 1914 Mad 91 (92).
('12) 13 Ind Cas 204 (205) (DB) (Mad).
('10) 6 Ind Cas 776 (776) (DB) (Mad).
('09) 1 Ind Cas 380 (381) (Mad).
('23) 10 AIR 1923 Nag 94 (95).
('30) 17 AIR 1930 Oudh 468 (470) (DB). (A plaint in a suit by a decree-holder for declaration that a certain property is liable to be attached and sold in execution of his decree can be treated as an application to take a step-in-aid within meaning of Art. 182, cl. 5 of the Limitation Act.)
('38) 25 AIR 1938 Pat 216 (220) (DB).
('36) 23 AIR 1936 Pat 303 (305) (DB).
('16) 3 AIR 1916 Pat 299 (300) : 1 Pat L Jour 43 (DB).
[*See also* ('03) 5 Bom L R 1036 (1041).]
2. ('15) 2 AIR 1915 Mad 226 (227) (DB).
('31) 18 AIR 1931 Mad 588 (590).

pleas.[3] See also the undermentioned case.[4] But it is not intended to save litigants from the trouble of choosing the proper forum and filing a plaint or an execution petition when it is discovered, in time, what is the proper forum and there is no further question about the matter.[5] A proceeding cannot, however, be treated *both* as a suit as well as an application.[6]

The power under this section is *discretionary* and may be exercised according to the circumstances of each case.[7] But two essential conditions must be satisfied before the Court can exercise its discretion and treat a suit as an application —

(1) the Court in which the suit is brought must have *jurisdiction to execute* the decree,[8] and

(2) the application should not have been *barred by limitation* at the date of the institution of the suit.[9]

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3. ('23) 10 AIR 1923 Nag 94 (95).
4. ('36) 23 AIR 1936 Bom 227 (231): 60 Bom 516 (DB).
5. ('31) 18 AIR 1931 Mad 270 (271).
6. ('15) 2 AIR 1915 Mad 226 (227) (DB).
7. *In the following cases suits were in the discretion of the Court allowed to be treated as proceedings :*
('39) 26 AIR 1939 Mad 944 (946). (Suit treated as an application under O. 21, R. 95, C. P. Code.)
† ('07) 29 All 348 (350, 351) (DB).
(1900) 22 All 121 (123) (DB).
('38) 25 AIR 1938 Cal 113 (115): ILR (1938) 1 Cal 280 (DB).
('35) 22 AIR 1935 Cal 15 (17). (Suit for setting aside court sale in respect of properties not included in the mortgage.)
('27) 14 AIR 1927 Cal 614 (615): 54 Cal 419 (DB). (Purchaser in execution of mortgage-decree—Title questioned—Application under S. 47 and not suit is the remedy — Suit can be treated as a proceeding.)
('05) 32 Cal 332 (333) (SB).
('19) 6 AIR 1919 Lah 430 (431, 432) (DB).
('07) 1907 Pun Re No. 5, p. 30.
('32) 35 Mad L W 103 (104). (Dismissal of prior execution petition is no bar for treating suit as proceeding.)
('30) 17 AIR 1930 Mad 12 (13, 14).
('16) 3 AIR 1916 Mad 429 (429) (DB).
('14) 1 AIR 1914 Mad 91 (92).
('10) 6 Ind Cas 776 (776) (DB) (Mad). (Where a suit is barred under S. 244, C. P. Code, the plaint may be treated as an application under that Section.)
('09) 1 Ind Cas 380 (381) (Mad). (Plaint covering a question under S. 47, C. P. Code, may be treated as an execution petition.)
('22) 9 AIR 1922 Nag 198 (199). (Suit for restitution which is barred under S. 144.)
[*See* ('16) 3 AIR 1916 Pat 299 (300): 1 Pat L Jour 43 (DB).]
In the following cases, a proceeding was allowed to be treated as a suit :
† ('26) 13 AIR 1926 All 387 (388): 48 All 362 (DB). (Decree against a minor — Objection by the minor that the decree was not binding on him in execution proceedings by an application—Proceeding on the objection may be treated as suit.)
('12) 16 Ind Cas 543 (545) (DB) (Cal). (Do.)
('38) 25 AIR 1938 Lah 177 (178) (DB). (Partition proceedings — Award declaring rights of parties without giving possession — Decree on award — Application for execution claiming possession with alternative prayer to treat application as a suit.)
('13) 18 Ind Cas 700 (700) (DB) (Lah).
('31) 18 AIR 1931 Mad 81 (83).
('25) 12 AIR 1925 Pat 16 (17): 3 Pat 344 (DB). (Proceedings in execution between rival assignees of decree regarded by Court as suit.)
In the following cases the Court refused to act under the Section :
('13) 35 All 243 (245) : 19 Ind Cas 622 (623, 624).
('09) 3 Ind Cas 495 (496) (All).
('04) 1 All L Jour 61 (63) (DB).
(1900) 1900 All W N 196 (197).
† ('19) 6 AIR 1919 Cal 674 (676): 46 Cal 103 (DB).
('24) 11 AIR 1924 Mad 707 (708) (DB).
('31) 18 AIR 1931 Oudh 45 (46) : 6 Luck 452.
† ('15) 2 AIR 1915 Oudh 134 (135, 136).
8. ('10) 7 Ind Cas 55 (59) (DB) (Cal).
('34) 21 AIR 1934 All 699 (700). (Party to suit in Small Cause Court objecting to attachment of property in execution of decree in same Court—Objection dismissed and declaratory suit filed in Munsif's Court — Munsif's Court cannot treat suit as application under S. 47 and suit must be dismissed.)
('16) 3 AIR 1916 All 184 (186) (DB).
('14) 1 AIR 1914 Cal 691 (692) (DB).
('95) 22 Cal 483 (486) (DB).
† ('26) 13 AIR 1926 Lah 165 (166): 7 Lah 1 (DB).
('35) 22 AIR 1935 Mad 923 (925).
('20) 7 AIR 1920 Mad 206 (207) (DB).
('09) 32 Mad 425 (427, 428) : 4 Ind Cas 723 (724) (DB).
('05) 28 Mad 64 (66) (DB).
† ('99) 22 Mad 347 (349) (DB).
('22) 9 AIR 1922 Nag 189 (191).
('21) 8 AIR 1921 Nag 130 (131).
('18) 5 AIR 1918 Nag 102 (103).
('95) 8 C P L R 3 (4) (DB).
('10) 1 Upp Bur Rul 66 : 10 Ind Cas 991 (992).
9. ('43) 1943 P W N 45 (47) (DB).
(1900) 22 All 376 (377).
('11) 35 Bom 452 (461) : 11 Ind Cas 987 (989) (DB).
('27) 14 AIR 1927 Cal 106 (108): 53 Cal 837 (DB).
('11) 10 Ind Cas 417 (420) (Cal).

The power exercisable under this sub-section may not only be exercised by the original Court, but also by the Appellate Court, subject, however, to the same two conditions, namely, that the original Court had jurisdiction to execute the decree[10] and that the suit was filed within the limitation period prescribed for applying under this section.[11]

The discretion given under this sub-section must be exercised when the plaint or application is filed, and after the procedure has once been determined at that stage (subject to the usual control of an appellate or revisional Court) it cannot thereafter be altered.[12] Hence, it has been held that where a claim suit has been filed and has proceeded to its conclusion, a Court in which an application for execution is subsequently filed cannot treat such suit as an *application* to take a step-in-aid of execution for the purpose of saving limitation in respect of the subsequent execution application.[13]

Where an application falling under this section is dismissed on the merits and the applicant then brings a suit for the same relief, the suit cannot be converted into an application under this section, on its being contended that such suit is barred by this section. The remedy of the aggrieved party was to have appealed against the decision dismissing his prior application.[14]

Where an objection to execution is treated, under this section, as a suit, the judgment-debtor who objects to the execution is in the position of a plaintiff and therefore he has to pay the court-fee due to the Government in respect of the suit.[15]

83. Objection as to limitation, when to be considered. — An objection as to limitation may be taken at any stage of the execution proceedings if the facts upon which the objection is based are patent upon the face of the record.[1]

See also Note 23 on section 11.

84. Appeal. — Where an order amounts to a determination of a question between the parties and relates to the execution, discharge or satisfaction of the decree, it will be a decree within the meaning of S. 2 cl. (2) and is appealable as such under S. 96.[1] As to whether *every* such order is appealable, see Note 86. The question of the

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('37) 24 AIR 1937 Mad 580 (580).
('25) 12 AIR 1925 Mad 1198 (1200).
† ('18) 5 AIR 1918 Mad 180 (182) (DB).
('17) 4 AIR 1917 Mad 453 (453).
('30) 17 A I R 1930 Oudb 468 (470) (DB). (Plaint treated as an execution application and as an application to take a step-in-aid.)
[*See* ('38) 25 A I R 1938 Nag 534 (536) : I L R (1940) Nag 334.]
[But see ('40) 27 AIR 1940 Nag 92 (94) (DB).
('21) 8 AIR 1921 Bom 285 (289): 45 Bom 174 (DB). (Suit was treated as application to set aside sale and application was held time barred.)]

10. ('95) 22 Cal 483 (485, 486) (DB).
[*See* ('05) 32 Cal 332 (336).]

11. (1900) 22 All 376 (377).
('27) 14 AIR 1927 Cal 411 (411, 412) : 54 Cal 524 (DB).
('27) 14 A I R 1927 Cal 106 (108) : 53 Cal 837 (DB).
('05) 28 Mad 64 (66) (DB).

12. † ('38) 25 AIR 1938 Nag 534 (536): ILR (1940) Nag 334 (DB).

13. † ('38) 25 AIR 1938 Nag 534 (536): ILR (1940) Nag 334 (DB).

14. † ('35) 22 AIR 1935 Mad 923 (925).

15. ('34) 21 AIR 1934 Pat 9 (11) (DB).

Note 83

1. ('16) 3 AIR 1916 Pat 331 (333).
('35) 22 AIR 1935 Cal 230 (231) (DB).

Note 84

1. †('42) 29 AIR 1942 Cal 342 (342) : 46 Cal W N 179 (180). (Application by judgment-debtor for dismissal of execution case on full satisfaction in view of Bengal Money-lenders Act comes under S. 47 — Order rejecting application is appealable.)
('42) 29 AIR 1942 All 390 (392) : ILR (1943) All 35 (FB). (Application under S. 8, U. P. Debt Redemption Act — Controversy determined by execution Court—Judgment is appealable.)
('42) 29 AIR 1942 Cal 428 (428). (Bengal Non-agricultural Tenancy (Temporary Provisions) Act, (IX of 1940), S.4—Order holding judgment-debtor entitled to benefits of Act relates to execution of decree and is decree within S. 2.)
('42) 29 AIR 1942 Mad 688 (689) : I L R (1943) Mad 164 (FB). (Decision that applicant is not entitled to take out execution is appealable.)

('42) 29 AIR 1929 Mad 732 (732). (Decision that a son was a party to the suit being represented by his father is appealable.)
('42) 29 AIR 1942 Pat 146 (147) (DB). (Application purporting to be under O. 21, R. 90—Terms of the application showing that it could be only dealt with under S. 47—*Held* second appeal lay.)
('42) 29 AIR 1942 Pat 197 (198) (DB). (Order under O. 21, R. 18.)
('42) 29 AIR 1942 Pat 237 (238). (Order under Bihar Money-lenders (Regulation of Transactions) Act is appealable.)
('41) 28 AIR 1941 All 224 (225). (Order by executing Court staying execution on the ground that S. 7 of the Encumbered Estates Act, applied to the case—Order held appealable as controversy between the parties was conclusively determined.)
('41) 28 AIR 1941 Cal 251 (252) : I L R (1940) 2 Cal 226. (Property of judgment-debtor sold in spite of notice under S. 34, Bengal Agricultural Debtors Act, 1936 — Judgment-debtor can apply under this section for declaration that the sale has not affected his title—Order on the application is appealable.)
('41) 28 AIR 1941 Cal 264 (265) (DB). (Sale of judgment-debtor's holding in execution—Application by judgment-debtor for setting aside sale — Notice under S. 34, Bengal Agricultural Debtors Act — Executing Court refusing to stay further proceedings and proceeding with application for setting aside sale—Order comes under S. 47 — Appeal lies and not revision.)
('41) 28 AIR 1941 Cal 357 (360) : ILR (1941) 1 Cal 363 (DB). (Order on an application for attachment before final decree under O. 21, R. 42 is appealable.)
('40) 27 AIR 1940 All 326 (328) : ILR (1940) All 517 (FB). (Order staying execution under S. 3, U. P. Postponement of Execution of Decrees Act is appealable.)
('40) 27 AIR 1940 Mad 296 (297). (Ojbection to execution of instalment decree.)
('39) 26 AIR 1939 Cal 651 (654) (DB). (Application for transfer of decree is one relating to execution of decree—Objection opposing transfer comes under S. 47 — Order on such objection is appealable.)
('12) 13 Ind Cas 365 (367) (DB) (Cal).
('33) 20 AIR 1933 All 732 (733) : 55 All 983 (DB). (Order dismissing execution application is appealable.)
('36) 23 AIR 1936 All 479 (480) (DB). (A decision that certain person is representative of the judgment-debtor is appealable.)
† ('35) 22 AIR 1935 All 183 (184) (DB).
† (33) 20 AIR 1933 All 201 (202) : 55 All 235 (DB). (Decree for possession—Decision on question between decree-holder and transferee *pendente lite* from judgment-debtor as to right to possession is a decree.)
('33) 20 AIR 1933 All 57 (59) : 54 All 1031 (DB). (Decision on question under O. 21, R. 98 between plaintiff and exonerated defendant appealable as a decree.)
('32) 19 AIR 1932 All 49 (49) (DB). (Even if order is not strictly within S. 47 if Judge purports to act under this section, it would be appealable.)
('24) 11 AIR 1924 Mad 518 (519) (DB). (Do.)
('05) 28 Mad 127 (129). (Do.)
('25) 12 AIR 1925 All 551 (552) (DB).
('38) 25 AIR 1938 Cal 236 (237).
('39) 26 AIR 1939 Cal 334 (335). (Order purporting to be one under S. 151 but one which ought to be made under S. 47—Appeal lies.)
('37) 24 AIR 1937 Cal 259 (259) : I L R (1937) 2 Cal 127 (DB). (Order dismissing execution petition for failure to comply with directions of Court — Second appeal lies.)
('25) 12 AIR 1925 Cal 318 (319) (DB).
('18) 5 AIR 1918 Cal 551 (552) (DB). (Such an order passed even on review is appealable as a decree.)
('10) 5 Ind Cas 483 (484) (DB) (Cal). (Do.)
('15) 2 AIR 1915 Cal 137 (138) (DB).
('13) 20 Ind Cas 874(875,876) (DB) (Cal). (Question of agreement to give time to judgment-debtor for delivery of possession after court-sale.)
('10) 8 Ind Cas 4 (5) (DB) (Cal).
('10) 7 Ind Cas 769 (771) (DB) (Cal).
('67) 8 Suth W R 398 (398) (DB).
('39) 41 Pun L R 186 (187). (Appeal lies from an order transferring decree to another Court for execution, as the order is one relating to the execution though it is itself not an order executing the decree.)
† ('36) 23 AIR 1936 Lah 725(727). (Though application purports to be under S. 151, the order is under this section and appeal lies.)
('29) 16 AIR 1929 Lah 884 (885). (If the order is under S. 151 it is not appealable.)
('14) 1 AIR 1914 Lah 9 (11) : 1914 Pun Re No. 10 (DB). (Do.)
('13) 19 Ind Cas 439 (439) (Lah). (Do.)
('29) 16 AIR 1929 Pat 391 (392) (DB). (Do.)
('27) 14 AIR 1927 Lah 651 (652). (Executing Court —No power to amend decree—If it amends, appeal under S. 47 lies.)
('07) 2 Mad L Tim 307 (307) (DB). (Do.)
† ('37) 24 AIR 1937 Mad 509 (511) : I L R (1937) Mad 834 (DB). (Even though matter does not fall under this section, if the order purports to be made under this section appeal lies.)
('36) 23 AIR 1936 Mad 812 (814). (Order refusing application of judgment-debtor to raise attachment is appealable — The fact that order is passed on a separate application by judgment-debtor and not on the execution petition itself does not make any difference.)
† ('36) 23 AIR 1936 Mad 636 (638). (Though purporting to have been passed under S. 151.)
('35) 22 AIR 1935 Mad 340 (341). (Order recording satisfaction of decree is appealable — Such order cannot be set aside by executing Court.)
('27) 14 AIR 1927 Mad 842 (843) (DB).
('13) 19 Ind Cas 448 (448) (DB) (Mad). (Substance of the order must be looked at if provision of law quoted is not decisive.)
('34) 21 AIR 1934 Nag 201 (203): 13 Nag L R 240. (Question not between parties or representatives—No appeal lies.)
('02) 15 C P L R 69 (72).
('91) 4 C P L R 132 (133).
('36) 23 AIR 1936 Oudh 50 (51) : 11 Luck 519 (DB). (Decree discharged as satisfied — Discharge amounts to a decree.)

right to appeal under this section does not depend upon *who* may happen to be the appellant but upon the question whether or not the case is within the section; thus, if the conditions of the section are satisfied, the auction-purchaser also will have a right to appeal.[2] Where the lower Court has held in effect that a person is the representative of a party to the suit, and such person appeals from the order the respondent who has invited the Court to pass the order on the footing of the appellant being such representative cannot be permitted to urge the contrary in bar of the appeal.[3]

Where a decree of a Small Cause Court is sent for execution to a Court exercising original jurisdiction and an order is passed under this section, such an order is appealable.[4] But no *second appeal* will lie against an order in execution under this section, where the suit is of a nature cognisable by a Court of Small Causes.[5] In the case of arbitration proceedings, the award must be considered to be a decree in a suit and therefore an appeal would lie against an order in execution of an award.[6] Where a decree is obtained in a suit brought under S. 9 of the Specific Relief Act and an order is passed in proceedings in execution of that decree, no appeal lies against that order.[7] The reason is that S. 9 of that Act provides that "no appeal shall lie from any order or decree passed in any suit under this section" and applications for execution of decrees are proceedings in suit.

Where a judgment-debtor or *a party to the suit* objects to the attachment and sale of his properties in execution, or in other words prefers a claim, an order deciding such a claim falls within this section and is appealable as a decree under S. 96 read with S. 2, Cl. (2).[8] The words '*as if he was a party to the suit*' in O. 21, R. 58 show that a claim

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('29) 16 AIR 1929 Pat 472 (472) (DB).
('29) 16 AIR 1929 Pat 141 (142) : 8 Pat 717.
('37) 24 AIR 1937 Pesh 3 (4) (DB). (Order by trial Court refusing to allow costs directed to be paid by Privy Council, has force of decree and is appealable.)
('28) 15 AIR 1928 Rang 40 (41) : 5 Rang 775. (Refusal to decide objections as to executability—Decree appealable.)
('93-1900) 1893-1900 Low Bur Rul 375.
[*See* ('41) 28 AIR 1941 Cal 530 (532): ILR (1941) 2 Cal 402 (DB). (An order made under S. 36 (6) (a) (i) of the Bengal Money-lenders Act, either granting or refusing a prayer for re-opening a decree does not come under S. 47, C. P. Code, and is not appealable.)
[But see ('77) 2 Bom 553 (556, 557) (DB). (Case under Code of 1859. Order as to amount of mesne profits not a decree—Not good law now.)]

2. † ('99) 26 Cal 539 (541, 542) (DB).
3. ('43) 30 AIR 1943 Mad 381 (382, 383) (DB).
[*See also* ('42) 29 AIR 1942 Mad 406 (406). (Dispute between judgment-debtor and stranger auction purchaser regarding delivery treated and decided as one under S. 47 — Appeal from order thereon lies.)]
4. ('06) 11 Cal W N 861 (862).
('17) 4 AIR 1917 All 304 (304) : 39 All 357. (Small Cause Court having ceased to exist.)
[*See* ('40) 44 Cal W N 587 (588, 589).]
Also see S. 24, Note 15 ; S. 42, Note 5 and S. 102, Note 4.
5. ('11) 10 Ind Cas 412 (413) (DB) (Cal).
(1900) 27 Cal 484 (487) (DB).
† ('21) 8 AIR 1921 All 55 (55) : 43 All 403 (DB).
('07) 30 Mad 212 (213) (DB).
('37) 24 AIR 1937 Pat 349 (351).
[*See* ('40) 27 AIR 1940 Bom 210 (214) : I L R (1940) Bom 370 (DB). (Order under O. 21 R. 93 directing judgment creditor to refund money to auction-purchaser is not an order under S. 47, hence appeal does not lie.)]
[*See also* ('39) 26 AIR 1939 Sind 360 (360) : ILR (1939) Kar 342 (DB). (Surety is a party for the purposes of appeals under S. 47 and hence second appeal is barred against him.)]
6. ('40) 44 Cal W N 231 (232) (DB).
('21) 8 AIR 1921 Sind 132 (133) : 16 Sind L R 245 (DB)
† ('29) 16 AIR 1929 Lah 228 (229).
('34) 21 AIR 1934 Lah 49 (50). (Proceedings for enforcement of award are governed by S. 47—Appeal lies from order rejecting application for enforcement.)
7. † ('18) 5 AIR 1918 Cal 925 (926) : 45 Cal 519 (DB).
† ('32) 19 AIR 1932 Lah 416 (416) : 13 Lah 798.
('28) 15 AIR 1928 Lah 539 (539).
('03) 26 Mad 438 (439).
8. ('41) 28 AIR 1941 Pat 240 (241) (DB).
('16) 3 AIR 1916 Cal 814 (814) (DB).
('21) 8 AIR 1921 Cal 242 (244) (DB).
('12) 16 Ind Cas 385 (386) (DB) (Cal).
† ('32) 19 AIR 1932 Lah 376 (376). (Even though claim is wrongly described as one under O. 21, R. 58.)
('24) 11 AIR 1924 Lah 589 (590). (Do.)
('27) 14 AIR 1927 Lah 895 (896).
† ('35) 22 AIR 1935 Mad 923 (924). (Even if Court treats the application as one under O. 21 R. 58 and refers claimant to a suit, appeal is the remedy and not a suit.)

by a party to the suit is not within the scope of that rule. Even if the matter comes within O. 21, R. 58, still a right of appeal under S. 96 cannot be taken away by any provision, such as O. 21, R. 63, which is not contained *in the body of the Code*. (Compare the words "provided in the *body* of this Code" in S. 96 with the words "provided in this Code" in Ss. 141, 146 and 148.)

Section 2, Cl. (2) excludes from the definition of decree any adjudication from which an appeal lies as an appeal from an *order*. Thus, an order appointing a receiver in execution under O. 40, R. 1 is appealable under O. 43, R. 1 (s) and is not a decree appealable under S. 96.[9] As to appeals from orders passed under O. 21, Rr. 89, 90 and 91, see those rules.

Appeals from orders under this section are expressly excepted from the provisions of Art. 1 of Sch. I of the Court-fees Act by notifications of the various Provincial Governments under S. 35 of the Court-fees Act and consequently *ad valorem* fee is not payable in respect of such appeals.[10] It has been held that an order under O. 21 R. 50 cls. (2) and (3) is not an order under this section and that on an appeal from such an order *ad valorem* court-fee is payable.[11] The Court can require a person appealing from an order under this section to give security for the costs of the appeal.[12]

See also the undermentioned cases.[13]

('34) 21 AIR 1934 Mad 435 (435) : 57 Mad 822 (DB). (Joint claim by party to suit and by stranger —Appeal by party and suit under O. 21 R. 63 by stranger.)

('21) 8 AIR 1921 Mad 627 (628) (DB). (Question under O. 21 R. 97.)

('21) 8 AIR 1921 Mad 612 (614, 615) (DB). (Question under O. 21 R. 100, fought out by parties to the suit—Appealable.)

('20) 7 AIR 1920 Mad 126 (128) : 43 Mad 696 (DB). (Same principle applies to claims under O. 21, R. 103.)

('16) 3 AIR 1916 Mad 727 (727)(DB). (Objection by judgment-debtor to sale.)

('13) 21 Ind Cas 748 (749) (DB) (Mad).

('94) 17 Mad 399 (400) (DB).

('29) 16 AIR 1929 Oudh 21 (21). (Claim by a party must be decided on the merits and not rejected without enquiry.)

('36) 23 AIR 1936 Pat 268 (270) (DB).

('31) 18 AIR 1931 Pat 97 (98).

('31) 18 A I R 1931 Rang 314 (316). (Though it is misdescribed as one under O. 21 R. 58.)

[*See* ('17) 4 AIR 1917 Bom 133 (134):42 Bom 10 (DB).]

[But see ('20) 7 AIR 1920 Mad 206 (207) (DB). (*Obiter.*)]

Also see O. 21 R. 58, N. 24.

9. ('29) 16 AIR 1929 Mad 20 (21) (DB).

Also see O. 40, R. 1 N. 51.

10. ('30) 17 AIR 1930 Lah 24 (25). (S. 35 of the Court-fees Act was amended by Act 38 of 1920 by which Local Governments were empowered to issue notifications.)

('37) 24 AIR 1937 Cal 152 (155) : ILR (1937) 1 Cal 637 (DB). (By notification of Government of India in force in Bengal the fee chargeable on appeals from orders under S. 47 was limited to amount chargeable under Art. 11 of Sch. II, Court-fees Act.)

('36) 23 AIR 1936 Rang 352 (353).

[*See also* ('38) 25 AIR 1938 Bom 320 (321).]

11. † ('39) 26 AIR 1939 Sind 161 (163):ILR (1939) Kar 589 (FB). (AIR 1929 Bom 386 : 53 Bom 839 followed.)

12. (1900) 24 Bom 314 (316) (DB).

13. ('42) 29 AIR 1942 Pesh 53 (54). (Appeal lies under S. 47, from order refusing to execute order for costs made under S. 12, Election Offences and Inquiries Act of 1920.)

('41) 45 Cal W N 342 (344). (Objection filed by only one of judgment-debtor's heirs — Appeal by decree-holder—Other heirs not necessary parties.)

('40) 27 AIR 1940 Pat 21 (24). (Where a third party has deposited the decretal amount and the landlord has challenged the depositor's right to make deposit, but that objection has been overruled by the executing Court on the footing that the depositor had an interest voidable on the sale as he was the real purchaser of the land sought to be sold, the decision of the executing Court is a summary order and is not appealable.)

('37) 24 AIR 1937 Pat 380 (381) (DB). (Question whether appeal lies against order of Subordinate Court can arise only if order is passed by the Subordinate Court *suo motu* as a Court of execution and not when order is passed on a direction from the Appellate Court.)

('34) 21 AIR 1934 Pesh 43 (44). (Decree removing Mahant from office — Application for appointing Committee to appoint Mahant — Order thereon— Appeal held not to lie.)

('37) 24 AIR 1937 Pesh 3 (4) (DB). (S. 47 applies to execution of decrees of Privy Council—Copy of judgment passed by Court executing decree and presented with memo of appeal should be stamped with a stamp of Re. 1 under Art. 7, Court-fees Act.)

85. Forum of appeal.—The value of the original suit in which the execution is taken out determines the *forum* of appeal in respect of an order passed in execution proceedings. The actual value of the subject-matter in dispute involved in the order is not the criterion.[1] See Note 18 on S. 96 as to the value of appeal for the purposes of jurisdiction.

86. Interlocutory orders in execution proceedings. — The phrase "determination of any question within S. 47" in S. 2 cl. (2) does not make every decision of any question within this section a decree. In order to be appealable as a decree, the decision must also have the essential characteristics of a decree as defined in that section, that is, it must also be the formal expression of an adjudication conclusively determining the *rights* of the parties.[1] If not, the order is merely an *interlocutory* one and is not appealable as a decree.[2] Otherwise "every interlocutory order in an execution proceeding, such as an

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Note 85

1. ('15) 2 AIR 1915 All 349 (349).
('25) 12 AIR 1925 Cal 212 (212) (DB).
('19) 6 AIR 1919 Lah 275 (276) : 1919 Pun Re No. 44.

Note 86

1. ('40) 27 AIR 1940 Cal 257 (258, 259) : I L R (1940) 1 Cal 393 (DB).

2. ('43) 30 AIR 1943 Lah 140(143, 144, 146) (FB). (A I R 1939 Lah 177, overruled.)
('42) 29 AIR 1942 Lah 153 (160) : I L R (1942) Lah 559 (FB). (Order for sale under O. 21 R. 66, C. P. Code, determining any rights or liabilities between the decree-holder and the judgment-debtor falls under S. 47 and is appealable.)
('41) 28 AIR 1941 Pat 1 (3) : 19 Pat 862 (DB). (An order determining instalments under S. 11, Behar Money-lenders Act, is not an order which conclusively determines the rights of the parties. Hence, an appeal does not lie from such order.)
('41) 28 AIR 1941 Pat 616 (616) (DB). (Fixing the valuation of a property under S. 14 of the Orissa Money-lenders Act does not finally determine the rights of the parties, because at the actual sale the property may fetch a different price from that already fixed by the Court.)
('40) 27 AIR 1940 Mad 54 (55). (Order setting terms of sale proclamation — No decision as to rights or liabilities of parties—Order not appealable.)
('40) 27 AIR 1940 Pat 75 (76) (DB). (Appointment of Commissioner to take accounts in execution—Order giving directions to Commissioner as to taking of accounts—Order is interlocutory and no appeal lies—Only final order is appealable.)
† ('24) 11 AIR 1924 All 808(811): 46 All 733 (DB).
('33) 20 AIR 1933 Mad 500 (500) (DB). (Order overruling preliminary objections by judgment-debtor.)
('11) 38 Cal 717 (720) : 6 Low Bur Rul 26 : 38 Ind App 126 : 11 Ind Cas 545 (545) (PC). (Order refusing leave to bid to a decree-holder under O. 21, R. 72 is only administrative order.)
('35) 22 AIR 1935 All 502 (503). (Order striking off objection for default.)
('32) 19 AIR 1932 All 136 (137) (DB).
('31) 18 AIR 1931 All 765 (765) (DB). (Order of District Judge approving appointment of a trustee made by committee under a scheme decree—Not a decree.)
('31) 18 AIR 1931 All 129 (130, 131) (DB). (Order directing execution against one set of defendants in the first instance—Not a decree.)
('30) 17 AIR 1930 All 638 (639) (DB).
('29) 16 AIR 1929 All 390 (391, 392) (DB). (*Ex parte* order under O. 21, R. 50 (2) granting leave to execute—Not a decree.)
('29) 16 AIR 1929 Bom 386(388):53 Bom 839. (Do.)
('29) 16 AIR 1929 All 85 (85) (DB). (Order refusing stay of sale.)
('24) 11 AIR 1924 Lah 671 (672). (Do.)
('24) 11 AIR 1924 Mad 234 (235) (DB). (Do.)
† ('27) 14 AIR 1927 All 208 (209).
† ('26) 13 AIR 1926 All 401 (401).
('26) 13 AIR 1926 All 268 (268, 269) : 48 All 260 (DB).
('25) 12 AIR 1925 All 588 (589) : 47 All 543 (DB). (Order directing enquiry into mesne profits.)
('24) 11 AIR 1924 All 794 (795). (Order refusing to restore an execution application dismissed for default.)
('28) 15 AIR 1928 Oudh 329 (330). (Do.)
('12) 34 All 530 (532) : 15 Ind Cas 50 (51) (DB). (Order holding that fresh attachment is not necessary.)
('90) 1890 All W N 85 (86) (DB). (Order for recovery of deficiency of price against defaulting purchaser — Not a decree — Not appealable.)
('87) 9 All 500 (503, 504) (DB). (Order allowing a payment directed by the decree to be made.)
('19) 6 AIR 1919 Cal 806 (807) (DB). (Do.)
('31) 18 AIR 1931 Bom 391 (393, 396) : 55 Bom 414 (DB). (Scheme decree with liberty to apply for modification — Order on such application — Not appealable.)
('31) 18 AIR 1931 Bom 388 (390) (DB). (Order of District Judge as *persona designata* under a scheme — Not appealable.)
('84) 8 Bom 287 (295) (DB).
('31) 18 AIR 1931 Cal 574 (576) : 58 Cal 808 (DB). (Order under O. 21, R. 99 is not one under S. 47.)
('25) 12 AIR 1925 Cal 679 (680, 681) (DB). (Order solely relating to jurisdiction.)
('19) 6 AIR 1919 Pat 383 (383) : 4 Pat L Jour 461 (DB). (Do.)
('19) 6 AIR 1919 Cal 471 (472) (DB). (Order accepting security under O. 41, R. 5.)
('31) 18 AIR 1931 Mad 38 (38) : 54 Mad 237 (DB). (Do.)

order granting or refusing process for the examination of witnesses, would be appealable; and far greater latitude would be given of appealing against orders in such proceedings than is allowed as against orders made in suits before decree—a thing which could hardly have been intended."[3] But though an order may be interlocutory, if it is one which in *substance* determines a question relating to execution between the decree-holder and the judgment-debtor as, for instance, where it has the effect of reviving an application for execution which was dismissed for default of the decree-holder, especially when a fresh application would be barred by limitation, it will be appealable as a decree.[4] An order rejecting an objection to the order of transfer under S. 39 relates to execution and is consequently appealable as a decree.[5] Similarly, the decision of the Court that the judgment-debtors are not debtors within the meaning of the Bengal Agricultural Debtors Act and therefore are not entitled to the benefit of the Act, conclusively determines the question relating to the judgment-debtors' liability with reference to the relief granted by the decree and hence is appealable as a decree.[6] As regards the appealability of an order fixing the value of property for the purposes of sale, see O. 21, R. 66. As regards appeals against orders granting or refusing stay of execution, see Note 44.

86a. Parties to proceedings under section. — The auction-purchaser is not a necessary party to a proceeding under this section as between the parties to the suit; nor is his non-joinder in an appeal from an order in such proceedings fatal to it.[1]

('12) 13 Ind Cas 170 (170) (DB) (Cal).
(1900) 7 Cal L Jour 436 (437, 438) (DB). (Order refusing grant of sale certificate to decree-holder auction-purchaser.)
('91) 18 Cal 469 (472) (DB). (Order on a preliminary point of law.)
('20) 7 AIR 1920 Lah 117 (118) (DB). (Do.)
('73) 19 Suth W R 90 (91). (Relating to procedure.)
('29) 16 AIR 1929 Lah 815 (816). (Do.)
('30) 17 AIR 1930 Lah 20 (22) : 11 Lah 93. (An order restoring an execution application which had been dismissed for default.)
('32) 19 AIR 1932 Lah 120 (121). (Order accepting or refusing to accept security not appealable.)
('29) 16 AIR 1929 Lah 391 (392). (Administrative order not appealable.)
('27) 14 AIR 1927 Lah 527 (528). (Order rejecting security and ordering execution to continue.)
('27) 14 AIR 1927 Lah 337 (337). (Order setting aside sale after confirmation — S. 47 does not apply.)
('86) 1886 Pun Re No. 55, p. 116.
('36) 23 AIR 1936 Mad 623 (624). (Order allowing amendment to execution petition is not a decree.)
('33) 20 AIR 1933 Mad 500 (500).
('30) 17 AIR 1930 Mad 918 (918, 921) : 54 Mad 315 (DB). (Order filling up vacancy in the office of trustee appointed under a scheme—Not covered by S. 47.)
('29) 16 AIR 1929 Mad 718 (720). (Order under O. 21, R. 22 for arrest and notice at the same time.)
('36) 23 AIR 1936 Oudh 369 (370) (DB). (Order accepting security tendered by judgment-debtor and directing stay of execution.)
('38) 25 AIR 1938 Pat 216 (220) (DB).
† ('37) 24 AIR 1937 Rang 157 (159) (DB). (Final decree for sale in mortgage suit—Order by District Court in execution directing sale of properties outside district — Order is not appealable as it does not affect the question as to the liability of the properties to be sold.)
('27) 14 AIR 1927 Rang 317 (317) : 5 Rang 534 : 5 Rang 641 (DB). (Order requiring security before drawing out money.)
('25) 12 AIR 1925 Rang 271 (273) : 3 Rang 132.
[*See* ('02) 29 Cal 622 (625). (Order determining principle for ascertainment of mesne profits held not interlocutory.)]
[*See also* ('41) 28 AIR 1941 Lah 342 (342). (Decision on the dispute between persons having rival claims to be accepted as legal representatives on one side is a summary decision—No appeal lies.)]
[But see ('32) 19 AIR 1932 All 85 (89) : 53 All 391 (DB). (Order prescribing the order of sale of mortgaged properties falls under S. 47—Appealable.)
('16) 3 AIR 1916 Cal 471 (472) (DB). (Question as to benami transfer of decree governed by the section.)]
Also see S. 2 (2) Notes 6 and 14; S. 96 Note 11.

3. ('40) 27 AIR 1940 Pat 75 (76) (DB).
('97) 24 Cal 725 (739) (FB). (Per Banerji J.)
('14) 1 AIR 1914 Cal 149 (149) : 41 Cal 160 (DB).
('11) 12 Ind Cas 745 (749, 750) (DB) (Cal).
('11) 10 Ind Cas 371 (371, 372) (DB) (Cal).
('09) 36 Cal 422 (430) : 2 Ind Cas 338 (341) (DB). (The propriety of such interlocutory orders can be attacked in the appeal from the final order.)

4. ('20) 7 AIR 1920 Cal 534 (535) (DB).
[*See also* ('43) 30 AIR 1943 Mad 346 (347). (Order dismissing for default of appearance of the decree-holder an execution application which was the last of the kind that could have been filed within limitation under S. 48, is appealable as decree.)]

5. ('40) 27 AIR 1940 Cal 161 (162) (DB).

6. ('40) 27 AIR 1940 Cal 257 (259) : I L R (1940) 1 Cal 393 (DB).

Note 86a

1. ('39) 26 AIR 1939 Nag 183 (186) : ILR (1939) Nag 548 (DB).

A transferee from a judgment-debtor can be added as a party in the execution proceedings either under O. 22, R. 10 or under inherent powers of the Court. The effect of joining such a person as a party would be to make it obligatory on him to raise all the objections he wants to raise in the execution proceedings and not by a separate suit.[2]

87. Revision. — An order which is appealable under this section[1] or in which there is no question of jurisdiction involved, is not open to revision.[2] In the case of an order not open to appeal, a revision may lie if the conditions of S. 115 are satisfied.[3]

88. Limitation. — Since the wording of Art. 166 of the Limitation Act of 1908 is wide and general in terms, any application under this Code to set aside a sale, whether it falls under this section or not, must be made within thirty days from the date of the sale. But where the sale is absolutely *void* for want of jurisdiction or is a *nullity*, then the application will be governed by the residuary Art. 181 which provides for a period of three years from the date of the sale. (See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 166, Note 2.) As to limitation for an application by a judgment-debtor for the restoration of immovable property sold or delivered in excess of the decree, or an application to recover back money realised in excess of the decree, see *ibid*, Art. 165 Note 3 and Art. 181, Notes 7 and 10. As to whether in such cases, if the applicant brings a suit under a *bona fide* mistake, he is entitled under S. 14 of the Limitation Act to deduct the time taken up in prosecuting the suit, in calculating the period for making an application under this section for refund of the excess, see *ibid*, S. 14 Note 24.

LIMIT OF TIME FOR EXECUTION

48. [S. 230, paras. 3 and 4.] (1) Where an application to execute a decree[4] not being a decree granting an injunction[5] has been made,[6] no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years[6] from —

Execution barred in certain cases.

(*a*) the date of the decree sought to be executed,[10] or,

(*b*) where the decree or any subsequent order[11] directs any payment of money or the delivery of any property to be made at a

2. ('40) 27 AIR 1940 Pat 615 (616) (DB).

Note 87

1. ('41) 28 AIR 1941 Cal 251 (252) : ILR (1940) 2 Cal 226.
('41) 28 AIR 1941 Cal 264 (265) (DB).
('41) 28 AIR 1941 Pat 408 (409) (DB).
('29) 16 AIR 1929 Pat 141 (142) : 8 Pat 717.

2. (1900) 2 Bom L R 887 (888) (DB).
('33) 20 AIR 1933 Bom 185 (186) (DB).
('36) 23 AIR 1936 All 479 (480) (DB).
('31) 18 AIR 1931 All 765 (766) (DB).
('05) 32 Cal 572 (575) (DB). (Only an error of law.)
('32) 19 AIR 1932 Lah 96 (97). (Order under S. 73 -No revision—Practice of Lahore High Court.)

3. ('42) 29 AIR 1942 Oudh 281 (282).
('41) 28 AIR 1941 Cal 156 (158) : ILR (1940) 2 Cal 277. (Execution application dismissed as time-barred — On decree-holder's application under S. 151, Court reconsidering previous order and reviving execution case—Order under S. 151 is not illegal — Aggrieved judgment-debtor's remedy lies under S. 115.)
('41) 28 AIR 1941 Lah 450 (451) : ILR (1942) Lah 483.
('28) 15 AIR 1928 Lah 811 (812).
('29) 16 AIR 1929 Mad 84 (84).
('21) 8 AIR 1921 Nag 130 (131).
('29) 16 AIR 1929 Rang 127 (127) (DB).
[*See also* ('42) 29 AIR 1942 Lah 275 (277) : ILR (1943) Lah 17 (FB). (Appeal held lay against judgment-debtor only — Appeal held may be treated as revision as against other persons who had been impleaded — Per Tek Chand, J., in Order of Reference.)]

certain date or at recurring periods,[12] the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed —

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force,[15] prevented the execution of the decree at some time within twelve years immediately before the date of the application : or

(*b*) to limit or otherwise affect the operation of article [a][183 of the First Schedule to the Indian Limitation Act, 1908.][2]

[1877, S. 230, paras. 3 and 4 and S. 231; 1859, S. 207.]

a. Substituted for the words "180 of the Second Schedule to the Indian Limitation Act, 1877" by the Code of Civil Procedure (Amendment) Act, XXXIV of 1940, Section 3.

Local Amendment.

ALLAHABAD

For the purposes of executing a decree based on a loan against the agricultural produce of a judgment-debtor the word "six" shall be deemed to have been substituted for the word "twelve" wherever it occurs in S. 48 — U. P. Regulation of Agricultural Credit Act, XIV of 1940, S. 9 (21-12-1940).

Synopsis

1. Legislative changes.
2. Object, applicability and scope of the section.
3. Retrospective operation of the section.
4. "Application to execute a decree."
5. "Has been made."
6. Fresh application presented after the expiration of twelve years.
7. "Fresh application" distinguished from "continuation of previous application."
8. Successive applications for execution of decrees of Courts other than Chartered High Courts.
9. Applicability of the section to Chartered High Courts — Sub-section (2) (b).
10. "Date of the decree sought to be executed."
11. Subsequent order, meaning of.
12. "At a certain date or at recurring periods."
13. Exclusion of time during minority or other disability of decree-holder. See Note 21 on Section 6 of the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn.
14. Deduction of time for other causes.
15. "By fraud or force."
16. Appeal from orders under the section.
17. Plea of bar under the section, when to be raised.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Combined mortgage decree. See Note 10.
Continuation of application. See Note 7.
Decree not being a decree for injunction. See Note 2.
Direction for recovery from one party on failure of another. See Note 12.
Execution by Collector. See Note 14.
Limitation Act, Sections 4 and 15. See Note 14.
Maintenance decree. See Note 12.
Terminus a quo for limitation. See Note 10.
To limit or otherwise affect Art. 183 of Limitation Act. See Note 2.
Where decree is transferred for execution. See Section 38.

1. Legislative changes. — This section corresponds to paragraphs 3 and 4 of S. 230 of the Code of 1882 with the following alterations :

(i) The old section applied only to decrees for payment of money or delivery of other property. The present section is made applicable to all decrees of any kind whatsoever, except decrees granting injunction. See Note 2.

(ii) The words "under the section and granted" occurring after the word "made" in the old section have been omitted, with the the result that the present section applies under whatever Code the previous application may have been made and whether such application was granted or not. See Note 2.

(iii) For the words "no subsequent application to execute the same decree shall be granted after" have been substituted the words "no order for execution of the same decree shall be made upon any fresh application presented after." See Notes 6 and 7.

(iv) The words "or of the decree in appeal (if any) affirming the same" have been omitted as superfluous and tending to confusion. See Note 10.

(v) The words "or at recurring periods" have been newly added in sub-s. (1) cl. (b). See Note 12.

(vi) Sub-section (2), cl. (b) was newly added. See Note 9.

2. Object, applicability and scope of the section. — A decree-holder is entitled, as of right, to execute his decree and for that purpose may make any number of applications in succession.[1] He cannot be refused execution unless his application is barred by the principles of *res judicata* or by Art. 182 of the Limitation Act, 1908. This section imposes a further restriction on the rights of the decree-holder by fixing a *maximum limit of time* for execution and by enacting that no order for execution shall be made upon an application presented after the expiry of twelve years from certain specified dates.[2] The effect of the section is not to supersede the law of limitation but only to fix the *outside period* after which, *execution* of a decree, though not barred by the Limitation Act, may not be granted.[3] The object of this section is to prevent execution proceedings being kept pending indefinitely to the harassment of judgment-debtors and to require sufficient diligence on the part of the decree-holders.[4]

Section 48 — Note 2

1. ('43) 30 AIR 1943 P C 98 (100) (PC).
('95) 17 All 106 (111, 112) : 22 Ind App 44 (PC).

2. ('24) 11 AIR 1924 All 263 (265) : 46 All 73.
('22) 9 AIR 1922 Mad 268 (268) : 45 Mad 785 (DB).
('26) 13 AIR 1926 All 93 (94) : 48 All 121.
('24) 11 AIR 1924 Mad 163(167): 47 Mad 120 (DB).
Under the Code of 1877, S. 230, there was a provision for an application to be made after the 12 years, if the same was made within 3 years of the passing of that Code—But only one such application could be made within those three years :
('81) 1881 All W N 58 (58) (DB). (Meaning of "after the passing of the Code" in S. 230 of 1877 Code.)
('82) 1882 All W N 2 (2) (DB). (Do.)
('83) 7 Bom 214 (216) (DB). (Do.)
('85) 1885 All W N 193 (193) (DB).
('80) 5 Bom 245 (246) (DB).
('87) 11 Bom 524 (526) (DB).
('86) 12 Cal 559 (561) (DB).
('77) 2 Mad 218 (218) (DB).
('81) 7 Cal 556 (559) (DB).
[*See* ('84) 6 All 189 (192).]
[*See also* ('82) 1882 All W N 111 (111).]

3. ('42) 29 AIR 1942 Cal 255 (256) : I L R (1942) 1 Cal 245 (DB). (Article 182 (6), Limitation Act, cannot be availed of by a decree-holder if his decree comes within the prohibition contained in S. 48, C. P. Code.)
('41) 28 AIR 1941 Bom 158 (159) : I L R (1941) Bom 147 (DB).
('41) 28 AIR 1941 Pat 45 (46) : 20 Pat 1 (DB).
('40) 27 AIR 1940 Pat 432 (433) (DB).
† ('32) 19 AIR 1932 Oudh 220 (221) (DB).
('89) 1889 Pun Re No. 109, page 380.
('88) 1888 Pun Re No. 27, page 73.
('32) 19 AIR 1932 Oudh 69 (71): 7 Luck 397 (DB). (Section in effect lays down limitation for execution of decree under S. 78 (2), Provincial Insolvency Act.)
('91) 1891 Pun Re No. 9, page 81.
('15) 2 AIR 1915 Bom 40 (41) : 39 Bom 256 (DB). (Execution may be barred under this Section, though the application may not be barred by *res judicata* or Art. 182, Limitation Act.)
[*See* ('05) 1905 Upp Bur Rul C P C 26.

4. ('28) 15 AIR 1928 Mad 1154 (1156) (DB).

Section 230 of the old Code referred only to decree for the *payment of money or delivery of other property*. There was a conflict of opinion as to the application of this section to *mortgage* decrees.[5] There was also a conflict of opinion as to the application of the section to cases where a decree was passed personally against A for payment of money, and in default, for sale of B's (surety's) property.[6] The omission of the words, "for the payment of money or delivery of other property" in the present section makes it clear that it applies to *all* decrees of any kind except a decree granting injunction.[7] This section does not come into play until there has been at least one prior application for execution of a decree. What it prohibits is a *fresh* application after the twelve years prescribed.[8]

Before the execution of a decree can be held to be barred under the section, it must be shown that the decree was, in all parts, ripe for execution on the date from which the twelve years' period is to be computed.[9] Where a decree-holder applies for execution and a fresh application therefor in the future is likely to be barred under the provisions of this section, the Court should allow the decree-holder to exhaust all lawful means of realising his decree in the pending application, before finally dismissing it.[10] But the salutary rule enacted in this section should not be permitted to be evaded as, for example, by striking off an execution petition and continuing the attachment so as to enable the decree-holder to apply for execution after the twelve years' period under the pretext of continuing a pending application.[11]

The section only requires that the *application* should be presented within twelve years. The *order* on such application may be made even after the expiry of the specified period.[12]

This section does not apply to decrees of Presidency Small Cause Courts and such decrees, though transferred for execution to a Court other than a Court of Small Causes, are nonetheless not governed by the section.[13]

The section bars only the *execution of the decree* after the specified period. The rights of the decree-holder in other respects are not in any way affected by its provisions.[14]

A warrant issued to the Collector under S. 386 of the Criminal Procedure Code for the recovery of fine has the force of a *decree*. But S. 70 of the Indian Penal Code sets a

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5. *The section applied* :
('05) 28 Mad 473 (478) (FB).
('05) 28 Mad 224 (226) (DB).
('04) 31 Cal 792 (796) (DB).
('08) 1908 Pun L R No. 121.
The section did not apply :
('13) 18 Ind Cas 455 (457) (DB) (Cal.)
('98) 25 Cal 580 (583, 584) (DB).
(1900) 22 All 401 (403) (DB). (Even though the judgment-debtor was personally liable for the deficiency.)
('03) 25 All 541 (543, 544) (DB).
('94) 16 All 418 (419, 420) (DB).
('93) 1893 All W N 184 (184) (DB).
('98) 1898 All W N 114 (115). (Decree against legal representative out of assets—Decree for money.)

6. ('12) 34 All 636 (640) : 16 Ind Cas 190 (191) (DB). (Applies.)
('12) 13 Ind Cas 187 (187, 188) (DB) (All). (No.)

7. ('15) 2 AIR 1915 Mad 407 (410) (DB). (Decree directing execution of conveyance.)
('15) 2 AIR 1915 Bom 40 (41) : 39 Bom 256 (DB). (Compromise decree.)

8. ('39) 26 AIR 1939 Nag 245 (246) : I L R (1939) Nag 559 (DB).

9. ('20) 7 AIR 1920 Nag 40 (41).
[*See also* ('08) 5 All L Jour 403 (404). (Such as decree ordering sale of share in a non-existing village.)]

10. ('26) 13 AIR 1926 Lah 544 (544).

11. ('10) 8 Ind Cas 727 (728) (Oudh).
[*See also* ('28) 15 AIR 1928 Mad 1154 (1155).]

12. See Note 6.

13. ('42) 29 AIR 1942 Pat 128 (128, 129) (DB).
† ('11) 36 Mad 108 (112) : 11 Ind Cas 635 (637) (DB).

14. ('10) 33 Mad 429 (431) : 5 Ind Cas 92 (93) (DB). (Mortgage of a mortgage decree after 12 years—Mortgagee can sue decree-holder for recovery of moneys realised by him.)
('24) 11 A I R 1924 Mad 163 (165, 167) : 47 Mad 120 (DB). (It does not mean that a decree more than 12 years old is not provable in insolvency proceedings.)

limit of six years for the recovery of fines imposed on an offender. The twelve years' rule under this section will not apply to such cases.[15]

3. Retrospective operation of the section. — It has already been observed in Note 3 on the Preamble that no one has a vested right in *procedure*. The right to execute a decree is only a right of *procedure* and not a *vested* right[1] and the law governing an application to execute a decree will be the law of procedure in force at the time of the *application* and not the law in force when the decree was passed.[2] Thus, where a mortgage-decree is passed under the old Code but an application is presented for execution of that decree more than twelve years after the date of the decree and after the present Code came into force, the application will be barred though S. 230 of the old Code did not apply to mortgage decrees.[3]

4. "Application to execute a decree."—An application to execute a decree means an application under O. 21, R. 11 or otherwise by "which proceedings in execution are *commenced* and not merely an *incidental* application."[1] It should be an application in accordance with law, asking for a relief granted by the decree and for obtaining it in the mode admitted by law.[2] An application to the Court passing a decree to *transfer* it for execution to another Court is not such an application.[3] But where a decree gives reliefs of different characters, there is nothing in the Code preventing separate and successive applications for execution as regards each of such reliefs.[4]

5. "Has been made." — As to the distinction between the present section and old S. 230 in this respect, see Note 2. The words "under this section and granted" which occurred after the word "made" in the old section gave rise to conflicting decisions, firstly, as to the applicability of the section where the previous application was not made under *the* section,[1] and secondly, as to when the previous application can be said to have

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15. ('41) 28 A I R 1941 Bom 158 (159) : I L R (1941) Bom 147 (DB). (In case of a conflict between substantive and adjective law former must prevail.)

Note 3

1. ('13) 21 Ind Cas 113 (114, 115) (DB) (Cal). (The right to execute a decree is not a substantive right.)
† ('17) 4 AIR 1917 Pat 485 (486) (DB). (No vested right in the procedure prescribed in that Code was acquired by the decree-holder.)
[But see † ('10) 32 All 499 (502) (DB). (The right to enforce execution of decree is a substantive right.)]

2. † ('26) 13 A I R 1926 All 93 (94) : 48 All 121 (DB).
('81) 3 Mad 98 (101) (DB).

Section 230 of the Code of 1882 was held in the following cases not to revive decrees dead under the Code of 1877 :
('81) 6 All 388 (390).
('86) 8 All 419 (427).

3. † ('21) 8 A I R 1921 Bom 40 (43) : 45 Bom 365 (DB).
('13) 21 Ind Cas 923 (924) (DB) (Cal).
('17) 4 AIR 1917 Pat 493 (494) (DB).
('13) 40 Cal 704 (709):19 Ind Cas 391 (392) (DB).
† ('15) 2 AIR 1915 Nag 103 (106):11 Nag L R 25.
('17) 4 AIR 1917 Mad 315 (316) (DB).
('24) 11 AIR 1924 All 696 (696) (DB).
('25) 12 AIR 1925 Bom 326 (326) (DB).
('13) 19 Ind Cas 899 (900) (DB) (Cal).
[See however ('19) 6 AIR 1919 Cal 1003 (1004) (DB). (The mere fact of coming into force of the new Code pending a suit on a mortgage under the Transfer of Property Act does not make the new S. 48 applicable to proceedings in execution of the decree in that suit.)]

Note 4

1. ('77) 3 Cal 235 (242) (FB).
('78) 2 Mad 1 (4) (DB).
('98) 1898 Pun Re No. 40, page 138.
2. ('89) 13 Bom 237 (239) (DB).
3. ('29) 16 AIR 1929 Mad 745 (745).
('12) 14 Ind Cas 277 (277) (DB) (All).
('26) 13 AIR 1926 All 660 (660).
('98) 20 All 78 (79) (DB).
('10) 35 Bom 103 (109):8 Ind Cas 168 (171) (DB).
('12) 34 All 396 (397) : 14 Ind Cas 172 (173) (DB).
('89) 16 Cal 744 (746) (DB).
4. ('91) 18 Cal 515 (518) (DB).
Also see O. 2, R. 2, N. 31.

Note 5

1. ('91) 1891 Bom P J 269 (269) (DB). (Previous application from which the twelve years are to be reckoned must be an application under the very section and not the corresponding sections of the earlier Codes.)
('78) 1 Mad 403 (404). (No.)
('78) 2 All 275 (276). (Do.)
('81) 6 Cal 504 (512). (Do.)
('86) 10 Bom 348 (349). (Do.)
('88) 11 Mad 132 (133).
('86) 9 Mad 454 (456).

been granted.[2] The said words having been omitted in the present section, these rulings are no longer good law and the section is applicable under whatever Code the previous application may have been made and whether it has been granted or not.

6. Fresh application presented after the expiration of twelve years. —The requirements of the section are satisfied if the application is *presented* within twelve years of the specified dates. The section does not prohibit the Court from making an order for execution after the expiration of twelve years, if the fresh application had been *presented* within the period.[1] This was the principle laid down even under the old S. 230.[2] The words of the present section adopt the said principle. As to the meaning of the words "fresh application," see Note 7.

7. "Fresh application" distinguished from "continuation of previous application." — The words "fresh application" have been substituted for the words "subsequent application" which occurred in the old section. Even under the old section the words "application to execute a decree" had been held to mean an application under O. 21, R. 11 or otherwise, by which proceedings in execution were *commenced* and not to include *incidental* applications made in pending execution proceedings.[1] The present substitution was made in accordance with the above view. Therefore, under the present section also the expression "fresh application" means a *substantive application for execution* and not merely an *ancillary* one made with the object of moving the Court to proceed in the matter of a substantive application already on file.[2]

The question whether an application is only *ancillary* to a previous application or is a "fresh application" depends upon the circumstances of each case[3] and is to be

2. ('82) 1882 All W N 91 (92).
('83) 6 Mad 172 (173).
('86) 8 All 301 (303).
('86) 8 All 536 (539).
('82) 9 Cal L Rep 321 (323).
('82) 8 Cal 297 (299).
('82) 1882 All W N 5 (5).
('93) 15 All 198 (204).
('96) 18 All 482 (488, 489, 492, 496) (FB).
('96) 18 All 49 (51).

Note 6

1. ('37) 24 AIR 1937 Mad 113 (113).
('34) 21 AIR 1934 Lah 610 (611, 612).
('26) 13 AIR 1926 All 331 (331, 332) (DB).
('10) 5 Ind Cas 474 (475) (DB) (Mad). (Also an application presented in time but corrected at the Court's direction and re-presented after time is not defective in any way and is not barred.)
† ('83) 6 Mad 359 (361) (DB).
[*See* ('30) 17 AIR 1930 Mad 995 (998) : 54 Mad 306 (DB).]
2. † ('83) 6 Mad 359 (361) (DB).
('98) 22 Bom 722 (726) (DB).
('04) 1904 Pun Re No. 76, page 258.

Note 7

1. See Note 4.
2. ('43) 30 AIR 1943 Bom 164 (166) (DB).
† ('11) 33 All 517 (520):9 Ind Cas 817 (819) (FB).
('90) 17 Cal 53 (57) (DB). (An application for sale is only continuation of the prior application for attachment.)
('10) 7 Ind Cas 707 (707) (DB) (Mad). (Do.)
('31) 18 AIR 1931 Mad 303 (308) (DB). (Application to implead legal representative of a deceased judgment-debtor need not be by a fresh execution petition.)
† ('31) 18 AIR 1931 Bom 425 (427) (DB). (Such application is ancillary and a continuation of the petition.)
[*See also* ('35) 22 AIR 1935 Cal 143 (144). (Application for time for supplying fresh list of properties is not a "fresh application.")]
[But see ('05) 28 Mad 224 (227) (DB). (Mortgage decree — Application for attachment in execution — Subsequent application for sale is a fresh application because the prior application is futile in respect of mortgage decree.)
('97) 24 Cal 473 (480, 487, 491) (SB). (Do.)
See also cases in foot-note 5.
3. ('43) 30 AIR 1943 Pat 127 (130) : 21 Pat 838 (DB). (Subsequent application merely to correct any description of the property mentioned in previous application may be regarded as a continuation of the original application.)
('40) 27 AIR 1940 All 270 (272): I L R (1940) All 377 (FB). (Fact that case was struck off does not show that execution application came to an end— Nor does tabular form of subsequent application suggest that it is fresh.)
('40) 27 AIR 1940 Pat 432 (433, 435) (DB). (Regard must be had to the substance rather than to the form of the application.)
✣ ('39) 26 AIR 1939 P C 80 (84) : 14 Luck 192 : I L R (1939) Kar 136 (PC). (The substance of the matter must prevail over the form of the application.)
('10) 8 Ind Cas 727 (728) (Oudh).
[*See* ('40) 27 AIR 1940 Lah 35 (35). (Question is mixed question of fact and law and second appeal lies from decision of question.)

decided with reference to the antecedent proceedings and the orders passed thereon.[4] As a general rule where the previous application has been suspended or stayed or dismissed for no fault of the decree-holder and the second application is similar in scope and character to the previous one, the second application will be deemed to be an *ancillary* one *in continuation* of the previous one.[5] Where the *character* of the second application

4. ('94) 1894 Pun Re No. 106, page 396.
5. ('42) 29 AIR 1942 Oudh 331 (332) : 17 Luck 618 (DB). (Execution sent to Collector — Papers sent from there for insufficient reason and Munsif consigning case to records—No finding that decree-holders had defaulted or not — Order of Munsif held not final order disposing application and subsequent application revived the previous one.)
('41) 28 AIR 1941 Lah 62 (63, 64) (DB). (First application dismissed for statistical or administrative purpose—Second one is in continuation of first one—AIR 1940 Lah 35 reversed.)
('40) 27 AIR 1940 Mad 566 (568) (DB). (An application in execution which is necessitated by the action of the Court in striking off a previous application for execution for statistical reasons is not in law a fresh application.)
('40) 27 AIR 1940 Pat 432 (437) (DB).
('40) 27 AIR 1940 Oudh 26 (26, 27) (DB). (Execution suspended owing to compromise entitling judgment-debtor to pay decretal amount by yearly instalments—Attached property however agreed to be kept under attachment—On default in payment of instalment decree-holder applying for sale of attached property—Application held in revival of previous application and hence not barred.)
('37) 24 AIR 1937 Nag 92 (93): ILR(1937)Nag 522.
('37) 24 AIR 1937 Pat 43 (44) (DB). (Execution sale set aside—Next application for sale.)
('36) 23 AIR 1936 Lah 843 (844). (Temporary release of attached property in pursuance of judgment-debtor's objections—Objections overruled in appeal —Re-attachment of the same property — Continuation of previous proceedings.)
('35) 22 AIR 1935 Lah 911 (912) (DB). (Proceedings interrupted by claim suit.)
('24) 11 AIR 1924 Pat 367 (369, 370) (DB).
✠('34) 21 AIR 1934 Pat 532 (533) (DB). (Previous application for execution not proceeded with because of claim made and allowed—Subsequent application after the removal of the bar is one in continuation of the first.)
('34) 21 AIR 1934 All 481 (487, 489, 493) : 56 All 791 (FB). (Execution petition for the sale of some of the mortgaged properties by transfer to Collector with a statement that in case of deficiency the other mortgaged properties may be sold — First prayer granted but no orders on second — Subsequent application for second relief is only a continuation of the first application.)
('31) 18 AIR 1931 Bom 492 (494) (DB).
('22) 9 AIR 1922 Mad 3 (5). (The theory of continuation applies only where the previous application has been interrupted by reason of circumstances over which the decree-holder has no control.)
('12) 34 All 396 (397); 14 Ind Cas 172(173)(DB).(To render an application one in continuation of another application, it is necessary that the two applications should be of the same nature.)
('14) 1 AIR 1914 Oudh 430 (432): 17 Oudh Cas 169.
('18) 5 AIR 1918 Pat 296 (297) : 3 Pat L Jour 103 (DB).
('11) 11 Ind Cas 48 (49) (DB) (Cal).
('13) 18 Ind Cas 841 (843) (DB) (Cal).
('09) 3 Ind Cas 940 (940) (DB) (Mad). (That the order "proceedings closed" did not amount to dismissal.)
('30) 17 AIR 1930 Lah 647 (651). (On an application records consigned to the record room pending appeal—Nature of order is a question of intention.)
('84) 10 Cal 416 (423) (DB). (Striking off.)
('92) 16 Bom 294 (302, 303) (DB). (Application struck off not necessarily cancelled.)
('16) 3 AIR 1916 All 24 (24) (DB). (Injunction.)
('26) 13 AIR 1926 All 331 (332) (DB). (Applications by decree-holder to the Court executing the decree to go on from where the previous proceedings have been arrested and to complete the execution are to be considered as merely ancillary and therefore not barred by the section.)
('98) 1898 All W N 137 (138) (DB). (Do).
('12) 16 Ind Cal 541 (542) (DB) (Cal). (Judgment-debtor declared insolvent.)
('13) 20 Ind Cas 244 (245) (Cal). (Injunction.)
('09) 1 Ind Cas 341 (343) (DB) (Cal). (Execution sale set aside—Further application for execution is in continuation of previous one.)
('85) 1885 All W N 269 (269) (DB). (Postponement of execution to enable debtor to raise money — Subsequent application for execution held to be linked to the prior one.)
('88) 1888 All W N 295 (296). (First application made in May, 1883, struck off without either granting or refusing it.)
('05) 2 All L Jour 276 (277). (Former application never finally disposed of.)
('13) 21 Ind Cas 923 (924) (DB) (Cal).
('15) 2 AIR 1915 Mad 407 (411) (DB). (Disposal of previous application not known.)
('08) 31 Mad 71 (74) (DB). (Conditions under which prior execution petition will be treated as pending.)
('10) 7 Ind Cas 707 (708) (All). (Obstruction by judgment-debtor — Application after removal of obstruction.)
('11) 10 Ind Cas 359 (360) (DB) (Cal).
('10) 6 Ind Cas 490 (490) (Lah). (First application struck off on judgment-debtor not being found — Second application for arrest held to be a continuation of the prior one.)
('99) 21 All 155 (158) (DB). (Do.)
('31) 18 AIR 1931 Lah 125 (126). (Dismissal for decree-holder's default—Not a continuation.)
See also the following cases to a similar effect under the old Code :
('08) 30 All 499 (503) 504).
('09) 1909 Pun Re No. 45, page 148.
('83) 5 All 459 (461).
('98) 21 Mad 261 (263).
('83) 5 All 243 (244, 245).
('81) 5 Bom 29 (35).

is different from that of the former, as for instance, where the relief claimed in the second application is against properties or persons different from those in the previous application, the second application will be deemed to be a "fresh application" within the meaning of this section.[6] Similarly, where the proceedings under the prior application have *come to an end*, the second application cannot be taken to be one in continuation of the prior application.[7]

Where an application made within twelve years of the specified date is found to be defective, an amendment thereof after twelve years is not necessarily *ultra vires* of the powers of the Court. The Court is vested with a discretion to deal with the matter according to the circumstances of the case.[8] An amendment should not be allowed if it has the effect of substantially altering the character of the execution proceedings.[9] A decree-holder who is not diligent should not, in the absence of special and sufficient grounds, be allowed to circumvent the provisions of this section by way of amendment. Where the decree-holder applied on the last day of limitation for arrest and attachment of *moveable* property and thereafter sought to amend it by adding a prayer for the attachment of *immovable* property, it was held that the result of allowing the amendment

('86) 8 All 545 (548).
('01) 23 All 13 (20).
('87) 14 Cal 385 (387)..
('79) 4 Cal 415 (416, 417).
('06) 28 All 651 (654).
('86) 12 Cal 161 (164, 165).
('77) 1 All 355 (360) (FB).
('82) 9 Cal L Rep 297 (300).
('84) 6 All 23 (24).
('94) 21 Cal 387 (391).
('95) 17 All 425 (427).
('95) 17 All 243 (244).
('05) 27 All 334 (338) : 32 Ind App 102 (PC).
('01) 1901 All W N 117 (117).

6. ('43) 30 AIR 1943 Pat 127 (130, 131) : 21 Pat 838 (DB).
('42) 29 AIR 1942 Cal 255 (257): ILR (1942) 1 Cal 245 (DB). (First application for attachment of surplus sale proceeds belonging to all judgment-debtors — Subsequent application for attachment and sale of immovable property of one of judgment-debtors.)
('41) 28 AIR 1941 Pat 635 (635, 636) (DB). (Application beyond 12 years for amendment to include property or person not named or specified in original application is fresh application—And amendment should not be allowed.)
('40) 27 AIR 1940 Pat 432 (435) (DB).
† ('36) 23 AIR 1936 Pesh 209 (210) (DB).
('29) 16 AIR 1929 P C 209 (212) (PC).
('96) 18 All 9 (11). (First application for attachment—Second for arrest.)
('12) 13 Ind Cas 929 (929) (All). (First application for arrest—Second for attachment.)
('31) 18 AIR 1931 All 31 (32). (Do.)
('02) 1902 Pun L R No. 112.
('10) 1910 Pun Re No. 17 : 5 Ind Cas 815 (816). (First application against moveables — Second against immovables.)
('28) 15 AIR 1928 Cal 241 (243) (DB). (First application for rateable distribution—Second application for attachment and sale.)
('81) 7 Cal 556 (558, 559) (DB). (Substitution of new properties.)
('31) 18 AIR 1931 All 134 (134) : 53 All 419 (DB) (Do.)
('24) 11 AIR 1924 Cal 131 (132): 50 Cal 743 (DB). (Adding of new properties.)
('26) 13 AIR 1926 All 93 (95) : 48 All 121 (DB).
('18) 5 A I R 1918 Mad 449 (449) (DB). (Prior application for sale of hypothecated property—Second application for sale of other properties.)

7. ('42) 29 AIR 1942 Bom 282 (284) (DB). (Compromise pending execution—Darkast "disposed of" as decree fully satisfied—Compromise subsequently held to be invalid—Application is not revived.)
('42) 29 AIR 1942 Cal 255 (257) : I L R (1942) 1 Cal 245 (DB). (Subsequent application for execution for recovery of amount which decree-holder had to refund is not one for revival or continuation of original execution proceeding.)
('40) 27 AIR 1940 Lah 75 (77). (Previous execution proceedings consigned to record room for want of prosecution as decree-holders were absent.)
('40) 27 AIR 1940 Pat 432 (433) (DB).
('12) 13 Ind Cas 160 (160) (DB) (Mad).
[*See* ('40) 27 AIR 1940 Pat 54(55):18 Pat 649 (DB). (If an executing Court wants to dispose finally of an application, it should use clear and unambiguous language such as "the application is dismissed." "Striking off an application" is a phrase which is capable of a number of meanings.)]
[*See also* ('13) 20 Ind Cas 563 (564) (Lah).]

8. ('42) 29 AIR 1942 Cal 306 (307) : I L R (1941) 2 Cal 251 (DB). (Subsequent application for purpose of amending list of properties accepted.)
('40) 27 AIR 1940 Mad 19 (20) (DB). (Amendment allowed in view of special circumstances of case.)

9. ('42) 29 A I R 1942 All 442 (443). (Application for execution by attachment and sale of property—Property attached—Objection by purchaser at revenue sale—Application could not be amended so as to seek execution in some other manner.)
('42) 29 A I R 1942 Cal 306 (307) : I L R (1941) 2 Cal 251 (DB). (Subsequent application filing supplementary list of properties to be proceeded with accepted.)

would be to circumvent the provisions of this section and that it should not therefore be allowed.[10] Where an amendment is sought, the question whether it ought to be allowed so as to make it operative from the date of the original application depends upon the circumstances of each case.[11] If the defect is not a fundamental one, the amendment may be allowed.[12] If it is a fundamental one, the amendment ought not to be allowed.[13] In such a case the so-called amendment is really a fresh application.

A Court executing a decree, while rejecting an application for execution, is not competent to order that a fresh application may be filed within a certain time when such an application would be barred by the section.[14]

8. Successive applications for execution of decrees of Courts other than Chartered High Courts. — See Note 2 above. As has been observed in that Note, this section only fixes the *maximum* limit of time for execution of a decree and subject to such outside limit, a final order on a previous execution application or an application to take some step-in-aid of execution will afford a fresh starting point of limitation.[1] As to what are "steps-in-aid of execution," see the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 182.

9. Applicability of the section to Chartered High Courts — Sub-section 2 (b). — Sub-section 2 (b) is new. It was held under the old Code that, in view of the provision in Art. 180 of the Limitation Act, 1877, for a revivor of the decrees of Chartered High Courts in the exercise of *ordinary original civil jurisdiction* and of orders of His Majesty in Council, S. 230 did not apply to Chartered High Courts in the exercise of ordinary original civil jurisdiction.[1] Sub-section (2) (b) has been added to give legislative recognition to that view. In the case of such decrees and orders, therefore, any number of applications for execution can be made and cannot be refused[2] unless they are barred on the principle of *res judicata*[3] or under Art. 183 of the Limitation Act, 1908, Article 183 of the Limitation Act, 1908, does not however apply to decrees of Chartered High Courts in the exercise of *appellate* jurisdiction.[4]

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10. ('36) 23 AIR 1936 Mad 623 (624).
[*See also* ('43) 30 A I R 1943 Pat 127 (130) : 21 Pat 838 (DB). (Application after 12 years to substitute new property for property mentioned in original application cannot be allowed.)
('41) 28 AIR 1941 Pat 635 (635, 636) (DB). (Application beyond 12 years for amendment to include property or person not named or specified in original application is fresh application and should not be allowed.)]

11. ('28) 15 A I R 1928 Mad 1154 (1155, 1156) (DB).

12. ('35) 22 AIR 1935 Mad 161 (163). (Execution application filed *bona fide* against wrong legal representative within time — Amendment allowed but after 12 years' time—Amendment takes effect from date of original representation.)
('15) 2 AIR 1915 Mad 1042 (1043) (DB).
('05) 1905 Pun Re No. 27 p. 108 (109). (Amendment as to particulars.)
[*See also* ('30) 17 A I R 1930 Oudh 65 (66) : 5 Luck 458. (Application returned for not filing process fee with the application—Amendment is retrospective.)]

13. † ('15) 2 AIR 1915 Mad 1042 (1043) (DB).
('90) 17 Cal 631 (636, 637, 638, 641) (FB).
('28) 15 A I R 1928 Lah 808 (811) (DB). (Application to file a supplementary list of properties.)
('27) 14 AIR 1927 Mad 347 (347). (Amendment by adding other items of property.)
('05) 15 Mad L Jour 243 (244) (DB). (An application for arrest of judgment-debtor if subsequently amended by a prayer for execution against his properties is a fresh application.)
('02) 1902 Pun L R No. 112. (Do.)
('03) 26 Mad 101 (103) (DB). (Petition when filed unverified.)
('29) 16 AIR 1929 Pat 407 (409) : 8 Pat 462 (DB). (Amendment by substituting immovable properties in place of moveables cannot be made.)

14. ('09) 4 Ind Cas 958 (959) (Lah).

Note 8

1. See Article 182 (5) of the Limitation Act, as amended by Act IX of 1927.

Note 9

1. ('09) 36 Cal 543 (555, 557): 1 Ind Cas 168 (174).
('82) 6 Bom 258 (260).
('84) 7 Mad 540 (545).
('93) 20 Cal 551 (557).

2. See Art. 183 of the Limitation Act, 1908.

3. See S. 11, Note 23.

4. ('72) 14 Moo Ind App 465 (484) (PC). (Case under Act XIV of 1859.)
('81) 6 Cal 201 (202) (DB).

10. "Date of the decree sought to be executed." — In the absence of the circumstances specified in sub-section 1 (b) and in the absence of anything postponing the period of execution, the period of twelve years is to be computed from the date of the decree.[1] The date of the decree is the date which it ought to bear under O. 20, R. 7 and not the date when it is actually *prepared* and signed by the Judge.[2]

Where there is a preliminary and a final decree in a suit, the two must, for the purposes of this section, be taken to be a single and indivisible decree and the date from which the time is computed is the date of the *final* decree.[3] Where a decree is amended, the date of the amendment will not give a fresh starting point of limitation under this section.[4] In the case of a combined mortgage decree which provides that if the nett proceeds of the sale are not sufficient to satisfy the mortgagee's claim the balance be realised from the person and other properties of the mortgagor, the period will run from the date of the decree in respect of *both* remedies.[5] If, however, after the sale of the mortgaged properties a personal decree for the balance is passed under O. 34, R. 6, time will run in respect of the personal decree from the date thereof.[6] Where a redemption decree does not mention any date for the payment of the mortgage debt, it must be taken as payable on the date of the decree itself.[7]

The words "or of the decree in appeal confirming the same" have been omitted in this section as being a mere surplusage. Where there has been an appeal from the original decree, the period under the section is to be computed from the date of the appellate

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Note 10

1. (1900) 2 Bom L R 199 (200) (DB).
('08) 11 Oudh Cas 57 (58, 59) (DB).

2. ('97) 1 Cal W N 93 (94) (DB).
('18) 5 AIR 1918 Bom 217 (218): 42 Bom 309 (DB).
Also see O. 20 R. 7 N. 2.

3. † ('16) 3 AIR 1916 Cal 482 (483) (DB).
('24) 11 AIR 1924 Cal 131 (132): 50 Cal 743 (DB).
('07) 6 Cal L Jour 462 (465) (DB). (Final decree awarding mesne profits.)
('18) 5 AIR 1918 All 254 (255) : 40 All 211 (DB). (Direction for enquiry into mesne profits — Assumed to operate as a final decree.)
('97) 19 All 520 (521) (DB). (Order absolute under S. 89 of the Transfer of Property Act now equivalent to a final decree.)
Also see O. 34 R. 5 N. 28.
[But see ('27) 14 AIR 1927 Mad 842 (844) (DB). (Decree directing ascertainment of mesne profits in execution — Time runs from date of decree and not from date of ascertainment.)
('16) 3 AIR 1916 Mad 288 (290): 39 Mad 544 (DB). (Decree-holder will have 12 years from date of order absolute under S. 89 of the Transfer of Property Act — The decree under S. 88 itself could have been executed within 12 years from the date thereof.)
NOTE.—In both the above cases, the decrees were passed under the old Code. The points are not likely to arise under this Code which provides for a preliminary and a final decree in such cases.
('22) 9 AIR 1922 Bom 95 (95): 46 Bom 761 (DB). (Mortgage decree under Dekkhan Agriculturists' Relief Act — No necessity for decree absolute — Time runs from date of decree.)]

4. ('40) 27 AIR 1940 Mad 127 (128, 129) : I L R (1940) Mad 349 (FB). (Decision of Madhavan Nair and Cornish JJ., in C. M. A. No. 264 of 1931 overruled.)
('39) 26 AIR 1939 Pat 607 (609, 610) : 18 Pat 395 (DB). (60 Ind Cas 318 (Pat) dissented from.)
† ('35) 22 AIR 1935 Lah 292 (294) (DB).
('34) 21 AIR 1934 Oudh 465 (469) (DB). (AIR 1932 All 351 : 54 All 622 followed.)
('18) 5 AIR 1918 Bom 217 (221): 42 Bom 309 (DB).
✻ ('32) 19 AIR 1932 All 351 (352): 54 All 622 (DB). (60 Ind Cas 318 (Pat) dissented.)
[But see ('26) 99 Ind Cas 204 (205) (Oudh).]

5. † ('17) 4 AIR 1917 P C 85 (85) (PC). (Affirming AIR1915 Cal 8.)
('16) 3 AIR 1916 Mad 972 (974) (DB).
('21) 8 AIR 1921 Cal 456 (456, 457) (DB).
('25) 12 AIR 1925 Mad 331 (331) (DB).
('28) 15 AIR 1928 Cal 668 (668, 669) (DB).
('26) 13 AIR 1926 Mad 954 (955) : 50 Mad 5 (DB).
Also see O. 34 R. 6 N. 17.
In view of the Privy Council ruling in AIR 1917 PC 85, the following decisions are no longer law :
('18) 5 AIR 1918 Mad 1187 (1194): 40 Mad 989 (FB).
('12) 36 Bom 368 (372): 15 Ind Cas 822 (824).
[*See also* ('26) 13 AIR 1926 Mad 20 (28): 48 Mad 846. (AIR 1918 Mad 1187 : 40 Mad 989 (FB). and AIR 1918 Mad 607 were held to be overruled by AIR 1917 PC 85.)]

6. ('40) 27 AIR 1940 Oudh 90 (91, 92) : 15 Luck 95 (DB). (The same principle applies even if the decree is a compromise decree which provides for the passing of two decrees, preliminary and final and for a subsequent personal decree for the balance.]
('26) 13 AIR 1926 Mad 954 (955): 50 Mad 5 (DB).
('20) 7 AIR 1920 Cal 378 (379) (DB).

7. ('89) 13 Bom 567 (570) (DB).
('92) 16 Bom 480 (485, 486) (DB).
('99) 23 Bom 592 (594) (DB).

decree even though the appeal was only from a *portion* of the original decree[8] and even if the original decree is confirmed in appeal[9] or the appeal is dismissed as not pressed.[10] The same principle applies to cases of appeals to the Privy Council.[11] There is a difference of opinion as to whether the same principle applies to the case of a revision. The Circuit Court at Cuttack is of the view that it does.[12] The High Court of Madras has taken a contrary view.[13] Where, however, an appeal is preferred where no appeal lies[14] or where an appeal is withdrawn[15] or is dismissed for default,[16] or is rejected for insufficiency of stamp,[17] time will run only from the *original* decree. Where a decree is passed *severally* against two or more defendants and one of the defendants appeals, it has been held that the period of twelve years as against the other defendants runs from the date of the original decree.[18] This view might require reconsideration in the light of the decision in *Nagendra Nath* v. *Suresh*.[19]

Where an application to set aside an *ex parte* decree has been rejected, the period for the execution of the *ex parte* decree runs from the date of the decree notwithstanding the pendency of the application.[20]

It has been held in the undermentioned case[21] that this section obviously refers to a decree which is *capable of execution* and that in the case of a decree which is not capable of execution except on the happening of a particular contingency, time will not begin to run until that contingency occurs.

11. **Subsequent order, meaning of.** — Where a subsequent order directs payment of money or delivery of property at a future date, the period of twelve years will run from such date.[1] Thus, an order under O. 20, R. 11 (2) will be a subsequent order

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8.✝('03) 26 Mad 91 (93, 95, 96) (FB).
('11) 12 Ind Cas 75 (75) (Mad).
('77) 1 All 508 (509) (DB).
('81) 6 Cal 194 (196) (DB).
('82) 4 All 274 (276) (DB). (It is not necessary that the appeal should be from the original decree in the suit—The appeal may be from decree passed on review.)
('83) 9 Cal 100 (102) (DB).
('84) 6 All 14 (16) (DB).
('86) 8 All 573 (575) (DB).
('89) 16 Cal 598 (602, 603) (DB).
('92) 19 Cal 750 (755) (DB).
('95) 17 All 103 (105) (DB).
('95) 22 Cal 467 (472) (DB).
('96) 23 Cal 876 (883) (DB).
✝ ('98) 22 Bom 500 (505, 508) (DB).
✝ ('98) 25 Cal 594 (601, 602) (FB).
('99) 23 Mad 60 (67, 69) (DB).
('07) 1907 Pun Re No. 32, p. 124.
('12) 16 Ind Cas 370 (372) (DB) (Cal).
✝ ('05) 27 All 501 (504, 505, 508, 509) (FB).
[See however ('78) 2 Cal L Rep 471 (473) (DB). (Appeal by one of the defendants with respect to his share not imperilling the whole decree—Time runs against the non-appealing defendants from the orginal decree.)]

9. ('11) 12 Ind Cas 75 (75) (Mad).
✝ ('94) 18 Bom 203 (205) (DB).
✝ ('10) 32 All 136 (137, 138) : 5 Ind Cas 473 (474) (DB). (Dismissing appeal on the ground that it had abated — Dissenting from 20 All 124 which was a case under the Limitation Act.)
('95) 19 Bom 258 (260) (DB).
('09) 31 All 379 (381) : 2 Ind Cas 364 (364) (DB). (Though appellate decree is the one to be executed, it does not by implication extend the time fixed by original decree for performance of any condition precedent.)

10. ✝ ('38) 25 AIR 1938 Pat 401 (402) (DB).
('08) 30 All 385 (386, 387) (DB).

11. ('80) 2 All 763 (764, 765) (DB).
('81) 7 Cal 620 (622, 627) (DB).

12. ('43) 9 Cut L T 21 (25, 26). (AIR 1941 Mad 477 dissented.)

13. ('41) 28 AIR 1941 Mad 477 (478) (DB). (AIR 1940 Mad 127 : ILR (1940) Mad 349 (FB) Rel. on.)

14. ✝ ('26) 13 AIR 1926 All 440 (442, 443) : 48 All 377.
[But see ('21) 8 AIR 1921 All 134 (134) : 43 All 405 (DB).]

15. ('08) 1908 Pun Re No. 54, p. 266.

16. ('43) 9 Cut L T 21 (26).
('18) 5 AIR 1918 Oudh 446 (449).

17. ('84) 6 All 438 (439) (DB).

18. ('26) 13 AIR 1926 Cal 664 (664) (DB).
✝ ('91) 13 All 1 (15, 16) (FB).
('04) 1 All L Jour 409 (411).
('23) 10 AIR 1923 Bom 400 (400). (Decree against *A* but not against *B*—Plaintiff appealing for decree against *B* also—Appeal dismissed—Time against *A* runs from original decree.)
Also see O. 41 R. 4 N 9.

19. ('32) 19 AIR 1932 P C 165 (167) : 60 Cal 1 : 59 Ind App 283 (PC).

20. ('92) 16 Bom 123 (125) (DB).

21. ('39) 26 AIR 1939 Bom 75 (78) : ILR (1939) Bom 87 (DB).

Note 11

1. ('09) 1 Ind Cas 48 (49) (Lah).

within the meaning of this section.[2] According to the High Court of Patna[3] and the Chief Court of Oudh[4] a subsequent order must be one passed by the Court which passed a decree *as such* Court and not an order of an *executing* Court. The Bombay High Court[5] has, on the other hand, held that the order may be of *any competent Court* including a Court of execution. The Calcutta[6] and Lahore[7] High Courts and the Courts of the Judicial Commissioner of Nagpur[8] and Sind[9] are also inclined to this latter view. Relying upon a Privy Council decision,[10] the same view has recently been taken by the Allahabad High Court[11] though in the undermentioned cases[13] it had previously held the former view.

12. "At a certain date or at recurring periods." — Where a decree does not fix a *definite* date the question whether a sum is payable by a certain date should be ascertained by construction of the decree and if so ascertainable, time runs from that date.[1] An order merely directing a compromise petition for payment by instalments to be filed, is not an order directing payments to be made at a *particular date*.[2]

Decrees for payment in instalments, annual or monthly,[3] and decrees for future maintenance[4] are decrees for payment "at recurring periods." Time in the case of such decrees and of decrees for the payment of money at a particular date, runs from the date of default or the expiry of the period as the case may be.[5] Where an instalment decree provides for the payment of the whole sum in default of any one instalment and either

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2. ('21) 8 AIR 1921 Pat 340 (340) (DB).
('17) 4 AIR 1917 Mad 188 (188) (DB). (But the application under O. 21 R. 11 must have been made within limitation period of Article 175— Otherwise, order of the Court is without jurisdiction and will not save time—However, *see* AIR 1923 Lah 381 where it was held that as the parties agreed to such an application which was made beyond limitation, the application was good.)
[*See* ('24) 11 AIR 1924 Lah 342 (344).]
[*See also* ('25) 21 Mad L W (Jour S R C) 29 (29). (Per Wallace, J.)]
[But see ('08) 18 Mad L Jour 548 (549) (DB). (Order under Sec. 257-A of the old Code (now deleted) *held* not to be a subsequent order.)]
3. ('35) 22 AIR 1935 Pat 380(381):14 Pat 816 (DB).
† ('21) 8 AIR 1921 Pat 340 (340) (DB).
('18) 5 AIR 1918 Pat 216 (217) (DB).
4. ('36) 23 AIR 1936 Oudh 266 (266):12 Luck 244.
5. ✝('25) 12 AIR 1925 Bom 503 (504) : 49 Bom 695 (DB).
6. ('38) 25 AIR 1938 Cal 25 (30) : I L R (1937) 2 Cal 373 (DB).
('29) 16 AIR 1229 Cal 687 (689):57 Cal 789 (DB).
('85) 11 Cal 143 (145).
[But see ('12) 13 Ind Cas 88 (90) (DB) (Cal).]
7. ('26) 13 AIR 1926 Lah 465 (466).
('89) 1889 Pun Re No. 200, p. 706. (Arrangement of parties in execution as to satisfaction of decree —Parties cannot be allowed to turn back upon it.)
[But see ('23) 10 AIR 1923 Lah 678 (678). (Where a Court executing the decree records a compromise the original decree is not altered thereby and the period will still be calculated from the date of the decree.)]
8. ('31) 18 AIR 1931 Nag 50 (51):27 Nag L R 150 (DB).
9. ('39) 26 AIR 1939 Sind 93 (96) : I L R (1939) Kar 502 (DB).
10. ('39) 26 AIR 1939 P C 80 (85, 86):ILR (1939) Kar P C 136 : 66 Ind App 84:14 Luck 192 (PC).
11. ('40) 27 AIR 1940 All 107 (108). (A I R 1932 All 273:54 All 573 (FB) held overruled by A I R 1939 P C 80 : 14 Luck 192 : I L R (1939) Kar P C 136 : 66 Ind App 84 (PC).)
('40) 27 AIR 1940 All 423 (424) : I L R (1940) All 536 (DB). (Do.)
('40) 27 AIR 1940 All 270 (272) : I L R (1940) All 377 (FB). (Do.)
12. ('18) 5 AIR 1918 All 216 (218) : 40 All 198 (DB).
('83) 1883 All W N 147 (147). (Arrangements for paying off decree in instalments not carried out by order of Court.)
[*See also* ('91) 1891 All W N 12 (13). (Order made without jurisdiction will not save time.)

Note 12

1. ('91) 14 Mad 396 (398) (DB).
('89) 1889 Pun Re No. 159 p. 559 (561).
2. ('89) 16 Cal 16 (18, 19) (DB).
† ('82) 4 All 155 (156) (DB).
† ('32) 19 AIR 1932 All 273 (282) : 54 All 573 (FB).
3. ('92) 1892 Pun Re No. 13, p. 64 (FB). (Instalment decree — Execution can be taken for instalments not barred.)
('85) 9 Bom 328 (332) (DB).
4. ('87) 9 All 33 (34) (DB).
('31) 18 AIR 1931 Bom 492 (494) (DB). (Amount of maintenance directed to be determined in execution—Time runs from date of such determination.)
† ('92) 19 Cal 139 (141, 145, 146) (FB).
('94) 16 All 179 (181).
('95) 22 Cal 903 (908).
('10) 38 Cal 13 (22, 23) : 6 Ind Cas 826 (829).
5. ('43) 30 AIR 1943 Pat 33 (34) (DB).
('40) 27 AIR 1940 All 423 (424) : I L R (1940) All 536 (DB).
('94) 1894 Pun Re No. 89 p. 321 (324).
('88) 12 Bom 65 (67) (DB). (Right to execute accruing on a particular day — Limitation should be computed from that day.)

no option is given to the decree-holder or an option is given and exercised by him, time for the execution of the whole decree runs from the date of the *first default.*[6]

In the undermentioned case,[7] an instalment decree provided that in default of payment of any instalment, the decree-holder was entitled to realise the whole amount of the decree at once. It was held that such a decree could not be considered to be a decree payable "at a certain date" within the meaning of this section, and that therefore, after twelve years from the date of the default, only that instalment will be barred in respect of which the default was made.

Where a decree is for delivery of possession of immovable property contingent on the non-payment of annuity, the decree-holder is not bound to execute for possession on the occurrence of the first default but might execute it on the occurring of any subsequent default.[8]

Where a decree directs that money be recoverable from a party only on failure to recover the same from another, the period of twelve years runs from the date of decree and not from the time of the failure of the other to make the payment.[9]

13. Exclusion of time during minority or other disability of decree-holder.—See Section 6 Note 21 of the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn.

14. Deduction of time for other causes. — Where the period of twelve years expires on a day when the Court is closed, the application can be presented on the next re-opening day on the broad principle that where the parties are prevented from doing a thing by the act of the Court they are entitled to do it at the first subsequent opportunity.[1]

As to whether the sections of the Limitation Act extending the period of limitation "prescribed" apply to the period of twelve years under this section, see the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn.[2]

In cases of intervening insolvency of the judgment-debtor the period during which the adjudication lasts will be excluded in computing the period of twelve years under this section.[3]

By virtue of S. 48 of the Dekkhan Agriculturists' Relief Act, 1879, the time spent in obtaining the conciliator's certificate can be deducted in computing the period of limitation under this section.[4] (Now see the Bombay Agricultural Debtors Relief Act, 1939, sections 85 and 74.)

Where property is under the management of the Collector under Sch. III of the Code, the period of such management can be excluded under para. 11 (3) of Sch. III in calculating the "period of limitation" applicable to the execution of any decree in respect of any remedy of which the decree-holder has been temporarily deprived. The expression

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('07) 30 Mad 504 (505) (DB).
('24) 11 AIR 1924 All 263 (264) : 46 All 73.
6. ('85) 7 All 373 (375) (DB). (Decree by instalments.)
† ('19) 6 AIR 1919 Cal 322 (323) (DB).
('25) 12 AIR 1925 Bom 326 (326) (DB).
('31) 18 AIR 1931 Bom 263 (264). (Option given and exercised.)
7. ('36) 23 AIR 1936 Lab 159 (160) (DB).
8. ('94) 16 All 237 (238, 239) (DB).
9. ('26) 13 AIR 1926 Mad 20 (23) : 48 Mad 846 (DB).

Note 14

1. † ('91) 18 Cal 631 (634) (DB).
('85) 7 All 107 (108) (DB).
('99) 22 Mad 179 (182) (DB).
('16) 3 Cal L Jour 339 (343) (DB).
2. See Note 3 on S. 4; Note 15 on S. 19; Note 10 on S. 20; Note 6a on S. 29.
3. † ('39) 26 AIR 1939 Mad 270 (272):ILR (1939) Mad 611 (DB).
('21) 8 AIR 1921 Cal 456 (457) (DB).
('12) 16 Ind Cas 541 (542) (DB) (Cal).
† ('32) 19 AIR 1932 Oudh 69 (71) : 7 Luck 397 (DB). (Section 48 is controlled by S. 78 (2), Provincial Insolvency Act.)
4. ('18) 5 AIR 1918 Bom 187 (188) : 42 Bom 367 (DB).

"period of limitation" has been interpreted as including the period fixed by S. 48.[5] But para. 11 (3) only applies when the decree has been transferred to the Collector for execution[6] and only in respect of any remedy of which the decree-holder is temporarily deprived.[7]

The pendency of an appeal by the judgment-debtor is not a ground of suspension of the period prescribed by this section in the absence of fraud or force.[8] When a decree is conditional on the redemption of a prior mortgage and the decree-holder redeemed the prior mortgage after twelve years from the date of his decree, the period up to the date of the redemption is not excluded, as nothing prevented him from redeeming it earlier and applying for execution within time.[9]

15. "By fraud or force." — Under sub-s. (2), fraud or force which prevents execution gives a fresh period of twelve years within which the decree may be executed.[1] In order to get the benefit of this sub-section it must be proved that —

(1) there was fraud or force on the part of the judgment-debtor,[2] and

(2) the decree-holder was thereby prevented from executing the decree.[3]

The fraud, however, need not be such as to have continued to prevent execution up to the expiry of the twelve years.[4] There is a conflict of opinion on the question whether the Court has any discretion to refuse execution even when fraud or force on the part of the judgment-debtor preventing execution is established within twelve years of the application. According to the Calcutta High Court[5] the Court has such discretion which will be exercised in favour of the decree-holder if he had been *diligent* in proceeding with the execution of the decree from the date of the decree. The Madras High Court is, on the other hand, inclined to the view that no such discretion exists under the section.[6] The Oudh Judicial Commissioner's Court has held[7] that even in the view of the Calcutta High Court stated above, the due diligence required is nothing more than keeping the decree alive under the provisions of the Code. It is submitted with respect that the Madras view is correct. The language of the sub-section makes it clear that sub-s. (1) which precludes the Court from ordering execution in the cases specified does not bar an application made after the specified period if the conditions mentioned in sub-s. (2) are satisfied. There is nothing to show that the Court has any *discretion* in the matter.

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5. ('37) 1937 Oudh W N 1116 (1117).
† ('34) 21 AIR 1934 Oudh 465 (470): 10 Luck 208 (DB).
† ('19) 6 AIR 1919 All 64 (65) : 42 All 118 (DB).
('10) 13 Oudh Cas 303 (305, 306) : 8 Ind Cas 377 (378) (DB).
[*See also* ('95) 19 Bom 261 (267, 268). (Remittances by collector—Step-in-aid.)]
6. ('15) 2 AIR 1915 Mad 449 (451) (DB).
('16) 3 AIR 1916 Mad 972 (972) (DB).
7. ('15) 2 AIR 1915 Nag 103 (106): 11 Nag L R 25.
8. ('17) 4 AIR 1917 Cal 460 (461) (DB).
9. ('13) 18 Ind Cas 897 (897) (DB) (All).

Note 15

1. † ('99) 22 Mad 320 (322, 323) (DB).
('11) 34 All 20 (21) : 11 Ind Cas 672 (672) (DB).
('20) 7 AIR 1920 Nag 68 (69).
('10) 8 Ind Cas 805 (805) (DB) (Mad).
2. ('10) 8 Ind Cas 805 (805) (DB) (Mad).
† ('35) 22 AIR 1935 Mad 8 (11) : 58 Mad 311 (DB). (Fraud committed by judgment-debtor — Decree-holder can avail of it against legal representative.)
[*See also* ('32) 19 AIR 1932 All 273 (277, 284): 54 All 573 (FB).]
3. ('35) 22 AIR 1935 Pat 380 (382): 14 Pat 816 (DB).
† ('29) 16 AIR 1929 Pat 597 (599) (DB).
† ('98) 8 Mad L Jour 203 (204).
('09) 4 Ind Cas 958 (959) (Lah).
† ('12) 13 Ind Cas 88 (89) (Cal).
('19) 6 AIR 1919 Mad 197 (198) (DB).
✣[But see ('35) 22 AIR 1935 Mad 8 (11) : 58 Mad 311). (Case law of Madras High Court discussed.)]
4. † ('11) 14 Oudh Cas 238 (242, 243) : 12 Ind Cas 793 (795).
('97) 1 Cal W N clxii (DB).
† ('99) 22 Mad 320 (322, 323) (DB).
('19) 6 AIR 1919 Mad 197 (198) (DB).
5. ('06) 11 Cal W N 440 (441) (DB).
6. ('11) 35 Mad 670 (672, 673): 12 Ind Cas 679 (681) (DB). (Even assuming due diligence is necessary, continuous diligence during all the time prior to the application need not be shown.)
7. ('11) 14 Oudh Cas 238 (241, 242) : 12 Ind Cas 793 (795).

The term "fraud" in the section should be interpreted in a very liberal sense.[8] Any improper means resorted to by the judgment-debtor to prevent execution of the decree would amount to such fraud.[9] The term includes not merely deceit but also circumvention.[10] But mere objections by the judgment-debtor cannot be taken advantage of as "fraud" within the meaning of this section.[11] In the case noted below[12] an objection raised to the jurisdiction of the Court was held not to amount to fraud. But raising a plea based on a false statement would be fraudulent.[13] Where there are frequent futile and false objections raised by the judgment-debtor accompanied by his keeping out of the way when warrants of arrest are issued, his conduct may be taken to amount to fraud.[14] In the following instances the conduct of the judgment-debtor has been held to amount to fraud within the meaning of the section —

(1) Where he raised frivolous objections in order to delay execution of the decree against him.[15]

(2) Where he wilfully evaded the arrest warrant.[16]

(3) Where, knowing that a warrant of attachment was issued against his moveable property, he locked up his house and so prevented the moveable property therein being attached.[17]

(4) Where he or his heirs made fictitious and fraudulent alienation of property which was subsequently set aside in a regular suit.[18]

(5) Where he kept out of British India so that the decree-holder was not in a position to take out execution against his person.[19]

Where the Court merely refused to permit execution against properties of the judgment-debtor in the hands of a receiver but it was open to the decree-holder to proceed against the person and other properties of the judgment-debtor or of the surety and he did not do so within the twelve years, it was held that S. 48 (2) was of no help to the decree-holder.[20]

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8. † ('12) 18 Ind Cas 1008 (1008) (DB) (Mad).
('12) 13 Ind Cas 88 (89) (DB) (Cal). (The term "fraud" in S. 48 should be interpreted in a wider sense than that in which it is used in English law.)
('31) 18 AIR 1931 All 31 (33) (DB).
('11) 35 Mad 670 (673) : 12 Ind Cas 679 (680) (DB).

9. ('36) 23 AIR 1936 Lah 843 (845). (Frivolous objection taken by the judgment-debtor was held to amount to fraud.)
† ('13) 18 Ind Cas 1008 (1008) (DB) (Mad).

10. ('36) 23 AIR 1936 Lah 843 (845).
† ('27) 14 AIR 1927 All 668 (669).

11. † ('35) 22 AIR 1935 Pat 380 (382) : 14 Pat 816 (DB).
('27) 14 AIR 1927 All 668 (669).
('31) 18 AIR 1931 All 134 (134) : 53 All 419 (DB).

12. ('36) 23 AIR 1936 Lah 843 (845) (DB).

13. ('36) 23 AIR 1936 Lah 843 (845). (But mere raising of objections so as to prolong execution proceedings beyond the period of limitation is not necessarily fraud.)

14. ('12) 13 Ind Cas 929 (929) (All).
† ('83) 6 Mad 365 (367) (DB).
† ('09) 2 Ind Cas 222 (223) (All).

15. ('11) 14 Oudh Cas 238 (242, 243): 12 Ind Cas 793 (794, 795). (It is sufficient to show that the judgment-debtor on various occasions within the aforesaid period dishonestly prevented the execution of the decree against him by frivolous devices.)
('34) 21 AIR 1934 Pat 532 (533) (DB). (The judgment-debtor fraudulently setting up a claimant to the attached property—Claim set aside by separate suit.)
† ('22) 9 AIR 1922 All 145 (146) : 44 All 319 (DB).
('17) 4 AIR 1917 Oudh 69 (71) (DB).
[But see ('12) 13 Ind Cas 88 (89) (DB) (Cal). (The mere fact that the judgment-debtor objects to a sale which objection ultimately proves unsuccessful will not amount to fraud.)]

16. † ('20) 7 AIR 1920 Mad 492 (493) (DB).
('24) 11 AIR 1924 Mad 836 (837) (DB).
('12) 13 Ind Cas 929 (929) (DB) (All).

17. ('85) 9 Bom 318 (319).
† ('99) 22 Mad 320 (322, 323) (DB).
[See however ('17) 4 AIR 1917 Oudh 159 (160). (Keeping the doors closed is *per se* no evidence at all of fraudulent conduct on the part of a lady, unless there is anything to show that she deliberately does so or attempts to do so against the executing officer.)]

18. ('40) 27 AIR 1940 Lah 178 (179). (AIR 1925 Nag 82 : 22 Nag L R 67 ; 4 Mad 292 and A I R 1935 Mad 8 : 58 Mad 311 relied on.)
('82) 4 Mad 292 (294) (DB).

19. ('25) 12 AIR 1925 Nag 82 (90): 22 Nag L R 67.

20. ('29) 16 AIR 1929 Pat 597 (599) (DB).

Fraud or force of one judgment-debtor will not extend the time against a co-judgment-debtor who did not resort to it.[21]

16. Appeal from orders under the section. — An order granting or refusing execution of a decree under the section is, it is conceived, a final order amounting to a decree under S. 47 and is, therefore, appealable.

17. Plea of bar under the section, when to be raised. — Where notice of petition for attachment in execution is duly served on the judgment-debtor who allows orders to be passed *ex parte*, he cannot ask for a review of the order, nor can he in appeal raise the plea that the execution application is barred by the expiry of the twelve years under the section.[1]

Where an executing Court decides that the execution of a decree is not barred, notwithstanding the provisions of this section, it is merely an erroneous decision and not an illegal exercise of jurisdiction. Therefore, so long as the order is not set aside in appeal or revision, it cannot be attacked in any collateral proceeding on the ground of want of jurisdiction in the executing Court.[2]

TRANSFEREES AND LEGAL REPRESENTATIVES

49. [S. 233.] Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

Transferee.

[1877, S. 233. See O. 21, R. 16.]

Synopsis

1. Scope and object of the section.
2. Equity of the judgment-debtor to set off cross-decree.
3. Transferee during pendency of suit by judgment-debtor takes it subject to the result of the suit.
4. Assignee of money decree from mortgagee — Equities enforceable against him. See O. 34, R. 14, Note 10.
5. Assignee's want of knowledge of equity, if affects rule.

1. Scope and object of the section. — This section may be compared with section 132 of the Transfer of Property Act, 1882, which is based on the same principle,[1] namely, that the assignee of a claim stands in no better position than the assignor as regards equities existing between the assignor and his debtor at the time of the assignment.[2] An attaching decree-holder is an "assignee" of the attached decree within the meaning of O. 21, R. 16 and is, under this section, subject to the same equities that the judgment-debtor in attached decree had against his decree-holder.[3] The equity, to which a transfer of a decree is subject, must, however, be one available against *the original*

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21. †('16) 3 AIR 1916 Mad 1 (2) : 38 Mad 419 (DB).
('31) 18 AIR 1931 Mad 381 (383) (DB).
† ('30) 17 AIR 1930 Sind 218 (219) (DB).

Note 17

1. † ('29) 16 AIR 1929 Mad 826 (826, 827).
[But see ('38) 25 AIR 1938 All 89 (90) (DB). (Objection as to bar not raised on notice of application for execution — Objection to confirmation of sale on the ground that execution was barred by limitation, allowed to be raised.)]
2. ('34) 21 AIR 1934 Cal 282(283):61 Cal 234 (DB).

Section 49 — Note 1

1. Section 132 of the Transfer of Property Act runs as follows: "The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer."
2. † ('10) 7 Ind Cas 55 (59, 60) (DB) (Cal). (Fraudulent assignment.)
('74) 21 Suth W R 141 (143).
Also see O. 21, R. 18, N. 10.
3. ('25) 12 AIR 1925 Cal 102 (103) (DB).
Also see O. 21, R. 18, N. 10.

decree-holder and not one available against others.[4] A mere *claim* for restitution made by the judgment-debtor against the original decree-holder is not an equity which can be availed of against an assignee from the decree-holder.[5] The equity which the judgment-debtor seeks to enforce against the transferee must have been existent at the date of the assignment.[6]

2. Equity of the judgment-debtor to set off cross-decree. — A right to set off a cross-decree or cross-claim under O. 21, Rr. 18 and 19 is an equity which can be enforced against the transferee of the decree,[1] but the decree against which the set-off is asked for must be before the Court for execution[2] and it is *that* Court that should consider whether the assigned decree is subject to any equities.[3] A right to set-off a cross-decree is not affected when the assignment of one of them has been found to be fraudulent.[4]

3. Transferee during pendency of suit by judgment-debtor takes it subject to the result of the suit. — An assignee of a decree which, subsequent to the assignment, is confirmed on appeal without the assignee being brought on the record, is nevertheless an "assignee" within O. 21, R. 16 who can execute the appellate decree[1] but a satisfaction entered on the decree under O. 21, R. 18 is binding on him though made subsequent to the assignment to him and before his name is brought on the record.[2] The right of a judgment-debtor to ask for a stay under O. 21, R. 29, is an equity which will bind an assignee of the decree.[3] Hence, where the decree is assigned during the pendency of a suit by the judgment-debtor against the decree-holder and a decree is passed subsequently in the later suit in favour of the judgment-debtor, the latter will be entitled to a set-off in respect of such decree against the transferee of the decree in the prior suit.[4]

4. Assignee of money decree from mortgagee — Equities enforceable against him. — See Order 34, Rule 14, Note 10.

5. Assignee's want of knowledge of equity, if affects rule. — An assignment takes effect against the *debtor* only on notice to him and is subject to all equities arising prior to the date of such notice;[1] but it is not necessary that the *assignee* should have any notice of the equity which the debtor could have asserted against the transferor,[2] though the case would be very much stronger against the assignee if he had such notice.[3]

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4. ('25) 12 AIR 1925 Pat 449 (450) : 4 Pat 120 (DB).
5. ('33) 20 AIR 1933 Cal 865 (868) (DB).
6. † ('38) 25 AIR 1938 Bom 253 (255, 256) : ILR (1938) Bom 263 (DB).
('33) 20 AIR 1933 Cal 865 (866) (DB).

Note 2

1. ('37) 24 AIR 1937 All 351 (352) : ILR (1937) All 553 (DB). (This section is not inconsistent with O. 21 R. 18 and even if it is so, this section will prevail.)
('36) 163 Ind Cas 618 (619) (DB) (Cal).
† ('68) 10 Suth W R 32 (33) (FB).
('73) 19 Suth W R 85 (87) (DB).
('72) 18 Suth W R 442 (443) (DB).
† ('89) 16 Cal 619 (622) (DB).
('24) 11 AIR 1924 Nag 46 (47) : 19 Nag L R 164.
Also see O. 21, R. 18, N. 10.
2. ('87) 13 Ind App 106 (110) : 14 Cal 18 (PC).
('02) 24 All 481 (482).
3. ('37) 24 AIR 1937 Cal 570 (571) (DB).
('19) 6 AIR 1919 Mad 424 (426) : 42 Mad 338 (SB). (Since so to determine is a stage in execution of the decree.)
4. ('67) 7 Suth W R 470 (471) (DB).

Note 3

1. ('18) 5 AIR 1918 Mad 279 (280) (DB). (Because transfer of decree means transfer of interest in it as finally determined.)
Also see O. 21, R. 16, N. 3.
2. ('97) 7 Mad L Jour 227 (229) (DB).
3. ('38) 25 AIR 1938 Bom 253 (256) : ILR (1938) Bom 263 (DB).
4. † ('38) 25 AIR 1938 Bom 253 (256): ILR (1938) Bom 263 (DB).
('37) 24 AIR 1937 Rang 316 (317) (DB). (Want of notice on assignee's part of the pending suit is not material.)

Note 5

1. ('02) 26 Mad 428 (429) (DB).
2. † ('38) 25 AIR 1938 Bom 253 (256) : I L R (1938) Bom 263 (DB).
('37) 24 AIR 1937 Rang 316 (317) (DB).
('11) 12 Ind Cas 205 (206) (Low Bur).
† ('10) 7 Ind Cas 55 (60) (DB) (Cal).
3. ('89) 16 Cal 619 (622) (DB).

50. [S. 234.] (1) Where a judgment-debtor dies[10] before the decree has been fully satisfied,[12] the holder of the decree[3] may apply to the Court which passed it to execute the same against the legal representative[4] of the deceased.

Legal representative.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent[6] of the property of the deceased[8] which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

[1877, S. 234; 1859, S. 210. See Order 21 Rule 22.]

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Holder of the decree."
4. "Legal representative." See O. 22 R. 3.
5. Appeal against order determining legal representative.
6. Extent of liability of legal representative. See Note 13 on S. 52.
7. Legal representative bound by what the deceased judgment-debtor himself would have been bound by.
8. "Property of the deceased." See S. 52 Note 9 and S. 53 Note 6.
9. Official Assignee. See Note 10.
10. "Where a judgment-debtor dies."
11. Decree against deceased defendant. See Note 8 on S. 52.
12. "Before the decree has been fully satisfied."
13. Application to execute against the legal representative.
14. Execution against wrong legal representative or without the legal representative.
15. Decree-holder, if can proceed against property in the possession of third party.
16. Limitation for substitution of legal representative.
17. Successive deaths of judgment-debtor and legal representative.
18. Decree for injunction.
19. Appeals.

1. Legislative changes.—Besides some verbal changes, the words "fully satisfied" have been substituted for the words "fully executed" in cl. (1) of this section. See Note 12.

2. Scope of the section.—This section and Ss. 52 and 53 may be usefully read together. Section 52 contemplates cases where the debtor dies *before the decree* and the *decree itself* has been passed against the legal representative. This will also include cases where the debtor dies *before suit* and the suit itself is instituted against the legal representative. This section provides for the *execution* of decrees against the legal representatives of a judgment-debtor who dies before the decree has been fully satisfied. Normally, it applies to cases where judgment-debtor dies after the decree. But the section is wide enough to include the case where the judgment-debtor dies before decree, provided the decree is *valid in spite of his death*, e. g., where under O. 22, R. 6 death occurs after hearing but before judgment, or in the case of Privy Council appeals.[1] Section 53 extends the scope of Ss. 50 and 52 to ancestral property in the hands of a descendant which is liable under the Hindu law for payment of debts of the ancestor.

3. "Holder of the decree."—For the definition of "decree-holder," see S. 2, sub-s. (3). A person who appears upon the face of the decree as the person in whose favour

Section 50 — Note 2

1. ('37) 24 AIR 1937 Pat 321(322): 16 Pat 316 (DB).
† ('32) 19 AIR 1932 Pat 261 (262, 263, 264): 11 Pat 445 (DB).

the decree is passed is entitled to execute it, unless it is shown that some other person has taken his place.[1] The Code does not provide that execution abates by death of decree-holder. See O. 22, R. 12. Where a decree is passed in favour of the estate of a deceased person for purposes of limitation, an application for execution by any person who, for the time being, is recognised as the proprietor of the estate is held to be good.[2]

4. "Legal representative." — See Order 22, Rule 3.

5. Appeal against order determining legal representative. — An order determining the question whether a person is the legal representative of a deceased party is within S. 47 and is appealable as a decree. See S. 47, sub-s. (3), and Note 27 on that section. If, however, the Court does not *decide* the question, the mere placing of the legal representative on the record is not appealable.[1]

Where a legal representative is brought on the record in the place of a deceased party, he becomes a party to the suit[2] and all further questions in execution between him and the opposite party must be decided in execution and not by a separate suit and an appeal will lie from such a decision.[3]

6. Extent of liability of legal representative. — See Note 13 on Section 52.

7. Legal representative bound by what the deceased judgment-debtor himself would have been bound by. — The liability of the legal representative is co-extensive with that of the deceased judgment-debtor himself, subject, however, to the condition that it does not extend beyond the assets actually received by him *and which have not been duly disposed of*. Thus, where the property could not be proceeded against even when in the hands of the judgment-debtor, as where it is governed by the special provisions of the Dekkhan Agriculturists' Relief Act, it cannot be proceeded against when it comes into the hands of the legal representative.[1] On the other hand, the legal representative will be bound by the decree passed or the previous proceedings taken, against the judgment-debtor himself.[2] Thus, where the properties had been attached or charged or mortgaged or directed to be sold by the decree, in the lifetime of the judgment-debtor, they continue to be liable in the hands of the legal representatives.[3] Similarly, where the judgment-debtor was impleaded in the suit as a subsequent mortgagee but did not plead his rights of marshalling, it is not open to his legal representatives, when substituted in execution proceedings, to raise the question again.[4] A Hindu son or a descendant of a Hindu is liable just like other legal representatives, and cannot

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Note 3

1. ('91) 18 Cal 639 (641) (DB). (Or may order to make over proceeds to any other person.)
Also see O. 21, R. 10, N. 2.
2. ('18) 5 AIR 1918 Pat 216 (216, 217) (DB).

Note 5

1. ('78) 3 Cal 708 (709, 710) (DB).
('93) 1893 All W N 106 (107).
[*See* ('23) 10 AIR 1923 Pat 149 (150). (Impleading legal representative without deciding his liability for decree held illegal.)]
2. †('72) 18 Suth W R 185 (188) (PC).
('84) 7 Mad 255 (257, 258).
3. ('22) 9 AIR 1922 Bom 280 (280) (DB).
(1900) 2 Bom L R 887 (888).

Note 7

1. ('21) 8 AIR 1921 Sind 29 (31, 32, 33, 34) : 15 Sind L R 47 (DB).
[*See also* ('25) 12 AIR 1925 Nag 449 (450). (By S. 11 (2) of the Central Provinces Act, 1920, no sale of right of an occupancy tenant is valid except in special circumstances.)
('69) 12 Suth W R 495 (495). (A decree to give accounts within specified time—No execution till expiry of the period — Death thereafter — Cannot be executed against legal representative.)
('19) 6 AIR 1919 Lah 145 (146) : 1919 Pun Re No. 17 (FB). (A case under Punjab custom.)]
2. ('18) 5 AIR 1918 Pat 41 (46): 4 Pat L Jour 213 (DB).
('86) 10 Bom 74 (77) (DB).
† ('89) 21 All 277 (279) (DB).
3. ('01) 24 Mad 689 (694) (DB).
('09) 31 All 45 (47) (DB). (Mortgage decree against widow — Reversioner as her legal representative cannot plead in execution the invalidity of mortgage or decree.)
('99) 21 All 356 (358, 359). (Mortgage decree against Hindu father covering whole family property — Son as legal representative cannot object in execution that his share is not liable.)
4. ('16) 3 AIR 1916 Oudh 288 (288, 289) (DB).

question the validity of the decree against the ancestor,[5] except in one respect, namely, that the decree debt is of an illegal or immoral nature so as not to bind him or his share in the joint family property under the Hindu law. See section 53, Notes 1 and 3.

8. "Property of the deceased." — See Section 52, Note 9 and Section 53, Note 6.

9. Official Assignee. — See Note 10.

10. "Where a judgment-debtor dies." — This section applies only where the judgment-debtor dies.[1] The word "dies" is used in its natural meaning and does not include a *civil death*.[2] Consequently, the section has no application where the judgment-debtor only becomes an insolvent or has only alienated or gifted away his property, or where, in his lifetime, there is a transfer or devolution by operation of law. After property vests in the Official Assignee, no proceedings can affect the property of the deceased insolvent in his hands unless he has been impleaded in the matter adjudicated upon.[3] Since attachment does not create any interest in the property and prevents only a private alienation, it does not prevail against the Official Assignee or Official Receiver and the decree-holder cannot claim payment of the money realised,[4] much more so if the attachment is prior to judgment.[5]

11. Decree against deceased defendant. — See Note 8 on Section 52.

12. "Before the decree has been fully satisfied." — The word "satisfied" has been substituted in this Code for the word "executed" in the previous Codes. Prior to this Code, there was a conflict of views amongst the High Courts as to the meaning of the word "executed." The High Court of Allahabad held that once attachment was effected and execution proceedings commenced and were progressing, the decree was fully executed and the property of the judgment-debtor passed into the hands of the law; further proceedings do not abate on the subsequent death of the judgment-debtor and it was not necessary that the legal representatives should be impleaded. A sale without legal representatives being brought on the record was therefore held to be good.[1] On the other hand, the Madras High Court held the view that, till the sale was actually held, the decree could not be said to be "fully executed," so that, even after attachment, if the judgment-debtor died, his legal representatives had to be impleaded; otherwise, the sale was void.[2] The Bombay High Court took an intermediate view and held that the legal representatives should be impleaded even if the judgment-debtor died after attachment, but that the failure to do so was only a material irregularity making the sale liable to be set aside only if substantial injury is caused thereby.[3] And the Calcutta High Court

5. † ('93) 16 Mad 99 (103) (DB).
('11) 9 Ind Cas 648 (649) (DB) (Mad).

Note 10

1. † ('14) 1 AIR 1914 Mad 328 (330): 38 Mad 1120 (DB). (Property obtained by son on partition — Not "assets" within this section so long as the father is alive.)
2. ('35) 22 AIR 1935 Cal 713 (714).
† ('31) 18 AIR 1931 All 306 (307) : 53 All 529 (DB).
[*See also* ('03) 30 Cal 961 (964). (Transfer of all its properties by one limited company to another —Former company cannot be said to have died.)]
3. ('35) 22 AIR 1935 Mad 907 (907, 908). (Property of a person who is adjudicated an insolvent veats in the Official Receiver from the date on which the person applies for insolvency.)
('29) 16 AIR 1929 Mad 609 (611) (DB).
† ('14) 1 AIR 1914 P C 129 (130. 131): 42 Cal 72: 41 Ind App 251 (PC). (Official Assignee.)
[But see ('70) 14 Suth W R 33 (35, 36) (FB). (Not good law: see 29 Cal 428 (FB).)]
4. ('85) 8 Mad 554 (556) (DB).
† ('02) 29 Cal 428 (432, 433) (FB).
See also S. 64, Notes 10 and 14 and S. 73, N. 14.
5. † ('84) 10 Cal 150 (157, 158) (FB).

Note 12

1. ('84) 6 All 255 (259).
('90) 12 All 440 (445, 446) (FB).
('95) 17 All 162 (165, 166).
[But see ('97) 19 All 337 (339) (DB). (Case under Limitation Act—Distinguishing 12 All 440(FB).)]
2. ('83) 6 Mad 180 (181).
('92) 15 Mad 399 (400).
('99) 22 Mad 119 (125, 126).
3. ('95) 19 Bom 276 (281, 285).

agreed with the Allahabad view in one case[4] and adopted the Bombay view in at least two cases.[5] The present Code gives legislative sanction to the Madras view, and hence the Allahabad view is no longer good law.[6] It is, therefore, now necessary to implead the legal representatives of a judgment-debtor who dies after attachment.[7] There is, however, still a divergence of views as to whether the failure to implead the legal representatives of a judgment-debtor dying after attachment renders the sale void or voidable; one view is that the sale will be an illegality[8] and another view is that it will be a mere irregularity.[9]

But where all the steps necessary to be taken by the decree-holder have been taken and nothing more remains to be done by him, and it is only for the Court to execute its final order in execution, as, for instance, where an order for possession has been made and the judgment-debtor dies thereafter, it is not necessary to implead the legal representatives.[10]

The principle applies where the judgment-debtor becomes insolvent after the attachment, so that, a sale thereafter without impleading the Official Receiver and without due notice to him is inoperative and irregular.[11]

13. Application to execute against the legal representative. — In this section the words "may apply" are equivalent to "shall apply" inasmuch as unless the decree-holder wishes to drop further proceedings in execution altogether, there is no option left to him but to follow the procedure laid down in the section.[1]

This section by cl. (1) enacts that the application is to be made to "the Court which passed the decree" while cl. (2) refers to "the Court executing the decree" as having certain powers for the purposes of the section. Now the executing Court may be the Court which passed the decree or it may be the Court to which it is sent for execution.[2] The application to execute the decree against the legal representative must under cl. (1) be made to the Court *which passed the decree.*[3] The section, however, does not specify which

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4. ('07) 5 Cal L Jour 80 (86).
5. ('96) 23 Cal 686 (688, 689).
('14) 1 AIR 1914 Cal 554 (556).
6. ✣('20) 7 A I R 1920 Oudh 178 (179) : 23 Oudh Cas 218.
('28) 115 Ind Cas 520 (521) (DB) (Cal).
7. (10) 5 Ind Cas 339 (340) (DB) (Mad).
8. ✣('36) 23 A I R 1936 Mad 205 (216) : 59 Mad 461 (FB). (AIR 1924 Mad 130 : 47 Mad 63 overruled.)
('22) 9 AIR 1922 Mad 307 (308, 309) (DB). (Word 'may' in Section amounts to 'shall'.)
('26) 13 AIR 1926 Mad 138 (139).
9. ('27) 14 AIR 1927 Cal 315 (318) (DB).
† ('29) 115 Ind Cas 520 (521) (DB) (Cal).
('14) 1 A I R 1914 Cal 554 (556) (DB). (Aggrieved person's remedy by proceeding under O. 21, R. 90, C. P. C., or a suit within one year.)
† ('20) 7 AIR 1920 Oudh 178 (179) : 23 Oudh Cas 218.
† ('25) 12 AIR 1925 Pat 384 (387) (DB).
10. ('89) 12 Mad 211 (213) (DB).
[*See also* ('41) 28 AIR 1941 Nag 322 (324): I L R (1942) Nag 633. (When once a decree has been fully satisfied, there is no need to bring the legal representative on record under S. 50, C. P. Code. Where proceedings under R. 95 of O. 21 are taken they are between the auction-purchaser and the claimants, in which the legal representatives of a judgment-debtor do not require to be added.)]
11. † ('14) 1 AIR 1914 P C 129 (131) : 42 Cal 72 : 41 Ind App 251 (PC).

Note 13

1. ('42) 29 A I R 1942 Cal 436 (437, 438) : I L R (1942) 2 Cal 262 (DB). (Sale held in execution of rent decree without bringing legal representatives of deceased judgment-debtor on record held void.)
('36) 23 AIR 1936 Mad 205 (206): 59 Mad 461 (FB.)
† ('22) 9 AIR 1922 Mad 307 (308).
('10) 5 Ind Cas 339 (340) (DB) (Mad). (Execution sale under mortgage decree held without bringing on record legal representatives of a defendant was held to be bad.)
2. See Sections 37 and 38.
3. ('41) 28 A I R 1941 Pat 139 (139) : 19 Pat 838 (DB). (Substitution of legal representatives must be made by Court passing decree—But if order for substitution is made by Court to which decree is sent for execution, the defect is one of procedure and not of jurisdiction.)
('37) 24 AIR 1937 Pat 239 (241) (DB). (AIR 1928 P C 162: 3 Luck 314: 55 Ind App 227 (PC) relied on.)
† ('34) 21 AIR 1934 Bom 215 (216) (DB). (Application to bring on record legal representatives of judgment-debtor is to be made to the Court passing the decree and not to the Court to which decree is sent for execution.)

Court has to *pass orders thereon*. At any rate the Court that passed the decree need only decide one point, viz., whether the decree is executable against the legal representative, and pass orders accordingly.[4] All further proceedings, inclusive of ordering notice of execution can, where the decree is sent to another Court for execution, be taken by the Court executing the decree.[5] As to the effect of non-compliance with the rule that the application for substitution should be made to the Court which passed the decree, see S. 42, Note 1. See also the case cited below.[6] The execution proceedings once commenced can be continued after the death of the judgment-debtor by substitution of the name of his legal representative in place of his name in the application for execution. No fresh or substantive application under O. 21, R. 11 is necessary.[7]

An application under this section is necessary only when *further* execution is needed or asked for. A separate application merely for substituting a legal representative is not necessary[8] and no limitation is prescribed for such substitution in execution proceedings which do not abate merely by the death of the parties.[9] See O. 22, R. 12 Note 1.

It is not incumbent on a party, to be entitled to apply under O. 9, R. 13 of the Code as the legal representative of the deceased defendant, to be first brought on record under S. 50 before filing an application to set aside the *ex parte* decree.[10]

14. Execution against wrong legal representative or without the legal representative. — It has been seen in Note 63b on S. 11, that a decree against one of several representatives will, in the absence of fraud or collusion, bind all the representatives, but that a decree against a *wrong person* as the legal representative does not bind the real representatives. The same principles will apply to execution proceedings taken against legal representatives. Thus, a proceeding taken against one of several representatives who *prima facie* is entitled to represent the estate of the deceased is binding on all the representatives.[1] But if it is taken against a *wrong person* as such legal

† ('05) 28 Mad 466 (471, 472) (FB).
('95) 17 All 431 (432).
('94) 18 Bom 224 (226) (DB). (Although notice to party be sent by execution Court.)
('07) 17 Mad L Jour 300 (301). (Order passed by execution Court not void if objection waived by parties.)
('12) 17 Ind Cas 293 (294) (Mad).
('26) 13 AIR 1926 Mad 411 (412) (DB).
Also see O. 21, R. 22, N. 14.

4. ('05) 28 Mad 466 (470).
('95) 17 All 431 (432). (Execution Court may determine extent of legal representative's liability.)
('26) 13 AIR 1926 Mad 411 (412).
('28) 15 AIR 1928 Rang 40 (42): 5 Rang 775 (DB). (The order permitting execution against the legal representatives can be made *ex parte*.)

5. ('94) 18 Bom 224 (226) (DB).

6. ('38) 25 AIR 1938 Rang 385 (387) : 1938 Rang L R 355. (Question as to whether application to add legal representative of a deceased judgment-debtor should be made to the Court passing decree or to Court which is executing decree is one of procedure and not one of jurisdiction — In case of non-compliance with procedure the defect might be waived.)

7. See S. 146 Note 4 and O. 22 R. 12 Note 1.

8. ('36) 23 AIR 1936 Oudh 152 (153) : 11 Luck 500 (DB).
('21) 8 AIR 1921 Mad 693 (693). (Execution was unnecessary for 20 years—Decree-holder not barred.)
[*See also* ('33) 20 AIR 1933 Mad 568 (568, 569). (Application for execution against legal representative under this Section need not contain a prayer for substitution of the legal representative on the record.)

9. ('20) 7 AIR 1920 All 171 (172) : 42 All 570 (DB).

10. † ('25) 12 AIR 1925 Oudh 370 (371) : 27 Oudh Cas 299.
Also see O. 9 R. 13 N. 16.

Note 14

1. ('40) 27 AIR 1940 Oudh 55 (58) : 14 Luck 751 (DB). (Decree against deceased father—One son made party to execution proceedings—Shares of other sons not exempted from sale.)
('79) 4 Cal 342 (345) (DB).
† ('09) 33 Mad 6 (8, 9): 4 Ind Cas 1059 (1060) (DB).
('17) 4 AIR 1917 Mad 979 (980, 981) (DB). (Position justified on the analogy of S. 11, Expl. 6.)
('16) 3 AIR 1916 Mad 1022 (1024) (DB). (Representation must be without fraud and collusion.)
† ('25) 12 AIR 1925 Oudh 330 (331, 334, 336, 337) : 28 Oudh Cas 177. (The same law applies to Mahomedans also.)
('03) 30 Cal 1044 (1057 to 1059) (DB). (Residuary legatee in possession.)
('89) 12 Mad 90 (91) (DB).

representative, it will as a general rule not bind the actual or real legal representatives.[2] Where, however, in such a case the real representative stands by and allows the proceedings to be taken or continued against a wrong person *who is allowed to be in possession* of the estate of the deceased, he and persons claiming through him will not be allowed to challenge the proceedings subsequently.[3] (See also section 52 Note 6 and Order 22, Rule 4 Notes 10 and 16.)

Similarly, where a wrong person is impleaded as a legal representative but the Court decides that he is the true heir and orders execution to proceed, such proceedings cannot be said to be void for want of jurisdiction.[4]

Another class of cases may be noted in this connexion, namely, cases where one person is competent, in law, to represent the interest of others in the estate, as for instance, a Hindu father or manager of a joint Hindu family, or the guardian of a minor, or a Hindu widow; in all these cases the proceedings taken against such persons in their representative capacity are binding on all persons who are represented by the person against whom such proceedings are taken.[5] But if the proceedings are taken against them

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✠('03) 26 Mad 230 (234) (DB).
[But see ('79) 4 Cal 142 (156) (FB).
('82) 11 Cal L Rep 268 (272) (DB).]

2. ('05) 32 Cal 296 (315) : 32 Ind App 23 (PC).
('10) 32 All 404 (409) (DB).
('10) 6 Ind Cas 627 (629 (DB) (Cal).
('11) 34 All 79 (88) : 12 Ind Cas 915 (918) (DB).
('85) 9 Bom 86 (93)(DB). (But legal representatives must not wilfully put forward 'wrong person' as legal representative.)
('85) 9 Bom 429 (432) (DB). (Decree against widow when minor son ignored — Widow does not represent minor son.)
('13) 18 Ind Cas 381 (382) (Bom).
('95) 22 Cal 903 (908).
(1900) 27 Cal 242 (258) (DB).
('13) 21 Ind Cas 519 (519) (Cal).
('16) 3 AIR 1916 Cal 661 (662) (DB).
('19) 6 AIR 1919 Cal 831 (833) (DB).
('22) 70 Ind Cas 886 (887) (DB) (Cal).
('88) 11 Mad 408 (410, 411) (DB).
† ('16) 3 AIR 1916 Mad 726 (727) (DB).
(1894) 1894 App Cas 437 (442), Mohamadu Mohideen v. Pitchey. (Creditor of deceased debtor cannot sue unless a person intermeddles with estate or proves a will.)
('12) 16 Ind Cas 690 (691, 692) (DB) (Cal).
('05) 2 Cal L Jour 484 (486, 487, 488, 489) (DB).
('09) 2 Ind Cas 818 (819) (DB) (Cal). (Case under Probate and Administration Act.)
† ('02) 4 Bom L R 340 (341).
✠('17) 4 AIR 1917 Mad 979 (980, 981) (DB).
('21) 8 AIR 1921 Bom 385 (388, 389) : 45 Bom 1186 (DB). (Sale in absence of and without notice to legal representatives.)
('81) 6 Cal 777 (784, 785) (DB). (Where on widow's death a person is impleaded as her legal representative without deciding if he was really so or not.)

3. ('79) 3 Cal L Rep 157 (158) (DB).
('79) 4 Cal 342 (345, 346) (DB).
[*See also* ('16) 3 AIR 1916 Mad 1022 (1024). (Wrong representative *bona fide* sued — Legatee was held bound by decree.)]

4. ✠('01) 25 Bom 337 (347) : 27 Ind App 216 (PC). (Because Court has jurisdiction to decide wrong as well as right.)
('25) 12 AIR 1925 Oudh 330 (334) : 28 Oudh Cas 177 (DB). (Decree against ostensible owner binds true owner.)
('26) 13 AIR 1926 Oudh 613 (614) (DB). (25 Bom 337 (PC) followed.)
Also see O. 21, R. 22, N. 5.

5. ('72) 24 Suth W R 109 (109) (DB).
('81) 3 All 517 (519). (For limitation purposes.)
('88) 12 Bom 48 (50) (DB). (Do.)
('88) 12 Bom 101 (103) (DB).
† ('90) 14 Bom 597 (603) (DB). (Manager.)
† ('96) 20 Bom 338 (344, 345) (DB). (Principle applies to Mahomedans also.)
('97) 21 Bom 539 (542, 543) (DB). (Minor sons represented by widow.)
(1900) 24 Bom 135 (147) (DB).
✠('87) 15 Cal 70 (81) : 14 Ind App 187 : 1888 Pun Re No. 1 (PC).(Managing members of joint family.)
('89) 12 Mad 90 (91). (Mahomedan father.)
('73) 16 Mad 452 (453) (DB). (Case under Malabar law.)
('24) 11 AIR 1924 Mad 571 (573, 574) (DB). (Father.)
('08) 2 Sind L R 55 (59) (FB). (Widow represents deceased husband though minor sons not on record.)
('10) 33 All 15 (16, 17) : 7 Ind Cas 97 (97) (DB). (Hindu widow held to represent reversioner.)
('89) 16 Cal 40 (56) : 15 Ind App 195 (PC). (Widow.)
('85) 11 Cal 45 (51) (DB). (Decree against widow representing deceased husband's estate binds adopted son.)
('96) 23 Cal 636 (638). (Hindu widow represents husband's estate—Succeeding heirs *held* bound.)
('98) 20 All 341 (343). (Decree against widow binds succeeding heirs.)
('11) 10 Ind Cas 344 (344) (All). (Elder brother only.)
('07) 6 Cal L Jour 719 (723) (DB).(*De facto* manager in possession—Minor held bound.)
('04) 8 Cal W N 843 (851, 856, 859) (DB). (Decree against widow holding estate created by ekrarnama binds her successor.)
[*See* ('89) 12 Mad 356 (365). (Decree for injunction against certain members of a sect cannot be executed against members not named in decree.)]

in their *personal and individual* capacity, only they and their personal heirs will be bound thereby and not others interested in the estate.[6]

The mere fact that the *name* of the legal representative is wrongly given does not invalidate the execution petition.[7] The rule that the proceeding taken against a person *prima facie* entitled to represent the estate is binding on the other persons entitled to the estate has no application where the judgment-debtor becomes an insolvent and his estate vests in the Official Receiver or Official Assignee, inasmuch as the latter alone represents the whole estate and has to be impleaded in any view.[8]

15. Decree-holder, if can proceed against property in the possession of third party.—A creditor of a deceased person cannot proceed against properties in the possession of third parties and held by them in their *own right* and not on behalf of the estate of the deceased.[1] Nor can he follow the property of the deceased in the hands of a *bona fide* purchaser for value[2] except where the doctrine of *lis pendens* is applicable.[3] Where, however, it is shown that the purchaser knew that there were debts of the ancestor or testator left unsatisfied and that the heir or devisee to whom he paid his purchase money intended to apply it otherwise than in the payment of such debts, the creditor may follow his debtor's property in the hands of the purchaser.[4] But the mere fact that the purchaser from a Mahomedan heir has notice of other debts will not enable the creditor to proceed against the purchased properties, if it is not shown that the assets in the hands of the heirs-at-law were not sufficient to satisfy the debt.[5]

Money given to a rival claimant to the estate of the deceased in settlement of his claim cannot be proceeded against by creditors of the estate as assets of the deceased.[6]

This section applies only where the judgment-debtor dies and his legal representatives alienate his properties. It has no application where the interests of the judgment-debtor devolve on another by purchase or otherwise subsequent to institution of suit.[7]

16. Limitation for substitution of legal representative.—Order 22 R. 12 provides that the provisions as to abatement by death do not apply to execution proceedings. And there is no provision in the Code as to abatement of execution by the death of parties.[1] Execution proceedings do not, therefore, abate by the death of the judgment-debtor.[2] It has been seen in Note 13 that no separate application for substitution

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6. (1900) 4 Cal W N 415 (417) (DB).
('86) 12 Cal 458 (463) (DB). (Personal decree against Hindu widow.)
('96) 23 Cal 454 (459) (DB). (Widow surrendering in favour of reversioners—They being legal representatives *held* liable to the extent of assets.)
† ('04) 27 Mad 106 (108, 109) (DB).
('29) 16 AIR 1929 Cal 423 (424, 425) (DB). (Personal decree for maintenance—No charge on estate—Subsequent holders of estate not liable.)
('09) 33 Mad 75 (77, 78): 3 Ind Cas 737 (738) (DB).
7. ('26) 13 AIR 1926 Lah 34 (35) (DB). (35 Cal 1047 followed.)
8. ('29) 16 AIR 1929 Mad 609 (611). (Decision under Provincial Insolvency Act, S. 28 (2).)

Note 15

1. ('94) 17 Mad 186 (187) (DB). (Stranger in possession — 15 Suth W R 476 holding contra, was based on the express provision of the Code of 1859.)
('68) 9 Suth W R 271 (272). (Whether stranger in possession or a person who is under an agreement to pay the debt can be substituted as legal representative : *Quære.*)
[*See* ('78) 3 Cal L Rep 437 (439) (DB). (Third party in possession.)
('25) 12 AIR 1925 Nag 288 (289).
('80) 5 Cal 86 (95, 96).]
2. See Section 52 Note 10.
3. ('97) 19 All 504 (505) (DB).
('79) 4 Cal 402 (410) : 5 Ind App 211 (PC).
† ('27) 14 AIR 1927 Bom 93 (95): 51 Bom 37 (DB).
[*See* ('67) 7 Suth W R 368 (372). (Stranger may be estopped under certain circumstances from pleading non-liability.)]
4. † ('79) 4 Cal 897 (908, 909, 913, 914) (DB).
5. ('82) 8 Cal 20 (23, 24) (DB).
6. ('24) 11 AIR 1924 Oudh 364 (365, 366) : 27 Oudh Cas 262 (DB).
7. ('08) 31 Mad 461 (466, 467) (DB).
[*See also* ('25) 12 AIR 1925 Nag 288 (289).]

Note 16

1. ('20) 7 AIR 1920 All 171 (172) : 42 All 570 (DB.)
2. ('42) 29 AIR 1942 Cal 436 (437) : I L R (1942) 2 Cal 262 (DB.)
('20) 7 AIR 1920 All 171 (172) : 42 All 570.

of legal representatives is necessary and that such substitution can be asked for and made in the execution petition itself.[3] There is no special period of limitation for substitution in execution, the only thing necessary being that the *execution petition* itself is in time.[4] The High Court of Patna, without deciding the question whether Art. 181 applies or not, has expressed a view that the decree-holder should have at least six months on the analogy of Art. 177 of the Limitation Act and O. 22 R. 4 of the Code, and that, in any view, S. 5 of the Limitation Act can be invoked to excuse any delay in the substitution of legal representatives.[5]

17. Successive deaths of judgment-debtor and legal representative. — If a judgment-debtor dies and his legal representative in possession of his assets is substituted in his place, and thereafter the legal representative himself dies, the assets continue as such even in the hands of the legal representatives of the legal representative who died subsequent to such substitution.[1]

18. Decree for injunction. — As has been seen in Note 21 to section 47, an injunction does not *run with the* land and cannot be enforced under the section against a purchaser of the property from the defendant[1] or against a person who is not his legal representative.[2] Under the specific provisions of this section, however, a decree for injunction against the judgment-debtor can be executed against his legal representatives.[3] Where the properties of the judgment-debtor are purchased during the *pendency of proceedings* in execution of a decree for injunction, the purchaser will be bound by the doctrine of *lis pendens* and the decree can consequently be enforced against him.[4]

19. Appeals. — Orders under this section are appealable if the conditions of section 47 are satisfied.[1] See also Note 5 and Note 84 on section 47.

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3. ('79) 24 Cal 778 (780, 783) (DB). (Application for substitution though disallowed is a step-in-aid of execution.)
† ('31) 18 AIR 1931 Bom 425 (427) (DB). (Such an application, if made, is not a "fresh application" within S. 48 so as to be hit by the bar of twelve years' limitation.)
[*See* ('21) 8 AIR 1921 Mad 693 (693).]
4. † ('78) 3 Bom 221 (222) (DB).
('21) 8 AIR 1921 Mad 693 (693).
('10) 13 Oudh Cas 90(93): 6 Ind Cas 746(748). (Legal representative impleaded in execution can raise bar of limitation for the execution application.)
Also see Note 13.
5. ('21) 62 Ind Cas 52 (53) (Pat).

Note 17

1. † (1900) 22 All 367 (368, 369, 370, 371) (DB). (Not necessary to every case — Per Banerji J.)
('14) 1 AIR 1914 Mad 668 (668, 669) (DB).
Also see S. 52, N. 9 and O. 22, R. 3, N. 10.

Note 18

1. ('02) 26 Bom 140 (141) (DB).
('99) 1 Bom L R 854 (854, 855) (DB).
('08) 32 Bom 181 (184) (DB). (The remedy is by separate suit.)
† ('31) 18 AIR 1931 Bom 280 (282, 283) (DB).
('18) 5 AIR 1918 Bom 165 (166): 42 Bom 504 (DB).
2. ('31) 18 AIR 1931 Bom 280 (282, 283).
3. ✱('02) 26 Bom 283 (287, 288) (DB).
('31) 18 AIR 1931 Bom 280 (283).
('31) 18 AIR 1931 Bom 482 (483). (The application for proceeding should be in accordance with O. 21 Rule 32.)
† ('31) 18 AIR 1931 Bom 484 (488, 489): 55 Bom 709 (DB). (Son taking joint family estate by survivorship is legal representative.)
Also see O. 39 R. 1 N. 13.
4. ('27) 14 AIR 1927 Bom 93 (95): 51 Bom 37 (DB).

Note 19

1. ('87) 1887 Pun Re No. 87, p. 183.
('73) 20 Suth W R 280 (282, 283) (DB).
('87) 9 All 605 (608) (DB).
† ('90) 12 All 313 (327) (SB).
('91) 13 All 290 (294, 295). (For costs by legal representative improperly impleaded.)
('89) 16 Cal 1 (6, 7, 8) (DB). (Questions of liability of the property to be taken in execution in the hands of legal representative are within S. 47.)
('89) 16 Cal 603 (605, 609) (DB).
('90) 17 Cal 711 (720, 721) (FB).
('84) 7 Mad 255 (257, 258) (DB).
('87) 10 Mad 117 (120) (DB).
('03) 26 Mad 501 (501, 502).
('21) 8 AIR 1921 Sind 29 (33): 15 Sind LR 47 (DB).
('28) 15 AIR 1928 Rang 40 (41): 5 Rang 775 (DB).

PROCEDURE IN EXECUTION

51. Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree —

Powers of Court to enforce execution.

(a) by delivery of any property specifically decreed ;

(b) by attachment and sale or by sale without attachment of any property ;

(c) by arrest and detention in prison ;

(d) by appointing a receiver ; or

(e) in such other manner as the nature of the relief granted may require :

[a][Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied, —

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,—

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property ; or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation. — In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.]

[See O. 21 Rr. 30 to 34, 35, 53, 56 and 64; O. 40 R. 1 ; also Ss. 54 and 68 to 72.]

a. Proviso inserted by the Code of Civil Procedure (Amendment) Act, 1936 (XXI of 1936), S. 2.

Synopsis

1. Scope of the section.
1a. "Subject to such conditions and limitations as may be prescribed."
2. Powers of the Court in execution.
3. "By delivery of any property specifically decreed."
4. "By attachment and sale or by sale without attachment of any property" — Clause (b).
5. " By arrest and detention "—Clause (c).
5a. Proviso to the section.
5b. Explanation.
6. " By appointing a receiver"—Cl. (d).
7. " In such other manner," etc.
8. "On the application of the decree-holder."
9. Appeal.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Decision of questions relating to execution. See Section 47.

Executing Court, if can go behind decree. See Note 8 on Section 38.

Simultaneous execution. See Note 2.

Appointment of receiver to collect future maintenance. See Note 6.

Power to sell whether includes power to order temporary alienation. See Note 4.

Power to appoint decree-holder himself as receiver. See O. 40, R. 1, Note 11.

Receiver in respect of inalienable property. See Note 6.

Receiver in respect of inalienable property where there are other hypotheca which can be sold. See O. 40, R. 1, Notes.

Power of receiver to sue in a Court outside the jurisdiction of the Court appointing him. See Note 6 ; see also O. 40, R. 1, Note 12.

Adjustments or agreements of parties relating to execution. See Note 7 ; see also O. 21, R. 2, Notes.

1. Scope of the section. — This section was newly inserted in the Code on the suggestion of the Advocate-General of Madras.[1] It enumerates in general terms the various modes[2] in which the Court may, in its discretion, order the execution of a decree according as the nature of the relief granted may require. In the Notes on Clauses the Select Committee observe as follows : "This clause states generally the powers of the Court in regard to execution leaving the details to be determined by rules. It will be observed that the power to direct immediate execution is no longer restricted to one class of suits but that it is now general in terms. Any limitation that may be found necessary will be imposed by rules." The section accordingly is made to operate "subject to such conditions and limitations as may be prescribed."

Section 168A of the Bengal Tenancy Act, 1885 (as amended by Bengal Act XVIII of 1940) provides that a rent decree cannot be executed by attachment and sale of any property other than the holding to which the decree relates. It has been held that the section is not repugnant to S. 51 as S. 51 only gives the powers of the Court to enforce the decree in general while S. 168A of the Bengal Tenancy Act is a *special* provision whose operation is saved by S. 4[3] of the Code.

1a. "Subject to such conditions and limitations as may be prescribed." — This section merely enumerates the different modes of execution in general terms while the conditions and limitations under which alone the respective modes can be availed of are prescribed further on by different provisions. As observed by Sulaiman, C. J., in *Anadilal* v. *Ram Sarup*,[1] "The Legislature has taken care to preface the section with the words 'subject to such conditions and limitations as may be prescribed." It is obvious that there is no wide and unrestricted jurisdiction to order execution in every case in all the ways indicated therein. The jurisdiction has to be exercised subject to such conditions and limitations as may be prescribed by the rules in the following schedule . . . Obviously, all the various modes mentioned in S. 51 are not open to an executing Court in every case ; it is to be guided by the procedure laid down in the schedule, and must resort to the method appropriate to each case."

Section 51—Note 1

1. ('19) 6 AIR 1919 Oudh 326 (327): 22 Oudh Cas 194 (DB).

2. ('42) 29 AIR 1942 Cal 587 (592) (DB). (The right, which a decree gives to proceed against the person and property of the judgment-debtor is founded on principles of substantive law and exists independently of the Code — S. 51 does not confer this right but only lays down the procedure in execution.)

('40) 27 AIR 1940 Pat 557 (558): 19 Pat 832 (DB).

('36) 23 AIR 1936 Pesh 209 (210) (DB). (Methods provided are distinct—Application for execution in one method is distinct from application for execution in another method.)

3. ('42) 29 AIR 1942 Cal 429 (434) (DB).

('42) 29 A I R 1942 Cal 470 (471) : I L R (1942) 2 Cal 325 (DB).

('42) 29 AIR 1942 Cal 587 (592) (DB).

Note 1a

1. ('36) 23 A I R 1936 All 495 (502) : 58 All 949 (FB).

"Prescribed" under S. 2 (16) means "prescribed by rules," and "rules," under S. 2(18) means "rules and forms" contained in the First Schedule of the Code or framed by the respective superior Courts in different Provinces under S. 122 or S. 125.

2. Powers of the Court in execution. — It is for the *judgment-creditor* to decide in which of the several modes mentioned in the section he will execute his decree; and the Court has no authority except under the circumstances mentioned in the proviso, to refuse to order execution of the decree in the mode asked for on the ground that the decree-holder should, in the first instance, proceed by another mode.[1] On the same principle, a Court passing a decree against a defendant should not ordinarily place any limitation as to the mode in which it is to be executed.[2] In fact, a decree may, under the provisions of O. 21 R. 30, be executed *simultaneously* against both the person and the property of the judgment-debtor,[3] though the Court has, under O. 21 R. 21, a judicial discretion to refuse to order such simultaneous execution in proper cases. The reason is that, as their Lordships of the Privy Council pointed out in the undermentioned case,[4] "the difficulties of a litigant in India begin when he has obtained a decree" and that far too many obstacles are placed in the way of a decree-holder who seeks to execute his decree against the property of the judgment-debtor. It is also an important principle of law that rules of procedure are only handmaids of justice and ought not to be used for obstructing justice. It is accordingly the duty of the Court executing the decree to aid the decree-holder in realising the amount due under his decree, and it should therefore offer him all possible and reasonable facilities for realising the decretal amount in as short a time as possible.[5] As to simultaneous executions generally, see Note 10 on S. 38 and O. 21, Rr. 21 and 30.

Ordinarily there can be only one *complete* execution[6] but where it is ineffectual and *invalid*, another execution, valid in law, can be ordered.[7] Thus, where a delivery of possession was made after an unconditional order of stay of execution had been passed by the Appellate Court, and consequently became ineffectual, the decree-holder can, after the dismissal of the appeal by the judgment-debtor, again apply for delivery of possession.[8]

3. "By delivery of any property specifically decreed." — As to the mode of execution of a decree for specific moveable property, see O. 21 R. 31 and that for specific immovable property, see O. 21 Rr. 35 and 36. As to whether, in an order for delivery of any property decreed, the Court can grant an alternative relief by way of damages in default of such delivery, see Note 7.

4. "By attachment and sale or by sale without attachment of any property"—Clause (b). — Where the decree itself *directs the sale* of properties, as in the case of mortgage decrees, it is clear that no attachment is necessary for bringing the properties to sale in execution of that decree.[1] But, is an attachment an essential

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Note 2

1. ('42) 29 A I R 1942 Nag 58 (59) : I L R (1942) Nag 159. (Charge decree—Decree for maintenance — Decree-holder can proceed personally without enforcing charge.)
('36) 23 AIR 1936 Pesh 46 (47) (DB).
† ('26) 13 A I R 1926 Lah 110 (110) : 6 Lah 548 (DB). (Arrest for recovery of money.)
Also see O. 21, R. 30, N. 4.
2. ('18) 5 AIR 1918 Cal 186 (186) (DB).
3. See Note 4 on O. 21 R. 30.
('43) 30 AIR 1943 Lah 166 (168).
[*See also* ('38) 25 AIR 1938 Pat 130 (131) : 17 Pat 248.]
4. ('72) 17 Suth W R 459 (460) (PC).
5. † ('36) 23 AIR 1936 Cal 238 (239).
('36) 23 AIR 1936 Pat 76 (77) (DB). (Court should not postpone or stay execution for unreasonably long time.)
6. † ('12) 16 Ind Cas 708 (709) (DB) (Cal).
('10) 8 Ind Cas 410 (411) (Oudh).
7. ('31) 18 AIR 1931 Pat 241 (247, 253) : 10 Pat 670 (FB).
8. ('12) 16 Ind Cas 708 (710) (DB) (Cal).

Note 4

1. † ('29) 16 A I R 1929 Lah 90 (91) : 10 Lah 543 (DB).
('06) 33 Cal 676 (678) (DB).

pre-requisite for the validity of sale of property in execution of a *money decree*? In order to answer this question it is necessary to read this section, which enables a Court to order a sale without attachment, along with O. 21 R. 30, which provides that a money decree may be executed by *attachment and sale* of the judgment-debtor's property, and along with O. 21 R. 64, which provides that the Court may order that any property *attached by it shall be sold*. Under the old Code which contained no provision corresponding to the present section, there was a conflict of opinion, one class of cases holding that the object of an attachment is to bring the property under the control of the Court with a view to prevent the judgment-debtor from alienating it, and that the absence of attachment is nothing more than an irregularity and does not *ipso facto vitiate* the sale,[2] and another class of cases holding that an attachment is an essential preliminary to sales in execution of simple decrees for money, and that the absence of attachment makes the *sale de facto* void.[3] (See also O. 21 R. 54, Note 12.)

The present S. 51 now makes it clear that a sale without attachment is not *without jurisdiction*[4] though in view of O. 21, Rr. 30 and 64 it may amount to an *irregularity*. (See also Order 21, Rule 90, Note 12.)

Section 51, clause (b) empowering the Court, in general terms, to attach and sell in execution *any property* must be interpreted to mean that the Court has jurisdiction to attach and sell in execution any property which the decree-holder puts forward as the property of his judgment-debtor.[5] If the property does not belong to the judgment-debtor

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('21) 8 A I R 1921 Pat 320 (321) (DB). (Mortgage suit — Compromise decree not expressly providing for attachment — Attachment not necessary.)
[*See also* ('39) 18 Pat 719 (720) (DB). (Decree in money suit providing for instalments later on amended into an instalment decree with hypothecation of property — This amendment was with consent of parties — *Held* decree-holder could proceed to sell hypothecated properties without attachment.]

2. ('07) 34 Cal 787 (802).
('95) 18 Mad 437 (439) (DB).
('99) 21 All 311 (313).
('67) 8 Suth W R 9 (10).
('91) 18 Cal 188 (192, 193).
('94) 21 Cal 639 (641).
('11) 9 Ind Cas 918 (922) (Cal). (Case under the old Code.)
('07) 30 Mad 255 (264). (Appointment of receiver means that property is under attachment.)
('13) 18 Ind 498 (499) (Mad).
('99) 21 All 140 (141, 142).
[*See also* ('07) 34 Cal 811 (820, 821) (FB). (Notice under S. 10, Public Demands Recovery Act, 1895 is condition precedent — Plaintiff should recover possession saying sale has not affected his title.)]

3. ('67) 8 Suth W R 415 (418, 419) (DB).
('83) 5 All 86 (91) (FB).
('88) 10 All 506 (510).
('85) 7 All 702 (706, 708).
('87) 9 All 136 (138).
('92) 16 Bom 91 (101).

4. ('40) 27 AIR 1940 Lah 78 (79, 80): ILR (1940) Lah 516.
† ('39) 26 AIR 1939 Bom 277 (278) : I L R (1939) Bom 420 (DB). (Dissenting from 36 Bom 156.)
‡ ('39) 26 AIR 1939 Lah 36(37): I L R (1938) Lah 582 (DB). (Dissenting from AIR 1934 Lah 395.)

('37) 24 AIR 1937 Lah 297 (298).
('37) 24 AIR 1937 Nag 149 (149) : I L R (1939) Nag 450.
('36) 23 AIR 1936 Mad 99 (100) (DB).
('36) 23 AIR 1936 Bom 315 (321) (DB).
('34) 21 AIR 1934 Bom 348 (350) : 58 Bom 564.
('34) 21 AIR 1934 Rang 188 (189).
('31) 18 AIR 1931 Cal 35 (36) : 57 Cal 1206 (DB).
('30) 17 AIR 1930 Lah 685 (685, 686).
('27) 14 AIR 1927 Cal 847 (847) (DB).
('26) 13 AIR 1926 Mad 211 (214, 215) (DB).
('24) 11 AIR 1924 Rang 124 (126) : 1 Rang 533.
('23) 10 AIR 1923 Nag 18 (20).
('23) 10 AIR 1923 Nag 78 (79).
('23) 10 AIR 1923 Pat 45 (47, 48): 2 Pat 207 (DB).
('22) 9 AIR 1922 Nag 267 (271): 18 Nag L R 152.
('18) 5 AIR 1918 Cal 194 (196) (DB). (Sale without attachment with consent of judgment-debtor.)
('18) 5 AIR 1918 Mad 1262 (1263) (DB).
('16) 3 AIR 1916 Cal 465 (467, 468) (DB).
('13) 18 Ind Cas 498 (499) (DB). (Mad).
('11) 9 Ind Cas 918 (922) (DB) (Cal).
[*See also* ('10) 13 Oudh Cas 43 (47) : 5 Ind Cas 798 (799, 800) (DB). (Attachment by Court without jurisdiction does not affect sale.)
[But see ('18) 5 AIR 1918 Cal 39 (40) : 45 Cal 780 (DB). (Submitted not correct.)
('18) 5 AIR 1918 Cal 1036 (1037) (DB). (Do.)]

5. ('27) 14 AIR 1927 Mad 394 (394, 395): 50 Mad 639 (DB). (It does not mean that the Court can sell properties which before the sale all parties knew did not belong to the judgment-debtor.)
[*See also* ('22) 9 AIR 1922 Lah 147 (148). (Attachment of land belonging to gaddinashin and entered in the name of the shrine — Attempt to defeat execution by getting property mutated in the name of shrine — Attachment should be ordered as requested by decree-holder.)]

but to a stranger, the latter will not be bound by the sale in any way.[6] But it is not void as between the decree-holder, judgment-debtor and the auction-purchaser,[7] and the purchaser can only apply under O. 21, R. 91 to set aside the sale on the ground that the judgment-debtor has no saleable interest in the property sold. The property to be sold must, however, be *saleable property* under S. 60 of the Code.[8] Thus, lands inalienable according to the provisions of special enactments such as section 27 of the Sonthal Parganas Settlement Regulation, III of 1872,[9] or S. 16 of the Punjab Alienation of Land Act,[10] or S. 168A of the Bengal Tenancy Act, 1885,[11] cannot be sold in execution.

There is a difference of opinion on the question whether the Court can, under this clause, order a temporary alienation of property in execution, such as by mortgaging or leasing it out for a term. There is also a conflict of opinion on the question whether, where a sale is prohibited under a special or local Act, the Court can, by way of execution, grant a mortgage or a lease of the judgment-debtor's property. On the *first* question it has been held by the High Court of Lahore that S. 72 implies that the Court has authority to order a temporary alienation of the judgment-debtor's property. It has also held that the power to transfer the entire bundle of rights constituting ownership by way of sale includes the lesser power of transferring some of those rights.[12] The High Court of Allahabad has, on the other hand, dissented from the Lahore view and has held that a power to sell does not include a power to grant a lease. As regards S. 72, it has held that that section circumscribes the Court's powers as regards the granting of leases to the conditions prescribed by it.[13] The Peshawar Judicial Commissioner's Court has held that the Court has power, apart from the provisions of S. 72, to order a temporary alienation of the judgment-debtor's property.[14] The Nagpur High Court has held that the Court has no *inherent* power to order temporary alienation, apart from the provisions of section 72.[15]

On the second question, the High Court of Lahore holds that the prohibition of sale does not prevent the Court from mortgaging or leasing the property under this clause and that the provisions of S. 72 do not affect the powers of the Court in this respect.[16] According to the High Court of Allahabad, as has been seen already, the power to grant a lease arises only under S. 72 which applies only when a sale has been ordered, so that, where no sale can be ordered by reason of statutory prohibition, the Court has no power to grant a lease at all.[17] According to the Judicial Commissioner's Court of Peshawar, when a sale is prohibited, all powers, such as those of mortgaging or leasing the property which are derived from the power to sell are also taken away.[18]

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6. ('26) 13 AIR 1926 Oudh 501 (502).
7. ('27) 14 AIR 1927 Mad 394 (394, 395): 50 Mad 639 (DB).
8. See Note 5 on Section 60.
('42) 29 AIR 1942 Cal 429 (434) (DB).
('42) 29 AIR 1942 Cal 470 (471) : I L R (1942) 2 Cal 325 (DB).
9. ('29) 16 AIR 1929 Pat 700 (701) : 9 Pat 368 (FB).
10. † ('20) 7 AIR 1920 Lah 456 (459) : 1 Lah 192 (FB).
11. ('43) 30 AIR 1943 Cal 233 (233).
('42) 29 AIR 1942 Cal 429 (434) (DB).
('42) 29 AIR 1942 Cal 470 (471) (DB).
12. ('30) 17 AIR 1930 Lah 77 (78).
('29) 16 AIR 1929 Lah 195 (195).
† (20) 7 AIR 1920 Lah 456 (459) : 1 Lah 192 (FB).
('36) 23 AIR 1936 Lah 696 (698).
13. †('38) 25 AIR 1938 All 290 (291, 292) : I L R (1938) All 528 (FB). (AIR 1932 All 571 overruled.) [*See also* ('37) 24 AIR 1937 All 699 (700, 701).]
14. † ('36) 23 AIR 1936 Pesh 90 (91) (DB).
('35) 22 AIR 1935 Pesh 113 (114).
15. ('37) 24 AIR 1937 Nag 41 (42) : I L R (1937) Nag 261.
16. ('20) 7 AIR 1920 Lah 456 (459): 1 Lah 192 (FB).
[*See also* ('36) 23 AIR 1936 Lah 448 (449). (The executing Court has no jurisdiction to refuse to lease the land on the ground that the land left with the judgment-debtor is not sufficient for his maintenance.)]
('36) 23 AIR 1936 Lah 30 (31).]
17. † ('38) 25 AIR 1938 All 290 (291, 292) : I L R (1938) All 528 (FB).
('37) 24 AIR 1937 All 699 (700, 701) (DB).
18. ('36) 23 AIR 1936 Pesh 90 (90, 91) (DB).
[But see ('35) 22 AIR 1935 Pesh 113 (114).]

The Nagpur High Court has held that the Court cannot order the attachment of property for the purpose of temporary alienation when such property is not liable to be *sold* in execution.[19]

Where not only a sale but also a temporary alienation is prohibited, it is of course clear that the Court cannot, by way of execution, make an order for temporary alienation.[20]

The word "sale" in the section includes not only a sale in court auction but also a sale by a nominee of the parties under a consent decree.[21]

The fact that immovable property is attached before judgment and the attachment is continued after the decree will not disable the decree-holder from applying for the attachment and sale of the moveable property of the judgment-debtor.[22]

5. "By arrest and detention." — Clause (c). — Under O. 21 R. 30 a decree for the payment of money, including a decree for the payment of money as an alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor. Under O. 21 R. 31 (1) a decree for specific *moveable* property may be similarly executed by the arrest and detention of the judgment-debtor. But there are some exceptions to this rule. Thus, a decree for money cannot be executed by arrest and detention where the judgment-debtor is a woman (S. 56) or a minor or legal representative of a deceased person (Ss. 50 and 52).[1] There may be also exemptions under special legislation, e. g., Punjab Relief of Indebtedness Act, VII of 1934, S. 34 which exempts certain classes of debtors from arrest under money-decrees.

As has been seen in Note 2, it is for the judgment-creditor to decide in which of the several modes he will execute his decree. Where, therefore, a decree-holder prays for the arrest of the judgment-debtor the Court cannot (except as provided for by the proviso) compel the decree-holder to proceed against his property[2] or to accept payment by instalments.[3]

Where a case falls within any of the clauses of the proviso, the judgment-debtor is liable to be detained in prison. And in the absence of evidence to show that he is in bad health or will suffer unduly by detention in the civil jail, the mere fact that he is sixty years of age does not entitle him to any consideration on that account.[4]

See also Ss. 55 to 59 and O. 21 Rr. 30, 31 (1) and 37 to 40 which contain further provisions on this mode of execution.

5a. Proviso to the section. — The proviso to the section was inserted in the Code by the Code of Civil Procedure (Amendment) Act of 1936 (XXI of 1936), S. 2. The proviso restricts the power of the Court to arrest the judgment-debtor in execution of a money decree and lays down that except in certain specified cases, the judgment-debtor shall not be arrested in execution of such a decree. The burden of proving that the circumstances specified in the section exist lies on the decree-holder.[1] Where the Court

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19. ('37) 24 AIR 1937 Nag 41 (43): I L R (1937) Nag 261.
20. ('29) 16 AIR 1929 Pat 700 (701): 9 Pat 368 (FB).
21. ('17) 4 AIR 1917 Cal 740 (742): 44 Cal 789 (DB).
22. ('36) 23 AIR 1936 Bom 268 (272) (DB).

Note 5

1. ('22) 9 AIR 1922 Nag 98 (100, 101) : 18 Nag L R 145 (DB). (Judgment-debtor a woman.)
2. † ('39) 26 AIR 1939 Pat 380 (381): 18 Pat 366: 180 Ind Cas 767 (769) (DB).
('37) 24 AIR 1937 Oudh 379 (381): 13 Luck 340 (DB).
† ('36) 23 AIR 1936 Pesh 46 (47) (DB).
† ('35) 22 AIR 1935 Cal 127 (129) (DB).
3. ('30) 17 AIR 1930 Lah 220 (221) (DB).
4. ('42) 29 AIR 1942 Sind 19 (21) : I L R (1941) Kar 479 (DB).

Note 5a

1. ('40) 27 AIR 1940 All 494 (496).
('39) 26 AIR 1939 Pat 22 (22). (The onus of proof is on the decree-holder to establish that the judgment-debtor had sufficient means to pay the debt within the meaning of sub-cl. (b) of the proviso.)

finds that the judgment-debtor has the means to pay the amount of the decree or a substantial part thereof and has refused or neglected to pay the same, it will order the arrest and detention of the judgment-debtor.[2] See also the undermentioned cases.[3]

Also see Notes on O. 21 R. 40.

5b. Explanation. — The explanation applies only to cl. (b) of the proviso and by virtue of it property which cannot be attached is not to be taken into account when deciding as to whether the judgment-debtor had any means to pay the money decreed.[1] The income of the judgment-debtor from his land, the land alone being exempt from sale, should not be left out of account when such income is attachable in execution of the decree against him.[2] But in calculating the means of the judgment-debtor the necessary expenses of maintenance of himself and his dependents must be taken into account.[3]

6. "By appointing a receiver" — Clause (d).—Execution by appointment of a receiver is known as *equitable execution*[1] and is entirely within the *discretion* of the Court.[2] It is thus an exception to the general rule stated in Note 2 that it is for the

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2. ('42) 29 AIR 1942 Pat 47 (48).
('42) 29 AIR 1942 Sind 19 (20) : I L R (1941) Kar 479 (DB).
[*See* ('42) 29 AIR 1942 Pat 242 (242) (DB). (Debtor not having sufficient income to pay off debt or substantial portion thereof after maintaining his family—He cannot be arrested.)]

3. ('41) 28 AIR 1941 Bom 17 (18). (Decree for payment of arrears of alimony is money decree within the proviso of S. 51, C. P. C., and if the provisions of the proviso are satisfied, the arrest can be ordered.)
('38) 25 AIR 1938 Cal 448 (449). (Fraudulent concealment or transfer of property—What amounts to, within the meaning of the proviso.)
('38) 25 AIR 1938 Lah 692 (693). (Arrest is not possible unless there has been some contumacious conduct on the part of the judgment-debtor and mere inability to pay does not justify arrest.)
('38) 25 AIR 1938 Pesh 17 (18). (Judgment-debtor after decree selling his property but neglecting to pay decretal amount is liable to be detained in civil prison.)

Note 5b

1. ('40) 27 AIR 1940 Pesh 33 (33, 34). (Explanation has nothing to do with cl. (a) and therefore gift with dishonest intention, of land not liable to attachment and sale makes judgment-debtor liable to arrest.)
2. ('43) 30 AIR 1943 Lah 166 (167). (Moreover, the land itself may be exempt from sale but it is not exempt from attachment.)
[*See also* ('39) 26 AIR 1939 Lah 299 (299, 300).]
3. ('42) 29 AIR 1942 Pat 242 (242) (DB).
('39) 43 Cal W N 427 (429).

Note 6

1. † ('39) 26 AIR 1939 Oudh 116 (118) : 14 Luck 538 (DB).
('29) 16 AIR 1929 Pat 700 (701) : 9 Pat 368 (FB). (Equitable execution is equitable attachment.)
('30) 17 AIR 1930 Mad 4 (9, 10). (Receiver is an officer of the Court—Second defendant appointed.)
† ('32) 19 AIR 1932 Cal 189 (192) : 59 Cal 205 (DB). (Such appointment to be deemed as one under O. 40, R. 1.)
† ('30) 17 AIR 1930 Cal 159 (159). (Affirmed in AIR 1931 P C 160 : 59 Cal 1:58 I A 215 (PC).)
[*See also* ('41) 45 Cal W N 1104 (1108). (Principles applied to this form of relief by decisions of Courts of England not equally applicable to Courts in India.)
('24) 11 AIR 1924 Nag 165 (166). (Appointment of a receiver is a mode of execution.)]

2. ('43) 30 AIR 1943 Pesh 52 (54) (DB).
('42) 29 AIR 1942 Pat 455 (456) (DB). (Proper case must be made out as by showing the existence of an impediment which prevents decree-holder from obtaining satisfaction by an ordinary execution sale.)
('41) 28 AIR 1941 Cal 240 (241). (Where decree-holder can only exercise the ordinary legal remedies at considerable risk and with doubtful results, there is ample justification for the appointment of a receiver in execution in such circumstances.)
('41) 45 Cal W N 1104 (1108). (So long as in the circumstances of the case it is the best means of securing the rights of the judgment-creditor without causing undue hardship to the judgment-debtor, there is no valid reason for avoiding this method of execution.)
('40) 27 AIR 1940 Lah 345 (348). (Ample property of judgment-debtor available for satisfaction of decree—Receiver should not be appointed — Receiver cannot be appointed when execution proceedings are to be transferred to Collector.)
('39) 26 AIR 1939 Cal 428 (430):ILR (1939) 1 Cal 523 (DB). (Members of Legislative Assemblies must satisfy their debts like other people, but there are grave objections to the appointment of a receiver of the salary of a member of the Legislative Assembly if the decree-holder has other remedies open to him.)
('39) 26 AIR 1939 Oudh 116 (118) : 14 Luck 538 (DB).
('36) 23 AIR 1936 Bom 399 (400) (DB).
† ('13) 16 Oudh Cas 238 (246) : 21 Ind Cas 283 (286,287). (Property unsaleable for rent and profits.)
('32) 19 AIR 1932 Cal 189 (192):59 Cal 205 (DB). (Decree-holder cannot ask for appointment as a right.)
('31) 18 AIR 1931 Oudh 307 (308):7 Luck 203 (DB).

decree-holder to choose the mode of execution and that the Court has no power to refuse to order execution in the mode asked for. This mode of execution was being adopted by Courts even under the old Code,[3] and this section only gives legislative sanction to the exercise of such powers. The section, however, does not confer a general power on the executing Court to appoint a receiver in every case. It merely prescribes a mode of execution of the decree by appointment of a receiver while the conditions and limitations under which such appointment is to be made are prescribed by O. 40 R. 1.[4]

A receiver can be appointed even before the property is attached as attachment of property is not a necessary preliminary to the appointment of a receiver in execution.[5]

There is a difference of opinion as to whether a receiver may be appointed in respect of properties *which cannot be attached and sold*. According to the High Courts of Allahabad,[6] Calcutta,[7] Lahore[8] and Nagpur,[9] the Chief Court of Oudh[10] and the Judicial Commissioner's Court of Peshawar,[11] such an appointment can be made, the Nagpur Court taking the view that the appointment of a receiver does not amount to attachment. The decisions of the Patna High Court are conflicting.[12] The Allahabad High Court has held in the undermentioned case that where the law prohibits the *dispossession* of the judgment-debtor from certain property, a receiver cannot be appointed in respect of such property.[13] No receiver can be appointed in respect of a *mere right to future maintenance* inasmuch as such a right is not *property* at all.[14] But where the main-

('32) 19 AIR 1932 Mad 193 (195) (DB). (Third party in possession—Parties without present right cannot disturb him — Appointment when just and convenient.)

[*See also* ('33) 20 AIR 1933 Sind 231 (232). (Defendant and property not under Court's jurisdiction and not a subject of suit or execution—Appointment refused.)

Also see O. 40, R. 1 Note 2.

3. ('87) 11 Bom 448 (455). (Under S. 503 of C. P. Code of 1882 to collect attached debt.)

4. ('42) 29 AIR 1942 Pat 455 (456) (DB). (Valuation fixed by the Court under S. 13 of the Bihar Money-Lenders Act, is not such an impediment to an ordinary execution as would entitle the decree-holder to the appointment of a receiver for the purpose of selling the property of the judgment-debtor by private sale.)

('37) 24 AIR 1937 All 389 (392, 393) : ILR (1937) All 542 (DB).

('37) 24 AIR 1937 Lah 738 (739).

† ('37) 24 AIR 1937 Oudh 232 (233) (DB).

Also see O. 40, R. 1 Note 19.

5. ('42) 29 AIR 1942 Mad 396 (396,397). (Appointment of a receiver in execution is itself a form of attachment.)

6. † ('34) 21 AIR 1934 All 605 (606) (DB). (Money decree against agriculturists in Bundelkhand.)

7. ('39) 44 Cal W N 637 (639).

† ('12) 39 Cal 1010 (1015) : 14 Ind Cas 227 (228) (DB). (Income of Ghatwali property is not itself Ghatwali property and is liable to be sold.)

('30) 17 AIR 1930 Cal 159 (160) (DB). (Affirmed on appeal in AIR 1931 P C 160 : 59 Cal 1 : 58 Ind App 215 (PC).)

8. ('42) 29 AIR 1942 Lah 126 (128): ILR (1943) Lah 179 (DB). (Interest of judgment-debtor not liable to attachment and sale by reason of S. 18 of Punjab Colonization of Government Lands Act.)

('37) 24 AIR 1937 Lah 433 (434) : ILR (1937) Lah 486 (DB). (Under settlement of dispute between father and son, house given to son for residence—Son not living in the house — Though house was not liable to attachment, receiver could be appointed to realize rent and make payment towards debt.)

('37) 24 AIR 1937 Lah 738 (739). (Occupancy holding which under S. 18, Colonization of Government Lands (Punjab) Act was not attachable and saleable in execution.)

('38) 25 AIR 1938 Lah 458 (458) (DB).

9. ('36) 23 AIR 1936 Nag 288 (289) : I L R (1937) Nag 534. (Inam fields of judgment-debtor granted to him for maintenance and as remuneration for services rendered.)

† ('15) 2 AIR 1915 Nag 98 (99) : 11 Nag L R 113. (Money decree in lieu of maintenance—*Sir* land.)

('33) 20 AIR 1933 Nag 266 (267). (AIR 1925 PC 176: 47 All 385 : 52 Ind App 262 (PC) followed—Jahagir for maintenance granted under Berar Inam Rules.)

10. ('42) 29 AIR 1942 Oudh 410 (412) (DB). (Right to future maintenance.)

11. ('43) 30 AIR 1943 Pesh 52 (54) (DB). (Land of agriculturist.)

('38) 25 AIR 1938 Pesh 30 (31) (DB).

12. ('42) 29 AIR 1942 Pat 240 (241, 242). (Court has jurisdiction to appoint a receiver in execution of a money decree against an occupancy raiyat, although sale of his holding is prohibited by S. 47 of the Chota Nagpur Tenancy Act.)

('24) 11 AIR 1924 Pat 269 (270) : 3 Pat 339 (DB). (Rents and profits of Ghatwali lands — Receiver can be appointed — See also the observations in AIR 1929 Pat 700 (701) : 9 Pat 368 (FB).)

('29) 16 AIR 1929 Pat 700 (700, 701) : 9 Pat 368 (FB). (Agricultural lands in Sonthal Parganas—No receiver can be appointed.)

13. ('37) 24 AIR 1937 All 389 (392, 393) (DB). (Land not transferable under Agra Tenancy Act.)

14. (1893) 1 QB 551 (558), Holmes v. Millage. (Moneys to become payable in consideration of services.)

tenance is *charged on property* or is to *come out of specified properties*, it has been held by the Privy Council that a receiver may be appointed for realising the rents and profits of the properties and for applying them towards the maintenance of the debtor and the balance towards the discharge of the decree debt.[15]

A receiver may be appointed to realise a decree or debt which has been attached in execution proceedings,[16] or to collect the future rents and profits accruing due from attached properties,[17] or from the estate of a deceased debtor in the hands of his heirs,[18] or even in respect of property situate outside the Court's jurisdiction,[19] or for realisation of property by prosecuting causes of action arising outside jurisdiction.[20]

Where a receiver has been appointed at the instance of one decree-holder, it is not necessary that every decree-holder should also have a receiver appointed in his own suit in respect of the same property,[21] though it does not disable him from asking for such relief in proper cases. Thus, a mortgagee decree-holder can ask for the appointment of a receiver though a receiver has already been appointed in a partition suit.[22] (See also O. 40, R. 1, Note 10.)

7. "In such other manner," etc. — As to the other modes of execution than those specified in clauses (a) to (d), see the following[1] —

Section 54. — Partition of estate or separation of share of such estate to be made by the Collector or any gazetted subordinate of the Collector.

Sections 68 to 72. — Execution of decrees against immovable property in certain cases to be transferred to the Collector.

O. 21, R. 31 (2). — Award of compensation to decree-holder for disobedience of decree to deliver specific moveable property.

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† [*See also* ('36) 23 AIR 1936 Bom 399 (400) (DB). (Receiver cannot be appointed in respect of possible future earnings.)

('33) 20 AIR 1933 Bom 350 (352) : 57 Bom 507 (DB).

[But see ('42) 29 AIR 1942 Oudh 410 (412) (DB). (Right to future maintenance though not attachable, a receiver can be appointed in respect thereof, if just and convenient—AIR 1933 Bom 350 : 57 Bom 507 not followed.)]

15. † ('25) 12 AIR 1925 P C 176 (176) : 47 All 385 : 52 Ind App 262 (PC).

Also see the following cases :

('15) 2 AIR 1915 Nag 98 (99) : 11 Nag L R 113. (Rents and profits in lieu of maintenance decree to be recovered from *sir* lands.)

('26) 13 AIR 1926 Mad 565 (565) : 49 Mad 567 (DB). (Recovery of stamp duty from pauper's future maintenance.)

('31) 18 AIR 1931 P C 160 (161) : 51 Ind App 215 : 59 Cal 1 (PC). (Pension implies periodical payment of money by Government.)

('43) 30 AIR 1943 All 1 (2) (FB). (Execution by appointment of receiver in respect of property in possession of widow in lieu of maintenance should be allowed only in case she persisted in making default of payment of instalments of the decretal amount.)

('35) 22 AIR 1935 Mad 1046 (1047). (Court can direct money collected by receiver in execution to be disbursed for benefit of judgment-debtor.)

('36) 23 AIR 1936 Nag 288 (289) : ILR (1937) Nag 534. (Service inam lands — Execution against judgment-debtor — Court can appoint receiver to collect income.)

('33) 20 AIR 1933 Nag 266 (267). (Berar Inam Rules, R. 3 — Jahagir granted under, for maintenance — Receiver can be appointed to manage jahagir—Suitable allowance to be fixed on amount coming into receiver's hands.)

Also see O. 40, R. 1, N. 5.

16. † ('87) 11 Bom 448 (455) (DB).

('29) 16 AIR 1929 Bom 279 (280) (DB). (Where a decree to be realised has been mortgaged to the plaintiff in the mortgage suit in which receiver is appointed.)

17. ('25) 12 AIR 1925 Rang 318 (319, 320) : 3 Rang 235 (DB). (Order allowing decree-holder to collect rent set aside — Receiver only can file suit for rent.)

18. ('19) 6 AIR 1919 Oudh 326 (328) : 22 Oudh Cas 194 (DB). (Money decree.)

19. † ('38) 25 AIR 1938 Lah 93 (94) : ILR (1938) Lah 305. (Receiver can be appointed in respect of property in Native State—But the receiver cannot be directed to take possession of such property — Proper order is to direct the person in possession to hand over possession to the receiver.)

('30) 17 AIR 1930 Cal 502 (506, 508) : 57 Cal 964.

Also see O. 40, R. 1, N. 12.

20. ('21) 8 AIR 1921 Mad 119 (120) (DB).

21. ('30) 17 AIR 1930 Mad 4 (11).

22. ('11) 12 Ind Cas 165 (165) (DB) (Cal.)

Note 7

1. ('40) 27 AIR 1940 Pat 557 (558) : 19 Pat 832 (DB).

O. 21, R. 32. — Enforcement of decree for specific performance, for restitution of conjugal rights or for an injunction.

O. 21, R. 33. — Special procedure for execution of a decree for restitution of conjugal rights.

O. 21, R. 34. — Execution of decree for execution of a document or endorsement of a negotiable instrument.

O. 21, R. 53. — Attachment of decrees.

O. 21, R. 56. — Delivery of attached coins or currency notes to the party entitled under the decree.

This clause does not enable a Court to add to, or subtract from, the terms of the decree itself inasmuch as it is a general principle of law that an executing Court cannot go behind the decree but must execute it as it stands.[2] Thus, where a decree in a redemption suit directs delivery of title deeds without any alternative provision for payment of damages in default of doing so, the *executing Court* cannot award such damages, though a separate *suit* may lie therefor.[3]

As to adjustments or agreements of parties out of Court as to the mode of execution of the decree, see O. 21, R. 2.

8. **"On the application of the decree-holder."** — The section provides that the Court can act only on the *application of the decree-holder*. The reason for this requirement is that it concerns the parties alone and that the Courts need execute their decrees only if the parties entitled thereto want it.[1] But the application need not necessarily be in writing; it may be *oral*.[2] Nor need the mode of execution be *specifically expressed* in such application; it may be inferred from the act of the Court executing the decree.[3] As regards the appointment of a receiver, it has been held by the High Court of Rangoon that even without an application, the Court can *suo motu* order the appointment of a receiver under S. 94 (d) and O. 40, R. 1.[4] This view is correct. The requirement as to the application in this section is subject to the conditions and limitations prescribed by the rules—in this case O. 40, R. 1—under which the Court can act *suo motu*.

This section requires that the application must be made by the decree-holder. A *stranger* to the suit or decree cannot apply for execution though there may be a benefit conferred on him by the decree.[5] Nor can the judgment-debtor apply under this section, e. g., for the appointment of a receiver.[6]

For definition of "decree-holder," *vide* section 2 clause (3).

9. **Appeal.**—This section must be read with O. 40, R. 1, and an order appointing a receiver in execution, if it falls under O. 40, R. 1, is appealable as an order under O. 43, R. 1 (s).[1] But if the order of appointment is only a *conditional* one on the furnishing of

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2. See Note 8 on Section 38.
3. ('22) 9 AIR 1922 Mad 299 (300) (DB).
Also see O. 34, R. 3, N. 10 and R. 5, N. 15.

Note 8

1. ('20) 7 AIR 1920 Lah 443 (446). (Court cannot appoint receiver unless asked.)
2. See O. 21, R. 11, Cl. (2).
3. ('20) 7 AIR 1920 Lah 443 (446).
4. ('25) 12 AIR 1925 Rang 318 (320): 3 Rang 235 (DB). (To collect rent in a money decree.)
5. ('17) 4 AIR 1917 Oudh 182 (184, 185) (DB). (Compromise decree for allowances—Third person, though allowances fixed for him, not entitled to apply for execution)
[See however ('32) 19 AIR 1932 Mad 193 (194, 195)(DB). (Scheme suit—Board of control created to call for accounts — Misappropriation and disobedience by trustee — Board of control deemed decree-holder entitled to ask for appointment of receiver.)]
6. ('22) 9 AIR 1922 Pat 369 (371) (DB). (Right of decree-holder to sell mortgaged property cannot be defeated.)
(See however ('70) 13 Suth W R 453 (454) (DB). [Manager appointed under S. 243 of Act VIII of 1859.)]

Note 9

1. † ('27) 14 AIR 1927 Lah 190 (190).

security and security is not furnished, the order does not take effect at all and no appeal lies.[2] An order refusing to discharge a receiver is one relating to the "execution" of the decree within S. 47 and as such is appealable as a *decree*.[3] An order under this section which does not fall within S. 47 or within O. 43, R. 1 is not appealable.[4]

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52. [S. 252.] (1) Where a decree is passed[4] against a party[5] as the legal representative[3] of a deceased person, and the decree is for the payment of money[12] out of the property of the deceased,[9] it may be executed by the attachment and sale[14] of any such property.

Enforcement of decree against legal representative.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent[13] of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

[1877, Ss. 252 and 234; 1859, Ss. 203 and 210. See O. 22, Rr. 4, 5 and 12.]

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. "Legal representative."
4. Decree against legal representative, when and how to be passed and its effect.
5. Decree against some of several legal representatives—Validity and legal effect.
6. Decree against wrong legal representative — Effect.
7. Decree against executor who has not proved the will — Effect.
8. Decree against dead person — Effect.
9. "Out of the property of the deceased."
10. Property in the hands of a third party.
11. Insolvency of heirs after decree — Effect.
12. Decree for payment of money.
13. Liability of legal representative under the section.
14. Manner of execution.
15. Right of legal representative to question the validity of the decree. See Section 50, Note 7.
16. Appeal.

NOTE to the Synopsis. See the Notes indicated for the following topics:

"Attachment and sale," meaning of. See Note 14.
Burden of proof. See Note 13.
Due application, what is. See Note 13.
Personal liability of legal representative. See Note 13.
"Where no such property remains." See Note 13.

1. Legislative changes. — The words "in respect of which he has failed so to satisfy the Court" have been substituted for the words "not duly applied by him" in sub-section (2) of the section.

2. Scope and object of the section. — This section contemplates cases where the debtor dies before the decree and the decree itself has been passed against the legal representatives. It also includes cases where the debtor dies before *suit* and the suit itself is instituted against the legal representatives.

('11) 12 Ind Cas 745 (751) (DB) (Cal).
('12) 39 Cal 1010 (1014): 14 Ind Cas 227 (228) (DB).
('20) 7 AIR 1920 Lah 443 (444).
2. ('11) 12 Ind Cas 745 (751) (DB) (Cal).
3. ('18) 5 AIR 1918 Pat 60 (61) (DB).
Also see S. 47 Note 71a.
4. ('29) 16 A I R 1929 Rang 161 (161): 7 Rang 110.

Where a limited liability company goes into voluntary liquidation and another company takes over its assets and liabilities, and a decree is passed against the latter company for the liability and the liability is expressed in the form adopted in decrees against legal representatives of deceased persons, the mode of execution of such a decree is not different in principle from that applicable to a decree passed against the legal representatives of a person who has died a natural death. The latter company having all the assets and liabilities of the former company, is to all intents and purposes a representative in interest of the former company and the principle of sub-s. (2) of this section extends to such a case even though under the Companies Act the transferee company cannot be said to be the legal representative of the transferor company.[1]

The award of the Registrar of Co-operative Societies under the Bihar and Orissa Co-operative Societies Act, 1935, against the legal representative of a deceased person in respect of a debt due by such person can be executed by attachment and sale of the property of the deceased in the hands of the legal representative.[2]

3. "Legal representative."—See also Order 22, Rule 3.

Where a suit is brought against the representative it is not necessary to state expressly that he is being sued as a representative. It is enough if the plaint contains an allegation that he is such representative.[1] See also section 53, Note 1.

4. Decree against legal representative, when and how to be passed and its effect.—The High Courts of Allahabad, Rangoon and Nagpur have held that, in a suit by a creditor against the heirs of the deceased debtor, the plaintiff is entitled to a decree against the defendants on proof of the debt, whether the deceased *left any property or not*.[1] The only result in a case where he has not left any property would be that the decree could not be executed against them. This was also the view taken by the High Court of Bombay in the undermentioned decisions.[2] But in a recent Full Bench decision[3] of the same High Court, Beaumont, C. J., considered this as going too far and observed as follows:

> "The Court (in 13 Bom 653) seems to have overlooked the Bombay Hindu Heirs' Relief Act, VII of 1866, which provides that no son of a deceased Hindu shall, merely by reason of his being such son, be liable to be sued for any of the debts of such deceased Hindu, and then in effect provides that he is only liable to the extent of the deceased's assets which have come to his hands and have not been duly accounted for. It seems clear therefore that the son can plead in defence that no assets of the father have come to his hands."

The Lahore High Court also holds that in such a case the plaintiff has no *cause of action* against the heirs.[4] It is submitted that the former view is the correct one. It is not necessary that the plaintiff should prove that the assets of the deceased have come into the hands of the legal representatives; it is sufficient if there are assets of which they may become possessed.[5] The question whether the heirs have got assets of the

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Section 52—Note 2

1. ('39) 181 Ind Cas 721 (725) (DB) (Pat).
2. ('39) 181 Ind Cas 512 (513) (DB) (Pat).

Note 3

1. ('73) 20 Suth W N 280 (281) (DB).

Note 4

1. ('35) 22 AIR 1935 All 390 (391).
('34) 21 AIR 1934 Rang 196 (196).
('27) 14 AIR 1927 All 459 (462) : 49 All 645 (DB). (Per Mukerji, J.—Ashworth, J. : plea of "*plene administravi.*")
('28) 116 Ind Cas 86 (86) (All).
('26) 13 AIR 1926 Nag 170 (170, 171). (This decision lays down that proof of existence of assets of the deceased is sufficient and legal representatives are presumed to have got them.)
[But see ('36) 1936 All W R 32 (33).]
2. ('89) 13 Bom 653 (654) (DB).
('71) 8 Bom H C R A C 245 (248, 249) (DB).
3. ('41) 28 AIR 1941 Bom 23 (24) : I L R (1941) Bom 177 (FB).
4. ('23) 10 AIR 1923 Lah 471 (473) (DB).
('74) 1874 Pun Re No. 65, page 213. (No decree can be passed.)
5. (1865) 2 Mad H C R 336 (337) (DB).

deceased in their hands must be determined in execution and not in the suit,[6] except when the suit is based on the allegation that the defendants are in possession of the assets.[7]

In an early decision of the Calcutta High Court, it was held that where there are several legal representatives of the deceased it is not necessary that their shares should be defined; it is enough if a joint decree is passed against all of them.[8] But it has been recently held by the Privy Council that in a suit against the heirs of a deceased Mahomedan for a dower debt due by the deceased, the proper form of decree is against each of the heirs of the deceased for that proportion of the plaintiff's joint claim which corresponds to the share of each heir in the estate of the deceased.[9] The decree against a legal representative under this section should direct the defendant to pay the decree debt *out of the assets* of the deceased in his hands.[10] A decree which does not make such a direction is an erroneous decree.[11]

The decree referred to in this section is a mere money decree and not one which creates a *charge* on the assets of the deceased.[12] The section only states the extent to which and the manner in which the debt can be recovered, and in no way provides for reservation of property to satisfy the debt.[13] Where a person is sued as a representative, a decree cannot be passed against him on the ground that he is a partner since it would alter the nature of the suit.[14]

In order that the provisions of this section may apply, the decree must be against a *person* and not merely against something which is not a person. Thus, a decree merely against the assets of a deceased person without mentioning the name of the legal representative is inexecutable.[15]

Where a decree is passed against several heirs of a deceased person and the decree-holder realises the entire decretal amount from some of the heirs alone, the latter can sue the other heirs for contribution.[16]

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† ('84) 8 Bom 309 (310) (DB).
† ('11) 33 All 414 (419) : 9 Ind Cas 935 (937).
(1865) 2 Mad H C R 423 (425) (DB).
('27) 14 AIR 1927 All 459 (460, 462, 463) : 49 All 645 (DB). (Ashworth, J. : plea of '*plene administravi*' discussed.)
('17) 4 AIR 1917 All 298 (298).
('18) 5 AIR 1918 All 391 (392) : 40 All 17.
('70) 14 Suth W R 431 (432) (DB).
('70) 2 N W P H C R 449 450 (DB).
('81) 1881 Pun Re No. 11, Page 20.
('26) 13 AIR 1926 Nag 170 (170, 171).
('20) 7 AIR 1920 Nag 195 (195).

6. ('35) 22 AIR 1935 All 390 (391).
✠('72) 18 Suth W R 185 (188) (PC).
('73) 20 Suth W R 280 (282, 283) (DB).
('27) 14 AIR 1927 All 459 (460) : 49 All 645 (DB). (Per Mukerji, J.—Contra, per Ashworth, J.)
('73) 20 Suth W R 162 (162) (DB).
('78) 2 Cal L Rep 189 (191, 192).
('81) 1881 Pun Re No. 11, page 20.
('75) 1875 Pun Re No. 12, page 19.
† ('31) 18 AIR 1931 Nag 173 (175) : 27 Nag L R 247. (120 Ind Cas 333 followed.)
[But see ('25) 12 AIR 1925 Nag 380 (381). (Possession of assets may be enquired into either in suit or execution proceedings.)

7. ('70) 14 Suth W R 431 (432) (DB). (If possession not proved, suit must be dismissed.)

8. ('71) 15 Suth W R 192 (192, 193) (DB).

9. ('38) 25 AIR 1938 P C 80 (84) : 65 Ind App 119 : 32 Sind L R 362 (PC).

10. † ('08) 18 Mad L Jour 36 (36) (DB).
('96) 1896 Bom P J 226 (227).
(1863) Marsh 611.
('10) 6 Ind Cas 397 (397) (DB) (Mad).
('17) 4 AIR 1917 Mad 418 (419)) (DB).
('26) 13 AIR 1926 Oudh 301 (303) (DB).
('31) 18 AIR 1931 Sind 141 (143) : 25 Sind L R 173.
('70) 2 N W P H C R 449 (450) (DB). (Costs also.)
Also see Note 9.

11. † ('23) 10 AIR 1923 Bom 414 (415) (DB). (Such decree can be amended even at a late stage.)
('74) 1874 Pun Re No. 65, page 213.

12. *See* ('83) 9 Cal 406 (409) (DB).

13. ('16) 3 AIR 1916 Mad 643 (645, 646). (Case under Provincial Insolvency Act (III of 1910), S. 16 (2).)

14. ('09) 34 Bom 244 (247) : 2 Ind Cas 146 (148) (DB).

15. † ('34) 21 AIR 1934 Mad 562 (563) (DB). (Phrase "out of the estate of the deceased" is merely restrictive—In this case it was held that amendment of the decree was the remedy.)

16. ('38) 25 AIR 1938 P C 169 (173, 174): 13 Luck 494 : 65 Ind App 219 (PC).

5. Decree against some of several legal representatives — Validity and legal effect. — As has been already mentioned in Note 63b on section 11, a decree obtained against some only of several heirs of a deceased person may be binding on the estate[1] in the absence of fraud or collusion, on the principle of substantial representation.[2] This principle will not, however, apply where all the heirs are impleaded and some of them are subsequently exempted by the plaintiffs from the array of defendants. In such a case the defendant exempted cannot be considered to have been represented by the other defendants.[3] (See also S. 50, Note 14.) In the case of *co-administrators* or two or more *legatees*, it has been held that a decree against one only will not bind the estate.[4] See also O. 34, R. 1, Note 11.

6. Decree against wrong legal representative — Effect. — Where a creditor selects from among several rival claimants to the estate of his deceased debtor any one whom he *bona fide* believes to have the best *prima facie* title as legal representative and obtains a decree against him, the decree and the consequent execution sale will bind the true heir in the absence of fraud or collusion.[1] This is an exception to the

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Note 5

1. ('35) 22 AIR 1935 Mad 737 (739). (Promissory note executed by deceased—Suit on note against his wife as his legal representative—Widow pleading that daughter and grandson were also interested as deceased had left will in their favour—Plaintiff not knowing anything about existence of will — They also impleaded but after suit as against them was barred—Estate of deceased held sufficiently represented by widow alone and decree will be binding on addad parties provided there was no fraud or collusion.)
('34) 21 AIR 1934 Lah 657 (658).
† ('05) 32 Cal 296 (313) : 32 Ind App 23 (PC). (Mahomedan heirs.)
('82) 8 Cal 370 (373, 374) (DB). (Do.)
('83) 9 Cal 508 (510) (DB).
† ('90) 14 Bom 597 (602, 603, 604).
('79) 6 Ind App 233 (237): 5 Cal L Rep 477 (480) (PC). (Mahomedan heirs.)
† ('86) 11 Bom 361 (364, 365) (DB). (Do.)
[*See* ('89) 12 Mad 356 (365). (Some persons allowed to represent a community—Decree for injunction—No personal liability against persons not co-nominees on the record.)]

In view of the Privy Council decision above referred to, the following cases relating to Mahomedan co-heirs cannot be considered to be good law:—
('79) 4 Cal 142 (153, 155, 156).
('76) 2 Cal 395 (398).
('85) 7 All 822 (826, 845) (FB).
('70) 14 Suth W R 448 (449).
('01) 23 All 263 (264).
('95) 19 Bom 273 (275).
('75) 1 All 57 (59, 60) (FB).
('85) 7 All 716 (719).
('87) 14 Cal 464 (483).
('82) 11 Cal L Rep 268 (271, 272).
('23) 10 AIR 1923 Bom 411 (411, 412): 47 Bom 712.

2. † ('03) 26 Mad 230 (234) (DB). (Mahomedan heirs.)
('28) 15 AIR 1928 Mad 1199 (1199). (Do.)
('24) 11 AIR 1924 Bom 420 (421). (Do.)
('87) 12 Bom 101 (103) (DB). (Do.)
('95) 20 Bom 338 (345) (DB). (Do.)
('89) 12 Mad 90 (91, 92) (DB). (Do.)
('94) 21 Cal 311 (317) (DB). (Do.)
('92) 20 Cal 453 (463) (DB). (Hindu heirs.)
('25) 12 AIR 1925 All 479 (480): 47 All 466, (Do.)

3. ('32) 19 AIR 1932 All 591 (592, 593) : 54 All 796 (DB).
[*See also* ('38) 25 AIR 1938 PC 7(8): 13 Luck 61: 32 Sind L R 221 (PC). (Suit against sons and grandsons of deceased Hindu — Suit dismissed against grandsons, decreed against sons—Decree cannot be executed against shares of grandsons in property.)]

4. ('17) 4 A I R 1917 Pat 432 (432) (DB). (Co-administrators.)
('13) 18 Ind Cas 632 (632, 633) (DB) (Mad). (Decree against one only of two legatees.)

Note 6

1. ('38) 40 Pun L R 25 (26). (Hindu widow remarrying before decree — This fact not known to decree-holder — Decree can be executed against estate of deceased in hands of his daughter.)
† ('33) 20 AIR 1933 Lah 380 (381) : 14 Lah 696 (DB).
('16) 3 AIR 1916 Mad 1022 (1023, 1024) (DB).
† ('30) 17 AIR 1930 Mad 930 (938) : 54 Mad 212 (DB). (Binding on legatee also.)
('28) 15 AIR 1928 Mad 243 (243, 245).
(1900) 24 Bom 135 (147, 148) (DB).
✣ ('72) 17 Suth W R 459 (461) (PC).
(1863) Marsh 614.
('85) 11 Cal 45 (49, 50, 51, 52) (DB). (Adopted son also is bound unless he shows some good cause.)
('89) 16 Cal 40 (56, 60, 61)•: 15 Ind App 195 (PC).
('79) 4 Cal 342 (344, 345, 346) (DB).
(1863) 1863 Suth W R Sup 119 (120, 121) (DB). (Campbell, J. dissentient.)
('96) 23 Cal 374 (388, 389) (DB).
[*See* ('39) 26 AIR 1939 Lah 277 (279): 41 Pun L R 147 (149). (Decree against widow as legal representative of deceased husband—Minor son not impleaded in suit is bound by decree.)]
[But see ('13) 18 Ind Cas 381 (382) (DB) (Bom). (Submitted wrongly decided.)]
Also see S. 50 Note 14.

general principle of law that a decree will bind only the parties to it or those claiming through them. But the true legal representative cannot, after the decree, be brought on record *for the purpose of execution* and the deceased debtor's property *in his hands* cannot be attached and sold in that same suit.[2] If a person who has no sort of right to represent the deceased is made a party to the suit and a decree is obtained against him as representing the deceased, such decree cannot bind the true heir.[3] In such a case it cannot be said that the suit was a *bona fide* one. See also O. 22, R. 4, Note 10.

As regards the cases where the true heir is affected by estoppel, the principle stated in S. 50, Note 14 applies here also. See also the undermentioned cases.[4]

7. Decree against executor who has not proved the will — Effect. — An executor appointed by will does not represent the deceased by virtue of the will until he has obtained probate. Therefore, a suit against him by the creditor is not maintainable unless the executor has intermeddled with the estate.[1] In order that the just claims of the creditor in such cases may not be defeated by the executor not taking out probate, the persons who take possession of the estate of the deceased will be treated as the representatives of the deceased. Even if the decree obtained against them cannot be executed against the estate in the hands of the executor when he has taken out probate, it is sufficient to enable the plaintiff to bring a suit against the executor in order to have the decree satisfied.[2]

8. Decree against dead person — Effect. — A suit against a dead person is not maintainable.[1] If a decree is obtained against a dead person without impleading

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2. ('09) 33 Mad 75 (77) : 3 Ind Cas 737 (738).
('32) 19 AIR 1932 Lah 314 (315) (DB). (True representative cannot be substituted after period of limitation—See S. 22, Limitation Act.)
('27) 14 AIR 1927 Mad 197 (198, 199).
† ('16) 3 A I R 1916 Cal 661 (662) (DB). (Remedy of decree-holder is either to have decree vacated and proceed with true legal representative or to file a suit on the judgment against the true legal representative.)
('87) 14 Cal 316 (320) (DB).
† ('14) 1 AIR 1914 Cal 28 (29) (DB).

3. ('80) 5 Bom 14 (19) (DB).
† ('34) 21 AIR 1934 All 474 (477, 479) (DB). (Trespasser in possession—Decree against—Not binding on real heir.)
('33) 20 AIR 1933 Mad 43 (46, 48) (DB). (Even in the absence of fraud.)
('69) 12 Suth W R F B 1 (4) (FB).
('68) 14 Suth W R 448*n* (449*n*) (DB).
('82) 4 All 192 (194, 195) (DB). (Proper heir who obtained from District Court letters of administration under Indian Succession Act, is not affected by the decree against wrong heirs.)
† ('71) 8 Bom H C R A C 37 (39) (DB).
('85) 9 Bom 86 (91, 93) (DB).
('74) 8 Mad H C R 186 (188) (DB).
('11) 34 All 79 (88): 12 Ind Cas 915 (918, 919) (DB). (The succeeding person to estate as per Hindu law does not do so as a heir or legal representative but as survivor ; hence cannot be said heir to his assets.)
('10) 5 Ind Cas 710 (711) (DB) (Cal). (Hindu widow —Decree against, after remarriage, does not bind the true legal representative of deceased husband.)
('14) 1 AIR 1914 Cal 263 (267) (DB). (When defendant dies, plaintiff must choose under S. 368 against whom he is to proceed.)
† ('88) 11 Mad 408 (410, 411) (DB). (Submitted decision is correct though the reasoning is wrong.)
Also see S. 50, N. 14.

4. ('27) 14 AIR 1927 Bom 131 (134): 51 Bom 125. (On alleged representative's request his name as representative removed. He or persons claiming under him are estopped from further claiming.)
('71) 8 Bom H C R A C 37 (43). (Case of intermeddling.)
('85) 9 Bom 86 (91).
('16) 3 AIR 1916 All 284 (285). (Once the plaintiff confines himself to decree for assets in hand, he cannot in execution claim the property which came in the hands of defendant thereafter.)
('79) 3 Cal L Rep 157 (157, 158).
('25) 12 A I R 1925 Nag 380 (381). (Defendant's failure to deny oral pleading— Inference of admission cannot be drawn.)

Note 7

1. † (1894) 1894 App Cas 437 (442), Mohamadu Mohideen Hadjiar v. Pitchey.
('12) 16 Ind Cas 690 (691) (DB) (Cal).
('94) 19 Bom 821 (827) (DB).
† ('09) 2 Ind Cas 818 (819) (DB) (Cal). (Order for probate not sufficient.)
Also see O. 31, R. 2, N. 2.
2. ('03) 30 Cal 1044 (1057, 1058, 1059) (DB).
† ('79) 4 Cal 342 (345, 346) (DB).
('15) 2 AIR 1915 Cal 207 (208) (DB).
('91) 14 Mad 454 (457) (DB). (4 Cal 342 followed.)
('08) 35 Cal 276 (279, 280) (DB). (Administrator— —Executor *de son tort*.)

Note 8

1. † ('08) 31 Mad 86 (88, 89) (DB).

the legal representative, the decree is a nullity and cannot be executed.[2] But the decree is not invalid if the defendant dies *after the conclusion* of the hearing but before the *pronouncement of the judgment.* See Order 22, Rule 6. So also a decree passed by the Privy Council against a respondent who dies pending the appeal is not a nullity.[3]

9. **"Out of the property of the deceased."** — A decree obtained against the legal representative of a deceased debtor can be executed only against the estate of the latter in his hands.[1] The decree-holder is not entitled to proceed against his separate property.[2] As to cases of survivorship in Hindu joint families, see S. 53, Note 2. Where the survivor does not inherit as heir of the deceased but gets into the estate in his own *individual right,*[3] or where lands are attached to a hereditary office and are inalienable,

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('25) 12 A I R 1925 Mad 1210 (1210) : 49 Mad 18 (FB). (But in the case of an appeal the defect can be rectified. Overruling AIR 1924 Mad 56.)
Also see O 22, R. 1, N. 19.

2. ('16) 3 AIR 1916 Mad 656 (656) : 38 Mad 682.
† ('95) 17 All 478 (481, 482) (DB).
('79) 3 Cal L Rep 192 (193) (DB).
('13) 20 Ind Cas 506 (506) (DB) (Cal).
('68) 10 Suth W R 455 (456, 457) (DB).
('67) 7 Suth W R 52 (52) (DB).
('67) 1867 Pun Re No. 65 p. 127 (128).
('70) 1870 Pun Re No. 85 p. 213 (214).
('02) 4 Bom L R 340 (341).
('20) 7 AIR 1920 Nag 61 (61, 62):16 Nag L R 138.
('70) 14 Suth W R 337 (338) (DB). (Principle applies to appellate decrees also.)
('02) 26 Bom 317 (319) (DB). (Do.)
Also see O. 22, R. 4, N. 19.

3. ('37) 24 AIR 1937 Pat 321 (322) : 16 Pat 316 (DB).

Note 9

1. ('39) 26 AIR 1939 Pat 500 (502) (DB). (Award for debts of father passed against son as legal representative—Ancestral property in son's hands can be attached and sold in execution.)
('08) 18 Mad L Jour 36 (36, 37) (DB).
('27) 14 AIR 1927 Bom 52 (52, 53) (DB). (Order 21, R. 12 is not applicable in such cases.)
('31) 18 AIR 1931 Bom 229 (231, 232) (DB). (Hindu law — Son is liable for his father's lawful debts only.)
('68) 10 Suth W R 199 (200) (DB).
('96) 1896 Bom P J 226 (DB).
('75) 23 Suth W R 265 (266) (DB).
('78) 2 Cal L Rep 189 (192) (DB).
('74) 22 Suth W R 388 (388) (DB). (The heirs of the deceased are also liable for the papers in custody for which the claim is established against the estate of the deceased.)
('74) 22 Suth W R 494 (495) (DB). (The heirs are also liable for damages arising out of breaches of contract made by the deceased.)
('84) 8 Bom 220 (223) (DB). (Although the property may not have come into the sons' possession.)
(1865) 2 Suth W R 258 (258) (DB).
('74) 1874 Pun Re No. 65, p. 213.
('05) 1905 Pun L R No. 48, p. 185. (*A* got a decree for possession of lands against *X* but died before getting possession—*X* himself, legal representative of *A* and hence merger of titles—*Held* lands liable in the hands of *X* for decree against *A*.)
('29) 16 AIR 1929 Lah 424 (425) (DB).
('24) 11 AIR 1924 Nag 410 (411) : 21 Nag L R 12. (Son's sons are liable after their separation from grandfather for his debts to the extent of assets.)
('87) 11 Bom 528 (532, 533) (DB). (Widow's arrears of maintenance are her assets for the cause of debt incurred by her.)
('25) 12 AIR 1925 Nag 380 (381). (Can be executed against property obtained even after the decree.)
('16) 3 AIR 1916 All 284 (286) (DB). (Do.)
Also see Note 4.

2. ('17) 4 AIR 1917 Pat 536 (537) (DB).
† ('25) 12 AIR 1925 Oudh 113 (113):27 Oudh Cas 234 (DB). (Even though passed as a personal decree not executable.)
('21) 65 Ind Cas 224 (224) (DB) (Pat). (Do.)
('76) 25 Suth W R 224 (224) (DB). (Judgment-debtor must prove and file the whole inventory of the whole estate descended to him before he can claim exemption on ground that he only received a small asset.)
('78) 3 Mad 42 (46) (DB).
('69) 12 Suth W R 233 (233, 234) (DB).
('70) 14 Suth W R 362 (362) (DB). (Before executing the decree against the heirs personally for the deceased person's assets decree-holder must prove that they have not duly applied the same and that no such property of the deceased can be found as he can sell in execution.)
('72) 18 Suth W R 185 (188) (PC).
('73) 20 Suth W R 280 (282, 283) (DB).
('06) 1906 Pun Re No. 123, p. 466.
(1864) 1864 Suth W R Misc 1 (2). (Even though he be a Hindu son.)
('71) 8 Bom H C R A C 245 (248, 249) (DB).
('31) 18 AIR 1931 All 368 (369) (DB). (Widow's maintenance amount after surrender of husband's estate is not liable to a decree against husband's estate.)
('97) 4 Cal W N 151 (152) (DB). (Where property is seized decree-holder must prove that it belongs to deceased and is not the private property of legal representative.)
('88) 1888 All W N 49 (50). (Do.)

3. ('14) 1 AIR 1914 Oudh 208 (208). (Zamindar is not a legal representative of the deceased tenant who leaves no heir and whose estate escheates to zamindar.)
† ('70) 5 Mad H C R 303 (309) (DB). (An unsettled Polliam in Madras Presidency.)
('87) 10 Mad 117 (121) (DB). (Malabar Tarwad karnavan.)

they have not the character of simple heritable property and do not form part of the assets of the deceased person.[4] But, where under a grant for maintenance, a grantee has a heritable but non-transferable interest in the property, it cannot be said that each successive heir has only a life-interest in the property. As the grant is heritable each heir derives his interest by inheritance and the property in his hands forms the assets of the deceased grantee.[5]

Rents and profits of immovable property are legal incidents of such property and bear the same character as the property itself. So, where a decree is passed against the assets of a deceased person in the hands of his heir, the rents and profits accruing since his death form part of his assets.[6] But in the case of lands attached to a hereditary office and which are inalienable, the income is not liable to attachment under this section.[7] A right to a share of offerings in a temple which has been inherited by a person forms part of the assets of the deceased for the purpose of this section.[8]

Where a decree is passed against the assets of the deceased in the hands of the representative and the representative himself dies thereafter, the property in the hands of his heir or legal representative does not cease to be assets of the deceased debtor.[9]

10. Property in the hands of a third party. — When a person is sued as the legal representative of a deceased person for the recovery of a debt due by the deceased, and a decree is passed for money to be paid out of the assets of the deceased in the hands of the representative, the decree is nonetheless a decree against the legal representative. It refers to him as the judgment-debtor, and it follows that such a decree

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4. † ('80) 5 Cal 389 (412, 419) (DB). (Ghatwalli lands.)
(1865) 4 Suth W R Misc 5 (6) (DB). (Do.)
('66) 6 Suth W R 129 (129) (DB). (Do.)
('67) 7 Suth W R 178 (178, 179) (DB). (Do.)
†('82) 9 Cal 187 (206, 208) : 9 Ind App 104 (PC). (Do.)
('82) 9 Cal 388 (388) (DB). (Do.)
('88) 15 Cal 471 (481, 482) : 15 Ind App 18 (PC). (Do.)
('84) 10 Cal 677 (684, 685) (DB). (Do.)
('85) 9 Bom 198 (212, 217, 232) (FB). (Vatan lands.)
† ('25) 12 AIR 1925 Nag 449 (450). (Balance of sale proceeds from occupancy field of the deceased father's estate is not asset in the hands of the son — Money representing such property is also not liable.)
('06) 1906 Pun Re No. 123, p. 466.
('20) 7 AIR 1920 Pat 468 (468). (But rent income accrued during deceased's lifetime though collected subsequently will be assets.)

5. ('36) 23 AIR 1936 Oudh 76 (79) (DB).

6. †('38) 25 AIR 1938 Oudh 45 (48) : 13 Luck 689 (DB). (Overruling AIR 1914 Oudh 233 : 17 Oudh Cas 207.)
('36) 23 AIR 1936 Lah 236 (236).
† ('24) 11 AIR 1924 Mad 530 (532, 533, 536, 537): 47 Mad 411 (FB).
('32) 137 Ind Cas 632 (633) (Oudh).
('32) 19 AIR 1932 Lah 383 (383).
('17) 4 AIR 1917 Mad 536 (537) (DB).
('28) 15 AIR 1928 Oudh 40 (40) : 2 Luck 408 (DB).
('21) 8 AIR 1921 Sind 29 (32, 33) : 15 Sind L R 47 (DB). (Income or crops during lifetime of judgment-debtor liable, even though crops not liable as inalienable under Dekkhan Agriculturists' Relief Act but not income or crops raised by successor after death of previous holder.)
('04) 8 Cal W N 843 (850, 852) (DB). (Accretions.)
('71) 15 Suth W R 285 (285, 286) (DB).
[But see ('97) 19 All 235 (236, 237) (DB). (Submitted wrongly decided.)]

7. (1865) 4 Suth W R Misc 5 (6) (DB). (Ghatwalli lands.)
('66) 6 Suth W R 129 (129) (DB). (Do.)
('67) 7 Suth W R 178 (178, 179) (DB). (Do.)
('96) 23 Cal 873 (876) (DB). (Do).
('23) 10 AIR 1923 All 169 (169, 170). (Inalienable property.)
('24) 11 AIR 1924 Mad 707 (707) (DB). (Impartible estates.)
('13) 9 Nag LR 137 (139) : 21 Ind Cas 272 (273). (Where Government rayat's holding is inalienable under Section 67E of the Central Provinces Land Revenue Act, 1881.)
('16) 3 AIR 1916 Lah 313 (314) (DB). (Punjab Colonisation of Government Lands Act (V of 1912) —Government tenant.)
† ('70) 5 Mad H C R 303 (310) (DB). (Unsettled Pollem and revenue and income therefrom are not liable in hands of successor.)
('30) 17 AIR 1930 Bom 238 (239) (DB). (Section 22, clause (2), Dekkhan Agriculturists' Relief Act— Collector cannot be appointed to manage lands of deceased judgment-debtor in the hands of legal representative.)

8. ('36) 23 AIR 1936 All 131 (134) : 58 All 457 (DB).

9. ('14) 1 AIR 1914 Mad 668 (669) (DB).
(1900) 22 All 367 (369, 370) (DB).
[*See also* ('38) 1938 Nag L Jour 176 (179).]
Also see S. 50, N. 17 and O. 22, R. 3, N. 10.

can be executed only against the representative who was made a defendant in the suit or his or her representatives.[1] As has been already mentioned in S. 50, Note 15, a judgment-creditor cannot in execution of his decree follow the assets of the deceased in the hands of transferees in good faith and for valuable consideration,[2] unless the transfers are affected by the doctrine of *lis pendens*[3] or the transferees knew that there were unpaid debts and that the transferor did not intend to apply the sale proceeds to pay them.[4] Even in such a contingency, the transfer not being a void one, the property in the hands of the transferee is liable only if the decree-holder shows that there are no other assets of the deceased in the hands of the representative out of which he might seek satisfaction of his decree.[5] Probably, the procedure under this section is intended to be confined to property remaining in the hands of the representative, leaving the creditors to follow the property alienated by a separate suit,[6] e. g., under S. 53 of the Transfer of Property Act. Where, however, the alienation is *void* the property in the hands of the alienee can be pursued by the decree-holder.[7]

11. Insolvency of heirs after decree — Effect. — It has been already mentioned in Note 4 that a decree passed under this section creates no charge or lien upon the estate of the deceased. Hence, upon the insolvency of the heirs of the deceased after decree, the estate of the deceased vests in the Official Assignee and consequently the creditor can only prove the decree debt in insolvency.[1] Further, even though the creditors of an ancestor have a general lien upon the assets of the ancestor for the payment of their debts and can follow such assets into the hands of the *heirs*, they cannot follow such assets into the hands of *other* persons. If the heir has disposed of the assets to other persons who took the property without notice of the creditors' claims, then the creditors' right to follow the property is lost. The right cannot be revived to them by the fact that the heir is adjudicated insolvent and that his transfer is set aside under the insolvency laws so that the assets now become available for distribution among his creditors.[2] It has been held in the undermentioned cases[3] that where the debtor dies an undischarged insolvent the creditor cannot sue the Official Assignee as the representative of the deceased debtor. The suit must be filed against those persons who would ordinarily be his legal representatives. For, the Official Assignee is not accountable for any assets vested in him as such except to the Insolvency Court.

12. Decree for payment of money. — Order 22, which provides for cases of death after suit and before decree, is not confined to decrees on claims for payment of money alone. Though this section provides only for the case of money decrees, where a

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Note 10

1. † ('09) 33 Mad 75 (77) : 3 Ind Cas 737 (738) (DB).
('30) 17 AIR 1930 Cal 762 (763) : 58 Cal 170 (DB).
(The right of a creditor to follow the assets in the hands of a legatee is a right which has to be exercised by a suit only.)
('41) 28 AIR 1941 Cal 27 (28). (Do.)
[*See* ('84) 10 Cal 860 (864) : 11 Ind App 59 (PC).]
2. ('40) 27 AIR 1940 Mad 22 (23).
(1863) Marsh 509.
† (1865) 2 Suth W R 296 (297) (DB).
('69) 12 Suth W R 177 (178) (DB). (*Obiter.*)
('71) 14 Suth W R 239 (241, 244, 245, 246) (DB).
(Mahomedan widow's dower is on par with other debts—A purchaser from the deceased Mahomedan is not bound to enquire into the existence of legal necessity.)
('81) 8 Cal L Rep 447 (448) (DB).
('80) 7 Cal L Rep 460 (462, 463) (DB).
('75) 3 Ind App 241 (245) (PC).
('79) 4 Cal 402 (408) : 5 Ind App 211 (PC).
† ('72) 9 Bom H C R 116 (119).
('97) 19 All 504 (505, 506) (DB).
('69) 10 Suth W R 199 (201) (DB).
3. See S. 50, Note 15.
4. ('79) 4 Cal 897 (912, 914).
5. ('82) 8 Cal 20 (23, 24) (DB).
6. ('38) 25 AIR 1938 Mad 684 (686) (DB).
† ('79) 4 Cal L Rep 193 (210) (DB).
7. ('39) 26 AIR 1939 Lah 373 (374) : 41 Pun L R 362 (364).

Note 11

1. ('16) 3 AIR 1916 Mad 645 (646) (DB).
2. ('34) 21 AIR 1934 Rang 162 (163) : 12 Rang 602 (DB).
3. † ('75) 22 Cal 259 (262, 263).
('08) 30 All 486 (487) (DB).

plaintiff sues a deceased person's heir for return of account-books, papers, etc., which have come into his hands, a decree can, under general principles, be passed against the heir for return of those articles or in the alternative for money by way of damages.[1]

13. Liability of legal representative under the section. — As has been seen in Note 2 on S. 50 the liability of the legal representative is the same, whether he is impleaded *before* decree under this section or *after* decree under S. 50. In either case, it extends only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of.[1]

Whenever a decree is passed against the heir, it must be deemed to be executable only as provided in this section, though the decree is erroneously passed as a personal decree.[2]

Where a decree for the payment of money out of the property of the deceased is passed, the decree-holder can proceed only as provided by sub-s. (2) of this section. If he brings another suit, such as a suit for administration of the estate of the deceased, it will be barred by S. 47.[3] It is for the decree-holder to prove in the first instance, that some assets belonging to the estate of the deceased came into the hands of the legal representative[4] and then it is for the latter to satisfy the Court as to the extent of the assets received and to account for them.[5] He will be bound to account for all sorts of property that he

Note 12

1. ('74) 22 Suth W R 494 (495) (DB).
† ('74) 22 Suth W R 388 (388) (DB).
('12) 16 Ind Cas 414 (416, 417) (DB) (Cal).

Note 13

1. ('37) 24 AIR 1937 Rang 274 (274). (Security deposit of deceased judgment-debtor in hands of his employer cannot be attached as it has not yet come into the hands of legal representative.)
('84) 7 Mad 255 (257) (DB).
('32) 19 AIR 1932 Bom 522 (523).
('14) 1 AIR 1914 Lah 144 (145) (DB). (Intermeddler with part of estate liable for the part.)
† ('67) 8 Suth W R 160 (161) (DB).
[*See* ('41) 28 AIR 1941 Rang 37 (39) : 1940 Rang L R 603 (DB). (Action by executor or administrator as such failing—He is personally liable for costs unless defendant is proved guilty of misconduct inducing action — But if executor or administrator is sued upon testator's liability he is protected under S. 52.)
('39) 26 AIR 1939 Pat 568 (569): 18 Pat 499 (DB). (Decree against father — Joint family property attached and put up for sale — Death of father before sale — Decree-holder can proceed at least against what would have been father's share when he died.)]
[*See also* ('10) 13 Oudh Cas 297 (301) : 8 Ind Cas 374 (376).]

Also see O. 21, R. 46, N. 1.

2. ('75) 24 Suth W R 383 (384) (DB).
† ('21) 65 Ind Cas 224 (224) (DB) (Pat).

3. ('42) 29 AIR 1942 Mad 588 (590).
[*See* ('97) 24 Cal 473 (487, 491) (FB). (Suit on mortgage against widow of martgagor—Decree on mortgage obtained — Decree transferred to High Court for execution — Execution refused as property was outside jurisdiction of High Court — Thereupon plaintiff (mortgagee) bringing suit for administration of mortgagor's estate—*Held* that suit was barred by S. 244, i.e., present S. 47.)]
[*See also* ('40) 27 AIR 1940 Rang 78 (80).]

4. † ('17) 4 AIR 1917 Mad 536 (538) (DB). (Legal representative failing to satisfy the Court that he had duly applied the property of the deceased is personally liable.)
('34) 21 AIR 1934 All 249 (250).
('24) 11 AIR 1924 Mad 466 (467, 469) (DB). (No proof of assets—Not liable.)
† ('66) 3 Mad H C R 161 (164) (DB).
('72) 18 Suth W R 185 (188) (PC).
('76) 25 Suth W R 224 (224, 225) (DB).
('68) 10 Suth W R 199 (200, 201) (DB).
('67) 8 Suth W R 160 (161).
† ('67) 8 Suth W R 195 (196) (DB).
('70) 14 Suth W R 362 (362). (The decree-holder must satisfy the Court that no such property of the deceased can be found as can be sold in execution before he can execute the decree against heirs to the extent of property they inherited from the debtor.)
('69) 12 Suth W R 233 (234) (DB).
('96) 1896 Bom P J 226.
('78) 3 Mad 42 (46) (DB).
('14) 1 AIR 1914 All 230 (231).
† (1900) 4 Cal W N 151 (152) (DB).
2 Ind Jur (NS) 234. (Brother taking possession, widow having relinquished—Liable as legal representative.)
('73) 21 Suth W R 117 (118) (DB). (Son instead of objecting asked time for payment—Inference is that he had assets.)
('73) 20 Suth W R 422 (424) (DB). (Decree-holder should explain delay in proceeding against assets.) [But see ('88) 1888 All W N 49 (50).]

5. ('40) 27 AIR 1940 Rang 78 (80).
('39) 181 Ind Cas 721 (725) (DB) (Pat).
('37) 24 AIR 1937 Rang 531 (533). (Question to be decided by executing Court and not in regular suit.

got, such as money, moveables, immovables, accounts, papers, etc.[6] If the defendant fails to satisfy the Court that he has duly applied the property of the deceased he is personally liable to the extent of the property in respect of which he has failed to satisfy the Court.[7] But sub-s. (2) will apply only when no property of the deceased is in the possession of the judgment-debtor.[8] If payments are not made by the heir rateably to all the creditors, it does not follow that he has failed to apply the assets duly. Every payment on account of a debt is perfectly lawful, irrespective of its effect upon the other creditors.[9] In such cases the analogy of S. 323 of the Succession Act (XXXIX of 1925) governing executors and administrators does not apply. Where payments are made by the legal representative to the extent of the full value of the property of the deceased which has come into his hands, the decree cannot be executed even though he may still have in his possession property which originally belonged to the deceased.[10] This section does not provide that the representative shall be made answerable as well for what, with diligence on his part, would have come to his hands as for what actually has come to his hands.[11] In such a case, the creditor may have a remedy by an administration suit or other regular action.[12]

14. Manner of execution. — Where the heir pleads in answer to execution that the property attached is his own private property or is otherwise one which is not

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† ('17) 4 AIR 1917 Mad 536 (538) (DB).
† ('33) 20 AIR 1933 Rang 309 (310) (DB).
('33) 20 AIR 1933 Lah 447 (447).
† ('34) 21 AIR 1934 Lah 106 (107) (DB).
('34) 21 AIR 1934 Rang 93 (94).
† ('11) 12 Ind Cas 253 (253, 255) (DB) (Mad).
('24) 11 AIR 1924 Mad 466 (468).
('76) 25 Suth W R 224 (224) (DB). (Before judgment-debtors can claim exemption from decree-holder's claim on ground that they have received a small asset from ancestor's estate or otherwise, they should prove and file the whole inventory of it.)
('67) 8 Suth W R 195 (196) (DB).
('68) 3 Mad H C R 161 (164) (DB).
('71) 15 Suth W R 285 (285, 286) (DB).
(1865) 2 Suth W R 258 (258) (DB).
(69) 12 Suth W R 233 (234) (DB).
('15) 2 AIR 1915 Cal 646 (646) (DB). (Legal representative's liability for intermeddling with minor's estate.)
('88) 1888 All W N 49 (50).
('87) 1887 Pun Re No. 87, p. 187.
('73) 20 Suth W R 280 (282) (DB).
('03) 26 Mad 501 (501, 502) (DB).
('90) 1890 Bom P J 166 (166) (DB).
('27) 14 AIR 1927 Rang 127 (127) : 5 Rang 44 (DB). (This question should be decided in execution under S. 47 and not by a regular suit.)
('70) 14 Suth W R 431 (432) (DB). (But if question of possession of assets was raised and decided in suit itself, it cannot be agitated again in execution.)

6. ('74) 22 Suth W R 388 (388, 389) (DB).

7. ('42) 29 AIR 1942 Mad 588 (590).
('40) 27 AIR 1940 Mad 22 (23).
† ('39) 181 Ind Cas 721 (725) (DB) (Pat). (Section 52 (2) of the Civil Procedure Code simply enacts a rule of procedure in accordance with natural justice, and even in the absence of that section (and of any provision of law to the contrary) Courts would have been justified in applying the principle embodied in it as a rule of justice, equity and good conscience.)
('38) 25 AIR 1938 Mad 684 (686).
('17) 4 AIR 1917 Mad 536 (538) (DB).
('33) 20 AIR 1933 Rang 309 (310) (DB). (Question can be gone into in execution itself : AIR 1927 Rang 127 : 5 Rang 44 followed.)
('30) 17 AIR 1930 Lah 204 (204).
('69) 12 Suth W R 517 (517) (DB).
('68) 10 Suth W R 199 (200) (DB).
† ('78) 1 Cal L Rep 359 (360, 361) (DB).
('30) 17 AIR 1930 Lah 332 (333). (Lapse of time does not absolve judgment-debtor but may affect proof as to due application.)
('96) 1896 Bom P J 226 (DB). (This question to be decided only in execution and not in suit.)
('97) 20 Mad 446 (447) (DB). (Personal decree can be passed in suit.)
('22) 9 AIR 1922 Oudh 200 (200). (A person who without any right took possession of the property and disposed of a portion of it is liable for personal decree against him for the deceased person's debts.)
('10) 6 Ind Cas 397 (397)(DB)(Mad). (Unless assets came to them personal decree cannot be passed.) [But see ('70) 13 Suth W R 36 (36, 37) (DB). (Decree-holder may be estopped from proceeding personally.)]

8. ('37) 24 AIR 1937 Pesh 80 (80).
† ('30) 17 AIR 1930 Lah 354 (355).
('70) 14 Suth W R 362 (362) (DB).

9. ('03) 26 Mad 792 (796, 797) (DB).
('06) 30 Bom 270 (273).
('95) 1895 Pun Re No. 68, p. 337.
('27) 14 AIR 1927 All 459 (460) : 49 All 645 (DB). (May even pay the debt due to himself.)

10. ('03) 26 Mad 792 (798) (DB).
† ('69) 12 Suth W R 177 (178) (DB).
[*See* ('70) 14 Suth W R 239 (241).
('13) 9 Nag L R 137 (139): 21 Ind Cas 272 (273)]

11. † ('87) 11 Bom 727 (731, 732) (DB).
('08) 35 Cal 1100 (1103) (DB).

12. ('08) 35 Cal 1100 (1103) (DB).
('84) 8 Bom 220 (222, 223) (DB).

liable to be proceeded against in execution, the question should be decided in *execution* and not referred to a *separate suit*.[1] The decree-holder is entitled to attach and sell any property of the deceased in the possession of his heirs independently of the fact whether the property in such possession is more than his share or not.[2] He cannot be delayed till the legal representatives are able to ascertain all the creditors and the extent of their debts or till they effect a partition among themselves or settle their disputes *inter se*, or till probate is obtained, or till the assets are reduced to possession.[3]

The words "attached and sold" should be taken distributively; so that where income from property in the hands of the legal representative is attached, it is unnecessary to sell it.[4] A decree-holder is entitled to have the whole of his decree satisfied out of the assets of the deceased, as far as they go, to the exclusion of other creditors who have not obtained decrees. Section 323 of the Indian Succession Act (XXXIX of 1925) merely lays down a rule of procedure to be followed by the executor or administrator and does not control the operation of this section.[5] See also Note 13.

15. **Right of legal representative to question the validity of the decree.** See Section 50, Note 7.

16. Appeal. — Such of the orders passed under this section as satisfy the requirements of S. 47 are decrees and are appealable as such.

See section 47, Notes 71a and 84.

Liability of ancestral property.

53. For the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

Note 14

1. ('40) 27 AIR 1940 Rang 78 (80). (And not by asking the decree-holder to file a suit for administration.)
('73) 20 Suth W R 280 (283) (DB).
† ('89) 16 Cal 1 (8) (DB).
('89) 16 Cal 603 (606, 609) (DB).
('90) 17 Cal 57 (65) (DB).
† ('90) 17 Cal 711 (714, 721) (FB).
('90) 12 All 73 (78) (DB).
('86) 10 Mad 117 (121) (DB).
('10) 34 Bom 546 (552) (DB).
('09) 34 Bom 142 (151) : 4 Ind Cas 839 (841) (DB). (Nor is a fresh application necessary to decide the question.)
('78) 1 Cal L Rep 359 (360) (DB). (Do.)
Also see S. 47 Note 46.

2. ('39) 26 AIR 1939 Pat 500 (502) (DB). (Award for debts of father passed against son as legal representative — Ancestral property in the hands of sons and sons' sons can be attached and sold in execution.)
† ('25) 12 AIR 1925 Oudh 515 (515,516,517) (DB).
('14) 1 AIR 1914 All 392 (393) : 36 All 439 (DB).
('99) 22 Mad 194 (195, 196) (DB). (Decree-holder's right to execute his decree against legal representative is not affected by S. 104, Probate and Administration Act.)
('09) 33 Mad 6 (8) : 4 Ind Cas 1059 (1059) (DB).
('19) 6 AIR 1919 Sind 49 (50) : 13 Sind L R 138 (DB). (Court can however give effect to the equities as between the different legal representatives.)

3. ('25) 12 AIR 1925 Oudh 515 (516) (DB). (Till shares *inter se* are settled.)
('09) 33 Mad 6 (8, 9) : 4 Ind Cas 1059 (1059) (DB). (Decree-holder not bound to wait till the decision as to who is the true legal representative.)
('13) 6 Low Bur Rule 158 (159, 160) : 18 Ind Cas 510 (510, 511) (DB). (Till realisation of whole estate and finding out the extent of the assets.)
('99) 22 Mad 194 (195, 196) (DB). (Time for other disposition of the estate.)
('72) 17 Suth W R 513 (514) (DB). (Decree-holder need not wait till executor or administrator distributes in due course.)
See also cases cited in Note 7, foot-note (3) and those in Note 13, foot-note (9).

4. ('24) 11 AIR 1924 Mad 530 (536, 537) : 47 Mad 411 (FB).

5. ('72) 17 Suth W R 513 (514) (DB).
† ('13) 6 Low Bur Rul 158 (159, 160) : 18 Ind Cas 510 (510, 511) (DB).

Synopsis

1. Scope, applicability and object of the section.
2. "Property in the hands of a son or other descendant."
3. "Which is liable under Hindu law for the payment of the debt of a deceased ancestor."
4. "Deceased ancestor."
5. "Decree."
6. "Property of the deceased."
7. "Legal representative."

NOTE to the Synopsis. See the Notes indicated for the following topics:

Enforceability under this section in execution and not by separate suit. See Note 1.
Inapplicability of the section to persons other than descendants. See Notes 2 and 3.
Property not liable under this section. See Notes 3 and 6.

1. Scope, applicability and object of the section. — This section is new. It was introduced for the first time in the Code in 1908. Under the Hindu law, an undivided son or other descendant who succeeds to the joint family property on the death of the ancestor, does so by right of *survivorship* and takes property in his *own right* and not as *heir* of the ancestor.[1] As to whether he is a legal representative of the deceased ancestor as defined in S. 2, cl. (11), see Note 13 on O. 22 R. 3. But he is liable under the Hindu law by reason of his pious obligation, to pay the debts of his deceased ancestor, to the extent of the joint family properties in his hands. Under the old Code, the term "legal representative" was not defined, and there was a conflict of decisions as to whether a Hindu undivided son or other descendant could, so far as the ancestral property was concerned, be regarded as the legal representative of the deceased ancestor and whether the said liability could be enforced in *execution*, or only by a *separate suit*, inasmuch as the liability was quite distinct from, and independent of the contractual liability of the ancestor[2] or of the liability of a legal representative to pay the debts of the deceased out of the property of the deceased in his hands.[3] The High Courts of Madras[4] and Allahabad[5] held that the liability could be enforced only by way of a separate suit. The other High Courts held that it could be enforced in execution.[6] It is

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Section 53—Note 1

1. ('94) 16 All 449 (455, 457) (DB). (But self-acquired property is taken as heir.)
2. ('99) 21 All 301 (304) (DB). (Analogy of liability of joint debtors not applicable to pious liability.)
3. ('82) 5 Mad 223 (225) (DB).
('85) 8 Mad 376 (378).
('88) 11 Mad 413 (415). (S. 244 of C. P. Code, 1882 relates to obligations created by decree.)
('10) 33 Mad 423 (427) : 5 Ind Cas 362 (364, 365) (DB). (Passing of decree gives fresh cause of action against sons.)
4. ('04) 27 Mad 243 (250 - 254) (FB). (Suit to recover debt of record governed by Art. 120.)
('88) 11 Mad 413 (415, 416). (Because pious obligation and obligation created by decree against father are distinct.)
('90) 13 Mad 265 (266, 267). (3 Mad 42 ; 5 Mad 232; 7 Mad 328 and 10 Mad 283 followed.)
('04) 14 Mad L Jour 431 (432).
('94) 17 Mad 122 (127).
5. ('94) 16 All 449 (464).
('99) 21 All 301 (305, 306, 307). (In case of decree for secured debt also.)
6. ('09) 1 Ind Cas 442 (444) (DB) (Cal).
('09) 3 Ind Cas 763 (764) (DB) (Bom).
('87) 1887 Pun Re No. 87, p. 183 (184) (DB).
('96) 20 Bom 385 (389) (DB). (Objection as to binding nature of debt can be decided under S. 244, old C. P. Code. 11 Bom 37 followed.)
('09) 33 Bom 39 (43) : 1 Ind Cas 459 (459, 460). (Objection as to nature of debt lies under S. 244, old C. P. Code.)
† ('89) 16 Cal 1 (6, 7) (DB).
('06) 33 Cal 676 (677, 678).
('07) 5 Cal L Jour 80 (85, 87) (DB). (Contra :— If no proceedings have been taken to enforce the debt in father's lifetime, father's interest cannot be reached as assets in the hands of sons.)
✠('07) 34 Cal 642 (647, 648, 651, 653, 657) (FB). (If the legal representative has been properly brought on record under S. 234—"Legal representative" liberally construed.)

in order to settle this conflict of views in the procedure to be adopted for enforcing the said liability under Hindu law that this section has been enacted.[7] See also Order 22, Rule 3, Note 13.

This section is an explanation to Ss. 50 and 52. The latter sections provide for the remedies of a creditor against the properties of his deceased debtor in the hands of his legal representative. This section explains the meaning of the words "property of the deceased." It also extends the meaning of the term "legal representative" as defined in S. 2 cl. (11) by expressly making the son or other descendant of a Hindu, his legal representative in respect of the joint family property in his hands which is liable under Hindu law, for the satisfaction of the debt of the deceased ancestor.[8] Reading these sections together, it is now clear that ancestral property in the hands of a son or other descendant can be proceeded against in *execution* as assets of the deceased in the hands of such descendant.[9] The descendant can, in such proceedings, show that in fact no pious obligation exists in view of the illegality or immorality or the non-existence of the debt.[10] In fact, a separate suit will be barred in respect of that matter by virtue of S. 47.[11]

('10) 5 Ind Cas 146 (147) (DB) (Cal). (Decree was passed against son as legal representative—Stronger case than 34 Cal 642 (FB).)

('10) 6 Ind Cas 582 (582, 583) (DB) (Cal). (Because no hardship is caused to debtors by shorter remedy —34 Cal 642 (F B) not inconsistent with Privy Council view in 5 Cal 148 and 18 Cal 157.)
[But see (1900) 6 Cal W N 223 (225) (DB).]

7. ('37) 24 AIR 1937 Mad 610 (615): I L R (1937) Mad 880 (FB).

('34) 21 A I R 1934 All 590 (592, 593, 594, 601) (FB). (Pious obligation subsists even where family consists of uncle and nephew.)

† ('18) 5 AIR 1918 Bom 165 (166, 167) : 42 Bom 504 (DB) (Section is both descriptive and limitative—Criticised in AIR 1924 Mad 571.)

('24) 11 AIR 1924 Mad 571 (573, 574) (DB). (Section not confined to money decree only.)

† ('23) 10 AIR 1923 Pat 143 (147) : 6 Pat L Jour 451 (DB). (Allahabad and Madras view no longer law.)

('31) 18 AIR 1931 Sind 84 (86, 87) : 25 Sind L R 374 (DB). (Property acquired not by survivorship but by partition — Section applies.)

8. ('39) 26 AIR 1939 Mad 867 (873): I L R (1940) Mad 123 (DB).

† ('37) 24 AIR 1937 Mad 785 (785). (Reversed on another point by A I R 1939 Mad 552 : I L R (1939) Mad 820.)

('36) 23 AIR 1936 Bom 456 (459).

✣ ('23) 10 AIR 1923 Pat 143 (144, 147, 148, 149) : 6 Pat L Jour 451 (DB). (Son's liability is personal.)

('24) 11 AIR 1924 Mad 571 (573, 574, 575) (DB). (Decree in S. 53 is not limited to money decrees.)
[*See* ('38) 25 AIR 1938 P C 7 (8) : 13 Luck 61 : 32 Sind L R 221 (PC). (Decree against sons and grandsons for debt due by deceased ancestor can be executed against judgment-debtors' interest in the joint family property.)
[*See also* ('41) 28 AIR 1941 Bom 23 (24) : I L R (1941) Bom 177 (FB).
('40) 27 AIR 1940 Nag 278 (280) (DB).]
Also see O. 22, R. 3, Note 13.

9. ('39) 26 AIR 1939 Pat 500 (502) (DB).

('38) 25 AIR 1938 P C 7 (8) : 13 Luck 61: 32 Sind L R 221 (PC). (Ancestral property in the hands of grandsons.)

('39) 181 Ind Cas 512 (514) (DB) (Pat). (Principle applies to award passed by Registrar of Co-operative Societies under Co-operative Societies Act.)

('37) 24 AIR 1937 All 559 (560).

('36) 23 AIR 1936 Bom 456 (458).

('35) 22 AIR 1935 Lah 855 (856):17 Lah 139 (DB).

✣ ('35) 22 AIR 1935 Pat 275 (280) : 14 Pat 732 (FB).

('25) 12 AIR 1925 All 471 (472) (DB). (A decree for costs against father.)

('33) 20 AIR 1933 All 110 (111) (DB). (Decree for amount not collected due to negligence — A I R 1928 All 166 dissented from.)

† ('30) 32 Bom L R 919 (922, 923). (A decree on partnership accounts.)

('28) 116 Ind Cas 86 (86) (All). (Suit against father and sons of deceased debtor on pronote — Liability of joint family property to be decided in execution.)

('31) 133 Ind Cas 910 (911) (DB) (All).
Also see Note 3.

10. ('34) 21 AIR 1934 Cal 118 (119).

('12) 13 Ind Cas 670 (671) (Lah). (Ground of necessity.)

('15) 2 AIR 1915 All 126 (127) : 37 All 214 (DB).

('23) 10 AIR 1923 All 124 (125) (DB). (Decree-holder cannot be asked to prove the debt again.)

† ('23) 10 AIR 1923 Pat 143 (148) : 6 Pat L Jour 451 (DB).
Also see Note 3.

11. ('15) 2 AIR 1915 P C 88 (89) (PC).

('23) 10 A I R 1923 Pat 143 (148) : 6 Pat L Jour 451 (DB).
[*See* ('34) 21 AIR 1934 Oudh 212 (212) : 8 Luck 668. (Suit for declaration that joint family property in plaintiff's hands is not liable for attachment does not lie.)]
[See however ('39) 26 AIR 1939 Mad 867 (873, 874) : I L R (1940) Mad 123 (DB). (Final decree in mortgage suit passed against son after preliminary decree had been passed against father — Son cannot attack decree in execution proceedings—Separate suit is not barred by S. 47.)]

It has been held by the High Court of Allahabad that this section, being only a matter of procedure, can be applied even to pending cases, and that an order passed under the old Code can be reversed by the Appellate Court on the ground that S. 53 has been enacted in the meantime.[12] The Madras High Court has, on the other hand, taken a contrary view.[13] Where, however, in a prior order the decree has been construed to be restricted to the assets of the deceased in the restricted sense of the old Code, it becomes *res judicata*, and, thereafter, the present section cannot be availed of, to increase the liability and attach it to the ancestral property in the hands of the descendant.[14]

There is nothing in this section to justify the view that a suit for *administration* will lie where a Hindu father dies leaving no property of his own except his share in joint family property.[15]

See also Notes 3 and 4.

2. **"Property in the hands of a son or other descendant."** — The section applies only where the joint family property passes by survivorship to a *son or other descendant* who is liable, under the Hindu law, to pay the ancestor's debts.[1] The only persons who, under the Hindu law, are under a pious obligation to pay their ancestor's debts are the son, the grandson and the great-grandson[2] and none else. Hence, the section has no application where the property has passed into the hands of persons other than the ancestor's sons, grandsons and great-grandsons,[3] e. g., a brother,[4] father,[5] uncle[6] or nephew.[7] But if the property of the deceased passes into the hands of a son or other descendant, it does not cease to be liable for the debt even though the son or other descendant dies and even though the property has passed to his heirs.[8] Nor does it cease to be liable where it has passed to the son or other descendant *jointly* with *other* persons such as a grandfather or uncle; the reason is that the expression "in the hands of a son" does not necessarily mean property which is *exclusively* in the hands of a son or other descendant without any partner or coparcener. The expression stands for property belonging to the son or property in which he has a proprietary interest and which may

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12. ('09) 4 Ind Cas 492 (493) (All). (No vested interest in procedure.)
13. ('11) 12 Ind Cas 553 (553) (DB) (Mad).
14. ('10) 5 Ind Cas 210 (211) (DB) (All).
15. ('39) 26 AIR 1939 Mad 552 (553): I L R (1939) Mad 820 (DB). (Reversing on Letters Patent appeal AIR 1937 Mad 785.)

Note 2

1. ('24) 11 AIR 1924 All 873 (875).
('23) 10 AIR 1923 All 539 (540) : 45 All 455. (Descendant means lineal descendant.)
2. ('37) 24 AIR 1937 Oudh 327 (328) : 13 Luck 241 (DB).
†('26) 13 AIR 1926 P C 105 (106, 107, 108) : 48 All 518 : 53 Ind App 204 (PC). (A I R 1924 P C 50 : 46 All 95 : 51 Ind App 129 (PC) and 19 All 26 (FB) explained.)
3. † ('37) 24 A I R 1937 Mad 472 (474). (A decree obtained against a member of a joint family, even if it be for a debt binding on the family, cannot be executed against the shares of other members of the family unless they are the sons of the judgment-debtor.)
4. ('04) 27 Mad 106 (108). (Deceased brother was not sued in a representative capacity.)
('16) 3 A I R 1916 Bom 262 (263, 264) : 40 Bom 329 (DB). (He is not a legal representative.)
('04) 31 Cal 224 (227) (DB). (Impartible estate — Rule of survivorship applies.)
('06) 29 Mad 453 (460) (DB). (Brother took impartible estate by survivorship.)
('10) 5 Ind Cas 362 (364, 365) (DB).
[*See also* ('35) 22 A I R 1935 Mad 145 (146). (Hindu brothers — Pronote by elder—Decree on —Younger not impleaded — Execution against share of younger brother not allowable — S. 53 does not apply to such a case.)]
5. ('89) 11 All 302 (303, 304) (DB). (There was no attachment of son's share during his lifetime.)
('26) 13 A I R 1926 All 157 (158) : 48 All 4 (DB). (Interest of son was attached — Father held legal representative.)
('15) 2 AIR 1915 Nag 39 (40, 41) : 11 Nag L R 45.
6. ('77) 2 Bom 479 (480) (DB).
7. ('24) 11 A I R 1924 All 873 (875). (Is not legal representative for the purposes of preparing final decree.)
('10) 5 Ind Cas 362 (364, 365) (Mad).
('23) 10 AIR 1923 All 539 (540) : 45 All 455.
('10) 6 Ind Cas 38 (39, 40) (DB) (All).
('86) 8 All 495 (500, 501). (Grand nephew.)
[*See also* ('91) 18 Cal 157 (163, 164).]
8. ('14) 1 A I R 1914 Mad 668 (668, 669) (DB). (Assets included in term "property" in this section.)

be in his actual or constructive possession *joint or exclusive.*[9]

See also Note 6.

3. "Which is liable under Hindu law for the payment of the debt of a deceased ancestor." — In order to ascertain the liability of property in the hands of a son or other descendant for the debts of an ancestor, primarily the Hindu law itself and the decisions on the point should be referred.[1] A few broad aspects may, however, be mentioned here.

Under the Hindu law, a son or other descendant (i. e., grandson or great-grandson) is under a pious obligation to pay his ancestor's debt, but only to the extent of the joint family property in his hands, and provided that such a debt is not 'avyavaharika,' that is, neither illegal nor immoral.[2] The descendant is therefore entitled to show that he has received no joint family property from his ancestor, that the debt was one for which he was not liable under the Hindu law, or that such debt was non-existent.[3] The mere fact, however, that the debt was a personal one and not for the

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9. ('35) 22 A I R 1935 Oudh 510 (515) : 11 Luck 449 (DB). (Section 53 enacts a rule of procedure only and is not intended to affect in any way the extent of a son's liability for his father's debts under the Hindu law).
('34) 21 A I R 1934 All 590 (594, 595, 601, 603, 604) (FB). (AIR 1926 All 220 : 48 All 245 overruled.)
('33) 20 AIR 1933 Lah 857 (858) : 15 Lah 50 (DB).
('34) 21 AIR 1934 Lah 101 (101). (AIR 1933 Lah 857 : 15 Lah 50 followed.)

Note 3

1. ('12) 16 Ind Cas 970 (970) (DB) (Cal). (Contention that under the section father's share only attachable overruled.)
('88) 11 Mad 373 (374) (DB). (Not the Contract Act.)
2. ('38) 25 AIR 1938 All 437 (440) (DB).
('35) 22 AIR 1935 Bom 287 (294).
('35) 22 AIR 1935 Lah 176 (177) (DB).
('35) 22 AIR 1935 Lah 761 (762) : 16 Lah 1077.
('04) 27 Mad 243 (246, 247) (FB). (Debt includes judgment-debt.)
('32) 19 AIR 1932 Pat 12 (13, 14) (DB).
('33) 20 AIR 1933 All 235 (237, 238, 241) : 55 All 283. (Even where joint family consists of persons other than father and sons.)
('74) 22 Suth W R 56 (58) (PC).
† ('07) 34 Cal 642 (651) (FB).
('18) 5 AIR 1918 Pat 391 (392) : 3 Pat L Jour 533 (DB).
('23) 10 AIR 1923 Mad 36 (37, 39, 41, 42) : 46 Mad 64 (DB). (During father's lifetime even.)
('13) 19 Ind Cas 252 (252, 253) (DB) (All). (Decree for costs against father.)
('18) 5 AIR 1918 Pat 345 (347) : 3 Pat L Jour 396. ("Vyavaharika" was defined to mean "lawful," "usual" or "customary.")
† ('18) 5 AIR 1918 Bom 13 (14, 15) : 43 Bom 612 (DB). (Even during the lifetime of ancestor — "Vyavaharika" explained and discussed.)
('30) 127 Ind Cas 507 (508) (Bom). (Trade debts of father.)
† ('13) 19 Ind Cas 378 (379, 380, 383, 384) (DB) (Sind). (A debt arising out of a decree for damages for breach of contract to sell trust property is not illegal or immoral debt — Meaning of vyavaharik.)
† ('08) 32 Bom 348 (351, 352) (DB) (Decree for damages for wrongful obstruction of water course cannot be executed against sons.)
('83) 6 Mad 293 (294) (DB). (Barred debt renewed by father—Son liable.)
('88) 11 Mad 373 (374) (DB). (Surety debt of father.)
('99) 23 Bom 454 (457, 460) (DB). (Do.)
('97) 19 All 26 (32, 33) (FB). (Liability of grandson extends to principal as well as interest due under the mortgage.)
('98) 2 Cal W N 603 (604, 605) (DB).
('33) 20 AIR 1933 Lah 116 (116, 117) : 14 Lah 399 (DB). (Pre-partition debt—Son liable.)
('33) 20 AIR 1933 Oudh 102 (104) (DB). (Debt contracted by grandfather or great grandfather is antecedent debt.)
('33) 20 AIR 1933 All 179 (180) : 54 All 761 (DB). (Extent of son's liability indicated.)
('32) 138 Ind Cas 168 (169) (Nag). (Even during father's lifetime.)
('33) 20 AIR 1933 All 110 (110) (DB). (Father—Lambardar's negligence—Son liable.)
[But see ('32) 19 AIR 1932 Bom 483 (483). (Separate property was also liable as the decree against father and son was not restricted to joint family property.)]
3. ('93) 16 Mad 447 (448, 449) (DB). (Separate suit for that purpose is barred.)
('99) 21 All 323 (327, 328) (DB). (Not by separate suit.)
('89) 16 Cal 1 (2, 6, 8). (Separate suit barred.)
('14) 1 AIR 1914 Mad 328 (329, 330) : 38 Mad 1120 (DB). (Father was alive — Property was obtained on partition—Section 53 did not apply.)
('96) 1896 Bom P J 226. (Where mother is impleaded as in possession of son's estate.)
† ('18) 5 AIR 1918 Bom 13 (14, 15, 19) : 43 Bom 612. (Ancestral property *held* liable during father's lifetime.)
('96) 20 Bom 385 (389) (DB).
† ('15) 2 AIR 1915 All 126 (127) : 37 All 214 (DB). (Objection to factum and nature of debt can be taken in execution.)
† ('86) 13 Cal 21 (36). (Not being parties to execution proceedings sons could agitate the question by separate suit.)

benefit of the family will not absolve him from the liability.[4] Nor will the liability cease by the fact that the descendant was not impleaded in the suit in which the decree was passed,[5] or that after being impleaded in the suit it was withdrawn as against him.[6]

A and B constitute a joint Hindu family. A dies and afterwards, a decree is passed against C, A's son in respect of a debt due by A. B then dies and the entire family property comes to be vested in C. It was held that the share of B which devolves on C by survivorship is not liable to be proceeded against in execution of the decree, the reason being that the share of a paternal uncle to which a person succeeds by survivorship is not property which under the Hindu law is liable to satisfy a debt of the father of such person.[7] Where the son's liability under the Hindu law to pay his ancestor's debts is established, the *whole* of the ancestral property in his hands is liable and not merely the share of the deceased ancestor.[8] And the son cannot even claim that the father's share should be sold first.[9]

This section does not affect the rule of Hindu law that the property of a coparcener which has been *attached in execution* of a decree in his lifetime[10] or which has been

('07) 34 Cal 642 (647, 648, 654) (FB).
('06) 33 Cal 676 (677, 678) (DB).
('85) 8 Mad 376 (378) (DB).
('07) 1907 Pun Re No. 147 p. 685 (686). (In execution proceedings.)
[*See also* ('37) 24 AIR 1937 Sind 36 (36). (Property inherited by grandson is not a joint family property so as to be liable for the debts of his deceased father.)]

4. † ('05) 27 All 16 (18, 19, 20) (FB). (12 All 209 not followed.)
('25) 12 AIR 1925 All 471 (471, 472) (DB). (Decree for costs.)
('30) 127 Ind Cas 507 (508) (Bom). (New trade started by father.)

5. ('03) 6 Oudh Cas 101 (102). (Mortgage suit.)
('23) 10 AIR 1923 All 124 (124, 125) (DB).

6. ('15) 2 AIR 1915 All 126 (127, 128) : 37 All 214 (DB).

For the circumstances to be considered in deciding whether whole property or only father's share should be sold, see the following cases : —
('74) 1 Ind App 321 (334) : 22 Suth W R 56 (59) (PC). (Particular property was ordered to be sold in execution.)
('77) 3 Cal 198 (204, 209) : 4 Ind App 247 (PC). (Father's share liable.)
('80) 5 Cal 144 (146, 147) (DB). (When whole property liable pointed out.)
('83) 10 Cal 1 (8, 9, 10) (DB). (Personal decree against father—Father's share alone could be sold —3 Cal 198 : 4 Ind App 247 (PC) followed.)
('86) 13 Cal 21 (36, 37). (3 Cal 198 : 4 Ind App 247 (PC) not followed.)
('87) 14 Cal 572 (578, 579) : 14 Ind App 77 (PC). (Father's share only could be sold.)
('99) 21 All 356 (358, 359) (DB). (Sons not parties to decree directing sale of whole property — Sons cannot object to execution against whole property.)
('88) 15 Cal 70 (81, 82) : 14 Ind App 187 (PC). (All brothers were not joined as parties — Whole property held liable.)
('33) 20 AIR 1933 Oudh 309 (312) : 8 Luck 700. (Suit against son and grandson as legal representatives — Suit decreed against sons only — Grandson's interest cannot be proceeded against.)

7. ('35) 22 AIR 1935 Lah 650 (651) (DB). (AIR 1933 Lah 857 : 15 Lah 50 distinguished.)

8. ('39) 26 AIR 1939 Sind 258 (260) : ILR (1939) Kar 300 (301) (DB).
('22) 9 AIR 1922 All 310 (310, 311) : 44 All 649 (DB). (27 All 16 (FB) followed—AIR 1917 PC 61 : 39 All 437 : 44 Ind App 126 (PC) distinguished.)
†('04) 27 Mad 243 (247) (FB).
('24) 11 AIR 1924 Oudh 393 (393, 394) : 27 Oudh Cas 111.
('15) 26 Ind Cas 362 (362) (Mad).
('18) 5 AIR 1918 Bom 13 (16,19):43 Bom 612 (DB). (Sons' shares liable even during father's lifetime.)
('25) 12 AIR 1925 Bom 193 (193, 194) : 49 Bom 113 (DB). (S. 2, Bombay Act VII of 1866 not contravened.)
† ('12) 16 Ind Cas 970 (970) (DB) (Cal).
('31) 18 AIR 1931 Sind 84 (85, 87):25 Sind L R 374 (DB).(S.53applies—Property acquired by partition.)
('30) 127 Ind Cas 507 (508, 509) (Bom).
[*See also* ('39) 26 AIR 1939 Pesh 45 (47) (DB). (Legal representative includes Hindu son becoming owner of his father's property by survivorship—He is legally bound to provide out of estate descending to him maintenance payable by father —Maintenance can be enforced against entire property and not only against one charged with it.)]
Also see Note 1.

9. ('12) 13 Ind Cas 349 (349,350) (DB) (Cal). (Decree for mesne profits—34 Cal 735 distinguished.)

10. ('39) 26 AIR 1939 Pat 568 (569) : 18 Pat 499 (DB). (Decree against father alone — Property of joint family attached in execution and put up to sale — Father dying after attachment but before sale — Decree-holder applying for sale of father's eight annas share—Application allowed.)
('37) 24 AIR 1937 Lah 328 (329). (In absence of attachment during lifetime of the deceased coparcener the property cannot be proceeded against in execution of decree against him after his death.)
('85) 7 All 731 (732, 733) (DB). (Though attachment was defective.)
('14) 1 AIR 1914 Mad 68 (68, 69) (DB). (Debtor undivided brother.)
† ('82) 4 Mad 302 (307) (DB).

validly mortgaged by him[11] can be proceeded against even subsequent to his death. Nor does it affect the provision of Hindu law by which the whole of the family property can be sold in execution of a decree against the father or manager where the latter was sued in a representative capacity.[12] Nor again can the holder of a decree against the legal representative take advantage of S. 53 and attach ancestral property in the hands of the legal representative where the decree directs that it shall be realised from such property only as belonged to the deceased personally.[13]

There is a conflict of opinion as to whether in the case of Hindu impartible zamindari estates, the debts of a deceased zamindar are enforceable against the estate in the hands of the successor. See the undermentioned cases.[14]

The Jats and other tribes in the Punjab have power, under the customary law applicable to them, to alienate their properties during their lifetime for necessity; but if they die without exercising such power or before the property is attached in execution, the estate ceases to be liable in the hands of their sons.[15] They can attack the decree not only on the ground of the illegality or the immorality of the debt, but also on the ground of want of necessity; and this question can be raised even in execution as it relates to the liability of the judgment-debtor's property for the decree.[16]

Under S. 5 of the Bombay Hereditary Offices Act (III of 1874), *watan* property is not saleable to non-watandars. Hence watan property in the hands of a descendant is not saleable for debt of the deceased ancestor.[17]

('11) 9 Ind Cas 286 (286) (DB) (Mad).
('98) 8 Mad L Jour 64 (65, 66) (DB).
('84) 7 Mad 339 (340) (DB).
('93) 20 Cal 895 (898, 899) (DB).
†('80) 5 Cal 148 (174) : 6 Ind App 88 (PC).
('06) 3 All L Jour 128 (129). (5 Cal 148; 6 Ind App 88 (PC) followed.)
† ('07) 5 Cal L Jour 80 (85, 86, 87) (DB).
('94) 16 All 449 (453, 456) (DB). (There was no attachment during father's lifetime—Decree held not executable against sons.)
('06) 33 Cal 1158 (1162) (DB). (Order under S. 280, C. P. C., 1882, does not put an end to attachment.)
('14) 1 A I R 1914 Mad 118 (118) (DB). (Attachment before decree.)
('94) 17 Mad 144 (146). (Death before decree — Estate survives and attachment before judgment is of no avail.)
Also see S. 64 Note 10 and O. 21 R. 54 Note 3a.

11. ('91) 15 Bom 673 (674, 675).
('05) 15 Mad L Jour 486 (486).
('06) 33 Cal 676 (677, 678).
† ('99) 21 All 301 (305, 306, 307, 308) (DB).
† ('23) 10 AIR 1923 Pat 143 (147, 148, 149):6 Pat L Jour 451 (DB). (Decree was for sale of ancestral property.)
[*See* ('85) 8 Mad 376 (378).]

12. ('37) 24 AIR 1937 Mad 610 (618): ILR (1937) Mad 880 (FB). (Plea of partition before decree not allowed to be raised in execution.)
('89) 2 All 746 (752) (DB).
('97) 21 Bom 616 (618, 619) (DB).
('14) 1 AIR 1914 PC 136 (137):41 Ind App 216:36 All 383 (PC).
('99) 23 Bom 372 (374, 375) (DB).
('24) 11 AIR 1924 Mad 571 (573) (DB).
† ('30) 17 AIR 1930 Mad 206 (207, 208). (Decision on question of *res judicata*.)
† ('88) 15 Cal 70 (81, 82) : 14 Ind App 187 (PC).
('90) 14 Bom 597 (603, 604) (DB). (11 Bom 700 overruled by 15 Cal 70 : 14 Ind App 187 (PC).)
† ('03) 16 C P L R 19 (21 to 25).
('82) 5 Mad 234 (235)(FB). (Father not shown to be sued as manager—Family property held not liable). Also see O. 21, R. 94 N. 8.

13. ('11) 9 Ind Cas 631 (631, 632) (DB) (All).

14. ('09) 2 Ind Cas 18 (21, 22) (Mad). (Yes. 30 Mad 454 referred.)
('93) 16 Mad 452 (453). (Yes — Decree against "Valia Rajah" as representative of a Kovilagam.)
('02) 6 Cal W N 879 (881). (Yes.)
('04) 31 Cal 224 (227). (No.)
('06) 29 Mad 453 (460). (No.)
('81) 3 Mad 42 (45, 46). (No.)
('09) 3 Ind Cas 907 (908) (All). (No.)
('11) 12 Ind Cas 915 (918) (All). (No.)
('74) 21 Suth W R 420 (421). (No.)
('24) 11 AIR 1924 Mad 511 (511, 512). (Section 4, Madras Impartible Estates Act—Zamindar's debts binding on successors to the same extent as debt by a manager of a joint Hindu family not being father—30 Mad 454 is no good law after the said Act.)

15. ('36) 23 A I R 1936 Lah 21 (23) : 17 Lah 133 (DB). (Tiwans of Punjab—Case relating to.)
('36) 23 AIR 1936 Lah 167 (168).
('35) 22 A I R 1935 Lah 855 (856) : 17 Lah 139 (DB). (Among Khaggas of Lyallpur District there is no custom making the property inherited by the son liable for the ancestors' debts.)
('11) 11 Ind Cas 375 (376) (DB) (Lah.)
('11) 11 Ind Cas 376 (376, 377) (Lah.)
† ('12) 15 Ind Cas 868 (868, 869)(FB) (Lah). (1891 Pun Re No. 24 not followed.)

16. ('12) 13 Ind Cas 670 (671) (Lah.)

17. ('41) 28 AIR 1941 Bom 141 (146) (DB)

4. "Deceased ancestor."—The pious obligation of the son or other descendant under the Hindu law exists whether the ancestor is alive or dead.[1] This section, however deals with the obligation *after* the death of the ancestor, and cannot be extended to a case where the ancestor is living.[2] But, independently of this section, on general principles, *if the family continues to be joint at the time when execution is sought*, the son's share also in the joint family property can be proceeded against in execution of the decree against the father, even during the lifetime of the father.[3] The reason is that in such a case, the son's share will be property which the father can transfer to pay off his own debts. But, where at the time when execution is sought, partition has taken place between the father and the sons, the shares allotted to the sons at such partition cannot be proceeded against in execution during the lifetime of the father,[4] as in such a case, the father will not have any power of alienation over the share of the sons.

There is a conflict of decisions as to whether in a case where partition has taken place but the father is dead at the time of execution, the shares allotted to the sons at such partition can be proceeded against in execution under this section. One view is that under this section, such share can be proceeded against in execution,[5] while the other view is that such share cannot be so proceeded against in execution.[6]

5. "Decree." — For definition of "decree," see S. 2, cl. (2). The section applies only if there is a *decree* in respect of the debt sought to be realised out of the property of the deceased.[1] It has been held by the High Court of Madras that the word "decree" in the section is not limited to *money decrees* passed against the ancestor, but also includes decrees against property. Thus, according to that Court, a decree passed in respect of joint family properties against the father can be executed against the sons after the father's death.[2] The reason seems to be that, where a descendant has received

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('34) 21 A I R 1934 Bom 116 (117, 118, 119) : 58 Bom 218 (DB).

[*See also* ('34) 21 AIR 1934 Bom 119 (120) : 58 Bom 273(DB). (Watandar has only life interest in the property and the watan property in the hands of successor is not liable for debts of previous watandar.)]

Note 4

1. † ('24) 11 AIR 1924 P C 50 (55, 56) : 46 All 95: 51 Ind App 129 (PC).
('01) 23 All 206 (208) (DB). (Son's liability arises as soon as father fails to discharge his obligation.)
2. ('36) 23 A I R 1936 Oudh 139 (140) : 11 Luck 523 (DB).
('14) 1 A I R 1914 Mad 328 (330): 38 Mad 1120.
3. ('38) 25 A I R 1938 Nag 24 (27) : I L R (1938) Nag 136 (DB).
('37) 24 AIR 1937 Pat 517 (518) (DB).
('35) 22 AIR 1935 All 507 (508).
[*See* ('37)24AIR1937 Nag 45(50): ILR (1938) Nag 10 (DB). (Creditor's right to proceed in execution against son's share exists only so long as the property continues to be undivided.)]
4. † ('38) 25 AIR 1938 Nag 24 (29) : I L R (1938) Nag 136 (DB).
('37) 24 A I R 1937 Nag 45 (50) : ILR (1938) Nag 10 (DB). (Partition before decree.)
('34) 21 A I R 1934 Mad 662 (663, 664). (Partition after decree.)
† ('37) 24 AIR 1937 Mad 424 (425, 426) : I L R (1937) Mad 1001 (DB).
[*See* ('38) 25 AIR 1938 Mad 578 (579). (It is not clear from the decision whether in this case the father was alive at the time when execution was sought against the son's share.)
[See however ('36) 23 A I R 1936 Lah 64 (64). (Father—Decree against — Creditor can proceed against joint family property — Right is not lost by subsequent partition.)]
5. ('43) 30 AIR 1943 Mad 415 (416).
('42) 29 AIR 1942 All 248 (250, 251):I L R (1942) All 509 (DB).
('39) 26 AIR 1939 Sind 258 (260):I L R(1939) Kar 300 (304) (DB).
† ('37) 24 AIR 1937 Mad 610 (615) : I L R (1937) Mad 880 (FB). (Per Cornish, J.)
[*See* ('36) 23 A I R 1936 Lah 193 (194). (Decree against father for pre-partition debt of father can be executed against share allotted to son at partition — It is not clear whether in this case, the father was alive or dead at the time of execution.)]
6. ('37) 24 AIR 1937 Mad 813 (815, 816).
('35) 22 A I R 1935 Nag 11 (12). (A I R 1931 Sind 84 : 25 Sind L R 374 dissented from.)
✣('35) 22 AIR 1935 Pat 275 (287, 288):14 Pat 732 (FB). (Debt incurred by father while family was undivided — Subsequent partition — Then decree against father alone—Son's shares cannot be proceeded against in execution (Per Mohammad Noor and Agarwala JJ.—Per Wort, J., contra.)

Note 5

1. ('27) 14 AIR 1927 All 683 (684).
2. † ('24) 11 AIR 1924 Mad 571 (573, 574, 575) (DB).

property which, under Hindu law would be liable to satisfy the ancestor's debts, if any, the descendant becomes a legal representative of the ancestor for *all* purposes and that *every* decree got against the ancestor, whether money decree or not, can be executed against him. The High Court of Bombay has, on the other hand, held that a decree for injunction against an ancestor could not be executed against the descendants on the ground that they were not the legal representatives of the ancestor and that the object of the section is not merely descriptive but also limitative.[3] The High Court of Nagpur has held that this section is limited to cases where the decree that is being executed is a decree passed in a suit on a debt. Hence, it would not apply where the decree is for compensation in lieu of specific performance, for, the decree may only be regarded as creating a debt of record without its being a decree on debt.[4] The section has no application to the execution, against legal representatives, of *mortgage* decrees obtained against the ancestor. Where, therefore, a decree passed under O. 34 determines unconditionally that certain property is chargeable and shall be sold, the legal representatives of the judgment-debtor cannot, in execution, raise the plea that the mortgage debt was immoral or illegal.[5]

The section only applies where a decree has been passed against the deceased ancestor or against the son or other descendant sought to be proceeded against (see Ss. 50 and 52). Thus, where a suit is brought against the sons and grandsons of a deceased Hindu for the recovery of a debt due by the deceased but the suit is dismissed against the grandsons and is decreed only against the sons, the decree will not bind the grandsons and the interest of the latter in the joint family cannot be proceeded against in execution of such decree.[6]

A decree passed by the Privy Council against a respondent (who is a Hindu) who dies pending the appeal is not a nullity (see O. 22, R. 4, Note 19) and can be executed against the property coming into the hands of his sons under this section.[7]

A decree against a son or other descendant is not a *personal* decree against him but is only one against the assets in his hands.[8]

6. "Property of the deceased." — The words "property of the deceased" do not include the self-acquisitions of the son or other descendant himself.

Illustration.

A and his son *B* form members of a joint Hindu family. *B* has got his own *self-acquired or separate property* over which *A* has no control. *A* dies. The separate property of *B* cannot be proceeded against in execution of a decree against *A* as "the property of the deceased."[1]

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3. † ('18) 5 AIR 1918 Bom 165 (166): 42 Bom 504 (DB).

4. ('40) 27 AIR 1940 Nag 278 (281) (DB).

5. ('34) 21 AIR 1940 Lah 438 (439, 441) : 15 Lah 772 (DB). (Executing Court must execute the decree as it stands.)
[*See also* ('39) 26 AIR 1939 Mad 867 (873, 874): I L R (1940) Mad 123 (DB). (Separate suit not barred by S. 47.)

6. ('38) 25 AIR 1938 P C 7 (8) : 13 Luck 61 : 32 Sind L R 221 (PC).
[*See also* ('42) 29 AIR 1942 Oudh 9 (11, 12) : 17 Luck 319 (DB). (Mortgage by two brothers of joint Hindu family—Suit on mortgage impleading also sons of executants — Personal decree given against executants—Suit dismissed against sons —Execution of decree against whole family property held could not be allowed — Son's share held not liable.)

7. ('37) 24 AIR 1937 Pat 321 (322) : 16 Pat 316 (DB).

8. ('37) 24 AIR 1937 Mad 813 (816). (Son's separate property cannot be proceeded against in execution.)
('35) 22 AIR 1935 Bom 287 (292)
('21) 65 Ind Cas 224 (224) (DB) (Pat). (Decree construed in the light of S. 52.)
† ('32) 19 AIR 1932 Pat 12 (13, 14) (DB). (Decree in this case was in general terms — Court must find out the basis of decree.)
('32) 19 AIR 1932 Bom 522 (523). (The section settles the question of procedure.)

Note 6

1. ('34) 21 AIR 1934 Mad 173 (174) : 57 Mad 440 (DB)

The word "property" is used in this section in its ordinary and general sense. Thus, although lands inherited by the son of an agriculturist cannot be attached under certain special Acts such as the Dekkhan Agriculturists' Relief Act, yet the rents thereof are assets in the hands of the son.[2] Similarly, forest dues which have become due after the death of the father and received by the son can be proceeded against under this section.[3] But a gratuity given to the heir of a deceased employee by a railway administration is purely a personal one and cannot be attached as assets of the deceased.[4] Similarly, the provident fund to the credit of deceased ancestor and paid to his minor son under the Provident Funds Act (XIX of 1925) is, under S. 3 thereof, the property of the son and is not an asset of the ancestor within the meaning of this section.[5]

7. "Legal representative." — For the definition of 'Legal Representative' see section 2, clause (11). See also Note 1 and Notes on O. 22, R. 3.

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54. [S. 265.] Where the decree is for the partition of an undivided estate assessed to the payment of revenue to [a][the Crown], or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

Partition of estate or separation of share.

[1877, S. 265; 1859, S. 225; See Ss. 67 to 72.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Government."

Synopsis

1. Legislative changes.
2. Scope, object and applicability of the section.
3. "Estate," meaning of.
4. Decree for partition, meaning of.
5. "Shall be made by the Collector."
6. In accordance with law relating to partition.
7. Remedies against the Collector's action.
8. Appeals.
9. Decree for partition, when and how may be passed.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Applicability of the section if joint liability to revenue is affected and not otherwise. See Note 2.

Applicability of the section to lands leased from Government for a term. See Note 3.

Applicability of the section to ryotwari estates or temporarily settled estates. See Note 3.

Applicability for estates assessed in a lump sum and inapplicability to Burma paddy holdings. See Note 3.

Consent of parties not giving jurisdiction to Civil Court for this section. See Note 5.

Contents of the partition decree under this section. See Note 4.

Division of Civil Court to be followed by Collector except to avoid prejudice to revenue. See Note 7.

Inapplicability of the section to a share or plot short of a cosharer's share. See Note 3.

Inapplicability to a partition of specific land within an estate, whether "perfect" or "imperfect" partition, under Assam Land and Revenue Regulation See Notes 3, 6 and 7.

Jurisdiction of Civil Court where Collector has no powers as per revenue laws. See Note 7.

Meaning of "assessed to Government revenue." See Note 3.

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2. ('29) 16 AIR 1929 Bom 233 (234, 235): 53 Bom 463 (DB).
3. ('30) 17 AIR 1930 Nag 131 (134).
4. ('23) 10 AIR 1923 Oudh 21 (21, 22) : 26 Oudh Cas 53.
5. ('34) 21 AIR 1934 Mad 173 (174): 57 Mad 440 (DB).

Meaning of "undivided estate" in this section. See Note 2.
Nature of partition suits and applicability of bar of "res judicata" to them. See Note 9.
Non-liability of Revenue Officers to draw up a formal decree even where the title is gone into. See Note 6.
Partition at the instance of Hindu widow and the governing principles. See Note 9.
Remedy against Collector's mistake — Application under Section 47 and not separate suit. See Note 7.
Terms of decree binding on Collector. See Note 7.

1. Legislative changes. — The words "or any gazetted subordinate of the Collector deputed by him in this behalf" are new. Other alterations are merely verbal.

2. Scope, object and applicability of the section. — This section deals with a case in which a Civil Court can *pass a decree* but cannot itself *execute* it. Execution has to be effected by the Collector. Sections 68 to 72 deal with another class of cases in which also the decrees passed by the Civil Court have to be executed only by the Collector. The reason for the provision in this section restricting the ordinary powers of the Civil Courts to execute their own decrees is two-fold: *firstly* the Revenue Authorities are more conversant, and better qualified to deal with such matters than the Civil Court[1] and *secondly* the interests of the Government with regard to the revenue assessed on the assets would be better safeguarded by the Collector executing the decree than by the Court.[2] The section does not apply to decrees other than decrees for partition, or separate possession of a share of an undivided revenue paying estate.[3] Nor does it apply even to decrees for partition or separate possession of such estates, save where as a result of partition the revenue might be affected.[4] Where, therefore, no *separate* allotment of the revenue is asked for and the *joint liability* of the shares for revenue in respect of the whole estate is left unaffected, this section has no application.[5] But where a prayer is made for division of revenue in the suit, the section becomes applicable though the prayer is made, not by the plaintiff, but by a defendant.[6]

The section applies only to a case where the decree contemplates the partition of the whole of the estate paying revenue to Government. It does not apply where the decree is for separate possession of a share of a portion of an undivided estate.[7]

3. "Estate," meaning of. — The word "estate" must be taken to be used in this section in its ordinary signification[1] and not in the limited sense in which it may be used in other Acts.[2] There is a conflict of opinion as to whether the section applies to

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Section 54 — Note 2

1. ('18) 5 AIR 1918 Bom 206 (207) : 42 Bom 689 (DB).
2. ('88) 15 Cal 198 (201) (DB).
† ('33) 20 AIR 1933 Mad 259 (259) : 56 Mad 443 (DB).
3. ('84) 8 Bom 539 (541) (DB). (Decree in a suit for ejectment of tenants from specified land is not a decree for a separate possession of a share against cosharers as contemplated by this section.)
('84) 2 All 778 (780): 1884 All W N 118 (118) (DB). (Decree for restoration on redemption of lands held separately.)
('17) 4 AIR 1917 Low Bur 126 (127) : 8 Low Bur Rul 338 (DB). (Decree in an administration suit.)
('31) 18 AIR 1931 Cal 93 (94, 95): 58 Cal 122 (DB). ('Mouza' not a revenue paying estate.)
('31) 18 AIR 1931 Cal 104 (105) (DB).
4. ('88) 10 All 5 (8).
5. †('87) 24 Cal 725 (734, 737, 742, 745) (FB).
('33) 20 AIR 1933 Pesh 101 (103) (DB).
('34) 21 AIR 1934 Pat 365 (366): 13 Pat 637 (DB).
('81) 7 Cal 153 (155) (DB).
('88) 15 Cal 198 (200) (DB).
('89) 16 Cal 203 (205) (DB).
('88) 10 All 5 (7, 8).
('09) 36 Cal 726 (731, 732): 1 I. C. 549 (550) (DB).
('17) 4 AIR 1917 Pat 637 (638) : 2 Pat L Jour 221 (DB).
('18) 5 AIR 1918 Pat 63 (64): 4 Pat L Jour 29 (DB).
('17) 1 AIR 1917 Low Bur 126 (127) : 8 Low Bur Rul 338 (DB).
Also see O. 26, R. 11 N. 3.
6. ('31) 18 AIR 1931 Cal 93 (94, 95) : 58 Cal 122 (DB).
[*See also* ('34) 21 A I R 1934 Pat 365 (366) : 13 Pat 637. (Partition decree by Civil Court—Collector's partition does not supersede it.)]
7. ('33) 20 AIR 1933 Mad 259 (259) : 56 Mad 443 (DB).
† ('31) 18 AIR 1931 Cal 104 (105) (DB).

Note 3

1. ('84) 10 Cal 435 (435, 440) (DB).
2. ('84) 10 Cal 435 (440) (DB).

temporarily settled estates or only to *permanently settled* estates. The High Court of Madras has held that it applies only to permanently settled estates and not to property temporarily settled, such as property held on *ryotwari* tenure.[3] A contrary view has been taken by the Bombay High Court. According to it, the section applies even to property temporarily settled, such as *sheri* lands or lands held under a lease from Government for a fixed period.[4] According to the Rangoon High Court, the section is meant to be applied only to estates assessed to revenue in *one lump sum* for the whole estate and not to estates like the ordinary paddy lands in Burma which are assessed at acre rates.[5] According to the Allahabad High Court the word "estate" cannot be taken to mean isolated plots of land which fall short of being the share of a cosharer of a *mahal*.[6] Where a land is an estate to which the section applies, the crops attached to the land[7] and trees growing thereon[8] will go with the land and can be dealt with by the Collector in the same way as he can deal with the land.

4. Decree for partition, meaning of. — A decree for the partition of an undivided estate assessed to the payment of revenue must be drawn up as provided by O. 20, R. 18, cl. (1);[1] that is, it should declare the rights of the several parties interested in the property but should direct the actual partition to be made by the Collector or gazetted subordinate of the Collector deputed by him in that behalf. It is a joint declaration of the rights of persons interested in the property sought to be partitioned and is a decree, when properly drawn up in favour of each share-holder or set of share-holders having a distinct share.[2] It has been held by the Sind Judicial Commissioner's Court that where the decree gives no such directions as are required by O. 20, R. 18, cl. (1), it is incumbent on the plaintiff to have it corrected within the time allowed by law, and if this is not done, he cannot ask the Court to transfer the proceedings to the Collector.[3] The partition contemplated by this section is not confined to a mere *division* of the lands but includes also the *delivery* of the shares to the respective allottees, thus completely *carrying out* the partition.[4]

5. "Shall be made by the Collector." — As has been seen in Note 2, the Civil Courts have, under this section, jurisdiction to try and decide suits for partition or separate possession of estates of the kind contemplated by the section but have no power to *execute* the decrees passed in such suits.[1] The initial application for an order for

3. ('83) 6 Mad 97 (97) (DB).
† ('84) 7 Mad 382 (384) (FB).
4. ('92) 16 Bom 528 (532) (DB).
5. ('26) 13 AIR 1926 Rang 80 (80): 5 Rang 206 (DB).
6. ('84) 6 All 452 (454) (DB).
[*See also* ('05) 32 Cal 1036 (1049). (Case purely under the Assam Land and Revenue Regulation, I of 1886. See Ss. 96 and 154 as to meaning of "imperfect partition.")
('31) 18 AIR 1931 Cal 104 (105) (DB). (Only an eight annas share in only one of several mouzas comprised in an estate is not an "estate.")]
But see ('88) 10 All 5 (8). (6 All 452 distinguished.)]
7. ('27) 14 AIR 1927 Nag 300 (301).
8. ('01) 23 All 291 (297, 304, 305) (FB).

Note 4

1. ('43) 30 AIR 1943 Sind 7 (9) : ILR (1942) Kar 162 (DB).
2. † ('78) 3 Cal 551 (552, 553) (DB).
('99) 22 Mad 494 (499) (DB).
('83) 9 Cal 568 (570) (DB).
('99) 23 Bom 188 (190) (DB). (Mahomedan family.)
[*See also* ('17) 4 AIR 1917 Low Bur 126 (127): 8 Low Bur Rul 338.
('90) 12 All 506 (508, 509). (Where no partition amongst defendants *inter se* is asked for or agreed to, the Court cannot give a decree in favour of defendants also.)]
3. ('35) 22 AIR 1935 Sind 192 (192) (DB).
4. † ('87) 11 Bom 662 (663) (DB).
('27) 14 AIR 1927 Nag 300 (301).
('20) 7 AIR 1920 Nag 204 (204).

Note 5

1. ('92) 16 Bom 528 (532) (DB).
('15) 2 AIR 1915 Oudh 28 (29).
('88) 15 Cal 198 (200, 201) (DB).
('74) 1874 Bom P J 384 (384) (DB).
† ('81) 8 Cal L Rep 367 (368) (DB).
† ('18) 5 AIR 1918 Pat 63 (63): 4 Pat L Jour 29 (DB).
('19) 6 AIR 1919 All 140 (142) : 41 All 207 (DB).
('67) 8 Suth W R 79 (80) (DB).
[*See also* ('87) 11 Bom 662 (663).
('91) 15 Bom 527 (529) (DB).]

execution will have to be made in the Civil Courts but the actual execution by partition and delivery of possession is to be made only by the Collector.[2] The Civil Court has no power to do this[3] even if the parties agree to its being done.[4]

The Collector cannot refuse to carry out a decree passed under this section[5] nor can he contravene the terms thereof or the decretal command or transgress the law.[6] See also Note 7.

6. In accordance with law relating to partition. — The partition to be made by the Collector must be made not only in accordance with the terms of the decree, but also in accordance with various Rent and Revenue Acts and Regulations and Standing Orders of the Boards of Revenue of the various Provinces.[1] Thus, where a local Act prescribes that only recorded cosharers can apply to the Revenue Authorities for partition, the Civil Court must direct the parties so to apply.[2]

7. Remedies against the Collector's action. — The Collector, no doubt, acts ministerially in executing the decree of the Civil Court, but a certain discretion is allowed to him and, so long as he keeps within the bounds prescribed, the Court has no right to replace his discretion by its own,[1] inasmuch as the Legislature has preferred the execution by the Collector, to that by the Court as being a better qualified and superior

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2. ('90) 1890 All W N 75 (76) (DB).
[*See also* ('14) 1 AIR 1914 Sind 97 (98) : 8 Sind L R 335.]
3. See cases cited in foot-note (1).
4. ('15) 2 AIR 1915 Oudh 28 (28).
5. † ('90) 14 Bom 450 (451) (DB).
('91) 15 Bom 527 (529) (DB).
[*See also* ('88) 12 Bom 371 (376) (DB).]
6. ('90) 14 Bom 450 (451) (DB).
[*See also* ('43) 30 AIR 1943 Sind 7 (9) : I L R (1942) Kar 162 (DB). (If any particular party has a preferential right to any particular piece of property and that right is declared, the Collector must have regard to any such declaration when dividing the estate.)
('88) 12 Bom 371 (376) (DB).]

Note 6

1. ('06) 28 All 375 (376) (DB). (United Provinces Land Revenue Act, III of 1901, S. 107.)
('89) 1889 Pun Re No. 73, p. 279. (Act XXXIII of 1871 superseded by Act XVII of 1887 and rules.)
[*See also* ('84) 6 All 452 (454) (DB). (North West Provinces Land Revenue Act, XIX of 1873, Ss. 107, 113, 135 and 241.)
('15) 2 AIR 1915 Oudh 28 (29). (United Provinces Land Revenue, Act, S. 233.)
('74) 1874 Bom P J 384 (385) (DB). (Section 17, Bombay Act IV of 1868—Though Civil Court decree directs division of each survey field, the local Acts direct division without breaking up any survey number unless otherwise impossible—Here Collector should follow Act rather than decree.)]
('87) 11 Bom 662 (663) (DB). (Bombay Act, V of 1879, Ss. 113 and 114.)
('88) 12 Bom 371 (376) (DB). (Do.)
('88) 15 Cal 198 (200, 201) (DB). (Bengal Act VIII of 1876, Ss. 31 and 29.)
('09) 36 Cal 726 (730, 731) : 1 Ind Cas 549 (550) (DB). (Do.)
('31) 18 AIR 1931 Cal 104 (105) (DB). (Tenure-holder of only 8 annas share in only one of various mouzas of an estate not entitled under Bengal Act VIII of 1876.)
('05) 32 Cal 1036 (1044, 1049). (Assam Land and Revenue Regulation, I of 1886—"Imperfect partition" explained.)
('05) 8 Oudh Cas 59 (60). (The Oudh Revenue Act, S. 69.)
('17) 38 Ind Cas 593 (594) (B&O). (Bengal Estates Partition Act, B. C. V of 1897—S. 12 restricts the operation of this section.)
('18) 5 AIR 1918 Pat 63 (64) : 4 Pat L Jour 29 (DB). (Do.)]
2. ('06) 28 All 375 (376) (DB). (United Provinces Land Revenue Act, III of 1901.)
('01) 23 All 291 (303) (FB). (Section 241 of the North Western Provinces Land Revenue Act bars a Civil Court from deciding a question of title which arises in partition before the revenue authorities.)
[*See also* ('05) 8 Oudh Cas 59 (60).]

Note 7

1. ('43) 30 AIR 1943 Sind 7 (8, 9) : I L R (1942) Kar 162 (DB). (Court cannot so fetter Collector's discretion as to overrule powers conferred upon him under S. 54 and O. 20, R. 18.)
† ('88) 12 Bom 371 (376) (DB). (Objectionable partition not a ground for Civil Court to interfere.)
('91) 15 Bom 527 (529) (DB). (Partition "not a proper one"—No ground for Civil Court to interfere.)
('74) 1874 Bom P J 384 (385) (DB). (Mere objection of non-division of each survey field into several shares by Collector is unsustainable especially where partition on the whole was not unfair and where the Revenue Local Act has been followed on the point.)
('18) 5 AIR 1918 Bom 206 (207) : 42 Bom 639 (DB). (Partition made by Collector—Civil Court cannot re-open partition.)
('05) 8 Oudh Cas 59 (60). (Cannot give him directions for partition.)

agency.[2] But this does not deprive the Court of the judicial control of its decree.[3] Thus, the Court can entertain an application to expedite and authorise the Collector to revive and continue the execution proceedings already sent to, and pending before, him.[4] Similarly, where the Collector contravenes the decretal command of the Court[5] or transgresses the law[6] or otherwise acts *ultra vires*[7] or refuses to carry out the decree,[8] his action can be controlled and corrected by the Court which passed the decree. See also Note 5.

But can the Court interfere with the Collector's partition on the ground of inequality of the partition? According to the Bombay High Court it cannot.[9] The Madras High Court seems to take a different view.[10] But even in cases where the Civil Court will not interfere with the propriety of a partition made by the Collector so far as the parties thereto are concerned, it is bound to enquire into a complaint of a *third party* who alleges that he has been illegally dispossessed.[11]

Where a partition is made by a Civil Court which does not affect the revenue and subsequently an application is made to the Collector to make a "perfect partition," that is, a partition accompanied by separate revenue liabilities, the Collector is not bound by the Civil Court partition. He should, however, follow the Civil Court partition as far as possible, but may depart therefrom if the safeguarding of the Government revenue makes it necessary.[12]

Where the Collector puts the party in possession of a wrong village[13] or where a decree is wrongly sent to the Collector and he executes it,[14] the Collector's action is a mere nullity and without jurisdiction.

A Collector making a partition under the section can revise the same for mistake or other cause before he passes final orders and returns the proceedings to the Civil Court; and the remedy of a party aggrieved by the act of the Collector is to apply to the executing Court under S. 47 of the Civil Procedure Code and not to proceed by way of a separate suit.[15]

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2. ('18) 5 AIR 1918 Bom 206 (207) : 42 Bom 689 (691) (DB).
3. ('88) 12 Bom 371 (376) (DB).
('14) 1 AIR 1914 Sind 97 (98) : 8 Sind L R 335 (DB).
† ('96) 19 Mad 435 (436) (DB). (Collector's partition 'inequitable' — Civil Court can exercise judicial control.)
4. ('14) 1 AIR 1914 Sind 97 (98) : 8 Sind L R 335 (DB). (Civil Court can authorize the Collector to revive and continue the old execution proceedings.)
5. ('43) 30 AIR 1943 Sind 7 (9) : ILR (1942) Kar 162 (DB). (Collector must not disregard the terms of the decree; he must not divide the property in contravention of the terms of the decree and if he does so, the Court is entitled to refer the case back to the Collector to partition the property in accordance with the terms of the decree.)
('15) 2 A I R 1915 Bom 279 (280) : 40 Bom 118 (DB). (Where Collector's partition has not been in accordance with decree it was re-opened and corrected and papers sent back again to Collector therefor.)
('26) 13 AIR 1926 Bom 258 (259) (DB). (Do. Even though decree is not in accordance with the judgment.)
6. † ('88) 12 Bom 371 (376) (DB).
('90) 14 Bom 450 (451) (DB).
('91) 15 Bom 527 (529) (DB).
7. † ('03) 28 Bom 238 (240) (DB).
('09) 36 Cal 726 (731, 732) : 1 Ind Cas 549 (550) (DB). (Collector—No jurisdiction under the local revenue laws—His order void, and Civil Court can entertain suit therefor.)
8. ('90) 14 Bom 450 (451) (DB). (Re-survey subsequent to partition decree does not affect parties' right to partition as per original decree and the Collector cannot refuse to do so.)
9. ('88) 12 Bom 371 (375) (DB).
† ('91) 15 Bom 527 (529) (DB).
10. ('96) 19 Mad 435 (436, 437) (DB).
11. ('81) 1881 Bom P J 12 (DB).
12. † ('17) 38 Ind Cas 593 (594) (B & O).
('18) 5 AIR 1918 Pat 63 (64) : 4 Pat L Jour 29 (DB).
13. ('07) 30 Mad 280 (281) (DB).
14. ('84) 8 Bom 539 (541) (DB).
[But see ('74) 1874 Bom P J 384 (385) (DB). (Division by Collector not restricted to cases under this section but extends to other cases by any other process of law—So where objection to transfer to Collector for execution under this section is not raised before division, his acts are valid, the Collector being deemed as Court's Officer for the purpose.)]
15. ('03) 5 Bom L R 648 (650) (DB).

8. Appeals. — Under the various local Rent and Revenue Laws and Regulations in force relating to partition, appeals are provided for in respect of the several acts and orders of the Collector in making a partition,[1] some of the appeals lying to the Civil Court itself.[2] In respect of some orders and acts the jurisdiction of the Civil Courts is expressly excluded.[3] As to the Civil Court's power to control the execution, by the Collector, of the decree passed under this section, see Note 7.

9. Decree for partition, when and how may be passed. — For the form of decree to be passed under the section, see O. 20 R. 18, cl. (1).

Where a decree declaring a right to partition has not been given effect to and the decree has, by lapse of time or otherwise, become unenforceable, it is open to the parties, if they still continue joint, to sue afresh for partition.[1] Similarly, where a suit for partition is dismissed for *default*, a fresh suit for partition can be maintained notwithstanding O. 9 R. 8 of the Code.[2] The reason is that the right to enforce partition is a legal incident of a joint tenancy and as long as such tenancy exists, so long may any one of the joint tenants apply to the Court for partition of the joint *property*.[3] But where the shares *have been separated* as per the Civil Court's decree, the decree is final and cannot be re-opened by a fresh suit.[4]

All interests in estates such as subordinate tenures of a fractional share of an estate[5] or the estate of a Hindu widow[6] can be partitioned provided there is no inconvenience caused thereby to the other sharers or persons owning interests in that estate. But the partition should be complete, that is, should embrace *all the properties* in which the plaintiff is interested[7] and should be effected between *all persons* interested therein.[8] As has been seen already in Note 4 above, the decree under this section is a *joint decree* in favour of all the sharers. It follows that for purposes of limitation steps taken by one of them will save limitation in favour of all.[9] There can, however, be no decree in favour

Note 8

1. ('01) 23 All 291 (303) (FB). (Section 253, N. W. P. Land Revenue Act, XIX of 1873.)
('92) 14 All 500 (501) (DB). (North West Provinces Land Revenue Act, XIX of 1873 — Collector need not draw up a decree and his order is appealable.)
('89) 1889 Pun Re No. 73, p. 279. (Act XXIII of 1871 since superseded by Act XVII of 1887 and rules of the revenue authorities.)
2. ('91) 13 All 309 (312) (DB). (NOTE.—This case was overruled by 23 All 291 (FB) on the question of Civil Court's power to decide questions of title where Collector refused to go into that question or disregarded S. 113 of Act XIX of 1873.)
3. ('01) 23 All 291 (303) (FB). (Act XIX of 1873, S. 241 (f).)

Note 9

1. ('13) 37 Bom 307 (312) : 17 Ind Cas 955 (956) (DB).
*('91) 13 All 309 (313, 314) (DB).
2. ('06) 28 All 627 (628, 629) (DB).
3. ('06) 28 All 627 (628) (DB).
Also see O. 9, R. 9, N. 5.
4. †('18) 5 AIR 1918 Pat 63 (64) : 4 Pat L Jour 29 (DB).
('20) 7 AIR 1920 Nag 204 (204). (So also where allotment of shares alone was made by Collector without delivery of possession.)
5. ('05) 1 Cal L Jour 40 (42) (DB). (Where plaintiff was not jointly interested in the proprietary interests of defendants though defendants inter se were so interested.)
†('97) 24 Cal 575 (582, 583) (FB). (Balance of convenience should be considered.)
6. ('83) 9 Cal 244 (250) (DB). (*Held*, widow's estate is not an estate for life under S. 10, Bengal Act VIII of 1876 — But Courts shall see that interests of presumptive reversioners are not affected.)
7. *('10) 34 Mad 269 (275, 277) : 7 Ind Cas 559 (565). (Exception—Certain items of family property conveyed by one coparcener for purposes not binding on the family—The alienee from the other coparcener of his share in the said property may sue for his share in the said items without suing for general partition.)
('81) 7 Cal 577 (581) (DB).
('86) 12 Cal 566 (569) (DB).
('87) 14 Cal 122 (123) (DB).
†(1900) 24 Bom 128 (130, 133) (DB).
('94) 18 Bom 611 (613) (DB)
Also see O. 2, R. 1, Note 3.
8. ('81) 7 Cal 577 (581) (DB). (Co-landlords granting leases of their shares to different lessees—In a suit for partition by lessees the landlords must be impleaded.)
Also see O. 1, R. 10 Note 16.
9. ('78) 3 Cal 551 (552).

of sharers who do not agree to, or ask for, a partition of their own shares.[10] Nor can there be a decree in favour of any sharer where the plaintiff's suit is itself dismissed.[11]

Where there is a decree in favour of the plaintiff and none in favour of the defendants, the latters' shares cannot be partitioned in execution of the decree.[12]

ARREST AND DETENTION

Arrest and detention.

55. [S. 336.] (1) A judgment-debtor may be arrested[3] in execution of a decree at any hour and on any day,[4] and shall, as soon as practicable,[5] be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the [a][Provincial Government] may appoint[6] for the detention of persons ordered by the Courts of such district to be detained :

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise :

Provided, secondly, that no outer door of a dwelling-house shall be broken open[7] unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found:

Provided, thirdly, that if the room is in the actual occupancy of a woman who is not the judgment-debtor[8] and who according to the customs of the country does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest :

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The [a][Provincial Government] may, by notification in the [b][Official Gazette], declare that any person or class of persons whose arrest might be attended with danger or inconvenience[9] to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the [a][Provincial Government] in this behalf.

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10. ('90) 12 All 506 (509) (DB). (Mahomedan family)
[*See* ('99) 23 Bom 184 (186) (DB). (In such cases Court has a discretion.)]

11. ('07) 31 Bom 271 (292). (As plaintiff not entitled to any share in the property)

12. † ('84) 1884 All W N 215 (216) (DB).
('99) 23 Bom 184 (186, 187) (DB).

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him[10] that he may apply to be declared an insolvent, and that he [c][may be discharged] if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security,[11] to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court [d][may release] him from arrest,[14] and, if he fails so to apply and to appear, the Court may either direct the security to be realised or commit him to the civil prison in execution of the decree.

[1877, S. 336; O. 21 Rr. 37-40.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

b. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Official Gazette."

c. Substituted by the Code of Civil Procedure (Amendment) Act, 1921 (III of 1921), Section 2, for "will be discharged."

d. Substituted by Section 2 *ibid*, for "shall release."

Synopsis

1. Changes introduced in 1908.
2. Subsequent amendments.
3. "A judgment-debtor may be arrested."
4. "At any hour and on any day."
5. "As soon as practicable."
6. "In any other place which the Provincial Government may appoint."
7. Breaking open of outer door.
8. Where room is in the occupancy of a woman, not a judgment-debtor.
9. Exemption of persons whose arrest might be attended with danger or inconvenience.
10. Court's duty to inform judgment-debtor that he may apply to be declared insolvent.
11. Security bond to be given by the judgment-debtor.
11a. Bond, if should be in writing.
12. Liability and discharge of surety.
13. Realisation of security.
14. "The Court may release him from arrest."
15. Damages for wrongful arrest.
16. Insolvency, when a protection from arrest.
17. Application for arrest, if a step-in-aid of execution.
18. Appeal and revision from orders under the section.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Judgment-debtor adjudicated when brought under arrest—Security still necessary. See Note 11.

Simultaneous execution against judgment-debtor and surety whether allowed See Note 13.

"Within one month" — No power to extend period. See Note 12.

1. Changes introduced in 1908. — The following are the important changes introduced by the section :

(1) Under S. 336 of the old Code, no outer door of a dwelling-house could be broken open under any circumstances. The present section provides that "no outer door of a dwelling-house shall be broken open *unless* such

dwelling-house is in *the occupancy of the judgment-debtor and he refuses or in any way prevents* access thereto." See Note 7.

(2) Under the old Code the surety was released from his obligation if the judgment-debtor *applied* to be declared an insolvent, even if he *failed to appear* according to the terms of the bond. The words "if he fails so to apply *and to appear*" in sub-s. (4) make it clear that now a surety is liable if the judgment-debtor either failed to *apply* or *to appear* according to the terms of the bond. See Note 12.

(3) Sub-section (2) empowers the Local Government [the Provincial Government, after amendment by the Government of India (Adaptation of Indian Laws) Order, 1937] to exempt certain persons from arrest.

(4) The provision for the mode of realisation of the security has been omitted in view of section 145.

2. Subsequent amendments. — By Act III of 1921 the word "may" has been substituted for the word "will" in sub-s. (3) and for the word "shall" in sub-section (4). See Note 14.

By the Government of India (Adaptation of Indian Laws) Order, 1937, the words "Local Government" and "Local Official Gazette" have been altered to "Provincial Government" and "Official Gazette."

3. "A judgment-debtor may be arrested." — Where a personal decree is passed against a judgment-debtor, the decree-holder can enforce his decree against the person or the property of the debtor.[1] The Court has, however, a *discretion* to allow or refuse execution against the person and property of the judgment-debtor *at the same time*.[2] The mere fact that a warrant for attachment of property has been issued may be a sufficient ground for refusing to issue warrant of arrest but when the judgment-debtor has *evaded payment* it would not be a sufficient ground to refuse warrant of arrest.[3]

Where a decree on a hypothecation bond decrees satisfaction from the hypothecated property and also from the judgment-debtor personally and contains no condition that execution shall first be enforced against the property, it is open to the creditor to execute his decree against the person or the property of the judgment-debtor at his option.[4] Where, however, the decree provides for the satisfaction of the judgment-debt only out of the property mortgaged, the judgment-debtor cannot be arrested in execution of the decree.[5]

The officer arresting a judgment-debtor must have the warrant of arrest in his possession at the time of making the apprehension[6] but he need not show it to the judgment-debtor unless asked to do so.[7] An arrest is not effected unless the officer touches the person of the judgment-debtor.[8]

Where a warrant of arrest has been executed by a person authorised to do so by the Nazir, the fact that the endorsement was subsequently made irregularly by the Naib

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Section 55 — Note 3

1. ('79) 4 Cal 583 (587) (DB). (Fact of decree being *ex parte* makes no difference.)
2. ('83) 7 Bom 301 (302) (DB).
See also O. 21, R. 21 and Notes on S. 38 under the heading "Simultaneous executions."
3. ('83) 7 Bom 301 (302) (DB).
4. ('87) 9 All 484 (485) (DB). (Equitable principle not applicable when no question of fraud on judgment-debtor arises.)
[But see ('82) 4 All 497 (498) (DB).]
5. ('87) 11 Bom 537 (539) (DB). (A decree though anomalous cannot be extended beyond its terms.)
6. ('83) 5 All 318 (321, 322).
Also see O. 21, R. 24, N. 4.
7. ('21) 8 AIR 1921 Cal 79 (79, 80) (DB). (Apprising the judgment-debtor of the contents of the warrant is sufficient.)
8. ('30) 17 AIR 1930 Rang 131 (132): 7 Rang 598 (DB). (Or unless there is submission to custody by word or action. S. 46, Cr. P. Code, and English cases relied on.)

Nazir will not invalidate the arrest.[9] Where a warrant of arrest is addressed to the bailiff authorising him to arrest a judgment-debtor at a particular place but the judgment-debtor happens to be at another place within the jurisdiction of the Court, the judgment-debtor can be legally arrested at that place.[10]

4. "At any hour and on any day." — An arrest is not illegal because it was made on a Sunday[1] or on a day on which the Court was closed.[2]

5. "As soon as practicable." — It is the duty of the officer arresting a judgment-debtor to bring him before the Court "as soon as practicable." But this does not mean that, if the Court is closed for the vacation, he should take the judgment-debtor to the Court building or to the Judge of the Court at his private residence. The judgment-debtor should be produced at the next sitting of the Court, and in the meantime, the arresting officer is empowered to confine him even in the decree-holder's house.[1]

6. "In any other place which the Provincial Government may appoint." — The imprisonment of the arrested person must be either in the civil prison of the district in which the Court ordering the detention is situate, or in any other place which the Provincial Government may appoint. Where a debtor committed to a particular jail is handed over by the officer arresting him of his own motion, to the officer in charge of a *different* jail, the imprisonment is unlawful and the prisoner is entitled to be discharged.[1]

For a list of places appointed by the Provincial Government under this section, see the undermentioned notifications.[2]

7. Breaking open of outer door. — Under S. 336 of the old Code no outer door of a dwelling-house could be broken open under any circumstances. Under the present section, the outer door may be broken open if —

(1) such a dwelling house is in the *occupancy of the judgment-debtor*, and

(2) he *refuses* or in any way *prevents* access thereto.

The object of this change in the law is to prevent vexatious forms of resistance to execution which constantly obstruct decree-holders in the execution of their decrees.[1]

8. Where room is in the occupancy of a woman, not a judgment-debtor. — The third proviso to sub-section (1) only applies where the room is in the occupancy of a woman *who is not the judgment-debtor*. If it is in the occupation of a woman who is *herself* the judgment-debtor against whom a warrant of arrest was issued, as, for instance, in execution of a decree for restitution of conjugal rights,[1] (before the amendment of O. 21, R. 33 by Act XXIX of 1923) the proviso has no application.[2]

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9. † ('84) 6 All 385 (388) (DB).
('95) 22 Cal 596 (608) (DB). (Delegation by Nazir to process-server.)
('95) 22 Cal 759 (761) (DB). (Do.)
10. ('40) 42 Pun L R 374 (377).

Note 4

1. ('69) 4 Mad H C R App LXII.
† ('74) 7 Mad H C R 285 (286) (DB). (Lord's Day Act does not apply to India.)
('68) 10 Suth W R 350 (351) (DB). (Do.)
2. ('07) 30 Mad 179 (180) (DB).

Note 5

1. ('07) 30 Mad 179 (180, 181) (DB). (No offence of wrongful confinement.)

Note 6

1. ('85) 11 Cal 527 (530).
Also see O. 21, R. 40, N. 1.
2. Notification No. 217, Burma Gazette, 1897, Part I, p. 256, Fort St. George Gazette, 1903, Part I, p. 646.

Note 7

1. See Report of the Select Committee — Notes on clauses.

Note 8

1. *See* ('68) 1 Beng L R 31 (32, 43, 46, 48) (FB). (Application for arrest of a *pardanashin* woman in execution of a decree for money.)
2. ('81) 7 Cal 19 (20, 21). (NOTE. — Before the introduction of S. 245A of the old Code corresponding to S. 56 of the present Code women could be arrested in execution of decrees for money.)

9. Exemption of persons whose arrest might be attended with danger or inconvenience. — This sub-section is new and is intended to cover the cases of certain persons or classes of persons whose summary arrest might, as in the case of railway servants, be attended with danger or inconvenience to the public.[1] But where a suit is brought against such persons, the fact that they could not be arrested in execution is no ground for not passing a *decree* against them.[2]

10. Court's duty to inform judgment-debtor that he may apply to be declared insolvent.—Where a judgment-debtor is arrested and brought before the Court, it is the duty of the Court to inform him that he may apply to be declared insolvent.[1] This, however, is unnecessary where he has *already applied* in insolvency and the application is pending.[2] The Court has, in such a case, a discretionary power not to put the warrant in force if the judgment-debtor furnishes security for his appearance when called upon.[3] Similarly, in a case where the judgment-debtor has already applied in insolvency and his application has been *dismissed* by the Insolvency Court and he is *re-arrested*, the executing Court need not inform him that he may apply to be declared insolvent, or take the other steps indicated in sub-s. (3). The reason is that until the order of dismissal of the insolvency application is set aside with the permission of the Insolvency Court the judgment-debtor cannot apply again to be declared an insolvent.[4]

The provisions of sub-s. (3) or the mere fact of arrest will not, however, entitle the debtor to be adjudged an insolvent except in conformity with the provisions of the insolvency law.[5]

Under the Codes of 1877 and 1882, the provisions corresponding to this sub-section did not apply to the presidency towns[6] nor to Provinces which were not notified by the Provincial Governments.[7]

11. Security bond to be given by the judgment-debtor. — This section applies only where the judgment-debtor is *under arrest*. Where he is already committed to jail, he can only be discharged under S. 58.[1]

The judgment-debtor brought under arrest must furnish security —

(1) that he will, within one month, apply to be declared insolvent, and

(2) that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested.[2]

Note 9

1. See Notes on Clauses.
2. Case referred by Cantonment Small Cause Court Judge, Meean-Meer, ('71) 1871 Pun Re No. 43.
5. ('13) 25 Mad L Jour 545 (551) (DB).
6. The application had to be under Ch. XX of the Code which by S. 360 did not apply to the Presidency Towns. Chapter XX was repealed by the Provincial Insolvency Act III of 1907.
7. For Notifications see Assam Manual of Local Rules and Orders, Edn. 1893, p. 191 ; Bengal Local Statutory Rules and Orders, 1903, Vol. II, p. 70 ; Bombay List of Local Rules and Orders, Edn. 1896, Vol. I, p. 406 ; Lower Burma Courts Manual, 1905, para. 602, No. 3751, dated 28th September 1877; Judicial Commissioners Civil Circular, 1-43 ; Madras List of Local Rules and Orders, Edn. 1898, Vol. I, p. 195; N. W. P. and Oudh List of Local Rules and Orders, Edn. 1894, p. 112 ; Rules and Orders of Civil Court of Punjab, Vol. I, p. 2 (Edn. 2).

Note 10

1. ('09) 1909 Pun Re No. 16, p. 37.
('78) 2 Mad 9 (10) (DB). (Small Cause debtors also were held entitled to apply under the old Code.)
('30) 17 AIR 1930 Lah 736 (736). (Omission to note compliance with Section does not indicate that Court failed to inform judgment-debtor.)
[*See* ('30) 17 AIR 1930 Cal 555 (556).]
[See however ('40) 42 Pun L R 374 (378). (Failure of the Court to inform the judgment-debtor under S. 55 (3), C. P. Code, that he can apply for insolvency, does not invalidate the warrant of arrest which is otherwise legally issued.)]
2. ('10) 1910 Pun W R No. 83, p 202 (Object of the Section being only to give time to apply.)
3. ('98) 22 Bom 731 (733) (DB).
4. ('11) 9 Ind Cas 121 (121) (Sind).

Note 11

1. ('85) 8 Mad 503 (504) (DB).
See also O. 21, R. 40.
2. ('43) 30 AIR 1943 Mad 363 (364) (DB).

Where after the arrest has been ordered but before it is effected, the judgment-debtor applies to be declared an insolvent and when arrested and brought before the Court produces the adjudication order, it is obvious that the requirement of this section as to his being called upon to give security under the *first* head can have no application. But it has been held that even in such cases, the Court is bound to require him to give security under the *second* head before ordering his release.[3] In this connection it must be noted that proceedings for arrest commenced before adjudication can be continued thereafter until protection order, though after adjudication, a fresh proceeding for arrest cannot be commenced.

It has been held by the High Court of Allahabad and the Sind Judicial Commissioner's Court that no stipulations other than the two heads of covenants mentioned in the section, are contemplated by the section.[4] Where besides the two covenants the bond contained other stipulations as to what would happen if the judgment-debtor's application for insolvency was dismissed, it was held that such stipulations could not be enforced *in execution* under S. 145.[5] The High Court of Madras has, however, taken a contrary view.[6] The same High Court has also held that where a surety undertook to produce the judgment-debtor whenever called upon until he was "adjudged and discharged," the surety was not discharged merely on the filing of the judgment-debtor's application for discharge in insolvency.[7]

A *suit* will always lie to enforce any condition that may be incorporated in a surety bond.[8]

As to the general stamp fee and court-fee leviable on a security bond given under this section, see the undermentioned cases.[9]

11a. Bond, if should be in writing. — This section only requires that security to the satisfaction of the Court should be given. It does not provide that the surety will become effective only if a bond is formally executed. It is not, therefore, illegal for the Court to accept a person as surety in proceedings under this section on oral statements made before it; nor is it obligatory to take a bond in writing.[1]

12. Liability and discharge of surety. — Under the old Code, the security had to be furnished for the judgment-debtor applying to be declared an insolvent and for his appearance, whenever called upon by the Court, but the surety became liable only if the judgment-debtor failed "so to *apply*." It was therefore held under the old Code

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('42) 29 AIR 1942 Sind 134 (136) : I L R (1942) Kar 79 (DB). (Bonds taken under the section should be carefully worded and should be in terms of the section.)
('25) 12 A I R 1925 Rang 305 (305, 306) : 3 Rang 187
('17) 4 A I R 1917 Mad 237 (238) : (1916) 2 Mad W N 273 (274) (DB). (Surety bond must strictly conform to the provisions of the Section.)
[See however ('30) 17 AIR 1930 Lah 575 (576). (Security bond not strictly conforming to the Section — Interpreted and enforced according to the express conditions of the bond.)]

3. ('25) 12 A I R 1925 Rang 305 (306) : 3 Rang 187. (The object being to compel the insolvent to be reasonably diligent in insolvency in a *bona fide* manner.)
4. ('36) 23 AIR 1936 Sind 244 (246): 30 Sind L R 177 (DB).
('94) 16 All 37 (39).
5. ('94) 16 All 37 (39)
6. Madras S A. No. 107 of 1929 reported in ('34) 39 Mad L W Recent Cases, p. 35. (AIR 1934 Mad 186 : 57 Mad 688 relied upon.)
7. ('33) 20 AIR 1933 Mad 360 (362).
8. ('10) 12 Cal L Jour 419 (422) (DB).
Also see S 145, N. 11
9. ('33) 20 A I R 1933 Lah 89 (90) : 14 Lah 284 (SB). (Surety incurring personal obligation — No additional duty under Stamp Act.)
('34) 21 AIR 1934 Lah 228 (229): 14 Lah 708 (DB). (Personal bond — Stamp under Art. 6, Court-fees Act, is sufficient.)

Note 11a

1. ('37) 24 AIR 1937 Lah 772 (776).
[*See also* ('36) 23 A I R 1936 Lah 463 (465). (Liability of surety in such cases is determined by the undertaking that he has given to the Court by means of the agreement or statement made by him which is accepted by the Court.)]

that a surety was discharged if the judgment-debtor *applied* to be declared an insolvent, in time, though he *failed to appear* when called upon.[1] The substitution of the words "if he fails so to apply *and to appear*" in the present section now makes it clear that the surety is not discharged by the mere filing of the insolvency application by the judgment-debtor, but that his liability continues until a final order is made on the petition in insolvency.[2]

The surety will be liable (1) if the judgment-debtor fails to apply in time to be declared an insolvent;[3] or (2) if he fails to appear whenever called upon to do so.[4] A security bond executed under this section can be enforced against the surety although there has been a failure on the part of the judgment-debtor of only one of the two conditions set out herein.[5]

Application within one month to be declared an insolvent. — A surety is not discharged by a petition by the judgment-debtor to be declared an insolvent where it is not in *proper form* and not within the prescribed time.[6] Where a judgment-debtor presented an insolvency application not in a proper form and not accompanied with the necessary deposit, and the same was returned for amendment but was not represented thereafter, the surety was held not discharged from his liability.[7] Where, however, a surety bond is given undertaking that the judgment-debtor would "continue the insolvency proceeding," the liability continues only up to the adjudication. The fact that after adjudication it is annulled for the default of the insolvent will not render the surety liable under the bond.[8]

Note 12

1. ('87) 15 Cal 171 (174).
('95) 19 Bom 210 (212).
('01) 24 Mad 560 (562).
('91) 13 All 100 (102).
('06) 28 All 387 (389). (Execution application against surety after judgment-debtor's application in insolvency is not in accordance with law.)
('93) 15 All 183 (184, 185). (The object being only to insure that the judgment-debtor should apply to be declared an insolvent.)
('03) 13 Mad L Jour 484 (485).
('03) 26 Mad 366 (367). (Subsequent withdrawal of insolvency petition did not matter.)
('92-96) 1892-96 Upp Bur Rul 269.
('94) 1894 Pun Re No. 100.
2. ('22) 9 AIR 1922 Bom 340 (340) : 46 Bom 702.
('14) 1 AIR 1914 Mad 270 (271).
3. ('35) 22 AIR 1935 Lah 918 (918).
4. ('37) 1937 Mad W N 1165 (1166) (DB). (Bond undertaking that judgment-debtor would be present on specified date and that in default surety would produce him — Failure to produce after specified date when called on by Court — Surety liable.)
('36) 23 A I R 1936 Rang 168 (170) : 14 Rang 190 (DB). (Meaning of "when called upon to appear" — Service of special notice calling upon debtor to appear on any particular occasion not necessary — It is sufficient if his counsel is informed that his presence would be necessary on next date.)
('14) 1 AIR 1914 Mad 270 (271).
('28) 15 A I R 1928 Lah 974 (975). (Surety undertaking to produce judgment-debtor on date fixed must produce even though decree-holder remains absent.)
('27) 14 AIR 1927 Mad 1081 (1081) (DB).
('10) 12 Cal L Jour 419 (422) (DB).
('25) 12 AIR 1925 Lah 170 (171).
('26) 13 A I R 1926 Mad 958 (959). (Liability of surety not extinguished because judgment-debtor has obtained protection order.)
[*See also* (1900) 1900 All W N 156 (157). (Bond not making sureties liable for performance of the decree but only for production of the judgment-debtor before the Court. Sections 253 and 336 of the Code of 1882 *held* not applicable.)
('10) 1910 Pun L R No. 51. (Where he appears on the due date in obedience to the order of the Court, surety is not liable.)]
5. ('42) 29 AIR 1942 Sind 134 (136) ; ILR (1942) Kar 79 (DB). (Dissenting from AIR 1940 All 338; A I R 1936 Sind 244 : 30 Sind L R 177)
('36) 23 A I R 1936 Sind 244 (246) : 30 Sind L R 177 (DB).
[But see ('40) 27 AIR 1940 All 304 (304) : ILR (1940) All 338 (DB)]
6. ('28) 15 AIR 1928 Sind 192 (192).
[*See* ('31) 18 A I R 1931 Bom 444 (446). (Where however all the particulars required by S. 13 of the Provincial Insolvency Act, were not complied with but application was bona fide, it was held enough to discharge surety.)]
7. ('28) 15 AIR 1928 Sind 192 (192).
[*See also* ('42) 29 AIR 1942 Sind 134 (136) : ILR (1942) Kar 79 (DB). (Deposit not made within the time allowed though the application was presented within time — *Held* surety was not discharged.)]
8. ('33) 20 AIR 1933 Nag 40 (41, 42): 29 Nag L R 28.
[*See also* ('43) 30 A I R 1943 Mad 363 (364, 365) (DB). (Surety bond requiring judgment-debtor to apply in insolvency and to conduct regularly and properly the proceedings thereon—Surety bond must be strictly construed and the surety cannot be made liable for failure on the part of the insolvent to apply for discharge)
('36) 23 AIR 1936 Mad 963 (963, 964.)]

A Court has no jurisdiction to extend the period of one month fixed by the section. The period being one fixed *by law*, S. 148 has no application to it.[9]

Appearance whenever called upon. — A security bond under this section is in the nature of a continuing guarantee and the surety is entitled to produce the judgment-debtor before the Court and request it to absolve him from further liability under the bond.[10] But the production of the judgment-debtor at a time when it is impossible for the Court or the decree holder to take any steps to have the judgment-debtor taken into custody does not amount to his appearance when called upon to appear and the surety will not be discharged thereby.[11] Where the judgment-debtor dies *before* breach of either of the conditions of the bond, the surety is discharged thereby.[12] But where he dies *after* the breach of any one of the conditions, as for instance where he fails to apply within one month and then dies, the liability of the surety continues and he is not discharged.[13]

Under the old Code, the security had to be "that he will appear when called upon" and it was held that this referred to the *particular* execution application in which the judgment-debtor was arrested, so that if that application was dismissed or struck off, the surety was discharged.[14] Under the present section the security must be "that he will appear, when called upon *in any proceeding* upon the application or *upon the decree* in execution of which he was arrested." This makes it clear that a surety will not be released by the dismissal of the particular execution application,[15] especially where a breach of the conditions of the bond had occurred before the dismissal.[16] But, where, after the execution of the security bond, the judgment-debtor applied to the Debt Conciliation Board to settle his debts including the debt due to the decree-holder and on production of the certificate showing that such application had been made, the execution case was struck off as infructuous and the order was accepted without protest by the decree-holder, it was held that both parties must be considered to have accepted the position that the execution proceedings had come to an end and that the matter would be dealt with, thenceforth, by the Debt Conciliation Board, i. e., in other words, that the surety bond was regarded as cancelled and it was not thereafter open to the decree-holder, when he had refused to accept the offer made by the judgment-debtor before the Debt Conciliation Board, to ask the Court to realise the security.[17]

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9. † ('26) 13 AIR 1926 Mad 689 (689, 690).
('26) 13 AIR 1926 Mad 286 (286).
Also see Section 148 Note 1.

10. ('34) 21 AIR 1934 Lah 962 (962).
('29) 16 AIR 1929 Lah 262 (262, 263).
[But see ('42) 29 A I R 1942 Mad 101 (102). (A surety under this section cannot claim to be released from his obligation at any stage before he has fully carried out his undertaking to the Court —AIR 1934 Lah 962, dissented from.)]

11. ('25) 12 AIR 1925 All 344 (345) (DB). (Order for stay of execution against judgment-debtor in force—Production of judgment-debtor at that time without notice to decree-holder.)
[*See also* ('87) 14 Cal 757 (760). (Voluntary appearance of judgment-debtor for another purpose.)]

12. ('14) 1 AIR 1914 Cal 162 (163) : 41 Cal 50 (DB). (Death before occasion to appear in Court arrives.)
('07) 29 All 466 (468). (Death before order on insolvency application was passed.)
('01) 24 Mad 637 (639) (DB). (Death before expiry of specified time to appear.)

13. ('24) 11 AIR 1924 Bom 428 (429) : 48 Bom 500 (DB). (The fact that a warrant of arrest was issued against the judgment-debtor at that time makes no difference.)

14. ('87) 14 Cal 757 (760, 761) (DB).
[*See also* ('95) 19 Bom 694 (696). (Question as to discharge of surety's liability left to be decided in separate suit.)]

15. ('17) 4 AIR 1917 Mad 237 (239) : (1916) 2 Mad W N 273 (275) (DB).
('32) 19 AIR 1932 Lah 492 (493). (Execution dismissed for default of decree-holder.)
[*See also* ('35) 22 AIR 1935 Lah 918 (919). (Previous execution proceedings against judgment-debtor consigned to the record room — Surety is not discharged.)
('34) 21 AIR 1934 Lah 92 (92). (Surety bond held to be in force only during continuance of execution proceedings in absence of indication to contrary.)]

16. ('39) 26 AIR 1939 Sind 270 (272) : ILR (1939) Kar 401 (405) (DB).
('21) 8 AIR 1921 Pat 72 (73) (DB). (Surety accepted liability on judgment-debtor failing to apply.)
Also see S. 145 Note 9.

17. ('37) 24 AIR 1937 Nag 269 (270) : ILR (1939) Nag 497.

The non-production of the judgment-debtor owing to illness which renders his attendance physically impossible without risk to health or life is a valid excuse and does not render the surety liable on the bond.[18] Nor can he be proceeded against while the proceedings in insolvency filed by the judgment-debtor are pending and there is no other default.[19] See also the undermentioned cases.[20]

A decree-holder has no cause of action against an *attesting witness to* a security bond for appearance of an insolvent judgment-debtor.[21]

Death of surety. — Where in execution proceedings against a surety for a judgment-debtor the surety dies, the decree-holder should, in order that he may continue the proceedings, substitute in the place of the deceased surety his legal representatives. The Court should issue notice to them and their objections should be heard before the execution proceeding can be further continued against them.[22]

13. Realisation of security. — A security bond under this section is in favour of *the Court* and not *the decree-holder*.[1] Where therefore, a condition of the bond is broken the option as to whether the security should be realised or the judgment-debtor committed to jail rests with the executing Court and not with the decree-holder.[2] The Court in a proper case can refuse in its discretion to execute the bond against the surety.[3] The creditor interested must, however, take the necessary steps to move the Court in the matter.[4] The Court cannot proceed both against the judgment-debtor and against the surety. It can only proceed against the one or the other.[5] But a mere issue of a warrant against the judgment-debtor will not bar the Court from proceeding against the surety if the warrant is unfruitful,[6] nor will an arrest without committal of the judgment-debtor have the effect of discharging the surety,[7] though the surety will be automatically discharged

18. ('29) 16 AIR 1929 Lah 479 (480.)
('38) 25 AIR 1938 Mad 530 (531). (But illness which would not render the presence of the judgment-debtor physically impossible will not absolve the surety.)

19. ('06) 28 All 387 (389). (Execution application if made against surety is not in accordance with law.)

20. ('39) 26 AIR 1939 Sind 270 (271) : ILR (1939) Kar 401 (403, 404) (DB). (The fact that a judgment-debtor for whose appearance a person has stood surety absconds does not necessarily involve a breach of the condition in the surety bond executed by the surety if that bond provides that he should appear only when ordered by the Court —Case adjourned from time to time — Order for appearance at adjourned hearing is necessarily implied.)
('35) 22 AIR 1935 Mad 543 (544). (Surety undertaking to produce judgment-debtor in Court in case latter failed to apply for insolvency and on default to pay the decretal amount — *Held*, surety's liability for the decretal amount did not arise merely on failure of judgment-debtor to apply for insolvency within the stipulated period but such liability would arise only on failure to produce the judgment-debtor in Court as stipulated.)

21. ('80) 4 Bom 465 (468) (DB). (Suit on ground of misrepresentation as to solvency of surety.)

22. ('40) 27 AIR 1940 Pat 142 (144) : 18 Pat 761 (DB).

Note 13

1. ('27) 14 AIR 1927 Lah 336 (336).
('28) 15 AIR 1928 Mad 469 (470) (DB). (It is a contract between Court and parties and is operative only after acceptance by Court.)

2. † ('29) 16 AIR 1929 All 377 (377, 378).
('37) 24 AIR 1937 Pat 476 (477) (Assumed—When once the Court exercises its option and discharges the surety, it cannot afterwards re-open the matter and proceed against him.)
[But see ('42) 29 AIR 1942 Pat 506 (507, 508) : 21 Pat 644 (DB). (Section 55 (4) does not leave the option to the Court—The section gives the decree-holder two remedies and he may avail himself of either.)]

3. ('41) 28 AIR 1941 Cal 122 (122, 123). (In the circumstances of this case the Court refused to order realisation of security as the decree-holder had not for a long time taken steps to realise the security.)
('22) 9 AIR 1922 Bom 340 (341) : 46 Bom 702.

4. ('03) 26 Mad 258 (259). (The transferee of the decree-holder has the same rights as the decree-holder of proceeding against the surety.)

5. ('42) 29 AIR 1942 Pat 506 (507, 508) : 21 Pat 644 (DB). (Judgment-debtor sent to jail—Subsequent proceedings against surety not allowed.)
('29) 16 AIR 1929 Lah 479 (480).
('33) 20 AIR 1933 Nag 38 (38, 39) : 29 Nag L R 83. (Judgment-debtor committed to prison — Surety is automatically discharged.)
('24) 11 AIR 1924 Bom 428 (429) : 48 Bom 500 (DB).

6. ('24) 11 AIR 1924 Bom 428 (429) : 48 Bom 500 (DB).

7. ('31) 18 AIR 1931 Bom 444 (446).

if the judgment-debtor is committed to the civil prison.[8]

From the fact that the bond is executed in favour of the *Court* and not of *the decree-holder* it also follows that the surety's liability is not extinguished under S. 135 of the Contract Act by the decree-holder granting time to the judgment-debtor.[9]

Moneys realised from the security cannot be forfeited to Government but should be utilised to satisfy the decree amount.[10] The decree-holder will not, however, be entitled to anything more than the amount due to him under the decree.[11] But subject to this condition, the Court has no power to reduce the amount for which the bond is executed.[12]

14. "The Court may release him from arrest." — Under the old Code a judgment-debtor expressing his intention to file a petition in insolvency and complying with the provisions of the section was *entitled* to be discharged from custody.[1] The substitution of the word "may" for the word "shall" in sub-s. (4) by Act III of 1921 makes the release depend upon the *discretion* of the Court.

A judgment-debtor who, when brought before the Court under arrest, has not expressed his intention to apply to be declared an insolvent, is not thereby precluded from so applying during his imprisonment, and getting himself released under the insolvency laws.[2]

15. Damages for wrongful arrest. — In a suit for damages for wrongful arrest in execution of a decree, the plaintiff must show —

(a) that the original action out of which the alleged injury arose was decided in his favour,

(b) that the arrest was procured maliciously and without reasonable and probable cause, and

(c) that he has suffered some collateral wrong.[1]

16. Insolvency, when a protection from arrest. — A judgment-debtor is not protected from arrest by the mere fact of his having *applied* in insolvency whether the debt for which he is sought to be arrested is mentioned in the schedule or not.[1] Even an order of adjudication will not protect the debtor in respect of debts not provable in the insolvency proceeding.[2] In respect of debts scheduled in the insolvency petition, there is, by the mere fact of adjudication, a qualified protection inasmuch as the debtor cannot be proceeded against *without the leave of the Insolvency Court.*[3] Where a *protection order* has been made in favour of the insolvent under S. 31 of the Provincial Insolvency Act, the debtor will have an unqualified protection against all proceedings in respect of the scheduled debts.[4]

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8. ('35) 22 AIR 1935 Lah 918 (919).
9. ('27) 14 AIR 1927 Lah 336 (336).
10. ('36) 23 AIR 1936 Sind 244 (246) : 30 Sind L R 177 (DB).
('12) 39 Cal 1048 (1050).
11. ('21) 8 AIR 1921 Cal 559 (560) (DB).
[But see observations in ('37) 1937 Mad W N 1165 (1166).]
Also see S. 145 Note 7.
12. ('36) 23 AIR 1936 Sind 244 (246) : 30 Sind L R 177 (DB).

Note 14

1. ('85) 8 Mad 276 (277).
('98) 1898 Pun Re No. 59. (Court is however not bound to release him if such intention is expressed after termination of proceedings under Section 337.)
2. See S. 23 of the Provincial Insolvency Act, 1920.
('85) 11 Cal 451 (459) (DB). (Judgment-debtor could be released under Section 349 of the old Code.)
[But see ('85) 8 Mad 503 (504) (DB). (Under the old Code when a debtor was imprisoned he could only be di-charged under Section 341 and not S. 349 of the Code.)
('98) 12 Bom 46 (47, 48) (DB).

Note 15

1. ('79) 4 Cal 583 (585, 586) (DB).

Note 16

1. ('10) 1910 Pun W R No. 83, p. 202.
† ('06) 9 Oudh Cas 42 (46) (DB).
2 ('89) 16 Cal 85 (88) (DB)
3. See section 28 (2) of the Provincial Insolvency Act, V of 1920.
('27) 14 AIR 1927 Mad 919 (920) : 50 Mad 977.
4. See Section 31 of the Provincial Insolvency Act, V of 1920.

17. Application for arrest, if a step-in-aid of execution.—An application for the arrest of the judgment-debtor will be an application for execution and will give a fresh starting point of limitation under Art. 182 of the Limitation Act.[1] An application by the heirs of the decree-holder will also be a step-in-aid of execution within the meaning of the said Art. 182 even though the heirs have not obtained a succession certificate and have not been placed on the record.[2]

18. Appeal and revision from orders under the section. — An order against the judgment-debtor or against the surety under this section is an order falling within S. 47 and is appealable as a decree.[1] So also is an order against a decree-holder refusing simultaneous execution against the person and property of the judgment-debtor.[3]

As mentioned in Note 13, when a condition of the bond is broken, the option of proceeding against the surety or the judgment-debtor lies with the Court. When the Judge exercises the option in favour of the surety, the matter cannot be subsequently re-opened.[3]

Prohibition of arrest or detention of women in execution of decree for money.

56. [S. 245A.] **Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.**

1. **Scope of section.** — Before the Code of 1908 was enacted, there was no rule prohibiting the arrest of women in execution of decrees and a purdanashin woman was held not exempt from arrest.[1] Under the present section a Court cannot arrest a woman in execution of a *money decree*.[2] But, can a woman be arrested in execution of a decree for the restitution of conjugal rights? Under O. 21 R. 33 as it originally stood, such arrest was legal.[3] But after that rule was amended by Act XXIX of 1923 a decree for the restitution of conjugal rights, whether against the husband or the wife, cannot be executed by the arrest of the judgment-debtor.

Although this section exempts a woman from arrest in execution of a decree for money, yet where in a suit for money a woman is the plaintiff, she may be required under O. 25 R. 1 (3) to give security for the defendant's costs.

Subsistence-allowance.

57. [S. 338.] **The** [a][**Provincial Government**] **may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.**

[1877, S. 338; See O. 21 R. 39.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

Note 17

1. See Art. 182 (5) of the Limitation Act.
[*See* ('97) 24 Cal 778 (780, 784). (Even if the application is unsuccessful.)]
2. ('93) 20 Cal 755 (757) (DB).
† ('96) 20 Bom 76 (77, 78) (DB).
('08) 31 Mad 77 (80) (DB).

Note 18

1. ('95) 1895 Pun Re No. 69 p. 338 (338). (Order of imprisonment of judgment-debtor.)
('32) 19 AIR 1932 Bom 77 (78). (For appealability of orders against surety, see Section 145.)
Also see S. 47, N. 71a and O. 21, R. 40, N. 9.
2. ('83) 7 Bom 301 (302) (DB).
Also see O. 21, R. 21, N. 2.
3. ('37) 24 AIR 1937 Pat 476 (477). (Matter re-opened—Revision lies.)

Section 56 — Note 1

1. ('68) 10 Suth W R 21 (26) (FB). (Absolutely.)
2. ('22) 9 AIR 1922 Nag 98 (100, 101): 18 Nag L R 145 (DB). (The proposition that no money decree possible which does not carry with it a right to arrest the judgment-debtor is not correct.)
3. *See* ('67) 11 Moo Ind App 551 (609) (PC).

Detention and release.

58. [Ss. 341, 342.] (1) Every person detained in the civil prison in execution of a decree shall be so detained,—

(*a*) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months, and,

(*b*) in any other case for a period of six weeks :

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be, —

(*i*) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

(*ii*) on the decree against him being otherwise fully satisfied, or

(*iii*) on the request of the person on whose application he has been so detained, or

(*iv*) on the omission by the person, on whose application he has been so detained, to pay subsistence-allowance :

Provided, also, that he shall not be released from such detention under clause (*ii*) or clause (*iii*), without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

[1877, Ss. 341 and 342; 1859, S. 278.]

Synopsis

1. Legislative changes.
2. "Subsistence-allowance."
3. Omission to pay subsistence allowance will result in release of judgment-debtor.
4. Person released from detention under this section cannot be re-arrested.
5. Interim protection order, effect of.
6. Period of detention.
7. Release does not discharge debtor from debt.
8. Contempt of Court.
9. Application for arrest, if saves limitation.
10. Miscellaneous.

1. Legislative changes. — The following are the main changes effected :

(1) Clauses (*a*) and (*b*) of sub-s. (1) correspond to S. 342 of the old Code, but the phraseology has been changed with a view to make it clear that the Court has no power to fix shorter periods than those mentioned in the section. See Note 6.

(2) The proviso to sub-s. (1) and sub-s. (2) correspond to S. 341 of the old Code, clauses (*a*) to (*d*).

2. "Subsistence-allowance." — The cost of clothing, etc., of the judgment-debtor, required to be supplied by the decree-holder under S. 33 of the Prisons Act, is not "subsistence allowance" under S. 58 which includes only the monthly allowance fixed by scale under S. 57 of the Code.[1]

Section 58 — Note 2

1. †('12) 6 Low Bur Rul 61 (61) : 17 Ind Cas 911 (911). (Debtor released for non-payment of cost of clothing and bedding can be re-arrested.)
('93) 1893 Pun Re No. 43, p. 202 (Do.)
Also see O. 21, R. 39, N. 1.

3. Omission to pay subsistence allowance will result in release of judgment-debtor. — On failure of the decree-holder to pay subsistence allowance the judgment-debtor should be released.[1] A payment cannot be considered to have been made to the officer in charge of the prison until it actually reaches his hands. Hence where, though the subsistence allowance has been sent by money-order to such officer sufficiently early to reach him in time, it does not actually reach him in time, there is an "omission to pay" within S. 58 *(b) (iv)*.[2] Where a judgment-debtor is released on the application of the decree-holder the latter is entitled to a refund of the balance of the subsistence money advanced by him that remains in Court at the time of the debtor's release.[3]

4. Person released from detention under this section cannot be re-arrested. — A judgment-debtor released from detention under this section cannot be re-arrested in execution of the same decree.[1] Hence, a judgment-debtor cannot, in execution of an instalment decree, be arrested and imprisoned separately for default in respect of each instalment.[2] But the immunity from re-arrest exists only when the judgment-debtor has been actually *detained in prison*[3] and not where he has been merely *arrested*. Hence, where after arrest the judgment-debtor is released before *actual imprisonment*, he can be re-arrested in execution of the decree.[4] But where the warrant of commitment to jail has been made out, a discharge of the judgment-debtor whilst in confinement in the court-house is a release from "detention" within the meaning of this section.[6] Another condition for the applicability of the immunity from re-arrest is that the release from detention must be *under this section*. Thus, a debtor who has been released owing to a mistake of the jail authorities in sending the demand for clothing under S. 33 of the Prisons Act to a wrong address is not exempt from re-arrest under this section.[6] See also Note 5. A Court cannot direct the re-arrest of a judgment-debtor without any petition or motion of the decree-holder.[7]

5. Interim protection order, effect of. — Where a judgment-debtor who has been arrested and imprisoned in execution of a decree applies to be adjudicated an insolvent and obtains an interim protection order and is released, is he liable to be re-arrested under the decree? On this question there is a conflict of decisions. The High Courts of Allahabad[1] and Bombay[2] take the view that the judgment-debtor is liable to be

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Note 3

1. Bourke O C 28.
Bourke O C 51. (Subsistence allowance must be paid in advance.)
Bourke O C 59. (Do.)
2. ('14) 1 A I R 1914 Mad 24 (24). (Consequent release of the debtor is a release under this section.)
3. ('68) 5 Bom S C R A C 84 (85) (DB).
Also see O. 21 R. 39, N 1.

Note 4

1. ('68) 4 Mad H C R 76 (77) (DB). (Release for non-payment of subsistence money.)
Bourke O C 109. (Do. The decision in 1873 Pun Re No. 37 under the Code of 1859 must be regarded as absolete.)
2. ('83) 7 Bom 106 (108) (DB).
3. † ('37) 24 AIR 1937 Lab 253 (254) (Detention in court-house is not detention in civil prison — Judgment-debtor can be re-arrested.)
4. ('70) 6 Mad H C R 84 (84) (DB) (The Code expressly preserves a distinction between arrest and imprisonment.)
('99) 2 Upp Bur Rul 281. (Judgment-debtor arrested and released immediately without being imprisoned.)
†('29) 16 AIR 1929 Lah 361 (362). (Judgment-debtor released while being taken to civil prison.)
('04) 26 All 317 (318) (DB). (Judgment-debtor arrested but not imprisoned due to decree-holder's failure to pay subsistence allowance.)
('85) 8 Mad 21 (22) (DB). (Discharge before imprisonment on account of non-payment of subsistence money.)
('96) 23 Cal 128 (129) (DB). (Judgment-debtor arrested and discharged before imprisonment on ground of his being exempt from arrest under S. 135, C. P. Code.)
5. ('85) 9 Bom 181 (182) (DB).
6. ('12) 6 Low Bur Rul 61 (62) : 17 Ind Cas 911 (912).
7. ('71) 15 Suth W R 68 (68) (BB).

Note 5

1. ('11) 33 All 279 (282) (DB). (Such release is not discharge under this section.)
2. †('02) 26 Bom 652 (659) (DB). (Release under S. 13, Indian Insolvents' Act.)

re-arrested in such a case as, according to them, the only cases in which the judgment-debtor is entitled to exemption from re-arrest are those enumerated in S. 58. But the Calcutta High Court has taken the opposite view and held that once the judgment-debtor is released from imprisonment in execution of a decree he cannot be re-arrested under the same decree.[3] It is submitted that the view taken in Bombay and Allahabad is more in consonance with the language of the section.

6. Period of detention. — Under this section, the Court has no power at its discretion to fix shorter periods of imprisonment than those prescribed in the section.[1] Where the defendant is under imprisonment under O. 38, R. 4 of the Code, such imprisonment suffered after the date of the decree must be deemed as imprisonment in execution of the decree and the period of imprisonment after that date must be taken into consideration in calculating the period prescribed by S. 58.[2] Where a judgment-debtor is released, not under this section, but under a mistake of the jail authorities and he is re-arrested, the period of imprisonment under the new warrant should include the period of imprisonment already suffered under the old warrant.[3]

7. Release does not discharge debtor from debt. — A release under this section does not discharge the debtor from the debt. His property remains liable to attachment and sale[1] and he can also be adjudicated an insolvent for the debt.[2]

Under the U. P. Tenancy Act, 1939,[3] where a judgment-debtor has been released from detention the Court may declare him absolved from liability for payment of money under that decree and such liability shall thereupon be extinguished.

8. Contempt of Court. — This section does not apply to cases of imprisonment for contempt of Court,[1] the power of the Court to imprison for contempt being irrespective of the Code.[2]

9. Application for arrest, if saves limitation. — An application for the arrest of a judgment-debtor in contravention of this section does not give a fresh starting point of limitation.[1]

10. Miscellaneous. — A Court will release a debtor where the jailor holds no warrant[1] but not where the warrant is only informal.[2]

A return to a writ of *habeas corpus* must be taken to be true and cannot be controverted by affidavit;[3] but where a debtor who is arrested and imprisoned under a warrant of the Presidency Small Cause Court is brought before the High Court on a

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3. ('95) 20 Cal 874 (878) (Circumstances under which release is obtained are immaterial.)
† ('96) 12 Cal 652 (656, 657) (DB). (Debtor released on bail, in theory, remains in custody under the original warrant.)

Note 6

1. ('89) 13 Mad 141 (142) (DB).
('02) 5 Cal W N 145 (146) (DB).
2. ('88) 7 Bom 431 (437) (SB).
3. ('12) 6 Low Bur Rul 61 (62) : 17 Ind Cas 911 (912). (Demand to pay cost of clothing sent to wrong address — Decree-holder not receiving it in time.)

Note 7

1. ('68) 1868 Beng L R Sup 889 (891) (FB). (Debtor released at the request of the creditor.)
2. ('69) 6 Bom H C R O C 86 (87).
3. U. P. Act XVII of 1939, Sch. II, List 2.

Note 8

1. ('79) 4 Cal 655 (659) (DB).
2. † ('83) 7 Bom 5 (12) (DB). (Power was vested by Royal Charter in the Supreme Courts and subsequently in the present High Courts.)
('83) 7 Bom 1 (4). (Power not affected by the Code.)

Note 9

1. ('90) 12 All 64 (65) (DB). (Being "not in accordance with law.")

Note 10

1. 1 Ind Jur (N S) 19.
2. Bourke, O C 96.
3. ('70) 5 Beng L R 418 (428). (But may be amended.)

writ of *habeas corpus*, he is entitled to show that he was privileged from arrest, the Presidency Small Cause Court not being a Court of co-ordinate jurisdiction with the High Court but subordinate to it.[4] Under the Oudh Rent Act[5] the imprisonment and attachment may, subject to the provisions of this section, be continued until the party complies with the terms of the decree.

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59. [S. 653.] (1) At any time after a warrant for the arrest of a judgment-debtor has been issued the Court may cancel it on the ground of his serious illness.

Release on ground of illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom —

(a) by the [a][Provincial Government], on the ground of the existence of any infectious or contagious disease, or

(b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

1. **Discretion of Court in issuing warrant.**—The provisions of this section are based on humanitarian grounds and if a judgment-debtor is suffering from serious illness, the Court would be well advised in ordering his release so as to escape from the moral responsibility in case anything should happen to him on being sent to jail.[1] A Court is not bound in every case to issue a warrant for arrest and if it has reason to believe that the judgment-debtor is not in a fit state of health to undergo confinement, it would act wisely in issuing a notice to him to show cause in the first instance.[2] The discretion exercised in issuing a warrant of arrest will not ordinarily be interfered with in appeal.[3]

2. **On the ground of serious illness.** — Asthma and indigestion do not constitute "serious illness" sufficient to enable the Court to cancel a warrant of arrest issued against the judgment-debtor.[1]

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4. ✠('76) 1 Cal 78 (86). (Arrest by bailiff of Court as soon as debtor left Court premises for going home.)
5. Act XXII of 1886, Section 148 (2).

Section 59 — Note 1

1. †('34) 21 AIR 1934 Lah 807 (808). (The provisions of this section are also not controlled by sub-sections (3) and (4) of S. 55.)
2. †('11) 9 Ind Cas 746 (747) (DB) (Oudh). Also see O. 21, R. 37, N. 1.
3. ('33) 20 AIR 1933 Lah 307 (308). (Unless wrongly exercised.)

Note 2

1. ('33) 20 AIR 1933 Lah 307 (308).

ATTACHMENT

60. (1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf :

Property liable to attachment and sale in execution of decree.

Provided that the following particulars shall not be liable to such attachment or sale, namely :—

(*a*) the necessary wearing-apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman ;

(*b*) tools of artisans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section ;

(*c*) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him ;

(*d*) books of account ;

(*e*) a mere right to sue for damages ;

(*f*) any right of personal service ;

(*g*) stipends and gratuities allowed to [a][pensioners of the Crown], or payable out of any service family pension fund notified in the [b][Official Gazette] by [c][the Central Government or the Provincial Government] in this behalf, and political pensions ;

[d](*h*) the wages of labourers and domestic servants, whether payable in money or in kind ; [e][* * * * * * *] ;

[f][(*i*) salary to the extent of the first hundred rupees and one-half of the remainder :

Provided that where such salary is the salary of a servant of the Crown or a servant of a railway company or local

authority, and the whole or any part of the portion of such salary liable to attachment has been under attachment, whether continuously or intermittently for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months and, where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree.]

(*j*) the pay and allowances of persons to whom the [g][Indian Army Act, 1911, or the Burma Army Act applies] [h][or of persons other than commissioned officers to whom the Naval Discipline Act as modified by the Indian Navy (Discipline) Act, 1934, applies];

(*k*) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, [i][1925], for the time being applies in so far as they are declared by the said Act not to be liable to attachment;

(*l*) any allowance forming part of the emoluments of any [k][servant of the Crown] or of any servant of a railway company or local authority which the [l][appropriate Government] may by notification in the [m][Official Gazette] declare to be exempt from attachment, and any subsistence grant or allowance made to [n][any such servant] while under suspension;

(*m*) an expectancy of succession by survivorship or other merely contingent or possible right or interest;

(*n*) a right to future maintenance;

(*o*) any allowance declared by [o][any Indian law] to be exempt from liability to attachment or sale in execution of a decree; and,

(*p*) where the judgment-debtor is a person liable for the payment of land-revenue, any moveable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

[p]*Explanation 1.* — The particulars mentioned in clauses (*g*), (*h*), (*i*), (*j*), (*l*) and (*o*) are exempt from attachment or sale whether before or after they are actually payable, and in the case of salary other than salary of a [q][servant of the Crown] or a servant of a railway company or local authority the attachable portion thereof is exempt from attachment until it is actually payable.

Explanation 2. — In clauses (*h*) and (*i*), "salary" means the total monthly emoluments, excluding any allowance declared exempt from attachment under the provisions of clause (*l*), derived by a person from his employment whether on duty or on leave.

[a]*Explanation* 3. — In clause (*l*) "appropriate Government" means —

(*i*) as respects any [1][person] in the service of the Central Government, or any servant of a Federal Railway or of a cantonment authority or of the port authority of a major port, the Central Government ;

(*ii*) as respects any [1][person] employed in connexion with the exercise of the functions of the Crown in its relations with Indian States, the Crown Representative ; and

(*iii*) as respects any other [2][servant of the Crown] or a servant of any other railway or local authority, the Provincial Government.

(2) Nothing in this Section shall be deemed —

to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "pensioners of the Government."

b. Substituted by *ibid*, for "Gazette of India."

c. Substituted by *ibid*, for "the Governor-General in Council."

d. Clauses *(h)* and *(i)* substituted by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), Section 2, for the original clauses *(h)* and *(i)*.

e. The words "and salary to the extent of the first hundred rupees and one half the remainder of such salary" were omitted by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943).

f. Clause *(i)* and the proviso thereto were substituted for the original clause *(i)* and the proviso, *ibid*.

g. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Indian Articles of War apply."

h. Inserted by the Amending Act, 1934 (XXXV of 1934), Section 2 and Schedule.

i. Substituted by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), Section 2, for "1897."

j. Clause *(l)* substituted by *ibid*, for the original clause.

k. Substituted for "public officer" by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943).

l. Words "appropriate Government" substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Governor-General in Council."

m. Words "Official Gazette" substituted by *ibid*, for "Gazette of India."

n. Substituted for the words "any such officer or servant" by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943).

o. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "any law passed under the Indian Councils Acts 1861 and 1892."

p. The original Explanation was re-numbered Explanation 1 by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), Section 2 and words within square brackets inserted by *ibid*.

q. Substituted for the words "public officer" by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943).

r. Explanation 2, inserted by Section 2 of the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937).

s. Explanation 3, inserted by the Government of India (Adaptation of Indian Laws) Order, 1937.

t. Substituted for the words "public officer" by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943).

u. Substituted for the words "public officer," *ibid.*

Local Amendments.

PUNJAB

(a) In sub-section (1), in the proviso —

(i) In clause *(c)*, for the words "occupied by him" the following words shall be deemed to be substituted, viz : —

"not proved by the decree-holder to have been let out on rent or lent to persons other than his father, mother, wife, son, daughter, daughter-in-law, brother, sister or other dependents or left vacant for a period of a year or more;"

(ii) After clause *(c)*, the following clauses shall be deemed to be inserted, viz : —

"*(cc)* Milch animals, whether in milk or in calf, kids, animals used for the purposes of transport or draught cart and open spaces or enclosures belonging to an agriculturist and required for use in case of need for tying cattle, parking carts, or stacking fodder or manure;

(ccc) one main residential house and other buildings attached to it (with the material and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to a judgment-debtor other than an agriculturist and occupied by him: Provided that the protection afforded by this clause shall not extend to any property specifically charged with the debt sought to be recovered."

(b) After sub-s. (2), the following sub-sections shall be deemed to be inserted, viz :—

"(3) Notwithstanding any other law for the time being in force an agreement by which a debtor agrees to waive any benefit of any exemption under this section shall be void.

(4) For the purposes of this section the word 'agriculturist' shall include every person whether as owner, tenant, partner or agricultural labourer who depends for his livelihood mainly on income from agricultural land as defined in the Punjab Alienation of Land Act, 1900.

(5) Every member of a tribe notified as agricultural under the Punjab Alienation of Land Act, 1900, and every member of a scheduled caste shall be presumed to be an agriculturist until the contrary is proved.

(6) No order for attachment shall be made unless the Court is satisfied that the property sought to be attached is not exempt from attachment or sale."

—— Punjab Relief of Indebtedness Act, VII of 1934, S. 35 (as amended by Punjab Acts XII of 1940 and VI of 1942).

Synopsis

1. Legislative changes.
2. Subsequent amendments.
3. Scope and applicability of the section.
4. Property, meaning of.
5. "All other saleable property."
6. "Belonging to the judgment-debtor or over which or the profits of which he has a disposing power."
7. Debts.
7a. Proviso to sub-section (1).
8. Necessary wearing apparel, etc. — Clause (a).
9. Tools of artisans, implements of husbandry, etc. — Clause (b).
10. Houses, etc., of agriculturists — Clause (c).
11. "Books of account"—Clause (d).
12. Right to sue for damages—Clause (e).
13. Right of personal service — Clause (f).
14. Stipends and gratuities allowed to pensioners — Clause (g).
15. Wages of labourers— Clause (h).
16. Salary—Clause (i).
17. Salary of Army Officers.
18. Pay of persons to whom the Indian Army Act, 1911, etc., apply — Clause (j).
19. Compulsory deposits, etc.—Clause (k).
20. Allowances of public officers, etc. — Clause (l).
21. Mere expectancy or other contingent or possible right — Clause (m).
22. Right to future maintenance — Clause (n).
22a. Moveable property exempt from sale for arrear of land revenue — Clause (p).
22b. Explanation II — Salary, meaning of.
23. Objections to attachment.
24. Waiver of benefit of section.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Auctioneer. See Note 6.
Bonus by Railway Company. See Notes 6 and 19.
Cooking Vessels. See Note 8.
Delivery to post office. See Note 19.
In execution of a decree. See Note 3.
Land assigned for maintenance. See Notes 21 and 22.
Life interest. See Note 6.
Life-policy. See Note 6.
Non-transferable office. See Notes 5 and 13.
Ornaments. See Note 8.
Political Pensions. See Note 14.
Private Pensions. See Note 14.
Profits of property. See Notes 7 and 12.
Restraint upon anticipation. See Note 6.
Right of residence. See Note 5.
Salary of private servants. See Note 16.
Security for performance. See Note 7.
Service of a public nature. See Note 5.
Stipends out of service family fund. See Note 14.
Trustee of a charity. See Note 5.

1. Legislative changes. — The following are the main changes incorporated in the section in 1908 :

(1) The words "cooking vessels," "beds" and "and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman" found in clause (a) are newly added.

(2) The exemption relating to agricultural produce in clause (b) is new.

(3) Clause (c) has been substituted for the corresponding clause of S. 266 which ran as follows : "The materials of houses and other buildings belonging to agriculturists."

(4) In clause (g) the words "military and civil" occurring in S. 266 of the old Code have been omitted as superfluous (*vide* Report of the Select Committee), and the words "or payable out of . . . . in this behalf" have been added.

(5) Clause (h) is new.

(6) In clause (i), the words "or allowances equal to salary" and "while on duty" have been added.

(7) Clause (k) is new.

(8) In clause (l) the words "whether payable in money or kind" have been newly added at the instance of the Government of Burma (*vide* Report of the Select Committee).

(9) In sub-s. (2), the words within brackets, namely "with the materials .... enjoyment" are newly added with a view to correspond with the changes introduced in clause (1) (c).

2. Subsequent amendments.

(1) By Act XX of 1925, a proviso to clause (1) (i) was added and by Act XXVI of 1923, the words "twenty rupees" and "forty rupees", in clause (1) (i) were replaced by the words "forty rupees" and "eighty rupees" respectively. But the whole clause (i) was amended by Act IX of 1937 (see below).

(2) Sub-section (2) originally contained two clauses (a) and (b). Clause (b) laid down that nothing in the section shall be deemed "to affect the provisions of the Army Act or of any similar law for the time being in force." It has now been deleted by Act X of 1914, Schedule II.

(3) By S. 2 of Act IX of 1937 [the Code of Civil Procedure (Second Amendment) Act, 1937] the following changes were made in the section :

(a) The present clauses (l), (i) and (h) were substituted for the corresponding clauses (h), (i) and (l) as they existed prior to the amendment.

For comparison, both the old and the present clauses (h), (i) and (l) are given below —

PRIOR TO AMENDMENT.	THE CORRESPONDING PROVISION AFTER AMENDMENT OF 1937.
(h) allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty;	(l) any allowance forming part of the emoluments of any public officer or of any servant of a railway company or local authority which the appropriate Government may by notification in the Official Gazette declare to be exempt from attachment, and any subsistence grant or allowance made to any such officer or servant while under suspension.
(i) the salary or allowances equal to salary of any such public officer or servant as is referred to in clause (h) while on duty, to the extent of — (i) the whole of the salary, where the salary does not exceed forty rupees monthly; (ii) forty rupees monthly, where the salary exceeds forty rupees and does not exceed eighty rupees monthly; and (iii) one moiety of the salary in any other case; Provided that where the decree-holder is a society registered or deemed to be registered under the Co-operative Societies Act, 1912, and the judgment-debtor is a member of the society, the provisions of sub-clauses (i) and (ii) shall be construed as if the word "twenty" were substituted for the word "forty" wherever it occurs and the word "forty" for the word "eighty."	(i) the salary of any public officer or of any servant of a railway company or local authority to the extent of the first hundred rupees and one-half the remainder of such salary: Provided that where the whole or any part of the portion of such salary liable to attachment has been under attachment, whether continuously or intermittently for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months and, where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree;
(l) the wages of labourers and domestic servants, whether payable in money or in kind.	(h) the wages of labourers and domestic servants, whether payable in money or in kind; and salary, to the extent of the first hundred rupees and one-half the remainder of such salary;

(b) The Explanation was re-numbered as Explanation I and the words "and in the case of salary . . . . . until it is actually payable" were added.

(c) Explanation II was added.

(4) Explanation III has been newly added by the Government of India (Adaptation of Indian Laws) Order, 1937, and defines the term "appropriate Government" in cl. (l) which has been substituted for "Governor-General in Council" by the Government of India (Adaptation of Indian Laws) Order, 1937.

(5) By the Code of Civil Procedure (Amendment) Act, V of 1943, in cl. (h) the words "and salary . . . . . of such salary" were omitted and the whole of cl. (i) with its proviso as given now in the section was substituted for the old clause and the proviso which ran thus :

"(i) the salary of any public officer or of any servant of a railway company or local authority to the extent of the first hundred rupees and one-half of the remainder of such salary;

Provided that, where the whole or any part of the portion of such salary liable to attachment has been under attachment, whether continuously or intermittently for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months and, where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree;"

See also the foot-notes to the text of the section.

Restrospective effect of amendments.

Under S. 3 of the Amending Act IX of 1937 referred to above, the Amendments made by S. 2 of that Act and referred to above have no effect in respect of any proceedings arising out of any suit instituted before the 1st June 1937.[1]

3. Scope and applicability of the section. — This section declares what properties are liable to attachment and sale in execution of a decree and what properties are exempt therefrom.[1] It classifies the attachable properties under two heads :

(1) lands, houses or other buildings, etc., which are specifically mentioned, and

(2) all *other saleable property* belonging to the judgment-debtor or over which he has a disposing power which he may exercise for his own benefit, except in the cases specified in the proviso.

The section does not, however, affect any special or local law under which properties attachable under this section are declared to be not attachable in execution of decrees.[2] Thus, the properties which have been declared by the following enactments to

Section 60 — Note 2

1. ('40) 27 AIR 1940 Sind 147 (150). (Application to execute award under Bombay Co-operative Societies Act is not "proceeding arising out of suit"— A I R 1938 Sind 176 not followed.)

('40) 27 AIR 1940 Sind 160 (160). ("Suit" in S. 3 is confined to proceedings commenced by presentation of plaint.)

('39) 26 AIR 1939 Pat 77 (79) : 17 Pat 706 (DB).

('38) 25 A I R 1938 Sind 176 (177) (DB). (Suit includes proceedings resulting in an arbitration award.)

('38) 25 AIR 1938 Cal 325 (326) (DB). (Insolvency case in not a proceeding arising out of suit within the meaning of Section 3 of the Amending Act IX of 1937.)

Also see Note 16.

Note 3

1. *See* ('36) 23 AIR 1936 Pesh 109 (110) (DB). [*See also* ('43) 30 AIR 1943 Nag 1 (2) : ILR (1943) Nag 1 (DB). (Words " attachment and sale " at the beginning of S. 60 must be treated separately.)]

2. See Section 4.

be not attachable cannot be attached even though such properties are not exempted from attachment *under this section* —

(1) *The Madras Estates Land Act (I of 1908), Section 192 (h).* — Exempting from attachment and sale the manure stocked by an agriculturist.

(2) *The U. P. Tenancy Act (XVII of 1939), Schedule II, List 2, Section 60* — Exempting from attachment and sale the manure stocked by an agriculturist.

(3) *The Central Provinces Tenancy Act (I of 1920), Section 44*—Exempting from attachment and sale the right of a village-servant in his village service land.

(4) *The Oudh Laws Act (XVIII of 1876), Section 20.* — Exempting from sale in execution of a decree ancestral land, except with the permission of the Provincial Government.

For other enactments, see the undermentioned cases.[3]

This section does not apply to mortgage decrees. The word 'decree' in the section refers to a money decree and not to a mortgage decree for the execution of which no *attachment* is necessary.[4] The exemptions from attachment and sale specified in the section do not apply therefore to mortgage decrees.[5] It has been held that this section applies to the execution of an order for alimony under the Divorce Act.[6]

There is nothing in this section or in any other section of the Code empowering the Court to prescribe to the decree-holder what course he is to take for the realisation of his claim or *what* property he is to attach;[7] nor is there any restriction to the effect that properties of the judgment-debtor are to be attached only to the *extent necessary* for the satisfaction of the decrees.[8]

This section cannot be applied to distraint of property as distress is not permitted under the Code.[9]

4. Property, meaning of. — The word 'property' is a comprehensive term and indicates every possible interest which a person can have.[1] It includes not only tangible

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3. Bombay Bhagdhari Act (V of 1862).
('40) 27 A I R 1940 All 24 (26, 27) : I L R (1939) All 901 (DB). (Electricity Act 1910, S. 5 (f).)
('39) 26 AIR 1939 Lah 316 (317). (Punjab Alienation of Land Act, Section 16.)
('37) 24 AIR 1937 Nag 41 (41) : I L R (1937) Nag 261. (C. P. Land Alienation Act, Section 16—Property not saleable in execution by Civil Court under Act — Civil Court cannot attach it for temporary alienation.)
('36) 23 A I R 1936 Bom 227 (242) : 60 Bom 516. (Bombay Titles to Rent-free Estates Act, XI of 1852 — Neither land nor interest of *de facto* kazi can be sold in execution of decree.)
('36) 23 AIR 1936 Mad 283(284): 59 Mad 354 (FB). (Standing crop on village service inam land cannot be attached in view of Section 5, Madras Hereditary Village Offices Act, III of 1895.)
('97) 21 Bom 588 (591) (FB). (Superstructure of house belonging to a bhag is exempt.)
('98) 22 Bom 737 (738). (Portion of bhag cannot be attached — Bombay Watan Act (XI of 1843), Section 13.)
('73) 10 Bom H C R 400 (404). (Watan allowance is protected.)
4. ('29) 16 AIR 1929 Rang 275 (275) (DB).
5. ('38) 25 AIR 1938 Nag 544 (544).
('24) 11 AIR 1924 All 328 (334, 335, 337) : 46 All 489 (FB).
('25) 12 AIR 1925 All 652 (653) : 47 All 900 (DB).
[But see ('41) 28 A I R 1941 Pesh 53 (55, 56) (DB). (Exemptions in proviso apply both to cases where attachment is necessary for sale and those where such attachment is not necessary—House of agriculturist is exempted from being sold in execution of mortgage decree.)
('11) 8 All L Jour (notes of cases) 38.]
6. ('43) 30 A I R 1943 Nag 1 (2, 3) : I L R (1943) Nag 1 (DB).
7. (1865) 3 Suth W R Misc 16 (16) (DB).
8. ('12) 16 Ind Cas 708 (710) (DB) (Cal).
9. ('39) 26 AIR 1939 Sind 276 (277) : I L R (1939) Kar 566 (DB).

Note 4

1. ('42) 29 AIR 1942 Cal 92 (99) : I L R (1942) 1 Cal 169 (DB). (All interests in properties available to judgment-debtor can be attached.)

property but also intangible interests in property.[2] It is not every tangible object, however, that will answer the description of "property." Some things are in their nature incapable of appropriation, such as air and water in their natural state and they are not, therefore, property.[3] The equity of redemption in mortgaged property,[4] the interest of a partner in the partnership assets,[5] the interest of a purchaser in the property purchased after he has paid full consideration fixed,[6] the proprietary interest of a surety in the surplus that may remain over after satisfying the purpose for which he offered the security,[7] a *malikana* right to receive a percentage from muafidars[8] and the interest of a life-tenant charged with the maintenance and education of children when the latter have received other property for their maintenance,[9] are all instances of attachable property. See also the cases cited below.[10]

A mere right to sue is not 'property' but is only a title to recover future property.[11] A claim, therefore, to the right and interest of X in a *future award* which might be made on a reference to arbitration of matters in dispute between X and Y is not a claim to "property."[12] As to whether a preliminary decree passed in a suit for accounts is attachable, see Order 21 Rule 53, Note 4a. See also Note 12.

5. "All other saleable property." — The property, in order to be attachable under this section, must be "saleable property."[1] The word "saleable" in this section means saleable by *court auction at a compulsory sale*.[2] For this purpose it is *firstly* essential that the property should be in *existence*. Uncertain, future and fluctuating profits derivable from a property,[3] or an indeterminate interest in properties varying

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(1836) 5 L J Ch 87 (90), Jones v. Skinner. (Reversionary interest in a property.)
('25) 12 AIR 1925 P C 18 (26) : 6 Lah 1 : 52 Ind App 22 (PC). (Over which a person has absolute and unconditional power of disposal.)
(1900) 4 Cal W N 70 (75). (It includes choses in action.)

2. See Section 58, Transfer of Property Act.

† ('91) 13 All 432 (461, 473) (FB). (Equity of redemption—Per Mahmood, J.)
('11) 34 Mad 442 (449): 1 Ind Cas 535 (535, 536)(DB). (Mortgage decree for a sum of money is property.)
('71) 7 Beng LR 318 (320) (SB). (Decree of Court is property.)

3. Salmond's Jurisprudence, 3rd Edition, page 169.

4. ('94) 21 Bom 226 (228) (DB). (Considered as an estate in land.)
('73) 20 Suth W R 19 (20) (DB).
('70) 5 Beng L R 380 (381).
1 Ind Jur (N S) 211. (Interest of shipowner in mortgaged ship.)

† ('05) 8 Oudh Cas 327 (331) (DB). (But a mortgagee is not entitled by means of a money decree to sell the equity of redemption.)
[*See also* ('98) 22 Bom 624 (629) (DB).]

5. ('25) 12 A I R 1925 Sind 18 (18, 19) : 17 Sind L R 331 (DB).
('29) 16 A I R 1929 Mad 641 (646) : 52 Mad 563 (FB).

6. ('18) 5 AIR 1918 Cal 923 (925) (DB). (But not if the purchase money has not been paid: see ('91) 18 Bom 13 (17, 18).)

7. ('30) 17 A I R 1930 All 225 (242) : 52 All 619 (FB).

8. ('23) 10 AIR 1923 All 304 (304, 305) (DB).

9. ('99) 23 Bom 1 (10, 11). (Inasmuch as it is a benefit arising out of land.)

10. ('39) 26 AIR 1939 Cal 283 (284) : ILR (1938) 2 Cal 618. (Rights of patentee can be attached under Section 60.)
('36) 23 AIR 1936 Pesh 90 (90) (DB). (A mere right to give a lease is not property which can be transferred.)
('21) 8 AIR 1921 Mad 498 (502) (DB). (Right to get a reconveyance and possession of property is property which is attachable and saleable in execution.)

11. ('36) 23 AIR 1936 Nag 218 (220). (Cosharer's share of village profits before they accrue due is mere right to sue and not attachable.)
('35) 22 AIR 1935 Cal 751 (752) (DB). (But where the claim for money has been established and the claim has been merged in a decree by competent Court, the decree is property and assignable.)

† ('71) 14 Moo Ind App 40 (51) (PC).

12. ('71) 14 Moo Ind App 40 (51) (PC).

Note 5

1. ('38) 25 AIR 1938 Nag 504 (506) : 1 L R (1940) Nag 261.

2. ('16) 3 AIR 1916 Cal 175 (175) (DB). (Does not mean transferable by act of parties.)

3. ('29) 16 AIR 1929 Cal 352 (353) (DB).
('67) 7 Suth W R 266 (266) (DB). (Unascertained surplus profits of shebaitship.)

† (1865) 1 Suth W R 87 (90) (PC). (Uncertain right in uncertain property cannot be sold in execution.)
('20) 7 AIR 1920 Pat 651 (651) (DB). (Future perquisite on account of offering or bhog to the deity will be an uncertain and indefinite income which cannot be attached.)
('91) 4 Mad L Jour 13 (14). (Future melvaram rents of shrotriem village that have not been enfranchised.)

according to contingencies, as for example, the interest of a Buddhist couple in marriage property,[4] is not 'saleable property.' *Secondly* it is also essential that the property must, in law, be capable of being *transferred*. Where it is so transferable it is saleable property.[5] Property in which the judgment-debtor has no legally transferable interest,[6] or the transfer of which is *prohibited* by any law for the time being in force,[7] cannot be sold in court auction and will not be saleable property. But the fact that it is *agreed between the parties* that a property should not be transferred, will not make it non-transferable in law so as to take it out of the category of "saleable property."[8]

A *religious office*,[9] or the right of managing a temple and of officiating at the

('01) 28 Cal 483 (485) (DB). (Future rents and profits of ghatwali tenure.)
('02) 29 Cal 470 (472, 473) (DB). (Future offerings to idol.)
('16) 3 AIR 1916 Cal 269 (270, 271) : 43 Cal 28 (DB). (Do.)

4. ('27) 14 AIR 1927 Rang 274 (275) : 5 Rang 478 (DB).
('87) 14 Cal 384 (385) (DB). (Uncertain sum which may or may not be payable by one partner to another.)
('79) 4 Bom 222 (227) (DB). (A debt due to a partnership cannot be seized in execution of a decree against one partner only.)

5. *Thus the interest of a Hindu coparcener in joint family property is saleable* :
('77) 3 Cal 198 (205):4 Ind App 247 (PC). (Interest of Hindu father.)
('91) 18 Cal 157 (161) : 17 Ind App 194 (PC). (Interest of Hindu coparcener.).
('79) 4 Cal 723 (724) (DB). (Do.)

Trees forming part of exproprietary holding can be sold :
('83) 5 All 616 (618, 619) (DB).
('16) 3 AIR 1916 All 334 (334).

Unenfranchised inam lands can be sold :
('09) 4 Ind Cas 1057 (1057) (DB) (Mad).
('10) 5 Ind Cas 41 (42) (DB) (Mad). (Inam land in a proprietary estate attached to the office of blacksmith.)

Hereditary interest of tenants in a holding subject to payment of quit rent is saleable :
('75) 24 Suth W R 309 (309).
See also the following cases :
('39) 26 AIR 1939 Cal 283 (284) : I L R (1938) 2 Cal 618. (Patent right is assignable and hence attachable.)
('37) 24 AIR 1937 Nag 202 (204). (Inam granted for maintenance—Inam alienable by inamdar during life—Inam *held* attachable.)
('37) 24 AIR 1937 Rang 74 (75, 76) : 14 Rang 619 (DB). (Right of occupier of State land to occupy such land is saleable interest.)
('82) 1882 All W N 100 (100) (DB). (Interest of lessee under Government.)
('04) 27 Mad 375 (376, 377) (DB). (Moveable property of Malabar tarwad.)
('89) 12 Mad 250 (252, 253). (Life interest in trust funds.)
('90) 13 Mad 242 (246, 247). (Letters in the Post Office addressed to the judgment-debtor.)
('85) 9 Bom 518 (519) (DB). (Spears and daggers are goods.)
('72) 17 Suth W R 86 (87) (DB). (Property to be found in the zenana of a judgment-debtor.)
('08) 32 Bom 157 (161) (DB). (Country liquor is "saleable" property.)
('15) 2 AIR 1915 Nag 21 (23, 24) : 11 Nag L R 67 (DB). (Beer though brewed within the local limits to which the Excise Act applies is not exempted.)
('71) 15 Suth W R 274 (275) (DB). (Land upon which judgment-debtor was permitted to erect a mud house and occupy it for forty years without any reservation by the landlord that he could be ousted, but for which he paid rent.)
[But see ('87) 9 All 88 (90, 91, 92) (FB).]

6. ('39) 26 AIR 1939 Pat 598 (600, 601) : 18 Pat 370 (DB). (Crown grant containing prohibition against alienation — Creditor can proceed only against profits and not against tenure itself.)
('38) 25 A I R 1938 Mad 623 (631) : I L R (1938) Mad 767 (DB). (Grant of village—Grantee entitled to rents and profits but prohibited from alienating village — Village not attachable.)
('36) 23 AIR 1936 Oudh 235 (235, 236) : 12 Luck 59 (DB). (Groves inalienable according to village custom.)
For illustrations of cases in which the judgment-debtor has no legally transferable interest, see the following cases : —
('07) 30 Mad 378 (380) (DB). (Property transferred to a married woman with a restraint on anticipation cannot be transferred by her—Such restraint is valid under Section 10 of the Transfer of Property Act.)
('33) 20 AIR 1933 Oudh 79 (80).
('98) 20 All 248 (251) (DB). (House built by zamindar in abadi and occupied by tenant.)
('82) 12 Cal L Rep 60 (61) (DB). (After vesting order, insolvent has no saleable interest.)
('05) 29 Bom 405 (406, 409). (Do.)

7. For such a probibition, see S. 6 of the Transfer of Property Act and also the following cases :
('83) 9 Cal 722 (724) (DB). (S. 64, Bengal Act VIII of 1869—Portion of tenure.)
('27) 14 AIR 1927 All 779 (779). (Groves standing on exproprietary holding are not attachable.)

8. ('16) 3 AIR 1916 Cal 175 (175) (DB).
('93) 20 Cal 273 (278) (DB). (Even if there is a provision of forfeiture or re-entry in lease.)
[*See also* ('84) 7 Mad 315 (317) (DB). (Donee's share in property given with a proviso that it should be held impartible.)]

9. ('82) 4 Mad 391 (392) (DB).
('09) 36 Cal 975 (977):3 Ind Cas 76 (77) (DB). (Alienable *inter vivos* under special circumstances.)

worship conducted therein and of receiving the offerings at the shrine,[10] is inalienable and cannot be sold in execution. But the priest's share of the net balance in the offerings or other profits can be attached and sold.[11] Similarly, where he holds temple lands as remuneration for his services in the temple, his right, title and interest therein can be sold subject, in the hands of the purchaser, to its determination by the death or removal from office of the former.[12] When the right to receive the offerings at a temple is independent of an obligation to render services involving qualifications of a personal nature, such as officiating at the worship, such right is attachable.[13]

The properties of a *charitable trust*[14] or of a *public religious endowment* are inalienable.[15] But a gift of an idol belonging to a private endowment made with the concurrence of the whole family, to another family for the purpose of carrying on a regular worship, is valid.[16]

An *occupancy holding* is not, as such, non-transferable and is not exempt from attachment.[17] But an occupancy holding not transferable by custom or law or usage is inalienable and is not saleable property.[18] But the mere fact that an estate is impartible

('97) 24 Cal 83 (92) (DB).
('96) 23 Cal 645 (665) (DB). (Being opposed to public policy.)
† ('96) 20 Bom 495 (501) (DB).
('83) 6 Mad 76 (79) (DB). (To a person not in the line of heirs.)
('71) 7 Mad H C R 210 (218) (DB).
('03) 26 Mad 31 (33) (DB). (Being opposed to public policy.)
('93) 16 Mad 146 (147) (DB). (*Obiter.*)
('96) 1 Cal W N 493 (495) (DB). (Whether by private sale or in execution of decree.)

10. ✣('76) 1 Mad 235 (250) : 4 Ind App 76 (PC). (Custom.)
(1900) 23 Mad 271 (279). (1 Mad 235 (PC) followed.)
('81) 4 All 81 (83) (DB). (Do.)
('83) 7 Bom 188 (190) (DB). (Hereditary.)
('82) 5 Mad 89 (90) (DB).
('70) 14 Suth W R 409 (409) (DB).
† ('81) 6 Bom 298 (300) (DB). (But allowable to an heir in line of succession.)
('71) 15 Suth W R 339 (339) (DB).
[*See* ('35) 22 AIR 1935 Pat 131 (132). (Palas for worship of deities—Custom to transfer by private treaty — It can be sold in execution by limiting class of persons entitled to bid and purchase same.)
('33) 20 A I R 1933 Cal 757 (759) : 60 Cal 1351 (DB). (Attachable if there is a custom.)
[*See also* ('37) 24 AIR 1937 Lah 433 (434) : ILR (1937) Lah 486 (DB).
('36) 23 AIR 1936 Pat 10 (10, 11) (DB). (Where right to receive a share in the service of a deity is transferable, an alienation of it by the procedure of a court sale can be brought about provided the class of persons to whom the sale is to be made is a class who would be entitled to perform the services.)]

11. ('27) 14 A I R 1927 Bom 143 (144) (DB).
('34) 21 AIR 1934 Lah 57 (58) : 15 Lah 136. (Khadim's share in offerings of shrine allowed to be sold by custom—Right to such share is liable to attachment and sale.)
† ('80) 5 Cal 438 (444, 445) : 6 Ind App 182 (PC).
Also See Note 13.

12. ('82) 6 Bom 596 (597) (DB).
[*See also* ('88) 15 Cal 329 (340, 341) : 15 Ind App 1 (PC).]

13. ('36) 23 AIR 1936 All 131 (133) : 58 All 457 (DB). (Right of a panda to receive offerings.)
Also See Note 13.

14. ✣ (1837-41) 2 Moo Ind App 390 (421) (PC).
('76) 25 Suth W R 557 (559) (DB).
('99) 3 Cal W N 158 (160) (DB).
(1900) 24 Bom 170 (176) (DB).

15. ('39) 26 AIR 1939 All 387 (388, 389) (DB).
('66) 5 Suth W R 158 (159) (DB).
('82) 6 Bom 546 (552) (FB). (Though its income may be temporarily pledged for necessary purposes, such as repairs etc., of the temple.)
† ('81) 5 Bom 393 (396) (DB). (Do.)

16. ('90) 17 Cal 557 (560) (DB). (Hence binding on succeeding shebaits.)

17. ('26) 13 AIR 1926 Cal 337 (337) (DB).

18. ('37) 24 AIR 1937 All 389 (390) : ILR (1937) All 542 (DB). (The interest of an exproprietary or occupancy tenant is not saleable by virtue of S. 23, Agra Tenancy Act and S. 60 (1) does not apply to such tenancies.)
('30) 17 AIR 1930 Sind 75 (76). (Non-transferable occupancy is exempt from sale and does not vest in Official Receiver.)
('06) 28 All 696 (696). (Section 20, Agra Tenancy Act, II of 1901.)
('07) 29 All 327 (330) (DB). (Do.)
('25) 12 AIR 1925 Oudh 702 (703, 704, 705). (Non-transferable lease in Oudh.)
('11) 33 All 136 (138) : 9 Ind Cas 931 (931) (DB). (Grove—Not transferable under S. 30 of the Agra Tenancy Act, 1901.)
('09) 1 Ind Cas 362 (364) (DB) (Cal). (Homestead in the town of Comilla.)
✣[But see ('21) 8 AIR 1921 Cal 15 (29, 30) : 48 Cal 184 (SB). (Overruling 24 Cal 355 and holding that a sole landlord of a raiyat can sell whether it is transferable or not by custom or usage.)
('22) 9 AIR 1922 Pat 114 (116, 117) : 1 Pat 317 (FB). (Saleable either by a landlord or by a stranger.)]
Also See Note 10.

does not necessarily make it inalienable.[19]

A mere *right of residence* is a personal right and is not transferable. It is, therefore, not saleable property.[20] So also the right of a Mahomedan widow in possession of her husband's property for her dower debt is a personal right.[21]

A *service tenure* e. g., land burdened with the performance of a service of a public nature, is inalienable and cannot be attached.[22]

The *doors and windows* of a house cannot be separately attached as they have no separate existence.[23]

6. "Belonging to the judgment-debtor or over which or the profits of which he has a disposing power." — All saleable properties belonging to a judgment-debtor may be attached unless such attachment is prohibited by any law or the proviso to this section. For instances of saleable property, see the undermentioned cases.[1]

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19. ('27) 14 AIR 1927 Nag 15 (16).

20. ('37) 24 AIR 1937 Lah 433 (434) : ILR (1937) Lah 486 (DB). (But receiver may be appointed by way of equitable execution to realize rent and make payment towards debt.)
('35) 22 AIR 1935 Mad 848 (848). (Hindu widow's right of residence.)
† ('08) 31 Mad 500 (501) (DB). (e. g., right of Hindu widow.)
(1900) 1900 Pun Re No. 8, p. 26 (28).

21. ('32) 19 AIR 1932 Nag 18 (19,20): 27 Nag L R 389.

22. ('39) 26 AIR 1939 Pat 242 (244) (DB). (Ghatwali tenure cannot be sold—But surplus profits of ghatwali estate after making certain deductions can be attached.)
('36) 23 AIR 1936 Bom 227 (242) : 60 Bom 516 (DB). (Land appertaining to the office of kazi cannot be sold.)
('29) 16 AIR 1929 Nag 232 (232) (DB). (Being opposed to the nature of interest affected.)
('83) 9 Cal 388 (388) (DB). (Ghatwali tenure nor its proceeds.)
(1865) 4 Suth W R Misc 5 (6) (DB). (Ghatwali tenure—But surplus profits of the tenure can be attached in the lifetime of the Ghatwali.)
('98) 10 Cal W N cclx (DB). (Ghatwali tenure, but not income arising from it.)
('96) 23 Cal 873 (876) (DB). (Ghatwali tenure.)
('12) 39 Cal 1010 (1015) : 14 Ind Cas 227 (228) (DB). (Ghatwali tenure—A receiver may be appointed to collect the surplus rents and profits.)
✣ ('22) 9 AIR 1922 Mad 197 (198, 200): 45 Mad 620 (SB). (Land held on Swastichakam service.)
[*See* ('37) 24 AIR 1937 Nag 248 (249, 250) : ILR (1938) Nag 27 (DB). (Grant of land from generation to generation and expressing hope that grantee should wish for prosperity of donor—Expression did not impose upon grantee duty of rendering some specific service — Estate was liable to attachment in execution of decree against grantee.)
[*See also* ('41) 28 A I R 1941 Pat 240 (241) (DB). (Holder of ghatwali tenure can object to its sale under S. 47, Civil P. C., on ground that it is not saleable by reason of S. 60.)]
[But see ('88) 15 Cal 471 (481) : 15 Ind App 18 (PC). (The interest of a ghatwali tenure in Kharagpore saleable if assented to by the zamindar.)
('21) 64 Ind Cas 522 (523) (DB) (Pat). (Police jagir transferable and saleable in execution of a decree subject to the right of the Government to object to it.)]

23. ('90) 13 Mad 518 (520) (DB).
('85) 11 Cal 164 (166) (DB).
('91) 14 Mad 467 (469) (DB). (Case under District Municipalities Act.)

Note 6

1. ('41) 28 AIR 1941 Pat 485 (486) (DB). (Person taking settlement of land from under-raiyat for residential purposes is not raiyat — Building constructed by a him on land and his interest in land is not protected under Ss. 46 and 47, Chota Nagpur Tenancy Act, 1908 — Nor does S. 60, Civil P. C., bar sale thereof in execution.)
('38) 25 AIR 1938 Mad 623 (631): ILR (1938) Mad 767 (DB). (Grant of village — Grantee entitled to rents and profits but prohibited from alienating village—Right to enjoy rents and profits only, *held* attachable and saleable.)
('37) 24 A I R 1937 All 652 (653) : ILR (1937) All 823 (DB). (Preliminary decree in suit for the recovery of the unpaid consideration money due under a mortgage bond is saleable property.)
('37) 24 A I R 1937 Oudh 177 (177) : 13 Luck 64. (Books belonging to lawyer insolvent—Such books are not exempt from attachment and sale.)
('35) 22 AIR 1935 Cal 751 (752) (DB). (Preliminary decree for accounts.)
('29) 16 A I R 1929 Lah 600 (601) (DB). (Interest of heir in hands of administrator after latter has paid all expenses and debts.)
('32) 19 A I R 1932 Nag 18 (19) : 27 Nag L R 389. (Widow of a Mahomedan in possession of his land in lieu of dower debt — Husband's creditor can attach land subject to the widow's right to retain possession.)
('31) 18 A I R 1931 Pat 76 (77). (Interest of residuary legatee.)
('29) 16 A I R 1929 Pat 97 (98) : 8 Pat 478 (DB). (Insolvent's money deposited in Court as security for costs of appeal — Order attaching it must be made subject to result of appeal.)
('14) 1 AIR 1914 Cal 496 (497) (DB). (Case decided under S. 48, Bengal Court of Wards Act, IX of 1879.)
('96) 24 Cal 244 (248) (DB). (Property acquired by adverse possession.)

The words "belonging to" are used in contradistinction to property which does not belong to but over which the judgment-debtor has a disposing power. It does not follow from this that all property which belongs to the judgment-debtor is necessarily property over which he has disposing power. Thus, forcible deductions by Government from the judgment-debtor's salary for contribution to the provident fund as well as instalment due for advance taken from that fund belong to the judgment-debtor though he may not have a disposing power over them.[2] A cheque is a negotiable instrument and the amount of the cheque does not belong to the payee till it is actually drawn by him. Hence, such amount cannot be attached in execution of a decree against him by means of a prohibitory order under O. 21 R. 52 on the banker.[3]

Even though a property may not *belong* to the judgment-debtor it may still be attachable if he has a *disposing power* over it which he may exercise for his own benefit.[4] Thus, a Hindu father has a disposing power over the whole of the joint family property for the purpose of satisfying his personal debts under certain circumstances.[5] Similarly, a Hindu coparcener in Madras has a disposing power over his share of the joint family property.[6] So also the karnavan and the senior anandravan of a Malabar *tarwad* have a disposing power over the *tarwad* properties which they may exercise for the purpose of satisfying debts contracted for the benefit of the tarwad.[7] But on partition between a Hindu father and his sons the father will cease to have disposing power over the shares allotted to his sons.[8]

A Hindu widow has no disposing power over property which she is entitled to enjoy for her life but which she is not entitled to alienate.[9] See also Note 22.

A person in whose favour a retiring gratuity or *bonus* has been declared by a railway company, but which has not been completed by either a registered document or payment, has no disposing power over it so as to make it attachable in execution of a decree against him.[10] A member of a mutual benefit fund or society has no disposing

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('70) 5 Beng L R 386 (387). (The share of a partner in the partnership in the hands of another partner.)
('12) 1912 Pun Re No. 89 : 16 Ind Cas 779 (780). (Fine paid by judgment-debtor under a sentence—Sentence annulled—Fine paid belongs to judgment-debtor.)
('82) 6 Bom 596 (597) (DB). (The interest of a servant of a temple in land which he held as remuneration for his service can be attached.)
('14) 1 AIR 1914 Low Bur 268 (269) : 7 Low Bur Rul 294. (Crops grown by the judgment-debtor.)
('31) 18 AIR 1931 Mad 511 (512) (DB). (Judgment-debtor has saleable interest till Court auction sale is confirmed.)
('30) 17 A I R 1930 Rang 184 (185) (DB). (Vested remainder can be attached.)
[But see ('24) 11 A I R 1924 Lah 335 (335). (Crops grown on tenancy by the heir of a deceased tenant after his death cannot be said to be the deceased tenant's crops.)]

2. ('43) 30 AIR 1943 Lah 60 (61, 62) (DB). (The deductions should be considered as part of the judgment-debtor's salary when determining what his salary is for purposes of attachment.)
3. ('42) 29 A I R 1942 Rang 59 (60) : 1941 Rang L R 759.
4. ('42) 29 A I R 1942 Cal 92 (99) : ILR (1942) 1 Cal 169 (DB).
('37) 24 AIR 1937 Mad 424 (425): ILR (1937) Mad 1004 (DB). (Hindu father.)
[*See also* ('41) 28 A I R 1941 Pat 157 (159). (Reference to disposing power is limited to context indicated by words that follow.)]
5. † ('03) 26 Mad 214 (222, 223) (DB).
('86) 11 Bom 37 (41) (DB).
[*See also* ('31) 18 AIR 1931 Pat 364 (367) : 10 Pat 582 (DB). (Chota Nagpur Encumbered Estates Act, 1896, Section 12A.)]
6. ('81) 4 Mad 302 (307) (DB). (But it ceases to be saleable on his death unless it had been attached in his lifetime.)
[*See* ('89) 11 All 302 (303) (DB).]
7. ('04) 27 Mad 375 (376) (DB).
8. ('38) 25 AIR 1938 Nag 24 (27, 29) : ILR (1938) Nag 136 (DB).
('37) 24 AIR 1937 Mad 424 (425, 426) : ILR (1937) Mad 1004 (DB). (Motive behind partition is irrelevant and it is immaterial to consider whether or not creditor was aware of partition—Properties allotted on partition for wife's maintenance and daughter's marriage—Such properties also are not liable to be attached for father's debt.)
9. ('37) 24 AIR 1937 Mad 864 (864). (Receiver of income of property can be appointed.)
('23) 10 AIR 1923 Bom 276 (280) : 47 Bom 597.
[*See also* ('86) 10 Bom 342 (345) (DB).]
10. ('24) 11 AIR 1924 Bom 88 (88).

power over the moneys which by rules of the fund or society are payable after the death of the member to his nominee or legal heir.[11]

A person who holds properties in trust for another person or for other purposes has no disposing power over them[12] and the *corpus* of the trust property in the hands of the trustee cannot be attached in execution.[13] Where X effects an insurance policy on his own life and it is expressed to be for the benefit of his wife or of his wife and children, such expression amounts, in cases to which the Married Women's Property Act, 1874, applies, to a trust in their favour, and consequently X has no disposing power over the policy so as to enable his creditors to attach it in execution of a decree against him.[14] In cases to which the said Act does not apply, the simple declaration, (in the absence of an assignment under S. 130 of the Transfer of Property Act, or a declaration of trust under S. 5 of the Indian Trusts Act) does not create a trust in their favour, and X has a disposing power over the policy which he can exercise for his own benefit and the policy can consequently be attached in execution.[15]

A person who has transferred his property to another has no longer a disposing power over it.[16] Thus, money deposited under decree to the credit of a decree-holder who has already assigned his interest in the decree to another cannot be attached by the creditors of the decree-holder unless the transfer is proved to be not *bona fide*.[17] Similarly, where X, a contractor, deposits materials on A's premises and the value thereof is advanced by A, A becomes in effect the purchaser of the materials and X has no longer any disposing power over them.[18]

An auctioneer has no disposing power over the sale proceeds of goods sold on behalf of his client, except to the extent of his commission.[19]

For other cases in which the judgment-debtor has no disposing power, see the undermentioned cases.[20]

The words "belonging to the judgment-debtor" in the section do not mean "belonging to the judgment-debtor alone" and a judgment-debtor's *share* in property

11. ('39) 26 AIR 1939 Sind 15 (17). (Where the employee died during service.)
('36) 162 Ind Cas 889 (892) (Mad).
12. ('05) 1905 Pun L R No. 7 p. 47. (Part of consideration left with mortgagee for defraying the expenses of the marriage of the mortgagor's daughter.)
[*See also* ('73) 19 Suth W R 226 (226) (DB). (Property placed in trust with a person as manager.)
(1900) 24 Bom 400 (403) (DB). (Vendor, after he receives the price, is a bare trustee for the vendee.)
('31) 18 AIR 1931 Bom 300 (301) (DB).]
13. ('87) 15 Cal 329 (340, 341, 342) : 15 Ind App 1 (PC). (But its surplus profits liable.)
('02) 6 Cal W N 663 (665, 667) (SB). (Of a decree against him personally.)
('21) 8 AIR 1921 Oudh 119 (120, 121). (Decree against mahant — Asthal property cannot be attached.)
14. See Section 6 of the Married Women's Property Act, 1874.
[*See* ('38) 25 AIR 1938 Mad 234 (235) : I L R (1938) Mad 335 (DB). (Expression of intention only to be gathered from policy itself and not the proposal or the prospectus.)]
15. † ('13) 37 Bom 471 (477) : 19 Ind Cas 736 (737) (DB).
('28) 15 AIR 1928 Cal 518 (521) : 55 Cal 1315 (DB). (Creditor of the sons of the deceased assured can attach money payable under the policy.)
16. *See* ('79) 4 Cal 402 (408) : 5 Ind App 211 (PC). (Creditor cannot follow property into the hands of a *bona fide* purchaser for value.)
17. † ('25) 12 AIR 1925 Pat 372 (374) (DB).
18. ('70) 2 N W P H C R 337 (337).
19. ('01) 23 All 135 (136).
20. ('40) 27 AIR 1940 Rang 1 (3) : 1939 Rang L R 649 (FB). (*A* selling engine to *B* under hire purchase system — Engine remaining property of *A* under agreement till price is fully paid—Till such payment is made *B* has no disposing power over engine.)
('16) 3 AIR 1916 Low Bur 21 (22). (Buddhist law — Joint property — Wife has no interest in, after divorce.)
('70) 5 Beng L R 382 (386). (Share of partner in the hands of a receiver.)
('68) 10 Suth W R 149 (150, 151) (DB). (Money payable to sirdars as the wages of coolies over whom they are sirdars does not constitute a debt to the sirdars.)
('97) 19 All 256 (258) (DB). (Pre-emption price by the holder of a decree for pre-emption is not attachable by his creditor.)

which belongs to him and other persons jointly is also liable to attachment and sale under this section.[21]

7. **Debts.** — A 'debt' is a sum of money which is *now payable* or will become payable in the future by reason of a *present obligation*.[1] In other words it means an actually *existing* debt, i. e , a perfected and absolute debt.[2] Thus, arrears of rent[3] or other moneys[4] which have *become* due are 'debts' and can be attached and sold in execution. But a sum of money which may or may not become due or the payment of which depends upon *contingencies* which may or may not happen is not a 'debt.'[5] Thus, where A agrees to pay B Rs. 5,000 on a mortgage of B's property and pays Rs. 3,000 in advance, the balance of Rs. 2,000 agreed to be paid by A cannot be attached by a creditor of B. The reason is that the sum may not be paid by A in which case B will be entitled, not to a specific performance of the agreement, but to damages.[6] Similarly, a claim for profits,[7] rent,[8] salary or annuity,[9] or other claim[10] *not yet due* but which might become due in the future is not a 'debt.'

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21. ('37) 24 AIR 1937 Cal 199 (200) : ILR (1937) 2 Cal 48 (DB).
Also see Note 7 and O. 21 R. 46, Note 1.

Note 7

1. ('42) 29 AIR 1942 Lah 275 (278) : ILR (1943) Lah 17 (FB).
('42) 29 AIR 1942 Sind 47 (48) : I L R (1941) Kar 401 (DB).
('37) 24 AIR 1937 Nag 391 (393): ILR (1938) Nag 402.
('09) 86 Cal 936 (938, 939) : 3 Ind Cas 492 (FB).
('25) 12 AIR 1925 Cal 561 (563) (DB). (Judgment-debtor must have a vested interest *in praesenti* in the amount.)
[*See* ('39) 26 AIR 1939 Oudh 86 (89). (Decision under O. 21 R. 104 (Oudh).]
2. ('42) 29 AIR 1942 Lah 275 (278): I L R (1943) Lah 17 (FB).
('41) 28 AIR 1941 Rang 256 (259) (DB).
('38) 25 AIR 1938 Lah 336 (336, 337).
('36) 23 AIR 1936 Pat 572 (577) (DB).
('35) 22 AIR 1935 Mad 181 (184): 58 Mad 693 (FB). (A debt due to a judgment-debtor under a promissory note standing in the name of a third person who holds it in trust for or on behalf of judgment-debtor is attachable.)
† ('25) 12 AIR 1925 Cal 561 (563) (DB).
('98) 22 Bom 39 (41) (DB). (Moneys expected to reach the hands of a public officer cannot be attached.)
† ('28) 15 AIR 1928 All 193 (193): 50 All 507 (DB). (Rent in respect of a period still in existence not susceptible of attachment.)
('80) 4 Bom 323 (326, 327) (DB). (If the Court receives notice from the alleged debtor that no debt exists, the Court should satisfy itself as to the existence or otherwise of the debt.)
3. ('08) 1908 All W N 129 (129) (DB). (Although under agreement the lessee was to pay rent to third person.)
4. ('42) 29 AIR 1942 Lah 275 (278, 279) : I L R (1943) Lah 17 (FB). (Unpaid purchase price of a property left with the vendee for payment to the creditors of the vendor but which the vendee has not actually paid to them is a 'debt' due by the vendee to the vendor.)
('37) 24 AIR 1937 Bom 382 (383). (Amount due under insurance policy.)
('37) 24 AIR 1937 Lah 608 (609). (Money left by a judgment-debtor with a vendee to whom he had sold property for payment to his creditors but which was not so paid within a reasonable time, can be looked upon as a debt due to the judgment-debtor and attached and sold in execution of a decree against him, though no time limit had been fixed for its payment to the creditors.)
† ('94) 16 All 286 (293, 294) (DB). (Prior to attachment and sale ascertainment of exact amount not necessary.)
[But see ('83) 6 Mad 418 (419) (DB). (Decree for money not a debt.)]
5. ('42) 29 AIR 1942 Lah 275 (278) : ILR (1943) Lah 17 (FB).
('41) 28 AIR 1941 Rang 256 (259) (DB).
('38) 25 AIR 1938 Lah 336 (337).
('36) 23 AIR 1936 Pat 572 (577) (DB). (A right to receive royalty depends upon the happening of circumstances which are entirely contingent and hence cannot be attached as a debt under S. 60.)
(1900) 27 Cal 38 (42) (DB).
('33) 20 AIR 1933 Rang 23 (24): 11 Rang 116 (FB). (Sum which a person may or may not pay in his uncontrolled discretion is not a debt.)
('31) 18 AIR 1931 Bom 288 (289, 291) (DB). (Money to be paid on condition of obtaining possession of property.)
6. ('42) 29 AIR 1942 Lah 234 (236) (DB).
('36) 23 AIR 1936 Lah 727 (728, 729) : 17 Lah 270. (AIR 1935 Lah 141 reversed.)
† ('08) 30 All 252 (254, 255) (DB).
7. ('08) 30 All 246 (247): 1908 All W N 101 (101). (Future profits of the village from lambardar.)
† ('01) 28 Cal 483 (485) (DB). (Future rents and profits from ghatwali tenure.)
8. † ('28) 15 AIR 1928 All 193 (193): 50 All 507 (DB). (As the obligation is not complete.)
('25) 12 AIR 1925 Rang 318 (319): 3 Rang 235 (DB).
9. (1883) 11 Q B D 518, Webb v. Stenton. (As to salaries of public officers, see clause (i).)
('09) 31 All 304 (305): 1 Ind Cas 186 (187). (Future wages of lawyer's clerk.)
('11) 11 Ind Cas 423 (425) (DB) (Cal). (Annuity not fallen due.)
10. ('38) 25 AIR 1938 Lah 533 (534): I L R (1938) Lah 548 (DB). (Compensation money in the hands

As to whether a sum lying to the credit of a judgment-debtor in a provident fund amounts to a debt and hence liable to attachment, see Note 19.

It is important to remember that a debt may *become due* though *payable in the future*.[11]

Illustrations.

1. *A* is entitled to get a monthly allowance from *B* payable on the 1st of every month. *X*, a judgment-creditor of *A*, applies on the 21st December for the issue of an attachment (prohibitory order) in respect of a *half* of the allowance for the month of December. It was held that the attachment could be validly made, inasmuch as the allowance for three weeks in December had already become an *existing* debt though *payable* on the first of January.[12] The same principle will apply to *interest* payable at fixed periods.

2. *A* deposits certain moneys with *B* as security for the due performance and completion of a contract entered into by him. *X*, who has obtained a decree against *A*, can attach the amount deposited as money due and owing to *A* though it is not payable to him till the completion of the contract, and may even be forfeited.[13]

Where the money is due as, for instance, by an agent or a vendee to his principal or vendor, it will be a "debt" though the *exact amount* due is not ascertained at the time of the attachment.[14] But a mere claim for unliquidated *damages* is not a debt.[15]

A claim over which no Court in British India has jurisdiction is not a debt liable to be attached, but the mere circumstance that the garnishee is, at the time of the application for execution, beyond the limits of British India would not, of itself, render the debt not liable to be attached.[16]

The word 'debts' in this section includes share of debts. A judgment-debtor's share in a debt due to the judgment-debtor and other persons jointly can, therefore, be attached and sold in execution.[17]

7a. Proviso to sub-section (1). — The proviso to sub-s. (1) declares that the properties specified therein shall be exempt from attachment *or* sale. On this ground it

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of Collecter awarded under Land Acquisition Act is not a debt due to the person whose land has been acquired until the money is tendered to him under S. 31 of the Act.)

† ('81) 3 All 12 (14) (DB). (Vendor and vendee — Purchase money payable on execution of conveyance not a debt until it is executed.)

('32) 19 AIR 1932 Pat 311 (313): 11 Pat 584 (DB). (Gratuity sanctioned but not yet paid — Gift incomplete — Not attachable.)

('1900) 27 Cal 38 (42) (DB). (Maintenance allowance to fall due in future.)

('84) 6 All 634 (636) (DB). (Gratuity sanctioned to *A* but not yet paid — Gift not complete—Cannot be attached.)

('71) 8 Bom H C R A C 150 (151) (DB). (Right to an account claimed by the representatives of a deceased partner is not a 'debt.')

(1858) 27 L J Q B 234. (Verdict of jury giving liquidated damages is not a debt until the judgment is signed.)

2 Hay 142. (Sum receivable by way of assignment.)

11. ('42) 29 AIR 1942 Sind 47 (48) : I L R (1941) Kar 401 (DB).

('37) 24 AIR 1937 Bom 382 (383). (Amount due under a policy of insurance is a debt and is attachable under S. 60 though it becomes payable only on death of the assured.)

('37) 24 AIR 1937 Nag 391 (393): I L R (1938) Nag 402. (Sale proceeds deposited in Court during confirmation of sale — Judgment-debtor not objecting to cofirmation of sale—Surplus amount payable to judgment-debtor after confirmation is a debt and can be attached.)

('08) 30 All 246 (247) (DB).

† ('71) 14 Moo Ind App 40 (50) (PC).

('69) 1869 Pun Re No. 90. (Instalments payable by order of Court.)

[But see ('29) 16 AIR 1929 Mad 347 (347, 348). (Life policy requiring proof of death before payment—Money payable by company becomes debt only on proof of death.)]

12. ('05) 9 Cal W N 703 (704) (DB).

13. ('20) 7 AIR 1920 Low Bur 46 (47) : 56 Ind Cas 948 (948, 949) (DB).

See however the case of a deposit with railway company given in O. 21, R. 46, N. 12.

14. ('39) 26 AIR 1939 Oudh 86 (90). (Decision under O. 21, R. 104 (Oudh) — Mere fact that amount is not ascertained does not show that there is no debt.)

† ('94) 16 All 286 (294) (DB).

15. (1884) 12 Q B D 525 (529), Randall v. Lithgow.

16. ('81) 5 Bom 249 (252) (DB).

Also see O. 21 R. 46, N. 9.

17. ('37) 24 AIR 1937 Cal 199 (200) : I L R (1937) 2 Cal 48 (DB).

Also see Note 6 and O. 21 R. 46, N. 1.

has been held by the Peshawar Judicial Commissioner's Court that the exemptions from attachment declared by the proviso apply to sales in execution of *mortgage* decrees although no attachment is necessary in the case of such sales.[1] (See also Notes 3 and 10.) The Allahabad High Court has held that where the ground of exemption, e. g., the status of the judgment-debtor as an agriculturist did not exist at the time of the attachment but existed at the time of the sale, it could be urged against the sale taking place as the proviso applies both to attachments and sales.[2]

The clauses in the proviso are cumulative and a judgment-debtor may claim the benefit of more than one clause at the same time. Thus, he may claim the benefit of clause (i) as well as of clause (k) at the same time.[3]

8. Necessary wearing apparel, etc.—Clause (a). — The necessary wearing apparel of a person cannot be attached in execution.[1] The *mangalsutra* worn by a Hindu married woman cannot, according to Hindu religious usage, be parted with by her during the lifetime of her husband, and cannot therefore be attached in execution.[2] Cooking vessels include vessels required for cooking operations, such as a *thali* and a *gagru*.[3]

9. Tools of artisans, implements of husbandry, etc. — Clause (b). — An 'artisan' is a person engaged in a *mechanical* employment.[1] Musicians and washermen are not 'artisans' and musical instruments are not 'tools of artisans.'[2] Similarly, the instruments of a surgeon or a doctor do not come within this clause.[3] But a sewing machine is a 'tool of an artisan.'[4] The Allahabad High Court has held that an artisan is not merely a person who is engaged in mechanical employment but a person who works in the production of some commodity, that whatever he uses for the production of the commodity may be considered as his tools, and that therefore the utensils used by a sweet-meat vendor for preparation of sweets are tools of an artisan.[5] The Madras High Court has taken a contrary view.[6] But a person will not be an "artisan" within the meaning of this section unless he employs himself in a handicraft personally and depends for his living essentially on the proceeds derived from that handicraft.[7]

The expression "tools of artisans" indicates that *all* the tools that are used by an artisan are exempt from attachment; it does not mean only such tools as are *necessary* for the maintenance of the artisan.[8]

The question whether the judgment-debtor is an artisan is to be determined with reference to his status and position of affairs *at the time of execution*. Subsequent events need not be considered.[9]

Note 7a

1. ('41) 28 AIR 1941 Pesh 53 (55) (DB).
2. ('38) 25 AIR 1938 All 85 (86).
3. ('40) 27 AIR 1940 Mad 766 (768).
('39) 26 AIR 1939 Rang 432 (432): 1939 Rang L R 504.

Note 8

1. ('72) 9 Bom H C R 272 (275) (DB).
2. ('85) 9 Bom 106 (107) (DB).
3. ('32) 19 AIR 1932 All 344 (345) : 54 All 399.

Note 9

1. ('43) 30 AIR 1943 Mad 523 (523). ('Artisan' has a well-recognised meaning and is roughly synonymous with "handicraftsman" or mechanic.)
2. ('42) 29 AIR 1942 Mad 4 (5).
('17) 4 AIR 1917 Upp Bur 4 (5): 2 Upp Bur Rul 133.
3. ('33) 20 AIR 1933 Lah 936 (936) : 15 Lah 26. (Not an artisan.)
4. ('42) 29 AIR 1942 Mad 4 (4). (Conceded.)
('41) 28 AIR 1941 All 157 (158) : I L R (1941) All 278. (Number of sewing machines used— All of them are exempt from attachment.)
('23) 10 AIR 1923 Nag 289 (289) : 19 Nag L R 22.
5. ('35) 22 AIR 1935 All 848 (848).
[*See also* ('32) 19 AIR 1932 All 344 (345): 54 All 399. (One who practises the art of soap-making is an artisan—The paraphernalia of soap factory are tools and are exempt.)
6. ('43) 30 AIR 1943 Mad 523 (523, 524).
7. ('43) 30 AIR 1943 Mad 523(524). (Hotel-keeper cannot claim exemption from attachment of vessels used by his employees in preparation of food which he sells to public.)
('39) 26 AIR 1939 Lah 388 (392) : I L R (1940) Lah 23 (FB).
8. ('41) 28 AIR 1941 All 157 (157) : I L R (1941) All 278.
9. ('41) 28 AIR 1941 All 157 (158) : I L R (1941) All 278.

Charaks, *kadhais*, and planks of timber used by an agriculturist for pressing sugarcane grown on his field are implements of husbandry and are exempt from attachment.[10] The Sind Judicial Commissioner's Court has held that the term "implements of husbandry" should be interpreted in a fair and reasonable spirit and not in a narrow sense and that the term will include an engine or a water pump as being necessary for the agriculturist to irrigate his fields.[11] But, the Nagpur High Court has taken the view that implements would mean such instruments as the agriculturist handles in the course of his agricultural work and as driving a motor tractor cannot be regarded as manual work, it cannot be regarded as an "implement of husbandry."[12]

Such cattle and seed-grain as may, in the Court's opinion, be necessary to enable an agriculturist to make a living are not attachable.[13] Even the fodder required for the cattle is exempt from attachment.[14] The fact that the cattle have been pledged as security for a debt will not prevent the operation of this clause.[15] But it is necessary that the Court should express its opinion that such cattle or seed-grain are *necessary* to enable the judgment-debtor to earn his livelihood, before the exemption can operate,[16] and if the necessity is disputed, the executing Court must decide it.[17] The section is only intended for the benefit of indigent agriculturists and an attachment of such cattle and seed-grain will be valid where the judgment-debtor is easily able to replace them.[18]

10. Houses, etc., of agriculturists—Clause (c). — The object of proviso (c) to this section is that an agriculturist should not be deprived of his means of livelihood by having his house and other buildings taken from him.[1] 'Agriculturist' means a person, who earns his livelihood wholly or principally by *cultivating* land either personally or through servants.[2] It is not necessary that he should *own* the lands he cultivates.[3] He may be a proprietor or a tenant[4] or even a person who without being either, earns his

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10. ('24) 11 AIR 1924 Bom 294 (294, 295) (DB). ('28) 15 AIR 1928 Lah 943 (944).

11. † ('39) 26 AIR 1939 Sind 96 (97) : ILR (1939) Kar 499 (DB).

12. ('39) 26 AIR 1939 Nag 3 (4) : ILR (1939) Nag 355. (More so when not used for agriculture but for driving flour mill.)

13. † ('21) 61 Ind Cas 777 (778) (All).

14. ('07) 1907 Pun Re No. 82, p. 406. (Case governed by Civil Procedure Code and the Punjab Land Revenue Act.)

15. ('21) 61 Ind Cas 777 (777) (All).

16. ('83) 10 Cal 39 (40) (DB). (Execution Court only can decide the point.)

17. ('20) 7 AIR 1920 Sind 14 (15) : 13 Sind L R 210 (DB).
('83) 10 Cal 39 (40) (DB).
('21) 61 Ind Cas 777 (778) (All).

18. ('15) 2 AIR 1915 Mad 320 (321) (DB).

Note 10

1. ('41) ILR (1941) Lah 441 (447).
('32) 19 A I R 1932 All 508 (508) : 54 All 736 (DB).

2. ('42) 29 AIR 1942 Mad 375 (375).
('41) 28 AIR 1941 Oudh 395 (398).
('39) 26 AIR 1939 Lah 40 (41).
('38) 25 AIR 1938 Lah 72 (72) : I L R (1938) Lah 374. ('Agriculturist' means person who carries on and makes living by tillage and not mere owner of land.)
*('37) 24 AIR 1937 Mad 551 (553) : I L R (1937) Mad 777 (FB). (The test is not whether agriculture is the sole, main, chief or principal source of his income.)
('35) 22 AIR 1935 All 448 (448) (DB).
('23) 10 AIR 1923 Bom 12 (13) (DB). (Case decided under Dekkhan Agriculturists' Relief Act, Sec. 2.)
('33) 20 AIR 1933 Oudh 79 (79). (Patwari is Government servant and not agriculturist.)
('27) 14 AIR 1927 All 601 (603). (Obiter.)
('16) 3 AIR 1916 Cal 891 (891) (DB). (Means common agriculturist such as lives in this country.)
('17) 4 AIR 1917 All 427 (428) (DB).
('97) 1897 Pun Re No. 47, p. 212. (Mere owner of land not an agriculturist.)
('28) 15 AIR 1928 Lah 132 (133).
('25) 12 AIR 1925 All 432 (433) (DB).'
('16) 3 AIR 1916 All 332 (332). (Person owning 20 bighas and tenant of 50 bighas and whose chief occupation is agriculture is an agriculturist.)
[*See* ('38) 25 AIR 1938 Nag 366 (367) : I L R (1938) Nag 461 (DB). (Agriculture need not be the sole means of livelihood.)
('32) 19 AIR 1932 Oudh 76 (76) (DB).
('88) 12 Bom 363 (365) (DB). (Exemption limited to agriculturists in the strict sense and in that sole character.)]

3. See cases in foot-notes (4) and (5).

4. (1900) 13 C P L R (30) (32).

wages by cultivating the land of his employer.[5] The test is, in each case, what is the *chief source of his livelihood.*[6] If it is other than by *cultivation* of land he is not an agriculturist though he may also cultivate lands.[7] Thus, a large landed proprietor or zamindar is not an agriculturist even though his sole income is from land, unless his chief source of income is by cultivating lands either personally or through servants.[8]. The *onus* lies on the person claiming the exemption to establish that his chief source of livelihood is by cultivation of land.[9] The Nagpur High Court[10] has expressed the view that the question whether a person is an agriculturist or not is not a question turning on the source of the income or livelihood but on the nature of the employment or *occupation* and that the sole test for determining whether a person is an agriculturist or not is whether his occupation is that of a person cultivating the soil either personally or through servants whose activities he directs. The Allahabad High Court has also held in the undermentioned case[11] that the term 'agriculturist' in clause (c) refers to an *occupation*. The Lahore High Court has, in a Full Bench decision,[12] held that the true test is whether a man *personally* engages himself in tilling the soil and whether this occupation is essential to his maintenance. Such was the old law in the Punjab. But now see sub-s. (4) of the section as amended by the Punjab Relief of Indebtedness Act, VII of 1934.

A person who lets out his land to another for cultivation, reserving either money or produce as rent is not an agriculturist,[13] the reason being that in such a case neither

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5. ('38) 25 AIR 1938 Nag 366 (369) : I L R (1938) Nag 461 (DB).
† ('17) 4 AIR1917Bom253(253) : 41 Bom 475 (DB).
6. ('27) 14 AIR 1927 Mad 342 (343) (DB). (Chief means and not simply one means determines profession.)
('31) 18 AIR 1931 Nag 8 (9) : 26 Nag L R 295. (Substantial portion of livelihood by cultivation though some portion by skilled labour.)
† ('31) 18 AIR 1931 All 20 (20). (Main source of livelihood to be agriculture.)
[But see ('28) 15 AIR 1928 Nag 23 (24). (Where this proposition is doubted.)]
7. ('40) 27 AIR 1940 Cal 5 (6).
('39) 26 A1R 1939 Lah 537 (537). (Person neither tilling soil with his own hands nor maintaining himself mainly on agriculture is not agriculturist.)
('36) 23 AIR 1936 Lah 532 (533).
('36)23 AIR 1936 Pesh 151 (152). (Person living upon trade — Pleasure garden appurtenant to house — House and garden are not exempt from attachment.)
('35) 22 AIR 1935 All 292 (292). (The cultivation of land by hired labourers by a person who has a different occupation cannot constitute that person an agriculturist.)
† ('35) 22 AIR 1935 All 448 (449) (DB).
('25) 12 AIR 1925 Oudh 365 (365).
('21) 63 Ind Cas 681 (682) (DB) (Cal).
[*See also* ('40) 42 Pun L R 261 (263).]
8. ('39) 26 AIR 1939 Lah 40 (41).
('38) 25 AIR 1938 All 85 (86). (Judgment-debtor having two sources of livelihood, zamindari and cultivation—Zamindari main source—Judgment-debtor is not agriculturist.)
('38) 25 AIR 1938 Mad 922 (923).
† ('26) 13 AIR 1926 Mad 350 (351) : 49 Mad 227 (DB). (Large landed proprietor.)
('32) 19 AIR 1932 Oudh 76 (76) (DB). (Do. A I R 1926 Mad 350 : 49 Mad 227 followed.)
('13) 35 All 307 (308): 19 Ind Cas 125 (125) (DB). (This was however doubted in A I R 1928 All 211 by Ashworth, J., sitting as a single Judge.)
('27) 14 AIR 1927 All 601 (603).
('17) 4 AIR 1917 All 427 (428) (DB).
[*See also* ('37) 24 AIR 1937 Mad 551 (553): ILR 1937 Mad 777 (FB). (Dissenting from observations of Coldstream J. in AIR 1936 Lah 737.)]
[But see ('42) 29 AIR 1942 Pesh 65 (66) (DB). (The lands were mainly under the cultivation of tenants but as a landlord he had to take interest in the cultivation of his land in order to get the most out of it and had also to see that his share in the produce reached him — *Held* that judgment-debtor was an agriculturist.)]
9. ('42) 29 AIR 1942 Oudh 308 (309).
('41) 28 AIR 1941 Oudh 395 (398).
('36) 23 AIR 1936 Lah 532 (533).
('25) 12 AIR 1925 All 432 (433) (DB).
('27) 14 AIR 1927 Lah 810 (811).
('23) 10 AIR 1923 Bom 12 (13) (DB).
10. ('38) 25 AIR 1938 Nag 366 (369) : ILR (1938) Nag 461 (DB). (A person may have many occupations—If one of them is agriculture and for that purpose a house or building is occupied, protection can be claimed.)
11. ('35) 22 AIR 1935 All 292 (292). (The cultivation of land by hired labourers by a person who has a different occupation cannot constitute that person an agriculturist.)
12. ('39) 26 AIR 1939 Lah 388 (393) : ILR (1940) Lah 23 (FB).
13. ('38) 25 AIR 1938 Nag 366 (369) : ILR (1938) Nag 461 (DB). (Overruling AIR 1920 Nag 45 : 16 Nag L R 89 and AIR 1927 Nag 374.)
[But see ('42) 29 AIR 1942 Cal 425 (425) (DB). (Occupancy raiyat who has got about 20 or 25 bighas of land which he gets cultivated under the bhag system and whose other income derived from Zemindary properties is only Rs. 25, is an agriculturist within the meaning of S. 60(1)(*c*).)

his occupation nor the chief source of his livelihood will be the *cultivation* of land. A person, however, does not cease to be an agriculturist by the mere fact that he has obtained permission to build houses on a portion of the land which was formerly his occupancy tenancy,[14] or because he has turned an Akali.[15] Nor does the fact that a person owns a vast extent of land which he cultivates himself or through servants make him any the less an agriculturist.[16]

The house of an agriculturist is exempt both from attachment and sale. Hence, where a judgment-debtor is not an agriculturist at the date of the attachment of his house but by a change of circumstances becomes one subsequently and is an agriculturist at the time of the proceedings for the sale of the house, the house cannot be sold in execution.[17]

Where a person is proved to be an agriculturist, the houses and other buildings belonging to and occupied by him are exempted from attachment.[18] The exemption from attachment under this clause depends upon the property being that of an agriculturist at the time when the decree-holder seeks to execute the decree against it. Thus, where the decree-holder seeks to attach a dwelling-house belonging to the deceased debtor in the hands of his legal representative, the legal representative can claim exemption if he occupies the same as an agriculturist.[19] But the Lahore High Court has held that the applicability of this clause depends on the status of the original judgment-debtor and not of the legal representative against whom execution may be taken out.[20] (See also Note 7a.) Where an agriculturist mortgages his house with possession to another but is in occupation as a tenant under the mortgagee, there is a conflict of decisions as to whether such occupation comes within this clause. It has been held by the Oudh Chief Court that this clause will not apply to such cases, the reason given being that the clause contemplates occupation by an agriculturist as *owner* and not as tenant.[21] A contrary view has been taken by the Lahore High Court.[22] The words "occupied by" mean living in or using for agricultural purposes.[23] It is not necessary therefore that the house should

('30) 17 AIR 1930 Lah 191 (191). (In this case it was held that the judgment-debtors who had for years been tilling their land could not, by reason of their temporary letting out of the land, be considered to have lost their status as agriculturists.)]

14. ('32) 19 AIR 1932 All 499 (499) (DB).

15. ('25) 12 AIR 1925 Lah 331 (331).

16. ('38) 25 AIR 1938 Nag 366 (369): ILR (1938) Nag 461 (DB).
[*See* ('36) 23 AIR 1936 Rang 215 (215) (DB). (The mere fact that the judgment-debtor owns 150 acres of land makes no difference when there is evidence to the effect that he cultivates 25 acres, while the rest of the land is cultivated by his son who devotes all the profits to paying off his father's debts—That does not render the judgment-debtor a zamindar or a rent receiving landlord.)]

17. ('38) 25 AIR 1938 All 85 (86).
('32) 19 AIR 1932 All 499 (499) (DB).

18. ('42) 29 AIR 1942 Mad 375 (375).
('36) 23 AIR 1936 Bom 315 (319) (DB). (House should be in actual occupation.)
('17) 4 AIR 1917 All 10 (11) : 39 All 120 (DB).
('32) 19 AIR 1932 All 499 (500) (DB).
† ('33) 20 AIR 1933 Nag 80 (81) : 29 Nag L R 106 (All the buildings are exempt even though a portion of the building is enough to enable the judgment-debtor to earn his livelihood as an agriculturist.)
('24) 11 AIR 1924 Lah 226 (227).
[*See* ('33) 20 AIR 1933 Lah 1010 (1010). (House occupied by insolvent agriculturist does not vest in Official Receiver.)]
[*See also* ('33) 20 AIR 1933 Rang 227 (229) : 11 Rang 372 (FB). (Occupation must be in good faith and for purposes of agriculture.)]

19. † ('83) 7 Bom 530 (532) (DB).
('32) 19 AIR 1932 All 508 (508) : 54 All 736 (DB).
('28) 15 AIR 1928 All 211 (212).

20. ('43) 30 AIR 1943 Lah 19 (21, 22) : I L R (1943) Lah 242 (FB).
('38) 25 AIR 1938 Lah 459 (460).
('38) 25 AIR 1938 Lah 608 (609) (DB).
[*See also* ('36) 23 AIR 1936 Lah 895 (896). (Deceased debtor not agriculturist—Property attached during his lifetime—Legal representative not entitled to protection although himself an agriculturist.)]
[But see ('40) 27 AIR 1940 Lah 320 (320): I L R (1941) Lah 588 (DB). (Decree against non-agriculturist legal representative—Original debtor an agriculturist—Property is liable to attachment—Affirming AIR 1939 Lah 556.)]

21. ('36) 23 AIR 1936 Oudh 155 (156.)

22. ('38) 25 AIR 1938 Lah 736 (737).
[*See also* ('33) 20 AIR 1933 Lah 1010 (1010).]

23. ('42) 29 AIR 1942 Mad 375 (375).
('42) 29 AIR 1942 Oudh 308 (309). (Parcha Khatauni is not sufficient to prove that objector occupies house as agriculturist.)

be the *dwelling-house* of the agriculturist provided it is "occupied by" him as an agriculturist.[24] Thus, the town residence of an agriculturist is not exempt from attachment,[25] but it will be so exempt, if he takes his cattle there and spends his nights there, even though he has a house in the vicinity of his lands.[26]

But it is only the *house* or other *building* with its appurtenances that is exempted from attachment.[27] A *vacant site* is not exempted from attachment even though used by an agriculturist for storing manure and fodder.[28] (But see as regards Punjab, the amendment of the section by S. 35 of the Punjab Act VII of 1934.) A house or building occupied by an agriculturist will be exempt from attachment, even if the house is in a dilapidated condition unless the owner is proved to have no intention to rebuild.[29]

A property which is *not necessary* for agricultural purposes is not exempt from attachment, though occupied by the agriculturist.[30]

It has been seen in Note 3 that this section does not apply to mortgage decrees. Where, therefore, the house of an agriculturist is specifically mortgaged by him, the house can be sold in execution of the mortgage decree,[31] unless it is appurtenant to an agricultural holding which is not transferable by law.[32]

It has been held by a Full Bench of the Allahabad High Court that where an ancestral house is sold in execution of a decree against a Hindu father and the objection

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('42) 55 Mad L W 634 (635).
('41) 28 AIR 1941 Pesh 68 (69). (By the deliberate use of the two words "houses and buildings" in S. 60 (1) (c) the Legislature meant that not only the residential house lived in by the agriculturist but also the other buildings occupied by him should be exempt. There is nothing in S. 60 (1) (c) to show that when occupying his residential quarter the agriculturist should also put it to some other agricultural use for enabling him to keep it safe from his creditors.)
('38) 25 AIR 1938 Lah 459 (460).
('38) 25 AIR 1938 Nag 366 (367) : I L R (1938) Nag 461 (DB). (If buildings are occupied by a farmer when he is farming a big farm they do not cease to be occupied by him as an agriculturist simply because his farm shrinks to more modest proportions, if the various parts are in actual use for agricultural purposes. AIR 1919 Nag 54: 15 Nag L R 83 followed.)
('37) 24 AIR 1937 Lah 113 (114). (Not used for agricultural purposes—No exemption).
('37) 24 AIR 1937 Lah 200 (201).
† ('36) 23 AIR 1936 Rang 215 (216) (DB).
('35) 22 AIR 1935 Nag 59 (60).
('35) 22 AIR 1935 Lah 894 (895). (House used *bona fide* for agricultural purpose—Mere fact that he has open sites for agricultural purpose does not deprive him of the exemption.)
('34) 21 AIR 1934 Lah 614 (615).
('30) 17 AIR 1930 Lah 1034 (1035) : 12 Lah 367 (DB).
('34) 147 Ind Cas 676 (676) (Lah).
('26) 13 AIR 1926 Lah 230 (230, 231).
24. ('19) 6 AIR 1919 Nag 54 (55): 15 Nag L R 83.
('27) 14 AIR 1927 Lah 66 (66). (House owned and occupied by him as such only is exempted.)
† ('09) 1909 Pun Re No. 65 p. 214: 2 Ind Cas 983 (983). (Unused khurli attachable.)
25. ('35) 22 AIR 1935 Pat 496 (497) (DB).
('05) 7 Bom L R 685 (686) (DB).
('34) 21 AIR 1934 Lah 614 (615). (House used as shop where liquors were sold—Not exempt.)
† ('18) 5 AIR 1918 All 250 (251.)
26. ('26) 13 AIR 1926 Lah 230 (230).
('30) 17 AIR 1930 Rang 129 (129) : 7 Rang 766. (House occupied by him in village and also hut in field, both are exempted.)
27. See cases in foot-note (28).
('27) 14 AIR 1927 All 214 (214). (House in ruins can hardly be called a house.)
28. ('02) 1902 Pun Re No. 59, p. 221.
('17) 4 AIR 1917 Lah 21 (22). (House does not include vacant site.)
29. ('28) 15 AIR 1928 Nag 23 (23). (Before such a house is liable to attachment, it must be proved that there is no intention to re-construct it or that it has been abandoned.)
30. ('29) 16 AIR 1929 Lah 181 (182). (Property more than sufficient.)
('34) 21 AIR 1934 Lah 163 (169). (Two houses of agriculturist attached — Finding that one is sufficient for occupation for agricultural purposes —Other held to be attachable.)
31. ('79) 4 Bom 25 (26) (DB).
('89) 1889 Pun Re No. 1, p. 1. (Property not extra commercium.)
('11) 9 Ind Cas 825 (825) (DB) (All).
† ('11) 34 All 25 (28, 29, 30) (FB).
✠ ('24) 11 AIR 1924 All 328 (336) : 46 All 489 (FB).
('15) 2 AIR 1915 All 459 (459).
[*See also* ('38) 25 AIR 1938 Nag 544 (544). (Agriculturist mortgaging his house—Protection is waived.)]
32. ('15) 2 AIR 1915 All 459 (459).
('12) 34 All 25 (30) (FB).
† ('19) 6 AIR 1919 All 222 (223) (DB).
('09) 1 Ind Cas 362 (363) (DB) (Cal). (Homestead in town of Comillah is not transferable in law.)
('11) 33 All 136 (138) : 9 Ind Cas 931 (931) (DB).
[But see ('41) 28 AIR 1941 Pesh 53 (55) (DB).]
Also see Note 5.

by him under this clause is dismissed for default the sale is binding on his minor sons. A suit, therefore, by his sons to restrain the decree-holder from interfering with their possession of the house is not maintainable.[33]

Under S. 266 of the old Code only the *materials* of a house occupied by an agriculturist were exempted from attachment.[34] But it was held that even a *house* could not be attached if it was occupied by an agriculturist as such.[35] The present section has now been drafted in conformity with this view.

Punjab Amendment. — The section has been extensively amended in the Punjab by S. 35 of the Punjab Relief of Indebtedness Act VII of 1934. These amendments are reproduced immediately below the principal section. It will be seen that some of the main amendments concern the exemption referred to in this clause. The decisions bearing on this portion of the amendments are noted in the foot-note below.[36]

11. "Books of account" — Clause (d). — Under the Code of 1859 there was no express provision exempting account books from attachment. But it was held by the Courts, applying the Common Law rule of exemption, that such books were not saleable property and could not be seized in execution.[1] It was, however, held that the Court could require the judgment-debtor to produce them in Court.[2] The provision exempting books of account from attachment and sale was introduced in the Code of 1877, and is now incorporated in clause (d) of this section.

12. Right to sue for damages—Clause (e). — It has been seen in Note 4 that a mere right to sue is not 'property' at all and cannot be attached and sold in execution.[1] It follows that a mere right to sue for damages cannot be attached and sold[2]

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33. ('39) 26 AIR 1939 All 399 (400) : I L R (1939) All 602 (FB). (Karta of joint family represents interests of all members. AIR 1930 All 727 overruled.)
34. ('82) 1882 All W N 13 (13) (DB).
35. ('83) 7 Bom 530 (531) (DB).
36. ('43) 30 AIR 1943 Lah 19 (20, 21, 22) : I L R (1943) Lah 242 (FB). (Residential house of insolvent vesting in Official Receiver — Before sale cl. (ccc) coming into force — Receiver cannot sell house — Mortgage of residential house executed by insolvent annulled by Insolvency Court before proviso to cl. (ccc) came into force—Proviso does not apply.)
('42) 29 AIR 1942 Lah 88 (89). (S. 60 (1) (cc)— Words "belonging to agriculturist" qualify "open spaces or enclosures"—S. 60(1)(cc) exempts all milch animals whether belonging to agriculturist or not.)
('42) 29 AIR 1942 Lah 102 (103-105) : I L R (1942) Lah 349 (FB). (S. 60 (1) (ccc) is not retrospective —It does not apply to attachment or sale effected before it came into force—Fact that sale was not confirmed is immaterial—Word "sale" in S. 60(1) (ccc) means sale as at conclusion of auction and not as confirmed by Court.)
('41) I L R (1941) Lah 441 (444). (Onus of proving facts necessary for the exemption under S. 60 as amended by S. 35 of the Punjab Relief of Indebtedness Act lies on the judgment-debtor for two reasons (1) the burden of proving an exemption is generally on the persons seeking to prove the exemption; (2) the judgment-debtor has special knowledge of the circumstances.)
('39) 26 AIR 1939 Lah 50 (51). (Judgment-debtor's house lent to and occupied by his sons who are independent proprietors living apart held not exempt from attachment.)
('38) 25 AIR 1938 Lah 459 (460). (Property validly and legally vested in Official Receiver in 1933 —Amendment coming into force in 1935 does not divest him of such property — Succession opening out long after vesting of property—Legal representatives can claim no exemption.)
('37) 24 AIR 1937 Lah 100 (101). (The effect of the amendment of S. 60, by the Punjab Relief of Indebtedness Act, is that if a house is reserved for the personal occupation of the judgment-debtor, then it is saleable only if it has remained unoccupied for more than a year; otherwise only a house actually occupied by the judgment-debtor is exempt.)
('43) 30 AIR 1943 Lah 170 (175) (FB). (Amendment by Act XII of 1940 introducing clause (ccc) of the proviso is not retrospective and does not affect attachment of property already made before the coming into force of the amendment : A I R 1937 Lah 560 and AIR 1939 Lah 168, Overruled.)

Note 11

1. (1865) 3 Bom H C R O C 42 (43).
2. ('71) 3 N W P H C R 334 (335) (DB).
Also see O. 21 R. 41, Note 5.

Note 12

1. (1865) 3 Suth W R Misc 18 (18) (DB).
('70) 14 Suth W R 152 (153) (DB). (Right to sue to set aside a sale.)
('74) 6 N W P H C R 95 (97). (Right to sue for damages.)
(1865) 3 Suth W R Misc 16 (16) (DB). (Right to appeal.)
2. † ('35) 22 AIR 1935 Nag 135 (137) : 31 Nag L R 235.
('25) 12 AIR 1925 Sind 98 (99). (Damages for breach of contract.)

and if sold, the purchaser will not get any right or title thereby.[3] It has, however, been held by the Sind Judicial Commissioner's Court that the words 'a mere right to sue for damages' are restricted to damages arising from bodily or mental suffering or injury to the person or reputation of the debtor and not to damages for breaches of *contract*.[4] The case was one under the Insolvency Act and the question was whether a right to sue for damages for breach of contract vested in the Official Receiver. It is submitted that the decision must be regarded as being applicable only to the facts of the particular case and cannot be taken to lay down the correct law as to the interpretation of this clause.

A right to claim mesne profits for wrongful possession is a right to sue for damages and cannot be attached.[5] Where, however, a *decree* has been passed awarding damages, it can be attached.[6]

A right to get a reconveyance and possession of property which has been sold with an agreement of reconveyance is *property* and is attachable in execution.[7]

13. Right of personal service — Clause (f).—A right of personal service cannot be attached and sold in execution of a decree, though private alienations thereof are not absolutely prohibited.[1] Thus, the right of a *gangaputra* to receive offerings from pilgrims on the banks of the Ganges is a right of personal service and cannot be attached and sold in execution.[2] Similarly, a *vritti* which is a priestly office by virtue of which certain personal services are performed on behalf of pilgrims,[3] or a *birt mahabrahmani* or *birt jajmani*, which is a right to officiate at the funeral ceremonies of Hindus dying within a particular locality,[4] cannot be attached and sold. But the interest of an *utpat* (priest officiating in the Pandharpur temples) in the net balance of the offerings to the deity is not exempt from attachment and sale.[5] *Jatri bahi* which is a list of the names and addresses of pilgrims who are the clients of a Gayawal judgment-debtor and which can be used only by him in order to perform personal service to the pilgrims cannot be attached and sold in execution.[6]

A right to receive the offerings made at a temple is liable to attachment and sale in execution when such a right is independent of an obligation to render services of a personal nature such as officiating at the worship.[7]

Where it is shown that there is a custom to transfer by private treaty *palas* for worship of certain deities, there will be no objection to transfer the same by execution, limiting the class of persons entitled to bid and eventually purchase the property.[8]

('31) 18 AIR 1931 Oudh 398 (399) (DB). (Possible right on a contract to be decided in a pending appeal.)
('19) 6 AIR 1919 Mad 864 (864) (DB). (Right of mulgani tenant in Suth Kanara to compensation for improvement.)
3. ('25) 12 AIR 1925 Sind 98 (99). (Since sale becomes invalid.)
4. ('24) 11 AIR 1924 Sind 89 (91) : 17 Sind L R 52. (Liquidated damages, if attachable—*Quære*.)
[*See also* ('25) 12 AIR 1925 Sind 159 (162) : 10 Sind L R 286.]
5. ('83) 9 Cal 695 (697) (DB).
6. ('71) 15 Suth W R 34 (34) (SB). (See "Other saleable property".)
7. † ('21) 8 AIR 1921 Mad 498 (502) (DB).
[*See also* ('87) 14 Cal 241 (244) (DB).]

Note 13

1. ('36) 23 AIR 1936 Pat 10 (10) (DB).
† (89) 23 Bom 131 (135). (Also opposed to Hindu law and public policy.)
2. ('29) 16 AIR 1929 Oudh 444 (445) : 5 Luck 206 (DB). (But right of occupation of particular spot attachable.)
3. ('86) 10 Bom 395 (397, 398) (DB).
('88) 12 Bom 366 (367) (DB). (Under the Hindu law, vritties are to be regarded as generally extra commercium.)
[*See* ('84) 8 Bom 185 (187) (DB). (But if the decree directs the sale of vritti, the execution Court cannot go behind it, but must sell it.)]
4. † ('18) 5 AIR 1918 All 380 (380). (Although in Hindu law such a right is immovable property.)
('71) 16 Suth W R 171 (171) (DB).
('89) 1889 All W N 169 (169).
5. ('27) 14 AIR 1927 Bom 143 (144) (DB). (Should be sold to that class only.)
Also see Note 5.
6. ('22) 9 AIR 1922 Pat 556.(556): 1 Pat 619 (DB).
7. ('36) 23 AIR 1936 All 131 (133) : 58 All 457 (DB). (Right of a panda to receive offerings.)
Also see Note 5.
8. ('35) 22 AIR 1935 Pat 131 (132).

Money due to the firm of managing agents of a company from the company is not a right to personal service.[9]

14. Stipends and gratuities allowed to pensioners— Clause (g). — The word "pension" in this clause must be construed as having the same meaning as it has under S. 11 of the Pensions Act (XXIII of 1871).[1] Under that section two essentials are necessary in order to constitute a grant a 'pension'—

(1) it must be a *periodical* allowance, and

(2) it must be a grant, not in respect of any *right, privilege, perquisite* or *office*, but on *political considerations* or on account of *past services* or *present infirmities* or as a *compassionate allowance.*[2]

A grant of a sum of money or land revenue[3] or of a zamindary[4] or other land[5] is not a pension, for it is not a *periodical* allowance. A grant of an annual sum of money made by Government as *compensation* for resumption of the grantee's land is not a pension,[6] for it is not granted on *political* grounds or for *past services* or *present infirmities* or as a *compassionate allowance.* Similarly, a *toda giras haq* is not a pension as it is a grant in respect of a right, privilege, perquisite or office.[7] A *malikana* allowance payable from a Government treasury is in the nature of a pension and cannot be attached in execution of a money decree.[8]

A pension granted by the Government by virtue of a treaty obligation contracted with another State[9] or for other reasons of State[10] is a *political pension* and is exempt

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9. (41) 28 AIR 1941 Cal 240 (241).

Note 14

1. ('14) 1 AIR 1914 Cal 765 (766) (DB).
('09) 31 All 382 (384) (DB).
† ('04) 26 All 617 (621) (DB).
('31) 18 AIR 1931 P C 160 (161) : 59 Cal 1 : 58 Ind App 215 (PC). (26 All 617 approved — The word has the same meaning it has in S. 6 of the Transfer of Property Act.)
[But see ('37) 24 AIR 1937 Lab 178 (179) : ILR (1937) Lah 415 (DB). (Not permissible to refer to the various provisions of the Pensions Act to find out the true import of the word "pensions" in the Civil Procedure Code.)]
2. ('37) 24AIR 1937 Nag 202 (203). ("Pension" implies periodical payments—It does not apply to rent of property drawn by a person as limited owner thereof.)
✠('80) 4 Bom 432 (436) (SB). (*Toda giras haq* is not a pension.)
('34) 21 AIR 1934 Lah 881 (881). (Compensation to dethroned Princes is political pension and hence Ala Jagirs in Ambala District are political pensions and thus exempt from attachment.)
('14) 1 AIR 1914 Cal 765 (766) (DB).
3. ('09) 4 Ind Cas 1057 (1057) (DB) (Mad).
('30) 17 AIR 1930 Nag 134 (134). (Sum payable by Government as compensation in respect of jagir land taken over by Government.)
† ('30) 17 AIR 1930 Lah 816 (817) (DB). (Grant of land revenue—Not pension.)
('02) 1902 All W N 161 (162) (DB).
4. ('04) 26 All 617 (621, 622) (DB).
5. ('40) 27 AIR 1940 All 373 (377) : ILR (1940) All 603 (FB). (Right to lakhiraj or revenue-free land—No pension.)
('38) 25 AIR 1938 Nag 269 (270) : ILR (1939) Nag 679. (Grant of fields rent-free to grantee for his maintenance and in consideration of his rights as Deshmukh, Deshpandia and Sirmukaddam — No pension.)
('37) 24 AIR 1937 Nag 202 (203). (Grant of inam lands for holding office of Deshpandia liable to attachment.)
('17) 4 AIR 1917 P C 94 (95) (PC). (Land granted in lieu of pension.)
† ('09) 31 All 382 (384, 386) (DB).
('14) 1 AIR 1914 All 475 (476) : 36 All 318 (DB). (Grant of land for political considerations to *A* for life and as an absolute estate to *A*'s descendants.)
('31) 18 AIR 1931 PC 160 (161) : 58 Ind App 215: 59 Cal 1 (PC). (Rents from properties granted by Government for maintenance of dignity of donee— No pension.)
6. ('04) 8 Cal W N 665 (667) (DB).
7. † ('76) 1 Bom 203 (207) DB).
('80) 4 Bom 432 (436) (SB).
('09) 33 Bom 258 (263) : 2 Ind Cas 271 (272) (DB). (Case under Toda Giras Allowance Act VII of 1887.)
[*See* ('92) 16 Bom 731 (734, 735). (DB). (Case of desaigiri hak — See Pensions Act, Ss. 4 and 11. Similarly a Babuana allowance granted in lieu of maintenance is not inalienable during the lifetime of grantee.)]
8. ('12) 13 Ind Cas 194 (194) (DB). (All).
[*See also* ('78) 3 Cal 444 (416) (DB). (Specific amount then due was held attachable.)]
9. † ('90) 18 Cal 216 (223) : 17 Ind App 181 (PC).
10. ('37) 24 AIR 1937 Lah 178 (179) : ILR (1937) Lah 415 (DB). (Jagir that was realized in the shape of an assignment of land revenue and was granted in lieu of the relinquishment of the sovereign rights, with a view to retain their alliance or goodwill, was held to be 'pension' within the meaning of clause (g). Affirming 38 Pun L R 531.)
('03) 26 Mad 423 (427) (DB).

from attachment under this section.[11] Thus, a *wasika* allowance which is guaranteed by the British Government by the Treaty of the 17th August 1825 in consideration of the loan of 1825 by the then Ruler of Oudh, is a political pension.[12] Similarly, the pensions granted by the Government to the descendants of the families who at one time occupied the throne of Ceylon,[13] or to the members of the Mysore family[14] or to the descendants of the Nawab of Carnatic,[15] or pensions granted by a foreign State by arrangement with the Government of India to a deposed Maharaja,[16] are all political pensions.

A *jahgir* may be a political pension,[17] but there is no initial presumption that it is so[18] and the Court should inquire, in each case, into the nature of the *jahgir* and see whether it is liable to attachment.[19] Where the *jahgir* is in the nature of a pension it will be exempt from attachment.[20]

Political pensions and other Government pensions are exempt from attachment so long as they are in the hands of the Government, notwithstanding the fact that the amounts *have become due.*[21] The character of the fund remains unchanged so long as it remains unpaid in the hands of the Government,[22] but once the money is received by the pensioner it becomes subject to all the incidents attached to his properties and can be attached like any other moneys in his hands.[23]

Pensions not granted by Government are *private pensions.*[24] These are not exempted from attachment but they are attachable only as 'debts' or as 'property belonging to the judgment-debtor.'[25] It follows therefore that they could be attached only to the extent of the sums that *have become due.*[26]

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11. ('27) 14 AIR 1927 Mad 604(606) : 50 Mad 711 (DB).

12. ('09) 12 Oudh Cas 323 (329) : 4 Ind Cas 145 (148, 155) (DB).
[*See also* ('19) 6 AIR 1919 Oudh 252 (252) : 21 Oudh Cas 329.)]

13. ('03) 26 Mad 423 (425) (DB).

14. ('67) 7 Suth W R 169 (169) (DB).

15. ('69) 4 Mad H C R 277 (279) (DB).

16. ('27) 14 AIR 1927 Mad 604 (606, 607) : 50 Mad 711 (DB).

17. ('88) 1888 Pun Re No. 133, p. 361.
('37) 24 AIR 1937 Lah 178 (179) : ILR (1937) Lah 415 (DB). (Jagir in shape of an assignment of land revenue.)
('37) 24 AIR 1937 Lah 211 (214). (Government granting income of certain water mills as jagir—Jagirdar leasing out water mills — Income from lease cannot be attached.)

18. ('30) 17 AIR 1930 Lah 816 (818) (DB).
† ('28) 111 Ind Cas 838 (839) (Lah).

19. ('93) 1893 Pun Re No. 47, p. 212.
('32) 19 AIR 1932 Mad 417 (417). (Jagir — Grant of land revenue—Liable.)
('88) 1888 Pun Re No. 133, p. 361. (Money paid by the lambardars of a village to a judgment-debtor due to him as jagir income may be attached.)
('04) 1904 Pun L R No. 92 p. 330 (DB). (Do.)
('14) 1 AIR 1914 Cal 765 (765) (DB). (Jagir without power of alienation — Standing crops are attachable.)
('22) 9 AIR 1922 All 429 (429) : 44 All 697 (DB). (Onus whether a pension is within S. 7 of the Pensions Act and so is attachable is on the decree-holder.)

20. ('90) 1890 Pun Re No. 137, p. 439.
(1900) 1900 Pun Re No. 35, p. 129. (But where a mortgage decree for sale of the jagir is passed it is liable to sale.)

21. † ('70) 5 Mad H C R 371 (372) (DB). (Arrears of yeomiah pension accidentally accumulated are not liable to attachment.)

22. ('03) 26 Mad 69 (71) (DB).

23. ('09) 12 Oudh Cas 323 (331) : 4 Ind Cas 145 (154) (DB).
('67) 1867 Pun Re No. 79 p. 155. (Money virtually becoming the property of the judgment-debtor and lying in deposit in the Government treasury at his call is attachable.)
('03) 26 Mad 69 (71) (DB).
[*See* ('42) 29 AIR 1942 Sind 19 (20) : ILR (1941) Kar 479 (DB). (Commutation of pension is not stipend—At least it ceases to be so after amount is paid to pensioner.)]

24. For example pensions granted by Railway Companies to their servants.
('84) 1884 Pun Re No. 58, p. 155. (Pension granted by the Mandot estate.)
('24) 11 AIR 1924 Lah 688 (688). (Gratuity granted by a university.)

25. See Note 7.

26. † ('80) 6 Cal L Rep 19 (20). (Pension granted by the Bank of Bengal.)

A *gratuity* or *bonus* allowed by the Government to its servants is exempt from attachment whether granted to a non-pensioner or to a pensioner in addition to his pension.[27]

For Notifications issued under this clause, see Appendix IV.

15. Wages of labourers — Clause (h). — The wages of labourers and domestic servants are wholly exempt from attachment.[1] A person is a 'labourer' within the meaning of this clause who earns his daily bread by personal manual labour, or in occupations which require little or no art, skill or previous education.[2] A person who spins cotton and receives wages according to the quantity spun is a 'labourer.' Similarly, coolies employed on railway or other works and paid by the number of baskets of earth carried are 'labourers.'[3]

16. Salary — Clause (i). — This clause exempts, to a partial extent, the *salaries* of persons from attachment.[1] The clause applies both to public servants and persons in private service. Under the Code of 1859 there was no exemption to any extent in regard to the salaries of public servants and the whole of such salary was attachable as a *debt* when the salary had fallen due.[2] The later Codes provided for a partial exemption of such salary but the unexempted portion could be attached.[3] A special procedure was also provided for the attachment of salaries in such cases, so that they need not be attached as *debts* after they had fallen due but could be attached in advance.[4] (See O. 21, R. 48. See also Explanation I.) The object of the provision for exemption is to enable public officers, etc., to maintain themselves and their families in a suitable manner. That the debtor is a European and that the pay is not large enough to maintain his family is, however, no ground for refusing attachment of the attachable portion of his salary.[5] For definition of "public officer," see S. 2, cl. (17). An advocate engaged by the Government on daily fees for the conduct of civil litigation on its behalf is a "public officer" within the meaning of the clause.[6]

Before the amendment of the section by Act IX of 1937 there was no provision for exempting from attachment the salary of a person in *private* employment, and hence the salary of such a person was not exempt from attachment to any extent.[7] The above Act amended the section by introducing a provision for exempting from attachment the salaries of private employees also to a partial extent. This exemption was embodied in cl. (h). Clause (i) dealt with the salaries of public servants and persons in the service of

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27. ('84) 6 All 173 (174) (DB). (Gratuity in consideration of past services.)
('82) 5 Mad 272 (273) (DB). (Bonus in addition to pension.)

Note 15

1. ('42) 29 AIR 1942 Bom 191 (193) : ILR (1942) Bom 287.
('42) 29 AIR 1942 Pat 194 (194): 20 Pat 866 (DB).
2. ('42) 29 AIR 1942 Bom 191 (192) : ILR (1942) Bom 287. (Jobber required to do personal manual labour is labourer and remuneration earned by him is "wages of a labourer".)
3. ('80) 5 Bom 132 (134) (DB).

Note 16

1. *See* ('43) 30 AIR 1943 Lah 60 (62) (DB). (For purpose of calculating the amount of the salary which may be attached one hundred rupees should first be subtracted from the total figure of the salary and half of the amount left over may be attached.)
Also see Note 2.
2. ('70) 7 Bom H C R A C 110 (111) (DB). (Prospective salary unattachable.)
('72) 18 Suth W R 124 (124) (DB). (Government Telegraph Officer.)
('75) 24 Suth W R 446 (447) (DB).
3. ('83) 6 Mad 179 (180) (DB).
('14) 1 AIR 1914 Cal 1 (2) (DB). (Officer insolvent —Attachable portion of salary vests in receiver.)
('17) 4 AIR 1917 Upp Bur 1 (1). (Half of insolvent's salary vests in receiver.)
4. ('98) 21 Mad 393 (394).
5. ('18) 5 AIR 1918 All 248 (248, 249) : 40 All 213.
NOTE : — A moiety of an insolvent's pay can be ordered to be given to the receiver for the benefit of the creditors : See AIR 1922 Mad 439 (440) (DB).
6. ('39) 26 AIR 1939 Pat 77 (80) : 17 Pat 706 (DB).
7. ('39) 26 AIR 1939 Sind 134 (135) : ILR (1942) Kar 237.

railway companies and local bodies. The proportion of the salary with regard to which exemption was given in regard to persons in private service was the same as in the case of public servants. By Act V of 1943, the provision as to the exemption of salaries contained in cl. (b) was omitted and cl. (i) was enlarged so as to include all salaries, whether of public servants or persons in private employment. This does not make any real change in the legal position. But before the amendment by Act V of 1943, the inclusion of the provision as to salaries in clause (h) gave rise to certain difficulties of interpretation. For instance, it was argued that the wages of labourers, dealt with in the same clause, were also exempt from attachment only to a partial extent. It was also argued that the word "salary" in the clause referred only to the emoluments of labourers and domestic servants. Such contentions were held untenable.[8] The present amendment makes the position quite clear on both the points.

Order 21, R. 48 does not apply to the attachment of the salary of a *private* servant. Hence, before the above amendments, it was held that such salary could be attached only as a *debt* after it had become due.[9] Explanation I to the section also shows that the attachable portion of such salary can be attached only after it has become payable.

17. Salary of army officers. — Section 4 of the Code provides that the provisions of the Code shall not affect any special or local law for the time being in force. Section 60 will not therefore apply where there is a special or local law to the contrary. Two of such enactments are —

(1) The Indian Army Act (VIII of 1911), section 120, and

(2) The Army Act, 1881 (44 & 45 Vict. Ch. 58) as amended by the Army (Annual) Act of 1895 (58 Vict. Ch. 7), sections 136, 144 and 145.

The Indian Army Act, 1911, applies only to *Indian* Officers and other persons specified in S. 2 of that Act, and it is provided in S. 120 of the Act that the pay or allowances of any person subject to the Act cannot be attached.[1]

The Army Act, 1881, applies to British Officers in His Majesty's Regular Forces including the Indian Army, and to other persons specified therein. An 'Officer' means, under that Act, a *Commissioned* Officer.[2] Thus, a First Class Warrant Officer[3] or other Non-Commissioned Officer[4] is only a 'soldier' for the purposes of that Act. Section 136 of the Act provides that the pay of an *officer* of His Majesty's Regular Forces serving in India should be paid without any deduction '*other than deductions authorised . . . . by any law passed by the Governor-General of India in Council.*' Section 60 of the Code being such a law passed by the Governor-General in Council, it was held by the High Courts of Madras[5] and Calcutta[6] and by the Court of the Judicial Commissioner of Oudh[7] that the pay of such officer could be attached as being that of a 'public officer'

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8. ('42) 29 AIR 1942 Bom 191 (193) : ILR (1942) Bom 287.
('42) 29 AIR 1942 Pat 194 (195): 20 Pat 866 (DB).
('39) 26 AIR 1939 Sind 134 (137) : ILR (1942) Kar 237. (Salary of an employee in a Bank is included in "salary.")
9. ('39) 26 AIR 1939 Cal 428 (429) : ILR (1939) 1 Cal 523 (DB).
('29) 16 AIR 1929 Nag 333 (334).

Note 17

1. ('26) 13 AIR 1926 All 122 (124) : 48 All 73 (DB). (Assistant Surgeon is warrant officer and if recruited in India is governed by the Indian Army Act and his pay is exempt from attachment under Section 120.)
('33) 20 AIR 1933 All 153 (153).
2. ('26) 13 AIR 1926 All 122 (123) : 48 All 73 (DB).
3. ('11) 14 Oudh Cas 82 (84, 85) : 10 Ind Cas 719 (720). (Military Assistant Surgeons in Subordinate Medical Department — Assistant Surgeon is warrant officer and as such is a "soldier.")
('19) 6 AIR 1919 Bom 133 (134) : 43 Bom 368.
4. ('18) 5 AIR 1918 Upp Bur 39 (40) : 3 Upp Bur Rul 20.
5. ('01) 25 Mad 402 (406) (DB).
6. † ('96) 24 Cal 102 (106).
7. ('14) 1 AIR 1914 Oudh 199 (201) : 17 Oudh Cas 99 (DB).

within the definition of S. 2 (17) of the Code. It was also held that sub-s. (2) (b) of S. 60, as it originally was, could not be taken to negative the application of S. 60 to cases coming under S. 136 of the Army Act, 1881, inasmuch as the latter section is not in conflict with section 60.[8]

The High Courts of Allahabad[9] and Bombay,[10] on the other hand, held, that sub-s. (2) (b) clearly negatived the applicability of S. 60 to such cases and that, therefore, the pay of such officers could not be attached.

By Act X of 1914, sub-s. (2) (b) of S. 60 was repealed with the result that S. 60 clearly becomes applicable to cases under S. 136, and the salary of a British Officer in an Indian Regiment can be attached in execution as provided by this clause.[11]

But S. 60 cannot prevail over other special provisions in the Army Act such as Ss. 144 and 145 relating to 'soldiers' and providing that their pay shall not be attached in execution.[12] The reason is that there is no saving in those sections, such as is found in S. 136, as to any law passed by the Governor-General in Council. By virtue of S. 4 of the Code, therefore, S. 60 cannot prevail over those special provisions.[13]

18. Pay of persons to whom the Indian Army Act, 1911, etc., apply — Clause (j).—Clause (j) originally ran as follows : "the pay and allowances of persons to whom the Indian Articles of War apply." This clause was amended into its present form by the Amending Act XXXV of 1934, S. 2 and schedule and the Government of India (Adaptation of Indian Laws) Order, 1937. (See foot-notes to section.) The Indian Articles of War which applied to soldiers and followers of the Native Army[1] have been repealed by the Indian Army Act (VIII of 1911), and the reference to the Indian Articles of War in this clause as it originally existed must be read as referring to the Indian Army Act (VIII of 1911).[2] As has been seen in Note 17, the pay of persons subject to that Act is not, in view of S. 120 of that Act, attachable in execution.

19. Compulsory deposits, etc., — Clause (k). — The words 'compulsory deposit' have been defined in S. 2 of the Provident Funds Act (XIX of 1925) as amended by Act I of 1930. The provisions of the Act have been extended to the provident fund of the Calcutta Corporation.[1] A compulsory deposit in any Government or railway provident fund is, under S. 3 of the Act, not liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred

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[*See also* ('97) 1897 Pun Re No. 59. (The moiety of the salary of an officer of a British regiment serving under the orders of the Government of India will be liable to attachment in execution.)]

8. † ('14) 1 AIR 1914 Oudh 199 (201) : 17 Oudh Cas 99 (DB). (Salary of Honoray Commissioned Officer in Indian Subordinate Medical Department *held* attachable.)

9. ('11) 33 All 529 (538, 539) : 9 Ind Cas 1023 (1025) (DB).

10. ('12) 37 Bom 26 (31) : 17 Ind Cas 13 (13) (DB).
('14) 1 AIR 1914 Bom 137 (137) : 38 Bom 667. (Case under S. 60 as it was originally, before the amendment by Act X of 1914, repealing sub-s. (2) (b).)

11. ('17) 4 AIR 1917 All 315 (316) : 39 All 308 (DB).
('33) 20 AIR 1933 All 597 (599) : 55 All 648 (DB).
†('18) 5 AIR 1918 Bom 32 (33, 38) : 43 Bom 716.

12. ('11) 14 Oudh Cas 82 (85) : 10 Ind Cas 719 (720).
† ('33) 20 AIR 1933 Bom 185 (187) (DB).
('34) 21 AIR 1934 Bom 31 (32) (DB).
('10) 1910 Pun Re No. 10.
('19) 6 AIR 1919 Bom 133 (134) : 43 Bom 368 (DB). (Case falling under S. 145 of the Army Act —Pay of soldier not to be attached in execution of decree for alimony and maintenance.)
[*See also* ('38) 25 AIR 1938 Sind 237 (239) : ILR (1939) Kar 160 (DB). (The pay of a soldier of His Majesty's Regular Forces, subject to the Army Act of 1881 is not liable to attachment under a decree of the Civil Court.)
('37) 24 AIR 1937 All 129 (141) : ILR (1937) All 350 (FB). (Pay of Military Assistant Surgeon is not attachable.)]

13. ('19) 6 AIR 1919 Bom 133 (134) : 43 Bom 368 (DB).
('33) 20 AIR 1933 Bom 185 (187).

Note 18

1. *See also* ('82) 1882 Pun Re No. 41. (Native grass-cutters attached to Battery of Artillery of British Army while not on active service — Pay not exempt from attachment.)

2. ('26) 13 AIR 1926 All 122 (124) : 48 All 73 (DB).

Note 19

1. ('08) 35 Cal 641 (646). (See also Notification in Gazette of India, dated 8th July 1902.)

by the subscriber or depositor.[2] This is so even if the subscriber or depositor may have ceased to be in service,[3] and so long as the fund remains in the hands of authorities managing the fund.[4] But where once the amount is *paid out* to the person entitled to it, the exemption ceases and it can be attached in execution.[5] Provident fund money sent by money-order to the judgment-debtor is attachable even when it is in the hands of the post office, as the post office in such a case is the *agent* of the judgment-debtor.[6]

The amount of subscription payable out of the salary of a judgment-debtor to the provident fund is a compulsory deposit and is, therefore, exempt from attachment under this clause.[7] But the recoveries of advances made from the provident fund are not so exempt inasmuch as they are not *deposits* although they may be compulsory deductions; nor do such recoveries fall under the expression "other sums" occurring in this clause.[8]

As has been seen in Note 7a, the exemptions contained in the clauses in sub-s. (1) are cumulative. Where, therefore, a certain amount is deducted monthly from the salary of a judgment-debtor as a subscription to the provident fund such amount will be exempt from attachment *in addition* to the amounts that will have exemption under other clauses such as cls. (h) and (i).[9] Instalments due for advance taken from the provident fund *belong* to the judgment-debtor though he may not have disposing power over them and must be considered as part of his salary in determining whether such salary is attachable or not.[10]

A creditor seeking to attach a provident fund amount due to his judgment-debtor must show that the provident fund rules allow such attachment.[11]

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2. ('37) 24 AIR 1937 Pat 22 (23) : 15 Pat 779 (DB). (A provident fund maintained by the authorities of an aided college, provided it is constituted by the authority of Government, is a Government provident fund as defined by the Provident Funds Act.)
('23) 10 AIR 1923 Cal 585 (587) : 50 Cal 347 (DB). (State Railway Provident Fund.)
('34) 21 AIR 1934 Lah 153 (154).
('05) 29 Bom 259 (262, 263) (DB). (Money in a provident fund under the Act is compulsory deposit and is exempt from attachment.)
('20) 7 AIR 1920 Cal 305 (307) : 46 Cal 962. (Servant in service or not, dead or alive, his share unattachable.)
('24) 11 AIR 1924 Pat 524 (525) : 3 Pat 74 (DB). (Case of optional subscriber who cannot under rules demand the payment of his deposit at his option.)
† ('29) 16 AIR 1929 All 417 (418) : 51 All 845. (Compulsory deposit made in General Provident Fund.)
† ('20) 7 AIR 1920 Bom 58 (60) : 44 Bom 673 (DB). (Receiver has no claim on the money drawn.)
('24) 11 AIR 1924 All 68 (68):45 All 554. (Even on retirement not attachable.)
[*See* ('33) 20 AIR 1933 Rang 23 (24) : 11 Rang 116 (FB).]

3. ('29) 16 AIR 1929 All 417 (418) : 51 All 845. (Retirement.)
('24) 11 AIR 1924 All 68 (68) : 45 All 554. (Even on retirement.)
('23) 10 AIR 1923 Cal 585 (587) : 50 Cal 347 (DB). (State Railway Provident Fund.)

4. ('40) 44 Cal W N 637 (639). (Compulsory deposit continues to retain that character only so long as it remains in the hands of the provident fund trustees.)
('37) 24 AIR 1937 Pat 22 (25) : 15 Pat 779 (DB).
('35) 22 AIR 1935 Bom 396 (397) : 59 Bom 517 (DB). (The fund does not vest in the Official Receiver on the insolvency of the subscriber.)
('03) 26 Mad 440 (444) (DB).
('27) 14 AIB 1927 Oudh 22 (23): 1 Luck 313 (DB).
[But see ('03) 5 Bom L R 454 (458). (On retirement fund becomes payable at the judgment-debtor's option and so attachable.)]

5. ('42) 29 AIR 1942 Cal 292 (293). (Money kept in suspense account pending payment to depositor.)
('40) 44 Cal W N 637 (639). (Money paid to receiver.)
('35) 22 AIR 1935 Bom 396 (397) : 59 Bom 517 (DB). (After the amount standing to the credit of a subscriber is paid to him, and comes into his hands, it ceases to retain its character of a compulsory deposit and becomes his property. It is then liable to be attached in execution. For the same reason it will vest in the Official Receiver if he is adjudicated an insolvent either before or after such acquisition.)
('27) 14 AIR 1927 Oudh 22 (23) : 1 Luck 313 (DB).

6. ('16) 3 AIR 1916 All 336 (336).
7. ('39) 26 AIR 1939 Rang 432 (433): 1939 Rang L R 501.
8. ('40) 27 AIR 1940 Mad 766 (767).
9. ('40) 27 AIR 1940 Mad 766 (768).
('41) 28 AIR 1941 Pat 157 (159).
('39) 26 AIR 1939 Rang 432 (433) : 1939 Rang L R 501.
10. ('43) 30 AIR 1943 Lah 60 (61, 62) (DB).
11. ('97) 1897 All W N 88 (89) (DB).

The question whether money standing to the credit of a subscriber to the provident fund, to which the Provident Funds Act, 1925, is not made applicable, *belongs* to him and is liable to attachment even before the amount is *paid* to him, depends upon the construction of the rules governing the particular provident fund.[12]

20. Allowances of public officers, etc. — Clause (l). — Under the Code of 1882 it was held that the allowance of an officer while absent from duty stood on the same footing as his allowances while on duty so that when an officer on sick leave drew Rs. 150 as his half-pay, it was held that Rs. 75 out of it was attachable.[1] When the Code of 1908 was enacted, it was provided by cl. (h) that "allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty" were exempt from attachment so that, in the above illustration, the whole of the Rs. 150 would be exempt from attachment. By S. 2 of Act IX of 1937 the above cl. (h) has been replaced by the present cl. (l).

21. Mere expectancy or other contingent or possible right—Clause (m). — This clause declares that (1) an expectancy of succession by survivorship, or (2) other merely contingent or possible right or interest, cannot be attached in execution.[1] The right of a Hindu reversioner to succeed to the properties inherited by a Hindu widow or other Hindu woman is a mere hope or expectancy of succession and cannot be attached.[2] Similarly, the right of a son to succeed to his father's specific share of property by survivorship,[3] or the chance of Mahomedan heir-apparent to succeed to the property of the owner,[4] cannot be the subject of a sale or attachment. The interest in the pre-empted property of a successful pre-emptor who has not paid the pre-emptive price fixed by his decree is only a *contingent* right and cannot be attached under this clause.[5] Similary, the right of a Mulgeni tenant in South Canara to compensation for improvements is a contingent and inchoate right which becomes perfected only at the time of eviction.[6] But

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12. ('42) 29 AIR 1942 Sind 47 (49): ILR (1941) Kar 401 (DB). (Burmah-Shell Oil Storage and Distributing Company — Company maintaining provident fund for benefit of employees—Employee's deposit in provident fund account is his property and is debt owed by company to him—It can be attached but cannot be sold until it is at employee's disposal.)
('41) 28 AIR 1941 Rang 256 (258, 259) (DB). (Burmah Oil Subsidiary Provident Fund Trust — Judgment-debtor member of the Fund—*Held*, provident fund amount standing to his credit could not be attached in execution of decree against him — AIR 1941 Rang 239 not approved.)
('36) 23 AIR 1936 Lah 694 (695) (DB). (Amount standing to Imperial Bank employees credit in provident fund is not attachable.)
('38) 25 AIR 1938 Mad 234 (235) : I L R (1938) Mad 335 (DB). (United Planters' Association Provident Fund—Death of employee during service —Under the rules of the provident fund, contributions not attachable.)

Note 20

1. ('83) 6 Mad 179 (180) (DB).

Note 21

1. ('39) 26 AIR 1939 P C 6 (7): 32 Sind L R 963: I L R (1939) Bom 36 (PC). (Bequest of income of property to husband and wife for life — Gift over of income and corpus to children — Interest of children—Attachability during lifetime of parents —*Held* on construction of will that during lifetime of both parents, a child's interest was only contingent and not liable to attachment — Confirming AIR 1936 Sind 65: 30 Sind L R 50.)
('31) 18 AIR 1931 Oudh 398 (399) (DB). (The right of a person which might be determined in his favour with reference to an agreement in a suit pending before a Court is only a possible right and cannot be attached.)
2. ('99) 21 All 71 (80) : 25 Ind App 183 (PC). (25 Cal 778 overruled by this decision.)
2 Ind Jur (N S) 277 (FB). (Daughter's son's right to succeed the daughter to the estate of the grandfather.)
('98) 22 Bom 984 (985, 986) (DB).
('02) 29 Cal 355 (361, 363) (DB).
† ('66) 6 Suth W R 34 (34) (DB).
† ('71) 7 Beng L R 341 (345, 346) (FB). (Such a right is not property.)
('82) 10 Cal L Rep 61 (65) (PC).
('06) 29 Mad 120 (120) (DB).
3. † ('67) 8 Suth W R 253 (254) (DB).
4. ('94) 1894 Pun Re No. 68, p. 185.
('09) 1 Ind Cas 590 (591) (Cal).
('07) 31 Bom 165 (171) (DB). (It is only by an application of the principle that equity considers that done which ought to be done that such a chance can, if at all, be bound.)
5. ('06) 28 All 383 (384) (DB).
6. ('19) 6 AIR 1919 Mad 864 (864) (DB).

the interest of a coparcener in the Hindu joint family property is not a merely contingent or possible right or interest.[7]

A *vested remainder* is not a mere expectancy though liable to be displaced.[8] Thus, where A gives a certain property to B for life for her maintenance, the reversion after the life estate is a vested estate in A which can be attached and sold in execution of a decree against A.[9] In the undermentioned case[10] it was held by the Madras High Court that where a Hindu widow alienates her husband's property without legal necessity, the alienee gets an interest in the property which will last during the lifetime of the widow but that as the widow fully represents the husband's estate, the reversionary interest continues to be vested in the widow and can be attached in execution of a decree for a debt due by the husband. A vested interest does not cease to be so merely because the person in whom it is vested will be entitled to receive the property at a future date[11] or because the property is the subject of an existing suit.[12] A resulting trust is not a mere expectancy or contingency.[13] Where in execution of a mortgage decree the sale proceeds are deposited in Court pending confirmation of sale, to which the judgment-debtor does not object, the right to the surplus amount of the sale proceeds which is payable to the judgment-debtor after the confirmation of the sale is not a *contingent* interest as contemplated by this clause.[14]

22. Right to future maintenance — Clause (n). — Under this clause, a judgment-debtor's right to *future* maintenance cannot be attached in execution of a decree.[1] The reason is that such a right is a *personal* right and it is in accordance with public policy that this right which is generally created for the maintenance or personal enjoyment of the grantee, e.g., a Hindu female, ought to be inalienable.[2] Where, therefore, the

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7. ('42) 29 AIR 1942 Mad 97 (99) (DB).
8. ('36) 23 AIR 1936 Cal 802 (803) : I L R (1937) 1 Cal 583 (DB). (Life estate to widow and grant absolute of residue to daughter after widow's death — Daughter dying before widow and leaving husband — Interest of the husband is not mere expectancy and hence attachable.)
† ('08) 32 Bom 172 (177) (DB).
('91) 18 Cal 164 (177) : 17 Ind App 201 (PC). (Gift to *A* for life, then to *B*, but if *A* should have a child, the whole estate to go to *A* — Estate taken by *B* is a vested one though liable to be displaced by *A* getting a child.)
('30) 17 AIR 1930 Rang 184 (185) (DB). (Trust to *A* for life with direction to trustee to convey to *B* after *A*'s life — Interest is vested.)
[*See also* ('93) 17 Bom 503 (505, 506) (DB).
9. † ('88) 10 All 462 (466) (DB).
10. † ('16) 3 AIR 1916 Mad 347 (350) : 39 Mad 565 (DB).
11. ('43) 30 AIR 1943 P C 121 (123). (Gift to testator's wife for life and after her death to his grand-daughter *S*—Interest of latter during widow's life time is not mere contingency.)
('12) 13 Ind Cas 795 (795) (DB) (Mad). (Legacy to *A* — *A* entitled to receive it in due course of administration — *A*'s interest is a vested one from the date of bequest.)
† ('26) 13 AIR 1926 Mad 371 (373) (DB). (Present gift with payment postponed.)
12. ('73) 19 Suth W R 132 (133) (DB).
13. ('99) 1 Bom L R 303 (307).
14. ('37) 24 AIR 1937 Nag 391 (392) : ILR (1938) Nag 402.

Note 22

1. † ('37) 24 AIR 1937 Nag 202 (203). (The rule in S. 60 (1) (n) is no more than an application of the general principle that only present rights can be dealt with as property and not inchoate future rights which have not accrued, such as a spes successionis or a right to future rents.)
('36) 23 A I R 1936 Lah 944 (946). (Pocket money allowance treated as future maintenance and hence held not attachable.)
('35) 22 AIR 1935 Sind 21 (22) : 28 Sind L R 317. (Maintenance charged on property—Such property or its sale proceeds cannot be attached.)
† ('17) 4 AIR 1917 Mad 79 (82) : 40 Mad 302 (DB). (Hence receiver cannot be appointed.)
('1863) Marsh 200.
(1865) 3 Suth W R Misc 16 (16) (DB).
('66) 5 Suth W R 111 (112) (DB). (Personal right.)
('67) 7 Suth W R 311 (311) (DB).
('75) 23 Suth W R 427 (428) (DB).
('10) 5 Ind Cas 879 (879) (DB) (Mad.) (Decree for maintenance.)
[See however ('42) 29 AIR 1942 Oudh 410 (411, 412) (DB). (Receiver may be appointed in cases where right to future maintenance is not attachable. See also Notes on S. 51.)]
2. ('42) 29 AIR 1942 Oudh 410 (411) (DB).

See Statement of Objects and Reasons to the Transfer of Property (Amendment) Act XX of 1929 with reference to the addition of the new clause (dd) to Section 6.

('33) 20 AIR 1933 Bom 350 (351) : 57 Bom 507 (DB).
[*See* ('36) 23 AIR 1936 Lah 55 (58) : 17 Lah 378 (DB). (Test to see whether right to maintenance is exempt from attachment is whether such right is personal, non-heritable and non-assignable.)

right of maintenance is not a mere *personal* right or where it amounts to an *interest in property*, the exemption will not apply. Thus, a *hereditary* right of maintenance is not a mere personal right but an alienable one, and can be attached in execution.[3] Again where, in lieu of maintenance, there is a *transfer of an interest in property*, such interest is not exempt from attachment[4] unless such interest is restricted in its enjoyment to the grantee personally in which case it will not be a *saleable property* attachable under this section.[5] In the case cited below,[6] it was held by the Madras High Court that this clause only applies to cases where the right to maintenance is based on the personal law or the personal relationship of the parties and not where such right is *purely* the result of a contractual arrangement between the parties. Hence, it was held that where a person grants a usufructuary mortgage of all his properties to another and under one of the terms of the mortgage is entitled to receive a certain periodical payment for his maintenance, his right to such payment is not exempt from attachment under this clause. But this view has been dissented from by the Chief Court of Oudh on the ground that it is against the express provisions of S. 6 (dd) of the Transfer of Property Act.[7]

The mere fact that the person entitled to maintenance is placed in a position to enforce his right by recourse to a particular fund or interest in land in the event of default of payment by the grantor, or that the maintenance is payable out of a particular estate, will not constitute the right an *interest in the property*, so as to take it out of the application of this clause.[8] An *annuity* charged upon an estate is property which can be attached under this section.[9]

('36) 23 AIR 1936 Oudh 76(79)(DB). (Right to future maintenance as contemplated by Section 60 (1) (n) means a personal right for the maintenance and personal enjoyment of the grantee.)]

3. ('42) 29 AIR 1942 Oudh 410 (411) (DB).

† ('36) 23 AIR 1936 Oudh 76 (79)(DB). (Heritable but non-transferable interest in property granted in lieu of maintenance is not exempt from attachment.)

('07) 30 Mad 279 (280) (DB).

('84) 10 Cal 521 (522) (DB).

† ('21) 8 AIR 1921 Oudh 164 (165) : 24 Oudh Cas 250. (Heritable annuity.)

('31) 18 A I R 1931 P C 160 (161) : 58 Ind App 215 : 59 Cal 1 (PC). (Property settled on Nawab Bahadur of Moorshedabad under Act XV of 1891— Rents and profits thereof are saleable property.)

4. ('38) 25 AIR 1938 Nag 269 (270) : I L R (1939) Nag 679. (Land granted as inam for maintenance is not exempt from attachment.)

† ('37) 24 AIR 1937 Nag 202 (203). (Do.)

('12) 13 Ind Cas 152 (153)(DB)(Mad). (Crop standing on land allotted to a widow for maintenance can be attached — Distinguishing 15 Mad L Jour 7 and 10 Bom 342.)

† ('83) 1883 All W N 9 (10)(DB). (Land transferred to Hindu widow without power of alienation.)

('16) 3 AIR 1916 Mad 833 (834) (DB). (Malabar law.)

('25) 12 AIR 1925 Mad 624 (626).

('25) 12 AIR 1925 All 297 (298) (DB).

('05) 32 Cal 683 (689) (DB). (Babuana grant for maintenance is alienable by custom and can be attached.)

('09) 36 Cal 943 (952) : 36 Ind App 176 (PC). (Property though impartible is alienable.)

† ('06) 33 Cal 1158 (1162) (DB). (Babuana grant alienable subject to the contingent interest of the grantor.)

5. ('17) 4 AIR 1917 Mad 624 (624) (DB). (Zamindari 'Mahal' estate left for the enjoyment of the zamindari ladies.)

('23) 10 AIR 1923 Bom 276 (277):47 Bom 597 (DB).

6. ('35) 22 AIR 1935 Mad 815 (815).

7. ('42) 29 AIR 1942 Oudh 410 (411) (DB).

8. *('10) 7 Ind Cas 80 (86) (DB) (Cal). (Allowance payable out of grantor's estate.)

('25) 12 AIR 1925 P C 176 (176) : 47 All 385 : 52 Ind App 262 (PC). (On appeal from AIR 1921 All 120 : 43 All 617 disagreeing with the view of the High Court that the right was more than a right to maintenance. But a receiver can be appointed. In view of this Privy Council decision, the decision in 11 Suth W R 138 cannot be considered to be good law.)

('93) 15 All 371 (372). (Land left in possession of Hindu widow for her maintenance — Her rights in it cannot be attached.)

[*See* ('35) 22 AIR 1935 Nag 133 (135) : 31 Nag L R 239. (Impartible property — Specific share of profits allotted to junior member in lieu of maintenance cannot be attached.)]

[*See also* ('35) 22 AIR 1935 Sind 21 (22). (A right to future maintenance cannot be attached — *A fortiori* the charge on the property securing the right would not be attachable.)

('33) 20 AIR 1933 Bom 350(352):57Bom 507(DB).]

9. ('36) 23 AIR 1936 Lah 55 (58) : 17 Lah 378 (DB).

('36) 23 AIR 1936 Pat 527 (530).

('35) 22 AIR 1935 Lah 811 (812).

† ('12) 17 Ind Cas 284 (286) (DB) (Cal). (Not the same as right to future maintenance.)

('72) 17 Suth W R 254 (255) (DB). (By one who inherited the grants.)

This clause prevents the attachment of a judgment-debtor's right to *future* maintenance. It does not prevent the attachment of *arrears* of maintenance which have fallen due.[10] It was, however, held by the Calcutta High Court in the case cited below[11] that arrears of maintenance under an order of a Criminal Court under S. 488 of the Criminal Procedure Code were not attachable, the reason given being that the right to such arrears was a purely *personal* one and not assignable by the judgment-debtor.

It was held in the undermentioned case[12] that the right of the judgment-debtor to *reside* in a particular house was exempt from attachment under this clause, but where the house was not in the actual occupation of the judgment-debtor but only had been let out by him, a receiver could be appointed to realise the rents and apply them in discharge of the decree.

There is no provision in the section exempting from attachment land belonging to the judgment-debtor and required for his maintenance and that of his family.[13]

22a. Moveable property exempt from sale for arrear of land revenue — Clause (p). — This clause exempts from attachment any *moveable* property which is exempt from sale for arrears of land revenue. The clause has no application to immovable property.[1]

22b. Explanation II — Salary, meaning of. — Explanation II has been newly added by S. 2 of the amending Act IX of 1937, and has no retrospective effect, by virtue of S. 3 of the said amending Act.

In a case to which the provisions of the amending Act did not apply, it was held that the daily remuneration of a counsel charged by the Government to conduct civil litigation on its behalf, was "salary" of a public servant.[1] This will no longer be so in view of the Explanation under which salary means the *total monthly emoluments* derived by a person from his employment.[2] Profits accruing to a ghatwal from his estate are not "salary."[3]

23. Objections to attachment. — A decree-holder is not precluded from taking any of his judgment-debtor's properties in execution of his decree merely because he has a lien on particular properties[1] or because the judgment-debtor denies that he has any interest in the properties.[2] But if he effects a wrong attachment, he will be liable in damages resulting therefrom though he may have acted in good faith.[3]

('01) 23 All 164 (165) (DB).
('06) 10 Cal W N 1102 (1104). (An annuity given by will and not by any right of maintenance.)
10. ('10) 38 Cal 13 (23) : 6 Ind Cas 826 (827) (DB).
('34) 21 AIR 1934 Nag 83 (83). (Maintenance decree can be attached as to arrears.)
('67) 8 Suth W R 41 (41) (DB).
† ('66) 6 Suth W R Misc 64 (64) (DB).
11. ('35) 22 AIR 1935 Cal 578 (579, 580) : 62 Cal 404 (DB).
12. ('37) 24 AIR 1937 Lah 433 (434): ILR (1937) Lah 486 (DB).
13. ('36) 23 AIR 1936 Lah 448 (448).

Note 22a

1. ('35) 22 AIR 1935 Pesh 113 (114).

Note 22b

1. ('39) 26 AIR 1939 Pat 77 (80): 17 Pat 706 (DB).
2. ('43) 30 AIR 1943 Lah 60 (61, 62) (DB). (It includes any sum which may be required for the payment of taxes or payments or repayments to a Provident Fund, even though these may be recovered by deduction from his salary. In other words, 'salary' means the total gross salary.)
('41) 28 AIR 1941 Pat 157 (159). (There is nothing in cl. (i) to indicate that the salary mentioned there is net salary.)
('40) 27 AIR 1940 Mad 766 (767). (Allowances of railway guard can be taken into consideration in determining salary attachable.)
('39) 26 AIR 1939 Rang 432 (132) : 1939 Rang L R 504. (Emoluments known as pay must be regarded as salary.)
3. ('39) 26 AIR 1939 Pat 242 (244) (DB).

Note 23

1. ('72) 4 N W P H C R 99 (100) (DB).
2. ('66) 1 Agra 169 (171).
3. ('25) 12 AIR 1925 Nag 390 (391). (Property o stranger not a party to suit.)
Also see S. 62, Note 4.

It is for the person claiming exemption from attachment to prove the circumstances entitling him to do so.[4] And he must raise his objections at the proper time, otherwise he will be precluded from raising them later on. Thus, where a property has been attached and sold in execution, a person who was a *party* to the order for sale or was aware of it, cannot object to the attachment after the sale.[5] But if he was not such a party or was not aware of the proceedings, he can object to the attachment even after the sale.[6] The same rule will apply to objections to sales by Collectors.[7] It has been held that the objection need not be taken at the *earliest* possible stage in the execution proceedings.[8] Where property is attached *before judgment*, it is, however, not necessary for the judgment-debtor to claim the exemption from attachment at that stage and objection can be taken after decree is passed.[9]

24. Waiver of benefit of section. — There is a conflict of judicial opinion as to whether a judgment-debtor can waive the benefit conferred by this section. Thus, in the undermentioned cases,[1] it was held that the exemption conferred by clause (c) of

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4. NOTE.— Under sub-section 6 of the section as amended by Punjab Relief of Indebtedness Act VII of 1934 no order for attachment shall be made unless the Court is satisfied that the property sought to be attached is not exempt from attachment and sale. This seems to throw the burden of proof on the decree-holder.
('42) 29 AIR 1942 Lah 153 (157) : I L R (1942) Lah 559 (FB). (Burden of proving facts entitling a judgment-debtor to claim exemption under S. 60 rests on him. NOTE:—This seems to overlook the special amendments in Punjab.)
('35) 22 AIR 1935 Nag 59 (60).
('27) 14 AIR 1927 All 601 (603) (DB).
('33) 20 AIR 1933 Lah 251 (252). (Judgment-debtor alone can claim. If he chooses to waive that privilege his son cannot complain of his action.)
† ('03) 28 Bom 125 (128) (DB).
5. ('42) 29 AIR 1942 Oudh 308 (309).
('04) 28 Bom 125 (128) (DB). (Objection cannot be taken in suit for possession by auction-purchaser.)
('41) 28 AIR 1941 Oudh 395 (399). (Do.)
('31) 18 AIR 1931 All 112 (113) : 52 All 1027 (DB). (Do.)
('18) 5 AIR 1918 All 305 (306) : 40 All 680 (DB). (Do).
('13) 37 Bom 415 (425) : 19 Ind Cas 591 (594) (DB). (Do.)
('37) 24 AIR 1937 Lah 309 (310). (Objection under Section 60 (1) (c) after sale but before confirmation cannot be entertained.)
('36) 23 AIR 1936 Bom 315 (317, 319) (DB).
('36) 23 AIR 1936 Nag 123 (124, 125) : I L R (1936) Nag 30.
('35) 22 AIR 1935 Nag 30 (31) : 31 Nag L R 217.
('85) 7 All 641 (642, 643) (DB).
† ('34) 21 AIR 1934 Nag 82 (83): 30 Nag L R 135.
('34) 21 AIR 1934 Bom 348 (350) : 58 Bom 564. (Objection that house could not be attached and sold should be raised before sale.)
('07) 29 All 612 (614). (Party aware of sale but refraining from objecting or preferring an appeal against it cannot object after sale.)
('05) 9 Cal W N 972 (973) (DB).
('07) 34 Cal 199 (206) (DB). (9 Cal W N 972 followed.)
('18) 5 AIR 1918 All 305 (306) : 40 All 680 (DB). (Sale conclusive between parties — No objection after it.)
('26) 13 AIR 1926 Mad 12 (13) (DB). (9 Cal W N 972 and AIR 1918 All 305 : 40 All 680 followed.)
('30) 17 AIR 1930 Lah 106 (106).
('24) 11 AIR 1924 All 726 (727).
† ('31) 18 AIR 1931 Bom 446 (447) (DB). (Unsuccessful objection before sale that decree is not executable—Objection under S. 60 taken after sale —Latter disallowed.)
[*See also* ('42) 29 AIR 1942 Lah 153 (157, 158, 160) : I L R (1942) Lah 559 (FB). (It was held in this case that the judgment-debtor will be barred by *res judicata*— A I R 1939 Lah 113 : I L R (1939) Lah 103 overruled.)]
[But see ('39) 26 AIR 1939 Lah 256 (257). (Objection can be taken at any time before confirmation of sale.)
† ('35) 22 AIR 1935 All 1016 (1017) : 58 All 360 (DB). (Do.)]
Also see Note 10 and O. 21, R. 90, N. 41.
6. ('42) 29 AIR 1942 Lah 153 (159) : ILR (1942) Lah 559 (FB). (Judgment-debtor not duly served —Principle of *res judicata* does not apply. NOTE.— The remark of Bhide, J., at p. 159 of the A. I. R. that if the ground of objection did not exist at the time of the sale but arose later on, it could be raised, is not correct, inasmuch as such objection will not come under S. 60 at all.)
('99) 26 Cal 727 (732).
[*See also* ('43) 30 AIR 1943 Pat 75 (76) : 21 Pat 774 (DB). (Execution sale—Application to set aside sale on ground of exemption under S. 60 (1) (c), C. P. C.—Article 166, Lim. Act, applies.)]
7. (1900) 22 All 108 (110) (DB).
8. ('36) 38 Pun L R 669 (669, 670). (Objection two days prior to sale—Entertainable.)
('35) 22 AIR 1935 Lah 942 (943).
('30) 17 AIR 1930 All 727 (729) (DB). (No objection taken — Court itself can take cognizance of the exemption.)
('30) 17 AIR 1930 Nag 11 (12).
9. ('11) 38 Cal 448 (450) : 10 Ind Cas 305 (306) (DB). (Attachment before judgment not on the same footing as attachment in execution.)

Note 24

1. ('39) 26 AIR 1939 Lah 316 (318).

sub-s. (1) being only intended for the benefit of the judgment-debtor could be waived by him. Similarly, it has been held that where a judgment-debtor agriculturist agrees to give his house as security for the amount of the decree,[2] or agrees, in consideration of time being given to him that his house might be sold in default of payment within the extended time,[3] he cannot claim exemption subsequently.

But in two recent decisions, one of the Bombay High Court[4] and the other of the Madras High Court,[5] it has been held that the benefit conferred by this section is based on public policy and cannot be waived by the judgment-debtor. Thus, it has been held in the above decisions that an agreement by the judgment-debtor that a certain portion of his salary may be attached in execution cannot be enforced if such portion is exempt from attachment under this section. In Punjab, under the amendment of the section by S. 35 of the Punjab Relief of Indebtedness Act (VII of 1934) an express sub-section (sub-s. (3)) has been added to the effect that an agreement by which a debtor agrees to waive any benefit of any exemption under this section shall be void. Notwithstanding this, it has been held in certain rulings of the Lahore High Court[6] that a judgment-debtor can waive the benefit of the exemption conferred by this section. The decisions follow an earlier judgment of the same Court in *Chittar Mal* v. *Mt. Ram Devi*.[7] But the latter judgment was delivered before the coming into force of the Punjab amendments referred to above. Curiously, there is no reference to these amendments in the decisions mentioned above and in the face of the amendments, the decisions cannot be regarded as correct.

Apart from the special amendments in the Punjab, it is submitted that the Madras and Bombay view is preferable on principle.

But the question of the validity of an agreement to waive the benefit of this section must be distinguished from the question of a judgment-debtor being precluded from raising an objection under this section by his failure to take the objection at the proper stage of the proceedings. The latter is a question of *res judicata*. It has been considered in Note 23.

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61. [New.] The [a][Provincial Government] may, by general or special order published in the [b][Official Gazette], declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the [a][Provincial Government] to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family, shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree.

Partial exemption of agricultural produce.

a. Substituted by the Govt. of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."
b. Substituted by *ibid*, for "Local Official Gazette."

('38) 25 AIR 1938 Nag 544 (544) : ILR (1939) Nag 534.
('37) 24 AIR 1937 Lah 100 (101).
('36) 23 AIR 1936 Lah 737 (738).
('27) 14 AIR 1927 Pat 233 (233) : 6 Pat 254 (DB).
('20) 7 AIR 1920 Cal 424 (425) (DB).
2. ('35) 22 AIR 1935 Lah 164 (164) (DB).
('37) 24 AIR 1937 Lah 939 (940).
('27) 14 AIR 1927 Pat 233 (233) : 6 Pat 254 (DB).
3. ('20) 7 AIR 1920 Cal 424 (425) (DB).
4. ('41) 28 AIR 1941 Bom 389 (392) : ILR (1941) Bom 415 (DB).
5. ('42) 29 AIR 1942 Mad 391 (391, 392) : I L R (1942) Mad 640.
6. ('40) 27 AIR 1940 Lah 65 (65).
('40) 27 AIR 1940 Lah 126 (128).
('40) 42 Pun L R 261 (263).
('39) 26 AIR 1939 Lah 316 (318).
('39) 26 AIR 1939 Lah 539 (540).
7. ('35) 22 AIR 1935 Lah 164 (164) (DB).

1. **"Be exempted from liability to attachment or sale."** — As to attachment of agricultural produce, see O. 21, Rr. 44 and 45 and as to its sale, see O. 21, Rr. 74 and 75.

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62. [S. 271.] (1) No person executing any process under this Code directing or authorizing seizure of moveable property shall enter any dwelling-house after sunset and before sunrise.

Seizure of property in dwelling-house.

(2) No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

[1877, S. 271; see O. 21, R. 43.]

1. **Legislative changes.** — Under S. 271 of the old Code the *outer* door could not be broken open under any circumstances.[1] The words "unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto" have been added. See Notes 7 and 8 on section 55.

2. **Scope of the section.**—Section 55 deals with how an arrest of the judgment-debtor is to be effected. This section deals with how *moveable* property is to be seized in execution. Provisos 1, 2 and 3 of S. 55 correspond to sub-ss. (1), (2) and (3) of this section.

There is no prohibition, such as is applicable to the breaking open of an *outer door*, to the breaking open of a door of a room *inside* the house, when once the person executing the process has gained access into the house.[1] Nor will a seizure of moveables be invalidated by the fact that the bailiff entered the house, which had been closed, after the same had been opened by a certain person who gained entrance into it by getting over the roof.[2]

Where a room inside a house is in the occupancy of a *pardanashin* lady, the person executing the process should give notice as required by sub-s. (3) of this section before entering the room for the purpose of seizing property.[3] But there is no limitation that the particular room in question must be in the occupancy of the judgment-debtor. It

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Section 62 — Note 1

1. *See* ('71) 8 Bom HCRAC 127 (128) (DB). (No decision or even dictum to the contrary.)

Note 2

1. ('70) 5 Mad HCR 189 (191) (DB). (Attachment under Section 241, C. P. Code.)
2. ('15) 2 AIR 1915 Mad 320 (321) (DB).
3. ('34) 21 AIR 1934 Sind 52 (54) (DB). (An enclosed verandah is a room within the meaning of this Section.)

is sufficient that the decree-holder or the person making the attachment should consider that there may be property of the judgment-debtor in that room.[4]

3. **"Dwelling-house."** — A shop or a godown is not a 'dwelling-house' within the meaning of this section.[1] Similarly a store-house or barn standing at a distance from a dwelling-house and not forming parcel of it is not a 'dwelling-house.'[2]

4. **Damages for wrongful seizure.** — A bailiff who breaks open the doors of a house belonging to a third person in execution of a decree against the judgment-debtor is a trespasser, if it turns out that the person or goods of the debtor are not in the house.[1] The attaching creditor is also responsible for any results which can be traced to an unlawful attachment carried out on application made by him[2] and will be liable in damages to the person injured thereby, though he may have acted *bona fide*, without malice and under mistake.[3]

5. **Limitation for suits for damages for wrongful seizure.** — A suit for damages for wrongful seizure of moveable property is governed by Art. 29 of the Limitation Act. See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 29.

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63. [S. 285.] (1) Where property not in the custody of any Court is under attachment[4] in execution of decrees of more Courts than one,[5] the Court which shall receive or realize[6] such property and shall determine any claim thereto and any objection to the attachment thereof[7] shall be the Court of highest grade,[8] or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

Property attached in execution of decrees of several Courts.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

[1877, S. 285; see Order 21.]

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4. ('35) 22 AIR 1935 All 490 (492).

Note 3

1. ✢('79) 3 Bom 89 (90) (DB). (Approving 13 Suth W R 339. Presumption regarding the intention of the Legislature.)
2. † ('71) 8 Bom H C R A C 127 (129) (DB).

Note 4

1. † ('70) 7 Bom H C R Crown Cas 83 (86) (DB). (English and Indian law compared.)
2. † ('12) 14 Oudh Cas 343 (348) : 13 Ind Cas 803 (805) (DB). (Exposition of law.)
('70) 14 Suth W R 120 (120) (DB). (To follow the property in the hands of the purchaser is not the only remedy of the owner.)
3. ('71) 8 Bom H C R A C 177 (180).
('70) 14 Suth W R 120 (120) (DB).
('74) 11 Bom H C R 46 (52). (No universal rule determining the liability of the judgment-creditor—It depends upon the circumstances of the case.)
✢('78) 3 Bom 74 (83) (DB).
('77) 1877 Pun Re No. 20, page 46. (But there are exceptions.)
✢('69) 12 Suth W R 329 (330) (DB). (Exception to the rule.)
('01) 28 Cal 540 (544, 545) (DB). (Attachment under Sec. 88 of the Code of Criminal Procedure.)
('16) 3 AIR 1916 Cal 428 (429, 431) : 43 Cal 511 (FB). (Agent fraudulently attached the property.)
('73) 5 N W P H C R 211 (212) (DB). (No proof of mala fide is necessary.)
✢('90) 17 Cal 436 (443) : 17 Ind App 17 (PC). (Attachment before judgment of goods not belonging to the judgment-debtor.)
† ('29) 16 AIR 1929 Lah 200 (201). (Attachment in execution of property of stranger.)
† ('25) 12 AIR 1925 Nag 390 (391). (Do.)
('26) 13 AIR 1926 Oudh 483 (484). (Do.)
† ('24) 11 AIR 1924 Rang 302 (307) : 2 Rang 181. (Third person's property attached — He need not prove malice.)
[*See also* ('69) 11 Suth W R 516 (516). (Nazir proceeding beyond what decree directs.)]
[But see ('68) 9 Suth W R 133 (135) (DB).]
Also see S. 60 N. 23 and O. 21 R. 63 N. 10.

Synopsis

1. Legislative changes.
2. Scope, object and applicability of the section.
3. "Of more Courts than one."
4. "Is under attachment," meaning of.
5. "Shall receive or realize," meaning of.
6. "Claim thereto and any objection to the attachment thereof," meaning of.
7. Rateable distribution. See Notes 6 and 10 and also Section 73.
8. "Court of highest grade."
9. Effect of non-compliance with sub-section (1)—Sub-section (2).
10. Procedure when inferior Court sells property.
11. Appeal.

NOTE to the Synopsis. See the Notes indicated for the following topics:

Attachment by Courts of different grades — Validity of sale by inferior Court. See Notes 9 and 10.

Attachment by Courts of same grade—Validity of sale by one. See Note 8.

Attachment by Revenue and Civil Courts. See Note 3.

1. Legislative changes. — The following are the changes introduced in the section :

(1) The words "has been attached" in S. 285 of the Code of 1882 have been replaced by the words "is under attachment" in the present section (*vide* Note 4).

(2) Sub-section (2) is new (see Note 9).

2. Scope, object and applicability of the section. — This section deals with the procedure to be adopted where the same property is under attachment in execution of decrees of more Courts than one.[1] The object of the section is to prevent confusion in the execution of decrees[2] and to avoid conflicting claims which might arise out of the attachment and sale of the same property by different Courts.[3] This section deals merely with *procedure* and does not affect the substantive rights of the decree-holders *inter se*,[4] nor does it affect the *jurisdiction* of Courts.[5] There was a conflict of views under the old Code on this point for which see Note 9.

The words "property not in the custody of any Court" include immovable property.[6]

3. "Of more Courts than one." — It has been held that the Courts contemplated in the section are Courts which are capable of being compared as Courts of different grades or of the same grade. They must, therefore, be all Civil Courts or all Revenue Courts. A Civil Court cannot be compared with the Revenue Court and the section will not apply to attachments made by a Civil and also by a Revenue Court.[1]

Section 63 — Note 2

1. ('39) ILR (1939) 1 Cal 488 (491, 492) (DB). (Where the rival decree-holders have not attached any of the properties belonging to the judgment-debtor they cannot invoke the provision of S. 63.)
† ('35) 22 AIR 1935 Mad 988 (995).
('36) 23 AIR 1936 Cal 723 (726): ILR (1937) 1 Cal 391.
('81) 3 All 356 (360) (DB).
2. ('86) 12 Cal 333 (338) (DB).
† ('94) 18 Bom 458 (463) (DB).
3. ('98) 25 Cal 46 (48) (DB).
('21) 8 AIR 1921 Pat 140 (141): 6 Pat L Jour 332.
4. ('14) 1 AIR 1914 Mad 454 (455) (DB).
† ('94) 21 Cal 200 (203). (This section and S. 73 should be read together and due effect given to each.)
('28) 15 AIR 1928 Rang 157 (158): 6 Rang 131 (DB). (Section 73 must be read with S. 63.)
('35) 22 AIR 1935 Bom 176 (177): 59 Bom 310 (DB). (Section 63 does not determine the principle on which the Court is to act in determining the claims, it only lays down which Court is to decide the question.)
5. ('07) 34 Cal 836 (838) (DB).
† ('98) 22 Bom 88 (92) (DB).
6. ('81) 1881 Bom P J 210 (DB).
('84) 7 Mad 47 (48) (DB).
[But see ('81) 7 Cal 410 (413) (DB).

Note 3

1. † ('21) 8 AIR 1921 All 142 (143): 43 All 612 (DB).
(1900) 22 All 182 (186, 187) (DB).

It has been held by the Madras High Court that the expression "of more Courts than one" qualifies the word "attachment" and not the word "decrees" so that the section applies also to a case where the property has been attached by different Courts though the decrees have been passed by the *same* Court.[2]

This section applies to Small Cause Courts also.[3]

4. "Is under attachment," meaning of. — It was held under the old Code that the attachments of two or more Courts must be *subsisting* or existing at the same time.[1] This has been made clear now by the substitution of the words " is under attachment" for the words "has been attached" occurring in the old section.

It has been held that where immovable property which is under attachment is sold for arrears of land revenue, the attachment does not cease but fastens itself to the balance of the sale proceeds that remains after paying the revenue.[2]

The section requires an attachment in *execution*. But where a property has been attached before judgment, such attachment will become one in execution on an application for execution being made by the decree-holder. See O. 38 R. 11, Note 2.

It has been held by the Nagpur High Court that the words "where property .... is under attachment" do not mean that the only 'claim' which can be determined under the section is one relating to the attachment or put forward by a person who has attached the property.[3] In that case, it was held that the Court of the highest grade under this section has the power to allow without recourse to the provisions of section 73, rateable distribution of the judgment-debtor's assets and that in exercise of this power, such Court could grant a rateable share of assets even to a decree-holder who has not attached the property from which the assets have been derived. (See Note 8 on section 73.)

5. "Shall receive or realize," meaning of. — These words will include the *sale* of the attached property.[1]

6. "Claim thereto and any objection to the attachment thereof," meaning of. — The above words mean claims and objections which can be summarily decided in execution proceedings.[1] It is only on *an application* that the claims are to be decided. The section does not indicate that the Court should *suo motu* ascertain who are the various claimants to the property attached.[2] As to whether a claim for rateable distribution comes within the meaning of the above expression, see S. 73 Note 8.

7. Rateable distribution. — See Notes 6 and 10 and also Section 73.

8. "Court of highest grade." — The grade of any Court depends upon the pecuniary or other limitations of jurisdiction of the particular Court.[1] A District Court

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2. † ('36) 23 AIR 1936 Mad 797 (799) : 59 Mad 1028 (DB).
3. ('95) 19 Bom 127 (129) (DB).

Note 4

1. ('84) 6 All 255 (258) (DB).
2. ('37) 24 AIR 1937 Nag 80 (83) : I L R (1937) Nag 219. (Doctrine of the "right to follow" is not confined to cases where there is a fiduciary relationship.)
3. † ('37) 24 AIR 1937 Nag 80 (83) : I L R (1937) Nag 219.

Note 5

1. ('39) 26 AIR 1939 Mad 169 (170) : ILR (1939) Mad 248 (DB). (Section 63 cannot be controlled by S. 38.)

[*See* ('98) 22 Bom 88 (93, 94).
('82) 4 All 359 (361).]

Note 6

1. † ('09) 3 Ind Cas 105 (108) (DB) (Cal). (Sec. 285 of the Civil Procedure Code of 1882 is governed by the immediately preceding sections with which it must be read.)
2. ('41) 28 AIR 1941 Mad 125 (126).

Note 8

1. ('95) 19 Bom 127 (129) (DB).
('94) 16 All 11 (14) (FB).
('31) 18 AIR 1931 Nag 127 (127) (DB). (No formal application for execution for rateable distribution is necessary under this section.)

is of a higher grade than a Subordinate Judge's Court[2] and the latter Court is of a higher grade than that of the District Munsif.[3] The Small Cause Court is inferior in grade to the Subordinate Judge's Court[4] and may be inferior also to the Court of the District Munsif.[5]

See also sections 3 and 15.

9. Effect of non-compliance with sub-section (1)— Sub-section (2).— Under the old Code there was a conflict of opinion as to the effect of sale by an inferior Court in contravention of the section. The High Court of Allahabad held that the sale was a nullity as being without *jurisdiction*.[1] The Bombay and Madras High Courts and the Nagpur Judicial Commissioner's Court held that the sale was not without jurisdiction and would be upheld if the purchaser brought it about *bona fide* without notice of the attachment by the higher Court.[2] The Calcutta High Court also held that the sale was not without jurisdiction but in order to uphold the sale it was necessary to show that not only the purchaser but the *Court* also should have acted without knowledge of the attachment by the higher Court.[3] The addition of sub-section (2) to the section now sets the conflict at rest[4] and a sale in contravention of the section will now be protected independent of any question of notice either to the Court or to the purchaser.[5] But the Patna High Court has held that even under the present Code, the sale would be invalid if it was held with notice of the prior attachment by a superior Court.[6]

Where, after the sale by the inferior Court in contravention of the section, the property is sought to be sold by the superior Court, then, according to the Madras High Court, the purchaser as a *representative* of the judgment-debtor may apply to the

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† ('36) 23 AIR 1936 Nag 270 (270): I L R (1937) Nag 122. (Small Cause Court having higher pecuniary jurisdiction than Additional Small Cause Court is Court of higher grade.)

2. ('09) 1 Ind Cas 78 (78) (DB) (All).
('22) 9 AIR 1922 Mad 3 (4, 5). (Theory of continuation of proceedings.)

3. ('82) 4 All 359 (361) (DB).
('02) 29 Cal 773 (778) (DB).
('10) 1 Upp Bur Rul 53 : 8 Ind Cas 1176 (1178).
('36) 23 AIR 1936 Lah 519 (520). (Court of Sub-Judge, First Class, is higher in grade to the Court of Sub-Judge Second Class.)

4. ('95) 19 Bom 127 (129) (DB).

5. ('94) 16 All 11 (16) (FB).
('92) 19 Cal 651 (655) (DB). (But the Court of First Munsif is not a Court of higher grade than that of the Second Munsif.)
[*See also* ('38) 25 AIR 1938 Oudh 12 (14). (Court of Civil Judge is superior to a Small Cause Court.)]

Note 9

1. ('09) 31 All 527 (529) (DB). (Ruling of the Court to which a Court is subordinate must be followed by it.)
✣('82) 4 All 359 (361) (DB).
('83) 5 All 615 (616) (DB).
('96) 18 All 348 (349, 350) (DB).
('04) 26 All 538 (539) (DB).
('05) 27 All 56 (59) (DB).

2. † ('98) 22 Bom 88 (92) (DB).
('95) 19 Bom 127 (129) (DB). (Proclamation of sale issued before an application for execution was made to the higher Court.)
('98) 22 Mad 295 (297) (DB). (Distinguishing 7 Mad 47.)
✣(1900) 13 C P L R 145 (150).
[*See also* ('94) 18 Bom 458 (463).

3. † ('86) 12 Cal 333 (338, 339) (DB).
('98) 25 Cal 46 (48) (DB).
('07) 34 Cal 836 (839) (DB). (Section 285 of the Civil Procedure Code does not take away the jurisdiction conferred on the Court under S. 284.)
('92) 19 Cal 651 (655) (DB). (The property was first attached by the lower Court under the decree passed by it.)

4. ('24) 11 AIR 1924 Cal 168 (170) (DB).
† ('18) 5 AIR 1918 Mad 663 (664) (DB).
('15) 2 AIR 1915 All 406 (407) (DB).
('35) 22 AIR 1935 Mad 988 (993).
† ('36) 23 AIR 1936 Mad 797 (798) : 59 Mad 1028 (DB).

5. ('24) 11 AIR 1924 Mad 889 (890) (DB).
('19) 6 AIR 1919 Cal 545 (546) : 46 Cal 64 (DB).
('18) 5 AIR 1918 Mad 663 (664) (DB).
('17) 4 AIR 1917 Mad 602 (603, 605). (As to notice to purchaser—*Quære*.)
('35) 22 AIR 1935 Oudh 154 (156) (DB).
('36) 23 AIR 1936 Mad 797 (798): 59 Mad 1028 (DB).
The following cases were cases in respect of sales under the old Code and therefore held that where the purchase was bona fide the sale was regular :
('15) 2 AIR 1915 Mad 61 (62) (DB).
('17) 4 AIR 1917 Mad 320 (322) (DB).

6. ('21) 8 AIR 1921 Pat 140 (141) : 6 Pat L Jour 332 (DB).
('34) 21 AIR 1934 Pat 511 (513): 13 Pat 765 (DB). (In this case it was held that the Court did not know of the prior attachment and so the sale was not invalid.)

superior Court under S. 47 to stop the sale.[7] According to the Calcutta High Court, the purchaser is not a representative of the judgment-debtor and cannot apply under S. 47.[8]

It has been held in the undermentioned case[9] that even if a sale is liable to be set aside for irregularities under S. 63, it cannot be impeached in collateral proceedings, or by persons who are not parties to the proceedings.

Suppose in a sale held by a Court of an inferior grade, the Court has allowed the decree-holder to purchase the property and to set off the decree amount against the purchase-money. In such a case, is the effect of sub-s. (2) not only to validate the *sale* but also to exempt the amount so allowed to be set off, from the claims of other decree-holders for rateable distribution ? On this question, there is a conflict of decisions. It has been held by the Calcutta High Court[10] and in an earlier decision by the Bombay High Court[11] that the order allowing set-off of the decretal amount must also be considered to be validated by the sub-section so as to exempt the amount so allowed to be set off from the claims of other decree-holders for rateable distribution and that the Court of the superior grade can only call for the balance, if any, out of the sale proceeds remaining after such set-off is allowed, for the purpose of rateable distribution among the other decree-holders. But, the Bombay High Court in a later decision[12] and the Madras High Court[13] have taken a different view and held that in such cases, the effect of the sub-section is only to validate the *sale* held by the Court of the inferior grade and not to exempt the amount allowed to be set off from the claims of other decree-holders for rateable distribution.

Where an inferior Court sells the property and pays out the sale proceeds to the decree-holder in ignorance of an attachment in a pending execution proceeding of a superior Court, the superior Court has no jurisdiction to order restitution and rectify the error.[14]

10. Procedure when inferior Court sells property. — Where the inferior Court has sold the property, the superior Court should not re-sell it but should adopt the sale held by the inferior Court and after getting the sale proceeds transferred to itself, should distribute them rateably among the decree-holders.[1] As to the procedure to be adopted in getting such sale proceeds transferred to the superior Court, there is a difference of opinion. The Bombay[2] and Madras[3] High Courts have held that the superior Court itself can send for the proceeds of the sale from the inferior Court. The Patna and Calcutta High Courts have, on the other hand, held that the *District Judge* must

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7. ('24) 11 AIR 1924 Mad 889 (890) (DB).
8. ('11) 9 Ind Cas 194 (194, 195) (DB) (Cal).
9. † ('17) 4 AIR 1917 Mad 602 (603).
10. ('37) 24 AIR 1937 Cal 55 (56) (DB).
11. † ('31) 18 AIR 1931 Bom 350 (353, 354) : 55 Bom 473 (DB).
12. ('35) 22 AIR 1935 Bom 176 (177) : 59 Bom 310 (DB).
13. ('36) 23 AIR 1936 Mad 797 (798) : 59 Mad 1028 (DB).
('35) 22 AIR 1935 Mad 988 (994).
† ('35) 22 AIR 1935 Mad 904 (905) (DB).
14. † ('30) 17 AIR 1930 Mad 699 (700).

Note 10

1. ✠ ('85) 12 Cal 333 (338) (DB).
('27) 14 AIR 1927 Mad 67 (68). (The sale proceeds had not reached the superior Court at the time of application.)
('09) 3 Ind Cas 105 (110) (DB) (Cal).
† ('94) 21 Cal 200 (203).
('02) 29 Cal 773 (778) (DB).
('32) 19 AIR 1932 All 2 (3, 4) : 53 All 759 (DB).
† ('31) 18 AIR 1931 Bom 350 (352, 354) : 55 Bom 473 (DB).
('30) 17 AIR 1930 Mad 699 (700).
† ('19) 6 A I R 1919 Cal 545 (546) : 46 Cal 64 (DB).
('36) 23 A I R 1936 Cal 723 (726) : I L R (1937) 1 Cal 391.
✠ ('36) 23 AIR 1936 Mad 797 (798) : 59 Mad 1028 (DB).
('38) 25 AIR 1938 Sind 175 (176).
[*See* ('41) 28 A I R 1941 Oudh 277 (278). (It is duty of inferior Court to send sale proceeds to superior Court.)]
2. † ('25) 12 A I R 1925 Bom 420 (422) : 49 Bom 655 (DB).
3. ('27) 14 AIR 1927 Mad 67 (68).
('35) 22 AIR 1935 Mad 988 (994, 995).

be moved in the matter of the transfer of the sale proceeds.[4]

11. **Appeal.** — An order of the inferior Court refusing to proceed with the execution on the ground of pendency of execution against the same property in a superior Court is an order under section 47 and is appealable as a decree.[1]

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64. [S. 276.] Where an attachment has been made,[3] any private transfer or delivery of the property attached or of any interest therein[10] and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment,[11] shall be void as against all claims enforceable under the attachment.[12]

Private alienation of property after attachment to be void.

Explanation. — For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.[13]

[1877, S. 276; 1859, S. 240. See O. 21, R. 58.]

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. "Where an attachment has been made."
4. Attachment before judgment.
5. Effect of attachment.
6. Effect of removal of attachment.
7. Abandonment or discontinuance of attachment.
8. Effect of striking off or dismissal of execution proceedings. See Notes on O. 21, R. 57.
9. Revival of attachment.
10. "Private transfer or delivery of the property attached or of any interest therein."
11. Contrary to such attachment.
12. Transfer is void only as against claims enforceable under the attachment.
13. Claims enforceable under an attachment include claims for rateable distribution —Explanation.
14. Effect of vesting order or winding up order after attachment.
15. Prior contract for sale of property.
16. Objections as to attachment.
17. Waiver of benefit under the section.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Alienation under irregular attachment. See Notes 3 and 12.
Attachment by prohibitory order. See Note 3.
Attachment creates no charge. See Note 5.
Attachment raised and restored later. See Note 6.
During continuance of attachment. See Note 6.
Effect of adjudication. See Notes 5, 10 and 14.
Right of decree-holder to question transfer. See Note 12.
Transfer to decree-holder. See Note 11.
Transfer under O. 21, R. 83. See Note 11.
Transfer when not void. See Notes 6 and 10.

1. **Legislative changes.** — The following are the changes introduced by this section :

(1) The words "by actual seizure or by written order duly intimated and made known in the manner aforesaid" occurring in the old section (S. 276) have been omitted. See Note 3.

(2) For the words "any private alienation of property attached whether by sale, gift, mortgage or otherwise" in the old section, the following words, *viz.*, "any private transfer or delivery of the property attached or of any interest therein" have been substituted. See Note 10.

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4. ('21) 8 AIR 1921 Pat 140 (142) : 6 Pat L Jour 332 (DB). (Following obiter in 18 Bom 458 which however was not followed in AIR 1925 Bom 420 : 49 Bom 655.)
('19) 6 AIR 1919 Cal 545 (546) : 46 Cal 64 (DB).
('36) 23 A I R 1936 Cal 723 (726) : I L R (1937) 1 Cal 391.

Note 11

1. ('17) 4 AIR 1917 Cal 182 (182) (DB).

(3) The words "during the continuance of the attachment" occurring in the old section have been replaced by the words "contrary to such attachment." See Note 11.

(4) The explanation to the present section is new. See Note 13.

2. Scope and object of the section. — This section enacts that a *private* alienation of property after attachment is void as against claims enforceable under the attachment.[1] The object of the section is to prevent fraud on decree-holders and to secure intact the rights of attaching creditors and of those creditors who have obtained decrees and are entitled to satisfaction out of the assets of the judgment-debtor.[2] It is immaterial for the application of the section whether the decree had or had not been passed before the time when the transfer was effected[3] or whether the transferee acted in good faith or not.[4]

The effect of the section is, however, not to invalidate such private alienations for *all* purposes but only *as against claims enforceable under the attachment.*[5] The benefit of the section can also be *waived* by the decree-holder so as to bind himself and his assignees with notice.[6]

As the section operates as a distinct interference with the rights of alienation of property, its provisions should be *strictly construed*,[7] and cannot be extended to cases not contemplated by the section.[8] Thus, a transfer by a successful claimant after the date of the claim order but before institution of a suit under O. 21, R. 63 is not prevented by the section which only prohibits a transfer by the *judgment-debtor*.[9]

The provisions of the section relate to execution and a *suit* by the attaching creditor to avoid an alienation made during attachment is not maintainable.[10] The section must be read with O. 21, R. 83 which provides for the private transfers of attached property with the Court's permission in certain circumstances. (See O. 21, R. 83, Note 6.)

See also the case cited below.[11]

3. "Where an attachment has been made." — The words "where an attachment *has been* made" show that the section has no application to transfers made *before* the attachment is levied.[1] Such a transfer, if real, would be valid even though it

Section 64 — Note 2

1. ('02) 6 Cal W N 57 (59) (DB). (Court sale in execution is not affected by the Section.)
('20) 7 AIR 1920 Mad 626 (626) (DB).
2. ('40) 27 AIR 1940 Mad 385 (408) : ILR (1940) Mad 526 (FB).
('17) 4 AIR 1917 Cal 561 (561) (DB).
('06) 30 Bom 337 (339) (DB). (Qualified by O. 21, R. 83.)
('16) 3 AIR 1916 Cal 927 (927) (DB).
3. ('17) 4 AIR 1917 Cal 561 (561) (DB).
4. ('19) 6 A I R 1919 Oudh 4 (7) : 23 Oudh Cas 18 (DB).
5. See Note 12.
6. See Note 17.
7. † ('85) 7 All 702 (707) (DB). (Attachment must be duly intimated and made known.)
('72) 14 Moo Ind App 543 (549) (PC).
NOTE.—Decisions under S. 240 of the Code of 1859 which differed in language from the present Section are not binding on the construction of the present Section or of Section 276 of the Code of 1882, *see*: ('92) 16 Bom 91 (101).
8. ('16) 3 A I R 1916 Cal 927 (928) (DB). (Obligations prior to attachment not affected.)
9. ('15) 2 AIR 1915 Mad 495 (497) : 38 Mad 535 (540) (DB).
10. ('01) 28 Cal 492 (497, 499) (DB).
Also see Section 47, Note 21.
11. ('41) 28 AIR 1941 Mad 125 (126). (Sections 63 and 64 do not indicate that Court should *suo motu* ascertain claimants to particular sum and divide it among persons entitled to share.)

Note 3

1. ('42) 29 A I R 1942 Mad 522 (523). (Execution sale set aside under O. 21, R. 89—In the interval, property sold by private sale to X and afterwards attached by Y—On sale being set aside X and not Y gets title to property.)
('98) 8 Mad L Jour 266 (268, 269) (DB). (The attachment of property cannot override the rights already acquired against the property at the time of the attachment.)
('32) 19 A I R 1932 Sind 164 (165) : 26 Sind L R 158 (DB).
('01) 3 Bom L R 892 (892). (Sale by mortgagee under power conferred by mortgage prior to the attachment is valid.)

may have been in the contemplation of the parties that future attempts to attach the property should be defeated.[2] Before property could be subjected to the restriction imposed by the section, there must be a perfected attachment.[3] The modes of attachment of various kinds of property are prescribed in Order 21 and an attachment takes effect not from the date of the Court's *order* but only from the date of its *actual promulgation in the manner prescribed.* In *Muthia Chetti* v. *Palaniappa Chetti*,[4] their Lordships of the Privy Council observed as follows :

> "No property can be declared to be attached unless *first*, the *order* of attachment has been issued and *secondly*, in execution of that order the *other things prescribed by the rules in the Code have been done.*"

It follows that where a transfer is made after an order of attachment but before it was *actually* effected,[5] or where the mode prescribed is not complied with,[6] or where there

('30) 17 AIR 1930 Lah 858 (859). (No order of attachment but only ad interim injunction restraining alienation—Section 64 does not apply.)
('37) 24 A I R 1937 All 63 (64). (Attachment of money decree complete when notice of attachment is served on Court passing decree — Subsequent transfer of said decree void against all claims enforceable under attachment.)
('37) 24 AIR 1937 Nag 143 (144, 145) : ILR (1939) Nag 266. (Sale deed executed before but registered after attachment—Sale not affected by S. 64.)
('36) 23 AIR 1936 Nag 209 (213, 214) : ILR (1936) Nag 127 (DB). (Attaching creditor can claim priority only against those persons who derive their interest from the judgment-debtor after attachment but his right cannot prevail against those who hold a superior or paramount right such as the prior mortgagee.)
2. † ('79) 4 Bom 70 (73, 74) (DB). (See Sections 23 and 24 of Contract Act.)
† ('70) 5 Mad H C R 368 (371) (DB).
('70) 2 N W P H C R 225 (225) (DB).
('74) 22 Suth W R 473 (474) (DB).
('67) 2 Agra 206 (208, 210) (DB).
('81) 1881 All W N 158 (158) (DB).
3. ✣('85) 7 All 702 (706,709) (DB). (Per Mahmood, J.)
4. ('28) 15 AIR 1928 P C 139 (142): 51 Mad 349: 55 Ind App 256 (PC).
Also see O. 21, R. 54, N. 4.
5. ('90) 1890 All W N 224 (225) (DB).
('33) 20 AIR 1933 Cal 212 (212, 214): 59 Cal 1176 (DB). (Mortgage before affixture of order of attachment on the Court house.)
('05) 1905 Pun L R No. 137, p. 488.
('07) 1 Sind L R 176 (177) (DB).
('16) 3 AIR 1916 Cal 135 (135).
('31) 18 AIR 1931 Mad 570 (571).
('16) 3 AIR 1916 Oudh 169 (173). (Attachment not complete until O. 21, R. 54 is complied with.)
('19) 6 AIR 1919 Mad 594 (595): 42 Mad 565 (566) (DB). (Do.)
✣('20) 7 A I R 1920 Mad 804 (807) : 42 Mad 844 (852, 853) (FB). (Do.)
('19) 9 Mad L W 13*n* (DB). (Do.)
('23) 10 AIR 1923 Lah 423 (424): 4 Lah 211. (Do.)
('29) 16 A I R 1929 All 846 (847). (Service of prohibitory order on the judgment-debtor must be proved.)
† ('29) 16 AIR 1929 Bom 395 (396) : 53 Bom 851. (Mere information of order of attachment to the purchaser before his purchase is immaterial.)
('10) 33 Mad 429 (431, 433) (DB).
6. ('39) 26 AIR 1939 Bom 508 (511). (Attachment of immovable property not made in the manner prescribed by O. 21, R. 54.)
('39) 26 A I R 1939 Mad 811 (813). (Procedure in S. 39 and O. 21, R. 46 not complied with.)
('67) 2 Agra 206 (208) (DB).
('34) 21 A I R 1934 Pat 619 (622) (DB). (Copy of order not served as provided in O. 21, R. 46 — Attachment not perfected.)
('33) 20 AIR 1933 Rang 198 (199) (DB). (Requirements of O. 21, R. 54, Sub-r. 2 not complied with.)
('33) 20 A I R 1933 Rang 267 (268). (Warrant of attachment not affixed—Attachment is not valid.)
('81) 1881 All W N 65 (65) (DB). (Attachment order not fixed up in Court house or in Collector's office.)
('68) 10 Suth W R 264 (265, 266) (DB).
('85) 7 All 702 (709) (DB). (Attachment of immovable property not made in the manner prescribed by O. 21, R. 54 is ineffective.)
('17) 4 AIR 1917 Cal 832 (832) (DB). (Do.)
('19) 6 AIR 1919 Mad 594 (595): 42 Mad 565 (DB). (Do.)
('23) 10 AIR 1923 Lah 423 (424): 4 Lah 211 (DB). (Do.)
('78) 2 All 58 (60) (DB). (Where copy was not posted in the Court house or sent to or posted in the Collector's office.)
('05) 9 Cal W N 693 (695) (DB). (Do.)
('25) 12 AIR 1925 Lah 583 (584) (DB). (Do.)
('37) 24 AIR 1937 Lah 671 (672). (Formalities regarding proclamation and affixing of notices prescribed by order 21 Rule 54 (2) not complied with. Transfer is not void under Section 64.)
('35) 22 AIR 1935 Lah 57 (59). (Omission to affix copy of order on conspicuous part of property is fatal defect.)
('28) 15 A I R 1928 Pat 600 (602, 603) : 8 Pat 1 (DB). (Failure to affix copy of the notice in the office of the Collector of the District where the property is situate.)
('16) 3 A I R 1916 Pat 353 (355) (DB). (But entry in the Towzi Register is unnecessary.)
('16) 3 AIR 1916 Mad 434 (435): 39 Mad 389 (DB). (Attachment of mortgage bond if not made under the provisions of O. 21 R. 51 is ineffective.)
('23) 10 A I R 1923 Mad 317 (318) : 46 Mad 415 (DB). (Attachment of promissory note, if not made by actual seizure under O. 21 R. 51 is ineffective.)

is a material misdescription or other defect in the attachment,[7] or where the order of attachment is *ultra vires* or obtained collusively,[8] the section does not apply. Whether property is or is not, at a given moment, under attachment is a question of fact, capable of absolute demonstration.[9]

Suppose a certain house is attached as a whole as belonging to the judgment-debtor. At the time of attachment he has only a half share in the house but subsequently, he acquires the remaining half share also. A subsequent transfer of such half share, it has been held, will be invalid under this section.[10]

The presumption under S. 114 of the Indian Evidence Act, in favour of the regularity of judicial acts, does not apply to proceedings that follow such judicial acts.[11] In the absence of proof that an attachment, good in law, was ordered and was effected in due manner and without any defect, prior to alienation, the alienation will be upheld.[12] The onus of proving that an alienation is void owing to a prior valid attachment of the property is on the person challenging the alienation and it is for him to prove that the requirements of law as regards a valid attachment were fulfilled[13] or that the attachment was subsisting at the date of alienation.[14]

Applications for rateable distribution under S. 295 of the Code of 1882 (now S. 73) do not amount to attachment under the section.[15]

4. Attachment before judgment. — The section makes no distinction between attachment before judgment and attachment in execution of a decree.[1] A private alienation of property pending a valid attachment before judgment is void as against claims enforceable under the attachment.[2] The attachment must, however, have been effected in the

('29) 16 AIR 1929 Pat 1 (3) : 7 Pat 726 (DB). (Attachment of money decrees.)

7. ('81) 3 All 698 (701) (DB). (Wrong description of property.)
('85) 7 All 731 (733) (DB). (Other defect in attachment.)
('23) 10 A I R 1923 Mad 567 (568) (DB). (Other defect in the attachment — Want of sanction of Court to proceed against receiver.)

8. ('81) 1881 All W N 117 (118) (DB). (Attachment by Revenue Court of a Civil Court decree was *ultra vires*.)
('12) 14 Bom L R 511 (519, 520). (Attachment after insolvency of the judgment-debtor.)
('10) 8 Mad L Tim 197 (198) (DB). (Attachment under a collusive decree.)

9. ('43) 30 AIR 1943 Nag 101 (105) : I L R (1943) Nag 390 (DB). (Question whether attachment covered only the father's own share in the joint family property or the entire joint family property is a matter of evidence.)
('41) 28 AIR 1941 Peah 18 (20) (DB). (Application for execution ordered to be "filed" but attachment continued — Private sale void against execution purchaser.)
('05) 8 Oudh Cas 409 (417) (DB). (Order of attachment cannot subsist after a sale has been confirmed.)

10. ('40) 42 Pun L R 356 (357, 358).

11. ('10) 33 Mad 429 (432) : 5 Ind Cas 92 (94) (DB). (Presumption is not applicable to receipt of notice of attachment by a Court.)
('25) 12 AIR 1925 Rang 89 (91). (Report of the process-server is admissible in evidence, but is not conclusive proof of the date of the actual attachment.)

12. ('90) 13 All 119 (124) (DB).
('10) 33 Mad 429 (432, 433) (DB).
('14) 1 AIR 1914 Oudh 308 (309). (Paying of process fee for the issue of an order of attachment is not sufficient proof of its service.)

13. ('37) 24 AIR 1937 Lah 671 (672).
[*See* ('43) 30 AIR 1943 Bom 27 (30). (Prior agreement of sale subsisting — Onus lies on person claiming under an attachment before judgment to prove that the agreement was collusive and fraudulent so as not to displace his rights under the attachment.)

14. ('43) 30 AIR 1943 Nag 101 (106) : ILR (1943) Nag 390 (DB).

15. ('03) 25 All 431 (434) (DB).
('85) 7 All 702 (711) (DB).
('88) 15 Cal 771 (774).

Note 4

1. ('29) 16 AIR 1929 Cal 494 (495, 496) : 57 Cal 274 (DB). (Agreement to sell prior to attachment cannot prevail against attachment.)
('99) 26 Cal 531 (533) (DB). (Provided that in the case of attachment before judgment a decree is subsequently passed in the suit for the plaintiff who got the attachment.)
† ('34) 21 AIR 1934 All 165 (166).
[*See* ('37) 24 AIR 1937 All 424 (426).]

2. † ('22) 9 AIR 1922 Nag 238 (239).
('19) 6 AIR 1919 Mad 752 (754) : 42 Mad 1 (DB).
('15) 2 AIR 1915 Mad 386 (386) (DB).
[*See* ('28) 15 AIR 1928 Cal 234 (235). (When suit abates, attachment before judgment ceases and does not revive when abatement is set aside.)

manner prescribed by the Code[3] and where the formalities laid down by O. 38, R. 5 were not complied with, the attachment was held *ultra vires* and an alienation pending such attachment was held to be valid.[4] An attachment ordered before judgment cannot be treated as a nullity merely because the attachment is not *completed* till after judgment.[5]

5. Effect of attachment. — An attachment has merely the effect of preventing all private alienations of the property to the prejudice of claims enforceable under the attachment. It confers no title, charge, lien or priority in the property in favour of the attaching creditor.[1] So far as moveable property is concerned, it has the effect of keeping

3. ('39) 26 AIR 1939 Bom 508 (511). (Attachment of immovable property — O. 21 R. 54 must be complied with.)
('27) 14 AIR 1927 Cal 885 (886): 55 Cal 545 (DB). (Immovable property—O. 21 R. 54 must be complied with.)
('34) 21 AIR 1934 All 165 (166). (Mere passing of order or issuing it is not sufficient — it must be served.)

4. See O. 38 R. 5 Note 18.

5. ('19) 6 AIR 1919 Mad 752(753): 42 Mad 1 (DB). Also see O. 21 R. 54 Note 6.

Note 5

1. ('42) 29 AIR 1942 Nag 36 (37) : I L R (1942) Nag 691 (DB). (Attachment of a debt only gives a negative right of seeing that it is not paid without an order of Court—Debt held did not cease to be debt within S. 2 (e), C.P. Debt Conciliation Act, even after its attachment.)
('41) 28 AIR 1941 Bom 198 (201) : I L R (1941) Bom 290 (DB).
('41) 28 AIR 1941 Peah 87 (88). (No right to mesne profits.)
('10) 32 All 479 (483).
('33) 20 AIR 1933 Mad 342 (344).
('33) 20 AIR 1933 All 953 (953) (DB). (A case of attachment before judgment.)
('15) 2 AIR 1915 All 275 (276) : 37 All 575 (DB). (Priority of attachment does not give priority of title.)
('32) 19 AIR 1932 All 353 (355).
('78) 3 Bom 58 (61) (DB). (Although when the sale takes place, priority of attachment may affect the distribution of assets.)
('30) 17 AIR 1930 Bom 16 (18) (DB). (Attaching creditor is not a secured creditor.)
('80) 5 Cal 148 (174) : 6 Ind App 88 (PC). (An order of sale in addition to attachment under a mortgage decree was held to create a valid charge.)
† ('14) 1 AIR 1914 P C 129 (130) : 42 Cal 72 : 41 Ind App 251 (PC). (Reversing 15 Ind Cas 288.)
('81) 6 Cal 663 (666). (Attaching creditor has no right to redeem a mortgage subsisting prior to attachment.)
('88) 15 Cal 202 (210) (SB).
†('98) 25 Cal 179 (185) : 24 Ind App 170 (PC).
† ('02) 29 Cal 428 (431) (FB). (Judgment-creditor has no priority over Official Assignee in respect of property attached previous to vesting order.)
('10) 14 Cal W N 677 (679) (DB).
('15) 2 AIR 1915 Cal 444 (446) (DB).
('17) 4 A I R 1917 Cal 13 (16) : 44 Cal 1072 (DB). (Hence fund in Court attached by several creditors was rateably distributed.)
('29) 16 AIR 1929 Cal 524 (525) : 57 Cal 122 (DB). (Attaching creditor has no higher right than that of any other unsecured creditor.)
('23) 10 AIR 1923 Lah 261 (262): 3 Lah 414 (DB).
('29) 16 AIR 1929 Lah 90 (91) : 10 Lah 543 (DB). (Attachment gives no cause of action for a suit by reversioners for a declaration.)
('85) 8 Mad 573 (575).
('91) 14 Mad 277 (282, 284) (DB). (The word "lien" here apparently only means "the right of the attaching creditor to disregard a private alienation under the section.")
('03) 26 Mad 673 (678) (DB). (Attachment of money before insolvency of judgment-debtor was of no effect as against Official Assignee.)
('15) 2 A I R 1915 Mad 464 (471) (DB). (Property attached prior to a decree for maintenance but sold after the decree remains subject to maintenance charge.)
('16) 3 A I R 1916 Mad 792 (794) : 38 Mad 221. (Attaching creditor gets no priority over other creditors — Overruled on another point in AIR 1921 Mad 218 : 44 Mad 100 (FB).)
('17) 4 AIR 1917 Mad 743 (744) : 39 Mad 903 (DB).
('21) 8 AIR 1921 Mad 30 (33) : 44 Mad 232 (DB).
('27) 14 AIR 1927 Mad 190 (191).
† ('30) 17 AIR 1930 Mad 4 (8).
('69) 1869 N W P H C R 172 (184) (DB).
('15) 2 A I R 1915 Lah 281 (281) : 1915 Pun Re No. 39.
('03) 25 All 347 (350) (DB). (Attaching creditor cannot impeach a subsequent decree as bad in law.)
('90) 12 All 440 (445) (FB). (Attachment—In the custody of the law.)
('30) 17 AIR 1930 All 552 (553) (DB).
('06) 33 Cal 639 (643).
('12) 15 Ind Cas 668 (669) (DB). (Cal).
('16) 3 AIR 1916 Cal 371 (372) (DB) (Attachment before judgment cannot affect attachment after decree obtained by another.)
('12) 13 Ind Cas 96 (96) (DB) (Mad). (Title continues in the owner notwithstanding attachment till confirmation of sale.)
('39) 26 A I R 1939 Nag 267 (268) : 1939 Nag L Jour 257 (259). (Attachment does not create equitable or judicial lien—Attachment does not make the amount of the decree a secured debt within the meaning of Central Provinces Reduction of Interest Act, 1936, Section 2 (d).)
('38) 25 A I R 1938 Mad 360 (363) : I L R (1938) Mad 744 (FB). (Attaching creditor is not secured creditor — Attachment does not confer title — Crown is entitled to priority for its debts.)
('37) 24 AIR 1937 All 424 (426) (DB).

the property in *custodia legis* and a person who, for instance, cuts and carries away crops which have been attached, will be liable in damages to the person at whose instance the crops were attached.[3] An attachment does not prevent an alienation by *operation* of law.[3] (See Note 10.) Nor does it prevent the judgment-debtor from applying to a Debt Conciliation Board for conciliation of his debts which have been attached under Order 21, Rule 46.[4]

A judicial sale of property in pursuance of an attachment carries with it any enlargement thereof that accrues after the attachment and before the sale.[5] But an attachment cannot be enforced against property received in lieu of the property originally attached, in a subsequent partition.[6]

As to the distinction between attachment under the Code and a vesting order in insolvency, see the undermentioned case.[7]

See also O. 21, R. 46, Note 16; O. 21, R. 54, Note 11; O. 21, R. 63, Note 24 and Order 38, Rule 5, Note 18.

6. Effect of removal of attachment. — A transfer by the judgment-debtor after an attachment has been removed or withdrawn is valid and a subsequent attachment cannot be made so as to *relate back* to the date of the first attachment and operate against a transfer in the interval, even though the removal or withdrawal of the first attachment was under a misapprehension.[1] Similarly, a private transfer pending an attachment which has subsequently ceased will be valid.[2] Even an *implied withdrawal* as, for example, where an order of withdrawal is not formally passed but the attachment is understood by

('37) 24 AIR 1937 Cal 517 (519) : ILR (1937) 2 Cal 675 (DB). (Existence of attachment in favour of creditor does not make him a secured creditor.)
('37) 24 AIR 1937 Pat 50 (51, 52) (DB).
('36) 23 A I R 1936 Mad 192 (133) : 59 Mad 428. (Attaching creditor is not a secured creditor—Priority of Crown debts.)
† ('36) 23 AIR 1936 Nag 209 (213) : I L R (1936) Nag 127 (DB).
('34) 21 AIR 1934 All 165 (168).
('35) 22 AIR 1935 Nag 171 (172) : 31 Nag L R 301. (Mere attachment does not give interest in property attached within the meaning of O. 21, R. 59, Civil P. C.)
('33) 20 AIR 1933 Nag 229 (230) : 29 Nag LR 303.
('20) 7 AIR 1920 Mad 626 (626) (DB).
[*See* ('31) 18 AIR 1931 Cal 474 (476) : 58 Cal 1. (Attaching creditor does not acquire more rights than what debtor has.)]
Also see S. 73, Note 10.

2. ('07) 30 Mad 413 (415, 416) (DB).

3. ('14) 1 AIR 1914 PC 129 (130) : 42 Cal 72 : 41 Ind App 251 (PC). (Reversing 15 Ind Cas 288.)

4. ('42) 29 A I R 1942 Nag 36 (37) : I L R (1942) Nag 691 (DB).

5. ('91) 18 Cal 164 (176) : 17 Ind App 201 (PC). [*See also* ('40) 42 Pun L R 356 (358). (Attachment of house in which judgment-debtor had only a half share — Subsequent acquisition by him of remaining share—Transfer of such share is affected by this section.)]

6. ('13) 20 Ind Cas 43 (44) (Oudh).

7. ('28) 15 AIR 1928 Mad 735 (742, 745) : 51 Mad 417 (FB).

Note 6

1. † ('29) 16 AIR 1929 Rang 229 (237) : 7 Rang 201.
('34) 21 AIR 1934 All 165 (167, 168).
('13) 6 Low Bur Rul 170 (172) : 18 Ind Cas 524 (525) (DB).
('73) 20 Suth W R 133 (136) (PC).
('95) 22 Cal 909 (920) : 22 Ind App 129 (PC).

2. ('43) 30 AIR 1943 Mad 165 (167) : ILR (1943) Mad 175 (DB).
('42) 29 AIR 1942 Mad 330 (332) (DB).
('41) 28 AIR 1941 Mad 208 (213) (DB).
('21) 8 A I R 1921 Oudh 176 (183, 184) (DB). (Attachment ceasing — No right to rateable distribution.)
('32) 19 A I R 1932 Rang 103 (104) : 10 Rang 199 (DB). (Mortgage subsequent to attachment — Amount of decree deposited and full satisfaction entered—Mortgage valid.)
('99) 23 Mad 478 (482) (DB).
('19) 6 A I R 1919 Lah 129 (130) : 1919 Pun Re No. 5.
('27) 14 A I R 1927 Nag 289 (289). (Sale executed pending attachment, registered after release thereof is valid.)
('34) 21 A I R 1934 All 165 (168). (Attachment before judgment ceases on dismissal of suit — No revival of attachment on suit being decreed by Appellate Court—Fresh attachment after appellate decree does not affect alienation made during prior attachment.)
('73) 12 Beng L R 411 (421) (PC). (Sale after removal of one attachment and before a fresh attachment — Overruling 14 Suth W R 25.)
(68) 1 Beng L R A C 71 (73) (DB).
[But see ('36) 163 Ind Cas 812 (813) (DB) (Cal). (Transfer pending attachment — Attachment removed and fresh attachment made — Transfer inoperative against fresh attachment also.)]

the decree-holder to have been withdrawn, bars any objection against the validity of an alienation of the attached property.[3]

As to the *revival* of attachment, see Note 9.

7. **Abandonment or discontinuance of attachment.** — See also O. 21 R. 57. An attachment may cease for various reasons. Thus it may cease —

(1) by an express order withdrawing or putting an end to the attachment;[1] there cannot, however, be a *partial* withdrawal by consent,[2]

(2) by the decree being discharged by payment out of Court[3] or by sale of the attached property in execution of the decree,[4]

(3) by the decree being set aside,[5]

(4) in cases of attachment before judgment, by the suit being dismissed,[6] or

(5) by abandonment of the attachment by the decree-holder.[7]

Whether an attachment has been abandoned is a question of fact depending upon the circumstances of each case. Thus, where the decree-holder took no steps to enforce his rights for a very long time after the attachment was made, and the application for execution was consequently 'struck off,' it was held by the Privy Council that the attachment must be presumed to have been abandoned.[8] In *Chamiappa Tharagan* v. *Rama Ayyar*,[9] where the application for execution was 'struck off' after some time after the attachment was made and the decree-holder did nothing further for nearly twelve years, except keeping alive the decree by periodical applications for execution, Wallis, C. J., held, applying the Privy Council case above referred to, that the attachment must be taken to have been abandoned. Seshagiri Ayyar, J., dissented from this view and held, distinguishing the Privy Council case, that the periodical applications by the decree-holder negatived the idea of abandonment. *Mere* lapse of time after the attachment will not, however, be sufficient to prove abandonment,[10] especially if the delay was caused by the decree-holder's willingness to grant his debtor indulgence and opportunity to repay the debt.[11]

The mere fact that the decree-holder applies for *fresh* attachment does not necessarily imply an abandonment of the attachment already made,[12] though it may,

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3. ('69) 1 N W P H C R 30 (31) (DB).

Note 7

1. ('21) 8 AIR 1921 Oudh 176 (183, 184) (DB).
('08) 1908 Pun Re No. 81, p. 381 (385) (DB). (Execution struck off as satisfaction of decree reported to Court and attachment removed.)

2. ('27) 14 A I R 1927 Mad 648 (649). (Sale with decree-holder's consent is not excepted.)

3. ('99) 23 Mad 478 (482) (DB).
† ('11) 35 Bom 516 (523, 525) (DB).
('82) 8 Cal 279 (281) (DB).
('69) 1 N W P H C R 125 (127). (Satisfaction of decree reported to Court—Mortgage executed a day prior to the removal of the attachment held valid.)
('12) 15 Ind Cas 677 (678) (All). (But attachment cannot be deemed to be withdrawn when decree is satisfied in part only.)
Also see, O. 21 R. 55 Note 2.

4. † ('86) 12 Cal 317 (322) (DB).
('05) 8 Oudh Cas 409 (417) (DB).
('20) 7 AIR 1920 Pat 75 (77).
('73) 20 Suth W R 19 (20) (DB). (But if execution sale is set aside on account of irregularity in the proceedings, the attachment remains, so that decree-holder can again bring attached property to sale.)

5. ('68) 10 Suth W R 99 (99) (DB).
('06) 29 Mad 175 (176) (DB). (A renewed decree in the same terms will not validate it.)

6. ('88) 10 All 506 (511) (DB). (Though eventually on appeal it may be decreed.)

7. See the discussion *infra*.

8. ('73) 20 Suth W R 133 (136) (PC).
('73) 20 Suth W R 418 (418). (20 Suth W R 133 (PC) followed—Case of long delay.)

9. ('21) 8 A I R 1921 Mad 30 (32) : 44 Mad 232 (DB).

10. ('15) 2 AIR 1915 Mad 61 (61) (DB).
('69) 11 Suth W R 517 (518) (DB).

11. ('75) 24 Suth W R 56 (58, 59) (DB).

12. † ('13) 18 Ind Cas 691 (694) (DB) (Mad).
('15) 2 AIR 1915 Mad 386 (386).
('74) 12 Beng L R 414 (415).
('81) 6 Cal 129 (133). (A re-attachment of property after decree does not imply an abandonment of attachment before decree.)
('69) 11 Suth W R 517 (518) (DB). (Second attachment taken because Court insisted on it.)
See also cases in Note 11 on O. 21 R. 54 and Note 3 on O. 38 R. 11.

under particular circumstances, give rise to a presumption as to abandonment.[13] See also O. 21 R. 54, Note 11 and O. 38 R. 11, Note 3.

An attachment does not abate on the death of the judgment-debtor.[14]

8. Effect of striking off or dismissal of execution proceedings. — See Notes on Order 21, Rule 57.

9. Revival of attachment. — It has already been seen in Note 6 that if an attachment *comes to an end*, interests created thereafter are not affected by a second attachment. But an attachment cannot be said to have come to an end, so long as the order releasing the attachment is liable to be set aside by way of appeal or otherwise.[1] It can only be said to be temporarily discontinued or suspended.[2] Thus, where an attachment is wrongly released and the order of release is set aside in appeal, the attachment will be deemed to have continued and an alienation made between the date of the order of release and the date of the order in appeal, will be void against all claims enforceable under the attachment.[3] See also Note 4 on O. 21 R. 55. Similarly, where a claim is allowed and the property is released from attachment, such release is only provisional and subject to the result of the suit under O. 21 R. 63. Where therefore the order in the claim petition is set aside in the suit, the attachment is revived so as to affect the alienations made in the interval.[4]

In the case of an *attachment before judgment* the attachment comes to an end upon the dismissal of the suit and is not revived upon the reversal of the judgment in appeal.[5] The reason is that O. 38 R. 9 contains no provision corresponding to O. 21 R. 63 which makes the order in the claim case and the release from attachment thereupon subject to a regular suit.[6] Where, however, a suit in which an attachment before judgment is obtained, is dismissed but subsequently a review application is allowed and the suit is decreed, the attachment also revives and enures for the benefit of the decree-holder as against purchasers of the property subsequent to the passing of the decree after review.[7] See also Note 1 on O. 38 R. 9.

10. "Private transfer or delivery of the property attached or of any interest therein." — The word 'transfer' is used in the most generic sense and includes all species of contract which pass real rights in property from one person to another.[1]

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13. ('94) 16 All 133 (135) (DB). (Decree-holder failing to show that the first attachment was subsisting.)
('01) 23 All 114 (116) (DB).
('69) 11 Suth W R 517 (518) (DB).
('76) 25 Suth W R 513 (515) (DB). (Creditor submitting to fresh attachment ordered by Court.)

14. ('90) 12 All 440 (445) (FB).
[*See* ('14) 1 A I R 1914 Bom 256 (257) : 38 Bom 105. (But an attachment before judgment will be displaced by the death of a Mitakshara coparcener.)]

Note 9

1. ('24) 11 AIR 1924 Cal 744 (747): 51 Cal 548 (DB).
2. ('19) 6 AIR 1919 Lah 54 (55). (Decree-holder's rights are not affected by the temporary discontinuance of the attachment.)
3. ('12) 34 All 490 (492) (DB). (Review.)
('20) 7 AIR 1920 All 356 (357) : 42 All 39 (DB). (Attachment before judgment set aside.)
[*See also* ('21) 8 AIR 1921 Cal 101 (103) (DB).]
[But see ('95) 22 Cal 909 (920) : 22 Ind App 129 (PC). (Attachment does not revive on a mere order of remand in appeal.)]
4. ('22) 9 AIR 1922 Mad 176 (178): 45 Mad 84 (DB).
† ('21) 8 AIR 1921 Cal 101 (103) (DB).
('79) 3 Cal L Rep 146 (149, 150) (DB).
('96) 23 Cal 829 (833, 834, 835) (DB).
('06) 33 Cal 1158 (1162) (DB).
('09) 31 All 367 (368) (DB).
('18) 5 AIR 1918 Mad 1095 (1096) : 40 Mad 955 (DB).
('22) 9 AIR 1922 Nag 138 (140). (The attachment is revived even if the order of release is set aside only in appeal from the decree in the claim suit.)
('39) 26 AIR 1939 Oudh 178 (179) : 14 Luck 543.
[*See also* ('15) 2 AIR 1915 Mad 495 (497) : 38 Mad 535 (DB).]
Also see O. 21 R. 60, N. 5 and O. 21 R. 63, N. 16.
5. ('21) 8 AIR 1921 Cal 101 (103) (DB).
('34) 21 AIR 1934 All 165 (167).
6. ('21) 8 AIR 1921 Cal 101 (103) (DB).
7. ('43) 30 AIR 1943 Mad 515 (517). (AIR 1935 Mad 365 : 58 Mad 721 (FB) relied on.)

Note 10

1. ('83) 5 All 121 (137) (FB).

But it is not *confined* to transfers by contract. A transfer purporting to be made by a deed of appointment is a 'transfer.'[2]

The transfer contemplated by the section is a transfer between *living* persons and therefore does not include a devise by will.[3] A '*private transfer*' means a *voluntary* transfer such as a sale, mortgage, lease or gift and not a transfer by operation of law, such as an involuntary sale under a decree of a Court[4] or the enforced execution of a conveyance or assignment in obedience to the order of the Court.[5] Thus, a transfer effected by an award which has been given effect to by a decree,[6] or a conveyance executed in obedience to a *decree* for specific performance of a contract of sale,[7] is not a 'private transfer' within the meaning of this section. But it has been held that where a transfer is embodied in a decree but the decree is entirely based on an agreement between the parties, the transfer is a 'private' transfer.[8] As to the effect of a private transfer under O. 21 R. 83, see Note 6 on that rule. A vesting order in insolvency is a transfer by operation of law and is not within the mischief of this section.[9] But where the adjudication order is made by a *foreign* Insolvency Court, it cannot have the effect of prevailing over a prior attachment effected by the order of a British Indian Court.[10] But the creditor who attaches the property *after* such adjudication is not entitled to anything by reason of his attachment.[11]

The prohibition under the section extends to all private transfers and delivery of property by which the attachment is defeated by the property or interest therein being put out of the reach of the attaching creditor.[12] But an act which is consistent with the

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('91) 13 All 432 (476) (SB).
[*See* ('34) 21 AIR 1934 Rang 313 (215) (DB). (Transfer of property by agreement which is incorporated in a decree is a private transfer.)]

2. ('95) 22 Cal 185 (202) (SB). (Appointment under a settlement held to be a 'transfer.')
Also see O. 21 R. 66, N. 23.

3. ('02) 15 C P L R 1 (5). (A power of devise is not included in 'transfer').

4. ('42) 29 AIR 1942 Nag 36 (37) : ILR (1942) Nag 691 (DB). (The section is restricted to private transfers of, and private dealings with the property attached and does not extend to involuntary transfers or other consequences which ensue *ad invitum* the parties because of a statutory enactment.)
✠('82) 4 All 219 (225) (FB).
('33) 20 AIR 1933 All 953 (953) (DB).
('11) 21 Mad L Jour 82 (84, 85) (DB). (Unless collusive.)
('95) 1 Oudh Decision 792 (793). (Lease.)
('96) 18 All 123 (125) (DB). (Do).
('01) 23 All 467 (470) (DB).
† ('86) 10 Bom 400 (406, 407) (DB).
('81) 7 Cal 107 (118) : 8 Ind app 65 (PC). (Private sale in satisfaction of a decree is not a sale under a decree of a Court.)
('90) 17 Cal 826 (828) (DB).
('37) 24 AIR 1937 Pat 50 (52) (DB).
('39) 26 AIR 1939 Lah 380 (381): 41 Pun L R 305 (307).
('20) 7 AIR 1920 Mad 626 (626) (DB). (Section does not affect court sale.)

5. ('82) 4 All 219 (225, 226) (FB).
('24) 11 AIR 1924 Mad 610 (610).
('36) 23 AIR 1936 Nag 163 (165): ILR (1936) Nag 172.

6. ('82) 4 All 219 (225, 226) (FB).
('32) 19 AIR 1932 P C 235 (237) : 59 Ind App 405: 13 Lah 702 (PC).
('19) 6 AIR 1919 Mad 798 (798) (DB).
('22) 9 AIR 1922 Mad 221 (222): 45 Mad 103 (DB). (Unless collusive.)
[*See* ('39) 26 AIR 1939 Bom 212 (214) (DB). (Where there is no arbitration at all but merely a private arrangement between the parties drawn up in the form of an award, the section applies.)

7. ('43) 30 AIR 1943 Bom 145 (146).
[*See* ('10) 7 Ind Cas 795 (796) (DB) (Mad).
('32) 19 AIR 1932 Bom 301 (303, 305). (Decree for specific performance of a contract of mortgage.)]

8. ('37) 1937 Mad W N 45 (46). (Charge created under a compromise decree is no better than any other private transfer.)
('34) 21 AIR 1934 Rang 313 (315) : 11 Rang 310 (DB).
[*See also* ('39) 26 AIR 1939 Bom 212 (214) (DB).]

9. ('69) 1 N W P H C R 172 (188) (DB).
('96) 20 Bom 403 (407) (DB).
('35) 22 AIR 1935 Mad 151 (151) : 58 Mad 403 (DB). (Attachment before judgment—Subsequent insolvency of defendant—Attachment does not prevent vesting of property in Official Receiver.)
('33) 20 AIR 1933 Nag 229 (230) : 29 Nag LR 303 (DB).
Also see Note 14.

10. ('40) 27 AIR 1940 Mad 47 (48) (DB). (Adjudication of a person as insolvent by a foreign Court operates as a private transfer within the meaning of S. 64.)
('33) 20 AIR 1933 P C 134 (135, 136): 60 Ind App 167 : 56 Mad 405 (PC). (Reversing A I R 1931 Mad 474 : 54 Mad 727.)

11. ('40) 27 AIR 1940 Mad 47 (48, 49) (DB).

12. ('27) 14 AIR 1927 Mad 1147 (1148) (DB). (Resolution of a Bank setting off shares for debts due to the Bank.)

proper management of the property is not barred by the section.[13] A consent given by heirs of a Mahomedan after his death, to a bequest made by him, does not amount to an alienation of property.[14]

The operation of the right of survivorship among members of a Hindu joint family is not a private transfer ; but it has been held *independently of this section* that when a judgment-debtor dies after an attachment *in execution* is effected on his undivided share, the right of survivorship of his coparceners does not prevail over the rights enforceable under the attachment.[15] Where, however, the judgment-debtor dies after an attachment *before judgment* but before it is converted into an attachment in *execution*, does the right of survivorship prevail over the attachment ? There is a conflict of decisions on this question. See O. 38 R. 5, Note 21.

An assignment of a decree under attachment is a "transfer of a property" within the meaning of this section.[16] Where the *karta* of a Hindu joint family business is adjudicated an insolvent, the power of such *karta* to dispose of joint family property for discharging business obligations vests in the Official Receiver. But such power in the hands of the Official Receiver will be subject to the same qualifications as it was in the hands of the *karta*. Hence, where the joint family property is under attachment, at the time of the adjudication, the Official Receiver's powers of disposal over such property are not unrestricted but subject to the clog created upon it by the attachment.[17]

11. Contrary to such attachment. — These words have been substituted for the expression 'during the continuance of the attachment' which occurred in the old section. This latter expression was too wide and was capable of being construed as rendering any alienation during the attachment void, *whether prejudicial to the claims enforceable under the attachment or not*. The Privy Council in the undermentioned case[1] under the old Code, negatived such a construction and held that the object of S. 276 (corresponding to present S. 64) was only to prohibit alienations 'contrary to the attachment.' The substitution of the said words brings out this idea clearly and specifically. The words 'contrary to the attachment' mean that the transfer must be prejudicial to the interests of the attaching creditor or the auction-purchaser,[2] and an alienation which does not in any way prejudice the rights of the attaching creditor or the auction-purchaser is not affected by

('22) 9 AIR 1922 Lah 147 (148). (Mutation by gaddinashin of property standing in his name to the name of the shrine.)
('29) 16 AIR 1929 Rang 229 (234) : 7 Rang 201. (An assignment of a debt or fund.)
('98) 23 Bom 1 (10,11). (An assignment of a Hindu widow's life interest in the profits of immovable property left to her by her husband's will.)
(08) 35 Cal 889 (895). (Release of an easement.)
('10) 7 Ind Cas 481 (482) (DB) (Cal). (A compromise resulting in transfer of property after attachment.)
('10) 8 Ind Cas 76 (77) (DB) (Cal). (Surrender of holding after attachment to the landlord.)
('09) 33 Bom 264 (266) (DB). (Attachment of son's interest — Father cannot thereafter exercise his disposing power over son's share.)
13. (1900) 13 C P L R 145 (151).
14. ('02) 26 Bom 497 (499) (DB).
15. ('43) 30 AIR 1943 Mad 149 (150): ILR (1943) Mad 397 (DB). (Decree-holder has what amounts to a charge which prevents the accrual to the other coparceners of the right of survivorship and therefore the decree-holder can execute the decree : 4 Mad 302 followed.)
('93) 20 Cal 895 (898) (DB).
†('79) 5 Cal 148 (174) : 6 Ind App 88 (PC).
('14) 1 AIR 1914 Bom 256 (257) : 38 Bom 105 (DB). Also see S. 53 N. 3 ; O. 21 R. 54, N. 3a.
16. ('37) 24 AIR 1937 All 63 (64). (Assumed.)
17. ('43) 30 AIR 1943 Nag 101 (108) : ILR (1943) Nag 390 (DB). (It is only the attaching creditor that may insist upon his rights being worked out. The son has no right to rely on it.)
('42) 29 AIR 1942 Mad 330 (332, 333) (DB).
('37) 24 AIR 1937 Cal 517 (519) : I L R (1937) 2 Cal 675 (DB).

Note 11

1. †('02) 29 Cal 154 (166) : 29 Ind App 9 (PC). [*See also* ('34) 21 AIR 1934 All 902 (903). (Land let out during attachment on nominal rent is act "contrary to attachment.")]
2. ('34) 21 AIR 1934 All 902 (903). (Thus, where the landlord, while the lands were under attachment, let in tenants on a nominal rent which was one-fifth of annual letting value of land, it was held that this act was "contrary to the attachment.")
('36) 164 I. C. 1031 (1032) (DB) (Oudh). (Transfer prior to attachment is not affected by this section.)

the section.[3] Thus, if the attachment is subject to the obligation under a prior contract of sale, the sale in pursuance of the contract will not be a transfer contrary to the attachment within the meaning of this section.[4]

Where a mortgage is executed pending attachment in renewal of[5] or for the purpose of discharging[6] prior mortgages, the transfer is not really contrary to the attachment as the attaching creditor is not in any way prejudiced thereby. But if the amount secured under the new mortgage is in excess of the amount secured under the prior one at the time of the attachment, the security to the extent of the additional amount is void against the claims enforceable under the attachment.[7] A sale pending attachment for the purpose of discharging a prior mortgage debt will be one 'contrary to attachment,' but if the vendee has paid off the prior mortgagee, he is entitled to stand in the shoes of that mortgagee in respect of the amount so paid off.[8]

An attachment of a decree is made under the provisions of O. 21 R. 53. Under that rule the holder of the attached decree is not prohibited from transferring the decree attached and therefore an assignment of the decree will be valid and will entitle the transferee to have his name substituted in place of the assignor and to apply for execution under O. 21 R. 16.[9] But his right to execute the decree is only a permissive right and is subject to the rights of the attaching decree-holder to be paid out first from out of the moneys recovered in execution.[10] See O. 21 R. 53, Note 7.

The attachment referred to in the section is the particular attachment under which a claim is being made[11] and when an alienation is not contrary to such attachment the section has no application.[12] Consequently, an alienation, resulting in the satisfaction of the decree in execution of which the attachment is made, is not 'contrary to such attachment' within the meaning of the section,[13] whereas an alienation pending one attachment, in order to pay off another attaching creditor, is invalid as against the former.[14]

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3. ('38) 25 AIR 1938 Lah 737 (739).
4. ('42) 29 AIR 1942 Mad 67 (69).
5. ('82) 4 Mad 417 (418) (DB).
6. ('42) 29 AIR 1942 Bom 227 (229, 230) : I L R (1942) Bom 67 (DB). (Prior mortgagee attaching property in execution of his money decree subject to his mortgage — Subsequent mortgage executed after attachment expressly providing for payment of portion of the mortgage money to prior mortgagee in full satisfaction—Payment of such amount is not contrary to attachment and the subsequent mortgage is to that extent valid.)
('98) 20 All 421 (424) (DB).
† ('02) 29 Cal 154 (165, 166) : 29 Ind App 9 (PC).
('28) 15 AIR 1928 Mad 703 (704) (DB).
('35) 22 AIR 1935 All 391 (397) (DB). (Portion of amount advanced paid to discharge prior encumbrance—Mortgage is valid to this extent.)
7. ('82) 4 Mad 417 (418) (DB).
[*See* ('35) 22 AIR 1935 All 391 (397) (DB).]
[*See also* (1900) 1900 All W N 155 (155) (DB). (Is void so far as it tended to defeat the object with which the attachment was made.)]
8. ('82) 8 Cal 530 (533) (DB).
† ('26) 13 AIR 1926 Mad 1082 (1083) (DB).
('13) 11 All L Jour 127 (128). (In such cases the purchaser must be presumed to have intended to keep the mortgage alive.)
[*See also* ('38) 25 AIR 1938 Mad 465 (467). (Properties mortgaged to a person—Personal decree passed in favour of another person and against the owner of the properties—Attachment of properties—Mortgagee purchasing properties during the continuance of attachment—Purchase is void.)]
9. ('29) 16 A I R 1929 Pat 1 (2,3):7 Pat 726 (DB).
('12) 17 Ind Cas 323 (325) (DB) (Mad).
10. ('27) 14 AIR 1927 Mad 1025 (1026, 1027) (DB).
11. ('28) 15 AIR 1928 Bom 545 (547) (DB).
12. ('28) 15 AIR 1928 Bom 545 (548) (DB).
('37) 24 AIR 1937 Mad 843 (844) : I L R (1937) Mad 970 (DB).
('36) 163 Ind Cas 587 (589) (DB) (Cal).
('34) 21 AIR 1934 All 165 (167, 168). (Attachment before judgment comes to an end on dismissal of suit — Reversal of judgment in appeal does not revive attachment—Fresh attachment after appellate decree does not affect alienation pending the previous attachment.)
13. †('18) 5 AIR 1918 Mad 127 (131) : 41 Mad 265 (FB).
('22) 9 AIR 1922 P C 393 (396) (PC).
('70) 6 Mad H C R 65 (70).
('31) 18 AIR 1931 Mad 570 (571).
('37) 24 AIR 1937 All 641 (642) (DB).
('37) 24 AIR 1937 All 424 (426) (DB). (Attachment of debt — Assignment of debt to attaching creditor himself is not invalid.)
† ('34) 21 AIR 1934 All 1057 (1060) (DB).
14. ('22) 9 AIR 1922 All 443 (445): 44 All 714 (DB).

Any payment to the judgment-debtor of an attached debt contrary to the attachment will be void under this section as against all claims enforceable under the attachment and the mere fact that the debtor does not pay money into the hands of the judgment-debtor but to somebody else will not make it any the less a payment contrary to the attachment, if the payment is voluntarily made at the instance of or for the benefit of the judgment-debtor.[15]

12. Transfer is void only as against claims enforceable under the attachment. — A private transfer is not *wholly void* but is void only as against *claims enforceable under the attachment*[1] and only to the extent necessary to meet those claims.[2] The only persons therefore who are entitled to object to an alienation pending attachment are those who have legal claims enforceable thereunder.[3] Thus, a transferee

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15. ('36) 23 AIR 1936 Mad 251 (252). (Debt due to *A* (judgment-debtor) attached—Debtor *B* paying amount into Court at instance of *A* or for his benefit—Payment is one made to judgment-debtor and void as being contrary to attachment — Position will be different if *B* pays it under compulsion of law.)
[*See also*] ('40) 27 AIR 1940 P C 173 (176) : ILR (1941) Mad 1 : 67 Ind App 350 : ILR (1940) Kar PC 312 (P C). (Several decree-holders against the same judgment-debtor, attaching decree in his favour — Payment out of Court to one of the attaching creditors will be void against the others under S. 64.)]

Note 12

1. ('43) 30 AIR 1943 Mad 165 (166): I L R (1943) Mad 175 (DB).
('43) 30 AIR 1943 Mad 179 (180) (DB).
('43) 30 AIR 1943 Nag 101 (108) : I L R (1943) Nag 390 (DB).
('42) 29 AIR 1942 Mad 330 (332) (DB). (The section does not put an end to the power of sale but only provides that a transfer of the attached property shall not prejudice the attaching creditor.)
('41) 28 AIR 1941 Mad 161 (173) : I L R (1941) Mad 438 (FB). (*Obiter* — Per Patanjali Sastri, J.)
† ('39) 26 AIR 1939 Mad 702 (706) : ILR (1939) Mad 853 (DB). (Section does not put an end to the power of sale.)
('27) 14 AIR 1927 Mad 190 (191).
('27) 14 AIR 1927 Mad 445 (446) (DB). (A mortgagee pending attachment can apply under O. 21 R 89.)
('72) 14 Moo Ind App 543 (549, 550) (PC). (Case under S. 240 of 1859 Code.)
('21) 63 Ind Cas 108 (108) (DB) (Lah).
('82) 1882 All W N 210 (210) (DB).
('69) 1 N W P H C R 18 (19) (DB).
(1900) 1900 All W N 148 (149) (DB). (A decree-holder who having purchased the property from the judgment-debtors by a private sale deed has dropped the execution proceedings has no right to bring a suit for possession against a third party to whom the judgment-debtors have in defiance to injunction alienated a portion of the property.)
('05) 2 All L Jour 265 (267) (DB). (Purchaser is entitled to appeal against an order for sale of the property purchased by him.)
('17) 4 AIR 1917 Cal 281 (282) (DB). (Application under O. 21 R. 89 does not offend S. 64.)
('16) 3 AIR 1916 Pat 353 (356) (DB). (The private transferee has not even a lien on the property to the extent of the purchase money.)
('10) 8 Mad L Tim 197 (198) (DB).
('91) 14 Mad 277 (282) (DB).
('99) 26 Cal 531 (535) (DB).
('27) 14 AIR 1927 Lah 101 (102).
('17) 4 AIR 1917 All 423 (423) (DB).
('25) 12 AIR 1925 Mad 338 (340).
('98) 20 All 421 (425) (DB).
('38) 25 AIR 1938 Mad 465 (466).
('37) 24 AIR 1937 All 424 (426) (DB).
('37) 24 AIR 1937 Mad 843 (844) : I L R (1937) Mad 970 (DB). (Alienation is void only as against claims under the particular attachment.)
[*See also* ('33) 20 AIR 1933 Mad 96 (97) (DB). (Transferee after attachment entitled to apply under O. 21 R. 90 as same is not contrary to attachment.)
('36) 23 AIR 1936 Mad 100 (101) : I L R (1937) Mad 335. (Debtor alienating property in contravention of attachment — Debtor subsequently declared insolvent — The property does not vest in Official Receiver — After discharge of debtor in the insolvency proceedings, creditor can proceed against the property.)
[But see ('96) 18 All 123 (124) (DB).]
2. ('42) 29 AIR 1942 Bom 227 (230) : I L R (1942) Bom 67 (DB). (The very object with which the section has been enacted is to save rights which do not conflict with the claims enforceable under the attachment.)
('41) 28 AIR 1941 Mad 208 (213) (DB).
('41) 28 AIR 1941 Pesh 87 (88). (Attaching decree-holder cannot sue transferee from judgment-debtor, for mesne profits.)
('74) 6 N W P H C R 296 (300, 301).
† ('81) 7 Cal 107 (118) : 8 Ind App 65 (PC).
('02) 29 Cal 154 (166) : 29 Ind App 9 (PC).
[*See also* ('19) 6 AIR 1919 Oudh 351 (352) : 22 Oudh Cas 150 (DB). (Mortgagee, under mortgage executed while property under attachment, can claim rateable distribution in respect of simple money decree for interest due on mortgage.)]
3. ('43) 30 AIR 1943 Nag 101 (108) : I L R (1943) Nag 390 (DB). (Attachment of son's interest in family property by father's decree-holders — Subsequent sale of son's interest by receiver in insolvency—Son challenging the debts incurred by the father cannot challenge the sale by receiver on the ground of *attachment* as he is not a person enforcing a claim under the attachment.)

from the decree-holder,[4] a claimant for the rateable distribution of assets[5] and an auction purchaser at the sale held in pursuance of the attachment,[6] are all persons whose claims are enforceable under the attachment and who can object to the private transfer pending attachment. But a purchaser at a private sale held in pursuance of O. 21, R. 83 cannot be said to have a claim enforceable under the attachment and he cannot contest a prior alienation of the property by the judgment-debtor on the ground that it was made during an attachment of the property.[7]

The attachment referred to in the section is the attachment in respect of which the property was sold and it is *that* attachment alone which can be employed for the purpose of impugning a private alienation.[8] Thus, where property attached in execution is alienated, but such attachment ceases by a dismissal of the application for execution under O. 21 R. 57 and the property is again brought to sale in pursuance of a second attachment, the alienation pending the first attachment is not void against the auction purchaser in the sale held under the second attachment.[9]

If an attachment is not properly perfected, no claim can be enforced thereunder.[10] Again, if the attachment comes to an end by the satisfaction of the decree in execution of which it was attached, all claims enforceable under the attachment also cease to be enforceable and the section does not apply.[11] Nor can a decree-holder who has not secured his title from the Court and has no longer any claim enforceable under the attachment, obtain any benefit from the provisions of this section.[12]

A who has mortgage rights over certain properties transfers the rights to B in order to discharge two other decree debts in execution of which those rights had been attached. B delays in discharging those debts and in the meanwhile C, in execution of another decree against A, attaches the moneys retained by B to pay off the prior attaching

† ('29) 16 AIR 1929 Pat 1 (3) : 7 Pat 726 (DB).
('37) 24 AIR 1937 All 63 (64).

4. ('89) 1889 All W N 132 (133).
('13) 18 Ind Cas 691 (693) (DB) (Mad).

5. See Explanation to the Section.

6. ('41) 28 AIR 1941 Mad 161 (173): I L R (1941) Mad 438 (FB).
('69) 11 Suth W R O C 1 (5, 9, 10) (FB).
('13) 20 Ind Cas 241 (243) (DB) (Cal).
(NOTE — The decision of Stuart, A. J. C. in A I R 1915 Oudh 157 to the effect that an auction purchaser cannot question the validity of a mortgage pending attachment and that the title to hold the house unencumbered is not a claim enforceable under the attachment is, it is submitted, not correct.)

7. ('41) 28 AIR 1941 Mad 208 (211,212,213) (DB).

8. † ('16) 3 AIR 1916 P C 238 (241) : 44 Ind App 72 : 44 Cal 662 (PC).
('33) 20 AIR 1933 Nag 230 (232). (Mortgage after attachment — Second attachment by another decree-holder — Property sold in execution of first attachment — Mortgage will prevail as against the second attachment.)
† ('84) 6 All 33 (36) (DB).
('74) 11 Bom H C R 159 (161). (Sale pending one attachment — Another creditor attaching subsequent to sale does not claim under the prior attachment and cannot impugn sale.)

9. ('26) 97 Ind Cas 547 (548) (All).

10. †('85) 7 All 702 (708) (DB).

11. ('43) 30 AIR 1943 Mad 165 (166, 167) : I L R (1943) Mad 175 (DB). (Attachment ceasing as a result of setting aside sale — Claims for rateable distribution also cease.)
('42) 29 AIR 1942 Mad 522 (523). (Attachment and sale in execution — Private transfer by judgment-debtor after sale—Sale set aside under O. 21 R. 89 and attachment ceasing—Claim for rateable distribution cannot be enforced.)
('40) 27 AIR 1940 Pesh 18 (19). (Mortgage executed for the purpose of discharging the decretal amount — Decree adjusted as fully satisfied — Mortgage is not void as there is no claim enforceable under the attachment.)
('67) 7 Suth W R 430 (430) (DB).
('11) 35 Bom 516 (524, 525) (DB).
† ('28) 15 AIR 1928 Bom 545 (548) (DB).
('74) 6 N W P H C R 217 (219).
('18) 5 AIR 1918 Mad 280 (281) (DB).
('03) 25 All 431 (434) (DB). (Where no assets are realised claims for rateable distribution cannot be enforceable.)
('21) 8 AIR 1921 All 45 (46) : 43 All 399 (DB). (Where the sale under the attachment has been set aside, claims enforceable thereunder cease.)
('12) 15 Ind Cas 860 (861) (DB) (Oudh). (Attachment ceases on adjudication — Claims under the attachment cease to be enforceable thereafter.)
[*See also* ('36) 163 Ind Cas 587 (589) (Cal) (DB). (Persons entitled to rateable distribution can impeach private alienation only if the attachment under which they claim is subsisting.)]

12. ('19) 6 AIR 1919 Lah 54 (56). (Forfeiting his rights by becoming private purchaser.)

creditors. Subsequent to this B pays off the decree debts. Is such payment valid against C? Yes. The reason is that A himself has no absolute rights to amounts retained by B but is subject to the latter's right to pay off the prior encumbrances. C's attachment of A's rights will therefore be also subject to the paramount rights of B to protect his title by paying off the prior creditors.[13]

Suppose, the judgment-debtor whose property has been attached in execution of a decree sells the property to another person pending the attachment. Part of the consideration is left with the purchaser to be paid to the decree-holder. Can the decree-holder take out garnishee proceedings against the purchaser in respect of this money? It was held by the Allahabad High Court in the undermentioned case[14] that he could not do so, the reason being that under Rule 131 of O. 21, as amended by the Allahabad High Court, garnishee proceedings cannot be taken in regard to debts secured by a charge or mortgage whereas in the present case, there is a statutory charge in regard to unpaid purchase money.

13. Claims enforceable under an attachment include claims for rateable distribution — Explanation. — The Explanation to the section is new. It gives effect to the view taken by Telang, J., in *Sorabji* v. *Govind*,[1] a case under S. 276 of the old Code, that claims enforceable under an attachment include claims under S. 73 of the Code for rateable distribution of assets.[2] But in order that the Explanation may apply, two conditions must be satisfied —

(1) there must be *assets* held by the Court, for otherwise there is no right to rateable distribution at all,[3] and

(2) the claim of the decree-holder must be one enforceable *under the particular attachment* in respect of which the assets have been realised.[4]

Illustrations.

1. *A* obtains a decree against *B* and attaches his properties in execution. *B* transfers the property pending the attachment, to *C*. *Subsequently*, *X* attaches the same properties in execution of his decree against *B*, brings it to sale and purchases it himself. Here if assets are held by the Court in *X*'s execution, *A* will be entitled to rateable distribution, he having applied in execution before the receipt of such assets. But he cannot question *C*'s title inasmuch as his claim is only in respect of *X*'s attachment which *cannot be enforced against* the transfer to *C* which took place prior to that

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13. ('15) 2 AIR 1915 Mad 599 (600) (DB).

14. ('40) 27 AIR 1940 All 500 (504) : ILR (1940) All 681 (DB). (It is not open to the decree-holder to apply for garnishee order and at the same time contend that the sale is void under S. 64 and so there is no statutory charge.)

Note 13

1. ('92) 16 Bom 91 (101).

2. ('40) 27 AIR 1940 Mad 385 (395): I L R (1940) Mad 526 (FB).
† ('34) 21 AIR 1934 All 896 (897) (DB). (Applicant for rateable distribution is on the same footing as attaching decree-holder.)
† ('33) 20 AIR 1933 Nag 349 (352).
('36) 164 Ind Cas 1031 (1032) (DB) (Oudh).
[*See also* ('22) 9 AIR 1922 Bom 241 (242) : 46 Bom 895 (DB).]

3. ('12) 16 Ind Cas 640 (640) (DB) (Bom). ("Assets" mean all a man's property, of whatever kind, which may be used to satisfy debts or demands existing against him.)
('15) 2 AIR 1915 Low Bur 92 (92). (If there are assets received, a claimant for rateable distribution can question an alienation pending attachment.)
† ('37) 24 AIR 1937 Nag 1 (4) : I L R (1937) Nag 291 (DB).
('37) 24 AIR 1937 Pat 609 (610).
('34) 21 AIR 1934 All 1069 (1070) (DB).
('34) 21 AIR 1934 All 1057 (1061) (DB).
† ('36) 163 Ind Cas 587 (589) (DB) (Cal). (The claim for rateable distribution must be an enforceable claim.)
[But see ('40) 27 AIR 1940 Mad 385 (401): ILR (1940) Mad 526 (FB). (Obiter — Per Abdur Rahman J.)]

4. ('42) 29 AIR 1942 Mad 522 (522, 523). (Attachment ceasing owing to sale being set aside—Transfer cannot afterwards be impeached by person who had applied for rateable distribution before sale.)
See the case in foot-note (5).
[*See also* ('26) 13 AIR 1926 Sind 177 (177) : 20 Sind L R 111. (Private transfer before attachment and sale — Purchaser cannot question the validity though the transfer was made pending a different attachment by another person.)
('33) 20 AIR 1933 Nag 349 (351).]

attachment.[5] For the same reason, *X* himself or a stranger auction purchaser under his decree cannot question *C's* title, although at the date of the private transfer, *X* had *applied* for execution of his decree (the attachment under his decree being effected after the private transfer).[6]

2. *A* obtains a decree against *B* and attaches his properties in execution. *C* also obtains a decree against *B* and applies for execution of his decree. *B* then transfers the property to *D* and discharges *A's* decree. Here *no assets are received at all* and *C* has no right to any rateable distribution. He cannot consequently question *D's* title to the property.[7]

It has been held by the Bombay[8] and Madras[9] High Courts that in order that a claim for rateable distribution may be 'enforceable' so as to defeat an alienation pending the attachment in respect of which assets are received, it is not necessary that the claim should have been *in existence on the date of the alienation*, i. e., that the claimant should have obtained a decree and applied for execution before that date. The same view was taken in an earlier decision of the Calcutta High Court.[10] The same High Court has however, in a later case, held that the claim should have been in existence on the date of the alienation.[11] There does not seem to be anything in the section itself which leads to the restricted interpretation adopted by the later decision of the Calcutta High Court. It is submitted that the Bombay and Madras views are correct.

See also the case noted below.[12]

14. Effect of vesting order or winding up order after attachment. — As has been seen in Note 10 a vesting order in insolvency is a transfer by operation of law and is not affected by S. 64. Where the judgment-debtor is adjudicated an insolvent, the whole of his property vests in the Official Receiver or Official Assignee for the benefit of the general body of the creditors and an attaching creditor has no priority over the Official Receiver or Official Assignee.[1] Under S. 34 of the Provincial Insolvency Act, 1907,

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5. ('16) 3 AIR 1916 P C 238 (241) : 44 Ind App 72 : 44 Cal 662 (PC).

6. ✣('40) 27 AIR 1940 Mad 385 (399) : ILR (1940) Mad 526 (FB). (Per majority of Full Bench — Abdur Rahman and Krishnaswami Ayyangar JJ. contra : The application for execution by *X* prior to the private transfer makes him a person having a claim for rateable distribution under *A's* decree and so, by virtue of the explanation to S. 64 can question the alienation made contrary to *A's* attachment though *X's* own attachment is made after the private transfer to *C*.)

7. † ('21) 8 AIR 1921 All 45 (46): 43 All 399 (DB).
('12) 14 Bom L R 511 (514).
('21) 8 AIR 1921 Oudh 176 (184) (DB).
✣('18) 5 AIR 1918 Mad 127(132): 41 Mad 265(FB).
('19) 6 AIR 1919 Lah 129(130): 1919 Pun Re No. 5.
('20) 7 AIR 1920 Lah 94 (94).
† ('28) 15 AIR 1928 Bom 545 (547) (DB).
('05) 28 Mad 380 (382, 384, 385) (DB).
† ('37) 24 AIR 1937 All 641 (642) (DB).
('34) 21 AIR 1934 All 1069 (1070) (DB).
† ('34) 21 AIR 1934 All 1057 (1060) (DB).
[*See also* ('37) 24 AIR 1937 Pat 609 (610). (Property sold by private treaty between judgment-debtor and decree-holder.)
('36) 163 Ind Cas 587 (589) (DB) (Cal).]

8. ('22) 9 AIR 1922 Bom 241 (242) : 46 Bom 895 (DB).
('92) 16 Bom 91 (101, 102).

9. † ('26) 13 AIR 1926 Mad 307 (308, 310): 49 Mad 38 (DB).

10. ('17) 4 AIR 1917 Cal 561 (561) (DB).

11. ('21) 8 AIR 1921 Cal 801 (805, 806) (DB). (Dissented from in AIR 1926 Mad 307: 49 Mad 38.)

12. ('41) 28 AIR 1941 Pesh 18 (20) (DB). (*Held*, that the explanation to S. 64 shows that applications for execution and those for rateable distribution go hand in hand. Hence, an order for continuation of attachment made with reference to an application for execution enures for the benefit of another decree-holder who has applied for rateable distribution and a private transfer of the property will be void against a purchaser in execution of his decree.)

Note 14

1. (1864) 2 Bom H C R 142 (144, 145) (DB).
('68) 10 Suth W R 353 (353, 354) (DB).
('72) 17 Suth W R 234 (235) (DB).
('74) 12 Beng L R App 1 (1).
('81) 7 Cal 213 (214) (DB).
('82) 1882 Pun Re No. 93, p. 264.
✣('84) 10 Cal 150 (157, 159) (FB).
('85) 8 Mad 554 (556) (DB).
('96) 20 Bom 403 (406) (DB).
✣('02) 29 Cal 428 (432, 433) (FB).
† ('03) 26 Mad 673 (679, 680) (SB).
('12) 15 Ind Cas 860 (861) (DB) (Oudh).
('13) 40 Cal 78 (81).
('18) 5 AIR 1918 Cal 351 (353) : 44 Cal 1016.
† ('33) 20 AIR 1933 Nag 229 (230): 29 Nag L R 303 (DB).
[*See* ('19) 6 AIR 1919 Mad 607 (608) : 41 Mad 1053 (DB). (Deposit of money by the defendant under O. 38 R. 2 — Insolvency of the defendant before decree — Plaintiff can appropriate that amount to the exclusion of receiver.)

the attaching creditor was entitled to the assets realised in execution or otherwise before the *order of adjudication* so that if execution had taken place and sale price deposited in Court before adjudication, the decree-holder was entitled to the sale proceeds as against the receiver.[2] This is now no longer law in view of the provisions of S. 51 of the Provincial Insolvency Act, 1920, which provides that "no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution by sale or otherwise before the date *of the admission of the petition.*"

Where property under attachment is transferred contrary to such attachment, the transfer is not *absolutely void* and so, where the debtor is adjudicated insolvent after the alienation, the property does not vest in the Official Receiver.[3]

An order for liquidation *does not vest* the property of the company in the liquidator and an attachment made on the property of the company at the instance of the decree-holder *before* the winding up of the company will prevail over the rights of the liquidator.[4]

15. Prior contract for sale of property. — It has been held in the undermentioned cases[1] that an alienation of immovable property pending an attachment of such property can be avoided under this section, although the alienation has been made in pursuance of a contract entered into before the attachment.

But a contrary view has been held in several cases. In *Gutta Bapineedu* v. *Gutta Venkayya*,[2] it was held by the High Court of Madras that as the contract entered into before attachment could be enforced under S. 27 (b) of the Specific Relief Act, against the transferee in court auction and the attaching creditor, the claim of the latter was not one *enforceable* under the attachment against the sale executed in pursuance of such a contract and therefore cannot prevail against the sale. The High Court of Bombay[3] has taken the same view. In *Babala Venkata Reddi* v. *Mangadu Yellappa Chetty*,[4] the High Court of Madras rested the view on another ground. It held, following an earlier decision of the Calcutta High Court,[5] that the contract of sale created an *obligation annexed to the ownership of the property* under S. 40 of the Transfer of Property Act

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† ('33) 20 AIR 1933 Cal 625 (626, 627) (DB). (Defendant depositing amount with plaintiff's pleader under Court's order — Deposit subject to result of pending action — Subsequent insolvency of defendant — Plaintiff is entitled to deposit in preference to general creditors.)]

[*See also* ('69) 12 Suth W R 103 (104) (DB). (Money due to an insolvent deposited in Court — Court orders it to be paid to creditors who had attached it — Remedy open to Official Assignee is a suit for injunction to restrain the creditors.)

('35) 22 AIR 1935 Mad 882 (883, 884). (Attachment and sale for non-payment of income-tax — *Held*, title of purchaser of insolvent's property from Official Receiver was superior to that of purchaser under attachment for non-payment of income-tax though such attachment was prior in point of time.)]

Also see Note 10; S. 50, N. 10; S. 73, N. 14; O. 38, R. 5, N. 20.

2. ('69) 1 N W P H C R 172 (187, 189) (DB).
('05) 29 Bom 405 (409). (Payment to the sheriff not treated as equivalent to payment to the creditor — Official Assignee's title prevailed.)
('18) 5 AIR 1918 All 324 (324) : 40 All 86 (DB).
('18) 5 AIR 1918 All 402 (403) : 40 All 197 (DB).
('19) 6 AIR 1919 All 68 (69) : 41 All 274 (DB).
('22) 9 AIR 1922 Mad 189 (190) : 45 Mad 70 (DB).
('12) 34 All 628 (630, 631) (DB). (But not to the money of the insolvent which he had attached.)

3. ('43) 30 AIR 1943 Mad 179 (180) (DB).
('36) 23 AIR 1936 Mad 100 (101). (Discharge of insolvent — Creditor can proceed against the property notwithstanding such discharge.)

4. ('16) 3 AIR 1916 Cal 918 (919) : 43 Cal 586 (DB).

Note 15

1. ('35) 22 AIR 1935 Lah 71 (75) : 16 Lah 328 (DB).
('09) 5 Low Bur Rul 6 (6) : 2 Ind Cas 350 (350).
('29) 16 AIR 1929 Cal 491 (495, 496) : 57 Cal 274 (DB).

2. ('10) 7 Ind Cas 795 (796) (DB) (Mad).
[*See also* ('32) 19 AIR 1932 Bom 301 (303, 305). (Prior decree for specific performance of agreement to mortgage — Subsequent attachment — Mortgage executed by Court as per decree — *Held* attachment subject to mortgage.)]

3. ('43) 30 AIR 1943 Bom 145 (145). (Agreement to sell — Subsequent attachment of property to be sold — Decree for specific performance and consequent sale prevails against attachment.)

4. ('17) 4 AIR 1917 Mad 4 (5) (DB).

5. ('16) 3 AIR 1916 Cal 927 (928) (DB).

and that the attachment and sale must be deemed to have been made of the property only *subject* to such obligation. The High Court of Rangoon has held the same view in the undermentioned case[6] on yet another ground. In that case possession of the property had also been delivered to the promisee under the contract of sale prior to the attachment and it was held that the *beneficial interest* had been transferred before attachment, that what is aimed at by S. 64 is only the transfer of the beneficial interest and that therefore the mere conveyance of the *legal title* after the attachment is not affected by S. 64. The view held in *Babala Venkata Reddi's case*[7] has also been taken by the Madras High Court in subsequent decisions[8] and by the Bombay High Court in the undermentioned cases.[9] The Nagpur High Court has also held that this section does not affect a transfer in pursuance of a contract entered into prior to the attachment.[10] See also O. 38 R. 10, Note 1.

It is submitted that the second of the two views mentioned above seems to be the correct one. No doubt a mere contract for the sale of immovable property does not create any interest in the property. But the contract certainly creates an obligation annexed to the ownership of the property and as what is attached is the right, title and interest of the debtor in the property, the attachment cannot be free from any obligation to which the debtor is subject in respect of the property at the date of the attachment.[11] As the learned Judges observed in *Babala Venkatareddi's case*,[12] "it does not seem to be sound sense that when a creditor attaches property which is subject to a particular obligation, he should be able to override it."

If an *interest in the property* is created only after the attachment, it is clearly within the terms of the section and cannot prevail against claims enforceable under the attachment.

16. Objections as to attachment.—The onus of proving that an attachment *prima facie* legal is not legal is on the party pleading it.[1] But a judgment-debtor who consents to an attachment of an occupancy holding is not estopped from objecting to the sale of the holding on the ground of its non-transferability.[2] An attachment *before judgment* does not stand on the same footing as an attachment in execution; and a party who does not object to the attachment before judgment is not estopped from objecting to its validity after the decree.[3] The question of non-observance of the formalities of attachment cannot be raised for the first time in appeal to the Privy Council.[4]

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6. ('25) 12 AIR 1925 Rang 382 (383) (DB).
7. ('17) 4 AIR 1917 Mad 4 (5) (DB).
8. ('42) 29 AIR 1942 Mad 67 (68) (DB).
('39) 26 AIR 1939 Mad 702 (707) : I L R (1939) Mad 853 : 1939 Mad W N 329 (334) (DB). (There is no distinction in this respect between a conveyance voluntarily executed by the judgment-debtor in pursuance of a pre-existing contract and a conveyance executed by him under an order of Court on basis of such contract.)
('35) 22 AIR 1935 Mad 193 (195). (Attachment holds good in respect of judgment-debtor's right to the balance of the unpaid purchase money.)
('35) 22 AIR 1935 Mad 872 (873): 59 Mad 1 (DB). (Do.)
9. † ('41) 28 AIR 1941 Bom 198 (200, 201) : I L R (1941) Bom 290 (DB).
('43) 30 AIR 1943 Bom 27 (30).
('39) 26 AIR 1939 Bom 492 (493). (Case relating to attachment before judgment.)
10. ('36) 23 AIR 1936 Nag 163 (165) : ILR (1936) Nag 172.
11. ('42) 29 AIR 1942 Mad 67 (68).
('17) 4 AIR 1917 Mad 4 (5) (DB).
12. ('17) 4 AIR 1917 Mad 4 (5) (DB).

Note 16

1. ('99) 1899 All W N 127 (128) (DB).
('81) 6 Cal 129 (134) : 7 Ind App 157 (PC). (*Held* that the objection to the validity of attachment cannot be raised for the first time in appeal.)
('10) 20 Mad L Jour 821 (822) (DB). (Attachment for a larger amount than due is valid to the extent of the amount due.)
2. ('18) 5 AIR 1918 Pat 604 (605) (DB).
3. ('11) 10 Ind Cas 305 (306) (DB) (Cal).
4. ('81) 6 Cal 129 (134) : 7 Ind App 157 (PC).

See also the undermentioned case[5] where the Privy Council observed that the main purpose of attachment is to prevent the transfer or charging of the property by the judgment-debtor and held that the alleged irregularities in the attachment in the particular case did not justify the setting aside of the sale.

17. Waiver of benefit under the section. — The section being intended for the benefit of the attaching creditor, the benefit can be *waived* by him.[1] Waiver, however, is an intentional act and a clear act showing such an intention must be shown.[2] The mere fact that the decree-holder in taking out execution referred to a mortgage that had been executed pending attachment,[3] or that such mortgage was notified in the proclamation of sale,[4] will not amount to a waiver of the plea under S. 64. If however the decree-holder *expressly permits* its notification at the time of the sale, he cannot be permitted to plead the bar under section 64.[5]

SALE

65. [S. 316.] Where immoveable property[3] is sold in execution of a decree and such sale has become absolute,[4] the property shall be deemed to have vested[8] in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

Purchaser's title.

[1859, S. 259; See O. 21 Rr. 82 and 92.]

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. "Immoveable property." See Section 16.
4. "Become absolute."
5. Sale certificate. See O. 21 R. 94.
6. Effect of reversal of decree after confirmation. See Note 58 on Section 47.
7. Effect of reversal of decree before confirmation.
8. "Shall be deemed to have vested."
9. Right to possession, when accrues.
10. Right to mesne profits.
11. Liability for rent and revenue.
12. Titles of purchasers at successive execution sales.
13. What passes under a court sale. See O. 21, R. 94.
14. Sale in execution of mortgage decree.
15. Sale in execution of satisfied decree. See Note 71 on S. 47.
16. Sale in execution of decree barred by limitation. See Note 69 on Section 47.
17. Revenue sales.
18. Effect of vesting order in insolvency proceedings. See Section 64, Note 14.

1. Legislative changes. — Two important changes have been introduced into the present section—

(1) The date of vesting of title in the auction purchaser is *the date of the sale* and not the date of the *sale certificate*.

(2) The decree under which the property is sold need not be *subsisting* at the time of the confirmation of the sale.

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5. ('38) 25 AIR 1938 P C 230 (232) : 32 Sind L R 879 (PC).

Note 17

1. † ('23) 10 AIR 1923 Mad 230 (231) (DB).
('86) 1886 All W N 176 (176) (DB).
('34) 21 AIR 1934 Pat 685 (693): 13 Pat 446 (DB).
[See however ('27) 14 AIR 1927 Mad 648 (649). (Where the facts are not clear.)]
2. ('28) 15 AIR 1928 Bom 444 (447) (DB).
3. ('28) 15 AIR 1928 Bom 444 (447) (DB).
4. ('22) 9 AIR 1922 All 443 (445) : 44 All 714 (DB).
5. ('16) 3 AIR 1916 Oudh 169 (174) (DB).

2. Scope and object of the section. — A judicial sale, unlike a private one, is not complete immediately it takes place. It is liable to be set aside on appropriate proceedings taken under O. 21 Rr. 89 to 91. If no such proceedings are taken, or if taken are not successful, the sale will then be made absolute under O. 21 R. 92. Questions, therefore, arise as to whether the auction purchaser is entitled to rents and profits during the period between the two dates, i. e., the date of the sale and the date of the certificate of sale. Again, there may be successive sales of the same property in execution of different decrees giving rise to questions of priority of title with reference to dates of *confirmation*. Questions as to the validity of private sales by auction purchasers or judgment-debtors before the date of confirmation may also arise. In order to settle the law bearing on such questions, this section lays down that though the property does not vest in the auction purchaser till the date of confirmation, once the sale is confirmed and becomes absolute, the title of the auction purchaser shall *relate back to the date of the sale* itself.

3. "Immoveable property." — See Section 16.

4. "Become absolute." — See O. 21 R. 92. As to when a judicial sale is void or voidable, see O. 21 Rr. 89 to 91 and S. 47, Notes 51 to 71.

5. Sale certificate. — See O. 21 R. 94.

6. Effect of reversal of decree after confirmation. — See Note 58 on Section 47.

7. Effect of reversal of decree before confirmation. — Under the old section there was a proviso that the decree must be *subsisting on the date of the sale certificate* for the property to vest in the purchaser.[1] This is now no longer necessary and a sale in favour of a *bona fide* purchaser not a party to the suit will not be set aside merely because the decree has been reversed before confirmation.[2] See also S. 144, Note 13.

8. "Shall be deemed to have vested." — Until the sale is confirmed, title does not vest in the purchaser.[1] But where, on confirmation, it does vest in him, it shall be deemed to have vested from the date of sale. In other words, the vesting relates back to the date of sale.[2] The fact that the sale certificate is *issued* on a later date than that of the confirmation, does not affect the vesting of title on the confirmation of the sale.[3]

Section 65 — Note 7

1. ('88) 10 All 83 (84, 85) (DB).
('78) 2 Bom 540 (541) (DB).
('81) 7 Cal 91 (95) (DB). (Decree subsists unless set aside or reversed by competent Court.)
('98) 25 Cal 175 (178, 179) (DB).
('07) 29 All 591 (592, 593).
2. †('33) 20 AIR 1933 Mad 598 (603, 604, 605): 56 Mad 808. (Overruled on another point in A I R 1941 Mad 161 : I L R (1940) Mad 39 (FB).)

Note 8

1. † ('33) 20 AIR 1933 Sind 198 (200) : 27 Sind L R 256 (DB).
('37) 1937 Oudh W N 1153 (1156).
2. ('12) 40 Cal 89 (102, 103) : 39 Ind App 228 : 16 Ind Cas 210 (212) (PC).
('33) 20 AIR 1933 Mad 482 (484).
('38) 25 AIR 1938 Mad 317 (318). (The tenant of the judgment-debtor is entitled to pay rent to the judgment-debtor until sale has been confirmed — Auction-purchaser to recover it from judgment-debtor—Tenant is protected.)
('38) 25 AIR 1938 Pesh 49 (50).
('33) 20 AIR 1933 Oudh 38 (38) (DB). (Judgment-debtor after sale but before confirmation altering rent in kind to rent in cash — *Held*, he had no right to do so.)
('09) 2 Ind Cas 81 (82) (All).
('19) 6 AIR 1919 All 253 (254) : 41 All 526 (528) (DB).
† ('15) 2 AIR 1915 Mad 805 (806) (DB).
('21) 8 AIR 1921 Mad 498 (503) (DB). (The converse is true so that where sale not confirmed nothing is vested.)
('25) 12 AIR 1925 Bom 483 (484) (DB). (No title till confirmation though vesting relates back to date of sale.)
† ('30) 17 AIR 1930 Bom 81 (83) (DB). (Before confirmation property purchased agreed to be sold —Sale confirmed—Agreement specifically enforceable.)
('27) 14 AIR 1927 Oudh 261 (262) : 2 Luck 496 (DB). (Gift by auction-purchaser before confirmation—Donee authorized to take possession—Valid.)
[*See* ('42) 29 AIR 1942 Lah 153 (156) : I L R (1942) Lah 559 (FB). (Objection to attachment and sale under S. 60 of the Code cannot be taken *after* sale though sale has not been confirmed.)]
Also see O. 21 R. 94, Note 3.
3. ('14) 1 AIR 1914 Oudh 306 (306).

The legal effect of the relation back of the vesting of the title to the date of the sale is that the auction-purchaser will be entitled to rights in the property and be liable to the obligations in respect of the same *as from the date of sale.* Thus, if there are accretions to the property between the date of sale and the date of confirmation, they would belong to him. But if the property is, between those two dates, sold for arrears of revenue, he would lose it completely.[4] But the provisions of the section as to the retrospective vesting of title do not come into operation until and unless the sale has become absolute. Hence, the profits of the property for the period between the sale and its confirmation must be deemed, for purposes of income-tax, as accruing to the purchaser on the date of the confirmation.[5] The effect of the legal position that the title of the purchaser is not complete till confirmation is that if the sale is prohibited by an order of Court or other competent authority in the meanwhile, the confirmation is to be treated as prohibited and the purchaser does not get any title.[6] But it has been held by the Lahore High Court that legislation before confirmation of sale exempting the property from attachment or sale will not affect the rights of the auction-purchaser unless there is a clear provision to the contrary.[7]

Though, according to the strict terms of S. 316 of the old Code, title vested only on the date of the sale certificate, the Courts had held that even from the date of sale the purchaser acquired an *equitable* interest in the property to be perfected on confirmation,[8] and, in effect, the same position was reached as is now embodied in the section in clear terms. Again, under the old Code the property vested in the purchaser only against parties to the suit and persons claiming under them.[9] The omission from the present section of the words "so far as regards the parties to the suit and persons claiming through or under them" does not, however, alter the law under the present section.

9. Right to possession, when accrues. — As has been seen in Note 8, the right of the auction purchaser to the property arises on confirmation of the sale.[1] It is therefore no longer necessary to obtain a sale certificate before applying for possession[2] as

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† ('26) 95 Ind Cas 965 (966) (All).
('96) 19 All 188 (191).
('82) 7 Bom 254 (256) (DB).
('10) 5 Ind Cas 263 (264) (All). (Purchaser's title though not full till grant of sale certificate, he has lesser equitable interest on confirmation of sale.)
('15) 2 AIR 1915 Lah 9 (10): 1915 Pun Re No. 81, p. 328. (Confirmation of sale inferable from Court's action.)
('81) 6 Bom 139 (142,143) (DB).
('74) 21 Suth W R 349 (350) (DB).
† ('88) 12 Bom 589 (594, 595) (DB).
('81) 7 Cal 199 (207) (DB).
✠('32) 19 AIR 1932 Pat 80 (83) : 10 Pat 670 (DB). (Title derived from court sale — Sale certificate is only an evidence.)
† ('31) 18 AIR 1931 Pat 241 (245) : 10 Pat 670 (FB).
[*See also* ('82) 6 Bom 586 (587). (Question left open.)]

4. ✠('13) 40 Cal 89 (102, 103, 104) : 39 Ind App 228 (PC).
('98) 2 Cal W N 589 (591) (DB).
('26) 13 AIR 1926 Nag 17 (19) : 24 Nag L R 48.

5. ('33) 20 AIR 1933 PC 101 (106) : 12 Pat 305 : 60 Ind App 133 (PC).

6. ('40) 27 AIR 1940 Pat 565 (566) (DB). (Order prohibiting sale passed by the Commissioner under S. 2-B of Chota Nagpur Encumbered Estates Act.)

7. ('42) 29 AIR 1942 Lah 102 (103, 104) : I L R (1942) Lah 349 (FB).

8. See O. 21 R. 94, Note 3.

9. ('91) 18 Cal 164 (178) : 17 Ind App 201 (PC).

Note 9

1. ('40) 27 AIR 1940 Lah 230 (233) : ILR (1941) Lah 91 (DB). (It is wrong to say that the right to possession only accrues from the date of the sale certificate.)
('83) 5 All 305 (309) (FB). (If sale confirmed purchaser can prove title otherwise than by a sale certificate.)
('92) 1892 Pun Re No. 27 p. 112.
('94) 1894 All W N 54 (54). (After confirmation of sale purchaser can sue for possession, though sale certificate not yet had.)
('88) 15 Cal 546 (553, 554) (DB).
('96) 23 Cal 49 (51) (DB).
† ('88) 11 Mad 296 (299, 300) (DB).
('83) 9 Cal 842 (843) (DB).
[*See* ('43) 22 Pat 280 (283) (DB). (Auction-purchaser has a right of possession not from the date of sale but from the date of the confirmation of the sale—Per Manohar Lall J.)]

2. See cases in foot-note (1).

was held to be necessary under the Code of 1859.[3]

10. Right to mesne profits. — The present section entitles the auction purchaser to claim mesne profits from the date of sale.[1] But the profits will be deemed to have arisen, for purposes of income-tax, only on the confirmation of the sale.[2] Under S. 316 of the Code of 1882 though the theory of equitable title was largely recognized, the right to claim mesne profits was held to arise only on confirmation of the sale.[3]

11. Liability for rent and revenue. — It has been held by the Calcutta High Court that the liability of an auction purchaser of a leasehold interest for rent and revenue dates from the date of the sale as his title relates back to that date and that the judgment-debtor is not liable for the rent between the sale and the confirmation thereof.[1] But the Patna High Court in the undermentioned case[2] has dissented from this view.

12. Titles of purchasers at successive execution sales.—On the doctrine of *relation back* on confirmation, the title of an auction purchaser dates from the date of sale. Consequently, as between purchasers at successive execution sales of the same property, the sale first in point of time is the sale first in the eye of law and will prevail over a later sale though confirmed earlier. Under the Code of 1882 the same result was arrived at by the application of the principle of *equitable title* in mitigation of the strict terms of the section as it stood.[1]

Where, however, on the date of the later sale the earlier sale was for any reason not in fact subsisting, as for example, where it had been set aside under O. 21 R. 90, it will not acquire priority on being revived in due course of law.[2]

13. What passes under a court sale. — See Order 21 Rule 94.

14. Sale in execution of mortgage decree. — In deciding the question of priority between two successive purchasers of the same property in execution of different mortgage decrees against the same judgment-debtor, the determining date is the date of

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3. ('73) 10 Bom H C R 435 (439). (Sale not complete until sale certificate compulsorily registrable is so registered.)
('80) 4 Bom 155 (157).
('79) 3 Bom 433 (436).
('84) 10 Cal 252 (255, 256). (Without sale certificate purchaser cannot sue for partition.)
But see ('74) 21 Suth W R 349 (351).
('86) 12 Bom 589 (594, 595).]

Note 10

1. ('40) 27 AIR 1940 Lah 230 (233) : ILR (1941) Lah 91 (DB). (Application by auction-purchaser for possession resisted by person claiming under judgment-debtor — Latter can be deemed to have notice of auction-purchaser's right of possession.)
('18) 5 AIR 1918 Oudh 9 (10). (Since title to property accrues from date of sale.)
† ('37) 24 AIR 1937 All 661 (662, 663). (Right of auction-purchaser of share of cosharer in village to sue for profits arises on date of sale — It is not necessary that mutation should be effected in his name in order to entitle him to sue.)
('28) 15 AIR 1928 Rang 67 (68) : 5 Rang 803. (Rent from lessee.)
2. ('33) 20 AIR 1933 P C 101 (106) : 12 Pat 305 : 60 Ind App 133 (PC).
3. ('02) 24 All 475 (476, 477).
('11) 33 All 63 (65).
('87) 1887 All W N 217 (218).

Note 11

1. ('19) 6 AIR 1919 Cal 341 (342) (DB).
† ('14) 1 AIR 1914 Cal 785 (785, 786) (DB). (Liability under S. 169, Bengal Tenancy Act, VIII of 1885.)
2. ('40) 27 AIR 1940 Pat 673 (675) : 19 Pat 824 (DB). (Section 65 only determines priority as between purchasers at successive sales. It is not meant to confer on a defaulting tenant the privilege of rent-free occupation for so long as he or the decree-holder can delay confirmation of the sale— Also held that S. 169 of Bengal Tenancy Act will prevail over this section in case of conflict.)

Note 12

1. See O. 21 R. 94, Note 3.
2. (1900) 22 All 168 (176, 179) (DB).
('96) 23 Cal 857 (861, 862) (DB). (First sale set aside—Decree-holder himself purchaser at subsequent sale—First purchaser's appeal to which decree-holder not a party—First sale confirmed—Priority of subsequent sale over the first one.)
† ('25) 12 AIR 1925 Bom 483 (484) (DB).
[See however ('93) 20 Cal 25 (28) (DB).]

the execution sale and not of the mortgages.[1] In a case of the Allahabad High Court,[2] it has been held that the purchaser under the earlier mortgage is entitled to priority. But in that case the different execution sales were held to be simultaneous. For a full discussion on this question, see Note 19 on Order 34 Rule 1.

15. Sale in execution of satisfied decree. — See Note 71 on Section 47.

16. Sale in execution of decree barred by limitation. — See Note 69 on Section 47.

17. Revenue sales.—As seen in Note 7 in case of execution sales by the Civil Courts, the title of a *bona fide* auction purchaser is not affected by the subsequent reversal or modification of the decree. But in the case of sales by Revenue Courts for arrears of Government revenue the purchaser gets no title, if it is subsequently declared in a suit that no arrears exist or no revenue is payable.[1]

As to what passes to the purchaser at a revenue sale, see O. 21 R. 94, Note 8.

18. Effect of vesting order in insolvency proceedings. — See Section 64, Note 14.

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66. [S. 317.] (1) No suit shall be maintained[7] against any person[16] claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one[11] through whom the plaintiff claims.

Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently[19] or without the consent of the real purchaser, or interfere with the right of a third person[11] to proceed against that property, though ostensibly sold to the certified purchaser[17] on the ground that it is liable to satisfy a claim of such third person against the real owner.

[1877, Ss. 316 and 317; 1859, S. 260.]

Synopsis

1. Legislative changes.
2. Scope, object and applicability of the section.
3. English law.
4. Retrospective operation of the section.
5. Revenue sales.
5a. Sale by Revenue Court.
6. Cases under the Public Demands Recovery Act. See Note 5.
7. "No suit shall be maintained."
8. Plea in defence, if can be raised.
9. Suits outside the section.
10. Suit by beneficial owner in possession or his successor in title for declaration of title.
11. Suits by third person.
12. Suit on grounds other than those mentioned in the section.
13. Suits by joint purchasers.
14. Purchase by Hindu coparcener.
15. Suit for specific performance of agreement to sell.
16. Suit against certified purchaser and persons claiming through him is barred.
17. "Certified purchaser," meaning of.
18. Waiver of right by auction-purchaser.
19. Name inserted in the certificate fraudulently or without the consent of the real purchaser.
20. Objection as to bar by section 66, when can be raised.
21. Benami transactions in general.

Note 14

1. ('09) 32 Mad 485 (489) (DB).
+('03) 26 Mad 486 (487) (DB). (Rights based on priority of mortgage enforceable by another suit.)
+ ('80) 5 Cal 265 (268) (DB).
('78) 2 Mad 108 (112, 113) (DB).
('21) 8 AIR 1921 Pat 344 (347) (DB).
2. ('80) 2 All 698 (706) (DB).

Note 17

1. ('21) 8 AIR 1921 Bom 257 (258, 259, 260) : 45 Bom 45 (DB). (Because the impartiality of Civil Courts cannot be expected of fiscal authorities.)

NOTE to the Synopsis. See the Notes indicated for the following topics:

Benami sales not illegal, unless fraudulent and unless fraud is carried out. See Note 2.

Benami transactions, meaning and effect of. See Notes 2 and 21.

Benamidar's or real owner's right to apply for setting aside execution sale. See O. 21 R. 90 Notes.

Benamidar's right to execution of decrees. See Note 21 foot-notes. See also O. 21 R. 16 Notes.

Fraudulent purchases not to be recognised if fraud is carried out by the person seeking relief. See Note 21.

Right of benamidar to sue. See Note 21.

Strict construction of the section. See Note 2.

Suits falling under this section. See Notes 2 and 7.

1. Legislative changes.— The main changes that have been introduced in this section are as follows :

(1) For the words "no suit shall be maintained against *the certified purchaser*" in S. 317 of the old Code, the words "no suit shall be maintained against *any person claiming title under a purchase certified* by the Court in such manner as may be prescribed" have been substituted. See Notes 16 and 17.

(2) For the words "any other person" and "such other person" in the old Code, the words "the plaintiff" have been substituted.

(3) The words "or interfere with the right of a third person . . . . real owner" in sub-s. (2) have been newly added. See Note 11.

2. Scope, object and applicability of the section.—This section enacts an exception to the general rule applicable to *benami* transactions, i. e., transactions by one person in the name of another. A *benami* transaction is not *per se* illegal[1] and, unless brought about for a fraudulent purpose and the fraud is carried out, a Court of Equity will give effect to the *real* title as against the *benami* title.[2] This is the general rule. The Legislature has, by this section, declared that this general rule shall not apply to *execution sales* held by the Court.[3] The object is to put an end to purchases in court auction by one person in the name of another[4] and to protect third parties who might deal with the

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Section 66 — Note 2

1. ('88) 11 Mad 213 (214).
† ('19) 6 AIR 1919 Pat 523 (524).
('75) 2 Ind App 151 (155): 23 Suth W R 358 (358) (PC).
('30) 17 AIR 1930 Bom 81 (83).
('38) 42 Cal W N 497 (501).

2. ✣('06) 33 Cal 967 (978, 979) (DB).
('01) 28 Cal 370 (379, 380) (DB).
† ('87) 11 Bom 708 (716, 719) (DB).
('07) 31 Bom 405 (412) (DB).
('97) 20 Mad 326 (329, 331) (DB).
('06) 29 Mad 72 (74) (DB).
('08) 31 Mad 97 (99) (DB). (Vendee holds the property for the benefit of the vendor.)
('08) 31 Mad 485 (489).
See also Indian Trusts Act, Section 84.

3. ('39) 26 AIR 1939 Nag 274 (276) (DB). (The object of S. 66 is to put a stop to benami purchases at execution sales.)
✣('39) 26 AIR 1939 Rang 122 (123) (DB). (Section protects certified purchaser at an auction sale from any claim that his purchase was made not on his own behalf but on that of the plaintiff.)
('37) 24 AIR 1937 Mad 362 (363). (Object of Section is to prohibit on grounds of public policy a suit against the certified purchaser on the ground specified in the Section.)

4. ('39) 26 AIR 1939 Nag 274 (275) (DB). (No difference between purchases by *A* in name of *B* where *A* and *B* are strangers and where *A* and *B* are closely related as father and son.)
† ('16) 3 AIR 1916 Cal 762 (763): 43 Cal 20 (DB).
† ('19) 6 AIR 1919 Pat 523 (524) (DB).
('74) 12 Beng L R 317 (329) (PC). (But the Section does not affect such purchases by a member of joint Hindu family in his own name, but with the joint funds.)
('20) 7 AIR 1920 P C 30 (32) : 43 Mad 643: 47 Ind App 108 (PC). (But a purchase coupled with an undertaking to convey to another at the price of purchase is not affected by this Section.)
('69) 11 Suth W R 16 (19) (FB).
('72) 14 Moo Ind App 496 (525) (PC).
✣('75) 2 Ind App 154 (155, 156) : 23 Suth W R (358) (PC). (Leading case relied on in AIR 1929 P C 225 : 56 Ind App 305 (PC).)
('05) 27 All 194 (197).
† ('16) 3 AIR 1916 Oudh 255 (256).
('15) 2 AIR 1915 P C 81 (82) : 37 All 545 : 42 Ind App 177 (PC).
('20) 7 AIR 1920 Mad 422 (422) (DB).
('07) 29 All 557 (559).
('09) 31 All 282 (284).
('96) 23 Cal 699 (701) (DB).
('99) 21 All 238 (243).

purchaser against the claims of an undeclared or secret owner who puts forward the certified purchaser as the legal owner.[5] The effect of the section would appear to help the certified purchaser in his fraud or breach of trust against the real purchaser, but really the section is designed to prevent fraud against third parties resulting from the collusive action of the real and certified purchasers.[6] Hence, the section should be applied in all cases without any regard to the consequences.[7] But inasmuch as it is restrictive of the Court's equitable jurisdiction to grant relief to the real owner as against the ostensible owner, it should not be extended beyond its *actual terms* but *should* be construed strictly.[8]

In order that the section may apply, the following essentials are necessary —

(1) There should be a *court sale*. In other words, the section applies only to *execution sales*. Thus, a sale by a *receiver* is not within the section.[9]

(2) The sale must be a *real* and not a *fictitious one*. Thus, where a collusive suit is brought in which a collusive decree is allowed to be passed and a fictitious sale held in execution of such decree, this section has no application.[10]

(3) The suit must be *against* the certified purchaser or his representative, on the ground that the purchase was *made on behalf of the plaintiff* or his predecessor-in-interest.[11]

('04) 26 All 82 (87) (FB).
[*See also* ('12) 10 All L Jour 97 (99). (Section is intended to preclude institution of suit against certified purchaser by beneficial owner or his successor.)]

5. ('98) 22 Bom 672 (678) (DB). (But if the benamidar himself raises no objection, and admits the title of the true owner, or owner obtains transfer of possession, Section does not come in the way of the true owner asserting his right as against third parties or *vice versa*.)

6. ('31) 21 AIR 1934 Cal 567 (568) : 61 Cal 440 (DB).
('86) 12 Cal 204 (206). (Section is intended to prevent and not to promote fraud—Dissented from in 16 Mad 290).

7. ('99) 21 All 29 (43).
(1900) 22 All 434 (438). (Trust Act, S. 82, saves the operation of this Section.)

8. ('38) 42 Cal W N 497 (501).
('38) 25 AIR 1938 Cal 874 (877) (DB).
† ('37) 24 AIR 1937 Mad 362 (363).
✣ ('20) 7 AIR 1920 Cal 48 (49) (DB).
('01) 23 All 175 (177) (DB).
('98) 2 Cal W N 433 (447) (SB).
('72) 14 Moo Ind App 496 (527, 528) (PC).
('03) 5 Bom L R 329 (331) (DB).
† ('31) 18 AIR 1931 Bom 578 (581). (Therefore this Section will not apply to a suit based on a contract which is separate from the transfer.)
(1900) 3 Oudh Cas 229 (230).
('75) 2 Ind App 154 (155) : 23 Suth W R 358 (358) (PC).
('01) 5 Cal W N 341 (343) (DB).
('99) 21 All 238 (245) (DB).
('99) 21 All 29 (43) (DB).

9. ('26) 13 AIR 1926 All 124 (125, 126) : 48 All 209 (DB). (Such sale is not by the Court but under the Court.)
('66) 6 Suth W R 160 (161) (DB).

10. ('13) 18 Cal L Jour 616 (620). (Rent suit.)

11. ('38) 42 Cal W N 497 (500). (Purchase benami for plaintiff—Sale set aside with consent of benamidar on application by judgment-debtor—Plaintiff dispossessed by judgment debtor — Suit for possession against benamidar and judgment-debtor is maintainable — S. 66 is no bar.)
('38) 25 AIR 1938 Cal 874 (877) (DB). (A suit for a relief which can only be given on declaration of title as against persons claiming title under a purchase certified by the Court, such persons being parties and contesting the claims, is barred under Section 66.)
('38) 25 A I R 1938 Cal 602 (604) (DB). (The fact that the certified purchaser was a benamidar for the plaintiff even before the auction sale is no answer to an objection under S. 66, C. P. Code.)
('37) 24 AIR 1937 Mad 362 (364). (If the cause of action is not based on the benami purchase but on a contract or title acquired subsequent thereto Section 66 is not a bar—The fact that the basis of the contract embodied in the sale deed is the prior benami purchase does not affect the title obtained under the conveyance—Suit for rectification of sale deed executed subsequent to the auction sale is not barred.)
† ('35) 22 A I R 1935 All 143 (146). (Plaintiff claiming property on the allegation that auction-purchaser *A* was a benamidar for *B*, under whom plaintiff claimed and that in collusion with *C*, *A* transferred his rights to *C* instead of to plaintiff—Section 66 applies.)
('23) 10 A I R 1923 Cal 302 (303) (DB). (Certified purchaser or his successor not party to the suit.)
('33) 20 A I R 1933 Lah 636 (637) : 14 Lah 712 (DB). (Suit against mortgagor and subsequent purchaser—Mortgagor can plead that purchaser is benamidar for plaintiff.)
('05) 27 All 194 (197). (Suit on the ground that the certified purchaser is not the real purchaser must be dismissed.)

The test to see whether a suit is *based* on the ground that the auction-purchase was made on behalf of the plaintiff is whether the plaintiff can get any relief or any material relief without proving that the purchase was made on behalf of the plaintiff.[12] The section, like the Limitation Act, does not extinguish the rights of the real owner but only prevents him from *enforcing* them in a Court of law.[13] See Note 15. Sub-section (2) excepts the classes of cases mentioned therein from the operation of sub-s. (1). The rule in sub-s. (1) therefore does not apply —

(1) to a suit for a declaration that the name of the certified purchaser was inserted in the certificate *fraudulently* or *without the consent* of the real purchaser.[14]

(2) to the right of a *third* person to proceed against the property on the ground that it is liable to satisfy his claim against the real owner.

3. English law. — Under the English law, as in the Indian law, where A purchases with his own funds property in the name of B, there will, in the absence of any other circumstances, be a resulting trust in favour of A which the Courts will enforce against B.[1] But no such trust will result if the policy of any Act of Parliament would thereby be defeated.[2] Thus, under the old Registry Acts, where A purchased a ship in the name of B, the register was conclusive evidence of the ownership of B both at law and in equity.[3]

4. Retrospective operation of the section. — There is a conflict of opinion as to whether this section is retrospective in its operation. The conflict arises in view of the fact that under S. 317 of the old Code an action against the *representative* of the certified purchaser was not barred but that, under the present section, it is barred. If a court sale is held and confirmed *before* this Code came into force, but a suit is brought against the representative of the certified purchaser *after* the Code came into force, is the suit barred under S. 66? The Calcutta High Court has held that it is not,[1] on the ground that the real owner had, on the date of the confirmation of the sale, acquired a *vested right* to have his title declared in respect of the properties, which he could enforce against the benamidar's transferee, and that such right is not taken away by S. 66. The

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† ('20) 7 AIR 1920 Lah 491 (493) : 2 Lah L Jour 353 (358, 359). (Hence suit not prohibited if defendant does not claim through certified purchaser.)
('29) 118 Ind Cas 713 (713) (All).
('67) 8 Suth W R 130 (131).
('68) 9 Suth W R 360 (361) (DB). (Possession of plaintiff—Immaterial.)
‡ ('25) 12 AIR 1925 Nag 41 (44). (Plaintiff resting his case on the fact that defendant purchased on his behalf—Suit is barred.)
† ('16) 3 AIR 1916 Mad 657 (658) (DB). (Suit against representative of certified purchaser.)
[*See* ('43) 47 Cal W N 544 (555).]
[*See also* ('11) 33 All 382 (384) (DB). (Purchase of mortgaged property in execution of decree on prior mortgage—Auction-purchaser alleged to be benamidar of mortgagor—Subsequent mortgagee cannot bring to sale the property on the ground that auction-purchaser was benamidar.)
('28) 15 A I R 1928 P C 75 (76) : 24 Nag L R 59 (P C).]

12. ('38) 25 AIR 1938 Cal 602 (604) (DB).

13. ('96) 23 Cal 699 (701) (DB).
† ('17) 4 AIR 1917 Mad 321 (325) (DB).

14. ('05) 1 Cal L Jour 550 (556) (DB).
('93-1900) 1893-1900 Low Bur Rul 16 (18).
(1864) 1 Suth W R 328 (329) (DB).

Note 3

1. ('28) 15 AIR 1928 P C 172 (173) : 55 Ind App 235 : 55 Cal 944 (PC).

2. (1829) 3 Y & J 163 (175), Groves v. Groves. (Purchase in name of *A* to enable him to vote at election of member of Parliament.)

3. (1808) 15 Ves 60 (71), Ex parte Yallop. (The policy of the Act being to secure evidence of title to a ship and enable it to be seen how far throughout her existence she was British built.)
(1810) 17 Ves 251 (254), Ex parte Houghton.
(1840) 1 Beav 354 (361), Slater v. Willis.

Note 4

1. ('43) 47 Cal W N 544 (554). (*Obiter.*)
† ('20) 7 AIR 1920 Cal 435 (437) : 47 Cal 1108 (1112) (SB). (On appeal from A I R 1919 Cal 210.)
('23) 10 AIR 1923 Cal 228 (232).
[*See also* ('16) 3 AIR 1916 Cal 394 (394). (Right to redeem.)]

Lahore High Court has followed the Calcutta view.[2] The Allahabad[3] and the Madras[4] High Courts have taken a contrary view, on the ground that this section embodies, as S. 317 of the old Code did, merely a rule of *procedure* and that rules of procedure are always retrospective. The view of the Calcutta High Court that section 66 or the corresponding section 317 of the Code of 1882 embodies anything more than a *rule of procedure* does not seem to be a sound one.

Where a sale was held before, but confirmed *after* the Code came into force, the purchaser's title becomes perfected only after the confirmation and consequently S. 66 applies.[5]

5. Revenue sales. — As has been seen in Note 2, this section applies only to *execution sales under the Code.*[1] It has no application to revenue sales.[2] By virtue of S. 19 (2) of the Public Demands Recovery Act (Bengal Act I of 1895), however, the provisions of this section apply to the case of a purchaser at a sale in enforcement and execution of a certificate issued under that Act.[3]

5a. Sale by Revenue Court. — The section is not applicable to sales in execution of a decree for arrears of rent by a Revenue Court under the Madras Estates Land Act. Such a sale is not held and certified in pursuance of the provisions of the Civil Procedure Code.[1]

6. Cases under the Public Demands Recovery Act. — See Note 5.

7. "No suit shall be maintained." — The words "no suit shall be maintained" in the section mean "no suit shall be instituted and if it is instituted, it shall

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2. ('37) 24 AIR 1937 Lah 471 (474).
3. (38) 25 A I R 1938 All 391 (393) : ILR (1938) All 556 (DB).
† ('14) 1 AIR 1914 All 552 (554).
('21) 8 AIR 1921 All 165 (167) : 43 All 416 (DB). (Reversed on another point in AIR 1929 P C 228: 51 All 675 : 56 Ind App 330 (PC).)
[*See also* ('15) 2 AIR 1915 All 316 (317). (Point assumed.)]
4. ('17) 4 AIR 1917 Mad 324 (326). (New Section is merely declaratory of the real meaning of the old Section 317.)
5. ('28) 15 AIR 1928 Cal 338 (339) (DB).

Note 5

1. ('37) 24 AIR 1937 All 176 (179): ILR (1937) All 113 (DB). (Section 66 is confined to a purchase certified by the Court in such a manner as may be prescribed; and 'prescribed' means under S. 2 (16) 'prescribed by rules.' 'Rules' under sub-s. (18) of S. 2 means 'rules and forms contained in Sch. 1 or made under S. 122 or S. 125, Civil P. C.' Hence, a person who is not claiming title under a purchase certified by the Court under any of the rules framed under the Code will not be protected under Section 66.)
('42) 29 AIR 1942 Mad 154 (155). (Do.)
('41) 28 A I R 1941 Nag 84 (86) : ILR (1941) Nag 90 (DB). (Do.)
† ('37) 24 A I R 1937 Pat 324 (325) (DB). (Section 66, Civil P. C., is not applicable to sales in execution of rent decrees under the Chota Nagpur Tenancy Act, held by the Deputy Commissioner.)
See also the following cases :
('97) 1897 Bom P J 27 (27) (DB). (Sale under Section 113, Bombay Land Revenue Code.)
('87) 14 Cal 583 (585) (DB). (Sale under the provisions of Act XI of 1859 for arrears of land revenue.)
('09) 19 Mad L Jour 270 (270). (There is nothing to preclude a plea that a purchase in a revenue sale was benami.)
('70) 14 Suth W R 372 (373). (Revenue sale.)
2. ('41) 28 AIR 1941 Nag 84 (86): ILR (1941) Nag 90 (DB).
('38) 25 AIR 1938 Mad 283 (284).
† ('97) 1897 Bom P J 27 (27) (DB).
† ('05) 28 Mad 526 (536) (DB). (Hence real purchaser is not precluded from showing that the certified purchaser was only a benamidar.)
('06) 29 Mad 473 (476) (FB). (25 Mad 655 overruled.)
('11) 9 Ind Cas 136 (137) (DB) (Mad). (Sale under Madras Revenue Recovery Act, 1864.)
† ('70) 14 Suth W R 372 (373) (DB).
('97) 20 Mad 494 (496). (Sale under Madras Revenue Recovery Act, 1864.)
('09) 4 Mad L Tim 316 (316) (DB). (Following 29 Mad 473 (FB).)
[*See also* ('94) 21 Cal 554 (558). (Benami sale under Bengal Tenancy Act, VIII of 1885—S. 173 provides that it may be avoided on application.)
('05) 9 Cal W N 134 (140). (Do.)
('95) 18 Mad 469 (471). (Suit by benamidar to eject tenant—Not maintainable.)]
3. ('12) 16 Cal W N 973 (975) (DB).

Note 5a

1. ('42) 29 AIR 1942 Mad 154 (156). (Section 66, C. P. Code, is not applicable to sales in execution of a decree for arrears of rent by a Revenue Court under the provisions of the Madras Estates Land Act.)

fail."[1] The words "*no* suit" show that not even a suit for *the return of the purchase money* from the *benamidar* will lie.[2]

8. Plea in defence, if can be raised. — The section bars only a *suit against the certified purchaser* or his representatives-in-interest. Where a suit is brought *by the certified purchaser* or his representative against the real owner, the latter can plead that the purchase was only benami for him. The section does not bar a plea of benami *in defence*.[1] In *Mussumat Bahuns Kowur* v. *Lalla Buhoree Lall*,[2] which was a case under S. 260 of the Code of 1859 corresponding to the present section, their Lordships of the Privy Council said as follows:

> "It is well known that benami purchases are common in India, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not, by any general measure, declared such transactions to be illegal; and therefore they must still be recognized and effect given to them by the Courts *except so far as positive enactment stands* in the way and directs a contrary course ..... The only express enactment on the subject occurs in S. 260 ..... This enactment is clear and definite ..... It is confined to a suit brought *against the certified purchaser* ..... The present suit which is converse of that pointed at in the section is not within the words or scope it. It would be specially unsafe so to construe the Act as by inference to import into it prohibitory enactments which would exclude any inquiry into the truth in any suit between the parties."

9. Suits outside the section. — As has been seen in Note 2, a suit which is not *against* the certified purchaser or his representatives, or which is not based *on the ground that the purchase was made on behalf of the plaintiff*, is not within the section. A suit *by* a certified purchaser for declaration of his on title to the property purchased is not barred by the section.[1] For suits based on grounds other than that the purchase was made on behalf of the plaintiff, see Notes 12, 13, 14 and 15.

10. Suit by beneficial owner in possession or his successor in title for declaration of title. — Where the beneficial owner is in possession and brings a suit against the *benamidar for declaration of his title*, is the suit barred by S. 66? The

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Note 7

1. ('99) 21 All 238 (242) (DB).
2. ('10) 7 All L Jour 623 (626).
[But see ('36) 23 AIR 1936 Pat 429 (430).]

Note 8

1. ✻('72) 14 Moo Ind App 496 (526, 527) (PC). (Suit for redemption by certified purchaser.)
† ('33) 20 AIR 1933 Lah 636 (637) : 14 Lah 712. (Plea raised to show that the plaintiffs had no *locus standi* to sue.)
('75) 2 Ind App 154 (155, 156) : 23 Suth W R 358 (358) (PC). (If the defendant is in possession.)
† ('67) 8 Suth W R 130 (131). (Auction-purchaser's transferee seeking to oust real owner.)
('68) 9 Suth W R 438 (439) (DB). (Defendant in possession — Transferee of the certified purchaser seeking to oust him.)
('18) 5 A I R 1918 Mad 1258 (1259) (DB). (Suit by benamidar to eject transferee of the real owner in possession.)
‡ ('05) 27 All 443 (446) (SB). (Suit for rents and profits against real purchaser in possession.)
('76) 1 All 290 (291) (DB).
('74) 22 Suth W R 270 (270). (Following 10 Moo Ind App 511 (522) (PC).)
('15) 2 AIR 1915 Nag 51 (52) : 11 Nag L R 130. (Suit by heirs of auction-purchaser — 2 C P L R 137 not followed.)
[*See also* ('01) 28 Cal 370 (381).
('75) 24 Suth W R 278 (279).
('74) 6 N W P H C R 197 (200). (Certified purchaser—Benamidar of judgment-debtor who had been in possession—Property again attached and sold by decree-holder — Suit for confirmation of possession by benamidar.)
('12) 36 Bom 116 (117). (Purchaser at court sale benami for defendant, cannot oust defendant from possession — Overruled on another point in 37 Bom 610 (FB).)
(1900) 3 Oudh Cas 229 (230). (Section does not relieve auction-purchaser plaintiff from showing the justice of his claim.)]
2. ('72) 14 Moo Ind App 496 (522, 523) (PC).
[*See also* ('75) 2 Ind App 154 (155) (PC).]

Note 9

1. ('96) 9 C P L R 55 (55, 56).
† ('96) 18 All 461 (463) (DB). (Suit against third party.)
✻('99) 21 All 29 (43).

general concensus of opinion is that it *is barred.*[1] The reason is that the words "*no* suit shall be maintained" in the section are very general and do not exclude a suit for a declaration of title on the mere ground that the plaintiff is in *possession.*[2] A contrary opinion was, however, expressed by the Calcutta High Court in *Sasti Churn Nundi* v. *Aunopurna.*[3] Their Lordships seem to have proceeded in that case on the view that the suit was not based on the ground that the purchase was made *benami*, but on the ground of *existing possession* in the plaintiff. The case has been dissented from by the same High Court in later cases.[4] The view expressed in *Sasti Churn Nundi* v. *Aunopurna*,[5] if accepted, would amount practically to a repeal of the whole section, and cannot, therefore, be accepted as a sound one.[6] The Lower Burma Chief Court[7] has, however, followed the decision in *Sasti Churn Nundi* v. *Aunopurna.*[8]

But an auction-purchaser may, by his conduct, be *estopped from* pleading the bar under S. 66.[9] Thus, where the real owner sells the property to a third person with the consent and attestation of the benamidar auction-purchaser and the third person brings a suit against the *benamidar*, the latter will be estopped from pleading that the suit is barred under section 66.[10]

Where the true owner has perfected his title by adverse possession for twelve years, a suit by him against the certified purchaser for declaration of his title will not be barred as it is based on *title* by adverse possession[11] and not on the ground *that the purchase was made on his behalf.* See also Note 12.

11. Suits by third person. — Under section 317 of the old Code, no suit was maintainable against the certified purchaser on the ground that the purchase was made

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Note 10

1. † ('38) 25 AIR 1938 Cal 602 (604) (DB). (It is immaterial whether the plaintiff is in possession and seeks a confirmation of possession or whether he is out of possession and seeks to recover possession. In either case Section 66 applies.)
† ('01) 23 All 175 (178, 180) (DB).
✠('33) 20 AIR 1933 Pat 264 (266, 267) : 12 Pat 616 (DB). (However, possession by real owner is a good defence to suit by certified purchaser.)
('68) 9 Suth W R 360 (361).
† ('16) 3 AIR 1916 Cal 762 (764) : 43 Cal 20.
† ('26) 13 AIR 1926 Cal 542 (543, 544) : 53 Cal 297 (DB).
† ('17) 4 AIR 1917 Mad 321 (325) (DB). (Even when defendant recognises plaintiff's title, unless the recognition is by the execution of deed of gift or sale.)
('20) 7 AIR 1920 Nag 51 (51): 16 Nag L R 87 (88). (Suit against the successor-in-title of certified purchaser.)
('16) 3 AIR 1916 Oudh 255 (256).
[*See* (39) 26 AIR 1939 Nag 274 (276) (DB). (Property purchased by father in court auction in name of sons with his self-acquired money—Suit by executor of father that property belonged to father and not sons—S. 66 is bar.)]
[*See also* ('38) 42 Cal W N 497 (500). (Mere fact that plaintiff once got possession and was subsequently dispossessed not sufficient to get round Section 66.)]
2. ('38) 25 AIR 1938 Cal 602 (604).
See cases in foot-note (1).
3. ('96) 23 Cal 699 (701) (DB).
4. ('16) 3 AIR 1916 Cal 762 (763) : 43 Cal 20.
('26) 13 AIR 1926 Cal 542 (544) : 53 Cal 297 (DB).
5. ('96) 23 Cal 699 (701) (DB).
6. ('16) 3 AIR 1916 Cal 762 (763) : 43 Cal 20.
7. ('11) 1 AIR 1914 Low Bur 275 (276) : 7 Low Bur Rul 260.
8. ('96) 23 Cal 699 (701) (DB).
9. ('13) 36 Mad 564 (569).
[*See also* ('20) 7 AIR 1920 Cal 48 (49). (Tenant from real owner cannot plead title of the certified purchaser.)]
10. ('13) 36 Mad 564 (569).
[*See also* ('31) 133 Ind Cas 551 (552) (Lah). (Benamidar attesting sale by real owner and attorned to the vendee also — But the decision rests on the basis that oral sale is valid in the Punjab and that the plaintiff had become complete owner already.)]
11. † ('38) 25 AIR 1938 All 391 (393) : ILR (1938) All 556 (DB). (It is unnecessary for them to prove that auction-purchase was made on their behalf.)
† ('29) 16 AIR 1929 P C 228 (231) : 56 Ind App 330 : 51 All 675 (PC). (Section has no application to such a case.)
('34) 21 AIR 1934 All 990 (992, 993).
('25) 12 AIR 1925 Oudh 20 (21). (In determining title by prescription the fact that the purchase was benami can be taken into consideration.)
('92) 19 Cal 199 (201) (DB).
('20) 7 AIR 1920 Nag 51 (51) : 16 Nag L R 87. (Hence plaintiff cannot be called trespasser.)
[*See* ('38) 42 Cal W N 497 (500). (Mere fact that the plaintiff once got possession of the property and was subsequently dispossessed by the certified purchaser or his representative, would not enable him to get round the bar of S. 66, C. P. Code, unless the possession continued for twelve years and thus gave the plaintiff a title quite independent of the purchase made at the execution sale.)]

"on behalf of *any other person* or on behalf of some one through whom *such other person claims.*" This raised a conflict of opinion as to whether a *third person*, such as a creditor of the real owner, could sue to enforce his claims against the property purchased on the ground that the purchase was *benami* for the real owner. The Calcutta High Court held that he could, and that the bar under the section operated only on suits brought by the *beneficial owner* as plaintiff.[1] The Madras High Court held a contrary view in the undermentioned case,[2] but in a later case[3] dissented from the earlier case and came to the same conclusion as that of the Calcutta High Court. The Allahabad High Court and the Oudh Judicial Commissioner's Court took a view contrary to that of the Calcutta High Court.[4]

The substitution, in the present section, of the words "on behalf of *the plaintiff* or on behalf of some one through whom the *plaintiff claims*" and the introduction of the words "or interfere with the right of a third person to proceed against that property, on the ground that it is liable to satisfy a claim of such third person against the real owner" in sub-section (2) gives effect to the Calcutta decisions and removes the conflict mentioned above.[5]

12. Suit on grounds other than those mentioned in the section. — A suit is barred under the section only if it is based on the ground that the purchase was made *on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.* The section has no application if the relief is sought on certain facts which establish certain *other kinds of legal relations* between the parties which entitle the plaintiff to rely on them as involving and creating effectual legal claims in his favour.[1] In *Ganga Sahai* v. *Keshri*,[2] their Lordships of the Privy Council observed as follows :

> "In their Lordships' opinion the provisions of that section (Section 317 of the old Code) were designed to create some check on the practice of making what are called *benami purchases* at execution sales for the benefit of judgment-debtors, and in no way affect the title of persons *otherwise beneficially interested* in the purchase."

Note 11

1. ('86) 12 Cal 204 (206) (DB).
('94) 21 Cal 519 (521) (DB). (Suit for declaration that property belonged to the debtor.)
2. ('93) 16 Mad 290 (292) (DB).
3. ('97) 20 Mad 362 (364) (DB).
4. ('11) 33 All 382 (384) (DB).
† ('04) 26 All 82 (87, 88, 89) (FB).
† ('99) 21 All 238 (245) (DB). (Section is subject to no limitation other than such as is contained in the Section itself.)
('05) 8 Oudh Cas 306 (311). (Following 26 All 82 (FB).)
5. *See also the following cases* :
('20) 7 AIR 1920 Mad 422 (423).
('13) 35 All 138 (143). (Distinguishing from 26 All 82 (F B) on the ground that the plaintiff did not claim through the real owner.)
The following cases of the Allahabad High Court are still good law under the present Section :
('99) 21 All 29 (50). (Per Banerji, J.)
('74) 6 N W P H C R 265 (267). (Case under the Code of 1859.)
('76) 1 All 235 (235).
('96) 18 All 461 (463).

Note 12

1. ('43) 47 Cal W N 544 (555). (Allegation in plaint that purchase was on behalf of plaintiff's predecessor in title but relief claimed in suit under S.106, Bengal Tenancy Act not on this ground but on ground only of the factum of possession in character of a tenant irrespective of the question whether plaintiff had title to such possession—S. 66 or old S. 317 is no bar.)
('40) 27 AIR 1940 P C 202 (203) : I L R (1940) Kar P C 406 (PC).
('40) 27 AIR 1940 Nag 1 (4) (DB). (*A*, *B* and *C* entering into contract providing that they would jointly put money necessary to purchase certain village in auction — Property purchased by agent of *C* acting on behalf of all but certificate taken in name of *C* alone—S. 66 is no bar to *A* and *B*'s suit for their share and for possession.)
† ('19) 6 AIR 1919 Mad 942 (943) (DB). (Following 18 Mad 436.)
('16) 3 A I R 1916 Pat 315 (317) (DB). (Claim independent of and prior to sale — Suit not barred.)
('01) 23 All 175 (178) (DB).
('32) 19 AIR 1932 All 32 (33) (DB). (Real owner is entitled to subrogation of prior mortgagee's rights as against the certified purchaser.)
2. ('15) 2 AIR 1915 P C 81 (82) : 37 All 545 : 42 Ind App 177 (PC).

Illustrations.

1. *A* sues and obtains a decree against *B*. In execution of the decree *B's* house is sold in court auction and is purchased by *C*, the paid agent of *A*, with *A's* money, but without his knowledge. *A* then sues *C* for possession, on the ground that the purchase by the *agent* enures to the benefit of the principal. The suit is not barred as it is based on a legal relationship of *principal and agent*, and not *merely* on the ground that *C* was a benamidar.[3]

2. *A and B are joint mortgage decree-holders* against *C*. *A* applies on behalf of himself and *B* under S. 231 of the old Code (O. 21 R. 15) to execute the decree and purchases *C's* property in the court sale in his own name, the purchase money being set off against the *whole* decree amount. *B* then sues *A* for recovery of his share of the properties purchased by *A*. The suit is not barred, as *B* is beneficially interested in the purchase otherwise than merely on the ground that the purchase was made on *B's* behalf.[4] The same principle applies where one of the heirs of a deceased decree-holder puts the decree into execution and purchases the property in lieu of the decretal amount at the execution sale.[5]

3. In execution of *A's* decree against *B*, *C* purchases certain properties in court auction and then agrees with *A* to convey the property to him. *A* brings a suit for *specific performance* of the contract against *C*. The suit is not barred as the claim is based on an agreement and not on the ground that the purchase was made *on A's behalf*.[6]

4. *A* purchases certain properties in court auction with his own funds, but in the name of *B*. *A* continues in possession of the properties purchased for over twelve years. He then sues *B* for a declaration that he is entitled to the properties. The suit is not barred as it is based not merely on the ground that the purchase was made on behalf of *A* but on the ground of his having *perfected his title to the* property by adverse possession.[7]

13. Suits by joint purchasers. — It has been seen in the illustration 2 in Note 12 that where one of several joint decree-holders applies for execution of the decree on behalf of all and purchases the property, the purchase money being set off against the entire decree amount, the other decree-holders are entitled to sue the purchaser for recovery of their share in the property and that S. 66 is no bar thereto.[1] Where without being decree-holders, two persons enter into a joint venture to buy a property at a court sale, the funds being provided jointly, but the sale certificate is issued in the name of one of them only, there is a conflict of decisions as to whether a suit by the other claiming half the property on the ground that the purchase was made for both is barred under

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3. ('19) 6 AIR 1919 Mad 942 (943) (DB).
('95) 18 Mad 436 (437). (Sale under mortgage decree — Benami purchaser — Purchase on account of a subsequent usufructuary mortgage — Suit for conveyance and possession not barred.)
('94) 17 Mad 282 (285). (Purchase made by the defendant as agent of the plaintiff.)
('94) 21 Cal 375 (378) (DB).
[See however (1900) 22 All 434 (438, 440). (But this was a case where the certified purchaser was really not an agent in respect of the purchase as it was not within his general duty to purchase the properties.)]

4. † ('15) 2 AIR 1915 P C 81 (82): 42 Ind App 177: 37 All 545 (PC).
('24) 11 AIR 1924 Oudh 218 (221) (DB). (Following A I R 1915 P C 81 : 37 All 545 : 42 Ind App 177 (PC).)
('07) 29 All 557 (561).

5. ('42) 29 AIR 1942 Pat 230 (233) : 20 Pat 855 (DB).

6. ('19) 6 AIR 1919 Mad 94 (95) : 42 Mad 615 (FB).
('31) 18 AIR 1931 Bom 578 (581). (Even though the basis of the agreement might be the benami nature of the original purchase at court sale.)
('88) 11 Mad 213 (214).
('88) 11 Mad 231 (236, 237).
('21) 8 AIR 1921 Pat 39 (41). (Agreement before the sale — Distinguishing A I R 1919 Pat 523.)
Also see Note 15.

7. ('29) 16 AIR 1929 P C 228 (231) : 56 Ind App 330 : 51 All 675 (PC). (Reversing A I R 1921 All 165 : 43 All 416.)
See the cases in Note 10.

Note 13

1. † ('15) 2 AIR 1915 P C 81 (82) : 42 Ind App 177 : 37 All 545 (PC).
('07) 29 All 557 (560, 561).
('10) 7 All L Jour 1091 (1092). (Following 29 All 557.)
('14) 1 AIR 1914 All 259 (261).
[But see ('15) 2 AIR 1915 All 316 (317). (Cannot be considered to be good law in view of the Privy Council decision in A I R 1915 P C 81: 37 All 545 : 42 Ind App 177 (PC).)]

S. 66. The general trend of decisions is to the effect that such a suit is barred.[2] This view proceeds on the basis that the section applies to all cases where the suit is based on the ground that the purchase was made on behalf of the plaintiff, whether the allegation is that the purchase was made on behalf of the plaintiff exclusively or that it was made on behalf of the plaintiff and the certified purchaser jointly. But the contrary view was taken in the undermentioned case[3] by the Bombay High Court. The reason given is that the section applies only to *benami* purchases at execution sales and that in such a case, there is only a *joint* purchase and not a *benami* purchase. It was also held that in such cases there is a partnership and the plaintiff must be deemed as suing to enforce his right as a partner. A similar view was also held by the Nagpur High Court in the undermentioned case[4] in which it was held that the plaintiff in the circumstances of the case must be held to be suing for his share in a *partnership* venture.

The Privy Council has recently held that this section will bar a claim based on the ground that the execution purchase was made *in part* on behalf of the plaintiff by the auction purchaser.[5] In view of this, the contrary view must be treated as not good law.

Where, out of two joint mortgagees *one alone* sues making the other a *pro forma* defendant and obtains a decree, in execution of which he purchases the property in his own name, a suit by the other joint mortgagee claiming a share of the property purchased does not fall within the principle of the decision in *Ganga Sahai* v. *Keshri*[6] and is barred by S. 66.[7]

Where, A and B both applied to purchase a property at an auction sale in a certain proportion, agreeing to pay the price in that proportion and actually paid the 25 per cent. of the purchase money in that proportion, but the balance was wholly paid by B and he obtained the sale certificate in his name, it was held that the payment by B was on behalf of A also, that B's name in sale certificate was inserted *without A's consent* and that a suit by A for his share of the property purchased was not barred under section 66, sub-section (2).[8]

14. Purchase by Hindu coparcener. — Under the Hindu law, every acquisition made by a Hindu coparcener, *with joint family funds*, becomes the common property of the family, in which the other members are entitled to share. Such acquisitions are not *benami* transactions, which are the result of *private agreements or undertakings*. The rights of coparceners to treat such acquisition as the common property of the family arise from the *operation of law*. A suit, therefore, by one coparcener to share in the property purchased by another at a court sale with joint family funds is not barred by S. 66, as it is based on a ground *other* than the one mentioned in the section, namely, that the purchase *was made on behalf of the plaintiff*.[1]

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2. ('39) 26 A I R 1939 Pat 207 (208) : 18 Pat 181 (DB).
† ('37) 24 A I R 1937 All 176 (182) : I L R (1937) All 113 (DB). (Distinguishing A I R 1915 P C 81 : 37 All 545 : 42 Ind App 177 (P C).)
† ('34) 21 AIR 1934 Cal 322 (324) : 61 Cal 371.
('20) 7 AIR 1920 Nag 147 (148).
('01) 23 All 31 (36).

3. ('26) 13 AIR 1926 Bom 525 (525) : 50 Bom 600 (DB).

4. ('40) 27 AIR 1940 Nag 1 (3, 4) (DB).

5. ('40) 27 AIR 1940 P C 202 (203) : I L R (1940) Kar P C 406 (PC). (A I R 1937 All 176 : I L R (1937) All 113 affirmed.)

6. ('15) 2 AIR 1915 P C 81 (82) : 37 All 545 (554) : 42 Ind App 177 (PC).

7. ('23) 10 AIR 1923 All 405 (406).
[But see ('33) 20 AIR 1933 All 854 (856) (DB). (The purchase would enure for the benefit of all persons interested in joint fund utilized for purchase of property unless there is anything definitely showing that such persons did not intend the purchase to be on their behalf also.)]

8. ('26) 13 A I R 1926 Cal 719 (719, 720) : 51 Cal 992 (DB).

Note 14

1. ('15) 2 A I R 1915 Oudh 194 (195). (Following 12 Beng L R 317 (PC).)

Where the managing member of a Hindu family makes a purchase with joint family funds but takes the sale in the name of a *third* person, there is a conflict of opinion as to whether any member of the family can sue the third person on the ground that the purchase was benami for the managing member and so enures for the benefit of the family. The Madras High Court has held that he can.[2] The reason is that a purchase by a managing member in the name of a third person cannot be considered to have been made on behalf of all the members of the family and so cannot be considered to have been made "*on behalf of the plaintiff*" within the meaning of the section.[3] The Allahabad High Court has held to the contrary basing its decision on the ground that a purchase by a managing member is made on behalf of all the members of the family and so is made on behalf of the plaintiff.[4] It purported to follow the decision of the Privy Council in *Suraj Narain* v. *Ratan Lal*[5] which was, however, a case under S. 317 of the old Code which barred a suit on the ground that the purchase was made "*on behalf of any other person*." It is submitted that the view of the Allahabad High Court is not correct. The object of S. 66 is, as has already been seen, to put a stop to *benami* purchases at court sales,[6] and when a managing member makes such a purchase in the name of a third person, he is doing something which is wholly wrong and cannot be presumed to be acting *on behalf* of the family.[7]

15. Suit for specific performance of agreement to sell. — Where *before* the date of a court-sale A and B agree that B should buy the property in his name *with funds supplied by* A and should convey the property to A thereafter, the agreement is really to buy the property *on behalf of* A and a suit by A for specific performance of such an agreement will be one based on the ground that the property was purchased "on behalf of A" and is consequently barred by section 66.[1]

Where, *before* the court sale, B intends to buy the property for himself with his own funds but agrees to convey the same to A for consideration, the purchase by B is not a *benami* transaction at all and a suit by A for specific performance of the contract is one not based on the ground that the purchase was "on behalf of the plaintiff" and is outside S. 66.[2] If, however, the circumstances show that notwithstanding the purchase

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† ('34) 21 AIR 1934 Cal 567 (568):61 Cal 440(DB). (Karta purchasing property with family funds in the name of his son—Suit by nephew for recovery of his share in the property—Suit not barred.)
† ('74) 12 Beng L R 317 (330) (PC).
('17) 4 A I R 1917 Oudh 143 (145). (The principle does not apply to separated members of a Hindu family and the Section will bar a suit between such members though some property is left undivided between them.)
('73) 19 Suth W R 223 (225) (DB).
('99) 9 Mad L Jour 298 (300) (DB).
[*See also* ('74) 1 Ind App 342 (345) : 22 Suth W R 199 (199) (PC). (Purchase at a revenue sale.)
('09) 31 All 282 (284).
(1900) 22 All 434 (438).
('12) 1912 Mad W N 1071 (1074).
('25) 12 A I R 1925 Mad 448 (449). (Two Hindu brothers—Joint family—Purchase by one brother is not presumed to be benami for other.)]

2. † ('22) 9 AIR 1922 Mad 481 (182, 183, 184) : 45 Mad 856 (DB).
('93) 6 Mad 135 (137).
('97) 20 Mad 349 (353).

3. ('22) 9 AIR 1922 Mad 481 (182, 483, 484) : 45 Mad 856.

4. ('21) 8 A I R 1921 All 185 (187) : 43 All 711 (DB). (Manager of joint Hindu family purchasing property in the name of a female member — Purchase is benami — Suit by a male member against her is barred.)
('28) 15 AIR 1928 All 619 (621) : 50 All 512.

5. ('17) 4 AIR 1917 P C 12 (17) : 40 All 159 : 44 Ind App 201 : 20 Oudh Cas 211 (PC).

6. See Note 2.

7. ('22) 9 AIR 1922 Mad 481 (483) : 45 Mad 856 (DB).

Note 15

1. *See* ('19) 6 AIR 1919 Pat 523 (525, 526).
('32) 19 AIR 1932 Cal 170 (170, 171).

2. ('23) 10 AIR 1923 Nag 11 (13).
('21) 8 AIR 1921 Pat 39 (41).
[*See also* ('95) 18 Mad 436 (437). (In this case money was paid by the plaintiff and possession was delivered to him, but he was subsequently ejected.)
('35) 62 Cal L Jour 88 (92).
('20) 7 AIR 1920 Cal 101 (103).]

was made with his own funds, B *never intended* to buy on his own behalf but intended to do so only on behalf of A, the case clearly falls within the mischief of section 66.[3]

Where B agrees with A *subsequent* to the purchase (whether made on his own behalf or on behalf of A) to sell the property purchased, and A sues B for specific performance of that agreement, the suit is not barred by the section.[4] The reason is that the suit is based, not on the ground that the purchase was made "on behalf of the plaintiff," but on *agreement* which is not only not inconsistent with B's own title, but is rather the reverse.[5] See also illustration 3 in Note 12.

16. Suit against certified purchaser and persons claiming through him is barred. — Under S. 317 of the old Code a suit was barred only as against a certified purchaser but not as against any one claiming title under him. This was the view held by all the High Courts[1] except the Bombay High Court. That Court held that the words "certified purchaser" included his *representatives* also.[2] The substitution of the words "against any person claiming title under a purchase certified by the Court in such manner as may be prescribed" in the present section for the words "against a certified purchaser" in S. 317 of the old Code has now set the conflict at rest and has given legislative effect to the Bombay view.[3] Where the defendant is neither the certified purchaser nor his successor-in-title, but a third person, the section of course has no application.[4] Where the real purchaser sues the certified purchaser and a third person on the ground that the purchase was made on behalf of the plaintiff, and the certified purchaser either is *ex parte* or admits plaintiff's title or does not contest the plaintiff's claim or executes a release deed in plaintiff's favour or is otherwise liable to him under a contract made after the sale which he duly admits, the section does not bar it.[5] The

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3. ('19) 6 AIR 1919 Pat 523 (525, 526) (DB).
('16) 3 AIR 1916 Mad 1156 (1157) (DB).

4. ('35) 62 Cal L Jour 88 (93).
† ('19) 6 AIR 1919 Mad 94 (95): 42 Mad 615(FB).
† ('20) 7 AIR 1920 P C 30 (32, 33) : 43 Mad 643 : 47 Ind App 108 (PC). (Approving AIR 1919 Mad 94 : 42 Mad 615 (FB).)
('31) 18 AIR 1931 Bom 578 (581, 582).
('73) 10 Bom H C R A C 344 (345). (Defendant purchasing property on his own behalf.)
('88) 11 Mad 213 (214) (DB).

5. ('19) 6 AIR 1919 Mad 94 (95): 42 Mad 615 (FB).
† ('30) 17 AIR 1930 Bom 81 (83) (DB). (Following AIR 1919 Mad 94 : 42 Mad 615 (FB).)

Note 16

1. ('36) 40 Cal W N 470 (472). (The words 'certified purchaser' in S. 260, C. P. Code of 1859, which has to be strictly construed cannot be held to include the heirs of the certified purchaser.)
('98) 21 Mad 7 (8). (Suit against assignee of the certified purchaser.)
('99) 21 All 196 (198) (DB).
† ('99) 26 Cal 950 (954, 955) (DB).
(1900) 5 Cal W N 341 (343) (DB).
('98) 2 Cal W N 433 (447, 449).
('01) 1901 Pun L R No. 28, p. 92.

Even after the new Code, the Calcutta High Court has held in cases arising under the old Code that a suit against a representative-in-interest of the certified purchaser is not barred—See the following cases :
('16) 3 AIR 1916 Cal 394 (394).
'20) 7 AIR 1920 Cal 435 (437) : 47 Cal 1108.
('14) 1 AIR 1914 Cal 175 (176) : 19 Cal L Jour 330 (331).
('17) 4 AIR 1917 Cal 464 (465).
('19) 6 AIR 1919 Cal 979 (979).

2. ('11) 35 Bom 342 (347) (DB).
('07) 31 Bom 61 (66).

3. ('35) 22 AIR 1935 All 143 (146). (Decisions holding that, where the auction-purchaser is mere stake-holder and indifferent as to which party succeeds in the suit, S. 66 is not applicable, are not applicable to such a suit.)
('38) 25 AIR 1938 Cal 602 (604) (DB). (Section 66 applies also to an assignee of benamidar.)
('17) 4 AIR 1917 Mad 324 (325) (DB).
('16) 3 AIR 1916 Mad 657 (658) (DB).
† ('20) 7 AIR 1920 Nag 51 (51) : 16 Nag L R 87.
('19) 6 AIR 1919 Oudh 420 (425) : 22 Oudh Cas 222. (The words "certified purchaser" in the Section include persons standing in the shoes of the Court purchaser.)
('16) 3 AIR 1916 Cal 394 (394) (DB).

4. (1863) 1 Marsh 423.
('28) 15 AIR 1928 Cal 448 (449):55 Cal 1070 (DB).
('29) 16 AIR 1929 Pat 664 (674) : 8 Pat 585 (DB).

5. ('38) 25 AIR 1938 Cal 874 (877)(DB). (Certified purchaser not contesting.)
† ('23) 10 AIR 1923 Cal 302 (302, 303) (DB). (Do.)
('20) 7 AIR 1920 Cal 932 (935). (Certified purchaser executing release in favour of plaintiff.)
('25) 12 AIR 1925 All 47 (48). (Certified purchaser not contesting claim.)
('85) 8 Mad 511 (515) (DB). (Certified purchaser disclaiming any interest in the property and admitting plaintiff's claim.)

section does not also apply to cases of contest between two persons each claiming to be the real purchaser under an admittedly benami court-auction-purchase.[6]

17. "Certified purchaser," meaning of. — In a case under S. 260 of the old Code of 1859 it was held by the Calcutta High Court that that section applied to a suit against a purchaser at a court sale though the sale certificate was obtained by him only during the pendency of the suit.[1] A person entitled to get a sale certificate was considered as a certified purchaser as soon as his bid at the sale was accepted.[2] The Allahabad High Court, on the other hand, held in a similar case that until the certificate was actually granted he was not a certified purchaser but that as soon as the certificate was granted, he became a certified purchaser and the bar under the section would become applicable.[3]

A sale certificate in the name of A "as mother and guardian of her infant son B," is a sale in favour of B who is therefore the certified purchaser.[4]

18. Waiver of right by auction-purchaser. — A purchases property at a court sale in the name of B. B obtains possession from the Court and *delivers it to* A and subsequently disturbs his possession. A sues B for a declaration of his title or for possession of the property. The suit is barred by S. 66. The reason is that a mere permission to hold possession cannot give or transfer a title from the *benamidar* to the real owner so as to enable him to maintain a suit on *title* against the benamidar.[1] After the Transfer of Property Act, no waiver or transfer of rights can be recognized in the case of immovable property in the absence of a registered instrument.[2]

Where, however, the real owner is in possession and the certified purchaser sues him for possession, the real owner can defend his possession on the basis of the real title resting with him.[3]

19. Name inserted in the certificate fraudulently or without the consent of the real purchaser. — Sub-section (2) is an exception to the rule in sub-s. (1). A certified purchaser is not protected if he is guilty of fraud or gets his name inserted in the sale certificate without the consent of the real purchaser.[1] The basis of

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('81) 9 Cal L Rep 295 (296). (Certified purchaser admitting plaintiff's title.)
('03) 13 Mad L Jour 354 (355) (DB). (No contest between certified purchaser and real owner—The former admitting the latter's title.)
[*See* ('36) 23 AIR 1936 All 750 (753). (In such a case they are not persons 'claiming title' under a purchase certified by Court.)]
[*See also* ('38) 42 Cal W N 497 (500). (Sale set aside with consent of benamidar—Plaintiff, real purchaser, dispossessed by judgment-debtor—Suit for possession against benamidar and judgment-debtor—Section 66 is no bar.)
('98) 22 Bom 672 (678). (Certified purchaser and real purchaser — Co-plaintiffs — The former admitting the title of the latter.)
(1863) 1 Bom H C R 20 (21). (Suit by real purchaser against third party is maintainable if consent of the certified purchaser could be shown.)]

6. ('17) 4 AIR 1917 Mad 365 (366).

Note 17

1. ('76) 25 Suth W R 493 (494) (DB).
2. ('76) 25 Suth W R 493 (494) (DB).
3. ('83) 5 All 478 (484) (FB).
4. ('69) 12 Suth W R 236 (238) (DB).

Note 18

1. † ('01) 23 All 175 (179, 180) (DB).
('20) 7 AIR 1920 Cal 852 (852) (DB).
2. *Registered instrument is not, however, always necessary as, e. g., in case of oral sales of property valued at less than Rs. 100* :
('16) 3 AIR 1916 Mad 657 (659) (DB).
[Note — The decision in 11 Mad 234 was before the Transfer of Property Act and the observations to the contrary are no longer law.]
[*See also* ('17) 4 AIR 1917 Mad 324 (325).]
[See however ('31) 133 Ind Cas 551 (552) (DB) (Lah). (In the Punjab oral sale is valid and hence attestation and attornment by benamidar in favour of the real owner vendee renders S. 66 inapplicable.)]
3. See Note 8.

Note 19

1. ('40) 27 AIR 1940 Nag 1 (4) (DB). (Purchase out of joint funds of *A*, *B* and *C*—*C's* name alone entered in sale certificate.)
('39) 26 AIR 1939 Rang 122 (123) (DB). (Fraud must be strictly pleaded and particulars of any fraud relied upon must be stated in the pleading.)

this exception is that the real purchaser is really an innocent person and it is not the policy of the law to benefit a fraudulent certified purchaser as against an innocent party. Where the pleader of a party, by means of treachery and fraud, purchases at an inadequate price the property of the party in a court sale, S. 66 will not operate as a bar to a suit against him for the recovery of the property on the ground that he must be taken to have made the purchase as trustee of the plaintiff.[2]

20. Objection as to bar by Section 66, when can be raised. — A plea that a suit is barred by the provisions of S. 66 may be put forward and given effect to at any stage of the suit, even in appeal for the first time.[1]

21. Benami transactions in general. — For principles applicable to benami transactions in general, see the undermentioned cases.[1]

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† ('34) 21 AIR 1934 Cal 567 (567, 568): 61 Cal 440 (DB). (Karta of joint family purchasing with family fund in the name of his son fraudulently—Suit by nephew for his share not barred.)
('94) 17 Mad 282 (286) (DB). *(Obiter.)*
('70) 13 Suth W R 85 (85) (DB).
('87) 1887 All W N 220 (221).
(1900) 22 All 434 (440).
('15) 2 AIR 1915 Cal 563 (563) (DB). (Manager of infant fraudulently purchasing property of ward.) [*See also* ('16) 3 AIR 1916 Mad 657 (658).
('70) 4 Beng L Rep 32 (33).]
2. ('96) 23 Cal 805 (813) (DB).

Note 20

1. ('17) 4 AIR 1917 Oudh 143 (144). (Plea raised in second appeal.)
('32) 19 AIR 1932 Cal 170 (170). (Plea goes to the root of suit and does not depend upon disputed facts.)

Note 21

1. *Benami transaction—Test :*
('08) 30 All 258 (266) : 35 Ind App 101 (PC).
† (89) 26 Cal 227 (230) : 26 Ind App 38 (PC). (The source of purchase money is not the only test of benami—The actual possession and receipt of rents also furnish a test of benami character.)
('82) 9 Cal L Rep 64 (65).
('96) 23 Cal 460 (476) (DB).
† ('96) 23 Cal 962 (966) (DB).
('73) 20 Suth W R 112 (113) (DB).
('75) 23 Suth W R 42 (42) (DB). (Following 21 Suth W R 422.)
† ('87) 11 Bom 708 (715, 717, 718).
('14) 1 AIR 1914 Cal 175 (176): 19 Cal L Jour 330 (332) (DB).
('16) 3 AIR 1916 Cal 532 (537, 538).
('08) 35 Cal 551 (558, 559) (DB).
('13) 18 Cal L Jour 616 (619, 620) (DB).
('06) 1906 Pun Re No. 3. p 7 (8).
('01) 8 Cal W N 620 (621).
('14) 1 AIR 1914 Bom 283 (284): 38 Bom 10 (DB).
('16) 3 AIR 1916 Cal 745 (746) (DB).
Party alleging his own fraud—Fraud carried out—Court will not help :
(1865) 3 Suth W R 92 (92) (DB). (Nor can his representatives or private purchasers from him plead his fraud.)
(1865) 4 Suth W R 37 (37) (DB). (Defendant alleging his own fraud.)
† ('33) 20 AIR 1933 Mad 457 (459) : 56 Mad 646 (DB). (Defendant pleading his own fraud.)
(1862) 1 Hay 528.
(1865) 3 Suth W R 221 (222) (DB). (Following 3 Suth W R 92.)
† ('70) 13 Suth W R 87 (89, 90) (DB).
('67) 7 Suth W R 118 (118) (DB).
(1900) 27 Cal 231 (233).
† ('01) 28 Cal 370 (379, 380) (DB).
† ('06) 33 Cal 967 (982, 983) (DB).
† ('07) 31 Bom 405 (411) (DB).
('97) 20 Mad 326 (329) (DB).
('06) 29 Mad 72 (74) (DB.) (Fraud need not be fully carried out.)
('08) 31 Mad 97 (99) (DB).
('08) 31 Mad 485 (487, 488) (DB). (Defendant alleging his own fraud to escape from the consequences of a decree fraudulently and collusively obtained.)
('08) S N U B R 3rd Qr. 1. (Benami transaction.)
(06) 3 Low Bur Rul 245 (247, 248) (DB). (Plaintiff alleging his own fraud—Suit should be dismissed whether fraud was carried out or not.)
† ('99) 23 Bom 406 (409, 413) (DB).
Real owner can sue :
(14) 1 AIR 1914 Cal 674 (675) (DB). (No conveyance of title from benamidar necessary.)
('16) 3 AIR 1916 All 36 (38) : 38 All 122 (DB). (Even if he affirms ownership in the benamidar in a previous suit.)
Benamidar can also sue :
† ('18) 5 AIR 1918 P C 140 (143) : 46 Cal 566 : 46 Ind App 1 (PC). (Whether real owner is party or not.)
('29) 16 AIR 1929 Pat 664 (674): 8 Pat 585. (Subject to equities against the beneficial or real owner.)
† ('98) 22 Bom 672 (679) (DB). (Even when the true owner's name is disclosed.)
('11) 34 Mad 143 (150) (DB). (Suit to set aside execution sale vitiated by fraud.)
('93) 20 Cal 388 (395) (DB). (Can execute decree in his name.)
('98) 21 Mad 30 (31) (DB). (Benamidar holder of a promissory note.)
Innocent transferee from benamidar—Real owner is estopped from asserting his rights :
('71) 15 Suth W R 19 (20) (DB). (Real owner consenting to the transfer.)

67. [S. 327.] (1) The [a][Provincial Government] may, by notification in the [b][Official Gazette], make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the [a][Provincial Government], to make it impossible to fix their value.

Power for [a][Provincial Government] to make rules as to sales of land in execution of decrees for payment of money.

(2) When on the date on which this Code came into operation in any local area, any special rules as to sale of land in execution of decrees were in force therein, the [a][Provincial Government] may, by notification in the [b][Official Gazette], declare such rules to be in force, or may, by a like notification, modify the same.

Every notification issued in the exercise of the powers conferred by this sub-section shall set out the rules so continued or modified.

[1877, S. 327; See Ss. 54 and 68 to 72.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

b. Substituted by *ibid* for "Local Official Gazette."

1. Sub-section (2). — Sub-section (2) was inserted in the section by the Code of Civil Procedure (Amendment) Act (I of 1914). There was an analogous provision contained in the corresponding section (section 327) of the former Code, and as the present Code originally omitted this provision it was held that the special rules which had been issued under the former Code were indirectly repealed from the date of the new Civil Procedure Code.[1] Even after the insertion of sub-s. (2) by Act I of 1914, if no notification is issued under it, the special rules framed under S. 327 of the former Code do

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('73) 19 Suth W R 292 (296) (PC). (His heirs are also estopped.)
('66) 5 Suth W R 37 (38) (DB).
('05) 29 Bom 306 (312) (DB). (Per Batty, J. — Source of purchase money is not the sole criterion.)
(1851) 6 Moo Ind App 53 (71) (PC). (Source of purchase money is the criterion—The knowledge and assent of the person in whose name the purchase is made is immaterial.)
('15) 2 AIR 1915 P C 96 (97) : 42 Ind App 202 : 37 All 557 (PC). (Criterion is the source of purchase money.)
('13) 18 Cal W N 428 (429) (PC).
('87) 14 Cal 109 (117) : 13 Ind App 160 (PC). (Actual possession and receipt of rents.)
[*See also* ('70) 13 Moo Ind App 395 (402) (PC).
('93) 20 Cal 296 (308) : 19 Ind App 203 (PC).
('76) 25 Suth W R 532 (534). (Real owner must make out a clear right to relief against the *bona fide* purchaser from the benamidar.)
('75) 24 Suth W R 79 (79).
('81) 5 Bom 154 (174). (Transaction made out to be benami—Courts will deal with it as English Courts of Equity.)
('71) 14 Moo Ind App 234 (244) (PC). (Decision as to benami nature must rest upon legal grounds and not on suspicion.)]

Burden of proof is upon person alleging benami to prove it :
('83) 12 Cal L Rep 186 (193) (PC).
('70) 14 Suth W R 10 (11) (DB). (Where defendant is in possession for a long time, the ostensible owner, plaintiff, must prove his title.)
('80) 5 Cal L Rep 470 (474) (PC).
('73) 20 Suth W R 269 (269) (DB). (Purchase by father in the name of his son—Presumption is that it is on behalf of family.)
(1854) 6 Moo Ind App 53 (79) (PC). (Father purchasing property in the name of his son — Presumption is that the purchase is on behalf of family.)
Where the fraud is not carried out, true nature of transaction can be shown :
('70) 13 Moo Ind App 551 (559) (PC). (A pleading by two defendants against the suit of another plaintiff cannot amount to an estoppel as between them.)
('70) 13 Moo Ind App 585 (600) (PC).
('74) 21 Suth W R 422 (424) (DB).
('72) 18 Suth W R 485 (494) (DB). (Following 13 Moo Ind App 551 (PC).

Section 67 — Note 1

1. ('13) 1913 Pun Re No. 89, p. 318. (Punjab Notification No. 1297-S is indirectly repealed.)

not apply.[2] But where rules are made after due notification under the sub-section, they are binding and a sale not in conformity with them is void.[3]

The words "with the previous sanction of the Governor-General in Council" were omitted by the Devolution Act (XXXVIII of 1920), S. 2 and Sch. I, Part. I.

A rule promulgated under sub-s. (2) by the Chief Commissioner of Coorg prohibits the sale of land and other immovable property in execution of money decrees. It has been held that this rule does not apply outside Coorg, so that when a money decree passed by a Court in Coorg is transferred to a Court outside Coorg for execution the decree can be executed by the sale of land and other immovable property.[4]

DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECREES AGAINST IMMOVEABLE PROPERTY.

68. [S. 320, para. 1.] The [a][Provincial Government] may declare, by notification in the [b][Official Gazette], that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property, shall be transferred to the Collector.

Power to prescribe rules for transferring to Collector execution of certain decrees.

[1871, S. 320; See Ss. 54, 67 and 69 to 72.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

b. Substituted by *ibid* for "Local Official Gazette."

Synopsis

1. Scope and object of the section.
2. "Has ordered any immoveable property to be sold."
3. Notifications under the section.
4. Retrospective effect of notifications.
5. Execution shall be transferred to the Collector.
6. Jurisdiction of Civil Court and of Collector. See Section 70, Note 2.
7. Liquidation of judgment-debt by temporary alienation of judgment-debtor's land. See Section 72, Notes 6, 7 and 8.

1. Scope and object of the section. — In *Huro Prasad* v. *Kali Prasad*,[1] Field, J., observed as follows:

> "In different parts of India, the effect of sales in execution of decrees was to transfer landed estates from the old families to modern speculators. A strong opinion was entertained by certain members of the Government of India that these results of the administration of civil justice were impolitic and inexpedient; and it was suggested that some procedure might be devised by which the Chief Executive Officer of the district would be enabled to liquidate debts of the encumbered landholders without the immediate sale of their estates, and so to preserve the old landed gentry of

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('10) 1910 Pun Re No. 4 (Rev) : 7 Ind Cas 495 (495).

2. ('21) 8 AIR 1921 Lah 223 (224). (Property of an insolvent vesting in receiver before his death.)

3. *See* ('88) 1888 Pun Re No. 95, p. 253 (257). (A case under the old Code.)

4. ('41) 28 AIR 1941 Mad 45 (46).

Section 68 — Note 1

1. ('83) 9 Cal 290 (294) (FB).

the country. The provisions of Ss. 320 to 325C[2] were inserted in the Code of Civil Procedure, in order to give effect to these suggestions."[3]

The words "with the previous sanction of the Governor-General in Council" have been omitted by the Devolution Act (XXXVIII of 1920), section 2 and Schedule I, Part I.

Sections 68 to 72 apply to the execution of decrees of Civil Courts and not of Revenue Courts.[4]

See also the undermentioned case.[5]

2. "Has ordered any immoveable property to be sold." — The section contemplates cases in which *immovable property* has been ordered to be sold. Hence a simple money decree in execution of which the Court has not ordered any *immovable property* to be sold cannot be transferred to the Collector for execution under this section.[1] For a similar reason, the section does not apply to land which is not capable of being sold in execution, e. g., land the sale of which in execution of a decree is prohibited under the law. Hence a decree cannot be transferred to the Collector for realising the decretal amount from such land even otherwise than by the sale of the land.[2]

3. Notifications under the section. — Sections 68 to 71 had formerly no application to the Punjab as no notification by the Provincial Government had been issued as contemplated by section 68.[1] But the Punjab Government has now issued a Notification [No. 365R (Revenue Department) dated 17th January 1939] to the effect that the execution of decrees in cases in which 'land' within the definition of the Punjab Tenancy Act is ordered to be sold shall be transferred to the Collector.[2]

The Government of the United Provinces of Agra and Oudh have issued a Notification No. 576-1A-93, dated 26th March 1932, declaring that with effect from the 1st April 1932, the execution of decrees in cases in which the Civil Court has ordered any agricultural land situated in those provinces or any interest in such land to be sold, shall be transferred to the Collector. See the undermentioned decisions[3] relating to the above notification.

Sections 68 to 72 have been excluded from operation in the following cases :

(1) Suits and proceedings under the Agra Tenancy Act (III of 1926) : see S. 264 and Schedule II.

(2) Suits for recovery of rent under the Bengal Tenancy Act (VIII of 1885) as amended by Act (IV of 1928), S. 148, and under the Orissa Tenancy Act (II of 1913) : see section 198.

(3) Suits, appeals and other proceedings under the Madras Estates Land Act (I of 1908) : see section 192.

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2. Corresponding to the present Ss. 68, 70, 71 and Sch. III.

3. *See also* ('35) 22 A I R 1935 All 468 (469). (Object to section 68 explained.)

('35) 22 AIR 1935 Oudh 156 (161) : 10 Luck 459. (Object is to enable Collector to liquidate debts of encumbered land-holders without immediate sale of their estates and so to preserve old landed gentry of the country.)

4. ('42) 29 AIR 1942 All 257 (258) : I L R (1942) All 237 (DB).

5. ('40) 27 AIR 1940 Bom 284 (285) : ILR (1940) Bom 519. (Decrees of Jagirdars' Courts under Bombay Regulation XIII of 1830 — Where land of agriculturist is to be sold, execution is to be transferred to Collector, according to the normal rule under the Code.)

Note 2

1. ('26) 13 AIR 1926 Oudh 318 (319) (DB).
2. ('35) 22 AIR 1935 Nag 133 (134, 135) : 31 Nag L R 239.

('26) 13 AIR 1926 All 339 (339) : 48 All 392 (DB). (Prohibition under S. 16 of the Bundelkhand Land Alienation Act, 1903.)

Note 3

1. ('28) 15 A I R 1928 Lah 475 (476). (Sale under S. 141, Punjab Tenancy Act. Paras. 58 to 69 of Instructions of the Court apply.)
2. ('40) 27 AIR 1940 Lah 345 (346).
3. ('37) 24 AIR 1937 All 550 (551) : I L R (1937) All 766 (DB). (The Collector ceases to have juris-

The Bombay Notification under this section is contained in Circular No. 95, Chapter II, Civil Manual. It provides that decrees for sale of immovable properties of an agriculturist which have been mortgaged should be sent to the Collector for execution. It has been held that this notification does not apply to cases in which at the time of the order for sale the agriculturist debtor's interest in the property has been conveyed to another person who is not an agriculturist.[4]

4. Retrospective effect of notifications. — Alterations merely in the form of procedure are, as has been seen in Note 3 on Preamble, retrospective in effect. Hence, rules made by the Provincial Government in pursuance of a notification under S. 68 for regulating the procedure of the Collector affect sales ordered before the coming into force of such rules as well as those ordered after, unless there be some strong reason to the contrary.[1] On the wording of the particular notification in the undermentioned case,[2] it was held by the Allahabad High Court that the notification did not apply to orders for sale passed before the date of the notification. Where agricultural land belonging to a judgment-debtor has been sold by a Civil Court in execution of a decree, and before the confirmation of the sale a notification under this section is issued by the Provincial Government directing execution proceedings in such cases to be transferred to the Collector, the notification does not affect the validity of the sale held by the Civil Court.[3]

See also section 70 Note 6.

5. Execution shall be transferred to the Collector.—Where a notification under the section affects only a portion of the immovable property ordered to be sold, the decree should be transferred to the Collector for execution as regards such portion of the land only.[1] Where a judgment-debtor stands by and allows a Court to sell certain land as not being covered by the Government notification under the section, he cannot subsequently sue to set aside the sale on the ground that the land was covered by the notification and that therefore the *Court* had no power to sell the land.[2] Where a notification under this

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diction to sell or confirm the sale, if one has already taken place, after the Court passing the decree recalls under R. 3 of the U. P. Govt. Notification in respect of sale under S. 68—Anything done by the Collector during the subsistence of the order of recall, is without jurisdiction.)

('35) 22 AIR 1935 All 468 (469) (DB). (The notification applies to pending execution proceedings.)

4. ('43) 30 AIR 1943 Bom 127 (128, 129). (Bombay Notification, Circular No. 95, Ch. II, Civil Manual — Under the circumstances, *held* that, the sale was not void on the ground that the sale should have been by the Collector.)

Note 4

1. ('40) 27 AIR 1940 Lah 345 (346). (Punjab Notification under S. 68, No. 365-R (Revenue Department), dated 17th January 1939, applies even to pending execution proceedings in which an order for sale of such land has been passed, provided, of course the sale had not been actually carried out before the notification.)

('35) 22 A I R 1935 All 468 (469) (DB). (Notification No. 576-1A-93 applies not only to execution proceedings which may be instituted after it is issued but also to pending execution proceedings.)

('91) 1891 Bom P J 294, Reprint page 173 (DB). (Case under old Code.)

† ('33) 20 AIR 1933 Oudh 274 (275) : 8 Luck 504. (Notification of U. P. Government directing execution to be transferred to Collector in cases of sales of agricultural land.)

('34) 21 A I R 1934 Oudh 16 (17) : 9 Luck 390 (DB). (U. P. Notification No. 576-1A-93, relating to agricultural land in Agra and Oudh.)

('34) 21 A I R 1934 All 253 (255) (DB). (Date of preliminary decree is not the test and execution should be transferred to Collector.)

[See however ('93) 17 Bom 289 (293). (A statute is not retrospective where party had acquired a vested right.)]

2. ('82) 4 All 116 (120) (FB).

('82) 1882 All W N 12 (12) (DB).

3. ('34) 21 A I R 1934 Oudh 143 (144, 145) : 9 Luck 554 (DB).

Note 5

1. ('40) 27 AIR 1940 Lah 345 (347). (Case regarding Notification No. 365-R (Revenue Department) by Punjab Government — Court is not justified in postponing sending to the Collector the decree for execution as to such portion merely because some other land also is directed to be sold.)

('06) 28 All 631 (632) (DB). (Recovery of money—Ancestral portion.)

2. ('22) 9 AIR 1922 All 56 (57) : 44 All 380 (DB). (Allowing ancestral land to be sold as non-ancestral.)

('06) 28 All 273 (275). (Money decree — Ancestral property sold as non-ancestral.)

section requires that in cases in which sale of immovable property of an agriculturist has been ordered, the execution should be transferred to the Collector, the material date for considering the status of the judgment-debtor is the date on which the sale is ordered.[8]

6. Jurisdiction of Civil Court and of Collector. — See Section 70, Note 2.

7. Liquidation of judgment-debt by temporary alienation of judgment-debtor's land. — See Section 72, Notes 6, 7 and 8.

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69. The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section.

Provisions of Third Schedule to apply.

[See S. 68 and Ss. 70 to 72.]

1. Provisions of the Third Schedule shall apply. — The Provisions of ss. 321 to 325C of the old Code have now been placed in the Third Schedule.

This section and S. 70 give the Collector sole authority for finding the best *means* of satisfying the transferred decree. But this power does not extend so as to give him jurisdiction to determine whether the decree itself is satisfied or not. Such jurisdiction belongs to the Civil Court.[1]

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70. [S. 320, Paras. 2 to 4.] (1) The [a][Provincial Government] may make rules consistent with the aforesaid provisions —

Rules of procedure.

(a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for re-transmitting the decree from the Collector to the Court ;

(b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector ;

(c) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue-authorities as nearly as may be as the orders made by the Court, or orders made on appeal with respect to such orders, would be subject to appeal to, and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.

[*See also* ('42) 29 AIR 1942 Sind 164 (165): ILR (1942) Kar 351 (DB). (Judgment-debtor must take objection when he gets notice under O. 21, R. 66 for settlement of sale proclamation—Otherwise he will be barred.)
('39) 26 AIR 1939 Bom 526 (527). (Do.)]

3. ('39) 26 A I R 1939 Bom 526 (527). (Compromise in execution proceedings under which the decree-holder agreed to give time to judgment-debtor and the latter agreed to give up his contention that he was an agriculturist — *Held* that this did not amount to waiver of the right to the transfer of proceedings to Collector — A I R 1934 Bom 383 followed.)

Section 69 — Note 1

1. ('12) 37 Bom 32 (35) : 17 I. C. 142 (143) (DB).
('33) 20 AIR 1933 Sind 112 (114, 115) : 26 Sind L R 506 (DB). (Mortgage decree.)
[*See also* ('38) 25 AIR 1938 Nag 49 (50). (Application to set aside order of satisfaction to be disposed of by Court.)]
Also see S. 70 Note 2; Sch. III Para. 1 Note 1a and Para. 7 Note 1.

(2) A power conferred by rules made under sub-section (1) upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exercisable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court.

Jurisdiction of Civil Courts barred.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

Synopsis

1. Extent of power of Provincial Government to make rules.
2. Jurisdiction of Collector and Civil Court.
3. Ancestral property.
4. Suit to set aside orders of Collector.
5. Suit to set aside sale held by Collector.
6. Power of Collector to set aside sale.
7. Appeal from orders of Collector.
8. Revision of orders of Collector.
9. Power of Collector to pass order under section 476, Criminal Procedure Code.
10. Applicability of the section. See Section 68, Note 3.

1. Extent of power of Provincial Government to make rules. — A rule made by the Provincial Government under this section providing that no suit shall lie to set aside a sale confirmed by the revenue authority is not *ultra vires*. Clause (b) of subs. (1) of this section authorises such a rule being made.[1] Under the former Code it was held that the power to prescribe rules for *regulating the procedure* of the Collector included a power to make rules providing for an appeal from his orders.[2]

Under ss. 35 and 37 of Madras Regulation V of 1804 the Local Government has power to make rules in regard to claims which have not merged into decrees and to extend to such claims the procedure laid down in S. 322 (a), (b) and (d) (Sch. III, paras. 3, 4 and 6 of the present Code).[3]

For rules providing for appeals in the Punjab from the orders of the Collector or the gazetted subordinate of the Collector in certain cases, see the *Punjab Gazette*, 1909 Part I, page 12.

2. Jurisdiction of Collector and Civil Court. — Section 69 provides that in all cases in which execution of the decree has been transferred under S. 68, it is the procedure in the Third Schedule of the Code that shall apply. Section 70 enables the Provincial Government to make rules consistent with sections 68 and 69 to regulate the procedure of the Collector in the execution of such decrees and further declares that the powers exercisable by the Collector under such rules shall not be exercised by the Court.[1] But the Provincial Government has no power under this section to make any rule empowering the Collector to deal with questions of *title*.[2]

It is thus clear that after a decree is transferred to the Collector, the jurisdiction of the Civil Court, in matters falling within the purview of the Third Schedule or of the rules framed under this section, is ousted and it cannot thereafter control the Collector's proceedings in execution.[3] Thus, a sale held by the Civil Court after the date of the

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Section 70 — Note 1

1. ('20) 7 A I R 1920 All 9 (10) : 42 All 275 (DB). (Decree for sale of ancestral property.)
2. ('90) 12 All 564 (569) (DB).
3. ('05) 28 Mad 489 (491) (DB).

Note 2

1. ('96) 1896 Bom P J 661 (662) (DB). (Civil Court wrongly carrying out execution — Liable to be set aside and sent to Collector.)
2. ('89) 11 All 94 (95, 96) (FB).
('87) 9 All 43 (45) (DB).
3. ('43) 30 AIR 1943 Oudh 265 (265, 266) (DB).
('40) 27 AIR 1940 Nag 372 (373, 374).
† ('28) 15 A I R 1928 All 558 (559) : 50 All 827 (DB). (Final decree for sale—Property ancestral—Lease by Collector.)

notification issued under S. 68 is void.[4] But the Collector has powers of *execution only* and not of deciding other matters.[5] Thus, he has no power to inquire into objections to attachment or applications for rateable distribution or matters of that kind.[6] He has also no jurisdiction to act except as provided by the Third Schedule or by rules made under this section. Thus, except as so provided, he has no jurisdiction to set aside a sale under O. 21, R. 89[7] or under S. 47,[8] or to allow payment of the decree by *instalments*,[9] or to decide as to a disputed adjustment of decree under O. 21 R. 2.[10] See also Note 74 on S. 47, and Note 1 on section 71.

In matters arising in execution, but not covered by the provisions of the Third Schedule or the rules framed under this section, the Civil Court will continue to have jurisdiction.[11]

('33) 20 AIR 1933 Bom 369 (370) (DB). (Instalment decree—Lease by Collector.)
('82) 4 All 382 (384) (DB). (Sale of ancestral property by Civil Court set aside.)
('27) 14 AIR 1927 Nag 324 (324).
('21) 8 A I R 1921 All 225 (226) (DB). (Under the rules of the Allahabad High Court.)
(1900) 22 All 108 (111) (DB). (Postponement of sale.)
('28) 15 A I R 1928 Bom 189 (190) : 52 Bom 290 (DB). (Stay can be given by Collector and not by Court decreeing a suit.)
('13) 37 Bom 488 (490):19 Ind Cas 903 (904) (DB). (Court cannot exercise powers conferred on Collector.)
† ('24) 11 A I R 1924 All 703 (705) : 46 All 562 (DB). (Court cannot re-sell the property.)
† ('18) 5 A I R 1918 Bom 216 (217) : 42 Bom 621 (DB). (Civil Court cannot grant leave to bid — Power to grant leave to bid given to Collector.)
('27) 14 AIR 1927 All 203 (204) : 49 All 272. (Insolvent's property entrusted to Collector under Section 60 of the Provincial Insolvency Act — Court cannot interfere in Collector's sale.)
('12) 37 Bom 32 (35) : 17 Ind Cas 142 (143) (DB).
('94) 16 All 228 (231). (Decree adjusted subsequent to transfer—Application to Collector.)
('29) 16 A I R 1929 Oudh 235 (236) : 4 Luck 635 (DB). (Decree transferred to Collector—Injunction by Court passing decree futile.)
('36) 160 Ind Cas 723 (724) (Nag). (Civil Court has no jurisdiction to issue warrant of arrest of judgment-debtor.)
('36) 23 A I R 1936 Oudh 280 (284) : 12 Luck 185 (DB). (Mortgage executed after transfer of the execution case to Collector is void though Civil Court had sanctioned under O. 21 R. 83.)
('37) 24 AIR 1937 Nag 41 (42) : I L R (1937) Nag 261.
('26) 13 AIR 1926 Nag 246 (247).
[*See* ('11) 35 Bom 516 (522, 523): 12 Ind Cas 572 (574). (Money decree — Collector can recognize certificate by decree-holder and stop execution.)
('84) 8 Bom 301 (302).]
[*See also* ('14) 1 A I R 1914 Bom 252 (253) : 38 Bom 673.]
[But see observations in ('83) 7 Bom 332 (335) (DB).]

4. ('34) 21 A I R 1934 Oudh 16 (17) : 9 Luck 390 (DB).
('34) 21 AIR 1934 All 314 (315) (DB).

5. ('28) 15 AIR 1928 Nag 297 (298). (Question of rateable distribution.)
('33) 20 AIR 1933 Sind 112 (114, 115) : 26 Sind LR 506 (DB). (Construction of decree and decision if it is satisfied or not.)
See also cases in Section 69 Note 1.

6. † ('28) 15 A I R 1928 Nag 297 (298). (Rateable distribution.)
('98) 20 All 428 (429) (DB). (Objection to attachment.)
('94) 16 All 1 (2) (DB). (Distribution.)

7. ('07) 31 Bom 207 (216) (DB).
('91) 15 Bom 322 (325) (DB).
('91) 15 Bom 694 (697) (DB).
('99) 23 Bom 531 (534, 535) (DB).
('03) 25 All 167 (169).
('95) 19 Bom 216 (220) (DB). (Re-selling is a nullity.)
† ('87) 11 Bom 478 (481, 482) (DB).

8. ('04) 26 All 101 (104) (DB). (Mortgage decree.)
[*See* ('40) 27 AIR 1940 Nag 372 (375). (Application under S. 47 to declare sale void and setting aside confirmation on ground that it is nullity, having been made after an order of stay, lies to the Civil Court and not to the superior Revenue Courts.)]

9. ('28) 15 A I R 1928 All 558 (558) : 50 All 827 (DB).
('83) 7 Bom 332 (335) (DB).
('07) 31 Bom 120 (125) (DB).

10. ('41) 1941 Nag L Jour 300 (302) (BR). (The Collector is not a Court within the meaning of the term occurring in O. 21 R. 2.)

11. ('43) 30 AIR 1943 Oudh 265 (265, 266) (DB). (Civil Court has jurisdiction to order stay of sale pending disposal of appeal against execution of decree by sale.)
('40) 27 AIR 1940 Nag 372 (374). (Civil Court has power to suspend proceedings before Collector on application under S. 11, C. P. Money Lenders Act.)
('09) 5 Nag L R 121 (124, 125): 3 Ind Cas 572 (574).
('07) 31 Bom 207 (215, 216, 217) (DB). (Can set aside sale.)
('96) 1896 Pun Re No. 83, page 261. (Can confirm sale by Collector.)
('13) 18 Ind Cas 1004 (1005) (DB) (All). (Re-transfer to Collector of execution proceedings.)
('95) 7 All 407 (409) (DB). (Delivery to the purchaser.)
('31) 18 AIR 1931 All 320 (323) (DB). (Substitution of heirs.)

The Collector ceases to have jurisdiction to sell or confirm the sale when the Court passing the decree recalls, under the rules governing the matter, the proceedings.[13]

For jurisdiction of Collector and Civil Court in respect of partition of an undivided estate assessed to Government revenue or for separate possession of a share of such estate, see section 54, Notes 5 and 7.

See also schedule III para. 1, Note 1a.

3. Ancestral property. — As an example of the working of this section may be taken the Allahabad Government Notifications requiring that decrees for the sale of "ancestral" property must be transferred to the Collector for execution. In such cases the Civil Court has no jurisdiction to sell the property.[1] But the decision of the Court as to property being non-ancestral is final and cannot be attacked subsequent to the sale.[2]

As to what is and what is not ancestral property, see the undermentioned cases.[3]

4. Suit to set aside orders of collector. — A suit to set aside the order of the Collector is maintainable under two circumstances —

(1) Where the order of the Collector is such that if it had been passed by the Court a suit would have been maintainable to set it aside,[1] except where the order is declared to be final or conclusive by the rules framed by the Provincial Government.[2]

Thus, it was held under the former Code that the last clause of S. 312 (O. 21 R. 92) did not preclude a suit to confirm a sale and set aside the order passed by the Collector cancelling it.[3] The reason is that S. 70 (2) does not preclude the jurisdiction of any Court

† ('14) 1 A I R 1914 Bom 252 (253) : 38 Bom 673 (DB). (Grievances under O. 21 Rr. 100 and 101.)

✠ ('36) 23 AIR 1936 Bom 227 (233, 241) : 60 Bom 516 (DB). (Power of determining whether land is liable to attachment is retained by Civil Court.)

('36) 23 A I R 1936 Bom 189 (191) : 60 Bom 688 (DB). (Permission to decree-holder to purchase when the judgment-debtor is a minor—Sub-rr. 11 and 15 framed by Bombay Government under Section 70—In such cases, Government has not transferred the power to permit the decree-holder to buy.)

[*See also* ('38) 25 AIR 1938 Nag 49 (50). (Application to set aside order of satisfaction—Collector to refer such questions to Civil Court.)]

[But see ('13) 37 Bom 488 (490): 19 Ind Cas 903 (904) (DB). (Grievances of third persons to be before Collector.)]

12. ('37) 24 AIR 1937 All 550 (551) : I L R (1937) All 766 (DB).

[*See also* ('40) 27 A I R 1940 Nag 372 (374, 375). (Order of Civil Court staying further proceedings before Collector held amounted to an order recalling the decree and came into effect as soon as it was passed and not only after it was communicated to the Collector.)

('37) 20 Nag L Jour 242 (244). (It is not open to the Collector to proceed after the proceedings had been stayed by the Civil Court.)]

Note 3

1. ('82) 4 All 382 (384) (DB).

('33) 20 AIR 1933 All 192 (195) (DB).

('06) 28 All 631 (632) (DB). (If portion of property ancestral so much portion should be transferred to Collector.)

('14) 1 AIR 1914 All 339 (340) : 36 All 33 (DB). (Ancestral grove with a house in it.)

('82) 4 All 115 (115) (FB). (Decree for sale of ancestral land in enforcement of an hypothecation of the land is a "decree for recovery of money.")

('85) 7 All 402 (403) (DB). (Riparian village ancestral, an accretion to it must be ancestral.)

[*See also* ('36) 23 AIR 1936 Oudh 280 (283) : 12 Luck 185.]

2. ('06) 28 All 273 (275, 276) (DB).

('96) 18 All 141 (144) (DB). (No application maintainable under O. 21 R. 90.)

('22) 9 AIR 1922 All 56 (57) : 44 All 380 (DB). (Suit not maintainable in absence of proof of fraud and injury.)

('33) 20 AIR 1933 All 192 (196) (DB). (Can assail validity on grounds apart from those specified in O. 21 R. 90.)

3. ('33) 20 AIR 1933 All 138 (138) (DB). (Allahabad High Court Rules (Civil) Ch. 4, R. 8—Property passing by gift is not ancestral within meaning of Rule.)

('16) 3 AIR 1916 All 107 (107) : 38 All 481 (DB).

Note 4

1. ('26) 13 AIR 1926 All 575 (576) : 48 All 568 (DB). (Setting aside sale after confirming and retransmitting.)

† ('17) 4 AIR 1917 Nag 19 (21). (Leasing village.)

('98) 20 All 379 (383) (FB). (Suit for declaration that sale is valid.)

[Contra ('09) 5 Nag L R 121 (124).]

2. ('20) 7 AIR 1920 All 9 (10) : 42 All 275 (DB).

('23) 10 AIR 1923 All 186 (187) : 45 All 203 (FB).

[*See also* ('26) 13 AIR 1926 Oudh 612 (612) : 1 Luck 558. (It is not clear whether there were any rules giving finality to the orders.)]

3. † ('98) 20 All 379 (381) (FB).

('87) 9 All 602 (604) (DB).

('95) 19 Bom 216 (220) (DB).

other than the one referred to in it, *viz.*, the Court which has transmitted the decree to the Collector for execution.[4] In view of these rulings, the decision of the Oudh Chief Court in the undermentioned case,[5] that after the transmission of the decree to the Collector for execution *no* Civil Court has authority in the matter and that no suit is maintainable for a declaration that the plaintiff's shares in the property are not liable to attachment, seems to be open to question.

(2) Where the order of the Collector is ultra vires as being beyond his powers, as for example, where he sets aside a sale under O. 21 R. 89 or R. 90 without having the power to do so.[6]

5. Suit to set aside sale held by Collector. — A suit to set aside a sale held by the Collector on the ground of fraud is maintainable if the fraud does not come within the scope of O. 21 R. 90.[1]

6. Power of Collector to set aside sale. — There is a consensus of judicial opinion that in the absence of rules under this section specifically empowering the Collector to set aside a sale in the particular circumstances in question, the Collector has no jurisdiction to set aside a sale.[1] The undermentioned case[2] is an instance of the Collector being empowered to set aside a sale under circumstances covered by O. 21 Rr. 89 and 90. The Allahabad High Court has held that even after the Collector has confirmed a sale and the case has been re-transmitted to the Civil Court, he may, in his inherent jurisdiction, set aside the sale on the ground of fraud.[3]

7. Appeal from orders of Collector. — An appeal from the orders of the Collector in an execution proceeding transferred to him lies to such authority as may be prescribed by rules under S. 70 (1) (c) and not to the High Court.[1] This is made clear by the sub-s. (2) which enacts that a power conferred by rules upon the Collector shall not be exercisable by *any Court in the exercise of appellate or revisional jurisdiction* which it has with respect to decrees or orders of the Court.

8. Revision of orders of Collector. — It also follows from what has been said in Note 7 above that an order passed by the Collector in execution of a transferred decree

('02) 24 All 467 (470) (DB).
[NOTE :—It should be noted that such a suit is not maintainable under the present Code, for O. 21 R. 92 precludes a suit whether its object is to confirm a sale or to set it aside.]
4. ('98) 20 All 379 (382, 383) (FB).
5. ('26) 13 AIR 1926 Oudh 612 (612) : 1 Luck 558 (DB).
6. † ('95) 19 Bom 216 (220).
('03) 25 All 355 (357) (DB).
('87) 11 Bom 478 (481, 482, 483) (DB).
('38) 25 AIR 1938 Oudh 62 (64) (DB).

Note 5

1. ('25) 12 AIR 1925 All 146 (150, 151) : 47 All 217.
Also see O. 21 R. 92, Note 5.

Note 6

1. *See Note 2. See also the following cases :*
('93) 17 Bom 289 (293). (It was held that S. 31 (2) of the Talukdari's Act (Bombay Act VI of 1888) requiring sanction of Local Government for confirmation of sale, was not retrospective.)
('91) 15 Bom 322 (325). (Rule enabling the Collector to set aside the sale held not retrospective.)
('21) 8 AIR 1921 Bom 209 (209) : 45 Bom 1132. (Manual of circulars — Petition to set aside sale to be filed in Civil Court—If filed before Collector, to be sent by him to the Civil Court.)
('38) 25 AIR 1938 Oudh 62 (64). (The jurisdiction of the Collector and the Commissioner to confirm or set aside a sale is restricted by Rr. 998 and 1011 of the Manual of the Revenue Department—If therefore the Commissioner in an appeal from the order of the Collector sets aside the sale on the ground which is not provided for by any of the rules, the order of the Commissioner is without jurisdiction.)
2. ('08) 30 All 192 (196) (DB). (One co-owner applying under O. 21 R. 89 and one applying under O. 21 R. 90—Existence of the latter application is no bar to granting of the former.)
3. ('35) 22 AIR 1935 All 868 (871, 872) : 58 All 249 (DB).
Also see Sch. III para. 1 Note 3.

Note 7

1. ('05) 7 Bom L R 682 (683) (DB). (Directing sale.)
† ('83) 5 All 314 (316) (FB). (Collector is subject to the chief controlling authority.)
('86) 1886 All W N 168 (168). (Lease by Collector.)
('09) 5 Nag L R 121 (124).
('26) 13 AIR 1926 Oudh 288 (288) (DB). (Lease.)

is not open to revision by the High Court.[1] The reason is that the Collector is not a Court and S. 115 of the Code only empowers the High Court to revise orders made by any *Court* subordinate to it. See also Note 1 on section 71. An order by the Collector in the course of execution proceedings transferred to him sanctioning the prosecution of a person under S. 476, Criminal Procedure Code, is made by him in the capacity of a Revenue Court and as the jurisdiction of the High Court under S. 439, Criminal Procedure Code, is limited to proceedings in *Criminal Courts*, the order cannot be set aside in revision by the High Court.[2]

9. **Power of Collector to pass order under Section 476, Criminal Procedure Code.** — An *Assistant Collector* has no powers of either Civil, Revenue or Criminal Court while receiving an application under the rules under S. 70 for setting aside the sale on payment of the decree amount. If therefore an offence under S. 182, Indian Penal Code, is committed in the course of making an application, the Assistant Collector has no jurisdiction to order prosecution.[1]

10. **Applicability of the Section.** — See Section 68, Note 3.

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71. [S. 320.] **In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially.**

Collector deemed to be acting judicially.

1. **Scope and applicability of the section.** — The Collector and his subordinates are by virtue of this provision entitled to the benefit of the Judicial Officers' Protection Act (XVIII of 1850) under which judicial officers are protected from liability to suit in respect of anything done in the discharge of judicial duty.[1]

But though the Collector is deemed to be acting judicially, he is not a *Court* and hence cannot entertain an application under S. 47, Civil Procedure Code,[2] or make a reference under O. 46, R. 1.[3] For the same reason, the Collector executing a decree is not competent to entertain an application under O. 21, R. 2 to record the adjustment of the decree.[4] See also the undermentioned case.[5]

Under the former Code the expression used was "shall be deemed to be acting judicially *within the meaning of Act No. XVIII of 1850.*" The italicised words have been omitted in the present section, presumably to negative the view[6] that, except for

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Note 8

1. ('33) 20 AIR 1933 Bom 369 (370) (DB). (Lease.)
Also see S. 115 Note 6.
2. ('17) 4 AIR 1917 All 59 (60) : 39 All 91.

Note 9

1. ('15) 2 AIR 1915 All 283 (284) : 37 All 334.
[*See also* ('35) 22 AIR 1935 Bom 158 (160) : 59 Bom 345. (Sale by mamlatdar — Application to put off sale by production of forged receipt — Complaint under S. 476, Criminal P. C. cannot be made by mamlatdar.)]

Section 71 — Note 1

1. ('35) 22 AIR 1935 Bom 158 (159) : 59 Bom 345 (DB).
('36) 23 AIR 1936 Bom 227 (230) : 60 Bom 516 (DB). (Per Tyabji, J. in the lower Court.)
2. ('25) 12 AIR 1925 All 146 (149) : 47 All 217 (DB).
3. ('19) 6 AIR 1919 Oudh 18 (19) : 22 Oudh Cas 319 (DB).
Also see O. 46 R. 1 Note 5.
4. ('37) 24 AIR 1937 Nag 217 (219) (DB).
('35) 22 AIR 1935 Bom 158 (160) : 59 Bom 345 (DB).
('36) 23 AIR 1936 Bom 277 (279) : 60 Bom 729.
Also see O. 21 R. 2 Note 15.
5. ('43) 30 AIR 1943 Bom 12 (18) : ILR (1943) Bom 104 (DB). (Application by person to Collector that property should be sold subject to his mortgage rejected — Suit to declare his right by such person—O. 21, R. 63 does not apply as Collector is not a Court and there is no investigation of claim by a Court—Per Broomfield J.)
6. ('91) 1891 All W N 189 (190, 191).
('88) 7 Bom 332 (336) (DB).
('87) 11 Bom 478 (481) (DB).

the purposes of the Judicial Officers' Protection Act, XVIII of 1850, the Collector's functions in execution proceedings were of a ministerial and not of a judicial character.

As to applicability of the section, see section 68, Note 3.

2. Powers of Collector. — See Schedule III, Paragraph 1.

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72. [S. 326.] (1) Where in any local area in which no declaration under Section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

Where Court may authorize Collector to stay public sale of land.

(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable.

[1877, S. 326; 1859, S. 244; See Ss. 54, 68 to 71.]

Synopsis

1. Legislative changes.
2. "And the Collector represents to the Court."
3. "Collector," meaning of.
4. Reference to the Collector by the Civil Courts.
5. Discretion of Court.
6. Court may authorise only temporary alienation.
7. Temporary alienation of land, in cases not covered by section. See S. 51, Note 4.
8. Collector to provide for such satisfaction in the manner recommended.
9. Provisions of Sections 69 to 71 shall apply.
10. Appeal.
11. Revision.

1. Legislative changes. — The corresponding provision in the Code of 1859 (S. 244) required that security for the amount of the decree must be given before the section could be applied. This condition was deleted in the Code of 1877. The second sub-section was inserted in the section in the Code of 1882. The only change of any importance made by the present section is that it has omitted the expression "or management" which occurred after the words "temporary alienation." As to the applicability of the section, see S. 68, Note 3.

2. "And the Collector represents to the Court." — This section does not authorize the Collector to effect a temporary alienation of the judgment-debtor's property on his own responsibility. The Collector can only make a representation to the Court which should then decide upon the matter after hearing the parties.[1] The Collector's proposal must provide for satisfaction of the decree within a reasonable period, otherwise the Court

Section 72 — Note 2

1. ('86) 1886 Pun Re No. 114, p. 269 (270).

('36) 23 AIR 1936 Pesh 14 (15). (But Collector has no authority to suggest satisfaction of the decree in part by transfer of certain debts from the judgment-debtors to the decree-holders, or that mortgagee rights should similarly be transferred to the decree-holder—He has also no right to compel the decree-holder himself to take the lands on lease at a valuation fixed by the Collector.)

('35) 22 AIR 1935 Pesh 113 (114). (He has however no authority to represent that a temporary alienation is objectionable and even if he represents that a public sale is objectionable, it is for the Court to decide whether his objection should be maintained.)

cannot act on his proposal.[2] His proposal for temporary alienation need not contain an express representation that the public sale of the land is objectionable. The very fact of his making the proposal for temporary alienation may be taken to show his opinion that the sale of the land is objectionable.[3]

3. "Collector," meaning of. — The term "Collector," not being defined anywhere in the Civil Procedure Code, is to be taken in the sense of the definition in the General Clauses Act, S. 3 (10), *viz.*, as meaning in a Presidency-town, the Collector of Calcutta, Madras or Bombay, as the case may be, and elsewhere, the Chief Officer in charge of the revenue administration of a district.[1]

4. Reference to the Collector by the Civil Courts. — Though this section empowers the Court to sanction a temporary alienation *on* the representation of the Collector, the Court can refer the case to the Collector and enquire if he wishes to intervene.[1] If the Collector reports his inability to do so, the Court should go on with the execution application in accordance with law and cannot decline to proceed further with it.[2]

5. Discretion of Court. — The Court is not bound to accept the Collector's proposal and, if after hearing the decree-holder's objections and the evidence that might be offered in support of them the Court is not fully satisfied that the proposal is feasible, it ought, in the exercise of its discretion, to refuse its sanction.[1] The Court must deal with the Collector's proposal in the exercise of its own judgment and not in deference to the opinion expressed by the Judge of the superior Court forwarding the Collector's recommendation to it.[2]

6. Court may authorise only temporary alienation.—This section permits only a temporary alienation of the judgment-debtor's land and does not empower the Court to allow payment of the decree amount by instalments.[1]

As to form of authorisation, see Schedule I, Appendix E, Form No. 42.

7. Temporary alienation of land, in cases not covered by section. — See Section 51, Note 4.

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2. ('06) 1906 Pun Re No. 63, p. 233 (234).
[But compare ('94) 1894 Pun Re No. 25, p. 61 (66, 67).]
3. ('19) 1919 Pun Re (Rev) No. 1 : 51 Ind Cas 399 (402).

Note 3

1. ('15) 2 AIR 1915 Lah 197 (198).

Note 4

1. ('10) 8 Ind Cas 391 (391) (Lah).
('37) 169 Ind Cas 511 (512) (Lah). (Application by a decree-holder for temporary alienation of judgment-debtor's land, referred by Court to Collector —Another decree-holder applying to Court for rateable distribution in temporary alienation before Collector made his proposal — Proper course to be adopted by Court is to refer that application also to the Collector and to ask him to suggest a method of temporary alienation which will provide as far as possible for satisfaction of both decrees.)
2. ('26) 13 AIR 1926 Lah 682 (682).

Note 5

1. ('18) 5 AIR 1918 Lah 361 (362). (Proposal to grant a 12 years lease on part of the property.)
('94) 1894 Pun Re No. 25, p. 61 (65).
('86) 1886 Pun Re No. 114, p. 269 (270).
† ('20) 7 AIR 1920 Lah 456 (457) : 1 Lah 192 (SB).
† ('83) 9 Cal 290 (293) (FB). (Proposal to pay off the debt in 13 years.)
('35) 22 AIR 1935 Lah 964 (965). (More than one application pending — Collector representing that public sale of property under attachment is objectionable—Proper procedure indicated.)
('35) 22 AIR 1935 Pesh 113 (114). (Collector has no authority to represent that temporary alienation is objectionable—It is for Court to decide whether such objection should be maintained even if taken by Collector.)
2. ('74) 6 N W P H C R 40 (41) (DB).

Note 6

1. ('70) 2 N W P H C R 59 (60) (DB).
('70) 2 N W P H C R 347 (347) (DB). (Instalment satisfaction extending over 13 years.)
('74) 6 N W P H C R 39 (41) (DB). (Instalment satisfaction extending over 12 years.)

8. Collector to provide for such satisfaction in the manner recommended. — The Collector is not required to submit a detailed scheme to the Court when he makes a representation under this section and the Court may give him an authority in general terms.[1]

9. Provisions of Sections 69 to 71 shall apply.—By virtue of this provision, Para. 2 of Sch. III applies to S. 72 and the Court cannot therefore direct a temporary alienation of property of which the decree orders the sale in pursuance of a contract specifically affecting it.[1] Similarly, it was held under the old Code that under Para. 2 of Sch. III, the judgment-debtor could not grant a usufructuary mortgage of property which was under the Collector's management under this section.[2] Under the same paragraph the period during which the property is under the Collector's control under the present section must be excluded in computing the limitation for execution against the property.[3] So also, S. 71 must be read with this section, and as S. 71 provides that the Collector must be deemed to be acting judicially, all objections relating to proceedings before the Collector under S. 72 must be disposed of by him.[4]

10. Appeal. — There is no right of appeal against the Collector's order making a representation or refusing to make a representation to the Court under the present section.[1] But the order of the *Court* authorising the Collector to make temporary alienation is appealable.[2]

11. Revision. — Where a Court, without exercising its own judgment, merely accepts, as a matter of course, the Collector's recommendation, the order of the Court can be set aside in revision.[1]

DISTRIBUTION OF ASSETS

73. [S. 295.] (1) Where assets[4] are held by a Court[1] and more persons than one have, before the receipt of such assets,[11] made application to the Court[6] for the execution of decrees for the payment of money[6] passed against the same judgment-debtor[7] and have not obtained satisfaction thereof, the assets, after deducting the costs of realization,[10] shall[12] be rateably distributed[22] among all such persons:

Proceeds of execution sale to be rateably distributed among decree-holders.

Provided as follows:—

(a) Where any property is sold subject to a mortgage or charge,[15] the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale;

(b) Where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the

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Note 8

1. ('94) 1894 Pun Re No. 25, p. 61 (67).

Note 9

1. ('80) 2 All 856 (857) (DB).
2. ('90) 17 Cal 432 (436) (PC).
3. ('98) 20 All 383 (385) (DB).
4. ('28) 15 AIR 1928 Lah 475 (476).

Note 10

1. ('94) 1894 Pun Re No. 25, p. 61 (63). (Order of Collector making a proposal.)
('10) 1910 Pun Re No. 5 : 8 Ind Cas 391 (391) (Rev). (Order refusing to intervene.)
2. ('94) 1894 Pun Re No. 25, p. 61 (63, 67).

Note 11

1. ('35) 22 AIR 1935 Lah 964 (965).

consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge,[16] giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold;

(c) Where any immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance[17] thereon, the proceeds of sale shall be applied —

first, in defraying the expenses of the sale;

secondly, in discharging the amount due under the decree;

thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any); and

fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.[18]

(3) Nothing in this section affects any right of [a][the Crown].[19]

[1877, S. 295; 1859, S. 270; See S. 64, O. 21, Rr. 52, 72, 89 and 90.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Government."

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. Essential conditions for the applicability of the section.
4. There must be assets held by the Court.
5. What are assets. See Note 4.
6. Claimant for rateable distribution and attaching decree-holder must be holders of decrees for the payment of money.
7. Such decrees should have been obtained against the same judgment-debtor.
8. Claimant for rateable distribution must have applied for execution to the Court by which assets are held.
9. Effect of dismissal of the application for execution.
10. Claimant attaching before judgment.
11. The application should have been made before the receipt of assets by the Court.

11a. "And have not obtained satisfaction thereof."

12. Jurisdiction of Court to inquire into the validity of the decree under which rateable distribution is claimed.
13. Right of one decree-holder to impeach the decree of another. See Note 12.
14. Insolvency or liquidation, how far affects the right of rateable distribution.
15. Sale subject to mortgage—Mortgagee cannot get rateable distribution—Proviso (a).
16. Sale free of mortgage — Rights of mortgagee — Proviso (b).
17. Sale in execution of decree on mortgage—Mode of applying the sale proceeds — Proviso (c).
18. Suit for refund of assets — Clause (2).
19. Priority of debts — Clause (3).
20. Debts due to the Crown. See Note 19.
21. Debts due to Co-operative Society. See Note 19.
22. Mode of distribution.

22a. Appropriation of amount received by way of rateable distribution.

23. Application for rateable distribution is one for a step-in-aid of execution.
24. Appeal.
25. Revision.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Application for rateable distribution, conditions of. See Note 8.
Distinction between "held" and "realised." See Note 4.
Distribution of assets realised by rent decree. See Note 19.
Effect of attachment before judgment. See Note 10.
Effect of rateable distribution on debtor's surety. See S. 145, Note 8.
Fund in Court — Rateable distribution of. See Note 11.
Higher Court to determine claims for rateable distribution. See Note 8.
Inter-relation between S. 73 and O. 21 R. 52. See Notes 11 and 19.
Limitation of suit for refund. See Note 18.
Order 21 Rule 72 does not affect S. 73. See Notes 4 and 11.
Priority of attachment confers no prior right. See Note 2.
Property declared not liable but sold by another decree-holder — First decree-holder entitled. See Note 19.
Right of rival decree-holder to challenge decree. See Note 12.
"Shall be rateably distributed." See Notes 7, 12 and 22.
"To the Court." See Note 8.
Transfer of assets whether necessary. See Note 11.
Whether Small Cause Court can try suit for refund. See Note 18.
Who can apply. See Notes 6 and 12.

1. Legislative changes. — This section corresponds to S. 295 of the Code of 1882. The following are the important changes introduced by the section :

(1) For the words "whenever assets are realised by the sale or otherwise in execution of a decree," the words "where assets are *held* by a Court" have been substituted. For the effect of the change, see Note 4.

(2) For the words "prior to the *realisation*," the words "before the *receipt* of such assets" have been substituted. See Note 11.

(3) The words "by which such assets are held" have been omitted.

(4) For the words "decrees for money," the words "decrees for *the payment of* money *passed*" have been substituted. This alteration does not really effect any change in the law prior to the Code of 1908.[1]

(5) For the words "right against" the words "interest in" in cl. (b) have been substituted, thereby bringing the section in conformity with S. 96 of the Transfer of Property Act. This alteration also is merely a verbal one.

2. Scope and object of the section. — Under Ss. 270 and 271 of the Code of 1859[1] which corresponded to the present S. 73, the creditor who first attached the property had a *statutory priority* to have his claim satisfied in full out of the sale proceeds to the *exclusion* of other creditors.[2] This superior position assigned to the first attaching creditor naturally led to scrambles and malpractices among attaching creditors, and, with a view to put an end to the same, the section was changed by the Code of 1877 so as to place *all* decree-holders on an equal footing regardless of any priority in attachment or of the application for rateable distribution.[3]

Section 73 — Note 1

1. ('24) 11 AIR 1924 Cal 801 (805):51 Cal 761 (DB).

Note 2

1. (S. 270) Whenever a property is sold in execution of decree, the person on whose application such property was attached shall be entitled to be first paid out of the proceeds thereof notwithstanding a subsequent attachment of the same property by another party in execution of a prior decree.

Attaching creditor to be first paid out of property attached.

(S. 271) If, after the claim of the person on whose application the property was attached has been satisfied in full from the proceeds of the sale, any surplus remain, such surplus shall be distributed rateably amongst any other persons who prior to the order for such distribution may have taken out execution of decree against the same defendant and not obtained satisfaction thereof.

Surplus to be rateably distributed among decree-holders who have taken out execution prior to the order for distribution.

Provided that, when any property is sold subject to a mortgage, the mortgagee shall not be entitled to share in any surplus arising from such sale.

Proviso where property is sold subject to a mortgage.

2. ('97) 20 Mad 107 (111) (DB).
('82) 6 Bom 16 (18) (DB).
('85) 7 All 702 (710) (DB).

3. ('41) 28 AIR 1941 All 110 (111) : I L R (1941) All 77 (FB).
('01) 23 All 106 (110) (DB).
('22) 9 AIR 1922 Mad 236 (236).
See also ('79) 3 Bom 217 (219). (But the change did not affect rights which had accrued to the judgment-creditor under the Code of 1859.)]

The object of the section is two-fold —

(1) to prevent unnecessary multiplicity of execution proceedings, to obviate, in a case where there are many decree-holders, *each competent to execute* his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property ;

(2) to secure an equitable administration of the property by placing *all* the decree-holders on the same footing and making the property rateably divisible among them.[4]

The rule enunciated in this section is only a rule of *procedure* and provides a cheap and speedy mode of execution of several decrees obtained against the same judgment-debtor by rateably distributing the assets held by a Court amongst the several rival decree-holders. It does not, however, alter or limit the *substantive rights* of such rival decree-holders.[5] A failure to participate in the assets under this section does not deprive a decree-holder of the rights to execute his decree.[6] As observed by their Lordships of the Privy Council in *Shankar Sarup* v. *Mejo Mal*,[7] the scheme of the section "is rather to enable the Judge as a matter of *administration* to distribute the price according to what seem, at the time, to be the rights of the parties, without this distribution importing a conclusive adjudication on those rights which may be subsequently re-adjusted in a suit."

See also the undermentioned case.[8]

3. Essential conditions for the applicability of the section. — In order that a decree-holder may claim a rateable distribution of the assets of the judgment-debtor under this section, the following conditions must exist[1] :

(1) The assets must be *held* by the Court. See Note 4.

(2) The decrees obtained by the decree-holder and the attaching-creditor must be *decrees for the payment of money*. See Note 6.

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4. ('41) 28 AIR 1941 All 110 (111, 112) : I L R (1941) All 77 (FB).
('01) 23 All 106 (110) (DB). (Per Strachey, C. J.)
('24) 11 AIR 1924 Cal 801 (805):51 Cal 761 (DB).
('10) 11 Cal L Jour 69 (72) (DB).
('10) 13 Oudh Cas 291 (292, 293) (DB).
('99) 26 Cal 772 (775).
('86) 12 Cal 317 (321) (DB).
('35) 22 AIR 1935 Nag 214 (215):31 Nag L R 423. (Rateable distribution under C. P. C. and distribution of assets under Provincial Insolvency Act are made on same principle.)

5. ('41) 28 AIR 1941 All 110 (115) : I L R (1941) All 77 (FB). (Section 73 cannot be invoked to entitle a decree-holder to satisfy his decree from assets which he could not touch if S. 73 was not on the statute book—Conversely the provisions of S. 73 cannot be utilized to deprive a decree-holder from satisfying his decree from assets which he would have been otherwise entitled to follow in execution.)
('79) 4 Cal 29 (32) (DB).
('84) 10 Cal 567 (576) (DB). (A suit is maintainable on such rights even without applying under this section.)
('26) 13 AIR 1926 Oudh 616 (617) : 1 Luck 569 (DB). (Rateable distribution is a mode of execution of a decree for the payment of money prescribed by law.)
('07) 2 Agra 183 (185) (DB). (Section applies only to rival decree-holders claiming under different decrees and not to persons claiming under the same decree.)

6. ('73) 19 Suth W R 255 (260) (DB).

7. ('01) 23 All 313 (322) : 28 Ind App 203 (PC). [*See also* ('35) 22 AIR 1935 Cal 290 (295):62 Cal 715 (FB). (AIR 1914 Cal 575 overruled.)]

8. ('34) 21 AIR 1934 Mad 426 (427) : 58 Mad 59. (Distribution under this section not a matter of equity—A Court has to deal with it only on terms of S. 73.)

Note 3

1. ('10) 11 Cal L Jour 69 (73) (DB).
('32) 19 AIR 1932 All 411 (413): 54 All 516 (DB).
('05) 27 All 132 (135) (DB).
('35) 22 AIR 1935 Cal 290 (290):62 Cal 715 (FB).
('21) 8 AIR 1921 Cal 801 (802) (DB).
('16) 3 AIR 1916 Cal 264 (266) (DB).
('18) 5 AIR 1918 Mad 512 (512) (DB).
('82) 6 Bom 16 (18) (DB). (Must have applied for execution.)
('11) 14 Cal L Jour 50 (52). (Application should be made before the whole purchase money is deposited.)

(3) Such *decrees* should have been obtained *against the same judgment-debtor.*

(4) The claimant for rateable distribution must have *applied for execution* to the Court by which the assets are held. See Note 8.

(5) Such application should have been made before the receipt of assets by the Court. See Note 11.

If the above conditions are all fulfilled, the decree-holder will be entitled to participate in the rateable distribution. It is not necessary that he should have given notice of his claim to other decree-holders.[2]

Before passing an order under this section, the Court should give the parties claiming to be interested an opportunity of being heard and of establishing their claims to participate in the distribution.[3]

4. There must be assets held by the Court. — The right to rateable distribution under this section is conditional upon there being assets held by the Court. Hence, where the property attached is purchased by the attaching decree-holder privately, no right to rateable distribution arises as in such a case no proceeds come into the hands of the Court.[1] Similarly, where there are cross-decrees, the decree-holders become entitled to a right of set off under O. 21 R. 18. In such a case if the smaller decree is attached by other persons holding decrees against the person, in whose favour such smaller decree was passed, they cannot claim any right of rateable distribution in the amount of such decree as no assets are received by the Court.[3] The word "assets" means all a man's property, of whatever kind which may be used to satisfy debts or demands existing against him,[3] in other words, which may be used to satisfy his *liabilities.*

The five percentum of the sale price which is deposited under O. 21 R. 89 for payment to the auction-purchaser as compensation is not an asset of the judgment-debtor available for rateable distribution among his judgment-creditors. The reason is that the five percentum is not deposited in payment of any *debt* due by the judgment-debtor to the auction-purchaser but a statutory payment in order to ensure the setting aside of the sale.[4] See also O. 21 R. 89, Note 23.

Where the manager of a joint Hindu family is adjudicated an insolvent, all that vests in the Official Receiver is not the *interest* of the other members of the family in the family property, but only the right or the capacity which the insolvent had of making such interest available for the benefit of joint creditors under certain conditions which are recognised by the Hindu law. So long, therefore, as this right is not exercised by the receiver and the interests of the other members are not sold, it is open to the latter to

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('27) 14 A I R 1927 Bom 542 (551) : 51 Bom 855 (DB). (Attorney who has got a lien on his client's property but who has neither got a decree nor applied in execution, cannot come under S. 73.) [*See* ('34) 21 AIR 1934 All 652 (653).]

2. ('05) 27 All 132 (134, 135) (DB).

3. ('97) 2 Upp Bur Rul 274.

('10) 13 Oudh Cas 282 (284) (DB). (The applications must be dealt with after notice to the rival decree-holders.)

Note 4

1. ('37) 24 AIR 1937 Pat 609 (610).

2. ('40) 27 AIR 1940 P C 173 (175, 176) : I L R (1943) Kar P C 313 : 67 Ind App 350. : I L R (1941) Mad 1 (PC). (A I R 1937 All 422 approved —*Quere* — Whether there can be rateable distribution in respect of the decree for smaller sum if the decree for greater sum was passed after the attachment of the former decree.)

3. ('92) 16 Bom 91 (98).

('34) 21 AIR 1934 Pat 685 (692) : 13 Pat 446 (DB). (Any money belonging to a person other than the judgment-debtor or any money paid into Court by a third party under a misapprehension cannot be described as "assets.")

('37) 24 AIR 1937 Pat 651 (651, 652) (DB). (Preliminary mortgage decree is "asset.")

† ('39) 26 A I R 1939 Pat 392 (396) : 18 Pat 404 (DB).

4. ('39) 26 A I R 1939 Pat 392 (396) : 18 Pat 404 (DB). (*Obiter*—Per Manohar Lall, J.)

transfer their shares voluntarily to others and it is open also to their creditors to attach and sell them in execution of their decrees against such members. Hence, proceeds realised by the sale of such shares in execution of decrees obtained against the other members will be "assets" available for rateable distribution among persons holding money decrees against such members.[5]

The expression "assets held by the Court" conveys the idea of assets realised or converted into *cash*, for until then, the assets cannot be said to be *held* by the Court.[6] A cheque, it has been held, may, in certain circumstances, amount to an 'asset' within the meaning of the section.[7] Where a *decree* is attached by several decree-holders and one of them executes the decree, any money recovered by such execution will be assets liable to rateable distribution among all the decree-holders who have attached the decree.[8]

This section applies also to cases where the Collector, to whom execution is transferred, sells the lands of the judgment-debtor and holds the assets,[9] as in such cases the purchase-money must be deemed to be received and held by the *Court* as soon as it is paid to the Collector.[10] But where the immovable property of a person is sold by the Collector in execution of an award under the Bombay Co-operative Societies Act, VII of 1925 (which provides for the enforcement of such award according to the law applicable to the recovery of arrears of land revenue) the sale proceeds of the property in the hands of the Collector are not assets held by a *Court* within the meaning of this section.[11]

In order that the assets should be capable of being distributed under S. 295 of the old Code, they had to be realised either —

(1) by sale in execution of a decree, or,

(2) otherwise in execution of a decree. This was interpreted in two ways —

(a) Such assets as were realised otherwise than by sale, *from the property of the judgment-debtor*, e.g., under O. 21 R. 69, O. 21 R. 83 and Sch. III, Paragraphs 2 and 7.[12] Thus, moneys paid by the judgment-debtor to the warrant officer arresting him in execution of a decree were held not to be distributable under S. 295 on the ground that such moneys were not realised *from the property of the judgment-debtor*.[13]

(b) Such assets as were realised by any *process of execution expressly* provided by the Code.[14] This was a wider interpretation than the one in *(a)*, above. Thus, moneys paid into Court under a prohibitory order under S. 268 (O. 21 R. 46) though not realised *from the property* of the

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5. ('39) 26 AIR 1939 Cal 279 (281) (DB).
6. ('41) 45 Cal W N 674 (677) (DB).
† ('25) 12 AIR 1925 Nag 157 (157, 159). (Voluntary deposit by judgment-debtor for payment to a particular decree-holder is not so—Case law fully discussed.)
('25) 12 A I R 1925 Cal 102 (104) (DB). (No order for rateable distribution is to be made of assets expected to be realised.)
† ('39) 26 AIR 1939 Cal 530 (535) : I L R (1939) 2 Cal 143. (The term 'assets' applies only to money.)
7. ('41) 45 Cal W N 674 (678) (DB). (Where the money representing the sale proceeds of the attached goods of the judgment-debtor is lying in the Treasury to the credit of the District Judge, a cheque drawn on the Treasury by the District Judge for payment to the attaching decree-holder and delivered over to the executing Court and accepted by it will amount to an asset, when the only form of payment which the decree-holder desires is that the cheque should be endorsed over to him.)
8. ('40) 27 AIR 1940 P C 173 (176) : I L R (1943) Kar P C 312 : I L R (1941) Mad 1 : 67 Ind App 350 (PC).
9. † ('33) 20 AIR 1933 All 666 (668) (DB).
10. ('20) 7 AIR 1920 Bom 35 (37) (DB).
Also see Note 11.
11. ('38) 25 AIR 1938 Sind 157 (160): I L R (1939) Kar 104.
12. ('86) 8 All 67 (68) (DB). (Deposit by judgment-debtor in execution when his property is attached.)
('12) 36 Bom 519 (523) (DB). (Amount realised by Collector under Sch. III is "assets.")
('82) 6 Bom 588 (589, 590) (DB).
13. ('82) 6 Bom 588 (589, 590) (DB).
14. ('94) 21 Cal 809 (817) (DB).
('05) 28 Mad 380 (384, 385).

judgment-debtor, are still recovered under a *process of execution* under the Code and were therefore held to be distributable assets under S. 295.[15]

See also the undermentioned cases.[16]

Moneys not realised in either of these two modes, were not assets distributable under S. 295 of the old Code.[17]

The substitution of the words "where assets are held by a Court" in the present section for the words "whenever assets are realised by sale or otherwise in execution of a decree" which occurred in the old section, makes the sectoin very much wider than before.[18] The words "assets held by a Court" will now include —

(1) all assets to which S. 295 of the old Code applied,[19] and also

(2) all moneys obtained in any manner whatsoever by the Court whose duty it is to execute the decree under execution, for the purpose of satisfying the said decree.[20]

('86) 13 Cal 225 (228).

15. ('92) 16 Bom 91 (98).
('04) 6 Bom L R 376 (378) (DB).
('96) 19 Mad 72 (74) (DB).
[*See* ('17) 4 AIR 1917 Lah 410 (411).]

16. ('99) 26 Cal 772 (777). (Monies realised by receiver in execution.)
('90) 1890 All W N 194 (194, 195). (Rents and profits realised by Collector appointed in execution as receiver and paid by him into Court.)
('12) 11 Mad L Tim 38 (38) (Jour). (Money paid into Court while application for attachment of that money is pending is assets.)
('82) 5 Mad 123 (124). (Where a decree-holder, permitted under O. 21 R. 72 (S. 294) purchased the property in execution of his own decree, the whole purchase money payable by him cannot be set off against his decree amount but will be assets.)
('88) 11 Mad 356 (358). (A decree-holder can set off only a rateable share of his purchase price.)
('82) 6 Bom 570 (571). (Do.)
('86) 12 Cal 499 (504). (Do.)
('04) 28 Bom 264 (274). (Money in the custody of a public officer attached under O. 21 R. 52 and paid into Court by that officer is assets.)
'08) 31 Mad 502 (504). (Realisations under O. 21 R. 53 are assets.)
('12) 14 Bom L R 633 (634). (Salary attached and realised under O. 21 R. 48 are assets.)
('12) 15 Ind Cas 406 (407) (Mad). (Monies realised in execution of personal decree.)
('17) 4 A I R 1917 Mad 739 (741). (Deposits under S. 310A (O. 21 R 89) by a volunteer can be treated as assets ratenbly distributable.)

17. ('12) 15 Cal L Jour 49 (51) (DB). (Payment privately made by judgment-debtor to one of the decree-holders is not assets.)
('92) 1892 Pun Re No. 60, p. 223 (228). (Property given as security for a decree.)
('03) 1903 Pun Re No. 6, p. 23 (25, 26). (Voluntary payment by judgment-debtor is not within S.295.)
('97) 1 Cal W N 695 (696) (DB). (Money deposited under S. 310A (O. 21 R. 89) for setting aside a sale is not assets.)
('87) 10 Mad 57 (61) (DB). (Assets are not "assets" until the property has been sold.)
('85) 7 All 702 (710) (DB). (Essential condition of applicability of Section is that there should be a sale.)
('06) 33 Cal 639 (642). ("Realised" means realised in execution of a decree.)
('14) 1 A I R 1914 Mad 641 (641) (DB). (Payment by judgment-debtor without any process in execution is not "assets" within S. 295 of the old Code.)
('86) 8 All 67 (68) (DB). (Deposit by judgment-debtor after attachment is not assets.)
('13) 37 Bom 138 (143) (DB). (Attaching creditor's debt privately satisfied—Other attaching creditors have no right of rateable distribution under S. 295 as there was no realisation by sale or otherwise in execution of decree.)
[*See also* ('03) 26 Mad 179 (181). (Assets meant the proceeds of the sale of the property sold in execution.)]

18. ('21) 8 AIR 1921 Cal 749 (750).
('32) 19 A I R 1932 All 411 (412, 413) : 54 All 516 (DB).
† ('32) 19 AIR 1932 Nag 156 (157) : 28 Nag L R 179.
('13) 40 Cal 619 (622) (DB). (Yet monies deposited under O. 21 R. 89 are not assets.)
† ('39) 26 A I R 1939 Pat 392 (393) : 18 Pat 404 (DB). (Money voluntarily paid into Court by judgment-debtor to satisfy the decree against him is "assets.")

19. ('18) 5 A I R 1918 Lah 75 (75,76) : 1918 Pun Re No. 33. (Money realised by sale of moveables.)
('37) 24 AIR 1937 Pat 651 (651,652). (Preliminary mortgage decree obtained by judgment-debtor — Attachment by holder of money decree—Attaching decree-holder obtaining final decree for sale and bringing properties for sale — Sale proceeds are assets available for distribution.)
('38) 177 Ind Cas 269 (270) (Pat). (Sum of money brought into Court by a decree-holder by attachment amounts to assets held by the Court.)

20. ('19) 6 A I R 1919 Mad 647 (647,648) : 41 Mad 616. (Monies paid under O. 21 R. 83.)
('26) 13 A I R 1926 Mad 307 (308) : 49 Mad 38. (Lands attached in execution acquired under Land Acquisition Act, and compensation money paid in Court, and the decree-holders' right to partake in it decided—Such money is assets.)

In order that S. 73 may apply, it is not, therefore, now necessary that the receipt of assets should have been under a *process* of execution, but it is still necessary that the assets should have reached the hands of the Court *in execution* i. e., on the execution side.[21] For example, O. 21 R. 1 provides that all moneys payable under a decree shall be paid into the *Court whose duty it is to execute the decree*. A payment made by the judgment-debtor of the decree amount into Court is not one levied by any *process* in execution but is still one *in execution*. Such a deposit will under the present section, be "assets held by the Court."[22] Similarly, money paid by a judgment-debtor under O. 21 R. 55, though paid for the satisfaction of a particular debt, is subject to rateable distribution under this section.[23] On the other hand, money paid in Court to avoid arrest *before judgment* under O. 38,[24] or money paid to the decree-holder out of Court under a private arrangement,[25] or money paid by a defendant into Court pending suit to satisfy the plaintiff's claim,[26] or money paid into Court towards a decree, not against the judgment-debtor but against a third person,[27] is not obtained by the Court *in execution* and is not "assets held by the Court."

In *Sorabji* v. *Kala Raghunath*,[28] the Bombay High Court has, however, placed a very narrow construction on the words "assets held by the Court." The question there was, whether money paid into Court by a judgment-debtor under O. 21 R. 55 for payment of the amount due to the decree-holder who got the property attached was subject to rateable distribution. Scott, C. J., held that it was not, on the ground that the assets referred to in S. 73 should be assets received *in the process of execution*. This view has been followed by the Rangoon High Court[29] and by the Judicial Commissioners' Courts

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('34) 21 AIR 1934 Nag 62 (63). (Supratdar failing to produce judgment-debtor's property — Decree-holder accompanying process-server to attach his property — Supratdar making payment to decree-holder — Assets must be held constructively by Court.)
('26) 13 A I R 1926 Mad 872 (875) : 49 Mad 570. (Deposit of 25 per cent. on default of balance becomes assets.)
('22) 9 AIR 1922 Cal 19 (20, 21). (Money deposited after execution was taken.)
('21) 8 AIR 1921 Cal 749 (750). (A voluntary payment by the judgment-debtor into the Court.)
('19) 6 AIR 1919 Oudh 326 (328) : 22 Oudh Cas 194 (DB). (Rents realised by receiver in execution and paid into Court are assets.)
('15) 2 AIR 1915 Low Bur 92 (92). (Deposit of decretal amount in Court—Amount is asset.)
('20) 7 AIR 1920 Mad 731 (731). (Permission to bid and order to set off decree debt does not affect right to distribution.)
('31) 18 AIR 1931 Bom 252 (254) (DB). (Do.)
('30) 17 AIR 1930 Cal 761 (762) (DB). (Do.)
('31) 18 AIR 1931 Mad 103 (105). (Do).
('31) 18 AIR 1931 Pat 359 (360) : 10 Pat 830 (DB). (Do.)
('31) 18 AIR 1931 Pat 405 (408) : 11 Pat 250 (DB). (Do.)
('38) 25 AIR 1938 Sind 144 (145).
('37) 24 AIR 1937 Nag 80 (83) : I L R (1937) Nag 219. (Money realised by sale of attached property for arrears of revenue is available for rateable distribution.)
[*See* ('34) 21 AIR 1934 Oudh 110 (111). (Money due to judgment-debtor attached by order of one Court—Transfer of execution to another Court—No fresh attachment necessary.)]

21. ('19) 6 AIR 1919 Bom 152 (152, 153).
('16) 3 AIR 1916 Mad 792 (794). 38 Mad 221 (224). (Money paid in satisfaction of decree — Overruled on another point by AIR 1921 Mad 218 (221): 44 Mad 100 (FB).)
('20) 7 AIR 1920 Cal 785 (786, 787) : 47 Cal 515.
('30) 17 AIR 1930 Sind 300 (300, 301) : 25 Sind L R 178. (Money paid into Court by judgment-debtor to avoid an attachment issued in execution.)
('39) 26 AIR 1939 Bom 112 (113) : I L R (1939) Bom 133 (DB).
22. ('22) 9 AIR 1922 Cal 19 (20, 21).
† ('39) 26 AIR 1939 Pat 392 (393, 394) : 18 Pat 404 (DB).
('32) 19 AIR 1932 All 411 (412) : 54 All 516 (DB). (Deposit into Court by judgment-debtor to avert sale.)
23. † ('39) 26 AIR 1939 Pat 392 (394) : 18 Pat 404 (DB).
24. ('15) 2 AIR 1915 Upp Bur 15 (16) : 2 Upp Bur Rul 91. (A lien is created as soon as money in deposited.)
[*See* ('20) 7 AIR 1920 Sind 118 (119) : 14 Sind L R 164 (168). (Plaintiff acquires a lien on deposit under O. 38 R. 1 after passing of decree.)
('19) 6 AIR 1919 Mad 607 (609) : 41 Mad 1053 (DB). (Such money is earmarked for the suit.)]
25. ('20) 7 AIR 1920 Lah 94 (94).
26. ('27) 14 AIR 1927 Rang 278 (278, 279) : 5 Rang 753. (Deposit under O. 24 R. 1.)
27. ('13) 1913 Pun L R No. 55, p. 215. (Money not paid towards any decree against the judgment-debtor is not assets.)
28. ('12) 36 Bom 156 (163) (DB).
29. ('27) 14 AIR 1927 Rang 278 (278, 279) : 5 Rang 753.

in Nagpur[30] and Sind.[31] In *Ebji Umersy* v. *Graham & Co.*,[32] which is also a case of the Bombay High Court, the question was whether money paid by the judgment-debtor under S. 55 (4) to the warrant officer arresting him, is an asset subject to rateable distribution. Macleod, J., sitting as a single Judge, held that it was not an asset, on the ground that the section was intended to apply to assets realised by the *sale of the property attached.*

The view of Scott, C. J., in *Sorabji* v. *Kala Raghunath*[33] has been expressly dissented from by the Madras, Calcutta and the Patna High Courts.[34] It has also been dissented from in later cases of the Bombay High Court itself, and by the Nagpur High Court in the case noted below.[35] In *Nathmal* v. *Moniram*,[36] Pratt, J., while feeling himself bound as a single Judge to follow the decision of the appellate Bench in *Sorabji* v. *Kala Raghunath*,[37] disapproved of the view of Scott, C. J., expressed therein. In *Indaji Majaji* v. *Cooverji Nowroji*,[38] Mirza, J., though sitting as a single Judge, refused to follow the decision in *Sorabji* v. *Kala Raghunath*,[39] on the ground that the observations of Scott, C. J., in that case were *obiter dicta.* He entirely agreed with the dissentient views expressed by Pratt. J., in *Nathmal* v. *Moniram.*[40]

It is submitted that the decisions in *Sorabji* v. *Kala Raghunath*[41] and *Ebji Umersey* v. *Graham & Co.*,[42] have not appreciated or given effect to the *deliberate* change in the language of the section[43] and in view of the considered opinions to the contrary both in the same and in the other High Courts, the view expressed in those decisions cannot be accepted as a sound one.

In some decisions[44] the view has been expressed that where a payment has been made for a *specific purpose* or specifically towards a particular decree, the money so paid is not liable for reteable distribution. It is submitted that this view is not sound in view of the wide language of the section. In *Satnarain Prasad Choudhury* v. *Mahabir Prasad Choudhury*,[45] Fazl Ali J., observed as follows :

> "Now S. 73 being imperative, it is obligatory upon a Court to distribute rateably the assets held by it (irrespective of how they came into its hands) among all the creditors who are entitled to the benefit of this section. The assets are so distributable by the operation of law and there is nothing in this section or any other provision of the Code to show that the Court must deal with them in accordance with the wishes of the judgment-debtor. When therefore there are several decrees outstanding against a judgment-debtor and all the requirements of S. 73 are complied with, the judgment-debtor cannot prevent rateable distribution by merely earmarking his payments for the benefit of one of the decree-holders."

('15) 2 AIR 1915 Upp Bur 15 (16) : 2 Upp Bur Rul 91.
30. ('25) 12 AIR 1925 Nag 157 (158).
31. ('20) 7 AIR 1920 Sind 118 (119) : 14 Sind LR 164 (168).
32. ('17) 4 AIR 1917 Bom 275 (276).
33. ('12) 36 Bom 156 (163, 164) (DB).
34. ('19) 6 AIR 1919 Mad 647 (648) : 41 Mad 616 (617) (DB). (Money paid into Court under O. 21 R. 55.)
('26) 13 AIR 1926 Mad 307 (308); 49 Mad 38 (DB). (Compensation paid by Collector under Land Acquisition Act.)
('20) 7 AIR 1920 Cal 785 (786): 47 Cal 515 (520, 521).
('39) 26 AIR 1939 Pat 392 (394) : 18 Pat 404 (DB).
('21) 8 AIR 1921 Cal 749 (750).
[But see ('15) 2 AIR 1915 Mad 236 (236) : 24 Ind Cas 617 (618). (Fund to credit of judgment-debtor held not assets.)]
35. ('41) 28 AIR 1941 Nag 239 (240).
36. ('19) 6 AIR 1919 Bom 152 (153).
37. ('12) 36 Bom 156 (163, 164) (DB).
38. ('26) 13 AIR 1926 Bom 242 (245). (Money paid by judgment-debtor under O. 21, R. 43 is assets.)
39. ('12) 36 Bom 156 (163, 164) (DB).
40. ('19) 6 AIR 1919 Bom 152 (153).
41. ('12) 36 Bom 156 (163, 164) (DB).
42. ('17) 4 AIR 1917 Bom 275 (276).
43. *Compare* the old Section 295.
[*See* ('21) 8 AIR 1921 Cal 749 (750).]
44. ('39) 26 AIR 1939 Bom 468 (470). (Amount produced by the judgment-debtor to be payable to one decree-holder for specific purpose of securing postponement of sale — Amount is not assets held by Court liable to be rateably distributed amoung all decree-holders.)
('39) 26 AIR 1939 Bom 112 (113, 114): ILR (1939) Bom 133 (DB).
('12) 36 Bom 156 (163) (DB).
('18) 5 AIR 1918 Mad 704 (704).
45. † ('39) 26 AIR 1939 Pat 392 (393, 394) : 18 Pat 404.

In *Noor Mahomed* v. *Bilasiram*,[46] Rankin, J., observed as follows :

"The money paid, with whatever motive, if paid to the Court, is paid upon terms of the Code whatever they may be. Those terms, as I read S. 73, have been laid down so that distinction in the form in which execution has been had, in the precise extent to which execution has been allowed to run, in the exact source or genesis of the fund in Court, are now no part of the definition of the assets that are subject to distribution rateably. The object of the new Code in using larger language can only be to avoid anomaly. To introduce a distinction on the strength of the voluntariness of the payment or the purpose of the debtor, is, I think, to cut down the language and intention of the Code upon a principle which is inapplicable to the subject-matter and which if applicable is very difficult to imply."

But, where a judgment-debtor has already assigned certain property to a particular decree-holder or created a charge on a certain property in favour of a particular decree-holder, such property is not liable to the claims of other decree-holders, for rateable distribution.[47] Similarly, where the assets in the Court represent *security* given for the satisfaction of a particular decree, the holders of other decrees are not entitled to rateable distribution out of such assets, the reason being that in such a case the decree-holder for whose benefit security has been given gets a lien on the assets for the satisfaction of his decree.[48]

It has been held by the Bombay High Court[49] that where the assets held by the Court are derived from property which is not liable to be proceeded against in execution of the decree under which the claim for rateable distribution is made, the holder of such decree will not be entitled to share in such assets. But the decisions of the Sind Judicial Commissioner's Court cited below[50] are inconsistent with this view which has also been dissented from by the Nagpur High Court.[51] It is submitted that the view of the Bombay High Court is not warranted by the language of the section.

As to claims for rateable distribution in cases where a decree-holder is allowed to purchase property in execution of his own decree and to set off the purchase money against the decretal amount, see O. 21 R. 72, Note 5.

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46. † ('20) 7 AIR 1920 Cal 785 (787) : 47 Cal 515.

47. ('37) 24 AIR 1937 All 424 (428) (DB). (Oral assignment of debt upheld.)

48. ('18) 5 AIR 1918 Mad 442 (442) : 41 Mad 327 (DB).
('18) 5 AIR 1918 Mad 1158 (1159): 38 Ind Cas 481 (482) (DB). (Decree amount must in such cases be regarded as charged on the money deposited.)
('20) 7 AIR 1920 Mad 409 (409) (DB). (Where something has been done for the credit of the suit the party who procures the thing is entitled to a preferential right.)
('19) 6 AIR 1919 Mad 607 (609) (DB).
('15) 2 AIR 1915 Lah 147 (150) (DB).
('37) 24 AIR 1937 Mad 531 (532) (DB). (In this case the view was expressed that the question depends upon whether a charge is created on the property given as security.)
('39) 26 AIR 1939 Bom 112 (114): ILR (1939) Bom 133 (DB). (This decision proceeds on the ground that in such a case the money is paid for a specific purpose. Though the decision itself is right the reason is not sound in view of the above discussion.)

49. ('80) 4 Bom 429 (432) (DB). (House of agriculturist sold in execution of decree for rent — Other decree-holders are not entitled to rateable distribution.)
[*See also* ('38) 25 AIR 1938 Bom 90 (90, 91) : I L R (1938) Bom 98.]
Also see Notes 8 and 12.

50. ('41) 28 AIR 1941 Sind 96 (96). (Attachment of salary under S. 60 before 1st June 1937 by a judgment-creditor saved by S. 3 of the Amending Act (IX of 1937) is available by way of rateable distribution to another judgment-creditor who is not covered by aforesaid S. 3.)
('38) 25 AIR 1938 Sind 144 (145). (Salary paid into Court under attachment made before amendment of S. 60 by Act IX of 1937 is liable to rateable distribution in favour of decree-holder whose suit was filed after the coming into force of the Act although if he himself had applied for attachment he would not have succeeded.)

51. ('41) 28 AIR 1941 Nag 239 (241). (Where there has been an attachment of the judgment-debtor's salary by one creditor prior to 1937 and another creditor obtains a decree subsequent to the amendment of S. 60, C. P. Code in 1937, he can claim rateable distribution in the amount attached in respect of earlier decree — Section 60 does not control S. 73.)

As to claims for rateable distribution of salary attached under O. 21 R. 48, see Note 2 on that rule. The costs of realisation must be deducted in calculating the assets available for rateable distribution under this section.[52]

5. What are assets. — See Note 4.

6. Claimant for rateable distribution and attaching decree-holder must be holders of decrees for the payment of money. — As already noticed in Note 3, it is one of the essential conditions for the applicability of the section that the claimants for rateable distribution and the attaching decree-holder must be holders of *decrees for the payment of money*. For definition and meaning of 'decree' see S. 2 (2) and the notes thereon. It has been held that where an execution sale is set aside and the decree-holder is ordered to refund the sale price the order is one under S. 47 and therefore amounts to a decree. Hence, it has been held that where such order is executed the proceeds of such execution are liable to rateable distribution under this section.[1] It has been held that a payment order under S. 186 of the Companies Act being, under S. 199 of the Act, enforceable as a decree, is to be treated as a decree for purposes of rateable distribution under this section.[2]

As a general rule, every decree by virtue of which money is payable is to that extent a "decree for money."[3] Thus, a decree for the payment of mesne profits is a "decree for the payment of money" within the meaning of the section. It is not necessary that the amount of mesne profits should have been *ascertained*; it is enough if the decree-holder has applied under O. 21, R. 42.[4] The reason is that O. 21, R. 42 treats the attachment as a proceeding in execution of the decree and the application for attachment may, therefore, be treated as one for execution. Similarly, a judgment entered up under S. 86 of the Insolvent Debtor's Act is a "decree for the payment of money."[5]

There has, however, been a conflict of opinion as to whether a *mortgage decree* is a "decree for the payment of money" and whether the holder of such a decree can claim rateable distribution under this section.

In *Hart* v. *Taraprasanna*,[6] it was held by the Calcutta High Court in accordance with the general rule stated above that a holder of a mortgage decree or of any decree under which money was payable and other relief granted, was the holder of a "decree for the payment of money" within the meaning of the section. In *Vaidhia-nadaswamy* v. *Somasundaram*,[7] a Full Bench of the Madras High Court held that a mortgage decree is one for the payment of money *whether there is a direction to pay personally or not*.[8] This view was also adopted by the Punjab Chief Court in the

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52. ('40) 27 AIR 1940 Sind 17 (18).

Note 6

1. ('40) 27 AIR 1940 Nag 267 (268): ILR (1942) Nag 136. (Dissenting from AIR 1934 Nag 243.)

2. ('41) 28 AIR 1941 Lah 273 (273): I L R (1942) Lah 460 (DB).

[*See* ('42) 29 AIR 1942 Mad 748 (750). (Scheme decree under S. 92 — Direction regarding realization of trust properties including certain amount as belonging to trust *held* not money decree.)]

[But see ('40) 27 AIR 1940 Oudh 237 (240): 15 Luck 332 (DB). (Order under S. 186, Companies Act, is not decree within S. 73.)]

3. ('85) 11 Cal 718 (729, 730) (DB). (Grant of any other relief in the decree is immaterial.)

4. ('34) 21 AIR 1934 Mad 604 (605): 58 Mad 233 (DB).
('82) 5 Mad 123 (124) (DB).

5. ('84) 8 Bom 511 (520) (DB).

6. ('85) 11 Cal 718 (729, 730) (DB).

7. ('05) 28 Mad 473 (477) (FB). (Approving 20 Mad 107 and 11 Cal 718).

8. *See also the following cases*:
('16) 3 AIR 1916 Mad 20 (22): 39 Mad 570 (574). (Mortgage decree with direction for personal decree in case of deficiency held to be a money decree.)
('02) 25 Mad 244 (286, 287) (FB). (Decree for recovery of balance after sale of mortgaged property is a money decree.)
('05) 28 Mad 224 (226). (Decree directing sale of mortgaged property in default and balance from other properties.)

undermentioned case.[9] The Full Bench view has been distinguished in a later case[10] wherein it was held that where a mortgage decree *expressly exempts the defendants from personal liability*, it is not a money decree under the section. The Allahabad High Court[11] and later decisions of the Calcutta High Court[12] distinguishing *Hart* v. *Taraprasanna*,[13] have held that a mortgage decree is not a decree for the payment of money even though it provides for the deficiency of the decree amount being realised, after sale of the hypotheca, *personally* from the mortgagor. The Lahore High Court also has taken a similar view.[14]

It is submitted that the Madras view is not sound. The provisions of O. 21 R. 20 clearly show that the Legislature intended to make a distinction between a "mortgage decree" and "a decree for the payment of money."

A composite mortgage decree for sale including a personal decree for the balance will become a decree for the payment of money within the meaning of this section and the holder of such a composite decree will be entitled to rateable distribution, when the net proceeds of the sale of the mortgaged properties fall short of the decretal amount.[16]

A *personal* decree obtained by a mortgagee independently of his mortgage,[16] or for interest due on the mortgage,[17] or for the balance due after the mortgaged property is sold[18] and found insufficient to satisfy the mortgage debt, are all decrees for the payment of money. Again, a decree for money *personally* against B and against the *properties* of C and D does not thereby lose its character as a money decree against B for the purpose of claiming rateable distribution of the assets of B held by the Court.[19]

A mortgagee may also *waive* his lien on the mortgaged property and content himself with a mere money decree. In such a case he will, as a money decree-holder, be entitled to claim rateable distribution.[20] The section applies to *transferees* of decrees also who apply for rateable distribution.[21]

7. Such decrees should have been obtained against the same judgment-debtor. — The third condition for the applicability of the section is that the decrees should have been obta ined*against the same judgment-debtor*.[1] Where X obtains

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9. ('08) 1908 Pun L R No. 121, page 370.
10. ('12) 23 Mad L Jour 699 (704) (DB).
11. ('94) 16 All 418 (420) (DB).
(1900) 22 All 401 (403) (DB). (Mortgage decree is not a money decree under S. 230 (S. 48) of the Code.)
('03) 25 All 541 (542, 543) (DB). (Combined mortgage decree under Ss. 88 and 90 of the Transfer of Property Act (O. 34 Rr. 4 and 6) is not a money decree under S. 230 of the Code.)
12. ('98) 25 Cal 580 (583) (DB).
('99) 26 Cal 166 (171) (DB). (Decree for certain sum, making the mortgaged properties liable for the realization of decree debt.)
(1900) 27 Cal 285 (289) (DB).
('13) 17 Cal W N 1039 (1041, 1042).
13. ('85) 11 Cal 718 (729, 730) (DB).
14. ('39) 26 AIR 1939 Lah 303 (304). (Holder of mortgage decree cannot claim rateable distribution even for costs.)
[*See also* ('33) 20 AIR 1933 Lah 48 (49) : 14 Lah 243.]
15. ('34) 21 AIR 1934 Cal 764 (766) : 60 Cal 22 (DB).
16. ('24) 11 AIR 1924 Pat 434 (436) (DB).
17. ('19) 6 AIR 1919 Oudh 351 (352) : 22 Oudh Cas 150 (DB).
18. ('04) 31 Cal 792 (795, 796) (DB). (Such as a decree under O. 34 R. 6.)
19. ('88) 10 All 35 (38) (DB).
20. ('70) 14 Suth W R 209 (210) (DB).
('74) 21 Suth W R 86 (87) (DB).
21. ('41) 28 AIR 1941 Mad 795 (796). (Marginal note cannot control the section which is wide enough to include transferees of decrees.)

Note 7

1. ('41) 28 AIR 1941 All 110 (117) : I L R (1941) All 77 (FB). (The Legislature added the word 'passed' in the new section in order to make it clear that the words "against the same judgment-debtor" had reference to the decrees themselves, and not to the various applications for execution contemplated by the section.)
('15) 2 AIR 1915 Cal 658 (660) : 42 Cal 1 (DB). (A decree against a person and a decree against a firm of which he is a partner not capable of execution against him individually are not decrees against the same judgment-debtor.)
('34) 21 AIR 1934 Nag 62 (63, 64). (Judgment-debtor's property attached and left with supratdar — On his failure to restore, monies realised from him — Monies so realised are in the eye of law monies realised from sale of judgment-debtor's

a decree against A, and Y obtains a decree against B, the decrees are not against the same judgment-debtor even if A himself is a judgment-creditor of B.[2]

But it is not necessary that *all* the judgment-debtors in each of the several decrees should be *identically* the same.[3] It is sufficient if there is *one* judgment-debtor common to all the decrees.[4] Thus, where X gets a decree against A, Y, a decree against A and B, and Z, a decree against A, B and C, the decrees are all "against the same judgment-debtor" with respect to the assets of A held by the Court.[5] But if assets are realised from C or his property, X and Y are not entitled to claim rateable distribution.[6]

There will be a difference, however, in the *extent* of the share of the assets in which each of the decree-holders can claim rateable distribution according as the properties of the one common judgment-debtor or of such debtor and of others, are sold in execution. Thus, in the illustration mentioned above, if A's property is attached and sold, X, Y and Z will share rateably in the *whole* of the proceeds. If the properties of A and B are sold, X will share in the assets *so far as it represents the share of* A *in the property*. Y and Z will share in the whole of the proceeds. If the properties of A, B and C are sold, X will share in the assets representing the share of A in the property, Y will share in the assets which represent the shares of A and B in the property and Z will share in the whole proceeds.[7]

From the above, it is clear that where X obtains a decree against A, and Y obtains a decree against A and B and the properties of both A and B are sold in execution of Y's decree, X will only be entitled to a rateable distribution of the sale proceeds of A's share in the properties, A alone being the *common* judgment-debtor under both the decrees. But, where A and B constitute a joint Hindu family of which A is the manager and X obtains a decree against A as *manager* of the joint family and Y obtains a decree against both A and B *eo nomine* as members of the joint family, *both* A and B would be

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property and so the judgment-debtor is common and other decree-holders are entitled to rateable distribution.)

('01) 25 Bom 494 (496) (DB). (Decree against a judgment-debtor and a decree against his legal representative and estate are not decrees against the same judgment-debtor.)

('16) 3 AIR 1916 Cal 264 (266) (DB).
[*See also* ('11) 12 Ind Cas 406 (406) (Mad).]

2. ('09) 5 Mad L Tim 126 (126) (DB).

3. ('03) 30 Cal 583 (586, 587) (DB).
('11) 10 Ind Cas 527 (529) (DB) (Cal).
('23) 10 AIR 1923 Pat 521 (522, 523) (DB).
('24) 11 AIR 1924 Cal 801 (804, 805) : 51 Cal 761 (DB).
('30) 17 AIR 1930 Sind 300 (301): 25 Sind L R 178.
('35) 22 AIR 1935 Mad 399 (401).

4. ('24) 11 AIR 1924 Cal 801 (804, 805) : 51 Cal 761 (DB).
('07) 10 Oudh Cas 129 (131).
('11) 15 Cal W N 872 (874) (DB).
('35) 22 AIR 1935 Mad 399 (400).
('36) 23 AIR 1936 Mad 40 (41): 59 Mad 93 (FB).

5. ('03) 30 Cal 583 (585, 587) (FB). (Overruling 12 Cal 294.)
('38) 25 AIR 1938 Lah 801 (802). (Decree against *A*, *B* and *C* — Another decree against *B* and *C* only.)
('81) 3 All 579 (580) (DB).
('83) 9 Cal 920 (921, 922) (DB). (Decree against *A* — Another decree against *A* and *B*.)
('03) 26 Mad 179 (181, 182). (One decree against father—Another decree against father and son.)
('18) 5 AIR 1918 Cal 281 (282) (DB). (Two decrees each against two out of three executors one of them being common to both.)
('05) 29 Bom 528 (529) (DB). (Dissenting from 16 Bom 683.)
('05) 27 All 158 (160) (DB). (Decree against *S* — Another decree against *S* personally and as representative of *R*.)
('26) 13 AIR 1926 Bom 150 (151) (DB). (Decree against *B* and *C*—Another decree against *C* alone.)
('99) 22 Mad 241 (244) (DB). (One decree against father and son, another decree against the son alone.)
('99) 3 Cal W N 368 (371) (DB). (First decree against *P* and *S* — Second against *P* and *R* — Third against *P*, *R* and *S*.)
('88) 10 All 35 (38) (DB). (A decree against three judgment-debtors and another decree against four judgment-debtors, three being common to both.)
('28) 15 AIR 1928 Rang 96 (96, 97) : 5 Rang 757.
('05) 8 Oudh Cas 86 (91). (The test is really to see whether rateable distribution has been applied for against the same judgment-debtor.)
[But see ('19) 6 AIR 1919 Mad 758 (758) (DB). (Submitted not correct.)]

6. ('33) 20 AIR 1933 Pat 277 (278).

7. ('03) 30 Cal 583 (586) (FB).
('05) 27 All 158 (160) (DB).
('05) 29 Bom 528 (529, 530): 7 Bom L R 567 (568) (DB).

judgment-debtors under both the decrees and X will be entitled to a rateable distribution of the proceeds obtained by the sale of the *entire* family properties and not only to a rateable share in the proceeds obtained by the sale of A's share in the properties. The reason is that where a person is sued as manager of a joint Hindu family, it must be taken that he represents all the members of the family and they are constructively parties to the suit.[8]

Suppose, X obtains a decree against A, a Hindu father and Y obtains a decree against A and his sons B and C, and suppose that the entire joint family properties belonging to A, B and C are sold in execution of Y's decree. Is X entitled to claim a share in the *entire* proceeds? In other words, are *all* the judgment-debtors to be considered to be the same under both the decrees? It has been held by the Madras High Court that it must be considered that both the decrees have been passed against the same judgment-debtors.[9] This view is founded on the ground that in such cases both the decrees are executable against the same properties, that a liberal construction should be adopted in regard to the words "same judgment-debtor" in this section and that without unduly straining the language of the section, decrees executable against the same properties may be treated as decrees passed against the same judgment-debtors.[10] The Bombay High Court has, however, held to the contrary.[11]

The words "same judgment-debtor" will not include a person who does not occupy the *same character* in all the decrees.[12] Thus, where X obtains a decree against A in his *personal* capacity and Y obtains a decree against him *as heir* of P, the two decrees are not against *the same judgment-debtor*.[13] Similarly, a decree against A in his personal capacity and a decree against a firm of which A is a partner are not decrees against the "same judgment-debtor."[14] The Calcutta High Court has, however, in the undermentioned decisions[15] taken the view that a decree obtained against a person as the heir of a deceased person and another decree obtained against him in his personal capacity are decrees against the same judgment-debtor within the meaning of the section. Similarly, the same High Court has held in the undermentioned decision[16] that a decree passed against a firm is really one against the individuals constituting the firm and hence, the judgment-debtors under a decree against a firm and under a decree against the individuals constituting the

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8. ('36) 23 AIR 1936 Mad 123 (125). (An extension of the principle in AIR 1936 Mad 40 : 59 Mad 93 (FB).)
[But see ('41) 28 AIR 1941 Bom 324 (325): ILR (1941) Bom 540 (DB). (Decree against father as manager and decree against father and son are not decrees against same judgment-debtor.)]

9. † ('40) 27 AIR 1940 Mad 525 (526, 527) (FB). (Joint Hindu family — Decree against grandfather must be deemed to be passed against son and grandson to the extent of their interest in family property — Decree against grandfather, son and grandson — Another decree against grandfather and son only — Grandfather and son adjudicated insolvents — Both decree-holders are entitled to rateable distribution in grandson's interest under S. 73 : AIR 1937 Mad 253 overruled.)
('36) 23 AIR 1936 Mad 948 (948).
('37) 24 AIR 1937 Mad 504 (508, 509).
† ('03) 26 Mad 179 (181, 182).

10. ('37) 24 AIR 1937 Mad 504 (508, 509). (Following AIR 1936 Mad 40 : 59 Mad 93 (FB).)

11. ('41) 28 AIR 1941 Bom 324 (325): ILR (1941) Bom 540 (DB). (Decree against father as manager and decree against father and son are not decrees against same judgment-debtor.)

12. ('36) 23 AIR 1936 Mad 40 (42) : 59 Mad 93 (FB).

13. ('41) 28 AIR 1941 Bom 327 (328): ILR (1941) Bom 544 (DB).
('14) 1 AIR 1914 Low Bur 191 (191).
('04) 26 All 28 (34) (DB). (Decree against *Y*, heir to *P* — Decree against *Y* in his personal capacity, not against the same judgment-debtor.)
('19) 6 AIR 1919 Oudh 326 (328) : 22 Oudh Cas 194 (199, 200) (DB). (Decree against three heirs of *M* as representing his estate — Decree against one of the heirs in his personal capacity.)
('36) 23 AIR 1936 Mad 40 (42) : 59 Mad 93 (FB).
[*See also* ('20) 7 AIR 1920 Mad 403 (404, 405).]

14. ('15) 2 AIR 1915 Cal 658 (660) : 42 Cal 1 (9) (DB)
('37) 24 A I R 1937 Lah 937 (938) : 18 Lah 637 (DB). (AIR 1915 Cal 658 : 42 Cal 1 followed.)

15. ('36) 23 AIR 1936 Cal 210 (212) : 63 Cal 923.
('85) 11 Cal 718 (728).

16. † ('38) 25 AIR 1938 Cal 316 (318).

firm are the same for the purpose of this section. The Bombay High Court has held a similar view in a recent decision.[17]

A decree is passed against A during his lifetime. Another decree is passed against A's heirs after A's death. Are the two decrees against the same judgment-debtor? On this question, there is a conflict of decisions. The High Courts of Bombay,[18] Calcutta[19] and Rangoon[20] have held that in such cases the decrees are not against the same judgment-debtor notwithstanding the fact that both the decrees are founded on a liability of the deceased. But, the Madras High Court has, in a Full Bench decision,[21] held that the decrees are against the same judgment-debtor. The Madras view proceeds on the ground that it is not necessary under this section that the several decrees must be against the same persons *eo nomine* and that decrees which are capable of execution against the same estate may, without unduly straining the language of the section, be regarded as passed against the same persons. The Madras view has been adopted in recent Full Bench decisions of the Allahabad[22] and Lahore[23] High Courts.

Where A and D each obtained a decree against B, and after B's death C who was the legal representative of B purchased A's decree with moneys not belonging to B's estate, C is not disentitled to claim rateable distribution, along with D, by reason only of his being the legal representative of B.[24]

Where A and B each obtains a decree against the same judgment-debtor, C, and D stands surety for C in regard to A's decree, though D may be treated as A's *judgment-debtor* as his liability is co-extensive with the principal debtor, he cannot be considered to be a judgment-debtor under B's decree and B cannot claim rateable distribution of the money paid by D in respect of the decree in A's favour.[25]

8. Claimant for rateable distribution must have applied for execution to the Court by which assets are held. — In order to claim rateable distribution, a decree-holder must have applied under O. 21 R. 11 of the Code for execution of his decree.[1] Such an application is necessary, not only for the enforcement of his right to

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17. ('43) 30 AIR 1943 Bom 156 (158). (Suit against firm — Partner served and appearing — Decree against partner—Decree against him in suit against him personally — Both are against "same judgment-debtor".)

18. ('37) 24 AIR 1937 Bom 461 (462, 463) : ILR (1937) Bom 795 (DB).

† ('01) 25 Bom 494 (496, 497) (DB).

[*See also* ('41) 28 AIR 1941 Bom 324 (325) : ILR (1941) Bom 540 (DB). (The expression, "the same judgment debtor" in S. 73, C. P. Code, must be construed strictly—*Obiter*.)]

19. ('35) 22 AIR 1935 Cal 738 (739) (DB). (Section 146 cannot enlarge the scope of Section 73.)
('30) 17 AIR 1930 Cal 454 (455).

20. (40) 27 AIR 1940 Rang 243 (246) : 1940 Rang L R 492.

21. ('36) 23 AIR 1936 Mad 40 (41, 42) : 59 Mad 93 (FB). (33 Mad 465 should be deemed as overruled by this Full Bench decision.)

22. ('41) 28 AIR 1941 All 110 (118) : ILR (1941) All 77 (FB). (A I R 1939 All 545 overruled — Bajpai, J., contra.)

23. ('43) 30 AIR 1943 Lah 148 (154) (FB).

24. ('89) 13 Bom 171 (176) (DB).

[*See also* ('42) 29 AIR 1942 Mad 260 (265, 266) : ILR (1942) Mad 360. (Creditor who had attachment before judgment obtaining decree and succeeding debtor as heir — Decree obtained by another creditor against such heir as representative of debtor and property in his hands sold in execution—Heir will be entitled to rateable distribution if other properties are not sufficient to satisfy his decree.)]

25. ('42) 29 AIR 1942 Oudh 491 (492).
('40) 27 AIR 1940 Nag 79 (79).

Note 8

1. ('41) 28 AIR 1941 Mad 125 (126). (Sections 63 and 64 do not indicate that the Court should *suo motu* ascertain the various claimants and divide the money among them.)
('40) 27 AIR 1940 Rang 201 (202) : 1940 Rang LR 421 (FB). (No inherent power to order rateable distribution in absence of application for execution.)
('16) 3 A I R 1916 Mad 792 (793) : 38 Mad 221 (224). (Overruled on another point in A I R 1921 Mad 218 : 44 Mad 100 (FB).)
('13) 14 Mad L Tim 533 (533) (DB). (Decree-holder's application for execution of attached decree obtained by the judgment-debtor is in substance an application for execution of his own decree.)
('13) 25 Mad L Jour 601 (601).
('23) 10 AIR 1923 Pat 521 (524) (DB).
('25) 12 AIR 1925 Nag 382 (383). (Mere prayer for rateable distribution is not sufficient).

rateable distribution but also to control similar rights of rival decree-holders.[2] But it is not necessary for a decree-holder to make a specific application for rateable distribution.[3]

The application must be in *form, and in substance* one for execution.[4] A mere omission to give certain particulars or other technical defects will not invalidate an application for execution for the purposes of S. 73.[5] Nor is it necessary that attachment should be asked for or should follow the application for execution.[6] Where an application for execution is presented to the Court before the receipt of assets by the Court but being defective is returned and is represented only after the receipt of assets, the application must be deemed to have been validly made on the date on which it was originally presented, and is sufficient for the purpose of this section.[7]

The following have been held not to be applications for execution, for the purposes of section 73:

(1) An application merely for rateable distribution.[8]

(2) An application merely for attachment of property without anything more.[9]

('81) 5 Bom 198 (201) (DB).
('89) 1889 Pun Re No. 93, page 330.
('81) 7 Cal 553 (555) (DB).
('12) 35 Mad 588 (589).
('17) 4 AIR 1917 Mad 692 (692).
('29) 16 AIR 1929 Nag 148 (150) : 25 Nag L R 94 (DB). (Mere prayer for rateable distribution is not valid.)
('21) 8 A I R 1921 Nag 5 (5) : 17 Nag L R 143. (Application must conform with provisions of O. 21 R. 11 (2).)
('29) 16 A I R 1929 Mad 703 (704) : 52 Mad 760 (FB). (Substantial compliance with O. 21 R. 11 is sufficient for purposes of S. 73.)
('16) 3 AIR 1916 Cal 371 (371) (DB).
('05) 27 All 132 (135) (DB). (It is not necessary that it should be made in the course of proceedings initiated by other decree-holders or in such a way that they have a knowledge of it.)
(1900) 2 Bom L R 489 (491) (DB).
('81) 6 Bom 16 (17, 18) (DB). (Though it is possible that under certain circumstances the sale might be set aside.)
('26) 13 AIR 1926 Mad 179 (180). (It is not necessary that the application should be such as to end in successfully obtaining satisfaction of the decree.)
('25) 12 A I R 1925 Mad 587 (587). (No separate application for rateable distribution necessary.)
('11) 11 Ind Cas 187 (189) (DB) (Cal). (Where receiver has been appointed to the properties of judgment-debtor a decree-holder must get leave of Court before applying under this Section.)
('30) 17 A I R 1930 Rang 342 (344) : 8 Rang 294 (DB). (Letter by Collector to Judge for money due under decree—Not sufficient.)

2. ('06) 33 Cal 639 (643).

3. ('33) 20 AIR 1933 All 337 (338) (DB).
('37) 1937 Mad WN 480 (486) (DB). (The fact that a decree-holder claims payment of the whole amount to himself cannot deprive him of his right to a share, if that is all that he is entitled to under the law.)

4. ('13) 14 Mad L Tim 533 (533) (DB).
('11) 34 Mad 25 (27) (DB).

5. ('29) 16 AIR 1929 Mad 703 (704) : 52 Mad 760 (FB). (Failure to give particulars.)
('28) 15 AIR 1928 Nag 332 (333). (Application stating inability to obtain transfer certificate which is subsequently received, is sufficient compliance with O. 21, R. 11.)
('13) 14 Mad L Tim 533 (533) (DB). (Application to execute attached decree is really one to execute the decree-holders' own decree.)
('92) 15 Mad 372 (377) (DB). (Application for execution asking for attachment of property already vested in receiver and for rateable distribution also.)
('05) 1 Cal L Jour 315 (318) (DB). (Simultaneous execution applications not invalid.)
[*See* ('81) 7 Cal L Rep 537 (538). (List of property incomplete—Application is valid—No question of rateable distribution involved.)]
[But see ('28) 15 AIR 1928 Mad 496 (497) : 55 Mad L Jour 120 (122) (DB). (Mere order of transfer is not enough if the decree is not actually received.)]

6. ('09) 9 Cal L Jour 210 (214) (DB).
('81) 7 Cal 34 (37, 38) (DB). (Illustrative case.)
('11) 13 Bom L R 1189 (1192) (DB).
('31) 18 AIR 1931 All 92 (94) : 53 All 125 (DB). (Especially where property is attached and brought to sale under another decree.)
('30) 17 AIR 1930 Mad 4 (11). (Do.)
[See however ('40) 27 AIR 1940 Bom 190 (192) : I L R (1940) Bom 146.) (Decree against Hindu coparcener — Attachment of undivided share—Death of coparcener — Sale of share in execution after death—Application for rateable distribution by other decree-holders without prior attachment of share of coparcener not maintainable because in absence of attachment property passes by survivorship to other coparceners.)]

7. ('36) 23 AIR 1936 Mad 91 (92) : 59 Mad 303 (DB).

8. ('29) 16 AIR 1929 Nag 148 (150) : 25 Nag L R 94 (DB).
('10) 34 Mad 25 (27) : 7 Ind Cas 856 (857) (DB).
('33) 20 A I R 1933 Oudh 75 (75). (Application merely for rateable distribution may be amended under O. 21 R. 17 into one for execution.)
('21) 8 AIR 1921 Nag 5 (5) : 17 Nag L R 143.
('25) 12 AIR 1925 Nag 382 (383).
('89) 1889 Pun Re No. 93, page 330.

9. ('26) 13 AIR 1926 Cal 249 (250) (DB).

(3) An application to a superior Court to transfer to itself, an execution case from an inferior Court.[10]

(4) An application to a Court for an order to another Court not to sell properties.[11]

(5) An application for payment out of Court, by a Judge's summons.[12]

Not only is an application for *execution* necessary, but such application must have been made to *the* Court i. e., the Court which holds the assets.[13] Where all the decrees are of the same Court as the one which holds the assets, the application for execution must, of course, be made to that Court. But where the assets are held by Court A and the decree under which the claim for rateable distribution is being made has been passed by Court B, such claim cannot be allowed unless before the receipt of assets by Court A an application has been made to that Court for execution of the decree.[14] (This is the *general* rule. In cases coming under S. 63, an application to the Court *actually* holding the assets is not necessary: see below.) This necessarily involves the condition that the decree must have been *transferred* to Court A for unless the decree is transferred to that Court no application can be made to it for execution of the decree. (See S. 38.) But, it is not necessary that the copy of the decree must have *actually reached* Court A. It is enough if Court B has *ordered* the transfer of the decree to Court A and the decree-holder has applied to that Court for execution before the receipt of assets by it.[15]

Suppose now that X obtains a decree in a *superior* Court against A and applies for execution there. Y obtains a decree against A in an *inferior* Court. Then —

(1) If Y has not applied for execution of his decree either in the superior or in the inferior Court, he will not be entitled to rateable distribution with X.[16]

(2) If he gets his decree transferred to the superior Court and applies for execution *there*, he will of course be entitled to participate in the rateable distribution.[17]

(3) If he has applied for execution to the inferior Court, he may get *his execution case transferred* to the superior Court. This will practically amount to his applying to the superior Court itself for execution and, consequently, he need not apply again to the superior Court, for execution.[18]

(4) If he has applied for execution to the inferior Court but has neither got his execution case transferred to the superior Court nor has applied to such Court for execution, is he entitled to rateable distribution along with X?

On this question, there is now a consensus of judicial opinion that where the same property of the judgment-debtor has been attached by both the superior and inferior

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('02) 6 Cal W N ccxxiii (223) (DB). (Mere attachment is not enough.)

10. ('21) 8 AIR 1921 Cal 87 (89) (DB).

11. ('10) 14 Cal W N 396 (399) (DB).

12. ('16) 3 AIR 1916 Mad 792 (793) : 38 Mad 221 (224). (Overruled on another point in AIR 1921 Mad 218 : 44 Mad 100 (FB).)

13. ('39) ILR (1939) 1 Cal 488 (492) (DB). (Unless the case comes under S. 63, one of several executing Courts, even though of a higher grade than any of the other Courts cannot order rateable distribution of assets held by another Court.)
('12) 35 Mad 588 (589).
[See however ('39) 26 AIR 1939 Bom 468 (470). (But a Court which is wrongly possessed of assets cannot pass an order for rateable distribution — One Court getting a transfer of assets and execution proceedings from another Court without a proper order of transfer by Dist. Court or High Court—No power to rateably distribute.)]

14. ('12) 35 Mad 588 (590, 591).

15. ('33) 20 AIR 1933 Mad 627 (627) : 56 Mad 692 (DB). (Dissenting from AIR 1928 Mad 496.)
('12) 35 Mad 588 (591).

16. ('28) 15 AIR 1928 Mad 496 (497). (An invalid application was made to the superior Court.)

17. For transfer of decree for execution, see Ss. 38, 39 and 40.
(1900) 22 All 182 (186) (DB).

18. ('92) 16 Bom 683 (686, 687).
('96) 20 Bom 377 (379, 380).
('36) 23 AIR 1936 Lah 519 (520, 521).

Courts and the property or its proceeds are received or realised by the superior Court, Y will be entitled to a rateable share of such property or proceeds, although he has not applied for execution to such superior Court, nor has got his execution case transferred to such Court.[19] In some of the earlier decisions,[20] however, a contrary view was taken. But, this view being opposed to the trend of recent decisions in all the High Courts must be treated as being no longer good law. It will be seen that such cases will fall under S. 63 which runs as follows:

> "Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached . . . . . ."

The view that in the above case a fresh application to the superior Court is not necessary is chiefly based on the ground that Ss. 63 and 73 must be read together, that the true view of S. 63 is that the receipt of assets by the superior Court in such cases is on behalf of all the Courts that have attached the property represented by the assets, and that therefore, the application to the inferior Court which has resulted in the attachment by that Court is really one to the Court by which the assets are received and held and as such is sufficient for the purposes of this section.[21]

Certain decisions give some other reasons also :

(a) In such cases, this section does not apply at all and it is only S. 63 that applies and as that section does not require any application for execution to be made to the superior Court by which assets are held, no such application is necessary.[22] It is submitted, this view is not correct. Section 63 merely points out the Court which shall determine the claims for rateable

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19. † ('39) 26 AIR 1939 All 159 (161) : ILR (1939) All 162 (DB).
('33) 20 AIR 1933 All 563 (564) : 55 All 622.
† ('35) 22 AIR 1935 Bom 176 (178) : 59 Bom 310 (DB).
† ('36) 23 AIR 1936 Cal 723 (727) : ILR (1937) 1 Cal 391.
('34) 21 AIR 1934 Cal 559 (560) : 61 Cal 419.
('25) 12 AIR 1925 Cal 966 (970) (DB).
('05) 1 Cal L Jour 315 (318) (DB).
('98) 2 Cal W N 126 (127) (DB).
('02) 29 Cal 773 (777, 778) (DB).
('94) 21 Cal 200 (203, 206) (DB). (Approving 12 Cal 333.)
† ('38) 25 AIR 1938 Lah 751 (756).
('36) 23 AIR 1936 Mad 797 (798) : 59 Mad 1028 (DB).
('35) 22 AIR 1935 Mad 904 (906) (DB).
('35) 22 AIR 1935 Mad 988 (994).
† ('14) 1 AIR 1914 Mad 454 (455) (DB).
('12) 35 Mad 588 (590).
† ('37) 24 AIR 1937 Nag 80 (82) : ILR (1937) Nag 219.
('31) 18 AIR 1931 Nag 127 (127) (DB).
('10) 13 Oudh Cas 291 (294) (DB).
('31) 18 AIR 1931 Rang 111 (112).
('28) 15 AIR 1928 Rang 157 (158): 6 Rang 131 (DB).
('15) 2 AIR 1915 Low Bur 59 (59).
('38) 25 AIR 1938 Sind 175 (176).
[*See* ('41) 28 AIR 1941 Oudh 277 (278). (Where a decree-holder applies for execution and subsequently finding that the assets of his judgment-debtor are under attachment in respect of other decrees in other Courts, thereafter applies under Ss. 63 and 73, for transfer of his decree to the Court holding the assets and for rateable distribution, his right to rateable distribution arises from the date of the execution application itself and not from the date of the application under Ss. 63 and 73.)]

20. ('94) 18 Bom 456 (457) (DB).
('92) 16 Bom 683 (687).
('80) 5 Bom 198 (201) (DB).
('80) 4 Bom 472 (473) (DB).
('21) 8 AIR 1921 Cal 87 (89) (DB). (Application to superior Court is necessary when the attachment in the inferior Court is subsequent to that in the superior Court and not when it is prior.)
('09) 3 Ind Cas 105 (108, 109) (DB) (Cal).
('02) 29 Cal 548 (553) (DB).
('26) 13 AIR 1926 Lah 538 (539).
('13) 25 Mad L Jour 601 (602).
('83) 6 Mad 357 (359) (DB).
('28) 15 AIR 1928 Rang 96 (97) : 5 Rang 757.
('26) 13 AIR 1926 Sind 177 (177) : 20 Sind L R 111.

21. † ('14) 1 AIR 1914 Mad 454 (455) (DB).
† ('36) 23 AIR 1936 Cal 723 (727) : I L R (1937) 1 Cal 391.
† ('38) 25 AIR 1938 Lah 754 (756).

22. ('39) 26 AIR 1939 All 159 (161) : ILR (1939) All 162 (DB).
('94) 21 Cal 200 (203, 206). (Following 7 Cal 553.)

distribution in such cases, but does not lay down the circumstances under which such rateable distribution can be claimed. For the latter purpose, it is only section 73 that must be seen.[23]

(b) The expression "application to the Court" in this section refers to an application to the *appropriate* Court and not necessarily to the Court by which assets are held.[24] This view, again, it is submitted, does not seem to be sound as that would entitle a decree-holder *even in a case not covered by section 63* to rateable distribution under this section though he has not applied to the Court holding the assets for execution — a result not contemplated by any of the decisions which all seem to agree in the view that the section requires an application for execution to be made to the Court which actually *or constructively* holds the assets.

It has been held by the Madras High Court that it is a *general* principle under S. 63 that where the same property is attached in execution of several decrees by several Courts against the same judgment-debtor, the receipt of assets by any one of such Courts is a constructive receipt by each of them so that the attaching decree-holder in each such Court is entitled to share rateably in such assets. So, even if the assets are held by a Court of an *inferior* grade, a decree-holder who has attached the property through a Court of a *superior* grade will be entitled to rateable distribution, although he has not applied for execution to the Court of the inferior grade.[25]

But where there is no application for execution made to the Court holding the assets before the receipt of such assets, and the claim for rateable distribution is only based on the applicant having attached the same property through another Court, he is not entitled to share rateably in *all* the assets held by the Court but only to share in that portion of it which represents the property attached by him.[26] The reason is that it is only in respect of such portion that the court which has attached the property can be deemed to have constructively received the assets when the same are received by the distributing Court.

Illustration.

A who has a decree for payment of money against *J* executes his decree in the Court of a particular Subordinate Judge and attaches and sells properties *X*, *Y* and *Z*, the proceeds of which are received by that Court. *B*, *C* and *D* who have decrees for the payment of money against *J* proceed to execute their respective decrees in other Courts, say, the first, second and third Court of the Munsif of a particular place, and attach respectively, *X*, *Y* and *Z*. These attachments are effected before the sale proceeds are received by the Subordinate Judge. They do not apply for execution of their decrees in the Court of the Subordinate Judge, nor are their executions transferred to that Court before the receipt of assets by that Court, but they bring the fact of the attachments to the notice of the Subordinate Judge. The entire proceeds of the sale of *X*, *Y* and *Z* cannot be distributed by the Subordinate Judge amongst *A*, *B*, *C* and *D* rateably under Section 63, but the proceeds of the sale of *X* have to be distributed rateably between *A* and *B*, those of *Y* between *A* and *C* and those of *Z* between *A* and *D*. But where before the receipt of the assets by the Court of the Subordinate Judge, *B*, *C* and *D* also apply to that Court for execution of their decrees after getting their decrees

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23. † ('35) 22 AIR 1935 Bom 176 (177) : 59 Bom 310 (DB).

24. ('35) 22 AIR 1935 Bom 176 (178) : 59 Bom 310 (DB). (Section 73 differs in its language from S. 295, the corresponding provision in the Code of 1882, in that the latter section expressly required an application for execution to the Court "by which such assets are held" while this section only speaks of an application to the "Court.")

25. ('35) 22 AIR 1935 Mad 988 (995).

26. ('36) 23 AIR 1936 Cal 723 (725) : ILR (1937) 1 Cal 391.

('12) 35 Mad 588 (590).

[But see ('14) 1 AIR 1914 Mad 454 (456) (DB). (The observations towards the end of the judgment in this case seem to indicate that the above proposition was not approved of in this case.)]

transferred to that Court, *B*, *C* and *D* would be entitled to share in the sale proceeds of all the properties *X*, *Y* and *Z*.[27]

Suppose A, B and C each obtain a money decree against D, respectively in Courts X, Y and Z. X and Y are Courts of the same grade and Z is a Court of a higher grade than either X or Y. A attaches certain property belonging to the judgment-debtor in execution of his decree through Court X. C attaches the same property in execution through Court Z. The property is sold and the sale proceeds are held by Court Z. In such a case, it has been seen above that A will be entitled to rateable distribution of the assets although he has not applied for execution to Court Z. Is B who has neither attached the property through Court Y nor applied for execution to Court Z entitled to a rateable share of such assets? It has been held by the Nagpur High Court in the undermentioned case[28] that B is entitled to a rateable share. The decision proceeds on the ground that in such a case the rateable distribution takes place under S. 63 which confers upon Court Z the power to determine all claims to the attached property including claims for rateable distribution and that under that section the word "claims" does not mean merely claims of persons who have attached the property. It is submitted that the decision cannot be supported. As already pointed out, it is not a correct view to hold that in such cases S. 63 alone applies and that a reference to the provisions of S. 73 is not necessary. Under the latter section an application to the *Court holding the assets* is necessary for making a claim for rateable distribution. But in the case of decree-holders who have already attached the property (from which the assets are derived) through Courts of inferior grade, a fresh application for execution to the Court of the superior grade which holds the assets is not necessary. The reason is that in such cases, the application to the Court of the inferior grade itself is to be treated as an application to the Court holding the assets, because the Court of the superior grade must be deemed to receive and hold the assets on behalf of all the Courts through whom the property has been attached. But this principle cannot apply to persons who have not attached the property through the inferior Court.

It has been held by the Bombay High Court[29] that the application for execution referred to by the section is one which on the face of it is entitled to succeed. On this ground, it has been held that if the decree is on the face of it one which could not be executed against the property represented by the money in the Court, the Court cannot allow the holder of such decree to share in the rateable distribution of the money.[30]

For the purposes of S. 73 an ordinary Civil Court and the same Court invested with Small Cause powers are distinct Courts.[31] But where the decree of a District Munsif passed in the exercise of his ordinary jurisdiction is transferred for execution to the Small

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27. ('36) 23 AIR 1936 Cal 723 (725) : ILR (1937) 1 Cal 391.

28. ('37) 24 AIR 1937 Nag 80 (83) : ILR (1937) Nag 219.

29. ('38) 25 AIR 1938 Bom 90 (90) : I L R (1938) Bom 98.

30. ('38) 25 AIR 1938 Bom 90 (90) : I L R (1938) Bom 98. (Decree showing on face of it that the judgment-debtor is agriculturist — Decree-holder cannot claim rateable distribution of sale proceeds of the immovable property of the judgment-debtor — 4 Bom 429 and 23 All 106, followed.)
Also see Notes 4 and 12.

31. ('43) 30 AIR 1943 Mad 262 (263).
See Section 33 of the Provincial Small Cause Courts Act, IX of 1887. (The decisions prior to Act, IX of 1887, were conflicting as there was no Section corresponding to Sec. 33 of that Act in Act X of 1869.)
See the following cases :
('85) 9 Bom 174 (176). (They are not distinct Courts but the same Court.)
('94) 18 Bom 61 (64). (Where a particular small cause suit is transferred to an ordinary Court, there are no two distinct Courts.)
('85) 9 Bom 237 (241). (Same Court if jurisdiction is locally co-extensive — If not, distinct Courts.)
('88) 12 Bom 486 (489). (Distinct Courts.)
('81) 3 All 710 (712). (Do).
('84) 8 Bom 230 (234) (Do.)
Also see S. 39, Note 10.

Cause side of the Subordinate Court, the holder of the decree so transferred is entitled to claim a share in the assets realised by the Subordinate Judge's Court in execution of a Small Cause decree as if both the proceedings are in the same Court.[32]

9. Effect of dismissal of the application for execution. — To entitle a decree-holder to claim rateable distribution it is essential that there should be a subsisting decree[1] and that his application for execution should be *pending* and *undisposed of* at the time of the receipt of the assets.[2] If the application had been *struck off* or *dismissed* before such date, he cannot participate in the distribution.[3] It has, however, been held that although there may be a formal order dismissing an application for execution, where such order is not a judicial order but only an order for administrative or statistical purposes, the application must be deemed to be pending notwithstanding such dismissal and the applicant will be entitled to rateable distribution of the assets received subsequently.[4] But, where an execution application has been struck off as wholly infructuous, it cannot be said to be pending merely because the attachment has been ordered to continue.[5] A dismissal of the application *after* the date of the receipt of assets will not affect the right to rateable distribution which had accrued to the decree-holder earlier at the time of the receipt of assets.[6]

10. Claimant attaching before judgment. — An attachment before judgment confers no right on the party who obtains the attachment,[1] the only benefit which he gets by such attachment being that, when he applies subsequently for execution, he need not re-attach the properties.[2] A decree-holder who has obtained an attachment before judgment of his debtor's property will not thereby become entitled to get rateable

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32. ('92) 15 Mad 345 (347) (DB).

Note 9

1. ('71) 15 Suth W R 219 (220) (DB). (Decree barred — No right to rateable distribution.)
('16) 3 AIR 1916 Cal 264 (266) (DB). (Decree barred or satisfied — No rateable distribution.)
2. ('40) 27 AIR 1940 Nag 302 (303) : I L R (1942) Nag 139.
('10) 5 Ind Cas 145 (145) (DB).
('82) 4 Mad 383 (385) (DB).
('10) 5 Ind Cas 820 (820) (DB) (Mad).
('35) 22 AIR 1935 Rang 135 (137) : 13 Rang 514. (The word 'application' in S. 73 cannot be unqualified — It must mean an application made in accordance with law, not barred by limitation, not yet satisfied, and capable of being satisfied and it must also mean an application still subsisting and pending, and not already disposed of, whether on the merits or by default.)
('37) 24 AIR 1937 Nag 16 (17) : I L R (1937) Nag 420.
[*See also* ('26) 13 AIR 1926 Cal 957 (958). (Execution application duly made — Death of decree-holder before receipt of assets—No proceedings by legal representative till after receipt—*Held*, legal representative not entitled to distribution.)]
3. ('10) 7 Mad L Tim 110 (111) (DB).
('01) 23 All 106 (110) (DB).
('16) 3 AIR 1916 Cal 264 (266) (DB). (Order declaring property not liable does not affect right when same property is sold by another decree-holder.)
('73) 21 Suth W R 66 (67) (DB). (Decision under Section 270 of Act of 1859.)
4. ('36) 23 AIR 1936 Mad 437 (439). (Court granting time to judgment-debtor and dismissing execution — Dismissal is only order for administrative purposes.)
5. ('36) 23 AIR 1936 Nag 277 (278) : I L R (1938) Nag 346. (Order is one of dismissal and not merely of adjournment.)
6. ('40) 27 AIR 1940 Nag 302 (303) : I L R (1942) Nag 139. (Dismissal for default before actual distribution of assets.)
('15) 2 AIR 1915 Cal 16 (16) (DB). (Subsequent dismissal for default.)
('33) 20 AIR 1933 Pesh 52 (53).
('37) 24 AIR 1937 Pat 92 (93) (DB).

Note 10

1. ('15) 2 AIR 1915 All 275 (276):37 All 575 (579, 581) (DB). (The object being only to prevent the judgment-debtor from removing any part of the property from the jurisdiction of the Court.)
('06) 33 Cal 639 (643). (It simply safeguards the property so as to enable the plaintiff to realise his decree if he gets one.)
('16) 3 AIR 1916 Cal 371 (372) (DB). (No interest in property is created.)
('31) 18 AIR 1931 Mad 570 (571). (Potential decree-holder has no right under the section.)
('37) 24 AIR 1937 All 424 (426) (DB).
Also see S. 64 Note 5.
2. ('06) 33 Cal 639 (643).
('39) 26 AIR 1939 Rang 20 (21) : 1938 Rang L R 565.
See O. 38 R 11.

distribution under S. 73 unless, like other decree-holders, he *applies for execution* after getting his decree.[3]

11. The application should have been made before the receipt of assets by the Court. — It has been seen in Note 1 that the words "before the *receipt* of assets" have in the present section been substituted for the words "prior to the *realisation*" in the old section. The change was effected with a view to make the meaning perfectly clear and to avoid the necessity of judicial interpretations such as those given to the word "realisation" under the old Code.[1]

In order to claim rateable distribution, a decree-holder must have applied for execution *before the receipt of assets by the Court.*[2] It, therefore, becomes important to ascertain the *exact point of time* at which assets are received by the Court.

The section only requires that there must be an application for execution before the assets are received. It does not prescribe "any period" within the meaning of S. 10 of the General Clauses Act for the making of such application. Hence that section does not apply to such cases and when assets are received by the Court during the vacation, an application for execution presented on the re-opening day cannot be considered to be in time for the purpose of this section.[3]

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3. ('41) 28 AIR 1941 Mad 125 (126). (AIR 1924 Mad 494 : 47 Mad 483 (FB) explained.)
('15) 2 AIR 1915 All 275 (277) : 37 All 578 (DB).
('11) 34 Mad 25 (27) : 7 Ind Cas 856 (857) (DB).
('09) 3 Ind Cas 836 (837) (DB) (Cal).
('06) 33 Cal 639 (643).
('69) 4 Beng L R 63 (67) (FB).
('88) 12 Bom 400 (406, 407).
('26) 13 AIR 1926 Rang 85 (86, 87).
('16) 3 AIR 1916 Cal 371 (372) (DB). (Person attaching before judgment not obtaining his decree until realization of assets — No right to rateable distribution.)
('28) 15 AIR 1928 Bom 545 (547) (DB).
('23) 10 AIR 1923 Mad 505 (507) : 46 Mad 506 (DB).
('17) 4 AIR 1917 Mad 692 (692).
('13) 1913 Mad W N 1021 (1021) (DB).
('39) 26 AIR 1939 Rang 20 (21) : 1938 Rang L R 565.

Note 11

1. See Note 4.
See also the following cases :
('06) 33 Cal 639 (642). ("Realised" means converted into cash in a form available for rateable distribution.)
('04) 28 Bom 264 (274). (Do).
('88) 15 Cal 202 (209).

2. ('43) 30 AIR 1943 Mad 165 (166):I L R (1943) Mad 175 (DB). (AIR 1940 Mad 385: I L R (1940) Mad 526 (FB) followed.)
('18) 5 AIR 1918 Mad 512 (512) (DB).
('17) 4 AIR 1917 Cal 13 (17) : 44 Cal 1072 (1087) (DB).
('10) 11 Cal L Jour 69 (73) (DB).
('02) 26 Mad 179 (180). (Land sold in parcels — Application after proceeds of sale of certain parcels paid into Court but before the deposit of sale proceeds of other parcels.)
('12) 35 Mad 588 (591, 592).
('15) 2 AIR 1915 Cal 16 (16) (DB).
('16) 3 AIR 1916 Cal 371 (371) (DB).
('20) 7 AIR 1920 Bom 35 (37) (DB). (Application after whole of the purchase money deposited in Court—No right to rateable distribution.)
('21) 8 AIR 1921 Nag 5 (5) : 17 Nag L R 143.
('25) 12 AIR 1925 Oudh 287 (287).
('26) 13 AIR 1926 Sind 77 (78).
('82) 4 Mad 383 (385) (DB).
('02) 1 Low Bur Rul 121 (123).
('29) 16 AIR 1929 Lah 645 (647). (Application for execution after receipt of assets does not lie.)
('27) 14 AIR 1927 Pat 252 (253).
('81) 6 Bom 16 (18) (DB).
('09) 13 Cal WN 1177 (1179)(DB). (All decree-holders applying after receipt — Apart from Section 73 rateable distribution is proper.)
('09) 9 Cal L Jour 210 (214) (DB). (Application for execution after receipt of assets—No rateable distribution.)
('06) 33 Cal 92 (97) (DB).
('99) 26 Cal 772 (775). (Realisation by receiver — Application thereafter does not lie.)
('35) 22 A I R 1935 Nag 214 (215) : 31 Nag L R 423.
('36) 23 AIR 1936 Cal 390 (391). (Assets in custody of Court attached by different decree-holders — Section does not apply—*Held* that still on general principles, the assets must be distributed *pro rata* —AIR 1917 Cal 13 : 44 Cal 1072 followed.)
('36) 23 A I R 1936 All 626 (628) (DB). (Fact that only a few minutes have passed after the receipt of assets by the Court when application is made is not sufficient to validate claim for rateable distribution.)
[*See also* ('91) 18 Cal 242 (244, 245). (Deposit of 25 per cent. is not realisation of assets.)
('13) 25 Mad L Jour 601 (601).]

3. ('37) 24 A I R 1937 Nag 16 (17) : I L R (1937) Nag 420.

Assets will be deemed to be received *by the Court* when they are received —

(1) by the Court itself, or,

(2) by a receiver appointed by the Court in execution,[4] or,

(3) by the officer conducting an execution sale under O. 21 R. 65,[5] or,

(4) by the Collector holding a sale under schedule III of the Code.[6]

In the first case the *date of receipt* is, of course, the *actual* date on which the money is received by the Court. In the other three cases, the date of receipt will be the date on which the *several officers receive the amount* and not the date on which those officers *send the money* to the Court.[7] Where, however, the sale held was unauthorised but was subsequently ratified by the Court, it was held that the date on which the price was paid into the Court after ratification and not that on which it was received by the officer was the date on which the assets were "received", within the meaning of this section.[8]

Now the several classes of cases in which assets may be received by the Court and the *dates* on which such assets will be deemed to have been "received" may be considered :

(a) Where a fund belonging to the defendant is attached before judgment and the same is deposited in Court to *the credit of that suit*, it does not become assets until the plaintiff, after getting a decree, applies for execution and the same is *ordered* by the Court. The date of receipt of assets is the *date of the order*.[9] If, in the above case, the fund attached is lying in Court to the credit of a suit, *other than the one in which it is attached*, it is further necessary that the fund should be *transferred* to the credit of the suit in which it is attached. The date of receipt of assets will, in such a case, be the date of the transfer.[10]

Illustration.

A files a suit against *B* and attaches before judgment certain piecegoods belonging to him. The goods are sold by order of the Court under O. 39 R. 6 and the sale proceeds deposited into Court to the credit of *A's* suit. *C*, another creditor, files a suit against *B* and attaches before judgment the money in deposit in *A's* suit. He then obtains a decree and applies for execution. The application for execution is ordered but the fund is not *transferred* to the credit of *C's* suit. Subsequent to this *A* obtains a decree in his suit and applies for execution and the *same is ordered*. Is *A* entitled to rateable distribution along with *C* ? *Yes.* The reason is that the fund did not become assets in *C's* suit, as it was not *transferred* to the credit of his suit, but became assets in *A's* suit when *A's* application for execution was *ordered*, since the fund was already lying to the credit of *A's* suit.[11]

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4. ('99) 26 Cal 772 (777).

5. ('17) 4 A I R 1917 Cal 740 (743) : 44 Cal 789 (798) (DB).

6. ('20) 7 AIR 1920 Bom 35 (37) (DB).
('38) 25 AIR 1938 Nag 14 (16) : I L R (1939) Nag 285.
Also see Note 4.

7. ('26) 13 AIR 1926 Nag 380 (381).
('20) 7 AIR 1920 Bom 35 (37) (DB).
('37) 24 AIR 1937 Nag 16 (17) : I L R (1937) Nag 420.

8. ('40) 27 AIR 1940 Mad 826 (828).

9. ('23) 10 AIR 1923 Mad 505 (507) : 46 Mad 506 (DB).

10. † ('23) 10 A I R 1923 Mad 505 (507) : 46 Mad 506 (DB).
† ('21) 8 A I R 1921 Mad 218 (222, 223) : 44 Mad 100 (FB). (Dissenting from AIR 1919 Mad 66 : 42 Mad 692.)
('21) 8 A I R 1921 Mad 481 (483) (DB). (Mere attachment of fund does not effect a transfer of the money to the credit of the suit in which it is attached.)
('28) 15 AIR 1928 Sind 165(166): 22 Sind L R 345.
('15) 2 AIR 1915 Cal 788 (789). (Practice — Application for transfer must be made in the suit to the credit of which money is in deposit.)
('27) 14 AIR 1927 Bom 247 (250) (DB).
('27) 14 A I R 1927 Bom 405 (409). (Custody Court under O. 21, R. 52 has no power under S. 73 — Transfer to attaching Court necessary.)
('30) 17 AIR 1930 Mad 4 (7, 11).

11. ('23) 10 A I R 1923 Mad 505 (507) : 46 Mad 506.

But, it has been held by the Patna High Court that where a fund in Court to the credit of the judgment-debtor in some other matter, is attached by a decree-holder in *execution* of his decree, the money must be treated as "received" by the Court in execution of the decree as soon as it is so attached although there is no entry in the books *transferring* the money to the credit of the suit in which the decree has been passed.[12]

(b) Where the amount belonging to the judgment-debtor *in the hands of a third person* is attached by a prohibitory order under O. 21 R. 46 and the garnishee deposits the amount in Court under O. 21 R. 46 (3), the date of the receipt of assets will be *the date on which the garnishee makes the deposit.*[13] A decree-holder who applies for execution *after* the deposit, though *on the same day* as the deposit, will not be entitled to claim rateable distribution, as he did not apply "*before* the receipt of assets by the Court."[14]

(c) Where *moveable* property of the judgment-debtor is sold in execution, the date of receipt of assets is the date on which the sale proceeds are received by the Court. If the property is sold in *several* parcels the assets will be deemed to be received on the *several dates* on which the sale proceeds of the several parcels are respectively paid. Thus, a decree-holder who applies for execution after the sale of parcels 1 and 2, but before the sale of parcels 3 and 4, will be entitled to rateable distribution of the sale proceeds of parcels 3 and 4, but not of parcels 1 and 2.[15]

(d) Where *immovable property* of the judgment-debtor is sold *in a single lot* in execution of a decree, the assets will be deemed to be received, *not* on the date when the deposit of 25 per cent. of the purchase money is paid under O. 21 R. 84, but on the date when the *balance* of the purchase money is paid. Thus, a decree-holder who applies for execution after the 25 per cent. deposit is made but before the balance is paid is entitled to come in under S. 73,[16] while one who applies *after the balance is paid* will not be so entitled, even if his application is before the date of the *confirmation* of the sale.[17]

(e) Where immovable property of the judgment-debtor is sold in *several lots* in execution of a decree, there is a conflict of opinion as to whether the assets are deemed to be received, *when the entire* amount of the purchase money in respect of all the parcels are paid, or whether they are deemed to be received on the *several dates* on which the sale proceeds of the several lots are respectively paid into Court. The Madras High Court and the Nagpur Judicial Commissioner's Court have taken the former view.[18]

[See however ('22) 9 AIR 1922 Mad 236 (236). (Wherein as a case of first impression, Kumaraswami Sastry J., held that when the fund is sent to the Court which in two suits has attached the fund before judgment, nothing remains to be done by the decree-holders but to apply for payment.)]

12. ('35) 22 AIR 1935 Pat 201 (204). (Dissenting from AIR 1921 Mad 218 : 44 Mad 100 (FB).)

13. ('96) 19 Mad 72 (74) (DB).
('30) 17 AIR 1930 Cal 623 (624) : 57 Cal 736 (DB).

14. ('96) 19 Mad 72 (74) (DB).

15. ('18) 5 A I R 1918 Lah 75 (76) : 1918 Pun Re No. 33.

16. ('91) 18 Cal 242 (245) (DB).
('26) 13 A I R 1926 Mad 872 (875) : 49 Mad 570 (DB). (Auction-purchaser making default in paying full amount—25 per cent. deposit is asset within Section 73.)
('12) 35 Mad 588 (589).
('21) 8 A I R 1921 Pat 401 (402) : 5 Pat L Jour 415 (DB). (Application while sale is going on lies.)
('11) 15 Cal W N 872 (873, 874) (DB).
('26) 13 AIR 1926 Nag 380 (383). (Receipt of assets means the receipt of whole of the assets.)
('36) 23 AIR 1936 Pesh 164 (165).

17. ('82) 6 Bom 16 (18) (DB).
('25) 12 AIR 1925 Cal 966 (967) (DB).

18. ('03) 26 Mad 179 (181).
('26) 13 AIR 1926 Nag 380 (383).

In the undermentioned case[19] the Calcutta High Court followed the decision of the Madras High Court. But in a later case[20] it has adopted the latter view. This later Calcutta case does not refer to its earlier case or to the decision of the Madras High Court. Nor does it give any reasons for its view. In view of the fact that the word 'assets' means, in such a case as this, the proceeds realised *by one order of sale*,[21] the later decision of the Calcutta High Court does not seem to be correct.

(f) As to when assets are deemed to be realised in cases where permission to bid and set-off is given to a decree-holder, see Note 5 on O. 21, R. 72.

(g) Where in pursuance of an order passed by a superior Court under section 63 assets realised in execution by an inferior Court are transferred to the superior Court, the assets are deemed to have been received within the meaning of this section, when they are received by the superior Court and not when they are received by the inferior Court.[22]

See also the undermentioned case.[23]

Where the receipt of assets and the application for execution are made on the *same day*, there is no presumption as to the *order* of events and it is the duty of the distributing Court to determine the question of priority.[24]

In the case of a claim for rateable distribution by the transferee of a decree it is enough if his *application for execution* is made before the receipt of assets by the Court. It is not necessary that the Court must have decided on the validity of the transfer before such receipt.[25]

11a. "And have not obtained satisfaction thereof." — Where the decree of any of the claimants for rateable distribution has been partially satisfied, only the unsatisfied portion of the decree should be taken into account in considering the question of rateable distribution.[1] Even if the partial satisfaction of the decree takes place after the application for rateable distribution has been made, such partial satisfaction must be taken into account.[2] In other words, rateable distribution should be made according to the amount due to each decree-holder *at the time of the distribution*.[3]

12. Jurisdiction of Court to enquire into the validity of the decree under which rateable distribution is claimed. — A and B obtain decrees for money against C and apply for execution before the assets are received by the Court. In the proceedings for rateable distribution A contends that B's decree is collusive,

19. ('21) 8 AIR 1921 Cal 801 (802) (DB).
20. ('25) 12 AIR 1925 Cal 966 (967) (DB).
21. ('26) 13 AIR 1926 Nag 380 (383).
('03) 26 Mad 179 (181).
22. ('27) 14 AIR 1927 Bom 247 (250) (DB).
23. ('41) 45 Cal W N 674 (678) (DB). (Money representing sale proceeds of judgment-debtor's goods lying in Government Treasury to the credit of District Judge — Latter sending a cheque for payment to decree-holder — Cheque sent to executing Court — This amounts to receipt of assets by the Court.)
24. ('19) 6 AIR 1919 Mad 758 (758) (DB).
('37) 24 AIR 1937 Mad 504 (509).
25. ('41) 28 AIR 1941 Mad 795 (795).

Note 11a

1. ('42) 29 AIR 1942 Mad 262 (265, 266) : I L R (1942) Mad 360. (*A* attached before judgment property of *J*, got a decree against him and applied for execution — On *J*'s death *A* succeeded as heir to him — *B* got a decree against *A* as *J*'s heir and sold certain property of *J* in execution — *A* applied for rateable distribution — *Held* that it should be seen what property there was other than that sold — If it could satisfy *A*'s decree there was no rateable distribution but if only a portion of it could be satisfied *A* had a right to the extent of the unsatisfied portion.)
('34) 21 AIR 1934 Mad 126 (127). (Following 3 Cal W N 368.)
2. ('34) 21 AIR 1934 Mad 426 (428). (Following 3 Cal W N 368 — Sale proceeds of attached property available to decree-holder but not drawn out by him — Decree must be treated as satisfied to the extent of the sale proceeds.)
3. ('35) 22 AIR 1935 Nag 214 (215) : 31 Nag L R 423.
Also see Note 22.

fraudulent and is otherwise invalid. Can the Court go into this question? There is a preponderance of judicial opinion to the effect that the Court cannot go into the question.[1] The view is based on the ground that the Court distributing the assets is only an *executing* Court and as such cannot question the decree.[2] In *Dattatraya Govindseth* v. *Purshottam Narayanseth*,[3] Macleod, C. J., observed as follows: "On general principles, the Court which would be merely a distributing agency would not have any power to deal with the question whether any of the decrees had been obtained by fraud or other improper means just as in an ordinary case of execution the Court which executes the decree cannot go behind the decree." But the question as to the validity of the decree can be gone into in a suit under sub-section (2) of the section.[4]

Though an executing Court acting under this section cannot question the validity of a decree under which a claim for rateable distribution is being made, yet, where on the face of it such decree is inexecutable against the property from which the assets held by the Court are derived, the Court cannot grant the claim for rateable distribution.[5]

13. Right of one decree-holder to impeach the decree of another. — See Note 12.

14. Insolvency or liquidation, how far affects the right of rateable distribution. — An order for rateable distribution under this section is not affected by the *subsequent adjudication* of the judgment-debtor as an insolvent.[1] The reason is that from the time of the order of rateable distribution, the money must be treated as belonging, not to the judgment-debtor but to the decree-holders in whose favour the order was passed. The Official Receiver could, therefore, no more recover the money from the Court which passed the order than from the decree-holder.[2] As regards realisations *subsequent to the vesting order*, however, they will vest in the Official Receiver or Assignee and will not be available for rateable distribution.[3]

Note 12

1. † ('22) 9 A I R 1922 Bom 31 (32) : 46 Bom 635 (FB). (Overruling 13 Bom 154.)
('24) 11 A I R 1924 Nag 39 (40) : 19 Nag L R 172.
('26) 13 AIR 1926 Pat 497 (498) : 5 Pat 445 (DB). (Because the Court acts in its administrative capacity.)
('34) 21 AIR 1934 Pat 545 (546). (Do.)
† ('18) 5 A I R 1918 Mad 825 (826, 827) : 40 Mad 841 (843, 845) (DB).
('27) 14 AIR 1927 Mad 944 (944).
✣('35) 22 AIR 1935 Cal 290 (294):62 Cal 715 (FB). (16 Ind Cas 795; A I R 1914 Cal 575 and 11 Cal 42, overruled.)
('38) 25 A I R 1938 Bom 90 (90) : I L R (1938) Bom 98.
[But see ('12) 17 Ind Cas 940 (943)(DB) (Mad).]
2. ('35) 22 AIR 1935 Cal 290 (294) : 62 Cal 715 (FB).
(38) 25 A I R 1938 Bom 90 (90) : I L R (1938) Bom 98.
[*See also* ('20) 7 A I R 1920 Mad 605 (612) : 43 Mad 381.]
3. ('22) 9 A I R 1922 Bom 31 (32) : 46 Bom 635 (FB).
4. ('16) 3 A I R 1916 Mad 792 (793) : 38 Mad 221 (223). (Applying 23 All 313 (PC). — Overruled on another point in AIR 1921 Mad 218 : 44 Mad 100 (FB).)
('20) 7 AIR 1920 Mad 605 (613, 614) : 43 Mad 381 (389, 391, 392) (DB).
('06) 3 Cal L Jour 385 (386) (DB). (Suit held to lie even after order for and before actual distribution.)
5. ('38) 25 A I R 1938 Bom 90 (90) : I L R (1938) Bom 98. (Holder of decree which shows on its face that it is against an agriculturist is not entitled to rateable distribution of assets realised by sale of the immovable property of the judgment-debtor.)
Also see Notes 4 and 8.

Note 14

1. † (1900) 27 Cal 351 (353).
('22) 9 AIR 1922 Mad 31 (31, 32) (DB). (Because the money belongs to judgment-creditors from the time of such order.)
('19) 6 AIR 1919 Cal 43 (44) (DB).
('92) 15 Mad 372 (377, 378) (DB).
('16) 3 AIR 1916 Oudh 274 (275): 18 Oudh Cas 268 (DB). (Sale proceeds realised before adjudication cannot be claimed by receiver.)
('16) 3 AIR 1916 Cal 918 (919) : 43 Cal 586 (590) (DB). (Assets received before liquidation — Liquidator cannot claim against decree-holder.)
2. ('22) 9 AIR 1922 Mad 31 (31, 32) (DB).
3. (1900) 27 Cal 351 (353, 354).
('02) 29 Cal 428 (432) (FB). (Mere act of attachment will not give the creditor priority over the Official Assignee — Overruling 28 Cal 419.)
('97) 21 Bom 205 (219). (Right of Official Assignee prevails over attaching creditors.)
('16) 3 AIR 1916 Oudh 274 (275) : 18 Oudh Cas 268 (DB).
Also see S. 50, N. 10 and S. 64, N. 14.

An application for rateable distribution presented *by* an insolvent (in regard to a decree passed in his favour before his adjudication) after adjudication and before his discharge is competent.[4]

15. Sale subject to mortgage — Mortgagee cannot get rateable distribution — Proviso (a). — Where a property is sold in execution of a money decree subject to a mortgage, the mortgagee is really not affected by such sale, but retains his rights to proceed against the property in enforcement of his mortgage.[1] He will not, therefore, as a mortgagee, be entitled to share in the proceeds of the sale along with other decree-holders.[2] If, however, he holds also a money decree, he is not barred from sharing, as a *money decree-holder*, in the rateable distribution.[3] He can also *waive* his right on the mortgage and claim to participate in the assets as a *money decree-holder*.[4] See Note 6.

A sale *subject to a mortgage* means a sale *expressly* made subject to the mortgage, i. e., by the certificate of sale.[5]

16. Sale free of mortgage — Rights of mortgagee — Proviso (b). — A mortgagee has an alternative remedy under this section of consenting to a sale of the property free of his mortgage and having the same right in the sale proceeds as he had against the property.[1] But the mortgage must be a *valid* one[2] and the sale must have *been validly held by the Court*.[3] Where a *private* alienation is made with the sanction of the executing Court, this proviso does not apply.[4]

The *consent* of the mortgagee is necessary for a sale under this proviso. A sale without notice to the mortgagee and without his consent will not prejudice his rights in any way.[5] If the mortgagee consents but the *fact* of mortgage or the *amount* of mortgage money is disputed, the Court should make a *summary* enquiry under O. 21, R. 66 (4) and state the result of the inquiry in the proclamation of sale.[6]

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4. ('39) 26 AIR 1939 Mad 196 (198).

Note 15

1. ('06) 3 Low Bur Rul 258 (260).
('67) 7 Suth W R 309 (311) (DB). (The mere fact that the mortgagee applies for and obtains the residue of the sale proceeds after all the judgment-creditors have been fully satisfied, does not take away his right to enforce his lien for the balance due.)
('83) 5 All 566 (568) (DB). (Para. 1 of S. 73 has reference only to sales in execution of simple money decrees.)
('84) 10 Cal 567 (576) (DB).
2. ('83) 5 All 566 (568) (DB).
('85) 11 Cal 718 (729) (DB).
('66) 6 Suth W R Misc Rul 13 (13) (DB).
('19) 6 AIR 1919 Low Bur 124 (125).
('70) 14 Suth W R 209 (209) (DB).
('71) 16 Suth W R 306 (306, 307) (DB).
('74) 21 Suth W R 86 (87) (DB).
3. ('19) 6 AIR 1919 Oudh 351 (352) : 22 Oudh Cas 150 (DB). (Simple money decree for interest due on the mortgage.)
4. ('70) 14 Suth W R 209 (210) (DB).
5. ('81) 5 Bom 470 (477) (DB).
('74) 21 Suth W R 43 (44) (DB). (Case under the Code of 1859 — 'Subject to a mortgage' in the proviso, means sold "with notice of the mortgage.")

Note 16

1. ('83) 5 All 566 (568) (DB).
('30) 17 AIR 1930 Mad 138 (141) : 53 Mad 670 (DB). (Rule applies to mortgagee who is also a simple money decree-holder but the two debts must be distinct and not identical.)
[*See* ('37) 24 AIR 1937 Oudh 270 (272) (DB). (Money decree-holder and mortgage decree-holder agreeing to sale in execution of money decree and to rateable distribution at the time of sale — Mortgage decree-holder entitled to same interest in sale proceeds as in property sold.)]
2. ('24) 11 AIR 1924 Pat 434 (436) (DB).
3. ('99) 22 Mad 241 (245) (DB). (Sale in contravention of S. 99 of the Transfer of Property Act — Section 73 does not apply.)
('24) 11 AIR 1924 Lah 132 (135) (DB). (Sale not by the Court but by private alienation.)
4. ('24) 11 AIR 1924 Lah 132 (135).
('67) 8 Suth W R 501 (501) (DB).
5. † ('19) 6 AIR 1919 Upp Bur 18 (19) : 3 Upp Bur Rul 139 (140, 141).
('06) 3 Low Bur Rul 258 (260). (Where a money decree-holder applies for such sale, notice must be given to the mortgagee.)
(1865) 2 Suth W R Misc App 21 (21) (DB).
('06) 3 Low Bur Rul 275 (278) (DB).
('84) 10 Cal 567 (575) (DB).
6. ('19) 6 AIR 1919 Upp Bur 18 (19) : 3 Upp Bur Rul 139.
('06) 3 Low Bur Rul 275 (277) (DB).
[*See* ('82) 6 Bom 584 (585) (DB).]

An order for sale under this proviso must have *specific* reference as to the person from whose encumbrance it will be sold free and there must be express direction or notice to purchasers that the property is to be so sold.[7]

Where a property is sold under this proviso the auction-purchaser becomes the *absolute owner* thereof, the mortgagee's rights being transferred to the sale proceeds in Court.[8] But the mortgagee cannot thereby obtain an order for payment of the amount due to him under the mortgage.[9] He must enforce his rights by way of *suit*.[10]

The words "any property" in cls. (a) and (b) of the proviso, as distinguished from "immoveable property" in cl. (c) show that a mortgage *of moveables* is included therein.[11]

17. Sale in execution of decree on mortgage—Mode of applying the sale proceeds—Proviso (c). — This proviso applies only where any immovable property is *sold* in execution of a decree ordering its sale *for the discharge of an incumbrance thereon*.[1] The words "an incumbrance" mean only the incumbrance *sued on* and not other incumbrances.[2] A executes a first mortgage in favour of X, a second mortgage in favour of Y and a third mortgage again in favour of X. X sues on the first mortgage, obtains a decree and sells the property. Y applies for payment to him out of the surplus remaining after the first mortgage sued on is paid off. He is entitled to be so paid in priority to the third mortgage of X.[3] But the words of the proviso are general and apply not only to a pre-existing incumbrance, i. e., an incumbrance existing independently of the decree ordering the sale of the property but also to an incumbrance which is created by the decree itself, as for instance, a charge created by the decree ordering the sale of the property in enforcement of such charge.[4] After discharging the interest and principal money due on the mortgage in discharge of which the sale is held, the surplus proceeds are to be applied in discharging the amounts due on *subsequent* incumbrances, if any, and not of *prior* incumbrances.[5] If there are *several* subsequent incumbrances, the proceeds are to be applied in satisfaction of such incumbrances according to their *priority*.[6] The amount due under the subsequent incumbrances must have been *ascertained*.[7]

If, even after the payment of subsequent incumbrances, there is a surplus, it should be applied rateably between the money decree-holders. These latter should, as the proviso says, have applied for execution of their decrees prior to the *sale* of the property.[8]

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7. ('84) 10 Cal 567 (575) (DB).

8. ('06) 3 Low Bur Rul 258 (260) (DB).

9. ('20) 7 AIR 1920 Low Bur 107 (108) : 10 Low Bur Rul 398.
('15) 2 AIR 1915 Low Bur 100 (100). (If he is paid out, a suit for refund will lie.)
('97-01) 2 Upp Bur Rul 276.
[*See* ('11) 10 Ind Cas 552 (552) (Mad). (Nor is there any duty on him to draw the amount and apply it in part satisfaction of his claim — He will be entitled to interest on sale proceeds until recovery.)]

10 ('20) 7 AIR 1920 Low Bur 107 (108) : 10 Low Bur Rul 398.

11. ('24) 11 AIR 1924 Cal 990 (991).

Note 17

1. ('90) 13 All 76 (78) : 1890 All W N 194 (195) (DB). (Collector receiving rents and profits as receiver—Property not sold—Proviso does not apply.)
('33) 20 AIR 1933 Lah 48 (50) : 14 Lah 243. (Decree directing sale of mortgaged property and if sale proceeds are insufficient giving personal remedy is a mortgage decree.)
('15) 2 AIR 1915 Cal 380 (381) : 19 Cal W N 535 (536) (DB). (Clause (c) applies only when the litigant has himself obtained a decree and applied for rateable distribution.)

2. ('90) 12 All 546 (547) (DB).

3. ('90) 12 All 546 (547) (DB).

4. ('35) 22 AIR 1935 Mad 713 (713).

5. ('83) 5 All 566 (568) (DB).
[*See also* ('03) 30 Cal 953 (957).]

6. ('85) 7 All 378 (381) (DB).
('86) 9 Mad 57 (60) (DB). (Possessory mortgagee electing to convert interest into rent payable by the mortgagor — Arrears of rent not a charge on the property which can be given priority over a subsequent incumbrance.)

7. ('06) 33 Cal 92 (97) (DB).
('27) 14 AIR 1927 All 467 (468) : 49 All 636 (DB.) (The validity or existence of such incumbrances must also be determined and if necessary, in a separate suit.)

8. ('20) 7 AIR 1920 Bom 35 (37) (DB).
('32) 19 AIR 1932 Bom 622 (624). (That is prior to the date on which the highest bid is accepted.)
('94) 21 Cal 809 (816).

Where there is a competition between an incumbrancer and a money decree-holder, the Court should satisfy itself that the former is lawfully entitled to priority over the latter.[9] An incumbrance, for instance, which came into existence *pending an attachment* by a money decree-holder, cannot be given priority over the latter.[10]

Where a sale takes place in execution of a mortgage decree, the sale cannot be stopped as soon as the amount of the mortgage decree is realised. The sale of the rest of the property also should continue as the money decree-holders are entitled to be paid out rateably from out of the surplus.[11]

18. Suit for refund of assets — Clause (2). — As already seen, an order under this section does not constitute a conclusive adjudication of the rights between the parties.[1] Clause (2) enacts that a suit will lie for refund of assets wrongly distributed.[2] Where the assets are not liable to be *rateably distributed at all*, this clause will not apply.[3] A executes a first mortgage in favour of B, a second mortgage in favour of C and a third mortgage again in favour of B. B files a suit on his *first* mortgage, obtains a decree and in execution thereof sells the mortgaged property. There is a surplus in Court after satisfying the decree. B then obtains a decree on his subsequent (third) mortgage and in execution of that decree draws out the balance in Court. C, the second mortgagee, who was not made a party to B's second suit, then files a suit against B for recovery of the amount withdrawn by B on the ground that he is entitled to a *prior* charge thereon. Such a suit is not one under clause (2).[4] The reason is that the assets after paying B's

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9. ('42) 29 AIR 1942 Sind 120 (120) : ILR (1942) Kar 200. (Person who pays earnest money for purchase of immovable property gets on such payment a charge on the property for such money, and if the proposed sale falls through, he is entitled to priority over ordinary money decree-holders against the vendor.)
('21) 8 AIR 1921 Cal 801 (803) (DB).

10. ('21) 8 AIR 1921 Cal 801 (803) (DB).

11. ('07) 17 Mad L Jour 80 (81) (DB).

Note 18

1. See Note 2.
[*See* ('75) 14 Beng L R 425*n* (426*n*).]

2. ('40) 27 AIR 1940 Pesh 36 (37). (Rateable distribution — Decree-holder purchasing property in execution of his own decree and setting off sale money against his debt—Applications for rateable distribution by other creditors before sale — Sale confirmed without disposing of such applications—Remedy of other creditors is by separate suit under Section 73.)
('24) 11 AIR 1924 Mad 97 (98) (DB). (Suit lies even though he is a decree-holder and not application under Section 47.)
('86) 9 Mad 57 (60) (DB).
('24) 11 AIR 1924 Lah 70 (70).
('17) 4 AIR 1917 All 276 (280) : 39 All 322 (333) (DB).
('91) 13 All 383 (385) (DB). (Suit by auction-purchaser for refund of purchase price.)
('15) 2 AIR 1915 Mad 405 (407) : 39 Mad 62 (66, 67) (DB).
('15) 2 AIR 1915 Mad 547 (548) (DB). (Suit and not revision lies.)
('10) 1 Upp Bur Rul 53 : 8 Ind Cas 1176 (1179).
('97) 1 Cal W N 633 (636) (DB). (Suit and not a revision lies.)
('88) 11 Mad 356 (359) (DB). (Against a decree-holder who has purchased with permission to set off but who refuses to deposit sale proceeds.)
('10) 7 Mad L Tim 232 (232) (DB). (Suit for refund of purchase price of judgment-debtor's interest.)
('73) 19 Suth W R 255 (260) (DB).
('71) 15 Suth W R 219 (220) (DB).
('68) 9 Suth W R 514 (515, 516) (FB).
[*See* ('42) 29 AIR 1942 Mad 748 (751). (Remedy of each aggrieved creditor is by suit—Where the suit is brought by one creditor and others are merely joined formally, no decree for their rateable shares can be passed in their favour merely because in supporting plaintiff's claim they ask for such a decree but have not paid any court-fee.)]
[*See also* ('33) 20 AIR 1933 All 666 (669).]

3. ('22) 9 AIR 1922 Mad 99 (100) (DB). (*A* obtained a decree against *B* and in execution thereof attached money belonging to *B*—Other decree-holders of *B* applied and obtained rateable distribution—Money was distributed—On appeal order was set aside—*Held*, *A*'s remedy for refund of money so distributed was not by a suit under S. 73 (2) but by application under S. 151.)
('33) 20 AIR 1933 Pat 277 (278).
('20) 7 AIR 1920 Mad 403 (404) (DB) (Obiter.)
[But see ('43) 30 AIR 1943 Nag 7 (9) : I L R (1942) Nag 685. (Creditor obtaining rateable distribution — Receipt of excess—Suit for refund—Creditor cannot plead that the execution under which the money was realised was void.)
('39) 26 AIR 1939 All 545 (548) : 1939 A W R H C 427 (431) (DB). (The terms of sub-s. 2 to S. 73, C. P. Code, are wide enough to cover a case where the plaintiff claims that he is entitled to all the assets in the custody of the Court and that the defendant, who claims and obtains rateable distribution, is not entitled thereto.)]

4. ('14) 41 Cal 651 (661) : 41 Ind App 45 (PC).

first decree were payable to subsequent incumbrancers in *order of priority* and not *rateably*.

In the undermentioned case[5] it was doubted by the Oudh Chief Court whether, in view of the language of the clause, it applies to cases where the right of the person, who has been paid the assets, to receive *rateable* assets is not denied.

In a suit for refund under cl. (2) it is for the Court to decide whether, having regard to all the equities between the parties, the plaintiff will be entitled to recover or not.[6] And, in order to enable the Court to adjudicate upon and settle effectually and completely all the questions involved, it is necessary that all the decree-holders who have obtained rateable distribution should be impleaded as parties to the suit.[7]

A suit under this clause is not one for *setting aside* the order for distribution[8] and therefore need not be brought within one year from the date of the order under Art. 13 of the Limitation Act.[9] It is virtually a suit for money had and received and can be brought within three years from the date of the receipt of the assets by the defendant.[10] The cause of action for the suit is the wrongful *receipt* by the defendant and, consequently, a suit does not lie where merely an *order for payment* is made, but the money is not actually paid.[11]

Where the dispute arising under cl. (2) arises between the judgment-debtor on the one hand and the decree-holder or decree-holders on the other, it has been held by the Calcutta High Court that the matter falls under S. 47 of the Code and that a suit is consequently barred.[12] Where, however, the dispute is between *rival* decree-holders, S. 47 will not apply and the suit is not barred.[13]

The Calcutta[14] and Allahabad[15] High Courts have held that a suit of this nature is not cognisable by a Court of Small Causes. The Madras High Court, on the other hand has held that it is cognisable.[16]

In the undermentioned case,[17] the Madras High Court, having regard to the expression "to compel him to refund the *assets*" in this clause, was inclined to hold that the plaintiff cannot ask for *interest* on the assets till the date of the suit.

19. Priority of debts—Clause (3). — It has been seen in Note 2 that under Ss. 270 and 271 of the Code of 1859 the creditor who first attached the property had a statutory priority, over the others, to have his debt satisfied in full.[1] It has also been seen

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5. ('38) 25 AIR 1938 Oudh 12 (13).
6. ('68) 9 Suth W R 514 (515, 516).
('05) 8 Oudh Cas 86 (90). (The word "entitled" means entitled under this section.)
7. (1900) 27 Cal 493 (497, 498) (DB).
('86) 13 Cal 159 (162) (DB).
('75) 23 Suth W R 431 (434) (DB).
Also see O. 1 R. 10 Note 13.
8. ('01) 23 All 313 (322) : 28 Ind App 203 (PC).
9. ('01) 23 All 313 (323) : 28 Ind App 203 (PC). (The decisions in 13 Cal 159 and 1 All 333 (F B) are no longer good law.)
('91) 15 Bom 438 (440) (DB).
('99) 1 Bom L R 795 (797) (DB).
('95) 1895 Pun Re No. 65, p. 327.
[*See also* ('37) 1937 Mad W N 480 (487) (DB). (Suit not governed by Art. 11 but may be brought within three years of actual distribution.)]
10. ('15) 2 AIR 1915 Mad 405 (407) : 39 Mad 62 (66) (DB).
('19) 7 Mad L Tim 232 (232) (DB).
('31) 18 AIR 1931 Rang 56 (58) : 8 Rang 185.
('17) 4 AIR 1917 All 276 (279, 280) : 39 All 322 (DB).
11. ('85) 11 Cal 718 (727) (DB).
('97) 1897 Pun Re No. 43, p. 195.
('97) 7 Mad L Jour 277 (279) (DB).
('18) 5 AIR 1918 All 327 (327) (DB).
('21) 8 AIR 1921 Nag 60 (62).
('31) 18 AIR 1931 Pat 359 (360, 361) : 10 Pat 830 (DB). (Order directing decree-holder auction-purchaser with permission to set off, to deposit amount due to rival decree-holder is executable.)
12. ('98) 2 Cal W N 429 (431) (DB).
13. ('24) 11 AIR 1924 Mad 97 (98) (DB).
14. ('80) 5 Cal 494 (497) (DB).
('84) 10 Cal 388 (390) (DB).
15. ('85) 7 All 378 (380) (DB). (Contra 3 All 59 which was not however referred to.)
16. ('86) 9 Mad 250 (251) (DB).
17. ('35) 22 AIR 1935 Mad 988 (995).

Note 19

1. *See also the following cases* :
(1865) 2 Suth W R Misc App 48 (48) (DB).

that the law was changed by the Code of 1882 and that now all the decree-holders are placed on the same footing regardless of the order of attachment.[2] A obtains a decree personally against B. C obtains a decree against B making him liable to the extent of the assets of his father in his hands. C cannot claim any priority against A.[3]

In cases not coming under S. 73 but under O. 21 R. 52 as, for instance, in a case where assets have been received *before* any of the contending decree-holders have applied for execution, there is a conflict of decisions as to whether such assets are liable to rateable distribution. As to this, see Note 6 on O. 21 R. 52.

In the undermentioned case[4] a patnidar brought to sale a darpatni tenure in execution of a decree for arrears of rent of such tenure. After satisfaction of the decree, the surplus proceeds were left in Court. The patnidar then obtained another decree against the same darpatnidar for arrears of rent accruing for a subsequent period in respect of the same tenure. It was held that the patnidar had no further lien for rent after the sale of the darpatni tenure, that the decree for rent in his favour was only a *money* decree, and that he was not entitled to any priority in respect of such decree and that the surplus sale proceeds in Court were liable to be divided rateably among all persons who had taken out execution of money decrees against the same judgment-debtor and had not obtained satisfaction.

It is a general principle of law that claims of the Crown or State are entitled to precedence over all other claims.[5] A judgment-debt due to the Crown is entitled to priority over all other decrees.[6] But the clause does not confer any jurisdiction on the executing Court to entertain a claim on behalf of the Government in the absence of any *decree* in support of it.[7] In *Oudh Commercial Bank Ltd.* v. *Secretary of State*,[8] Bhide, J., of the Lahore High Court observed as follows :

> "I am unable to see that this sub-section confers any jurisdiction on the executing Court to entertain a claim on behalf of the Government in the absence of any decree in support of it. The sub-section only saves the rights of the Government, independent of the section, such as they might be and merely appears to have reference to the right of priority which can be ordinarily claimed in respect of debts due to the Crown."

But, where certain moveable property of the judgment debtor was attached by the Court and was in the custody of the Court and the Collector attached such property under S. 46, sub-s. (2) of the Income-tax Act of 1922 in enforcement of the claim of the

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('67) 8 Suth W R 415 (420) (DB).
('69) 5 Mad H C R 113 (114) (DB).
('71) 6 Mad H C R 348 (349) (DB).
('72) 17 Suth W R 23 (24, 25) (DB).
('74) 21 Suth W R 191 (193) (DB).
('78) 3 Bom 217 (219) (DB).
('87) 10 Mad 57 (61) (DB).

2. *See also the following cases* :
('17) 4 AIR 1917 Cal 13 (18) : 44 Cal 1072 (1085, 1090) (DB).
('21) 8 AIR 1921 Cal 801 (804) (DB).
('21) 8 AIR 1921 Oudh 176 (183) (DB).
('36) 40 Cal W N 1249 (1250) (DB). (Attachment of same decree for money by several decree-holders—Attachment effected prior to deposit of money under attached decree—Right of rateable distribution — Decree-holder who starts the first execution cannot claim the benefit of the entire amount deposited by reason of O. 21 R. 53 (2), which Rule contemplates only cases where a decree for money is attached by a sole decree-holder.)

3. ('18) 5 AIR 1918 Mad 512 (513) (DB).

4. ('80) 5 Cal 494 (497) (DB).

5. *See* ('37) 24 A I R 1937 Rang 380 (382) : 1937 Rang L R 344 (DB).

6. ('39) 26 AIR 1939 Lah 488 (490): I L R (1940) Lah 124. (Court-fee in pauper appeal which is dismissed—Crown is entitled to be paid the court-fee out of the assets of the judgment-debtor lying in Court, in preference to other decree-holders—Conditions in S. 73 (1) such as applying for execution before receipt of assets, etc., do not apply to such a case.)
('68) 5 Bom H C R (O C) 23 (54) (DB).
('33) 20 A I R 1933 Sind 368 (369) : 27 Sind L R 444.
('76) 1 Bom 7 (9) (DB). (Court-fee in pauper suits.)
('36) 23 A I R 1936 Mad 602 (603) : 59 Mad 872. (Court-fee in a pauper suit ordered to be paid by defendant—O. 33 R. 10 does not have the effect of restricting the right of the Government to the subject-matter of the pauper suit.)

7. ('35) 22 AIR 1935 Lah 319 (320) (DB).

8. ('35) 22 AIR 1935 Lah 319 (320) (DB).

Crown for income-tax against the judgment-debtor, it was held that the matter was governed by O. 21 R. 52 and that the Crown was entitled to priority and that the income-tax must be paid in preference to the claims of the persons holding decrees against the judgment-debtor.[9]

A debt due to a co-operative society under S. 19 of the Co-operative Societies Act, II of 1912, is entitled to no priority as such over other judgment-debts and the society cannot make any claim under S. 73 unless it gets a decree or a charge under S. 20 and applies for execution as in the case of other creditors.[10]

The *costs of realisation* of the assets will have to be paid in priority to the other debts.[11] The words "costs of realisation" do not, however, include a previous mortgage amount paid off by the decree-holder.[12]

20. Debts due to the Crown. — See Note 19.

21. Debts due to Co-operative Society. — See Note 19.

22. Mode of distribution. — In practice difficulties may arise as to the actual working out of the rateable distribution between the various decree-holders. The following illustrations will make the matter clear :

Illustrations.

(1) *X* and *Y* obtain decrees for the recovery of Rs. 1000 each against two brothers *A* and *B*. *M* and *N* obtain decrees for Rs. 800 and 600 respectively against *B* alone. All the decree-holders attach the joint family property belonging to *A* and *B*. The property is sold in execution and the sale proceeds Rs. 1600 are received in Court. How is the amount to be distributed ? So far as *B* is concerned it must be taken that only his interest, namely, one-half, in the property was sold. The principle of distribution to be adopted is as follows :—Divide the sale proceeds into two halves, distribute one-half, namely Rs. 800, belonging to *A* between *X* and *Y* each being given Rs. 400. The decree amounts now due to *X* and *Y* must for purposes of further distribution be taken to be Rs. 600 each. *B's* half share, viz., Rs. 800, must now be rateably distributed between *X*, *Y*, *M* and *N* in the proportion of 600 : 600 : 800 : 600.[1]

(2) *X* obtains a decree against the estate of *F* in the hands of *A*, *B* and *C* who represent only three-fourths of the estate of *F*. *Y* obtains a decree against the same estate in the hands of all the heirs. The property is sold in execution of *Y's* decree, and *X* applies for rateable distribution. The amount to be rateably distributed between *X* and *Y* is only three-fourths of the amount recovered in execution of *Y's* decree.[2]

See also the undermentioned case.[3]

Rateable distribution should be made according to the amount due to each decree-holder *at the time of* distribution.[4] See also Note 11a.

An order for rateable distribution is enforceable by summary process in execution.[5]

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9. ('37) 24 AIR 1937 Rang 380 (382) : 1937 Rang L R 344 (DB).
10. ('15) 2 A I R 1915 Cal 197 (197) : 42 Cal 377 (380) (DB).
11. ('40) 27 A I R 1940 Sind 17 (18). (Goods of judgment-debtor attached by creditors remaining in possession of nazir in premises occupied by judgment-debtor as lessee—Landlord is entitled to rent during period of occupation as part of cost of realization out of sale proceeds.)
12. ('81) 6 Cal 663 (666).

Note 22

1. ('28) 15 AIR 1928 Mad 362 (363).
('34) 21 AIR 1934 Mad 426 (428) : 58 Mad 59.
2. ('18) 5 AIR 1918 All 327 (327) (DB).
3. ('31) 21 AIR 1934 Mad 426 (427) : 58 Mad 59. (*X* holding decree against *A* and *B* — *Y* holding decree against *A* alone—Properties of *A* and *B* sold in execution of *X's* decree — *Y* is entitled to rateable distribution only in respect of the proceeds of *A's* share of the properties.)
4. ('35) 22 AIR 1935 Nag 214 (215) : 31 Nag L R 423.
5. ('37) 24 AIR 1937 Nag 383 (384) : ILR (1937) Nag 466. (Decree-holder allowed to bid and to set off against purchase money his rateable share and directed to deposit rateable share due to another decree-holder—The order to deposit can be enforced by summary process—Ordering re-sale on failure to deposit is not proper remedy: AIR 1931 Pat 359 : 10 Pat 830 followed.)

Also see O. 21 R. 72, N. 5.

22a. Appropriation of amount received by way of rateable distribution. — A decree-holder is not entitled to appropriate the sum he receives by way of rateable distribution in any way he likes. What he receives goes towards the payment of every rupee of his debt.[1]

Illustration.

A obtains a decree against *B* and *C*. The decree awards *A* a certain sum of money payable by *B* and also a further sum by way of costs payable by *B* and *C*. *A* receives a certain sum by way of rateable distribution under the decree. *A* is not entitled to appropriate the whole of this amount towards the amount of the *decree proper* and proceed against *C* for the entire amount of the costs on the footing that such amount has not been reduced by the rateable share received. Both the items in the decree debt must be deemed as reduced *pro tanto*.[2]

23. Application for rateable distribution is one for a step-in-aid of execution. — It has been seen in Note 8 that a mere application for rateable distribution is not one *for execution*. Such an application however can be a *step-in-aid* of execution under Art. 182 of the Limitation Act. See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edition, Article 182 Note 125.

24. Appeal. — An order under this section is not appealable as an *order*.[1] It will be appealable as a *decree* if the conditions of S. 47 are satisfied.[2] Where such an order determines questions between *parties* i. e., between the judgment-debtor on the one hand, and the decree-holder on the other, it will fall under S. 47 and become appealable as a decree.[3] It follows that an order determining a question between *rival* decree-holders will not be appealable as a decree[4] unless such question is *also* one between the judgment-debtor and the decree-holders, in which case it would be appealable.[5] So also, where an

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Note 22a

('39) 26 AIR 1939 Bom 468 (469).

1. ('39) 26 AIR 1939 Mad 268 (269) : ILR (1939) Mad 301. (Bardwell v. Lydall, (1831) 7 Bing 489: 131 E R 189 followed.)
2. ('39) 26 AIR 1939 Mad 268 (269) : ILR (1939) Mad 301.

Note 24

1. See Section 104 and O. 43 R. 1.
('92) 14 All 210 (211) (DB).
('38) 25 AIR 1938 Lah 307 (308).
('36) 23 AIR 1936 Lah 181 (181).
2. ('18) 5 AIR 1918 Mad 1322 (1324) (DB). (Decision in respect of invalidity of execution or non-liability of fund for distribution is virtually one under Section 47.)
('27) 14 AIR 1927 Lah 100 (101): 8 Lah 35. (Order dismissing application for execution in toto.)
('15) 2 AIR 1915 Cal 658 (659): 42 Cal 1 (9) (DB). (Order rejecting an application for rateable distribution as between two rival decree-holders is not appealable.)
('21) 8 AIR 1921 Pat 401 (402) : 5 Pat L Jour 415 (DB). (Order rejecting an application under S. 73.)
('09) 36 Cal 130 (133).
('24) 11 AIR 1924 Cal 801 (803) : 51 Cal 761 (767, 771, 773) (DB).
† ('35) 22 AIR 1935 Lah 302 (303) : 16 Lah 990 (DB).
3. ('16) 3 AIR 1916 Mad 20 (21, 22) : 39 Mad 570 (573) (DB).
('31) 18 AIR 1931 Bom 252 (253) (DB).
4. ('41) 28 AIR 1941 Rang 113 (114) : 1940 Rang L R 718 (DB).
('22) 9 AIR 1922 Mad 99 (99) (DB).
('68) 9 Suth W R 514 (516) (FB).
('29) 16 AIR 1929 Rang 198 (200).
('29) 16 AIR 1929 Lah 645 (647).
('32) 19 AIR 1932 Lah 96 (96).
('14) 1 AIR 1914 Mad 437 (437) (DB).
('09) 36 Cal 130 (132, 133) (DB).
('10) 12 Bom L R 365 (366) (DB).
† ('31) 18 AIR 1931 Bom 350 (351) : 55 Bom 473 (DB).
('21) 8 AIR 1921 Pat 401 (402) : 5 Pat L Jour 415 (DB).
('92) 14 All 210 (211) (DB).
(1863) 1863 Suth W R Sp No. 116 (117) (FB).
(1865) 2 Suth W R Misc 41 (42).
('66) 6 Suth W R Misc 74 (75) (DB).
('74) 21 Suth W R 194 (194) (DB).
('37) 24 AIR 1937 Rang 134 (135) (DB).
('36) 23 AIR 1936 Pesh 52 (53).
('36) 23 AIR 1936 Mad 136 (137) : 59 Mad 399.
('38) 25 AIR 1938 Lah 801 (803).
('35) 22 AIR 1935 Lah 302 (303): 16 Lah 990 (DB).
('36) 23 AIR 1936 All 626 (628) (DB). (Order that a certain decree-holder is not competent to make an application for rateable distribution is not appealable.)
[*See also* ('76) 1 All 333 (337) (FB).]
[See however ('31) 18 AIR 1931 Pat 359 (360) : 10 Pat 830 (DB). (Order not refusing rateable distribution but refusing execution of an order for rateable distribution, *held* appealable.)
5. ('39) 26 AIR 1939 Bom 468 (469)
('12) 36 Bom 156 (163) (DB).

order under the section affects not only the rival decree-holders *inter se* but also the surety for the judgment-debtor, an appeal will lie from the order under S. 47 read with section 145 of the Code.[6]

25. Revision. — A wrong order of distribution can be contested in a suit under clause (2). This other remedy being open, the High Courts will not, as a general rule, interfere in revision in such cases.[1] This, however, does not mean that they *cannot* interfere in revision.[2] Where the lower Court acts without *jurisdiction* or declines to exercise jurisdiction,[3] or the remedy by suit is so inconvenient as to practically amount

('34) 21 AIR 1934 Pat 350 (351). (Decree in rent suit by one cosharer impleading other cosharers also — Decrees obtained by other cosharers also— Decision on question of rateable distribution in execution is appealable.)

('16) 3 AIR 1916 Mad 20 (21, 22) : 39 Mad 570 (DB).

('31) 18 AIR 1931 Bom 252 (253) (DB). (Following 36 Bom 156 and AIR 1915 Cal 658 : 42 Cal 1.)

('31) 18 AIR 1931 Bom 350 (351) : 55 Bom 473 (DB).

('32) 19 AIR 1932 Lah 96 (96).

† ('38) 25 AIR 1938 Pesh 63 (65) (DB). (Order treating execution application as *ultra vires* on ground that agent who filed it had no *locus standi* —Such order affects judgment-debtor and hence is appealable.)

('39) 26 AIR 1939 Bom 112 (114) : I L R (1939) Bom 133 (DB).

6. ('39) 26 AIR 1939 Bom 112 (114) : ILR (1939) Bom 133 (DB).

Note 25

1. ('40) 27 AIR 1940 Nag 302 (303) : ILR (1942) Nag 139.

('21) 60 Ind Cas 371 (372) (Lah). (Disallowing or allowing claim for rateable distribution.)

('33) 20 AIR 1933 Sind 329 (330) : 27 Sind L R 190 (DB). (But order under this Section is not a ministerial act.)

† ('06) 1906 Pun Re No. 128 p. 481 (485) : 1908 Pun L R No. 119, p. 366 (367) (DB).

('97-01) 2 Upp Bur Rul 274.

('94) 4 Mad L Jour 87 (88). (Mere fact that decision is erroneous does not justify revision.)

('97) 1 Cal W N 633 (635) (DB). (Mere mistake of law.)

('05) 2 All L Jour 370 (371) (DB). (Error in the exercise of jurisdiction.)

('12) 1912 Pun L R No. 176, p. 565.

('12) 17 Ind Cas 389 (389) (Mad). (Wrong decision on question of law, no ground.)

('05) 1905 Pun Re No. 65, p. 218 : 1905 Pun L R No. 130, p. 468. (A misapprehension of law or fact, no ground.)

† ('32) 19 AIR 1932 Lah 96 (97).

('36) 23 AIR 1936 Pesh 52 (53).

('36) 23 AIR 1936 Oudh 185 (187) : 12 Luck 52 (DB).

('35) 22 AIR 1935 Lah 971 (971).

('34) 21 AIR 1934 Mad 426 (427) : 58 Mad 59.

[*See* ('33) 20 AIR 1933 Pat 277 (278). (In cases where suit does not lie, revision is open.)]

2. ('40) 27 AIR 1940 Oudh 237 (238) : 15 Luck 332 (DB). (Order under S. 73 is judicial and not merely administrative order — Revision lies.)

('07) 10 Oudh Cas 129 (131) (DB).

('33) 20 AIR 1933 Lah 48 (49) : 14 Lah 243.

('33) 20 AIR 1933 Pesh 52 (52). (Interference in revision even if other remedy is open is proper when circumstances justify such interference.)

('15) 2 AIR 1915 Mad 547 (547, 548) (DB).

('09) 9 Cal L Jour 210 (215) (DB).

('26) 13 AIR 1926 Mad 179 (181).

('28) 15 AIR 1928 Mad 362 (362).

('28) 15 AIR 1928 Rang 163 (164) : 6 Rang 582 (DB).

('26) 13 AIR 1926 Nag 380 (381). (Against an order rejecting an application.)

('39) 26 AIR 1939 Bom 112 (114) : I L R (1939) Bom 133 (DB).

3. ('40) 27 AIR 1940 Oudh 237 (239) : 15 Luck 332 (DB). (Distribution wrongly allowed.)

('11) 15 Cal W N 872 (875) (DB). (Refusal to exercise jurisdiction — Fact that such refusal is based upon misapprehension of the true effect of statutory provision is immaterial.)

('34) 21 AIR 1934 Oudh 110 (111). (Disallowing rateable distribution in defiance of predecessor's order is illegal exercise of jurisdiction.)

('07) 10 Oudh Cas 129 (131) (DB).

('09) 32 Mad 334 (335). (Refusing to grant rateable distribution to a person who is entitled to it is declining to exercise jurisdiction.)

('22) 9 AIR 1922 Cal 19 (21).

('14) 1 AIR 1914 Upp Bur 15 (16). (Attachment of property situated outside Court's jurisdiction.)

('09) 4 Ind Cas 52 (53) (DB) (Cal).

('92) 15 Mad 372 (376) (DB). (Not entertaining application at all.)

('69) 11 Suth W R 54 (55, 56) (DB). (Court setting aside its own order for rateable distribution without jurisdiction — High Court interfered — S. 15, Charter Act.)

('35) 22 AIR 1935 Pat 201 (202). (Taking wrong view of S. 73 is not declining to exercise jurisdiction.)

† ('39) 26 AIR 1939 Mad 196 (196). (Declining to entertain application due to misapprehension of the true effect of statutory rules contained in the Civil Procedure Code.)

('38) 177 Ind Cas 269 (270) (DB) (Pat). (In execution a sum attached and brought into Court by one decree-holder — Court declining to order rateable distribution in favour of other decree-holder who had also taken out execution, on ground that sum was not assets in hands of Court—Sum held assets capable of distribution.)

('36) 23 AIR 1936 Mad 91 (93) : 59 Mad 303.

to no remedy,[4] or is manifestly wrong,[5] or the result of the suit, if brought, would be definite success,[6] a revision will lie. Where the Court sets aside the order, it can order the amount wrongly paid to be returned to Court.[7]

See also section 115, Note 22.

RESISTANCE TO EXECUTION

Resistance to execution.

74. [S. 330.] **Where the Court is satisfied that the holder of a decree for the possession of immoveable property or that the purchaser of immoveable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.**

[1877, S. 330; 1859, S. 228; See O. 21, Rr. 97 to 103.]

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Decree for the possession."
4. Resistance must be by judgment-debtor or some other person on his behalf.
5. What is resistance.
6. Possession.
7. Appeal.

1. Legislative changes. — These are referred to and discussed in their appropriate places in the Notes below.

2. Scope of the section. — The corresponding section of the old Code related entirely to decrees for *possession*.[1] The scope of the section has now been widened by making it applicable to cases where a *court auction-purchaser* is resisted or obstructed in obtaining possession of the property purchased by him. The old section contained the words "without prejudice to any penalty to which such judgment-debtor or other person may be liable under the Indian Penal Code or any other law for such resistance or obstruction." These words have been omitted in the present section apparently as being unnecessary. The law, it is conceived, must be regarded as being the same under the present section, notwithstanding the said omission.

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4. ('05) 2 All L Jour 370 (371) (DB).
('32) 19 A I R 1932 All 411 (412) : 54 All 516 (DB).
('82) 4 Mad 383 (384) (DB).
5. ('41) 28 AIR 1911 Oudh 277 (279). (Unjust order of lower Court under S. 73, Civil P. C. was interfered with by High Court under S. 25, Provincial Small Cause Court's Act 1887.)
('26) 13 AIR 1926 Mad 179 (181). (Manifest error.)
('27) 11 AIR 1927 Mad 1030 (1030) (DB).
('27) 14 AIR 1927 Mad 941 (944).
6. ('27) 11 AIR 1927 Mad 944 (944).
† ('09) 32 Mad 334 (336). (Refusal of rateable distribution application, because judgment-debtor has other properties.)
7. ('16) 3 AIR 1916 Cal 264 (265) (DB).
('31) 18 AIR 1931 Pat 405 (408): 11 Pat 250 (DB).

Section 74 — Note 2

1. ('98) 2 Cal W N 311 (314) (DB).

In addition to the powers which Courts have under the ordinary law to punish disobedience of judicial orders, the High Courts in India can enforce obedience to their orders by taking proceedings for contempt.[2]

For detailed provisions, see O. 21 Rr. 97 to 103.

3. **"Decree for the possession."** — A decree for partition is a decree for possession within the meaning of this section.[1] For further discussion of the subject, see Notes 5 and 6 on section 16.

4. **Resistance must be by judgment-debtor or some other person on his behalf.** — Under the old Code the resistance must be by the judgment-debtor himself or some other person *at his instigation*.[1] Under the present section it is enough if the resistance is by or *on behalf of* the judgment-debtor. A person who, on behalf of the judgment-debtor, obstructs the decree-holder in obtaining possession, is not a party to the suit within the meaning of section 47.[2]

5. **What is resistance.** — In cases arising under the Penal Code it has been held that a *mere oral statement* by a person claiming to be the owner of certain property attached by a bailiff in execution of a decree that he would not allow the bailiff to take hold of the property unless he entered it as his property, does not amount to such resistance as is contemplated by the Penal Code,[1] but that if such a protest is accompanied by a threat of violence if the bailiff persisted in removing the property, it would amount to resistance.[2]

6. **Possession.** — The word "possession" is not limited to actual physical possession. The section is wide enough to cover cases of constructive possession such as that by a tenant.[1]

7. **Appeal.** — An appeal lies from an order of detention in jail under the section. See section 104 clause (h).

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2. ('83) 7 Bom 1 (4). (Authority conferred on High Court by Charters and Letters Patent.)
('83) 7 Bom 5 (13) (DB).

Note 3

1. ('93) 16 Mad 127 (130) (DB).
Also see O. 21 R. 97, N. 2.

Note 4

1. ('01) 25 Bom 478 (486).
('93) 16 Mad 127 (128, 129).
2. † ('98) 2 Cal W N 311 (314) (DB).

Note 5

1. ('91) 15 Bom 564 (565).
2. ('04) 6 Bom L R 254 (255).

Note 6

1. † ('01) 25 Bom 478 (493).
('06) 33 Cal 487 (491) (DB).

PART III.

INCIDENTAL PROCEEDINGS

COMMISSIONS

Power of Court to issue Commissions.

75. [New.] Subject to such conditions and limitations as may be prescribed, the Court may issue a commission —

(*a*) to examine any person ;

(*b*) to make a local investigation ;

(*c*) to examine or adjust accounts ; or

(*d*) to make a partition.

[See Order 26.]

1. Issue of commissions. — This section is new and defines and limits the power of the Court to issue commissions. The detailed provisions are set forth in Order 26, but they do not amplify the scope of this section.[1] Where, therefore, it is not necessary for the purposes set forth in the section to issue a commission, it is not competent for the Court to do so.[2]

Though the Court has power to issue a commission, it cannot make over the whole case[3] or a material issue[4] to the Commissioner for trial on the merits. Nor should it issue a commission to *two* persons[5] or issue a *succession* of commissions covering the same ground.[6]

This section and Order 26 deal with cases in which a Commissioner is appointed either by the Court *suo motu* or on the application by either party. These provisions do not apply to cases in which the parties consent or agree to the appointment of a Commissioner for any particular purpose. Hence, where in a suit for infringement of copyright a Commissioner is appointed by the consent of both the parties to record evidence, the evidence recorded by the Commissioner is admissible in evidence although the case does not come under the rules in Order 26. But, the *opinion* of the Commissioner is no evidence and cannot be considered by the Court.[7]

2. Commission to examine any person. — See O. 26 Rr. 1 to 8.

3. Local investigation. — A Court ought not to hold a local investigation with a view to gather information on which it may base its judgment, though it may inspect

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Section 75 — Note 1

1. ('22) 9 AIR 1922 Lah 47 (48): 3 Lah 209 (DB).
2. ('12) 13 Ind Cas 440 (443) (DB) (Cal).
   [*See* ('40) 27 AIR 1940 Cal 337 (343) : I L R (1940) 1 Cal 372 (DB). (Suit for accounts by beneficiary against trustee — Commissioner cannot be appointed to ascertain value of moveables in defendant's possession—Plaintiffs are entitled to recover the goods *in specie* though the decree has under O. 20 R. 10 to state the amount of money to be paid by the defendant as an alternative if delivery cannot be had.)
3. ('26) 13 AIR 1926 Lah 145 (146) (DB).
   ('26) 13 AIR 1926 Cal 57 (57, 58) (DB). (Party ordered to supply papers to Commissioner—Commissioner asked to decide whether papers supplied were adequate and if not, whether party was liable to pay money compensation — Order was held unobjectionable.)
4. See O. 26 R. 10, Note 3.
5. ('29) 16 AIR 1929 Mad 661 (663) (DB).
6. See O. 26 R. 10, Note 9.
7. ('38) 25 AIR 1938 All 266 (267, (268) : I L R (1938) All 370 (DB).

the locality with a view to understand the evidence. Where additional information is required, the proper course is to appoint a Commissioner whose report may be used in evidence and who may himself be examined as a witness.[1]

Where a matter has been referred to a Commissioner for local investigation, it is not safe for the Court to act as an expert and to overrule the report of the Commissioner whose integrity is unquestioned.[2]

For further discussion see Notes on O. 26 Rr. 9 and 10.

4. Commission to examine accounts. — See O. 26 Rr. 11 and 12.

5. Commission to make partitions. — See O. 26 Rr. 13 to 18.

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76. [S. 386.] (1) A commission for the examination of any person may be issued to any Court (not being a High Court) situate in a province other than the province in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides.

Commission to another Court.

(2) Every Court receiving a commission for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order.

[1877, Ss. 383, 384, 385, 386 (2); 1859, S. 175; See O. 26 R. 4.]

1. Jurisdiction of Court to issue commission for examination of witness. — See O. 26 Rr. 1 and 4.

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77. [New.] In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within British India.

Letter of request.

[See O. 26, Rr. 5 and 6.]

1. Scope of the section. — This section applies only where the witness resides outside British India. If he is resident in another Province, but in British India, the previous section will apply.

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78. [S. 391.] [a][Subject to such conditions and limitations as may be prescribed], the provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by [a][or at the instance of] —

Commissions issued by foreign Courts.

(a) Courts situate beyond the limits of British India and established or continued by the authority of His Majesty or of [b][the Central Government or of the Crown representative], or

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Note 3

1. ('12) 14 Ind Cas 377 (379) (DB) (Cal).
[*See also* ('32) 19 AIR 1932 All 270 (271). (Appellate Court has such powers.)]
2. ('24) 11 AIR 1924 Cal 620 (622) (DB).

(b) Courts situate in any part of the British Empire other than British India, or

(c) Courts of any foreign country.

1877, S. 391.]

a. Inserted by the Code of Civil Procedure (Amendment) Act, 1932 (X of 1932), Section 2.

b. Substituted by the Government of India (Adaptation of Indian Laws), Order, 1937, for "the Governor-General in Council."

1. Amendments after 1908. — The following amendments were introduced by the Code of Civil Procedure (Amendment) Act (X of 1932) :

(1) The words "subject to such conditions and limitations as may be prescribed" have been newly introduced before the words "the provisions."

(2) The words "or at the instance of" have been added after the words "issued by."

(3) The words "for the time being in alliance with His Majesty" which occurred in clause (c) have been omitted. In the case noted below[1] it was held that the Kingdom of Ava was not in a state of alliance with the British Government, within the meaning of section 177 of the Code of 1859.

Section 78 — Note 1

1. ('68) 10 Suth W R 385 (385).

PART IV.

SUITS IN PARTICULAR CASES

SUITS BY OR AGAINST [a][THE CROWN] OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY

[b]**79.** Subject to the provisions of sections 179 and 185 of the Government of India Act, 1935, in a suit by or against the Crown the authority to be named as plaintiff or defendant, as the case may be, shall be —

Suits by or against the Crown.

(a) in the case of a suit by or against the Central Government, the Governor-General in Council before the establishment of the Federation of India, and thereafter, the Federation ;

(b) in the case of a suit by or against a Provincial Government, the Province ; and

(c) in the case of a suit by or against the Crown Representative, the Secretary of State.

[1877, S. 416 ; See O. 27.]

a. Substituted by the Government of India (Adaptation of Indian Laws), Order, 1937, for "the Government."

b. Section substituted by *ibid*, for the original Section 79.

Synopsis

1. Legislative changes.
2. Scope and applicability of the section.
3. In what cases suit will lie against the Government.
4. Act of State. See Section 9 Note 57.
5. Suits against State Railways.
6. Cases in which Government is a necessary party.
7. Jurisdiction in suits against Government.
8. Form of suit by or against Government.
9. Information exhibited by the Advocate-General.
10. Procedure in suits by or against the Government. See Section 80 and Order 27.

1. Legislative changes. — The present section was substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original S. 79, the change being necessitated by the Government of India Act, 1935 (25 & 26 Geo. V, Ch. 42). (See sections 3 and 176 of that Act.) The old section ran as follows :

"(1) Suits by or against the Government shall be instituted by or against the Secretary of State for India in Council.

(2) Nothing in this section shall be deemed to limit or otherwise affect any information exhibited by the Advocate-General in exercise of the power declared by S. 111 of the East India Company Act, 1813."

It will be seen that under the old section, *all* suits by or against the Government were to be instituted by or against the Secretary of State for India in Council. After

the passing of the Government of India Act, 1935, such suits will fall under the three categories enumerated in clauses (a), (b) and (c) of the present section and the section has accordingly been changed so as to deal specifically with each such category.

2. Scope and applicability of the section. — This section declares the *procedure* where suits are to be brought by or against the Government; it does not deal with the question as to *what* are the claims and liabilities enforceable against the Government.[1] These must be determined only with reference to the provisions of the Government of India Act, 1935. (See Ss. 172 to 180 of the Act.) The rule of procedure under this section applies also to appeals.[2]

3. In what cases suit will lie against the Government. — Under the English Constitution a person aggrieved by an act or omission of a Government servant or department can seek his remedy only by a *petition of right*.[1] The liabilities of the Crown upon a petition of right extend to detention of land, chattels or money of the subject and to breach of contract.[2]

In India S. 176 sub-s. (1) of the Government of India Act 1935, provides as follows :—

> "(1) The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province and, without prejudice to the subsequent provisions of this chapter, may, subject to any provisions which may be made by the Act of the Federal or Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed."

So, under the above sub-section the test to see if a suit lies against the Crown is whether in the circumstances of the case, a suit would have lain against the Secretary of State for India in Council, if the Government of India Act of 1935 had not been passed. For this, S. 32 of the Government of India Act of 1915 must be seen. Sub-section (2) of that section runs as follows :

> " Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act, 1858 and this Act had not been passed."

The above sub-section corresponds to the following provision in S. 65 of the Government of India Act of 1858 conferring the right of suit against the Government :[3]

> ". . . . all persons and bodies politic shall and may have and take the same suits, remedies and proceedings legal and equitable, against the Secretary of State in Council of India *as they could have done against the said Company*" (the East India Company).

The East India Company was engaged in transactions partly in the exercise of *sovereign powers* delegated to it by the Crown and partly on its own account, which, without delegation of sovereign powers might be carried on by *private individuals*.[4] Therefore, in so far as a person was aggrieved by an act done in the exercise of *sovereign*

Section 79—Note 2

1. *See* ('03) 6 Bom L R 131 (146). (Case about the corresponding S. 416 of the Code of 1882.)
2. ('29) 16 A I R 1929 Lah 10 (11) : 9 Lah 667 (DB).

Note 3

1. See Petition of Rights Act, 1860 (23 & 24 Vict., Ch. 34). Also Robertson on *Civil Proceedings by or against the Crown*, pp. 330, 419.
2. ('15) 2 A I R 1915 Mad 434 (438): 37 Mad 55: 19 Ind Cas 353 (357).
3. ('76) 1 Cal 11 (14) (DB).
('03) 6 Bom L R 131 (146). (Confirming 27 Bom 189.)
('13) 40 Cal 391 (399,400): 40 Ind App 48: 7 Low Bur Rul 10 : 18 Ind Cal 22 (24) (PC). (Government of India not competent to pass any Act which would prevent a subject from suing the Secretary of State for India in any case in which an action would have lain against the East India Company.)
4. ('76) 1 Cal 11 (13) (DB).
[*See also* ('81) 3 All 829 (834).]

rights, the East India Company was liable in the same way as the Crown upon a petition of right. It follows that the Crown in India is also liable in respect of all such acts, that is, *detention of land, chattels* or *money* and *breach of contract.*[5] In respect of *torts* by its servants in the exercise of sovereign powers, the Company was not, and the Crown in India will not be, liable unless it had *ordered* or *ratified* the tortious act.[6] The reason is that the doctrine of principal and agent can apply where the acts done by the Officers of the Government are done in the performance of *duties imposed by the Legislature*, though the officers themselves are *appointed* by the Government; and in exercising or exceeding such authority they cannot be considered to have been the agents of the appointing authority so as to render the latter liable.[7] In so far as the East India Company was engaged in transactions on its own account, which, without delegation of sovereign right can be carried on by *private individuals*, it was liable like any other private individual. The Crown in India will consequently be liable in respect of those acts also *which might be done by private individuals without the delegation of sovereign rights.*[8]

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5. † (15) 2 AIR 1915 Mad 434 (438, 439): 37 Mad 55: 19 Ind Cas 353 (357, 359)).
('80) 2 All 756(760,761) (DB). (Breach of contract.)
('85) 7 All 140 (144) (DB). (Suit to declare that certain land is not liable to assessment.)
('79) 4 Cal 103(105)(DB).(Suit to declare right to hold property under any settlement that may be made.)
('90) 17 Cal 590 (604): 17 Ind App 40 (PC). (Suit to declare that certain lands are not liable to assessment.)
('66) 5 Suth W R 47 (48). (Suit to set aside order directing plaintiff to pay Government revenue at a certain rate.)
('69) 11 Suth W R 425 (425). (Suit for refund of income-tax illegally assessed lies.)
† ('82) 4 Mad 344 (357). (Suit for import duty illegally levied lies—Dissenting from 1 Cal 11.)
('92) 5 Mad 273 (283) (DB). (Recovery of money illegally collected—Suit lies—Dissenting from 1 Cal 11.)
(1862) 1 Hyde 37 (38, 40). (Specific performance of contract.)
('74) 21 Suth W R 327 (330) (FB). (Suit to set aside a settlement and for possession.)
(1864) 2 Hyde 153 (162). (Breach of contract.)
('72) 4 N W P H C R 146 (147) (DB). (Wrongful resumption of ferry—Suit against Govenment lies.)
('01) 28 Cal 540 (544, 545) (DB). (Wrongful attachment under S. 88, Cr. P. Code, of property of a third person.)
('72) 17 Suth W R 497 (499) (DB). (But an agent on behalf of Government, e. g., a Public Works Officer cannot bind the Government with a contract made by him in excess of his authority.)
(1861) 8 Moo Ind App 529 (554) (PC). (Act of Government officer binds Government when authorized to do so, or if ratified by Government).
† ('13) 19 Ind Cas 353 (359,361) (Mad). (The broad proposition that acts in the exercise of sovereign powers cannot be sued upon in any case has been dissented from in later cases and is no longer good law.)
('05) 28 Mad 72 (77, 82) (DB). (Injunction—Continuing wrong.)
('05) 28 Mad 213 (215) (DB). (Liability under Indian Post Office Act VI of 1898, S. 34.)
[But see ('67) 7 Suth W R 191 (193): Beng L R Sup. Vol. 630. (Section 3 of clause 2 of Regulation VI of 1819.)
† ('75) 1 Cal 11 (26, 27) (DB). (Acts of officers appointed in connexion with the collection of excise duties—No suit lies.)]

6. † ('15) 2 AIR 1915 Mad 434 (441): 37 Mad 55: 19 Ind Cas 353 (359). (Liable.)
('03) 27 Bom 189 (211, 212). (Act of State.)
('05) 1 Cal L Jour 355 (359) (DB). (Acts of Judicial Officers.)
('12) 16 Ind Cas 922 (925) (DB) (Cal). (Wrongful dismissal of a public servant.)
('06) 33 Cal 669 (674, 675). (Do.)
('15) 2 AIR 1915 Mad 993 (998): 39 Mad 351 (DB). (Negligence of servants in keeping gravel on a military road.)
('04) 28 Bom 314 (325, 326) (DB). (Negligence of constable in respect of goods seized.)
('71) 7 Beng L R 688 (696). (Wrongful dismissal.)
('20) 7 AIR 1920 Lah 362 (364): 1919 Pun Re No. 143 (DB). (Tortious act by police officers.)
(1877) 2 C P D 445 (453), Grant v. Secretary of State. (Compulsory retirement.)
[*See also* ('71) 1871 Pun Re No. 60 p. 160 (167) (Civil).
('75) 1875 Pun Re No. 64 p. 162 (167) (Civil).
('99) 26 Cal 792 (808, 809).]
[*Compare also* ('84) 7 Mad 466 (472, 473). (Where the dismissal was under colour of Municipal law.)]

7. † ('84) 10 Cal 445 (461) (DB). (Contractor employed by Government and licenced by the Calcutta Municipality—Obstruction in public way—Corporation liable for breach of statutory duty—Secretary of State not liable.)
('15) 2 AIR 1915 Mad 434 (441): 37 Mad 55: 19 Ind Cas 353 (359).
('20) 7 AIR 1920 Lah 362 (364): 1919 Pun Re No. 143 (DB).
('03) 26 Bom 801 (807, 808, 809) (DB).
† ('04) 28 Bom 314 (325, 326) (DB).
('82) 5 Mad 91 (105) (FB).
('16) 3 AIR 1916 Mad 1157 (1159, 1160): 39 Mad 781 (DB).
('03) 26 Mad 263 (264) (DB).

8. † ('75) 1 Cal 11 (13, 14) (DB).

It was held, before the Government of India Act of 1935, that contracts with the Secretary of State for India must conform to the provisions of S. 29 of the Government of India Act, 1915; and where they did not conform to such provisions they were not binding on the Secretary of State.[9] It is obvious that the same principle will also apply now and the Crown will not be liable under any contract unless such contract conformed to the provisions of the Government of India Act of 1935.

4. Act of state. — See Section 9 Note 57 "Acts of State."

5. Suits against State Railways. — Before the passing of the Government of India Act of 1935, it was held that a suit against a State Railway must be brought against the Secretary of State for India in Council.[1] Under S. 185 of the Government of India Act of 1935, the Federal Railway Authority would be the body to sue or be sued in the case of any Federal Railways. But till the coming into existence of the Federation, the Central Government will be the authority to sue or be sued and under this section the suit will have to be brought in the name of the Governor-General in Council.[2]

6. Cases in which Government is a necessary party. — The rules governing the joinder of ordinary persons as parties would also apply to the joinder of the Government as a party.[1] Thus in a suit to set aside a sale under the Bengal Public Demands Recovery Act, I of 1895 (now see Bengal Act III of 1913), the Government is in the position of a decree-holder and as such is a necessary party.[2] Similarly, in a suit to recover possession of a *chur* which had been leased by the Government to the defendant, the Government as claiming a proprietary right in the land is a necessary party.[3] See also the undermentioned cases[4] showing in what cases Government was held to be a necessary party and in what cases not.

See also Note 25 on Order 1 Rule 10.

('15) 2 AIR 1915 Mad 434 (438) : 37 Mad 55 : 19 Ind Cas 353 (357).
('67) 5 Bom H C R App 1 (23).
('11) 38 Cal 797 (801) : 13 Ind Cas 370 (371) (DB).
('71) 3 N W P H C R 195 (197, 198) (DB). (Government bullock train — Goods stolen through negligence of servants—Government is liable.)
('11) 5 Sind L R 82 (85) : 11 Ind Cas 58 (59) (DB). (Tort by Government Railway Company servants —East India Company did the railway business as a private individual—Hence suit lies.)

9. ('28) 15 AIR 1928 Cal 74 (82) : 54 Cal 969.

Note 5

1. ('24) 11 AIR 1924 Bom 306 (306) : 48 Bom 297.
('01) 4 Oudh Cas 133 (136, 138).
('31) 18 AIR 1931 Pat 326 (327) : 10 Pat 466.
('31) 18 AIR 1931 Pat 393 (393, 394).
[*See* ('33) 20 AIR 1933 Pat 630 (632). (If Secretary of State is not made party, there is no liability on the Railway Company.)]

2. *See* ('42) 46 Cal W N 18 (20). (Suit against State Railway—Plaint describing Government as Secretary of State for India — Amendment after limitation altering description to Governor-General in Council — Suit is not barred by limitation — Error was merely one of description.)

Note 6

1. ('19) 6 AIR 1919 P C 225 (228) (PC).
2. † ('02) 31 Cal 159 (161) (DB).
3. ('79) 5 Cal L Rep 154 (156).

4. *Government a necessary party* :
('66) 3 Mad H C R 134 (135, 136). (Suit to transfer registration—Collector is a necessary party.)
('92) 15 Mad 350 (350, 351) (DB). (Suit to compel mutation of names—Collector is a necessary party.)
('88) 15 Cal 460 (470) (FB). (Suit under S. 42 of the Specific Relief Act against person claiming to use a land as public road.)

Government not a necessary party :
('72) 17 Suth W R 145 (146) (DB).
('74) 22 Suth W R 52 (53, 54) (DB). (*Held* that Collector ought to have been made a party but as the lower Courts were wrong on the merits of case, the case was not remanded to have the Collector made a party.)
('92) 15 Mad 292 (293). (Suit for declaration of title against Municipality.)
('71) 8 Beng L R 524 (532) (DB). (Suit for declaration of plaintiff's right to share in the settlement of an accretion.)
('78) 2 Cal L Rep 467 (470). (Suit by *A* against *B* for possession of certain land as accretion.)
('98) 25 Cal 833 (843) : 25 Ind App 151 (PC). (Appeal arising out of a suit for annulling a sale of an estate for supposed arrear of revenue.)
('03) 7 Cal W N 377 (380) (DB). (Do.)
('83) 9 Cal 271 (276, 277) (DB). (Do.)
('87) 11 Bom 519 (523) (DB). (Suit against farmer of Abkari revenue for a refund of money illegally levied at his instance by the Collector.)
('82) 16 Bom 649 (652) (DB). (Suit for declaration that plaintiff is a Kadim Naik.)

7. Jurisdiction in suits against Government. — It was held, before the Government of India Act of 1935, that a suit against the Secretary of State for India could only be brought in the Court within the local limits of whose jurisdiction the cause of action arose and that the words "dwell," "carry on business" or "personally work for gain" which occur in Ss. 16, 19 and 20 of the Code and Cl. 12 of the Letters Patent, did not apply to the Secretary of State for India.[1] It is conceived that the same principle will apply to suits against the Crown after the passing of the above Act. (See Notes on section 20.)

8. Form of suit by or against Government. — It was held, before the Government of India Act of 1935, that a suit against Government must be instituted against the Secretary of State for India in Council[1] and that it could not be brought against the "Secretary of State".[2] Where a suit was wrongly brought against an officer of the Government, it was held that the plaint should be amended by substituting the name "the Secretary of State for India in Council" for the name of the officer.[3] Under the Code of 1859, a suit against the Agent to the Governor-General on the part of the Government was held to be a suit substantially against the Government.[4]

In the undermentioned case,[5] a suit against the Government was dismissed and an appeal was filed against the decree dismissing the suit. The case was one in which under S. 179, sub-s. (1) of the Government of India Act of 1935 the appeal should have been lodged against the Government of the Punjab or the Secretary of State. But the respondent to the appeal was named as the Secretary of State for India in Council. It was held that although this was inconsistent with the provisions of the above section, the mere addition of the words "for Indian in Council" did not justify the dismissal of the appeal and it could only be construed as a misdescription of the respondent. A similar view, viz., that a mere misdescription of the defendant will not matter, was also taken in the case noted below[6] in which the defendant in a suit against a State Railway was described as the Secretary of State for India instead of the Governor-General in Council as required by this section.

See also the undermentioned cases.[7]

9. Information exhibited by the Advocate-General. — As seen in Note 1' sub-s. (2) of the old section, which provided that nothing in the section should be deemed to limit or otherwise affect any information exhibited by the Advocate-General in exercise of the power declared by S. 111 of the East India Company Act, 1813,[1] has been omitted

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'26) 96 Ind Cas 927 (927) (Lah). (Section 60 Excise Act—Suit by a claimant to property sold.)

Note 7

1. † ('86) 14 Cal 256 (271, 272).
(1862) 1 Hyde 37 (40, 41, 42).
('12) 15 Ind Cas 955 (959) (Cal).
('74) 6 N W P H C R 47 (51) (DB).
(1862) 1 Mad H C R 286 (292, 293, 294) (DB).
NOTE.—A Collector who, in his capacity as a District Magistrate was a member of a Municipality can be sued only in the District Court for acts done in his official capacity under Section 39 of the Bombay Act XIV of 1869. See ('76) 1 Bom 628 (629).

Note 8

1. ('10) 34 Bom 618 (631) (DB).
'84) 7 Mad 466 (478) (FB).
2. ('75) 1 Cal 11 (14) (DB).
3. ('82) 6 Bom 672 (673) (DB).
('82) 6 Bom 670 (671) (DB). (Even High Court on appeal can allow amendment.)
('04) 28 Bom 332 (337) (DB).
4. ('68) 10 Suth W R 142 (143).
5. ('39) 26 AIR 1939 Lah 298 (298).
6. ('42) 46 Cal W N 18 (20).
7. ('42) 29 A I R 1942 Pesh 33 (34) (DB). (Suit was brought by the Governor-General in Council through the Post Master General — *Held* that the words in the plaint "through the Post Master General" were merely surplusage and the suit was brought in the name of the correct plaintiff.)
('40) 27 A I R 1940 Lah 451 (454). (Suit against Provincial Government of Punjab—Description of defendant as Government Punjab Province through Deputy Commissioner instead of merely Punjab Province is not fatal.)

Note 9

1. ('10) 12 Bom L R 274 (291, 294).

from the section substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

10. Procedure in suits by or against the Government. — See Section 80 and Order 27.

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80. [S. 424.] No suit shall be instituted against [a]the Crown] or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been [b]delivered to, or left at the office of —

Notice.

(*a*) in the case of a suit against the Central Government, a Secretary to that Government ;

(*b*) in the case of a suit against the Crown Representative, the Political Secretary ;

(*c*) in the case of a suit against a Provincial Government, a Secretary to that Government or the Collector of the District, and

(*d*) in the case of a suit against the Secretary of State, a Secretary to the Central Government, the Political Secretary and a Secretary to the Provincial Government of the Province where the suit is instituted],

and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

[1877, S. 424; See O. 27.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the words "the Secretary of State for India in Council."

b. Substituted by *ibid* for "in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the District."

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. Applicability of the section.
4. Act of State. See Note 57 on S. 9.
5. "Act purporting to be done by such public officer in his official capacity."
6. "Public officer," who is. See S. 2 (17).
7. Suits against Municipalities.
8. Suits against Court of Wards. See Note 5.
9. Suits against Railway administration.
10. Notice is a condition precedent to the institution of the suit.
11. Suits on contracts and suits for injunctions.
12. Object of notice. See Note 2.
13. Form and sufficiency of notice.
14. Service of notice.
15. Waiver of notice and effect thereof.
16. Notice, if necessary, for amendment of plaint.
17. Fact of notice having been delivered to be mentioned in the plaint.
18. Institution of suit during currency of notice.
18a. Computation of period of notice.
19. Variance between notice and plaint.
20. Effect of death of intending plaintiff after notice.
21. Exclusion of period of notice for purposes of limitation.
22. Cases in which the Government is a necessary party. See S. 79.
23. Jurisdiction to entertain suits against Government or public officer. See S. 79.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Adding or substituting Secretary of State and notice. See Note 16.
Administrator-General and Official Trustee. See Note 3.
Common manager under S. 95, B. T. Act, VIII of 1885. See Note 11 and S. 2 (17).
Cantonment Committee. See S. 2 (17).
Dispensing with notice. See Note 11.
Notice to Collector. See Note 14.
Notice to Public Officer. See Notes 2 and 14.
Official Receivers. See S. 2 (17).
One of several plaintiffs—Notice by. See Note 13.
Provision mandatory. See Note 10.
"Secretary of State in Council." See Note 2.
Want of notice—Time for objection. See Note 15.

1. Legislative changes. — See foot-notes (a) and (b) to the text of the section.

2. Scope and object of the section.—This section, like S. 79, enacts only a rule of *procedure*[1] and does not affect the *right to sue* the Secretary of State for India in Council, which is given by the Government of India Act, 1935 (see NOTE 3 on S. 79). The object of the Legislature in requiring the notice under this section is to afford the defendant an opportunity to reconsider his position with regard to the claim made, and to make amends or settle the claim, if so advised, without recourse to the trouble and cost of litigation.[2] The terms of the section are *imperative* and admit of no exceptions or implications.[3] A suit, not complying with its provisions, cannot be entertained by any Court, and if instituted, must be rejected under O. 7 R. 11.[4] The provisions of the section

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Section 80 — Note 2

1. ('37) 24 AIR 1937 Lah 41 (49) : I L R (1937) Lah 11.

2. ('43) 30 AIR 1943 Bom 138 (139): I L R (1943) Bom 128 (DB).
('43) 30 AIR 1943 Bom 160 (164).
('42) 29 AIR 1942 Mad 288 (288). (The object of S. 80 is to give time for a public officer threatened with a suit in respect of his official acts to take the orders of his superiors on the question whether the suit shall or shall not be defended and to get permission to use the services of the law officers of the Crown.)
('40) 27 AIR 1940 Cal 1 (4) (DB).
('01) 24 Mad (279) (282) (DB). (Notice proceeding from only two out of three joint plaintiffs valid.)
('32) 19 AIR 1932 Lah 374 (376):13 Lah 672 (DB). (Application under Para. 17 of Sch. II, C. P. C. asking the Court to file an agreement to refer a dispute to arbitration does not amount to a suit within this section.)
† ('16) 3 AIR 1916 Bom 296 (297) : 40 Bom 392 (DB). (Defendant's agent threatening to demolish disputed property during currency of notice—Suit filed before expiry is good.)
('81) 7 Cal 499 (503). (The official trustee is a public officer.)
('98) 25 Cal 239 (244) (SB). (This Section applies to all kinds of suits.)
('05) 32 Cal 1130 (1134) (DB). (Objections as to notice required by this Section can be taken only by the Secretary of State.)
† ('07) 31 Cal 257 (282) (DB).
('31) 18 AIR 1931 Cal 503 (504) : 58 Cal 850 (DB). (Receiver appointed under O. 40, R. 1 with powers under R. 1, cl. 1 (d) is a public officer.)
('35) 22 AIR 1935 Bom 229 (230).
('38) 25 AIR 1938 Nag 415 (417) : I L R (1939) Nag 206.
[*See* ('81) 6 Cal 8 (10) (FB). (Decision under S. 87 of Bengal Act III of 1864.)]

3. ('41) 28 AIR 1941 Mad 446 (447, 448).
('41) 28 AIR 1941 Oudh 529 (559).
('41) 28 AIR 1941 Pat 517 (519): 20 Pat 394 (DB).
('40) 27 AIR 1940 Cal 1 (4) (DB).
✠ ('27) 14 AIR 1927 P C 176 (183) : 54 Ind App 338 : 51 Bom 725 (PC).
('33) 20 AIR 1933 All 53 (54).
('33) 20 AIR 1933 Lah 203 (207) : 14 Lah 330.
† ('38) 25 AIR 1938 Pat 127 (128). (Provisions of S. 80 cannot be relaxed in cases in which Crown happens to be only one of the defendants.)
('35) 22 AIR 1935 Sind 206 (207) : 29 Sind L R 404 (DB). (Two plaintiffs — Notice by only one plaintiff is not sufficient.)
('39) 26 AIR 1939 Pat 32 (33).
('35) 22 AIR 1935 Bom 229 (229, 230).
('38) 25 AIR 1938 Mad 583 (584) (DB).
Also see Note 11.

4. ('43) 30 AIR 1943 All 158 (160).
('43) 30 AIR 1943 Mad 284 (285). (In absence of notice in accordance with section, Court has no jurisdiction to entertain suit — If it does so, revision lies.)
('03) 25 All 187 (190, 193) (DB). (Notice issued by a person who dies before institution does not enure to the benefit of his legal representative.)
('38) 25 AIR 1938 Pat 127 (128). (Rejection of plaint and not dismissal of suit is the proper course.)
† ('35) 22 AIR 1935 Mad 389 (390) (DB). (Affirming, on Letters Patent Appeal, A I R 1931 Mad 175 : 54 Mad 416.)
Also see O. 7. R. 11, N. 9.

cannot be relaxed merely because the Crown or the public officer happens to be only one of several defendants.[5] Even where the Crown or the public officer is only a *pro forma* defendant, a notice under this section is necessary.[6] But in the undermentioned cases,[7] the view was held that where a suit has been instituted against several defendants one of whom is the Crown or a public officer and notice under this section has not been given, the *whole* suit is not bad but is bad only with reference to the Crown or the public officer.

The section deals with two classes of cases —

(1) Suits against the Crown.

(2) Suits against public officers.[8]

In the first class, notice under this section must be given in *all* cases.[9] In the second class, notice under this section is necessary only where the suit is in respect of any act *purporting to be done by such public officer in his official capacity.*[10]

It was held by the High Court of Lahore that an application under para. 17 of the Second Schedule of this Code (now repealed) was not a *suit* within the meaning of this section, so as to be governed by its provisions.[11]

3. **Applicability of the section.** — The provisions of this section have been made inapplicable to the following cases :

(1) Suits against the Official Trustee in which no relief is claimed against him personally. See S. 16 of the Official Trustees Act (II of 1913).

(2) Suits against the Administrator-General in which no relief is claimed against him personally. See S. 41 of the Administrator-General's Act (III of 1913).

(3) Suits of the class mentioned in S. 77 of the Punjab Tenancy Act (XVI of 1887). See section 94 of that Act.

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5. ('39) 26 AIR 1939 Pat 32 (33). (Public officer, one of the defendants.)
('38) 25 AIR 1938 Pat 127 (129). (Crown, one of the defendants.)

6. ('43) 30 AIR 1943 Mad 284 (286). (Suit under S. 14, Madras Survey and Boundaries Act, in which Government made party.)
('36) 23 AIR 1936 Pat 339 (339,340):15 Pat 353(DB).

7. ('40) 27 AIR 1940 Cal 1 (4) (DB). (Where causes of action are different failure of one owing to want of notice under this section is not fatal to the other cause of action — But where the causes of action are inseparable the whole suit will fail — Suit for declaration against A impleading R, a receiver appointed by the Court in respect of the property — Allegation of collusion against the receiver — Causes of action held inseparable.)
† ('36) 23 AIR 1936 Pat 339 (340) : 15 Pat 353. (Name of Crown as *pro forma* defendant expunged from action and suit proceeded with against others.)
('39) 26 AIR 1939 Pat 32 (33). (Decree against other defendants not affected.)
[*See also* ('38) 25 AIR 1938 Pat 127 (129). (Expunging name of Crown and proceeding with suit against other defendants held not possible where the amendment of plaint would entail a material change in the nature of the suit.)]
[But see ('41) 28 AIR 1941 Pat 461 (463).]

8. ('40) 27 AIR 1940 Mad 831 (833) : ILR (1940) Mad 929 (DB). (Liquidator appointed by Registrar of co-operative societies is not public servant and hence notice under S. 80 is not necessary — AIR 1934 Nag 291 : 30 Nag L R 240 and A I R 1939 Nag 232 not approved.)

9. ('14) 1 AIR 1914 Mad 502 (504) : 37 Mad 113 : 16 Ind Cas 947 (948) (DB). (Plaintiff asking for injunction.)
('15) 2 AIR 1915 Cal 62 (63). (The Collector to whom notice is to be given is one in whose district the suit is instituted.)
('38) 25 AIR 1938 Mad 583 (584) (DB).
† ('98) 25 Cal 239 (242, 243) (SB).
('16) 3 AIR 1916 Bom 296 (297) : 40 Bom 392 (DB)
† ('11) 35 Bom 362 (366) : 10 Ind Cas 639 (639) (DB). (Notice necessary even when asking for injunction.)
See Note 5.

10. ('41) 28 AIR 1941 Cal 643 (651) (DB). (Common manager appointed under S. 95, Beng. Ten. Act is public officer—A suit against him on a bond executed by him is not in respect of an act purporting to be done in his official capacity.)
('41) 28 AIR 1941 Oudh 529 (559). (Person appointed mutawalli by District Judge—Suit in respect of acts done by such person—Merely because such person happens to be the Deputy Commissioner who is public officer, acts done by him in his capacity as mutawalli cannot be said to be done in official capacity—Notice is not necessary.)
('40) 27 AIR 1940 Pat 516 (531) : 19 Pat 433 (DB). (Receiver appointed by Court in a suit is a public officer. Non-payment of royalty by him is not an official act.)

11. ('32)19 AIR1932Lah 374(376):13 Lah 672 (DB).

The provisions of this section do not apply to a suit brought pursuant to an undertaking given under S. 14 of the Bombay City Land Revenue Act (II of 1876).[1]

Every suit instituted under S. 42 (5) of the Burma Forest Act (IV of 1902) is subject to the provisions of this section.

The section does not apply to a suit for compulsory registration of a document under S. 77 of the Registration Act.[2] But the section applies to a suit under S. 14 of the Madras Survey and Boundaries Act (IV of 1897).[3] Where a certain property is attached in execution of a decree held by the Crown and a claim is preferred to the attached property, if on the claim being dismissed, the claimant brings a suit under O. 21 R. 63 to establish his right, the suit is only a continuation of the claim proceedings and no notice is necessary under this section.[4]

4. **Act of State.** — See Note 57 on Section 9.

5. **"Act purporting to be done by such public officer in his official capacity."**—In suits against public officers, notice under this section is necessary only —

(1) if the suit is in respect of any *act done* by such public officer, and

(2) such act *purports to have been done* by such public officer in his official capacity.[1]

Where a suit is not in respect of any *act done* by the public officer, no notice is necessary, though he is impleaded as a defendant in the suit.[2] Thus, where in a suit

Note 3

1. ('34) 21 AIR 1934 Bom 162 (163) (DB).
2. ('40) 27 AIR 1940 All 108 (111) (DB). (Section 77, Registration Act which requires such a suit to be brought within 30 days from the refusal of registration is a special provision which, under S. 4 of the Code, will prevail over S. 80 thereof.)
3. ('43) 30 AIR 1943 Mad 284 (285). (A I R 1934 Bom 162 distinguished on the ground that the suit in the case was under Bombay City Land Revenue Act, which provides a period of 30 days to bring a suit to set aside Collector's decision and being a special Act, it prevailed over C. P. Code.)
4. ('43) 30 AIR 1943 Mad 341 (341, 342). (AIR 1928 Mad 1201 : 52 Mad 465 (case under S. 49, Court of Wards Act) relied on.)

Note 5

1. ('43) 30 AIR 1943 Bom 138 (139, 140) : I L R (1943) Bom 128 (DB).
('42) 29 AIR 1942 Lah 287 (288) (DB). (Liquidator appointed by Registrar under S. 42, Co-operative Societies Act is a public officer—Suit against him for declaration that an order for contribution passed by him was illegal and *ultra vires* and for injunction to restrain him from enforcing that order — Notice is necessary.)
('41) 28 AIR 1941 Pat 438 (439).
('40) 27 AIR 1940 Cal 1 (4) (DB). (Suit against estate in hands of receiver and not against receiver personally—Notice under S. 80 is not necessary.)
('34) 21 AIR 1934 P C 96 (97) : 61 Ind App 171 : 61 Cal 470 (PC).
('10) 35 Bom 42 (45, 46) : 7 Ind Cas 993 (993) (DB). (Under S. 3 of the Bhagdari Act (Bom. Act V of 1862) collector declaring plaintiff's mortgage illegal and inoperative.)
('30) 17 AIR 1930 All 742 (744) : 53 All 44 (DB). (Report by Police Inspector of an offence under S. 332, I. P. C. is act done in official capacity.)
('39) 26 AIR 1939 Nag 232 (233). (Liquidator appointed under S. 42, Co-operative Societies Act, 1912 by order of Registrar is public officer — Suit against him under O. 21 R. 63 in respect of attachment by him—Notice is necessary.)
[*See* ('39) 26 AIR 1939 Cal 720 (721, 722) : ILR (1940) 1 Cal 73. (Suit for cancellation of a certificate under the Public Demands Recovery Act obtained by a manager of an estate under the Bengal Court of Wards Act—Notice is necessary.)]
2. ('43) 30 AIR 1943 Bom 138 (140) : ILR (1943) Bom 128 (DB). (Suit to declare that assessment on plaintiff's land was illegal and for refund of payment made by him in pursuance of demand — Payment which gives rise to a claim for refund is not an act of the Collector and notice is not necessary with respect to that claim.)
('40) 27 AIR 1940 All 108 (111) (DB). (Where on the refusal of a District Registrar to register a document executed by a receiver in insolvency acting under the orders of the District Court a suit is filed against him under S. 77 of Registration Act, the receiver is made a defendant, the latter cannot plead that he is entitled to notice under S. 80, C. P. Code.)
✣('34) 21 AIR 1934 P C 96 (97) : 61 Ind App 171 : 61 Cal 470 (PC). (Mortgage by common manager appointed under S. 95, Ben. Ten. Act—Non-payment—Suit against succeeding manager — Notice not necessary — AIR 1932 Cal 275 : 59 Cal 961 reversed.)
('33) 20 AIR 1933 Sind 1 (3) (DB). (Assuming the rights of a zamindar during pendency of suit, by common manager is not an 'act done'.)
('38) 25 AIR 1938 Cal 191 (191) (DB). (Suit against Receiver for arrears of rent—Omission of Receiver to pay rent is not an act purporting to have been done by him in his official capacity — Notice not necessary.)

against a ward of the Court of Wards, on a breach of contract or on a bond, the Collector is impleaded as the guardian *ad litem* of the ward, in order to protect the ward's interests, no notice will be necessary under this section,[3] though where the suit is in respect of an *act done* by him as agent of the Court of Wards, notice will be necessary if the second condition is also satisfied.[4] Similarly, where the Official Assignee or the Official Receiver is impleaded in a suit in which no *act* of the officer is in question, as for example, a mortgage suit or a suit for declaration of title, no notice will be necessary,[5] though where the suit is in respect of an *act* done by him, notice will have to be given if the second condition is also satisfied.[6] Similarly also, where the Official Trustee is impleaded in a suit relating to the rights of a *cestui que trust* and not to any *act done* by him, no notice is necessary under this section.[7] Where at the time when the act is done, the person doing the act is not a public officer within the meaning of S. 2 cl. (17), this section has no application.[8] So also, where at the time of the institution of the suit the defendant has ceased to be a public officer, this section does not apply.[9]

As regards the second condition that the act must be one *purporting to be done by the public officer in his official capacity*, it was held in the undermentioned cases[10] that this was limited to acts done *negligently* or *inadvertently* by the public officer and

('38) 25 AIR 1938 Nag 449 (451) : ILR (1939) Nag 200. (Mere assertion by Official Receiver of claim on behalf of insolvent's estate is not act contemplated by section.)
('35) 22 AIR 1935 Cal 726 (727) (DB). (Assessment by Municipality—Subsequent supersession of Municipality and public officer appointed by Government to perform duties of Commissioner — Suit for declaring assessment illegal and *ultra vires* — Notice under S. 80 is not necessary.)

3. ('88) 11 Mad 317 (318) (DB). (In such a case the suit is not against him at all and he defends on behalf of the minor only—1 Bom 318 explained.)
† ('89) 13 Bom 343 (347) (DB).
('81) 1881 All W N 175 (176) (DB).
('89) 1889 Pun Re No 24, p. 79.
('31) 18 AIR 1931 Sind 158 (159) : 25 Sind L R 200 (DB).
[*See also* ('38) 25 AIR 1938 Mad 612 (613). (Suit concerning title between plaint charity and temple represented by ward—Ward represented by Collector—Case held did not fall under S. 80.)]

4. † ('81) 3 All 20 (22, 23, 24) (FB).

5. ('23) 10 A I R 1923 Bom 392 (393) (DB). (Suit for declaration of title.)
† ('32) 19 AIR 1932 All 657 (658, 659) (DB). (Suit for declaration and cancellation of gift deed as fraudulent—Official Receiver impleaded as donee's father was an insolvent.)
('34) 21 A I R 1934 Nag 201 (202, 203) : 30 Nag L R 240.
✠('30) 17 A I R 1930 Bom 11 (15) (DB). (Suit on mortgage of insolvent's property.)
('27) 14 AIR 1927 All 132 (136) : 48 All 821 (DB). (Suit to enforce a charge.)
('37) I L R (1937) 2 Cal 265 (304).
[*See also* ('38) 25 AIR 1938 Nag 449 (451): ILR (1939) Nag 200. (Rival claims by Official Receiver and other creditors—Interpleader suit by debtor —Mere setting up of a claim to property on behalf of estate which receiver represents is not an act purporting to be done by a public officer in his official capacity—S. 80 is not attracted.)]
[But see ('40) 27 AIR 1940 Cal 578 (579). (Suit for declaration against Official Receiver by insolvent's wife that she is entitled to retain certain property until her dower debt is satisfied — Suit should be dismissed for want of notice.)]

6. † ('30) 17 AIR 1930 Mad 458 (463, 464) (DB). (Official Assignee taking possession of other's goods believing them to be insolvent's property.)
('32) 19 AIR 1932 All 575 (577) : 54 All 879 (DB). (Contract of lease in respect of insolvent's property.)
('34) 21 A I R 1934 Oudh 158 (161) : 9 Luck 577. (Act done by Official Liquidator.)
('24) 11 AIR 1924 All 40 (43) : 46 All 16.
† ('20) 7 A I R 1920 Bom 50 (50) : 44 Bom 895 (DB). (Same rule applies to receiver appointed under Provincial Insolvency Act.)
('31) 18 AIR 1931 Cal 61 (63) : 57 Cal 1127 (DB). (Official Receiver — Failure to use reasonable diligence in collecting rents and profits.)
('37) 24 A I R 1937 Lah 386 (387) (DB). (Suit attacking sale by Official Receiver—He is necessary party and suit is not maintainable without notice under S. 80.)

7. ('81) 7 Cal 499 (504).

8. ('35) 22 AIR 1935 All 106 (109) (DB). (Deputy Magistrate who has been appointed as the returning officer by the District Magistrate for the purposes of an election and who is doing the election work of the municipality at the time cannot be said to be a public officer who is acting in that connection in his official capacity as such public officer.)

9. ('42) 29 AIR 1942 Mad 288 (288).

10. ('04) 26 All 220 (222).
('12) 13 Ind Cas 721 (774) (Cal).
('05) 32 Cal 1130 (1134) (Observations *obiter*.)
('81) 7 Cal 499 (504). (*Obiter*.)
[*See also* ('83) 7 Bom 399 (406). (Case under Bombay District Municipal Act, VI of 1873—Meeting improperly convened.)
('90) 14 Bom 395 (402).
('76) 1 All 269 (271).
('82) 4 All 102 (107).]

did not extend to acts done *mala fide* by him. The cases given below,[11] on the other hand, have held that the section applies to all acts of public officers whether done *bona fide* or *mala fide*. In *Koti Reddi* v. *Subbiah*,[12] it was held that the words "any act purporting to be done by such public officer in his official capacity" mean any act *intended to seem* to be done by him in his official capacity. If, therefore, the act, whether done in good faith or not, was such as is ordinarily done by the officer in the course of his duties, and he desired that other persons should believe that he was so acting, the act is one *purporting* to be done by him in his official capacity within the meaning of the section.[13] Having regard to the general principles of interpretation of statutes[14] and to the dictum of the Privy Council in *Bhag Chand* v. *Secretary of State*[15] that the section does not admit of any implications or exceptions, the rulings referred to above which held that the act must be one done *negligently* or *inadvertently* cannot be considered to be good law.

But the words "act purporting to be done by such public officer in his official capacity" will not cover acts which are *outside* the sphere of his duties.[16] Thus, where a public officer insults, uses defamatory language, or assaults his subordinate,[17] or an investigating police officer assaults a witness,[18] or a public officer seizes property which he has no authority to seize,[19] the acts cannot be considered to be "acts purporting to be done" by him in his *official capacity* and notice under this section is not necessary.

See also the undermentioned cases.[20]

The suits contemplated by this section are those in which it is sought to make the public officer *personally* liable for acts done by him in his official capacity and the section does not apply where no relief is sought against the public officer personally.[21]

6. "Public officer," who is. — See Section 2 (17).

11. ('41) 28 AIR 1941 Pat 385 (387, 388) : 20 Pat 417 (DB).
('41) 28 A I R 1941 Pat 461 (462, 463). (Illegal arrest by police officer.)
†('18) 5 AIR 1918 Mad 62 (70) : 41 Mad 792 (FB).
('34) 21 AIR 1934 Pat 14 (16).
('97) 24 Cal 584 (588) (DB).
('06) 9 Oudh Cas 275 (280) (DB).
† ('24) 11 A I R 1924 All 851 (852) : 46 All 884 (DB).
(1900) 1 Low Bur Rul 152.
('07) 29 All 567 (568).
('81) 3 All 20 (23) (FB). (A Collector acting under S. 204, Act XIX of 1873, as agent of the Court of Wards is a public officer.)
('24) 11 AIR 1924 Cal 145 (148) : 50 Cal 992 (DB).
† ('97) 21 Bom 754 (772) (FB). (Official act is not necessarily a legal act—It may be an illegal one.)
('37) 24 AIR 1937 Sind 281 (284): 32 Sind LR 106.
[*See also* ('11) 33 All 540 (543, 544) : 10 Ind Cas 1 (2).
('88) 15 Cal 259 (264).]

12. ('18) 5 A I R 1918 Mad 62 (70) : 41 Mad 792 (FB).

13. ('24) 11 A I R 1924 All 851 (852) : 46 All 884 (DB).

14. See Notes on Preamble to this Code.

15. ('27) 14 AIR 1927 P C 176 (183) : 51 Bom 725 : 54 Ind App 338 (PC).

16. ('09) 36 Cal 28 (39) : 1 Ind Cas 514 (515).

17. ('10) 5 Ind Cas 467 (468) (DB) (All).

18. † ('28) 15 AIR 1928 Bom 352 (362) : 52 Bom 832 (FB).

19. ('09) 36 Cal 28 (39) : 1 Ind Cas 514 (515).

20. ('41) 28 AIR 1941 Cal 643 (651) (DB). (Common manager appointed under S. 95, Ben. Ten. Act, executing a bond in respect of loan taken by him — Such act will be 'act done by a public officer in his official capacity' but his failure to pay the loan will not be so — Suit on the bond by creditor — Notice not necessary.)
('40) 27 AIR 1940 Pat 516 (531): 19 Pat 433 (DB). (Suit for royalty of lands in possession of receiver appointed in a suit — Non-payment of royalty by receiver or surrender of lands without sanction of Court and based on individual contract between him and the plaintiff is not official act under S. 80 and notice is not necessary—Per Chatterji, J.)
('38) 25 AIR 1938 Mad 221 (223). (Deed of release executed by Official Assignee on behalf of insolvent's estate — Suit against Official Assignee for damages for breach of covenant of title in deed — No claim against the Official Assignee personally — *Held* that the suit was not one in respect of an act done by the Official Assignee in his official capacity and no notice under this section was necessary.)

21. ('42) 29 AIR 1942 Cal 394 (399) (DB). (Suit to declare the mortgage by the receiver in a partition suit with Court's permission, not binding on the parties to partition or the estate.)
('41) 28 AIR 1941 Pat 438 (439, 440). (Liquidator of co-operative society—House of member attached by him in execution of award issued by Registrar — Member claiming in suit exemption from attachment as agriculturist—Notice not necessary.)
('40) 27 AIR 1940 Cal 1 (4, 5) (DB). (Suit against estate in hands of receiver—Notice not necessary.)

7. Suits against Municipalities. — By virtue of specific provisions, analogous to this section, in the District Municipalities Acts of the various Provinces, notice of action is made necessary in the classes of suits against the Municipality, specified therein. See also the undermentioned cases.[1]

8. Suits against Court of Wards. — See Note 5.

9. Suits against Railway administration. — The Indian Railways Act (IX of 1890) provides for notice of suit to be given in suits against the Railway administration. See ss. 77 and 140 of that Act and the undermentioned cases.[1] Where, however, the railway is administered by the *Government*, a notice under the Railways Act alone is not enough and will not be a substitute for the notice required under this section.[2] Conversely, in such cases, a notice under this section alone will not be sufficient; a notice under the Railways Act also will be necessary.[3]

10. Notice is a condition precedent to the institution of the suit. — It has been seen in Note 2 that the section is mandatory and admits of no exceptions. A Court is debarred from entertaining a suit instituted without complying with the requirements of the section.[1] The only course open to the Court in a suit instituted without giving the notice required will be to reject it under O. 7 R. 11.

Note 7

1. ('40) 27 AIR 1940 Lah 451 (454). (Where the Municipal Committee has been superseded under S. 238 of the Punjab Municipal Act, the service of the notice under S. 49 of that Act and S. 80, C.P. Code, on the Deputy Commissioner who is the Collector of the District as well as the administrator of the Municipal Committee is valid and proper.)
('81) 6 Cal 8 (10) (FB). (Section 87 of the Bengal Act, III of 1864.)
('67) 7 Suth W R 92 (92). (Section 77 of Act III of 1864.)
('82) 6 Bom 580 (581). (Section 86, Bombay Act VI of 1873.)
('68) 9 Suth W R 535 (536). (Section 87 of Bengal Act, III of 1864.)
('68) 9 Suth W R 279 (280). (Do.)
('98) 22 Bom 283 (288). (Section 48 of the Bombay Act, II of 1884.)
('78) 2 All 296 (298). (Sections 40 and 43 of Act, XV of 1873.)
('01) 25 Bom 142 (150). (Section 48 of Bombay Act, II of 1884.)
('98) 22 Bom 289 (294) (FB). (Do.)
('82) 4 All 339 (342) (FB). (Section 43 of Act, XV of 1873.)
('83) 7 Bom 399 (406). (Case under Bombay District Municipalities Act, II of 1884).
('98) 22 Bom 605 (606). (Section 48 of the Bombay District Municipalities Act, II of 1884.)
('84) 8 Bom 421 (423). (Section 86, Bombay District Municipal Act, VI of 1873.)
('06) 29 Mad 539 (545). (Section 261 of Madras Act IV of 1884.)
('31) 18 AIR 1931 Mad 808 (811) : 55 Mad 207. (Municipal Councillor is not 'public officer' within S. 80, C. P. Code — As to notice, see S. 350 (1), Madras District Municipalities Act.)

Note 9

1. ('33) 20 AIR 1933 Pat 45 (47) : 12 Pat 67. (Company holding out particular official as competent to receive notice —Notice on him is good and notice to agent is unnecessary.)
('97) 24 Cal 306 (308) (DB). (Traffic Superintendent is not the Manger's Agent and notice to him is not notice to the Railway Administration.)
('06) 28 All 552 (553) (DB). (Do.)
('09) 3 Ind Cas 479 (479) (DB) (Mad). (Notice to the traffic manager was *held*, in the circumstances of the case, to be notice to the agent.)
('15) 2 AIR 1915 Cal 584 (585) (DB). (Notice to the Goods Superintendent is no notice to the agent.)
('07) 31 Bom 534 (544) (DB).
('08) 35 Cal 194 (197) (DB). (Notice to the traffic manager is no notice to the agent.)
('02) 26 Bom 669 (688) (DB). (Carriage over two Railways — Notice to one sought to be made liable is enough—But notice to both must be given when both are intended to be made liable.)
('04) 26 All 207 (210). (Do.)
('08) 12 Cal W N 165 (166). (Carriage by two railways—Notice to one cannot bind the other.)
2. ('43) 30 AIR 1943 All 158 (160). (Suit against G. I. P. Railway repesented by Secretary of State — Notice to Collector held wholly defective.)
*('28) 15 AIR 1928 Bom 421 (424) : 52 Bom 548 (DB).
('33) 20 AIR 1933 All 53 (54).
('30) 17 AIR 1930 All 476 (477) : 52 All 837 (DB).
('31) 18 AIR 1931 Pat 326 (328): 10 Pat 466 (DB).
('31) 18 AIR 1931 Pat 393 (394) (DB).
('31) 18 AIR 1931 Nag 96 (97).
3. † ('35) 22 AIR 1935 All 900 (902) (DB).

Note 10

1. ('43) 30 AIR 1943 Mad 284 (285).
('41) 28 AIR 1941 Mad 446 (447, 448).
('41) 28 AIR 1941 Oudh 529 (559).
('27) 14 AIR 1927 P C 176 (184, 185): 54 Ind App 338 : 51 Bom 725 (PC).
† ('31) 18 AIR 1931 Mad 175 (177) : 54 Mad 416. (Suit dismissed also as against defendants not falling under this section.)

11. Suits on contracts and suits for injunctions. — It was held by the High Court of Bombay in the undermentioned cases[1] that the section has no application to suits founded on *contracts*. There was also a conflict of opinion in the various High Courts as to whether the section applies to suits for *injunctions*.[2] It has now been authoritatively laid down by the Privy Council in *Bhag Chand* v. *Secretary of State*[3] that the language of the section is mandatory and admits of no implications or exceptions, that the section is applicable to all forms of action and all kinds of relief, and that the view that the section is inapplicable where the whole or part of the relief claimed is an injunction is not correct. But the decision of the Privy Council cannot be taken to mean that notice is necessary in every suit for injunction against the Secretary of State or a Public Officer,[4] without regard to the fact whether the other conditions necessary for the applicability of the section are satisfied. Thus, the section will apply only when the suit is in respect of an *act done* by the public officer. The words "act purporting to be done" cover only a *past act*, and do not include a future act threatened to be done. A suit therefore *merely* for an injunction, *not based upon any past act* of the public officer, is not within the scope of the section and no notice is necessary in such a case.[5] But if the suit is laid on a past act of such officer, the fact that an injunction is also prayed for will not take the case out of the operation of the section.[6] The High Court of Lahore, however, seems to be of the opinion that the Privy Council decision will apply even to suits *merely in respect of acts threatened to be done*.[7]

12. Object of notice. — See Note 2.

Note 11

1. † ('01) 25 Bom 387 (394) (DB). (Specific performance.)
('98) 22 Bom 637 (639) (DB). (Do.)
('95) 19 Bom 407 (417) (DB).
('96) 20 Bom 697 (699) (DB).
('10) 34 Bom 583 (589) (DB). (The section applies to actions substantially in tort although they may be treated for certain purposes as actions *ex contractu*.)
('03) 27 Bom 424 (450) (DB). (Where no injunction can be claimed against the Secretary of State, notice is not dispensed with because the plaintiff asks for an injunction.)

2. ('24) 11 AIR 1924 Bom 1 (11, 12) : 48 Bom 87 (DB). (Overruled in AIR 1927 P C 176 : 54 Ind App 338 : 51 Bom 725 (PC).)
('16) 3 AIR 1916 Bom 296 (297) : 40 Bom 392 (DB). (Suit for injunction—Notice *held* not necessary on facts only.)
('20) 7 AIR 1920 Bom 419 (420) : 44 Bom 555. (No.)
('12) 15 Ind Cas 539 (540) (DB) (Bom). (Yes.)
('12) 37 Bom 243 (250) : 17 Ind Cas 876 (878) (DB). (No.)
('11) 35 Bom 362 (367) : 10 Ind Cas 639 (640). (Yes.)
('98) 22 Bom 230 (231) (DB). (No.)
('98) 22 Bom 636 (637) (DB). (No.)
('09) 36 Cal 28 (39) : 1 Ind Cas 514 (515). (No.)
('09) 3 Sind L R 175 (176) : 4 Ind Cas 1156 (1157) (DB). (No.)
('06) 28 All 600 (603). (No—Per Knox, J. dissented.)
† ('20) 7 AIR 1920 Mad 723 (727) (DB). (Yes.)
('14) 1 AIR 1914 Mad 502 (504) : 37 Mad 113 : 16 Ind Cas 947 (949). (Yes.)
('13) 6 Sind L R 123 (123, 124) : 19 Ind Cas 361 (361). (Yes.)
('13) 6 Sind L R 250 (251) : 19 Ind Cas 838 (840) (DB). (Yes.)

3. ✣ ('27) 14 AIR 1927 P C 176 (184, 185) : 54 Ind App 338 : 51 Bom 725 (PC). (Followed in AIR 1932 Cal 163 : 58 Cal 1288.)
See the following cases also :
('34) 21 AIR 1934 P C 96 (97) : 61 Cal 470 (PC). (This section applies to suits based on contract — Approving AIR 1932 Cal 275 : 59 Cal 961 on this point.)
('33) 20 AIR 1933 Sind 4 (5). (Official Assignee advertising for sale—Suit for partition and possession and injunction against him — Subsequent abandonment of prayer for injunction cannot validate suit.)
('27) 14 AIR 1927 Bom 649 (650) (DB).
('20) 7 AIR 1920 Cal 575 (579) (DB). (Suit against common manager appointed under Bengal Tenancy Act.)
† ('32) 19 AIR 1932 Cal 275 (281) : 59 Cal 961. (Do—On a simple mortgage bond.)
('14) 22 Ind Cas 36 (36) (DB) (Cal). (Suit under S. 104H of the Bengal Tenancy Act by tenure-holders against Secretary of State as landlord.)
('30) 17 AIR 1930 Lah 708 (709) (DB). (Declaratory suit.)
('38) 25 AIR 1938 Mad 221 (223). (The section covers cases both in contract and in tort.)
Also see Note 2.

4. ('33) 20 AIR 1933 Lah 203 (207) : 14 Lah 330.

5. ('31) 34 Mad L W 993 (994). (Wherein AIR 1927 P C 176 : 54 Ind App 338 : 51 Bom 725 (PC). was sought to be explained.)
('27) 14 AIR 1927 Mad 166 (168, 170) : 50 Mad 239 (DB).

6. ('27) 14 AIR 1927 P C 176 (184) : 54 Ind App 338 : 51 Bom 725 (PC).

7. ('31) 18 AIR 1931 Lah 703 (703) : 12 Lah 260 (DB). (Suit to restrain threatened sale by Official Receiver.)
('37) 24 AIR 1937 Lah 380 (382).

13. Form and sufficiency of notice. — It is not necessary that the notice should be in any particular or technical form.[1] It should not be strictly construed as if it were a pleading and it need not set out all the details and facts of the case.[2] But it must *substantially* fulfil its object in informing the parties concerned generally of the nature of the suit intended to be filed.[3] Thus, it is essential that the notice should state the *cause of action* and the *relief* claimed;[4] the phrase "cause of action" need not in this connexion be narrowly construed and the notice is sufficient if it informs the defendant substantially of the ground of complaint.[5] Where a claim is made in the notice for a larger amount of money as due from the defendant, the fact that in the suit the claim is reduced to a smaller amount does not change the cause of action for the suit or make the notice invalid.[6] Where the cause of action has not arisen at all, a notice under the section is not valid.[7] But where a cause of action exists of which notice is given, such notice is not bad merely because it refers to a possible further claim which may arise before a suit is brought.[8] A notice which does not state the cause of action or the intention to file a suit,[9] or a notice merely objecting to, and asking for, the reconsideration of the order complained of,[10] or a mere objection to an entry in the settlement roll under the Bengal Tenancy Act,[11] or a mere report to the Deputy Commissioner,[12] will not constitute a valid notice under the section.

Note 13

1. ('89) 1889 Bom P J 50.
('34) 21 AIR 1934 Pat 346 (348).
2. † ('03) 27 Bom 189 (220).
('34) 21 AIR 1934 Pat 346 (349).
('26) 13 AIR 1926 Mad 408 (409).
† ('33) 20 AIR 1933 Mad 105 (107, 108).
('38) 25 AIR 1938 Nag 415 (418) : ILR (1939) Nag 206. (Full details of the claim need not be given —Notice to be interpreted in the light of commonsense.)

3. ('42) 29 AIR 1942 Cal 343 (345) : ILR (1942) 1 Cal 211 (DB). (Copy of plaint annexed with notice and indicating that the plaintiffs are suing in representative capacity—Notice not fatally defective for not stating that suit is in representative capacity.)
('03) 27 Bom 189 (206).
('34) 21 AIR 1934 Cal 187 (189) (DB). (Notice saying that cause of action and relief are described in the annexed copy of plaint which forms part of notice though defective is substantial compliance.)
('34) 21 AIR 1934 Pat 346 (348, 349). (Notice given jointly by several plaintiffs in different suits —Sum of all amounts not exceeding amount mentioned in notice—Notice is not illegal merely because notified claim is split up.)
('93) 17 Bom 307 (310).
('26) 13 AIR 1926 Mad 408 (409).
† (1878) 3 C P D 423 (428). Smith and Co. v. West Derby Local Board.
(1845) 13 M & W 361, Jones v. Nicholls.
('83) 13 Cal L Rep 195 (199) (DB).
('91) 14 Mad 386 (390) (DB).
('29) 16 AIR 1929 Sind 61 (63).
('38) 25 AIR 1938 Pat 556 (557):17 Pat 345 (DB). (*Held* that in this case there was sufficient indication of the cause of action.)

4. ('43) 30 AIR 1943 Bom 138 (139) : ILR (1943) Bom 128 (DB).
(1810) 2 Camp 196, Sabin v. De Burgh.
[*See* ('30) 17 AIR 1930 Cal 721 (721). (Notice and plaint at variance as to relief.)]
[But see ('38) 25 AIR 1938 Nag 415 (417) : ILR (1939) Nag 206. (Where the defendant knew the nature of the suit that would be brought nonmention of relief claimed in the notice does not make it bad.)]

5. ('28) 15 AIR 1928 Cal 74 (83) : 54 Cal 969. (But it must be stated with precision.)
('04) 8 Cal W N 913 (916).
('03) 25 All 187 (191) (DB).
('01) 24 Mad 279 (282) (DB).
('37) 41 Cal W N 92 (96) (DB).
† ('38) 25 AIR 1938 Pat 556 (557) : 17 Pat 345. (To state a cause of action it may be sufficient to give a legal description by which a particular cause of action is known, such as damages for breach of contract and damages for negligence.)

6. ('37) 41 Cal W N 92 (96) (DB). (Though the notice should, in every case, state with precision the cause of action, the mere reduction of the claim does not make the notice defective.)
[*See also* ('38) 25 AIR 1938 Nag 415 (417) : ILR (1939) Nag 206. (Alternative and lesser claim not mentioned in notice cannot derogate from plaintiff's right to have suit tried on issue claimed in the notice.)]

7. ('43) 30 AIR 1943 Bom 138 (139):I L R (1943) Bom 128 (DB).
('28) 15 AIR 1928 Cal 74 (83) : 54 Cal 969.

8. *See also* ('43) 30 AIR 1943 Bom 138 (140) : I L R (1943) Bom 128 (DB). (Notice regarding illegal assessment of tax—Suit may include claim for refund of amounts levied after notice.)
('41) 28 AIR 1941 Oudh 355 (358) : 16 Luck 421. (Suit in regard to illegal tax—Notice not bad in regard to sums recovered after date of notice.)

9. ('12) 16 Ind Cas 445 (446) (DB) (Bom).
10. ('67) 7 Suth W R 92 (92) (DB).
11. ('13) 22 Ind Cas 36 (36) (DB) (Cal).
12. ('23) 10 AIR 1923 Rang 250 (251).

It is also essential that the notice should *state* the names, descriptions and places of residence of *all* the plaintiffs.[13] But, there is a conflict of decisions as to whether a notice otherwise sufficient under the section is invalid on the ground that it has not been *given* by all the plaintiffs. According to one view such notice is sufficient[14] while the other view it that such notice is not sufficient.[15]

A notice given by a *pleader* on behalf of his client is sufficient for the purpose of this section.[16]

14. Service of notice. — The amendments in the section made by the Adaptation of Indian Laws Order of 1937, have made a change as to the officers to whom notice is to be given in the case of a suit against the *Crown*. Formerly, such notice was to be given, in *all* cases, to a Secretary to the Local Government or the Collector of the District in which the suit was to be instituted. Now, the notice is to be given to the various officers specified in the section and they are not the same in all suits against the Crown.[1] But where a notice was duly served under the section before the above amendments, the suit in pursuance of such notice is not bad though instituted after the amendments.[2] The notice under this section may be served personally or by post.[3]

15. Waiver of notice and effect thereof.— A notice under the section is given for the benefit of the defendant and there is nothing to prevent him from waiving the notice or from being estopped by his conduct from pleading the want of notice.[1] Thus, where objection as to notice was taken in the written statement, but no issue was raised on the point and no objection was taken subsequently at any stage of the trial in the Court of first instance, it was held that the notice was waived.[2] Where no objection is

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13. ('42) 29 AIR 1942 Bom 161 (165):ILR (1942) Bom 357 (DB). (Notice not bad on the ground that surnames, castes or occupations of the proposed plaintiffs have not been mentioned in the notice.)
('12) 40 Cal 503 (509): 16 Ind Cas 849 (850)(DB).
('35) 22 AIR 1935 Bom 229 (230). (The word "plaintiff" in S. 80, in singular must be construed in plural.)
[*See* ('31) 18 AIR 1931 Cal 61 (64):57 Cal 1127.]
[*See also* ('41) 28 AIR 1941 Pat 517 (526) : 20 Pat 394 (DB). (Notice to Secretary of State by firm—Objection by defendant that firm was unregistered—Plaint amended and names of owners of firm substituted—Defendants having knowledge that plaintiffs were carrying on business in name of firm by which notice was given, it must be deemed to be on behalf of substituted plaintiffs.)
(1825) 4 B & C 681, James v. Swift.]
14. ('01) 24 Mad 279 (282) (DB). (Notice by two out of three plaintiffs.)
[*See also* ('39) 26 AIR 1939 Oudh 196 (202).(Notice by transferor, one of co-plaintiffs, is enough for continuance of suit by other transferee co-plaintiff after former's death — Decree passed is not a nullity.)]
15. ('35) 22 AIR 1935 Sind 206 (207) :29 Sind LR 401 (DB).
('35) 22 AIR 1935 Mad 389 (390) (DB). (Affirming AIR 1931 Mad 175 : 54 Mad 416—Entire suit is bad and cannot be proceeded with even by plaintiff who has complied with section.)
† ('12) 40 Cal 503 (510) : 16 I. C. 849 (850) (DB).
16. ('28) 15 AIR 1928 Bom 338 (340)(DB).(*Obiter.*)

Note 14

1. *See* ('43) 30 AIR 1943 All 158 (160). (Suit against Secretary of State as representing G. I. P. Railway—Notice to Collector of place where suit is instituted is wholly defective.)
('40) 27 AIR 1940 Lah 451 (454). (Case before amendments — Suit against Municipality after being superseded—Notice to the Deputy Commissioner who is Collector of District and also administrator of the committee—Notice is valid and proper, it having served the purpose of informing the intention of plaintiff to sue the Secretary of State.)
2. ('40) 27 AIR 1940 Lah 455 (456) (DB).
3. ('91) 1891 Pun Re No. 71, p. 341.
[*See* ('31) 18 AIR 1931 Cal 503 (504) : 58 Cal 850. (Service on son of public officer—Invalid—O. 48 R. 2 does not control this section.)]

Note 15

1. ('42) 29 AIR 1942 Bom 339 (340) (DB).
† ('07) 34 Cal 257 (282) (DB). (Per Mookerjee, J.)
('90) 1890 Pun Re No. 155, p. 504.
('33) 20 AIR 1933 Mad 917 (919).
('33) 20 AIR 1933 Sind 1 (3).
('17) 4 AIR 1917 Cal 614 (615) (DB). (Plaint amended— Defendant in additional written statement, not objecting to want of further notice of two months—Objection was deemed to have been waived.)
2. ('07) 34 Cal 257 (282) (DB).
('31) 18 AIR 1931 Cal 175 (178) (DB). (Objection taken after two years and only in a supplementary written statement and pressed after plaintiffs' right became barred—Waiver.)
[But see ('38) 25 AIR 1938 Mad 583 (584) (DB). (Trial Court through negligence omitting to frame issue on point of want of notice — Government

raised in the Court of first instance, it cannot be pleaded for the first time in special appeal.[3] But the mere failure to raise the objection in the written statement cannot *per se* be regarded as a waiver, if it was raised practically before the trial had commenced and before any prejudice could have been caused to the plaintiffs by the lateness of the stage at which the objection was raised.[4]

Some decisions have, however, taken the view that the section being mandatory, its provisions cannot be waived by the defendant.[5] In *Secretary of State* v. *Sagarmal Marwari*,[6] the following rule was laid down: Where the applicability of the section depends on proof of certain facts and the Secretary of State does not deny facts alleged in the plaint, he would, under the ordinary rule of pleadings be held to have waived his objection as to the proof of those facts. For instance, where the plaintiff states in the plaint that the notice has been sent with all the requisites beyond the period of two months or that the notice has been served on a certain date which is beyond two months of the date of the suit, and the Secretary of State does not deny that the notice was received by him or does not raise any objection, he cannot during the trial be heard to say that he has not received the notice and would be debarred from challenging the facts alleged in the plaint in the course of the trial. But where the facts are admitted by the plaintiff himself and he falls under the express provisions of the statute, though in a Procedure Code, no question of waiver can arise. Hence, where the facts stated in the plaint themselves show that the suit has been instituted before the expiry of two months from the issue of the notice it cannot be said that silence on the part of the Secretary of State to plead the section as a bar to the maintainability of the suit amounts to an admission by him that the section is not a bar to the suit or to a waiver of the objection based on the section.[7]

An objection as to notice cannot be taken by a defendant other than the Secretary of State or other public officer for whose benefit the notice is intended,[8] or by a transferee from the Secretary of State.[9]

16. Notice, if necessary for amendment of plaint.—Where an amendment of the plaint is necessitated by the discovery of facts previously unknown to the plaintiff and the relief asked for in the plaint is not altered by the amendments, a further notice under the section is not necessary.[1] But where the amendment introduces a *new cause of*

Pleader also through negligence omitting to make application regarding it but all along resisting suit—Point regarding notice cannot be deemed to have been waived by the Secretary of State.)]

3. ('76) 1 All 269 (271) (DB).
('34) 21 AIR 1934 Pat 354 (355) (DB). (Plea of want of notice not taken for over two years — Another suit on the same cause of action impossible — Plea must be taken to have been waived.)
('34) 21 AIR 1934 Nag 201 (202): 30 Nag L R 240.

4. ('25) 12 AIR 1925 All 241 (243): 47 All 291 (DB).
[*See* ('42) 29 AIR 1942 Bom 339 (340) (DB). (Any prejudice to the plaintiff caused by the delay would result in the defendant being deemed to have waived his right to notice, even though delay, however long, would not necessarily by itself be a ground for holding that he had waived it: 34 Cal 257; 40 Cal 503 and A I R 1925 All 241: 47 All 291 relied on—Objection as to notice not taken until two years after the issues were framed and by that time plaintiff's rights under Specific Relief Act were barred.)]

5. ('41) 28 AIR 1941 Mad 446 (447, 448).
('37) 24 AIR 1937 Sind 291 (291, 292): 32 Sind L R 67 (DB).

6. ('41) 28 AIR 1941 Pat 517 (519): 20 Pat 394 (DB).

7. *See also* ('43) 30 AIR 1943 Bom 160 (163, 164). (Where a plaint avers that notice has been served within the meaning of S. 80 and that averment is not traversed in the written statement, the service of notice may be taken as admitted and leave thereafter should not be granted to deny what has been admitted either expressly or by implication, especially when a fresh suit by plaintiff would be barred by limitation: 34 Cal 257 held not good law after A I R 1927 P C 176: 54 Ind App 338: 51 Bom 725 (P C).)

8. ('42) 29 AIR 1942 Bom 339 (340) (DB).
('12) 40 Cal 503 (510): 16 Ind Cas 849 (850) (DB).
† ('05) 32 Cal 1130 (1134) (DB).
('33) 20 AIR 1933 Pat 49 (49).

9. ('07) 10 Oudh Cas 49 (54) (DB).

Note 16

1. ('03) 30 Cal 36 (72) (DB). (Confirmed in 32 Cal 605: 32 Ind App 93 (PC). (Suit against Secretary of State — Sub-Collector subsequently added as

action not specified in the original notice, as for example, where a suit based on negligence is sought to be amended into one based on nuisance, a further notice is necessary.[2] Similarly, where a plaint against a person is sought to be amended by substituting the Secretary of State in the place of the original defendant,[3] or by adding him as an additional defendant, and the effect of such addition would be to raise a question for decision as between the plaintiff and the Secretary of State, notice under the section is necessary[4] and, in fact, the application to add the Secretary of State as a party should state that the required notice has been given.[5] Where, however, a notice has been properly given to the Railway administration under S. 77 of the Railways Act, but the Railway is taken over by the Secretary of State subsequent to the notice, no second notice to the Secretary of State under this section is necessary to be given, before filing the suit.[6] Nor is a notice necessary where the defendant's interest devolves on the Government during suit.[7]

17. Fact of notice having been delivered to be mentioned in the plaint. — The section requires that the plaint shall contain a statement that the notice under the section has been delivered or left as required. But the non-mention of the fact will not necessarily entail a dismissal of the suit. The plaint may be amended by adding the statement and the suit proceeded with.[1] An averment in the plaint that a notice under this section is "sent" to the officer concerned is not sufficient under the section as the words "delivered" or "left" are not used as provided by the section.[2]

18. Institution of suit during currency of notice. — It has been seen in Notes 2 and 10 that the section is mandatory. It follows that a suit cannot be instituted before the expiry of the two months of notice.[1] But, where a suit instituted before the expiry of the two months' period has been withdrawn with liberty to bring a fresh suit, such fresh suit can be brought on the basis of the same notice.[2] Where two notices have been issued successively, a suit brought after the expiry of two months from the first notice but within two months from the second notice, would not be premature if the second notice does not cancel or annul the first one but merely amplifies it.[3]

18a. Computation of period of notice. — In calculating the period of two months provided by this section, the day of the delivery of the notice must be excluded.[1] Section 10 of the General Clauses Act does not apply to the computation of time under this section.[2]

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defendant — No separate relief claimed against him for any act done by him — No notice is necessary.)

2. ('07) 34 Cal 257 (281).
('12) 38 Cal 797 (804) : 13 Ind Cas 370 (372).

3. ('10) 4 Oudh Cas 133 (138) (DB).

4. ('90) 1890 Bom P J 156. (NOTE. — The section does not prevent a Court from adding the Secretary of State as a party to the suit. See 9 Cal 271 (276) and 1908 Pun W R No. 22 (p. 22).)

5. ('96) 1896 All W N 22 (22) (DB).

6. ('28) 15 AIR 1928 Mad 599 (601).

7. † ('26) 13 AIR 1926 All 585 (586).
('31) 18 AIR 1931 Sind 158 (159) : 25 Sind L R 200 (DB). (Manager of incumbered estates added as representing defendant in pending suit.)
[*See* ('33) 20 AIR 1933 Sind 1 (3).]

Note 17

1. ('04) 8 Cal W N 913 (916).
('35) 22 AIR 1935 Pat 86 (87). (Distinguishing AIR 1931 Cal 503 : 58 Cal 850.)

2. ('37) 24 AIR 1937 Sind 291 (292): 32 Sind L R 67 (DB).

Note 18

1. ('43) 30 AIR 1943 Bom 138 (139) : ILR (1943) Bom 128 (DB).
('41) 28 AIR 1941 Mad 446 (447, 448).
('41) 28 AIR 1941 Pat 517 (519) : 20 Pat 394 (DB).
('97) 24 Cal 584 (588) (DB).

2. † ('35) 22 AIR 1935 Bom 21 (22, 23) : 59 Bom 149 (DB).

3. ('39) 26 AIR 1939 Cal 758 (760). (Suit for correction of settlement record — Second notice merely adding a certain plot which was omitted from the first notice.)

Note 18a

1. ('43) 30 AIR 1943 Mad 284 (286).
('41) 28 AIR 1941 Mad 446 (447, 448).

2. ('43) 30 AIR 1943 Mad 284 (286). (NOTE. — In this case, the trial Court had held that the notice under this section was sufficient because of the provisions of S. 10, General Clauses Act—The High Court in revision held that S. 10 had no application— It is not clear how the lower Court had come to apply S. 10 to the case.)

19. Variance between notice and plaint. — Where there is no *substantial* variation between the notice and the plaint, the maintainability of the suit will not be affected.[1] But where the case set up in the plaint is different from the case stated in the notice, the suit is not maintainable.[2]

20. Effect of death of intending plaintiff after notice. — A notice given by a person to the Secretary of State of an intended suit will not, where such person dies before the institution of the suit, enure to the benefit of his legal representative and the latter cannot institute the suit without giving fresh notice.[1]

21. Exclusion of period of notice for purposes of limitation. — Under S. 15 (2) of the Limitation Act, the period of a notice under this section must be excluded in computing the period of limitation for the suit. See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., S. 15, Notes 19 and 20.

22. Cases in which the Government is a necessary party. — See Section 79.

23. Jurisdiction to entertain suits against Government or public officer. — See Section 79.

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81. [Ss. 427, 428.] In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity —

Exemption from arrest and personal appearance.

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and,

(b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

[1877, Ss. 425, 428; 1859, S. 72. See O. 27, R. 8.]

1. Scope of the section. — The exemption from arrest or attachment under this section is only with reference to arrest or attachment before judgment and not in execution (see O. 27, R. 8). Clause (b) may be compared with S. 133 of the Code which empowers the Provincial Government to exempt from personal attendance any person whom the Government considers, in view of his rank, to be entitled to such exemption.

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82. [S. 429.] (1) Where the decree is against [a][the Crown] or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the [b][Provincial Government].

Execution of decree.

Note 19

1. ('94) 1894 Pun Re No. 67, Page 221.
('17) 4 AIR 1917 Cal 614 (614) (DB).
† ('38) 25 AIR 1938 Nag 415 (417) : ILR (1939) Nag 206 (An alternative and a lesser claim which is not mentioned in the notice under S. 80 cannot derogate from the plaintiff's right to have the suit tried on the issue which is claimed in the notice.)
2. ('16) 3 AIR 1916 Cal 66 (67) (DB).
† ('72) 8 Beng L R 265 (275).

Note 20

1. ('03) 25 All 187 (191) (DB).

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

[See Ss. 80 and 81.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Secretary of State for India in Council."

b. Substituted by *ibid* for "Local Government."

1. **Scope and object of the section.** — The object of the section is to allow time and opportunity to the Crown or public officer to satisfy the decree amicably before execution proceedings can be started against them.[1] The section is confined to decrees passed in suits which are referred to in previous sections and which can only be instituted after service of notice under S. 80. Hence, the section applies only when there is a *suit* against the Crown or public officer and a *decree* is passed against the Crown or public officer in such suit. Thus, the section has no application to an *award* made by the Calcutta Improvement Trust Tribunal.[2]

SUITS BY ALIENS AND BY OR AGAINST [a][FOREIGN RULERS AND RULERS OF INDIAN STATES.]

83. [S. 430.] (1) Alien enemies residing in British India with the permission of the [b][Central Government], and alien friends, may sue in the Courts of British India, as if they were subjects of His Majesty.

When aliens may sue.

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts.

Explanation. — Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the [c][Central Government] shall, for the purpose of sub-section (2), be deemed to be an alien enemy residing in a foreign country.

[1877, S. 430.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Foreign and Native Rulers."

b. Substituted by *ibid* for "Governor-General in Council."

c. Substituted by *ibid* for "Government of India."

Synopsis

1. Scope and applicability of the section.
2. Alien enemy.
3. Suits by alien enemies.
4. Service of summons in a foreign country.
5. Contracts with alien enemies.
6. Limitation. See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., S. 9, Note 4.

Section 82 — Note 1

1. ('42) 29 AIR 1942 Cal 569 (570) : I L R (1942) 2 Cal 528 (DB).
2. ('42) 29 A I R 1942 Cal 569 (570, 571) : I L R (1942) 2 Cal 528 (DB). (Such an award is not a decree for all purposes of C. P. C. — Even assuming it is a decree, it is not one made in suit against Crown or public officer.)

NOTE to the Synopsis. See the Notes indicated for the following topics :

"Alien enemies residing in British India with the permission of the Central Government." See Notes 1 and 3.

"Permission"—Express or implied. See Note 3.

"Person" includes "corporation." See Note 1 and also Notes on Order 29.

Suits against alien enemies not prohibited. See Note 1.

1. Scope and applicability of the section. — Sections 83 to 88 of the Code deal with suits by aliens and by or against Foreign Rulers and Rulers of Indian States. This section deals with the question as to when aliens may sue in the Courts of British India. Alien friends are on the same footing as if they were subjects of His Majesty. Thus, an alien prince is competent to sue in a British Indian Court.[1] A foreign corporation can, in its corporate character, sue in British Indian Courts, even if it is not registered under the Indian Companies Act.[2]

An alien enemy residing in British India with the permission of the Central Government may also sue in British Indian Courts.[3] The section, however, does not preclude suits *against* aliens not so residing, or affect their *right of defence* in such suits.[4] As to who is an alien enemy, see Note 2.

2. Alien enemy. — The words "alien enemy" include not only the subjects of a State at war with Great Britain but also British subjects and subjects of a neutral State who are voluntarily residing in a hostile country.[1] The test, therefore, to determine whether a person is an alien enemy, is his place of *residence* or the place where he *carries on business* and not his *nationality*.[2] In *Janson* v. *Driefontein Consolidated Mines, Ltd.*,[3] Lord Lindley observed as follows :

> "When considering questions arising with an alien enemy, it is not the nationality of a person but his place of business during the war that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts."

The residence, however, must be a *voluntary* one. A prisoner of war kept in the enemy country cannot be regarded as an alien enemy.[4] But the residence need not be a permanent one, provided it is not of a temporary character.[5] A person residing in a hostile country for a *substantial period* of time acquires the disabilities of an alien enemy during the period, unless such residence is with the consent of the Crown.[6]

3. Suits by alien enemies. — An alien enemy *residing in a foreign country* cannot sue in British Indian Courts.[1] Thus, where some of the partners are resident in a

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Section 83 — Note 1

1. ('88) 1888 Pun Re No. 191, p. 491 (500). (Raja of Faridkot is competent to sue in the British Courts under one or other of old Ss. 430-433.)
('15) 2 AIR 1915 Mad 116 (116) (DB). (Temple to which suit land belonged in French India —Plaintiff French subject—Suit land in British India—Suit maintainable in British India.)
2. † ('03) 30 Cal 103 (105, 106).
3. See Note 3.
4. ('14) 1 AIR 1914 Sind 107 (108):8 Sind L R 329.
('17) 4 AIR 1917 All 374 (375):39 All 377. (Application to British Indian Court for service of summons against alien enemy in the alien enemy country.)
† ('17) 4 A I R 1917 Cal 838 (841) : 43 Cal 1140 (DB). (Suit against non-resident alien enemy maintainable in British India even during war with enemy country.)

Note 2

1. ('17) 4 AIR 1917 Low Bur 66 (67).
2. † ('20) 7 AIR 1920 Lah 4 (5) : 1 Lah 276 (DB).
(1802) 6 R R 724, M'Connell v. Hector.
(1915) 1 K B 857 (868), Porter v. Freudenberg.
('20) 7 A I R 1920 Bom 285 (286, 291, 292) : 44 Bom 61. (Neutral subject having a commercial domicile in an enemy country and with no intention of removing that domicile to a neutral country is an alien enemy.)
3. (1902) 1902 App Cas 484 (501).
[*See also* ('23) 10 AIR 1923 Nag 121 (122), Citing 1902 App Cas 484.]
4. ('20) 7 AIR 1920 Lah 4 (6) : 1 Lah 276 (DB).
5. ('20) 7 AIR 1920 Lah 4 (6) : 1 Lah 276 (DB).
6. (1916) 2 App Cas 307 (328), Daimler Co. v. Continental Tyre & Rubber Co. (Per Lord Shaw.)

Note 3

1. † ('20) 7 AIR 1920 Lah 4 (6) : 1 Lah 276 (DB).

hostile country, the firm cannot maintain an action in British Indian Courts.[2] An alien enemy residing in *British India* can sue in such Courts if such residence is with the permission of the Governor-General in Council.[3] The permission need not be express, but may be presumed from the circumstances. Where the alien enemy has resided in British India from before the outbreak of war and continues to remain after such outbreak without being ordered to remove himself, permission may be presumed.[4] Where a German lady filed a petition for divorce in the Allahabad High Court, while England was at war with Germany, the fact that she was not interned was construed as an implied permission to reside by the Government of India.[5] The Sind Judicial Commissioner's Court has, however, in the undermentioned case[6] taken the view that the permission must be express. The observation is *obiter* and is against the trend of authorities and cannot be considered sound.

4. Service of summons in a foreign country. — A summons can be transmitted by a British Indian Court to the Foreign Office through the High Court in England for being served on the defendant residing in any enemy country.[1]

5. Contracts with alien enemies. — It is a universal principle of public law that commercial intercourse between States at war with each other is interdicted.[1] But this prohibition is, however, confined to intercourse which is *inconsistent* with the state of war between the belligerents, including any act or contract which tends to increase the resources of the enemy. A lease granted after the commencement of hostilities, by an alien enemy in British India on behalf of one who is not shown to be an enemy subject, the rent whereof is intended to be used in this country and by persons who are not enemies, is enforceable.[2] A debtor indebted to an alien enemy is not entitled to a suspension of interest on his debt from the date the war began to the date when the enemy obtained a licence to trade in British India.[3]

6. Limitation. — See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn. Section 9, Note 4.

When foreign States may sue.

84. [S. 431, Cl. (b).] (1) A foreign State may sue in any Court of British India :

Provided that such State has been recognized by His Majesty or by the [a][Central Government] :

Provided, also, that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity.

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2. † ('20) 7 AIR 1920 Lah 4 (5) : 1 Lah 276 (DB).
(1917) 33 T L R 20 (21). Candilis & Sons v. Victor & Co.
[See however (1919) 1919 App Cas 59 (64, 77, 133). Rodriquez v Speyer Brothers. (Firm dissolved on outbreak of war as one partner became alien enemy – Firm can maintain suit during war in respect of pre-war debt due to it.)]
3. † ('17) 4 AIR 1917 All 374 (375) : 39 All 377.
('15) 2 AIR 1915 Low Bur 33 (34) (DB).
4. † ('18) 5 AIR 1918 Mad 1294 (1295).
(1916) 1 K B 284 (301, 302, 304, 305). Schoffenius v. Goldberg. (Internment of registered alien enemy does not operate as cancellation of the registration —He has right to sue.)
(1794) 2 Anst 462, Denbigny v. Dayallon.
100 Mass 561, Kershaw v. Kelsey.
[*See also* (1902) 1902 App Cas 484 (495, 498), Janson v. Driefontein Consolidated Mines, Ltd.]
5. ('17) 4 AIR 1917 All 374 (375) : 39 All 377.
6. ('14) 1 A I R 1914 Sind 107 (108) : 8 Sind L R 329.

Note 4

1. ('17) 4 AIR 1917 All 374 (375) : 39 All 377.

Note 5

1. 8 Wall 185, United States v. Lane. (Cited in AIR 1918 Mad 1294.)
2. ('18) 5 AIR 1918 Mad 1294 (1295).
3 ('20) 7 A I R 1920 Bom 294 (295) : 44 Bom 1 (DB).

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognized by His Majesty or by the [a][Central Government].

[1877, S. 431.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Governor-General in Council."

1. Legislative changes. — The second proviso to the corresponding section 431 of the former Code ran as follows :

"Provided that the object of the suit is to enforce the private rights of the head or of the subjects of the foreign State."

This was open to the interpretation that the foreign State had a general power to litigate in respect of the private rights of its subjects. This was not the intention of the Legislature and so the language of the proviso to the present section has been suitably modified so as to make it clear that a foreign State can litigate only in respect of private right vested in the head of the State or in any officer of the State in his capacity as such officer.

2. "A foreign State may sue." — The Raja of Faridkot is competent to sue in British Indian Courts.[1] A suit by a foreign State must be instituted in the name by which it has been recognised by His Majesty.[2]

3. Private rights. — The private rights spoken of in this section do not mean individual rights as opposed to those of the body politic but those private rights of the State which must be enforced *in a Court of Justice* as distinguished from its political or territorial rights which must, from their very nature, be made the subject of arrangement between one State and another. They are rights which may be enforced by a foreign State against private individuals as distinguished from rights which one State in its political capacity may have as against another State in its political capacity.[1]

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85. [S. 432.] (1) Persons specially appointed by order of the Government at the request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or at the request of any person competent, in the opinion of the Government, to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

Persons specially appointed by Government to prosecute or defend for Princes or Chiefs.

Section 84 — Note 2

1. ('88) 1888 Pun Re No. 191, page 491 (500).
[*See* ('30) 17 AIR 1930 Mad 1004 (1005, 1006) : 53 Mad 968. (Godwal Samsthanam is not a foreign State under this section.)]

2. (1867) 2 Ch App 582(592, 595), United States of America v. Wagner.

Note 3

1. ('85) 11 Cal 17 (24) (DB).
('88) 1888 Pun Re No. 191, page 491 (500).
(1861) 2 Giff 628 (681, 682), Emperor of Austria v. Dey.

[a][*Explanation.* — For the purposes of this sub-section the expression "the Government" means —

(*a*) in the case of any Indian State, the Crown Representative; and

(*b*) in any other case, the Central Government.]

(2) An appointment under this section may be made for the purpose of specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief.

(3) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.

[1877, Ss. 37, 38, 417 and 432; 1859, S. 17. See O. 3.]

a. Explanation added by the Government of India (Adaptation of Indian Laws) Order, 1937.

1. Scope of the section. — This section enacts that the persons specially appointed under this section "shall be deemed to be recognised agents." It does not exclude the other classes of recognised agents mentioned in O. 3 R. 2, and a Sovereign Prince is not prevented from suing in his own name or through a recognised agent appointed under O. 3 R. 2. This section is thus only an enabling provision,[1] and should be strictly adhered to.[2]

The section applies to Revenue Courts also.[3]

An administrator of a Native State, who is ruling the State as the representative of the Government of India and who has been appointed by the Government of India to prosecute suits on behalf of the State, is competent to institute suits on behalf of the State in British Indian Courts.[4]

2. "Sovereign Prince or Ruling Chief." — A Chief means a chieftain and a "Ruling Chief" is a chief who rules over his own territory, who may, however, be a feudatory of the British Sovereign owing allegiance and obedience to him as fixed by treaties.[1] As to persons who have been held to be Sovereign Princes and Ruling Chiefs, see the undermentioned cases.[2] Whether a particular person is a Sovereign Prince or Ruling Chief is for the Courts to decide and not for the Government.[3]

Section 85 — Note 1

1. ('40) 27 AIR 1940 Bom 172 (179) : ILR (1940) Bom 225 (DB).
('86) 1886 All W N 133 (133) (DB).
('89) 1889 Pun Re No. 165, page 576.
† ('84) 10 Cal 136 (137) (DB).
('97) 19 All 510 (512, 513) (DB).
2. ('40) 27 AIR 1940 Bom 172 (177, 179) : I L R (1940) Bom 225 (DB).
3. ('03) 25 All 635 (637) (DB).
4. ('33) 20 AIR 1933 Lah 456 (458) (DB).

Note 2

1. † ('84) 8 Bom 415 (418) (DB).
2. ('84) 8 Bom 415 (418, 421) (DB). (The Desai of Patadi, a talukdar of the fifth class in Kathiawar held to be a Ruling Chief.)
('76) 25 Suth W R 404 (405) (DB). (The Rajah of Tipperah—Sovereign Prince.)
('79) 3 Cal L Rep 417 (420) (DB). (Do.)
('83) 9 Cal 535 (552) (DB). (Do.)
('83) 12 Cal L Rep 473 (474) (DB). (Do.)
('84) 10 Cal 136 (137) (DB). (Do.)
('14) 1 AIR 1914 All 493 (494). (Do.)
('09) 1909 Pun Re No. 21, p. 45 (49). (The Rajah of Poonch—A Ruling Chief.)
('88) 1888 Pun Re No. 191, p. 491. (The Rajah of Faridkot—A Ruling Chief.)
('70) 7 Bom H C R O C 150 (169). (The Thakur of Palitana—Sovereign Prince.)
('19) 6 AIR 1919 Bom 122 (126) (DB). (Kurundwad Jahageerdars—Ruling Chiefs.)
('85) 11 Cal 17 (24) (DB). (Rajah of Cherrapoonjee —An Independent Prince.)
('75) 1875 Pun Re No. 93, p. 218 (226, 228). (Rajah of Nahan.)
('24) 11 AIR 1924 All 422 (422) : 46 All 355 (DB). (The Maharaja of Benares—A Ruling Chief.)
3. ('83) 9 Cal 535 (554).

2a. Explanation. — See the undermentioned case.[1]

3. Powers of the recognized agent appointed under the section. — The powers of a recognized agent under this section are defined in the section itself. He can validly sign and verify the pleadings on behalf of principal.[1] He can do so even *before his appointment*, under this section, provided that the appointment is made before the period of limitation for the suit has expired.[2] It has, however, been held in the undermentioned case[3] that where a suit on behalf of an Indian State filed by a *daftardar* not being an authorised agent under O. 3 R. 2 and without authority under this section is dismissed and an appeal is filed, a subsequent authority obtained under this section, pending appeal, cannot cure the defect. The agent appointed under this section can act for his principal even when the latter has not attained majority under the Majority Act, without being appointed as guardian *ad litem* by the Court.[4]

Sub-section (3) entitles an agent appointed under this section to appoint another person to make appearances, applications etc., on his behalf. Thus, it is an exception to the principle that a delegate cannot himself delegate his authority to another and should be strictly construed. The sub-section implies an active appointment by the agent under this section. Though the sub-section does not require that the appointment should be in writing, there must be some proof that the agent has authorised or appointed another to do the things mentioned in the section.[5]

4. Political Agent. — A Political Agent appointed by the Government to manage the Chief's estate generally is not as such a recognized agent under this section. See O. 3 R. 2, Note 7.

5. Discovery. — A foreign State, like any other party, is not exempt from giving discovery under the rules for discovery and inspection.[1]

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86. [S. 433.] (1) Any such Prince or chief, and any ambassador or envoy of a foreign State, may, [a][in the case of the Ruling Chief of an Indian State with the consent of the Crown Representative, certified by the signature of the Political Secretary, and in any other case with the consent of the Central Government, certified by the signature of a Secretary to that Government], but not without such consent, be sued in any competent Court.

Suits against Princes, Chiefs, ambassadors and envoys.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the

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Note 2a

1. ('39) 26 A I R 1939 Lah 279 (279, 280) (DB). (Order of 1935 appointing agent to prosecute or defend suits on behalf of Native State unless revoked is valid even after the Government of India (Adaptation of Indian Laws) Order, 1937.)

Note 3

1. ('02) 1902 Pun Re No. 41, page 152 (153).
2. † ('03) 25 All 635 (638) (DB).
('33) 20 AIR 1933 Lah 456 (458) (DB).
3. ('40) 27 AIR 1940 Bom 172 (179) : ILR (1940) Bom 225 (DB). (25 All 635 distinguished.)
4. ('25) 12 AIR 1925 Cal 513 (515) (DB).
5. ('40) 27 AIR 1940 Bom 172(179,180): ILR(1940) Bom 225 (DB). (Mere passive attitude of person appointed by Central Government in allowing another, who has filed a suit under his instructions when he had not been so appointed under this section, to continue the suit after he is so appointed is not sufficient.)

Note 5

1. (1867) 2 Ch App 582 (590, 592, 595), United States of America v. Wagner. (Cited in 11 Cal 17.)

Court in which the Prince, Chief, ambassador or envoy may be sued; but it shall not be given unless it appears to [b][the consenting authority] that the Prince, Chief, ambassador or envoy —

(a) has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immoveable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with [c][such consent as is mentioned in sub-section (1)], certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

[d][(4) The Central Government or the Crown Representative, as the case may be, may by notification in the Gazette of India authorise a Provincial Government and any Secretary to that Government to exercise with respect to any Prince, Chief, ambassador or envoy named in the notification the functions assigned by the foregoing sub-sections to the consenting authority and a certifying officer respectively.]

(5) A person may, as a tenant of immoveable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property.

[1877, S. 433.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "with the consent of the Governor-General in Council, certified by the signature of a Secretary to the Government of India."

b. Substituted by *ibid* for "the Government."

c. Substituted by *ibid* for "the consent of the Governor-General in Council."

d. Substituted by *ibid* for the original sub-section (4).

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. Suit against Sovereign Prince or Ruling Chief.
4. Consent when to be obtained.
5. "And is to be sued with reference to such property or for money charged thereon." —Sub-section (2) (c).
6. Suit by tenant of immovable property —Sub-section (5).
7. Waiver of objection to want of consent.
8. Defence of set-off—No consent is necessary.
9. Inquiry into the validity of consent.
10. Effect of non-compliance with the section.
11. Death of Ruling Chief against whom a decree is passed—Abatement of appeal.
12. Sub-section (3).
13. Notification. See Appendix IV.
14. Limitation.
15. Sovereign Prince or Ruling Chief. See Note 2 on Section 85.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Defendant becoming Ruling Prince after suit. See Note 4.
Grounds of consent, section, exhaustive of. See Note 2.
Ruling Chief in private capacity, suit against. See Note 3.

1. Legislative changes. — See foot-notes to the text of the section.

2. Scope and object of the section.—This section creates personal privilege for Sovereign Princes and Ruling Chiefs and their ambassadors and envoys.[1] "It is a modified form of the absolute privilege enjoyed by independent sovereigns and their ambassadors in the Courts in England, in accordance with the principles of international law. The difference is that while in England the privilege is unconditional, in India it is only a qualified privilege as a suit *can* be brought with the consent of the Central Government or the Crown Representative in certain circumstances. See also sub-s. (5) which permits suits in some cases even without such consent. This modified or conditional privilege is, however, based upon essentially the same principle as the absolute privilege, the dignity and independence of the ruler which would be endangered by allowing any person to sue him at pleasure, and the political inconveniences and complications which would be the result."[2] In *Gaekwar Baroda State Railway* v. *Hafiz Habib-ul-Haq*,[3] their Lordships of the Privy Council observed as follows :

"The sections (Ss. 86 and 87 of the Civil Procedure Code) relate to an important matter of public policy in India and the express provisions contained therein are imperative and must be observed."

The section is exhaustive of the cases in which sanction can be given. No sanction can be given on any other ground.[4]

It was observed by one of the Judges in the undermentioned case[5] that the immunity of a foreign Prince from the legal process of a country applies, in the case of property, only to public property of the foreign State and not to the private property of the foreign Prince. It is doubtful if such a distinction is permissible on the wording of this section.

See also Note 7.

3. Suit against Sovereign Prince or Ruling Chief. — The sanction required by the section is necessary for *all* suits against a Sovereign Prince or Ruling Chief whether in his *private capacity* or in his *sovereign* capacity.[1] But a suit against an *agent* of such Prince or Chief is maintainable without any sanction where he is *personally* liable within the meaning of S. 230 (3) of the Contract Act.[2] Similarly, a suit

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Section 86 — Note 2

1. † ('97) 21 Bom 351 (371, 372).
('12) 17 Ind Cas 444 (445) (DB) (Mad).
2. † ('97) 21 Bom 351 (371, 372). (Per Strachey, J.)
[*See also* ('21) 62 Ind Cas 778 (778) (Lah). (Section 86 does not apply to a claim of set-off in a suit against Ruling Chief.)
('05) 2 Cal L Jour 163 (165). (Unless a Sovereign Prince submits to the jurisdiction of a Court, he shall not be sued except as provided in S. 86.)]
3. ‡ ('38) 25 AIR 1938 P C 165 (167) : 65 Ind App 182: 32 Sind L R 531 : ILR (1938) All 601 (PC). (Reversing AIR 1934 All 740 : 56 All 828.)
4. † ('16) 3 AIR 1916 Mad 308 (309): 38 Mad 635: 21 Ind Cas 930 (931).
5. ('40) 27 AIR 1940 Cal 244 (248): ILR (1940) 1 Cal 344 (DB) (Per Narsing Rau, J. NOTE.—There is a learned discussion in the judgment which may usefully be referred to.)

Note 3

1. ('09) 1909 Pun Re No. 21, Page 45 (49, 50). (Suit for private property in British India of a Ruling Chief.)
‡ ('16) 3 AIR 1916 Mad 308 (309, 310) : 38 Mad 635 : 21 Ind Cas 930 (931, 932). (Ruling Chief as trustee of a temple in British India.)
('16) 3 AIR 1916 Mad 445 (446) (DB). (Do.)
('24) 11 AIR 1924 All 422 (423, 424) : 46 All 355 (DB). (Maharaja of Benares — Suit in respect of his zamindari in British India.)
('14) 1 AIR 1914 All 493 (494). (Ruling Chief as mutwalli and manager of a temple in British India.)
('75) 1875 Pun Re No. 93, p. 218 (228). (Native Prince carrying on trade in British India — Sanction necessary.)
('16) 3 AIR 1916 Mad 835 (835):39 Mad 661 (DB). (Ruling Chief as a usurper of trusteeship of a temple.)
2. ('28) 15 AIR 1928 Sind 189 (190).

against a business concern managed by the Durbar of a State is not a suit against the Prince or Chief.[3]

In the undermentioned case,[4] a suit was brought against a defendant who was described as "The Gaekwar Baroda State Railway through the Manager and Engineer-in-Chief" of the said railway. It was found that the above railway was neither a State Railway nor a company railway but was owned and managed by His Highness the Maharaja of Baroda through his own men. It was held that the suit was in reality, though not in form, a suit against His Highness the Gaekwar of Baroda and that the provisions of this section and section 87 applied to the case.

This section does not apply to proceedings under S. 184 of the Companies Act of 1913.[5] The reason is that if the Court makes an order under S. 184 and places the name of a Native Prince or Chief upon the list of contributories, it does not thereby enforce a jurisdiction against that Native Prince or Chief. But proceedings under Ss. 186 and 187 of the Companies Act of 1913 are proceedings in a Civil Court within the meaning of section 141 and by virtue of that section, this section applies to such proceedings.[6] It has been held by the Calcutta High Court that the section does not apply to a petition for adjudication as an insolvent merely because one of the creditors is a Sovereign Prince or Ruling Chief.[7]

4. Consent when to be obtained. — The consent referred to in the section must be obtained *before* the institution of the suit. A consent obtained after the institution of the suit will not validate the institution thereof.[1] Where the plaintiff wishes to amend the plaint by adding a new relief, it is necessary that sanction under this section should be obtained.[2] Where the defendant becomes a Ruling Chief or Sovereign Prince subsequent to the institution of the suit, it has been held that the suit cannot be *continued* without the sanction.[3] The reason is that the words "to sue" in the section include every step from the presentation of the plaint to the recovery of judgment.[4]

5. "And is to be sued with reference to such property or for money charged thereon" — Sub-section (2) (c). — Sub-section (2) (c) of the old section referred only to cases where the Prince or Chief was to be sued with reference to the *possession* of immovable property or for money charged thereon. The substitution of the word "property" for the word "possession" has widened the scope of the section by including all cases with reference to the *property* in the possession of the Prince or Chief. A suit for maintenance or for maintenance coupled with a prayer for the creation of a charge therefor on certain properties, is not a suit for "money *charged*" on those properties within the meaning of clause (c).[1]

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3. ('32) 19 AIR 1932 Lah 136 (137, 138) : 12 Lah 270 (DB). (Suit against a railway, managed by the Gwalior State durbar.)

4. ('38) 25 AIR 1938 P C 165 (169) : I L R (1938) All 601 : 65 Ind App 182: 32 Sind LR 531 (PC).

5. ✝('36) 23 AIR 1936 All 826 (829) : 58 All 742 (FB).

6. ('36) 23 AIR 1936 All 826 (829) : 58 All 742 (FB).
Also see S. 141 Note 2.

7. ('40) 27 AIR 1940 Cal 214 (245, 247, 249):ILR (1940) 1 Cal 344 (DB). (Per Nasim Ali, J. S. 86 does not deal with procedure and so S. 141 does not apply. Per Narsing Rau, J.—Section 86 will not apply unless the suit relates to the public property of a foreign state.)

Note 4

1. ✝ ('97) 21 Bom 351 (366).
('09) 1909 Pun Re No. 21, p. 45 (50, 51).
('69) 11 Suth W R 116 (116).
2. ('13) 22 Ind Cas 889 (891) (DB) (Cal).
3. ('21) 8 AIR 1921 Pat 23 (24) : 6 Pat L Jour 185 (DB).
4. ('97) 21 Bom 351 (365).
('21) 8 AIR 1921 Pat 23(24):6 Pat L Jour 185(DB).

Note 5

1. ('83) 9 Cal 535 (555) (DB).
('78) 3 Cal L Rep 417 (420) (DB). (Maintenance grant directed to be paid out of the revenues of a certain zamindari does not form charge on the zamindari.)
('83) 12 Cal L Rep 473 (474).

6. Suit by tenant of immovable property — Sub-section (5). — A suit for a declaration of a hereditary *proprietary right* to remain in possession of lands without payment of rent[1] or a suit by the plaintiff as cosharer against the Ruling Chief *as a cosharer* for a share of the profits[2] is not a suit brought "as a *tenant* of immovable property" within the meaning of sub-s. (5) and is not maintainable without the sanction required by the section.

Sub-section (5) refers to a *suit* against a Sovereign Prince or Chief and does not dispense with the consent required under sub-s. (3) for *execution* proceedings against such Prince or Chief.[3]

7. Waiver of objection to want of consent. — It is a general principle of law that parties can waive irregularities in *procedure*.[1] Similarly, a person for whose benefit a *privilege* has been conferred can waive the privilege. The question has arisen as to whether the objection on the ground of want of sanction under this section can be waived by the native Prince or Chief. Before the decision of the Privy Council in *Gaekwar Baroda State Railway* v. *Hafiz Habib-ul-Haq*,[2] there was a conflict of decisions on this question. It was held by the Bombay High Court that such objection could be waived by the defendant Prince or Chief and that contesting the suit on the merits without protest amounted to such waiver.[3] The Calcutta,[4] Lahore,[5] Patna[6] and Allahabad[7] High Courts also took a similar view. According to the High Court of Patna, even an application for adjournment would amount to a waiver of the privilege.[8] But it was held that the fact that the Sovereign Prince or Ruling Chief waived his privilege in one suit did not preclude him from pleading it in another suit.[9] The Madras High Court, however, held that in face of the clear language of the section, the privilege cannot be held to be waivable.[10]

The conflict has now been set at rest by the decision of the Privy Council referred to above, by which it was held that the provisions of this section are imperative and cannot be waived. Their Lordships of the Privy Council observed as follows: "Further, as already pointed out, the provisions relating to this matter are statutory. They are contained in Ss. 86 and 87, Civil Procedure Code; they are imperative and having regard to the public purposes which they serve they cannot, in their Lordships' opinion, be waived in the manner suggested by the High Court."[11]

8. Defence of set-off — No consent is necessary. — Where a person does not actually sue as plaintiff but only puts forward a claim of set-off in his defence to a suit by a Ruling Chief, no sanction is necessary to raise such a claim.[1]

Note 6

1. ('20) 7 AIR 1920 Oudh 203 (204) (DB).
2. ('24) 11 AIR 1924 All 422 (424) : 46 All 355 (DB).
3. ('35) 22 AIR 1935 Cal 664 (665, 666) (DB).

Note 7

1. ('87) 9 All 191 (203) : 13 Ind App 134 (PC).
2. ('38) 25 AIR 1938 P C 165 (167, 169) : I L R (1938) All 601 : 65 Ind App 182 : 32 Sind L R 531 (PC). (AIR 1934 All 740 : 56 All 828 reversed.)
3. ('97) 21 Bom 351 (374, 376).
4. ('18) 5 AIR 1918 Cal 985 (986) (DB). (Submission to jurisdiction—Objection to jurisdiction cannot be taken in appeal.)
5. ('03) 1903 Pun Re No. 40, page 129. (Objection to jurisdiction taken only in appeal and disallowed.)
6. ('21) 8 AIR 1921 Pat 23 (24) : 6 Pat L Jour 185 (DB). (If plaintiff ignores the bar and persists in the suit and defendant acquiesces in the procedure, waiver presumed.)
7. ('34) 21 AIR 1934 All 740 (761) : 56 All 828 (DB). (Reversed by the Privy Council in AIR 1938 P C 165 : I L R (1938) All 601 : 65 Ind App 182 : 32 Sind L R 531 (PC).)
8. ('21) 8 AIR 1921 Pat 23 (25) : 6 Pat L Jour 185 (DB).
9. ('83) 9 Cal 535 (556).
10. ('16) 3 AIR 1916 Mad 835 (835) : 39 Mad 661 (DB). (Privilege under S. 86 not waived if after pleading it defendant also pleads on merits of the case.)
11. *See also* ('40) 27 AIR 1940 Cal 244 (248) : ILR (1940) 1 Cal 341 (DB). (AIR 1938 PC 165 : 65 Ind App 182 : ILR (1938) All 601 : 32 Sind L R 531 (PC) followed.)

Note 8

1. ('21) 62 Ind Cas 778 (779) (DB) (Lah).

9. Inquiry into the validity of consent. — The introduction of the words "unless it appears to the consenting authority" effects an important change in the pre-existing law. Its effect is to show that the opinion of the consenting authority is *final* on the question whether any of the clauses (a) to (c) is satisfied in a given instance.[1] The cases[2] which before the passing of the present Code, held that it is open to or incumbent on the Courts to examine the correctness of the decision of the Government are no longer law.

10. Effect of non-compliance with the section.—A suit against a Sovereign Prince or Ruling Chief instituted without the *previous* sanction of the Government should be either dismissed or allowed to be withdrawn with liberty to bring a fresh suit duly sanctioned.[1] But a suit against several defendants, one or some of whom alone are privileged, is not bad as against the others for want of sanction as against the privileged defendants.[2]

11. Death of Ruling Chief against whom a decree is passed — Abatement of appeal. — An appeal from a decree against a Sovereign Prince or Ruling Chief does not abate on his death.[1]

12. Sub-section (3). — After a decree is passed against a Sovereign Prince or Ruling Chief in a validly laid suit, a twofold protection in execution is afforded to the defendant under this sub-section —

(a) An absolute protection of his person from *arrest*.

(b) A qualified protection of his property, subject to the sanction of the authority mentioned in sub-s. (1).

The consent required for executing the decree against the property is, evidently, independent of the consent required for initiating the suit. Further, such consent is necessary even if the decree-holder happens to be a tenant of the judgment-debtor[1] although, under sub-s. (5) the sanction under the section is not necessary for a *suit* by the tenant.

13. Notification. — See Appendix IV.

14. Limitation. — The time taken in obtaining the consent under this section cannot be deducted in computing the period of limitation.[1]

On a question arising under S. 13 of the Limitation Act, the Bombay High Court[2] held that in the case of Sovereign Princes or Ruling Chiefs, who are in fact generally resident in their own territories and outside British India, they cannot be said to be absent

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Note 9

1. † ('35) 22 AIR 1935 Oudh 164 (164) (DB). *Vide* Report of the Special Committee Notes to clause 86 (2).
2. ('83) 9 Cal 535 (555).
('86) 1886 Pun Re No. 51, page 97 (105). (Taking mortgage over immovable property and letting it out on lease is not trading under clause (a).)
('07) 29 All 379 (381). (Suit for arrears of pay *held* not to fall under cl. (c) and could not be maintained by virtue of consent of Governor-General in Council.)
('97) 21 Bom 351 (362). (The power of Court to question the decision of the Government was assumed in this case.)

Note 10

1. † ('97) 21 Bom 351 (366).
('35) 22 AIR 1935 Oudh 164 (164, 165) (DB). (Court's duty is to throw out the case if no sanction has been obtained.)
2. ('09) 1909 Pun Re No. 21, page 45 (51).

Note 11

1. ('86) 1886 Pun Re No. 51, page 97 (101).

Note 12

1. ('35) 22 AIR 1935 Cal 664 (665, 666) (DB).

Note 14

1. † ('29) 16 AIR 1929 Bom 14 (19, 20) : 53 Bom 12 (DB). (The maxim "*vigilanti bus non dormien tibus*" applies.)
2. ('29) 16 AIR 1929 Bom 14 (20) : 53 Bom 12 (DB). (Indian States are corporate bodies and to state that they reside out of India is to remove altogether the limitation bar on suits against them.)

from British India so long as they reside or carry on their business through their representatives in British India. The Calcutta High Court has, on the other hand, held that the defendant cannot be said to *reside* in British India by the mere fact of carrying on business therein.[3]

15. Sovereign Prince or Ruling Chief. — See Note 2 on Section 85.

Style of Princes and Chiefs as parties to suits.

87. [S. 434.] A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State :

Provided that in giving the consent referred to in the foregoing section [a][the Central Government, the Crown Representative or the Provincial Government], as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Governor-General in Council or the Local Government."

1. Scope of the section. — A State cannot be sued apart from the Sovereign Prince or Ruling Chief.[1] The section is based on public policy and is imperative.[2]

Where the Ruler of a State has severed his connexion with the State, this section does not preclude a suit being filed on behalf of the State by the administrator of the State by virtue of the provisions of section 85.[3]

INTERPLEADER

Where interpleader suit may be instituted.

88. [S. 470.] Where two or more persons claim adversely to one another the same debt, sum of money or other property, moveable or immoveable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself:

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted.

[1877, S. 470, R. S. C., O. 57 Rr. 1 and 2. See O. 35.]

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3. † ('98) 25 Cal 496 (503, 504) (FB).

Section 87 — Note 1

1. ('12) 12 Mad L Tim 496 (496). (A suit against "State of Travancore" dismissed.)
('86) 1886 Pun Re No. 51, p. 97 (101). (But where the State is a republic the name of the State should be used.)

[*See* (1867) 2 Ch App 582 (590, 591, 595), United States of America v. Wagner. (Cited in 11 Cal 17.)]

2. † ('38) 25 AIR 1938 P C 165 (168, 169) : I L R (1938) All 601 : 65 Ind App 182 : 32 Sind L R 531 (P C). (Reversing AIR 1934 All 740 : 56 All 828.)

3. ('33) 20 AIR 1933 Lah 456 (458) (DB).

Synopsis

1. Legislative changes.
2. Scope and applicability of the section.
3. Claims must be bona fide and adverse to one another.
4. Claims must be with reference to the same subject-matter.
5. Plaintiff should claim no interest in the subject-matter.
6. "Charges or costs," meaning of.
7. Plaintiff must be ready to pay or deliver the property to the rightful owner. See O. 35 R. 2.
8. Addition of parties in interpleader suits. See O. 1 R. 10.
9. Appeal. See O. 35, Rr. 3, 4, 5 and 6.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Adverse claim need not extend to the whole property. See Note 4.
Claim may be legal or equitable. See Note 3.
"Interpleader suit," meaning of. See Note 2.
Procedure in such suits. See O. 35 R. 4, Notes.
Procedure where the debtor is sued. See Note 2.
Protection afforded by the Section. See Note 2.
Suits not really interpleader. See Notes 2, 3 & 5.

1. Legislative changes. — The following are the main changes introduced in the section —

(1) For the words "payment or property" the words "debt, sum of money, or other property, moveable or immoveable," have been substituted.

(2) For the words "whose only interest is that of a mere stake-holder" are substituted the words "who claims no interest therein other than for charges or costs."[1]

The other provisions in the old Code relating to interpleader suits have been enacted in O. 35 of the First Schedule.

2. Scope and applicability of the section. — Where X is under a liability for any debt, sum of money, or other property, claimed adversely by A or B or more, and he desires protection against a wrong payment or delivery, he can file a suit under this section. The only way, in fact, in which he can protect himself is by filing such a suit; otherwise if he litigated with the claimant separately, he would have to pay the costs of the successful claimant.[1] It is necessary that the liability to some one must be admitted and there must be no collusion[2] and no interest in the subject-matter other than for charges or costs. A suit under this section is called an interpleader suit because the plaintiff is really not interested in the matter, but only the defendants interplead as to their claims. In fact each of the defendants so interpleading is virtually in the position of a *plaintiff* and his claim will be governed by the rules of the Limitation Act.[3]

In order to determine whether a suit is an interpleader suit under the section, the Court must have regard to *all* the prayers in the plaint. The mere fact that the plaintiff requires the defendants to interplead as regards one of the reliefs claimed would not necessarily make it an interpleader suit.[4]

Where a party in the position of a mere stake-holder is made a *defendant* in a suit, his proper course is to deposit the money (if it is a suit for money) into Court and ask that the parties really interested may be substituted for himself as defendants.[5]

Section 88 — Note 1

1. The words have been taken from the Rules of the Supreme Court, O. 57 R. 2 (a).

Note 2

1. † (1874) 9 Ch App 736 (738), Laing v. Zeden.
('97) 20 Mad 155 (156) (DB). (Land acquisition proceedings—Conflict as to right to receive compensation—Collector can institute an interpleader suit.)
2. See O. 35 R. 1 Cl. (c).
3. ('25) 12 AIR 1925 Mad 497 (562) : 48 Mad 1 (DB).
4. ('08) 32 Bom 592 (597) (DB).
(1861) 4 De G F & J 183 (186), Vyvyan v. Vyvyan.
5. 2 Ind Jur (N S) 113.
[*See* ('90) 14 Bom 498 (505, 506). (If he so deposits he will be entitled to his costs.)]

Such deposit by him is a valid discharge for him and if the Court paid it to a wrong person he is not responsible.[6] This section is not applicable to suits and other proceedings under the U. P. Tenancy Act (XVII of 1939) and the Madras Estates Land Act (I of 1908).

3. Claims must be bona fide and adverse to one another. — The claims of the defendants must be *bona fide* ones, though they need not have a common origin.[1] The Court must be satisfied that there is a real question to be tried. A mere pretext of conflicting claims is not sufficient.[2] The defendants must also claim the money or property *adversely* to one another *from the plaintiff*.[3] A decision given on the claims of the co-defendants in an interpleader suit will operate as *res judicata* between them.[4] It is, however, not necessary that the plaintiff must show the existence of an apparent title in each of the defendants claiming the property in dispute.[5] Nor is it necessary that the claims should be *legal* claims or rights. *Equitable* claims and rights can be entertained and given effect to.[6]

4. Claims must be with reference to the same subject-matter. — The rival claims must be with reference to the *same* debt, sum of money, or other property,[1] but not necessarily to the same *extent*.[2] It is thus not necessary that each of the defendants should claim the *whole* of the subject-matter of the suit.[3] The "same debt, sum of money, or other property" would not, it is conceived, include a claim for unliquidated damages[4] though it might include a chose in action.[5]

5. Plaintiff should claim no interest in the subject-matter. — The plaintiff must be in an impartial position. If he has, in some way, identified himself with one of the parties in the sense that it will make a difference to him which of the two succeeds, an interpleader suit will not lie.[1] Thus, a person who has taken an indemnity from one of the claimants, cannot file a suit under this section,[2] though he will not be

6. ('89) 2 C P L R 9 (14).

Note 3

1. (1864) 32 L J Q B 14 (15, 16), Mynell v. Angell.
2. (1812) 18 Ves 376 (377), East India Co. v. Edward.
(1845) 2 Jo & Lat 380 (389), Cochrane v. O'Brein.
(1828) 4 Russ 215 (221), Wright v. Ward.
(1856) 7 De G M & G 112, Meyers v. United & Co.
3. † ('22) 9 AIR 1922 Cal 138 (139) (DB).
4. ('28) 15 AIR 1928 Oudh 155 (179).
5. (1848) 7 Hare 57 (66), East and West India Dock Co. v. Littledale.
6. † (1875) 10 C P 554 (558, 559, 561), Duncan v. Cashin.
(1875) 10 C P 645 (652, 654, 657), Eryelback v. Nixon.
(1901) 1 K B 108 (115), Jennings v. Mather.

Note 4

1. † ('10) 37 Cal 552 (557) (DB).
(1895) 2 Q B 249 (251, 252), Greatorex v. Shackle.
(1835) 2 M & W 844 (846), Farr v. Ward.
2. (1841) Cr & Ph 197, Hoggart v. Cutta. (Cited in 1 Mad H C R 360.)
✠(1878) 3 C P D 450 (456), Attenborough v. London & St. Katherine's Dock Co. (Cited in 18 Bom 231.)
3. (1863) 1 Mad H C R 360 (361) (DB).
4. (1879) 48 L J Q B 276 (277), Wright v. Freeman.
[*See* 6 Dowl 517, Walter v. Nicholson.]
5. (1890) 24 Q B D 275 (278), Robinson v. Jenkins.

Note 5

1. † ('27) 14 AIR 1927 Rang 91 (93) : 4 Rang 465 (DB).
(1863) 1 H & C 718 (723), Best v. Haye. (Lien for storing the goods, claimed by a warehouseman, upon the goods stored, or a lien upon the proceeds of goods sold at auction claimed by way of commission by an auctioneer is not an interest in the subject-matter.)
(1878) 3 C P D 450 (457, 459), Attenborough v. London & St. Katherine's Dock Co. (Do. Cited in 18 Bom 231 (250).)
(1893) 62 L J Q B 396 (397, 398), Murietta v. South American Co. (Cited in AIR 1927 Rang 91 : 4 Rang 465 — Agreement by stake-holder to pay smaller amount in the event of success of one of the parties to the suit — Suit by stake-holder is not an interpleader suit.)
('10) 37 Cal 552 (557) (DB) (Tenant suing landlords to whom he has executed kabuliyats.)
('91) 18 Bom 231 (235). (Inclusion of a prayer that defendants should be restrained from suing the plaintiff in respect of the subject-matter of the suit. Suit not bad as an interpleader suit.)
For other cases of interest, see O. 35 R. 5 and Notes thereon.
[*See* (1867) 3 Ch App 74 (77), Prudential Assurance Co. v. Thomas.]
2. ('27) 14 AIR 1927 Rang 91 (93) : 4 Rang 465.
(1815) 1 Mer 405 (406), Burnett v. Anderson. (Cited in 10 Bom 350 (356).)

refused relief, if he has merely a natural affinity for one side rather than the other.[3] A right of *lien*, e.g., for wharfage, demurrage or freight, is not an interest in the property for the purposes of this section.[4]

6. "Charges or costs," meaning of. — The words "charges or costs" include costs of suit, freight, warehouse rent, dock rent, wharfage, demurrage and other charges.[1] A lien can be declared for such charges in an interpleader suit,[3] but the *amount* of those charges, if disputed, ought to form the subject of a separate proceeding between the lien-holder and the adjudicated claimant.[3]

See also Order 35 Rules 4 and 6.

7. Plaintiff must be ready to pay or deliver the property to the rightful owner. — See Order 35 Rule 2.

8. Addition of parties in interpleader suits. — See Order 1 Rule 10.

9. Appeal. — See Order 35 Rules 3, 4, 5 and 6.

PART V. SPECIAL PROCEEDINGS

ARBITRATION

Arbitration.

89. *(Repealed by section 49 (1) of the Arbitration Act, X of 1940.)*

The repealed section 89 ran as follows:

"(1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule.

(2) The provisions of the Second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code."

[1882, Cf. S. 506; 1877, S. 506; 1859, Ss. 312 and 313.]

SPECIAL CASE

Power to state case for opinion of Court.

90. [S. 527.] Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed.

[1877, Ss. 527, 528; 1859, S. 328. See O. 36, C. P. C. and S. 36, Bombay Court of Wards Act, I of 1905.]

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3. ('27) 14 AIR 1927 Rang 91 (93) : 4 Rang 465.
4. ('94) 18 Bom 231 (234, 235).
(1878) 3 C P D 450 (454), Attenborough v. London & St. Katherine's Dock Co.

Note 6

1. (1878) 3 C P D 450 (466), Attenborough v. London & St Katherine's Dock Co.
† ('94) 18 Bom 231 (236).
(1842) 5 Sim 19 (21), Mason v. Hamilton. (Wharfage and warehouse rent.)
(1833) 3 Moo & S 180, Cotter v. Bank of England. (Cited in 18 Bom 231—Claim for freight and charges made by a bank with which bullion is deposited—*Held*, no interest.)
2. † (1863) 1 Mad HCR 360 (361) (DB). (Lien for costs.)
('94) 18 Bom 231 (235).
3. ('94) 18 Bom 231 (235).

1. "In the manner prescribed." — "In the manner prescribed" means in the manner prescribed by Rules in the First Schedule. The section is based on Ss. 527-551 of the old Code, which are now arranged in O. 36. Parties may enter into an agreement and avail themselves of the provisions of O. 36 for the purpose of obtaining the opinion of the Court on a case stated by them.[1]

2. Re-opening of case. — Where a special case is settled by consent it can only be re-opened by mutual consent.[1]

SUITS RELATING TO PUBLIC MATTERS

91. [New.] (1) In the case of a public nuisance[3] the Advocate-General, or two or more persons[4] having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration[6] and injunction[7] or for such other relief[8] as may be appropriate to the circumstances of the case.

Public nuisances.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.[9]

Synopsis

1. Scope and object of the section.
2. "Public nuisance," meaning of.
3. Obstruction to public highway.
4. "The Advocate-General or two or more persons."
5. Remedies for a public nuisance.
6. Declaration.
7. Injunction.
8. "Such other relief."
9. Saving of rights, existing independently of this section—Sub-section (2).

NOTE to the Synopsis. See the Notes indicated for the following topics :

Effect of adding relator with the Advocate-General. See Note 4.
Instances of nuisance. See Note 2.
Nature of proceedings under this section. See Note 4.
Religious processions. See Note 3.
Special damage. See Note 5.

1. Scope and object of the section. — Under the Common law a private person cannot maintain a suit in respect of a public nuisance unless he is able to show that he suffered *special damage thereby*.[1] This section provides an exception to that rule and enacts that such a suit can be maintained even *without proof of special damage*

Section 90 — Note 1

1. ('30) 17 AIR 1930 Bom 232 (233) : 54 Bom 825 (DB).
[*See also* ('07) 31 Bom 472 (476).
('21) 8 AIR 1921 Bom 204 (205) : 45 Bom 138.]

Note 2

1. ('18) 5 AIR 1918 Bom 88 (90) : 43 Bom 281.

Section 91 — Note 1

1. ('42) 29 AIR 1942 Cal 360 (361) : I L R (1942) 1 Cal 533 (DB). (Object is to avoid multiplicity of proceedings.)
('40) 27 AIR 1940 Pat 449 (463) : 19 Pat 208 (DB). (English common law principle is that there can be no private action for a public wrong.)
('21) 8 AIR 1921 Cal 271 (272) (DB). (Special damage does not mean serious damage but damage of special nature.)
('26) 13 AIR 1926 Cal 549 (550).
(1900) 27 Cal 793 (797) (DB).
('15) 2 AIR 1915 Mad 336 (336).
† ('12) 16 Ind Cas 962 (963) (DB) (Mad).
† ('86) 9 Mad 463 (465) (DB).
('18) 5 AIR 1918 Nag 159 (159). (Special degree of inconvenience suffered is not special damage.)
† ('88) 15 Cal 460 (464, 467) (FB).
Also see Note 5.

provided the consent of the Advocate-General is obtained and the other conditions of the section are satisfied.[2] The section does not, as is made clear by sub-s. (2), deprive any person of any right which he may have independently of its provisions, as for instance, a right to sue in respect of a public nuisance on proof of special damage.[3]

The section only applies in the case of *public* nuisances. The section has no application to the infringement of the special right of a particular class of the public. In such a case, a person may sue as a member of the class whose rights are affected. This section is no bar to such a suit. Nor need such a suit be brought under O. 1 R. 8 as a *representative* suit.[4]

2. **"Public nuisance," meaning of.** — The words "public nuisance" have not been defined in the Code. But by virtue of S. 3 (44) of the General Clauses Act, the words mean a public nuisance as defined by the Indian Penal Code.[1] Under S. 268 of the Indian Penal Code, "a public nuisance" is an act or illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. The essence of the definition is that the injury, danger or annoyance must be to the *public*, or to the *people in general* who occupy property in the vicinity or who use any public right.[2] Thus, the obstruction of a public highway,[3] or the pollution of public waterways,[4] or the storage of inflammable or other material likely to endanger life or health,[5] or the causing of annoyance to the public in any other way,[6] is a public nuisance. Acts, however, which

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2. ('42) 29 AIR 1942 Cal 360 (362) : I L R (1942) 1 Cal 533 (DB).
('40) 27 AIR 1940 Pat 449 (462) : 19 Pat 208 (DB).
† ('37) 24 AIR 1937 Pat 481 (482) : 16 Pat 190. (Action by an individual will not lie except the one indicated by Section 91.)
('36) 23 AIR 1936 Oudh 154 (155) (DB). (Suit by some Mahomedans for demolition of certain constructions alleged to have been constructed by defendant on the ground of obstruction to tazias—Plaintiff not claiming to have suffered special damage—Suit is not maintainable without permission of Advocate-General.)
('38) 25 AIR 1938 Mad 338 (338, 339). (Channel constructed through village site—Public nuisance—Special damages not proved—Suit must be with permission of Advocate-General.)
('37) 24 AIR 1937 All 78 (79).
('18) 5 AIR 1918 Cal 497 (497) (DB). (Section 336 of the Calcutta Municipal Act does not control this section — See also the Report of the Special Committee.)
3. ('40) 27 AIR 1940 Pat 449 (462, 465) : 19 Pat 208 (DB).
('37) 24 AIR 1937 All 78 (79).
('24) 11 AIR 1924 All 599 (602, 603) : 46 All 470 (DB).
4. ✠('40) 27 AIR 1940 Pat 449 (463, 465) : 19 Pat 208 (DB). (It is not necessary to prove special damage in the case of quasi public rights where the plaintiff sues as a member of the limited class whose special rights have been infringed.)
('40) 27 AIR 1940 Pat 160 (160).
('37) 24 AIR 1937 Pat 481 (482) : 16 Pat 190. (Relying on Harrop v. Hirst (1868) 4 Ex 43 (47) : 38 L J Ex 1.)

Note 2

1. ('37) 24 AIR 1937 All 78 (79).
† ('36) 23 AIR 1936 Oudh 154 (155) (DB).
[*See also* ('88) 10 All 44 (46).]
2. ('42) 29 AIR 1942 Cal 360 (366) : I L R (1942) 1 Cal 533 (DB).
('41) 28 AIR 1941 Oudh 52 (54) : 16 Luck 173. (When the general public is apathetic and tolerates things which one might expect to annoy it it cannot be said that such an act does cause annoyance to the public or people in general.)
('84) 7 Mad 590 (591, 592).
(1823) 1 Russ 319, Rex v. Lloyd.
[*See also* ('88) 11 Mad 42 (43). (Right which vests in plaintiff and others jointly and severally, e. g., a right to graze in a tank bed, is not a public right.)]
3. See Note 3.
[*See also* ('89) 1 Weir 238 (239). (Allowing cattle to stray on public roads.)]
4. *See* (1861) 3 H L 326, Stockport Water Works v. Potter.
5. (1826) 2 Car & P 485 (485), R. v. Neil. (Trade of varnish maker—It would be enough if the smell is injurious or offensive to the senses.)
('07) 34 Cal 73 (78) (DB). (Keeping a stack of bones for a time sufficient to cause them to become rotten.)
('82) 1 Weir 242 (242). (Infecting the atmosphere by deposit of sweepings.)
6. (88) 10 All 44 (46). (Wilfully killing cattle in a public street so that the groans and blood of beasts could be heard and seen by every passer-by would amount to a public nuisance.)
✠('15) 2 AIR 1915 Nag 79 (80, 89) : 11 Nag L R 132. (A slaughter-house for butcher to sell meat is an offensive trade.)

offend the sentiments of merely a particular *class* of persons,[7] or annoyance caused to particular persons only,[8] do not constitute public nuisances. Thus, the placing of a Muhammadan symbol in the neighbourhood of Hindu temple,[9] or the carrying on of a tinman's trade causing annoyance to the inhabitants of three sets of chambers only,[10] is not a *public* nuisance. Similarly, where a suit is brought on behalf of the members of one community to vindicate their right to take out processions along a certain route, the suit is not one for the removal of a public nuisance within the meaning of this section, but is a suit for remedying the infringement of a special right exercised by that community.[11]

Whether a particular thing or act is an actionable nuisance at all, is to be decided with reference to the circumstances of each case.[12] In *Sturges* v. *Bridgman*,[13] Thesiger, L.J., observed as follows: "Whether anything is a nuisance or not is to be determined not only by an abstract consideration of the thing itself but in reference to its circumstances. What would be a nuisance in Belgram Square would not necessarily be so in Bermondsey."

No length of time can legitimate a public nuisance.[14] Nor will the fact that a person or company is acting under statutory powers enable such person or company to cause or continue a nuisance, unless the creation thereof was expressly contemplated by the statute.[15]

There are two kinds of public nuisances, actual and constructive or public nuisances in fact and public nuisances in law. What is meant by a constructive public nuisance or a public nuisance in law is that which is only wrong because it contravenes the provisions of an Act such as the building rules of a Municipal Act. Section 91 is restricted in terms to public nuisances in fact and a constructive public nuisance can be no ground for a suit under that section.[16]

('91) 14 Mad 364 (365) (DB). (Keeping a gambling house and permitting disorderly behaviour.)
† ('02) 25 Mad 118 (129) (DB). (Opening a burial ground and using it in such a way as to render living nearby unhealthy.)
('83) 1 Weir 243 (244). (Taking fighting rams in a market place.)

7. ('42) 29 AIR 1942 Cal 360 (366) : I L R (1942) 1 Cal 533 (DB).
('84) 7 Mad 590 (591).
('88) 12 Bom 437 (439) (DB). (Exposing meat in a varandah of house, which is repulsive to the feelings of Jains who pass by it to go to their temple.)
('08) 30 All 181 (187) (DB). (Slaughtering of kine by Moslems though it would hurt the susceptibilities of others.)
† ('16) 3 AIR 1916 Nag 81 (82) : 12 Nag L R 130. [*See also* ('37) 24 AIR 1937 Pesh 81 (81).]

8. ('42) 29 AIR 1942 Cal 360 (366) : I L R (1942) 1 Cal 533 (DB). (Obstruction to an individual as such on a public highway does not constitute a public nuisance.)
(1900) 22 All 113 (115) (DB). (Soliciting passers-by on a public road for purposes of prostitution.)
('39) 26 AIR 1939 All 586 (588):ILR(1939)All 754. [*See* (1823) 1 Russ 319, Rex v. Lloyd.
('37) 24 AIR 1937 All 78 (79).]

9. ('84) 7 Mad 590 (591).

10. (1823) 1 Russ 319, Rex v. Lloyd.

11. ('34) 21 AIR 1934 All 941 (943).

12. ('12) 17 Ind Cas 574 (574) (All). (Placing a cot temporarily on a public road is not a public nuisance.)

13. (1879) 11 Ch D 852 (865).

14. ('71) 16 Suth W R Cr. 6 (11).
(1812) 3 Camp 224 (227), R. v. Cross.
(1806) 7 East 195, Weld v. Hornby.(Though it may supply a defence to an action by a private person.)
(1825) 4 B & C 598 (602, 603), R. v. Montague.

15. ('73) 10 Beng L R 241 (252).
(1865) 6 B & S 631 (648), R. v. Bradford Navigation. (Canal company empowered by statute to take water in certain brooks — Water becoming polluted by drains, etc., before reaching canal and becoming a public nuisance—*Held*, company were liable to be indicted for nuisance as there was nothing in the Act compelling them to take water, or authorizing them to use it so as to create a nuisance.)
† (1895) 1 Ch 287(320), Shelfer v. London Electric Lighting Co. (Nuisance caused by electrical undertakings have no statutory protection.)
† (1899) 2 Ch 217 (257), Jordeson v. Sutton, etc. Gas Co. (So also nuisance caused by gas works.)
(1869) L R 4 H L 171, Hammersmith v. Brana. (Proceedings for nuisance cannot be taken in the case of railway authorized by Acts in respect of the use of locomotives on railways.)
(1832) 4 B & Ad. 30 (42), R. v. Pease. (Establishment of railway line or the like specifically authorized by Statute — No nuisance.)
(1885) 11 App Cas 45 (53, 58), L. B. and S. C. R. v. Truman. (Where a Legislature directs a duty to be done, it must be deemed to have weighed the balance of convenience between public benefit and private rights and to have laid down that the latter should give way to the former.)
(1899) 1899 App Cas 535 (546), Canadian Pacific Ry. Co. v. Parke. (There is no distinction between mis-feasance and non-feasance when the Legislature authorises a particular thing to be done.)

16. ('10) 5 Ind Cas 213 (224) (Bom).

3. Obstruction to public highway. — An obstruction to a public thoroughfare is a public nuisance.[1] The public is entitled to the full width of the public highway, however wide it may be, and any obstruction thereto infringes the right of the public to that extent.[2] Thus, the building of a construction over any part of a public street,[3] or the cutting of trenches across it,[4] necessarily causing obstruction to persons who may have occasion to use the street, is a public nuisance. Similarly, an *excessive user* of the highway incompatible with the reasonable exercise of rights by other members of the public,[5] or an illegitimate user of the road amounting to trespass, will amount to a public nuisance.[6] So also acts committed on or adjoining a highway, interfering with or endangering the safe user thereof, will amount to a public nuisance.[7]

A navigable river is a public highway and any act which interferes with the right of the public to freely navigate is a public nuisance.[8] A slight encroachment will not necessarily constitute a public nuisance. There must be some evidence that the encroachment causes one of the results specified in S. 268 of the Indian Penal Code.[9]

A village pathway is not a public highway and a suit for relief in respect thereof is not governed by this section.[10] The right of a person to have access to his land abutting on a public highway is a public right,[11] but a right, acquired by prescription of immediate

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Note 3

1. ('42) 29 AIR 1942 Cal 360 (366) : I L R (1942) 1 Cal 533 (DB). (An encroachment upon a public highway by the erection of a fencing.)
('41) 28 AIR 1941 Oudh 52 (54) : 16 Luck 173. (A temporary heap of rubbish stacked on a public thoroughfare at a busy and frequented part of the town.)
✠('16) 3 AIR 1916 Nag 81 (82) : 12 Nag L R 130.
('01) 23 All 159 (162) (DB).
2. ('42) 29 AIR 1942 Pesh 1 (3). (Public is entitled to the use of the whole area which has been dedicated as a road, and it is immaterial whether a portion of the road is metalled or whether a ditch runs alongside the road.)
('41) 28 AIR 1941 Pat 249 (250) (DB).
('97) 20 Mad 433 (434).
3. ('36) 23 AIR 1936 Oudh 154 (155) (DB).
('97) 20 Mad 433 (434) (DB).
4. (1883) 53 L J Ch 853 (856), Nicol v. Beaumont.
5. (1805) 6 East 427 (430), Rex v. Russul. (A waggoner constantly unloading waggons so that no carriage could pass.)
(1812) 3 Camp 224 (226), Rex v. Cross. (A public conveyance waiting for an unreasonable length of time so as to obstruct traffic.)
6. (1812) 3 Camp 230 (231), Rex v. Jones. (Sawing timber in a street.)
(1834) 6 Car & P 636 (618), Rex v. Carbille. (Exposing pictures for sale in street.)
(1888) 21 Q B D 191 (197, 198), Ex parte Lewis. (Holding public meetings.)
(1889) 1 Weir 232 (233). (Obstruction to part of a highway over the whole width of which the public had a right to pass.)
(1870) 9 Eq 418 (422), Turner v. Ringwood Highway Board. (An obstruction is not the less a nuisance because it is on a part of the street not commonly used.)
7. 1 Russ Cr 732 (732). (Keeping swine near a street.)
(1898) 2 Q B D 320 (325), Harold v. Watney. (Defective fence adjoining highway.)
8. (1887) 14 Cal 656 (658)(DB). (Placing a bamboo stockade across a tidal navigable river.)
[But see ('93) 20 Cal 665 (670) (DB). (Jags erected on the silted side of the river which was not ordinarily used for the purposes of navigation.)
(1871) 6 Ch App 572 (577), Attorney-General v. G. E. Ry. Co. (The withdrawal of waters from navigable rivers so as to impede navigation.)
('05) 32 Cal 930 (934) (DB). (Erection of a bund in a river making it unfordable.)
9. ('93) 20 Cal 665 (669) (DB). (Dissented from 14 Cal 656.)
10. ('18) 5 AIR 1918 Cal 212 (213) (DB).
('19) 6 A I R 1919 Cal 123 (124) (DB). (Special damage need not be proved.)
('21) 8 AIR 1921 Cal 405 (406). (Do.)
('29) 16 A I R 1929 All 790 (790). (Section 91 is inapplicable to issues arising on encroachments on village roads in abadi belonging to the zamindar kept open by right of easement.)
[*See also* ('04) 31 Cal 839 (847).
('30) 17 AIR 1930 Cal 286 (287) : 57 Cal 526.]
[But see ('40) 27 A I R 1940 Pat 449 (465) : 19 Pat 208 (DB). (Ways permitted to be used by a section of the public are private ways, generally having their origin in custom but such ways can be converted into ordinary highways after user by the public sufficient to raise a presumption of dedication to the public in general. If public are using the pathway, this section will apply.)
('37) 24 AIR 1937 Pat 54 (54, 55).]
11. ('13) 21 Ind Cas 601 (602) (DB) (Mad).
[*See* ('35) 22 AIR 1935 Pesh 190 (190).]

access from private property to a public highway is a private right.[12] See also the case cited below.[13]

Every class or community has a right to conduct a religious procession with its appropriate observances along a highway so that the procession does not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace.[14] A suit in respect of an obstruction to such a right is one respecting the infringement of a *civil right* of an individual and not one relating to a public nuisance. No special damage need be proved to maintain such a suit.[15]

It has been held in some decisions[16] that a suit for the removal of obstruction on a highway may be brought by a plaintiff without proof of special damage even where the procedure under this section is not followed. These decisions purport to follow the decision of the Privy Council in *Saiyed Manzur Hassan* v. *Saiyed Muhammad Zaman*,[17] in which it was held that a suit for declaration of the plaintiff's right to take out a procession along a highway is maintainable without proof of special damage. It is submitted that this decision of the Privy Council does not support the above view.[18]

It has been held that a person in the immediate neighbourhood and entitled to use a public thoroughfare has a special cause of action where it is obstructed and that he can sue without proof of special damage.[19]

See also Note 1.

4. "The Advocate-General or two or more persons." — In England, before the coming into force of the Rules of the Supreme Court, 1883, a proceeding in respect of a public nuisance was commenced by an "information" filed by the Attorney.

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12. ('24) 11 AIR 1924 All 715(716):46 All 573(DB). [*See also* ('35) 22 AIR 1935 All 789 (790). (Sanction not required for suit relating to encroachment of a private easement.)]

13. ('39) 20 Pat L Tim 414 (415). (Suit by particular class of public claiming right of way over village path — Suit is maintainable without sanction and proof of special damage.)

14. ✠('25) 12 A I R 1925 P C 36 (37, 38) : 47 All 151 : 52 Ind App 61 (P C). (2 Bom 457 and 18 Bom 693 overruled.)
('78) 2 Mad 140 (141) (DB).
† ('83) 6 Mad 203 (216, 219, 226) (FB).
('03) 26 Mad 376 (382) (DB).
† ('03) 26 Mad 554 (570, 577, 581) (FB).
('07) 30 Mad 185 (190) : 34 Ind App 93 (PC).
[*See also* ('09) 32 Mad 478 (481, 482) : 1 Ind Cas 716 (718).
('31) 18 AIR 1931 All 341 (344).]
Also see Section 9 Note 24.

15. ✠('25) 12 A I R 1925 P C 36 (37, 38) : 47 All 151 : 52 Ind App 61 (PC).
('07) 30 Mad 15 (16) (DB).
('10) 34 Bom 571 (574) : 7 Ind Cas 663 (665) (DB). (Dissenting from 2 Bom 457 and 18 Bom 693.)
('82) 5 Mad 304 (309).
† ('17) 4 AIR 1917 Mad 122 (124) (DB).
† ('83) 6 Mad 203 (225, 226, 227) (FB).
('03) 26 Mad 376 (384) (DB).
('97) 24 Cal 524 (526) (DB).
† ('16) 3 AIR 1916 Nag 81 (83,84):12 Nag L R 130.
† ('09) 32 Mad 478 (484). (Illegal order of Magistrate restraining procession will give rise to a cause of action.)
† ('31) 18 A I R 1931 All 341 (346) : 53 All 484 (DB).
† ('16) 3 AIR 1916 Mad 593 (595) (DB).
[*See also* ('34) 21 A I R 1934 All 941 (943). (Previous sanction of the Advocate-General was not taken.)]

16. ('39) 26 AIR 1939 Mad 691 (692) : ILR (1939) Mad 870.
('33) 20 A I R 1933 Cal 884 (885) : 60 Cal 1003 (DB).

17. ('25) 12 A I R 1925 P C 36 (37, 38) : 47 All 151 : 52 Ind App 61 (PC).

18. ('37) 24 AIR 1937 Pat 481 (482) : 16 Pat 190.

19. ('42) 29 AIR 1942 Pesh 1 (3). (It is immaterial whether obstruction is caused by the Government or the Municipality — Damages are not adequate remedy and plaintiff is entitled to have the obstruction removed.)
('41) 28 AIR 1941 Pat 219 (250) (DB).
('37) 24 AIR 1937 Pat 620 (621) (DB).
[*See also* ('35) 22 A I R 1935 Lah 196 (200) : 16 Lah 517. (The question of frontage for owners of houses abutting on a public highway means a great deal; and if anything is done by a Municipal Committee, or any one in whom such highway vests, which interferes with the rights of the owners in respect of the highway or tends to diminish the comforts of the occupants of the houses, the owners have a right of action against the Committee or other person so interfering without proving special damage.)]

General in the High Court of Chancery. Such a proceeding is now called an "action" and is commenced by a writ in the High Court of Justice, and may be brought by the Attorney-General either acting *ex officio* or at the *relation* of a private individual. In the latter case the plaintiff is described as "the Attorney-General at the relation of A. B. (relator)."[1] In either case the action is a *public* proceeding in which the Crown is really a party to the litigation through the Attorney-General.[2] The practice of inserting the relator's name in the proceeding is for the purpose of making him responsible for costs, and it does not make him a party to the litigation.[3] In actions taken by the Attorney-General without a relator, the former will be liable for the costs.[4]

The Advocate-General in this country represents the Attorney-General in England.[5] Under the present section a suit in respect of a public nuisance may be brought —

(1) by the Advocate-General acting *ex officio*, or

(2) by him at the *instance of relators*, or

(3) by *two or more persons* with the consent of the Advocate-General.

Neither a relator[6] nor a person suing under this section need have any *personal interest* in the subject-matter of the suit.[7]

As to the nature and form of consent necessary, see Notes 23, 24, 25 and 26 on S. 92. A plea as to want of sanction under the section cannot be raised for the first time in appeal.[8]

It has been observed in Note 2 that S. 91 does not apply to constructive public nuisances, i.e., public nuisances in law. But the Advocate-General has, like the Attorney-General in England, power, apart from the section, to take proceedings in respect of the latter class of nuisances.[9]

5. Remedies for a public nuisance. — The remedies available in respect of a public nuisance are as follows :

(1) *Under the Criminal Law* —

(a) The person committing a nuisance is liable to a criminal prosecution under the Indian Penal Code.

(b) Certain summary powers are also conferred on Magistrates by Ss. 133 to 143 of the Code of Criminal Procedure for the removal of the nuisance.

(2) *Under the Civil Law* —

(a) A suit will lie under this section without proof of any special damage to the plaintiffs.

(b) A suit will also lie at the instance of private individual where he has suffered *special damage* by reason of the nuisance, as distinguished from the damage suffered by him *in common with other persons* affected by the nuisance.

For illustrations, see the undermentioned cases.[1]

Note 4

1. *See* Rules of the Supreme Court Order 1 Rule 1 and the Commentary thereon in "the Yearly Practice of the Supreme Court for 1930" by Sir Willes Chitty, Bt., K. C.
2. (1891) 2 Q B 100 (106), Attorney-General v. Logan.
(1874) 18 Eq 172 (176), Attorney-General v. Cockermouth Local Board.
3. (1891) 2 Q B 100 (106), Attorney-General v. Logan.
4. (1891) 2 Q B 100 (103), Attorney-General v. Logan.
5. ('10) 5 Ind Cas 213 (218) (Bom).
6. (1868) 4 Ch 71 (81), Attorney-General v. Cambridge Gas Consumers Co.
7. *See* the wording of this section "though no special damage has been caused".
8. ('28) 15 AIR 1928 Nag 39 (40). (Permission of the Advocate-General need not be obtained before instituting the suit. It can be obtained even after the suit is instituted.)
('38) 25 AIR 1938 Mad 338 (339). (Plea not maintainable for the first time in second appeal.)
9. ('10) 5 Ind Cas 213 (224) (Bom).

Note 5

1. ('42) 29 AIR 1942 Pesh 1 (3). (Where an obstruction to a public road causes a particular in-

The remedies are concurrent and the pursuit of one does not bar the other. Thus, where A obstructs a public highway by occupying and enclosing a portion thereof he may be prosecuted under S. 268 of the Indian Penal Code. This will not preclude a suit under this section by the Advocate-General or by two or more persons with his consent. Nor will the institution of the said two proceedings bar a suit by a private individual whose house abuts on that highway and the access to whose house is cut off by such enclosure by A causing him *special* damage.[2]

6. **Declaration.** — Where the relief claimed in respect of a suit is a right of easement and not in respect of any public nuisance, no declaration that the place in suit is a public thoroughfare can be granted on the mere fact that the plaintiff's witnesses described it as a public place.[1] As to declarations of right to take religious processions in public streets, see Note 3.

7. **Injunction.** — Where a nuisance is temporary and intermittent,[1] or *occasional*,[2] no injunction will be granted. Nor will it be granted where the injury is

convenience of a substantial kind to the plaintiff he can bring a suit to remove it without the consent of the Advocate-General.)
('42) 29 AIR 1942 Cal 360 (362, 364) : ILR (1942) 1 Cal 533 (DB). (Road in front of plaintiff's house narrowed by encroachment — Special damage, if can be presumed.)
('41) 28 AIR 1941 Oudh 52 (54) : 16 Luck 173. (Mere placing of obstruction in front of plaintiff's house which does not impede his coming in or going out from his house cannot be said to cause special damage to plaintiff.)
('41) 28 AIR 1941 Mad 669 (670) (DB). (Wall across public road interfering with enjoyment of property by owner—Suit by latter for mandatory injunction to remove wall.)
(1794) 1 Esp 148 (148), Hubert v. Groves.
(1867) 2 Ex 316 (322), Winterbottam v. Lord Derby.
† ('78) 2 Bom 457 (469) (DB). (See the several illustrations quoted.)
('24) 11 AIR 1924 All 599 (602) : 46 All 470 (DB).
† ('91) 14 Mad 177 (180) (DB).
† ('15) 2 AIR 1915 Nag 79 (83) : 11 Nag L R 132. (Unauthorised and unlawful acts of the Municipal Committee.)
(1847) 9 Q B 991 : 16 L J Q B 233 (237), Dobson v. Blackmore.
† ('12) 16 Ind Cas 962 (963) (DB) (Mad). (Special damage need not be pecuniary loss.)
('19) 6 AIR 1919 Cal 123 (124) (DB). (Having to make a detour.)
('10) 33 All 287 (290) : 8 Ind Cas 808 (809) (DB). (Being obliged to make a detour.)
(1856) 1 H & N 369 (386, 387), Blagrave v. The Bristol Waterworks Co. (Obliged to take his goods by a longer and more difficult way.)
Sir T Jone 156 (156), Hart v. Bassett. (Do.)
(1738) Willes 71 (73, 74), Chichaster v. Lethbridge. (Incurring of additional expense in carrying goods a longer distance on account of the obstruction.)
(1815) 4 M & S 101 (103), Rose v. Miles. (Do.)
(1824) 2 Bing 263 (265, 266), Greasly v. Codling. (Do.)
(1867) 36 L J Q B 205 (217) : L R 2 Eng and Ir Ap 175, Ricket v. Metro. Ry. Co. (Special injury should not be merely consequential.)
('91) 14 Mad 177 (181) (DB). (The special injury however should not be merely consequential nor remote.)
Bull N P 26. (The damage must be direct and not consequential, e. g., by delay on a journey.)
† ('95) 22 Cal 551 (557) (DB). (Injury must not be remote.)
('78) 1 All 557 (559) (DB). (Deprivation of access to a thoroughfare and the use of a certain drain.)
('18) 5 AIR 1918 Nag 159 (159). (Special degree of inconvenience suffered by him cannot be said to cause him damages.)
('21) 8 AIR 1921 Cal 271 (271, 272) (DB). (Fact that plaintiffs were only inconvenienced by taking a longer route is not enough.)
('01) 5 Cal W N 285 (286). (Nor will mere inconvenience or a remote danger make such an action maintainable.)
(1835) 2 Bing N C 281 (297), Wilkes v. Hungerford. (Loss of custom due to building operations obstructing a highway in front of plaintiff's shop.)
(1874) 9 C P 400 (407, 408), Benjamin v. Storr. (Allowing carts and horses to stand in front of a shop for an unreasonable length of time.)
† ('84) 8 Bom 35 (87, 92) (DB). (Inability to let house, owing to noise and smoke emited by a manufacturing mill.)
('14) 1 AIR 1914 All 487 (487). (Narrowing a street from 22 inches to 2½ cubits which caused great inconvenience.)
('19) 6 AIR 1919 Cal 209 (210). (The fact that the plaintiff cannot himself commit a public nuisance owing to the nuisance caused by the defendant is not special damage to the plaintiff.)
Also see Note 1.
2. ('29) 16 AIR 1929 Bom 94 (95) : 53 Bom 187 (DB).
See also the cases under foot-note (1).

Note 6

1. ('23) 10 AIR 1923 Lah 546 (548).

Note 7

1. (1853) 3 D M & G 304 (323, 340), Attorney-General v. Sheffield Gas Consumers Co.
(1864) 4 Ch 71 (81), Attorney-General v. Cambridge Gas Consumers Co.
(1864) 4 De J & S 211 (216), Swaine v. G. N. Railway.
2. (1867) 3 Eq 166 (173), Cooke v. Forbes.

trifling in amount and effect.[3] But even slight nuisances, if they are of *frequent* occurrence. will justify the grant of an injunction.[4] Thus, a *continuous* ringing of bells will be stopped by an injunction.[5] Similarly, where the defendant claims a right to *continue* the nuisance,[6] or the act committed tends to the injury of the public,[7] or causes damage to private individuals,[8] an injunction will be granted.

Where, however, the plaintiff has *acquiesced* in the nuisance,[9] or where there is no *proof* or *prospect* of any injury,[10] no injunction will be granted. No mandatory injunction will be granted if the nuisance is only *constructive*.[11] Where a right to injunction is proved, it should be granted as a rule and without regard to any difficulty or expense that the defendant may be put to in removing the nuisance. But in exceptional cases where such difficulty is considerable, the Court may suspend the operation of the injunction.[12]

8. "Such other relief." — In England a private individual may join the Attorney-General in the action and claim special damages which he suffered by the nuisance.[1] It is doubtful whether persons suing under this section can claim such special damages.

9. Saving of rights, existing independently of this section — Sub-section (2). — It has been observed in Notes 1 and 5 that this section does not affect rights of suit which may exist independently of this section and this is embodied in sub-s. (2) of this section. Thus, the section does not control or restrict the provisions of O. 1 R. 8 under which a person may sue on behalf of others.[1] But if there is *no* right of action without proof of special damage, the mere adoption of the procedure laid down in O. 1, R. 8 cannot obviate the necessity of such proof.[2] See also Note 1.

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92. [S. 539.] **(1)** In the case of any alleged breach[6] of any express or constructive trust created for public purposes of a charitable or religious nature,[5] or where the direction of the Court is deemed necessary for the administration[6] of any such trust,

Public charities.

(1864) 4 De J & S 211 (216), Swaine v. G. N. Ry. (Where the defendant company allowed manure to be deposited in a siding.)

3. (1899) 2 Ch 705 (709, 710), Llandudno Urban District Council v. Woods.

4. (1851) 21 L J Ch 153 (166, 167) : 2 Sim (NS) 133, Soltan v. Debeld.

5. (1851) 21 L J Ch 153 (166, 167) : 2 Sim (N S) 133, Soltan v. Debeld.

6. (1875) 45 L J Ch 638 (643) : L R 7 H L C 697, Swinden Waterworks v. Wilts and Berks.
(1883) 22 Ch D 221 (231), Attorney-General v. Acon Local Board.

7. (1882) 21 Ch D 752 (755), Attorney-General v. Shrewsbury Bridge Co.

8. † ('78) 2 Bom 457 (468) (DB).
† ('84) 8 Bom 35 (88) (DB).
('77) 3 Cal 20 (22) (FB).
('88) 15 Cal 460 (467) (FB). (Allegation that a piece of land forms a part of a public highway — Suit under Section 42 of Specific Relief Act lies.)
('05) 32 Cal 697 (709) (DB).

9. (1895) Johiss 372, Wicks v. Hunt.

10. (1828) 3 Wills & Shaw 235, Mewzies v. Breadal Zeone.

11. ('10) 5 Ind Cas 213 (229) (Bom).

12. (1868) 4 Ch 146 (161), Attorney-General v. Colony Lunatic Asylum.

Note 8

1. (1868) 6 Eq 177 (180, 181), Cooke v. Mayor.
(1891) 2 QB 100 (104, 106), Attorney-General v. Logan.

Note 9

1. ('40) 27 AIR 1940 Pat 449 (465) : 19 Pat 208 (DB). (In the case of suits relating to obstructions to village ways, if the plaintiff does not utilize the special provisions of S. 91, or prove special damage, but purports to sue under O. 1 R. 8, he must plead and show (1) that he sues not on behalf of the public generally, but on behalf of a limited and clearly defined class with which he has a common interest and a common right of suit; (2) he must plead and show that the pathway in question is not a public highway in the full sense, in which all members of the public who happen to go to the place have equal interest; he must show that it is a way or path of the quasi-public type in which the class he represents has got special rights as distinct from those of the public generally.)
('25) 12 AIR 1925 Cal 1233 (1233) (DB).
('34) 21 AIR 1934 All 941 (943).

2. ('42) 29 AIR 1942 Cal 360 (364) : ILR (1942) 1 Cal 533 (DB).

the Advocate-General, or two or more persons having an interest in the trust[8] and having obtained the consent in writing of the Advocate-General,[23] may institute a suit, whether contentious or not,[32] in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the [a][Provincial Government] within the local limits of whose jurisdiction[33] the whole or any part of the subject-matter of the trust is situate, to obtain a decree —

(*a*) removing any trustee ;[15]

(*b*) appointing a new trustee ;[16]

(*c*) vesting any property in a trustee ;[17]

(*d*) directing accounts and inquiries ;[18]

(*e*) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust ;[19]

(*f*) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged ;[20]

(*g*) settling a scheme ;[21] or

(*h*) granting such further or other relief as the nature of the case may require.[11]

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs[9] specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.[33]

[1877, S. 539.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

Synopsis

1. Legislative changes.
2. Applicability, object and scope of the section.
3. Retrospective operation of the section.
4. Analogous law — Comparison with the Religious Endowments Act, 1863, and with Section 42 of the Specific Relief Act, 1877.
5. Trust, whether express or constructive, for public purposes of a religious or charitable nature, necessary.
6. In case of alleged breach of trust or where the direction of the Court is deemed necessary for administration.
7. Suit must be in a representative capacity on behalf of the public.
8. Who can sue — "Two or more persons having an interest in the trust."
9. The suit must be for one of the reliefs specified in the section.
10. Effect of adding other reliefs.
11. "Such further or other relief as the nature of the case may require."
12. Declarations.
13. Appointment of receiver.
14. Costs.
15. Removing a trustee — Clause (a).
16. Appointment of a new trustee — Clause (b).
17. Vesting any property in a trustee — Clause (c).
18. Directing accounts and inquiries — Clause (d).
19. Declaring what proportion, etc, — Clause (e).
20. Authorising alienation of trust property — Clause (f).
21. Settling a scheme — Clause (g).
22. Court's power to apply the cypres doctrine.

23. Sanction of the Advocate-General.
24. Nature of and form of consent.
25. Consent, when necessary—Effect of consent.
26. Consent not necessary for appeal.
27. Function of the Advocate-General.
28. Parties to a suit under the section.
29. Compromise of suit.
30. Abatement of suit.
31. Suit, if can be brought in forma pauperis.
32. Suit under the section need not be contentious.
33. Section is mandatory—Sub-section (2).
34. Execution of scheme decree.
35. Arbitration.
36. Appeal.
37. Revision.
38. Jurisdiction to entertain suit under the section.
39. Valuation of suit.
40. Limitation.
41. Decision under the section, whether operates as res judicata.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Court not competent to take action under the section unless a regular suit is filed. See Notes 2 and 4.
Court's power to add parties. See Notes 25 and 28.
Devolution of trust property. See Note 5.
Jurisdiction after scheme. See Note 21.
Mutts. See Note 5.
Power to trustee to deal with endowed property. See Note 20.
Relators — If can appeal. See Note 36.
Romilly's Act. See Note 4.
Scheme for Mahomedan mosque. See Note 21.
Suit against strangers to trust for declaration and possession of trust property. See Notes 2, 9 and 28.
Suit against trespassers. See Notes 2 and 28.
Suit to enforce private rights. See Notes 2 and 7.
Suit to remove trustee for illegal alienation impleading alienee. See Notes 10 and 28.
Trustee *de son tort*. See Notes 5, 28 and 40.
Trust denied — Whether section applies. See Notes 5, 6 and 12.
Trust not carried out. See Note 9.
Vague trust. See Note 5.

1. Legislative changes. — This section has been enacted in substitution of S. 539 of the Code of 1882 and has introduced the following changes :

(a) The words "public purposes of a charitable or religious nature" have been introduced in place of the words "public charitable and religious purposes." See Note 5.

(b) Under the old Code, the interest of the plaintiff was required to be a "direct interest" in the suit. The word "direct" has been deleted by Act VII of 1888.[1] See Note 8.

(c) The words "whether contentious or not" are new. See Note 32.

(d) The words "in the principal Court of original jurisdiction" have been substituted for the words "in the High Court or the District Court" and the words "or any other Court empowered in that behalf by the Local Government" have been newly added. See Note 38.

(e) Clause (a) is new. See Note 15.

(f) Clause (d) is also new. See Note 18.

(g) The following words in cl. (e), namely, "what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust" have been substituted for the words "the proportion in which its objects are entitled." See Note 19.

(h) Sub-section (2) is also new. See Notes 33 and 41.

2. Applicability, object and scope of the section. — This section may be taken as intended to confer upon the Courts in this country the same powers as the

Section 92 — Note 1

1. ('91) 24 Cal 418 (427) (DB). (To worship in a public temple.)

English Courts of Chancery possessed, in matters relating to the administration of public charities, religious or otherwise.[1] It is intended to be an exhaustive statement of the law applicable to cases in which there has been a breach of trust in relation to a *public* trust (whether express or constructive) of a charitable or religious nature.[2] The aim of the section is to protect the rights of the public in such trusts and to enable the public, the Advocate-General and Courts of Justice to stop the misuse of the income of charitable institutions.[3] This section is intended to provide proceedings of a special nature for the purpose of determining questions that relate to the administration of public, religious or charitable trusts and to prevent multifarious and vexatious suits being filed by irresponsible persons against the trustees whose duty it is to administer such trusts.[4] The infringement of *private* rights is outside the scope of the section.[5]

The real test, therefore, for the applicability of the section is to see whether the suit is *fundamentally* on behalf of the public for the vindication of a *public right*,[6] and in order to apply the test the Court must look to the *substance* and not to the form of the suit.[7]

In order that the section may apply, four conditions appear to be necessary to be satisfied[8]—

(1) There must exist a *trust* for *public purposes* of a charitable or religious nature.[9] (For full notes, see Note 5.)

(2) The plaint must allege that there is a *breach* of such trust or that the direction of the Court is necessary for the administration of the *trust*.[10] (For full notes, see Note 6.)

Note 2

1. ('05) 28 Mad 319 (324) (DB).
('12) 16 Ind Cas 225 (234) (DB) (Mad). (To appoint new trustees.)

2. † ('22) 9 A I R 1922 All 349 (351, 352) : 44 All 622 (DB).
('99) 21 All 187 (188) (DB).
('78) 3 Cal L Rep 112 (115) (DB).

3. ('16) 3 AIR 1916 Mad 332 (337) : 38 Mad 356 : 19 Ind Cas 694 (699) (DB).

4. ('41) 28 A I R 1941 Sind 88 (90) : I L R (1941) Kar 204 (DB).
† ('32) 19 AIR 1932 Rang 132 (134) : 10 Rang 342 (DB).

5. ('13) 19 Ind Cas 740 (744) (Mad).

6. ('27) 14 AIR 1927 Mad 338 (339).
('35) 22 AIR 1935 Mad 855 (856). (*Obiter* — Suit relating to public trust, but merely relating to vindication of private rights—Suit does not fall within S. 92, C. P. Code.)

7. ('40) 27 A I R 1940 Pat 425 (428, 429) (DB). (Allegations in the plaint alone should be looked to — But the Court must look to the substance of the claim and not merely to its wording.)
('26) 13 AIR 1926 Mad 1029 (1030). (Section cannot be evaded by merely asking for declaratory relief.)
[*See also* ('42) 29 AIR 1942 Cal 343 (346) : I L R (1942) 1 Cal 211 (DB). (Whether suit comes within rules of procedure prescribed by S. 92 depends on form of suit as revealed by plaint.)]

8. ('10) 5 Ind Cas 515 (517) (Mad).
('33) 20 AIR 1933 Mad 70 (71).
† ('32) 19 AIR 1932 Bom 65 (67) (DB).

9. ('40) 27 AIR 1940 Pat 425 (428) (DB).
('23) 10 AIR 1923 All 247 (248) (DB).
('25) 12 AIR 1925 Cal 1106 (1107) (DB). (If defendant claims under a public trust Section will apply even if plaintiff challenges his appointment as trustee.)
('16) 3 AIR 1916 Mad 331 (332) (DB). (Inam grant to persons who were not trustees—Benefit of inam to go to grantees alone — Suit to administer such inam—Section does not apply.)
('91) 14 Mad 1 (14, 15) (DB).
('21) 8 AIR 1921 Cal 405 (406). (Suit in respect of public way—Not public trust— O. 1 R. 8 applies and not S. 92.)

10. ('40) 27 AIR 1940 Pat 425 (428) (DB).
† ('23) 10 AIR 1923 Bom 67 (68, 70) : 46 Bom 101 (DB).
('19) 6 AIR 1919 Cal 179 (180).
('25) 12 AIR 1925 Pat 544 (546, 547) : 4 Pat 741 (DB). (Suit against non-trustee for accounts—S. 92 does not apply.)
('17) 4 AIR 1917 Mad 248 (249, 250) (DB). (Breach of trust by archakas in respect of income of inam lands granted to temple—S. 92 applies.)
('10) 13 Oudh Cas 177 : 7 Ind Cas 566 (567) (DB). (Suit against mohunt on allegations of breach of trust—Section applies.)
† ('12) 17 Ind Cas 779 (780) (DB) (Bom). (Suit for removal of trustee alleging breach of trust—Section applies).
('28) 15 AIR 1928 All 33 (33, 34) : 50 All 165 (DB). (Suit for possession of endowed property from trespasser—No allegation of breach of trust— Section does not apply.)
('03) 26 Mad 450 (452) (DB). (Suit to appoint new trustees on the ground that the present one is not a lawful trustee, is one covered by the words "where the direction . . . . . trust.")

(3) The suit must be a *representative* one on behalf of the public and not by individuals for *their own interests.*[11] (For full notes, see Note 7.)

(4) The relief claimed in the suit must be one of the reliefs *mentioned* in the section.[12] (See Note 9.)

See also the case cited below.[13]

When all the above conditions are satisfied, the suit will be governed by the section and cannot be instituted except in conformity with the procedure prescribed thereby.[14] When any one of the conditions is absent, the section has no application. The necessity of obtaining the sanction of the Advocate-General, in a suit falling within the section, has been imposed with a view "to prevent an indefinite number of reckless and harassing suits being brought against trustees by different persons interested in the trust."[15]

The mere fact that a suit *relates* to a public trust or to the properties belonging thereto, without the other conditions of the section being satisfied, will not make the section applicable thereto.[16] Nor will a suit which satisfied all the conditions of the section be taken out of its scope merely by the fact that claims for reliefs *other* than those described in the section are *also* added therein.[17] A suit for removal of a person from religious office, if the office is connected with the management of trust funds and properties, is within the scope of the section.[18] The aim of the section being to restrict the powers of individuals from having unrestricted access to Courts in the matters described in the section its provisions must be strictly construed.[19] Where therefore a point is taken

('91) 15 Bom 148 (151) (DB). (Suit by trustee against trespasser for possession—S. 92 does not apply.)
('21) 8 AIR 1921 Bom 297 (299):45 Bom 683(DB). (Pujari's claim for share of offerings from temple servants—Cl. (e) applies.)
('15) 2 AIR 1915 Mad 1044 (1047) (DB). (If welfare of trust requires it, Court can insist upon proper administration of trust or even remove the mutawalli.)
('11) 36 Bom 29: 12 Ind Cas 577 (578) (DB). (Death of trustees—Court will administer trust.)
('21) 8 AIR 1921 Mad 403(403)(DB). (Suit by trustee for account against dismissed servant—Section does not apply.)
('93) 16 Mad 31 (33) (DB). (Suit against trespassers —Not trustees—Section does not apply.)

11. ('40) 27 AIR 1940 Pat 425 (428) (DB).
† ('06) 33 Cal 789 (807).
('22) 9 AIR 1922 All 499 (500) : 44 All 721 (DB). (Dispute between rival claimants to office—Section does not apply.)
('23) 10 AIR 1923 Pat 309 (316, 317) (DB). (Suit for removal of mohunt on the ground that plaintiff in his own right was entitled thereto —S. 92 does not apply.)
('93) 16 Mad 31 (33) (DB).
('16) 3 AIR 1916 All 225 (225, 226) (DB). (Suit by plaintiff for declaration that he is the mohunt.)
('35) 62 Cal 1132 (1136) (DB).

12. ('42) 29 AIR 1942 Cal 343 (347): I L R (1942) 1 Cal 211 (DB).
('40) 27 AIR 1940 Pat 425 (428) (DB).
('10) 5 Ind Cas 515 (517) (DB) (Mad). (Assertion of right of an alleged trustee is not one of the reliefs mentioned in the section.)
('92) 15 Mad 241 (246)(DB). (Suit by trustees against ex-trustees holding over, for possession of properties —Section does not apply.)
('10) 13 Oudh Cas 177 : 7 Ind Cas 566 (567) (DB).

13. ('37) (24) AIR 1937 Cal 150 (152): ILR (1937) 1 Cal 673. (Bengal Wakf Act does not apply to suit under S. 92 which is based on rights accrued before commencement of Act.)

14. ('25) 12 AIR 1925 Pat 544(547):4 Pat 741(DB).
('18) 5 AIR 1918 All 218 (219)(DB). (District Judge cannot interfere in the management of trust on the mere application (without a suit under S.92) calling attention to a breach of trust.)
('27) 14 AIR 1927 All 526 (529): 49 All 191 (DB). (Suit not under S. 92—Question of breach of trust cannot be tried.)

15. See Note 23.

16. † ('23) 10 AIR 1923 Bom 67 (69, 70): 46 Bom 101 (DB).
('29) 16 AIR 1929 All 518 (518). (Suit in relation to trust property by mutwalli against tenant for rent.)

17. ('42) 29 AIR 1942 Bom 291 (293) (DB). (The fact that the suit raises some issues which have no direct bearing on the issues arising under S. 92, and which are not really appropriate to a suit under S. 92 cannot affect the maintainability of the suit.)
('42) 29 AIR 1942 Bom 125 (128) : I L R (1942) Bom 293.
('97) 24 Cal 418 (426) (DB). (Suit for removal of trustee and for possession from alienee from trustee —S. 92 applies.)
('21) 8 AIR 1921 Mad 563 (565, 566) (DB). (To find out what properties belong to the charity, Court may go into question not directly arising in the suit.)

18. † ('05) 2 Cal L Jour 460 (465) (DB).

19. ('41) 28 AIR 1941 Sind 88 (90) : I L R (1941) Kar 204 (DB).

that a suit brought in the ordinary manner is really governed by the provisions of this section, the Court must see whether it is really and strictly within the four corners thereof.[20] But the applicability of the section does not depend upon whether the defendants had or had not taken objection to the form of the suit.[21]

Section 9 of the Charitable and Religious Trusts Act (XIV of 1920) provides that if a suit under this section is pending or a scheme has been settled, no petition under the provisions of that Act shall be entertained. Section 10 of the same Act also empowers the Court, in suits under this section, to direct the defendant to furnish security or deposit money for costs of the plaintiff. Where an order under S. 5 of the Charitable and Religious Trusts Act is not complied with, there is a breach of trust and by virtue of S. 6 of the Act a suit for any of the reliefs mentioned in this section so far as it is based on such failure may be instituted without the previous sanction of the Advocate-General.[22]

Section 73 of the Madras Hindu Religious Endowments Act provides that this section (i. e., S. 92) shall have no application to any suit claiming any relief in respect of the administration or management of a Hindu religious endowment and that no suit in respect of such administration or management shall be instituted except as provided by that Act. The effect of S. 73 of that Act is that a suit which could only be instituted by the Advocate-General or by some persons with his consent under this section must, when it relates to religious endowments governed by that Act, be instituted by the Religious Endowments Board or by some person having an interest and with the consent of the Board.[23] See also the undermentioned cases[24] under that Act.

Under S. 192 (a) of the Madras Estates Land Act (I of 1908), the provisions of this section corresponding to S. 539, Chap. XL of the old Code, have been made inapplicable to proceedings under the said Act.

Sections 92 and 93 have no application as regards Tirumalai-Tirupati Devasthanams. See the Tirumalai-Tirupati Devasthanams Act (Madras Act XIX of 1933), S. 44 (2). See also the Bengal Wakf Act XIII of 1934 and the undermentioned case[25] relating to that Act. See also sub-section (2).

3. Retrospective operation of the section. — It is a general principle of law that alterations in *procedure* are always retrospective in operation, and accordingly there is nothing to prevent S. 92 of the Code from operating retrospectively.[1] This section deals with the *right of suit* (which is a *substantive* right), as well as with *procedure*.[2]

('19) 6 AIR 1919 Low Bur 56 (57).

20. ('23) 10 AIR 1923 Bom 67 (68, 70) : 46 Bom 101 (DB).

+('36) 23 AIR 1936 Sind 179 (181):30 Sind L R 101 (DB). (But though the section has to be construed strictly, it should not be construed in such a way that a fraud is perpetrated on the section itself.)

21. ('41) 28 AIR 1941 Sind 88 (90) : I L R (1941) Kar 204 (DB).

22. ('33)20AIR1933 Mad854(854):57 Mad 153(DB).

23. ('32) 19 AIR 1932 Mad 234 (236):55 Mad 549 (DB). (Hence a suit by a trustee to recover trust property from the alienees is outside the scope of S. 73, Madras Religious Endowments Act.)

24. ('43) 30 AIR 1943 Mad 228 (230). (Suit by trustees in office against ex-trustees for accounts on grounds of malfeasance, etc.—Suit is not barred by S. 73, Madras Hindu Religious Endowments Act.)
('41) 28 AIR 1941 Mad 878 (881) : I L R (1940) Mad 807 (DB). (Chapter VI-A of the Madras Hindu Religious Endowments Act permits of the notification of a temple in respect of which a scheme has been framed under S. 92.)
('34) 21 AIR 1934 Mad 126 (127) : 57 Mad 362. (Suit for removal of trustee of kattalai does not lie either under S. 73, Madras Religious Endowments Act or S. 92, C. P. Code.)
('35) 22 AIR 1935 Mad 983 (988). (Madras Hindu Religious Endowments Act applies only to what are religious endowments within the meaning of the Act—Fund devoted to two purposes, one falling within Madras Hindu Religious Endowments Act, other though religious, outside the Act — Endowment is not a religious endowment.)

25. ('40) 44 Cal W N 969 (971). (Section 73 (1) of the Bengal Wakf Act, refers to suits which fall within this section, but it simply exempts the Wakf Commissioner from obtaining leave of the Advocate-General.)

Note 3

1. ('12) 5 Sind L R 184 : 13 Ind Cas 264 (267).
2. ('10) 5 Ind Cas 515 (517) (DB) (Mad).

In so far, therefore, as it affects *rights of suit*, it will not have a retrospective operation, but will have such operation so far as it affects *procedure*.[3]

4. Analogous law — Comparison with the Religious Endowments Act, 1863 and with Section 42 of the Specific Relief Act, 1877. — Section 539 of the old Code, corresponding to S. 92 of this Code, was an imperfect reproduction of Lord Romilly's Act (52 Geo. III, C. 101) and the Trustee Act (13 & 14 Vict., C. 60) of 1850 in England. There is a conflict of opinion as to whether decisions on Romilly's Act could be referred to for interpreting the provisions of this section, some holding that they could be so referred to[1] and others that they could not.[2] The language of those Acts, however, is materially different from that of the Code[3] with this additional difference in procedure that the remedy under the English Act is by way of an *application*[4] and the proceedings are regarded as *summary ones*,[5] whereas under the Code the remedy is by way of a *suit*, and the proceedings are *not summary*.[6]

Before the year 1863, the general superintendence of all religious and charitable endowments in the Provinces of Bengal and Madras was vested in the respective Boards of Revenue of those Provinces by virtue of two Regulations, *viz.*, Bengal Regulation XIX of 1810 and Madras Regulation VII of 1817.[7] But there was no law of Religious Endowments as such applicable to the *whole* of India.

In the year 1863, the Government wanted to divest themselves of their powers of interference with *religious* endowments and accordingly Act XX of 1863 was passed, whereby the provisions of the said Regulations relating to *religious* endowments were repealed and provision was made to transfer all such endowments to trustees and committees.[8] The operation of the Act was, however, not confined to such endowments as had been actually taken under the management of the Board of Revenue.[9] The Act does not apply to the Presidency of Bombay excepting the District of North Canara, nor to any Presidency Towns.[10] So far as the Presidency of Madras is concerned now see the Madras Hindu Religious Endowments Act, II of 1927.

As regards *charitable* endowments, the power of superintendence continued to *remain* in the Board of Revenue, under the old Regulations, and is still retained by it.

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3. ('42) 29 AIR 1942 Cal 343 (348) : ILR (1942) 1 Cal 211 (DB). (The amendments in 1882 and 1908 of S. 92 as it originally stood were intended to be retrospective and affected existing rights.)
('14) 1 AIR 1914 Mad 593 (594) : 37 Mad 184 : 20 Ind Cas 515 (516) (DB). (Sanction granted by Collector for suit for removal of trustee — Suit brought under new Code—Sanction is valid.)
('79) 3 Bom 27 (28) (DB).
('28) 15 AIR 1928 All 660 (662) : 51 All 30 (DB).

Note 4

1. ('11) 36 Mad 364 (369) (DB).
('94) 17 Mad 462 (464) (FB). (Decisions relevant.)
2. ('97) 21 Bom 48 (52) (DB). (Not strictly relevant.)
('97) 24 Cal 418 (424) (DB). (Do.)
('05) 2 Cal L Jour 431 (439) (DB). (Not safe to rely on English decisions.)
[*See* ('36) 23 AIR 1936 Mad 449 (453). (Section 92 has been modelled on the practice of the Chancery Courts, but as that division of jurisdiction is not part of the law of this country, limitations arising out of that conflict of jurisdictions have no direct application here.)]
3. ('91) 14 Mad 186 (203, 204, 218) (SB).
('97) 24 Cal 418 (424) (DB).
† ('05) 2 Cal L Jour 431 (439) (DB).
4. ('91) 14 Mad 186 (193) (SB).
5. ('91) 14 Mad 186 (215) (SB).
6. ('91) 14 Mad 186 (217, 218) (SB).
‡('36) 23 AIR 1936 Mad 449 (452) (DB).
7. *See* ('17) 4 AIR 1917 Mad 551 (552) : 39 Mad 700 (703).
[*See also* ('32) 19 AIR 1932 Pat 177 (177) : 11 Pat 594.]
8. ('84) 6 All 1 (6) : 10 Ind App 90 (PC).
9. ('82) 8 Cal 32 (38, 40) (DB).
('94) 17 Mad 95 (96) (DB). (Act XX of 1863 does not apply unless endowment could come within Regulation VII of 1817.)
('96) 18 All 227 (231) (DB).
10. ('01) 24 Mad 219 (232) (DB). (Not intended to apply to suit, brought under the ordinary original jurisdiction of the High Court inherited from the Supreme Court.)
('78) 3 Cal 563 (572) (DB). (Suit brought under original jurisdiction of Supreme Court — Section does not apply.)

Comparison with Religious Endowments Act. — Section 14 of the Religious Endowments Act provides that any *person* or *persons interested*[11] in any *public religious trust*[12] may sue the trustee, manager, superintendent or a member of any committee appointed under the Act, for any *misfeasance, breach of trust* or *neglect of duty* committed by him in respect of the trust[13] and the Court may, in such a suit —

(1) direct the specific performance of any act by such trustee, manager, superintendent or member of the committee,

(2) decree damages and costs against such person, and

(3) direct his removal.[14]

Section 92 declares that the provisions of the Religious Endowments Act for the institution of suits governed by that Act are not affected by its provisions.[15]

Section 92 read with the provisions of the Religious Endowments Act thus leads to the following results :

(1) Suits in respect of *charitable* trusts are outside the scope of the Religious Endowments Act (XX of 1863). They will fall within the scope of S. 92 if the conditions for the applicability of section described in Note 2 are satisfied.

(2) Suits in respect of *religious* endowments, which do not charge the trustee, manager, superintendent or committee member with *misfeasance, breach of trust* or *neglect of duty*, are outside the scope of the Act. They will fall within the scope of S. 92 if the conditions for its applicability are satisfied.[16]

(3) Suits in respect of public *religious* trusts which charge the trustee, manager, superintendent or committee member with misfeasance, breach of trust or neglect of duty will fall within the scope of both the said Act and S. 92 of the Code. In such a case, the plaintiff may proceed under *either* provision at his choice,[17] though the proper machinery to proceed under would, in the generality of cases, be under the Code.[18]

(4) Both under the Act as well as under S. 92, permission is necessary to be obtained before the institution of the suit—if, under the Act, from the principal Civil Court of original jurisdiction, and if under S. 92, from the Collector or the Advocate-General.[19]

(5) The general procedure of the Code equally applies to suits under the Act.[20]

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11. ('67) 8 Suth W R 313 (314) (DB). (It is not necessary that the interest should be a pecuniary one.)
[*See also* ('97) 24 Cal 418 (427) (DB). (Pecuniary interest is not necessary.)]

12. ('92) 19 Cal 275 (284) (DB). (Act of 1863 applies only to public religious trusts.)
('91) 14 Mad 1 (8, 15) (DB). (Act does not apply if the endowment is not a public one.)
('81) 7 Cal 767 (770) (DB).
† ('77) 3 Cal 324 (330) (PC). (Suit for removal of mutwalli of Mahomedan religious endowment falls under Act XX of 1863.)
('86) 8 All 31 (34) (DB).

13. † ('78) 2 Mad 197 (199) (DB). (The Act does not recognize any difference between hereditary and selected trustees.)
('67) 8 Suth W R 313 (314) (DB).
('78) 2 Mad 58 (60) (DB).
('90) 3 C P L R 11 (13). (Act except S. 22 does not apply to Central Provinces.)

14. ('01) 24 Mad 243 (245) (DB). (Declaration also may be asked as ancillary to the claim for removal of manager.)

15. See S. 92, sub-section (2).

16. ('19) 6 AIR 1919 Mad 159 (160) : 42 Mad 668 (DB). (Per Abdur Rahim, J.)

17. ('18) 5 AIR 1918 Bom 134 (137) : 42 Bom 742 (DB).
('34) 21 AIR 1934 Pat 443 (446).
('14) 1 AIR 1914 Mad 593 (593, 594) : 37 Mad 184 : 20 Ind Cas 515 (515).
('21) 8 AIR 1921 Cal 425 (426). (Decree under S. 5 of Religious Endowments Act — No bar to a suit under this section.)

18. ('25) 12 AIR 1925 Pat 544 (546) : 4 Pat 741.
('04) 8 Cal W N 404 (407, 408). (But in a suit under the Act only such relief can be given as the special statute says it may give.)

19. ('07) 4 All L Jour 774 (775). (See S. 18 of Act XX of 1863.)

20. ('18) 5 AIR 1918 Mad 560 (562) : 41 Mad 237 (DB). (Per Sadasiva Aiyar, J.)

(6) The reliefs granted under the Act are slightly different from those accorded under S. 92 of the Code.[21]

(7) A suit under the Religious Endowments Act is as much a *representative* suit as one under S. 92 of the Code and affects the rights of all those interested in the trust.[22]

Comparison with Specific Relief Act, Section 42. — Section 42 of the Specific Relief Act provides that no Court shall grant a declaration where the plaintiff being able to seek further relief, omits to do so. But this section has been held to be inapplicable to cases falling within the scope of S. 539 (the corresponding section of the old Code), or S. 92 even if the suit is one for a *mere declaration* and the plaintiff does not ask for further relief, being able to do so.[23] Nor can a plaintiff evade the requirements of S. 92 by framing a suit as one under section 42 of the Specific Relief Act.[24]

5. Trust, whether express or constructive, for public purposes of a religious or charitable nature, necessary. — This section deals with *completed* trusts and does not become applicable until that stage is reached.[1] In other words, it pre-supposes the *existence* of a trust,[2] and does not apply where there is no trust, express or constructive, for public purposes of a charitable or religious nature.[3] A suit, therefore, for deciding solely *whether a trust exists or not* is outside the scope of the section.[4]

('01) 24 Mad 685 (689) (DB). (Application for leave to sue under the Religious Endowments Act must be verified and presented as in the case of plaints.)

21. ('25) 12 AIR 1925 Pat 544 (546) : 4 Pat 741 (DB). (Power to appoint new trustee or to frame scheme is restricted to S. 92 only.)
('18) 5 AIR 1918 Bom 134 (137) : 42 Bom 742 (DB). (S. 92 is wider than S. 14 of the Religious Endowments Act and provides for settling a scheme which is a jurisdiction of a very wide and beneficial nature.)
('08) 5 All L Jour 191 (192). (Court cannot appoint new trustee under the Act.)

22. ('28) 15 AIR 1928 Mad 614 (619) (DB).
('18) 5 AIR 1918 Mad 560 (562): 41 Mad 237 (DB).
('30) 17 AIR 1930 Mad 216 (218). (S. 73 of the Madras Religious Endowments Act is closely modelled on this section.)

23. ('03) 26 Mad 450 (453) (DB). (Suit for declaration that defendants in possession are not lawful trustees and for appointment of new trustees — Possession not claimed.)
('10) 5 Ind Cas 515 (517) (Mad).
('93) 16 Mad 31 (33) (DB). (Suit outside S. 539— S. 42, Specific Relief Act applies if it is a suit for mere declaration.)

24. ('22) 9 AIR 1922 All 349 (351, 352): 44 All 622 (DB). (Suits with regard to trusts relating to public charities must either be brought under S. 92 or they cannot be brought at all — Per Walsh, J.)
Also see Note 12.

Note 5

1. ('17) 4 AIR 1917 Mad 1008 (1008) (DB).

2. ('26) 13 AIR 1926 Pat 321 (326) : 5 Pat 539 (DB).
† ('04) 1 All L Jour 26 (28).
('30) 17 AIR 1930 Bom 167 (168).
('38) 25 AIR 1938 Bom 471 (476) (DB). (Section applies to trust under Trusts Act.)
('36) 14 Rang 575 (582, 583). (Suit denying existence of trust—Section does not apply.)

3. ('22) 9 AIR 1922 P C 253 (256) : 49 Cal 459 : 49 Ind App 100 (PC). (Gift as in effect a private trust—Section would not apply.)
†('29) 16 AIR 1929 P C 27 (29) (PC).
('15) 2 AIR 1915 Low Bur 67 (70) (DB). (Court should pause before interfering under S. 92 with a matter which is more a family matter than of a public nature.)
('20) 7 AIR 1920 Oudh 120 (122). (Acts of private trustee — Person having no interest in the trust property cannot question.)
('23) 10 AIR 1923 All 247 (248) (DB). (Pujari of an idol is not a trustee and S. 92 does not apply to suit against him.)
('16) 3 AIR 1916 Bom 281 (282) : 40 Bom 439 (DB). (Charitable bequest — No trust alleged — Section 92 does not apply.)
† ('27) 14 AIR 1927 Oudh 604 (604) (DB).
('10) 5 Ind Cas 515 (517) (Mad). (Suit must be against a trustee or trustee *de son tort*.)
('12) 17 Ind Cas 586 (587) (DB) (Mad).
('25) 12 AIR 1925 All 759 (761) : 47 All 867 (DB).
('21) 8 AIR 1921 Cal 405 (406). (Highway — Suit for declaration of public way on behalf of villagers —'Section does not apply.)
('21) 8 AIR 1921 All 116 (117) (DB). (No allegation that defendant was express or constructive trustee — Section does not apply.)
Also see Note 2.

4. ('41) 28 AIR 1941 Cal 68 (72) (DB). (But question whether particular property appertains to public trust or whether trustee has been validly appointed or not can be determined in suit under this section if determination of such questions is necessary to grant reliefs which properly come under the section.)
† ('26) 13 AIR 1926 Pat 321 (326) : 5 Pat 539 (DB).
('33) 20 AIR 1933 Lah 670 (671). (Suit for declaration of wakf and invalidity of alienations.)
† ('30) 17 AIR 1930 Cal 787 (795): 58 Cal 474 (DB.)

In order that the section may apply, the trust must be a *public* one.[5] The words "public purposes of a charitable or religious nature" used in the section should be given their ordinary meaning and cannot be made to vary according to the classification of trusts which may be accepted in different systems of law.[6] A public trust differs from a private trust in important particulars.[7] In the case of the former, the beneficial interest is vested in an *uncertain and fluctuating* body and the trust itself is of a *permanent* character.[8] In the case of the latter, the beneficial interest is vested absolutely in one or

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('20) 7 AIR 1920 Lah 455 (456).
('02) 25 All 631 (633, 634) (DB).
('27) 14 AIR 1927 Lah 350 (351): 8 Lah 111 (DB).
✣('25) 12 AIR 1925 All 683 (685, 686): 47 All 770 (DB). (Where a suit prays for removal of the trustee and incidentally prays for declaration that a property is wakf, it is not outside S. 92.)
('28) 15 AIR 1928 Lah 888 (889) (DB).
('86) 8 All 31 (34) (DB).
('36) 23 AIR 1936 Lah 283 (285) (DB). (Persons intended to benefit under a trust are competent to sue for declaration that property is wakf, without sanction required by S. 92.)
[*See* ('42) 29 AIR 1942 Sind 137 (139) : I L R (1942) Kar 179 (DB). (Suit under S. 92 for removal of trustee—Validity of trust questioned by defendant — Question is outside scope of suit under S. 92 and must be raised by separate suit.)
('35) 22 AIR 1935 Mad 855 (856). (Issue as to trust character of properties incidental — Main relief by way of scheme for management — Suit not maintainable without sanction under S. 92, C. P. Code — Declaration as to trust character *held* could not be given.)
('37) 24 AIR 1937 Sind 174 (175) : 30 Sind L R 478 (DB). (A suit to which a claim is made to property as the plaintiff's private property is not a suit to which S. 92, C. P. Code, applies. The nature of a suit is determined by the plaint and not by the written statement. The fact that the defendant in his written statement pleads that the property is a public charitable and religious trust cannot make the suit one under the Section.)]
[*See also* ('39) 26 AIR 1939 Bom 354 (358) : 41 Bom L R 787 (795) (DB). (Suit challenging trust—Section does not apply.)]
Also see Note 12.

5. ('42) 29 AIR 1942 Cal 343 (346): ILR (1942) 1 Cal 211 (DB). (Wakf for religious purposes—*Held* on construction of wakf deed that it was a public trust and was not confined to the sub-sect of Shias to which the founder belonged.)
('42) 29 AIR 1942 Sind 137 (139) : I L R (1942) Kar 179 (DB). (Part of Income from the property to be spent for upkeep of graveyard and substantial portion of income asked to be spent for distributing alms to the poor and feeding the poor—Trust is public one.)
('23) 10 A I R 1923 Mad 376 (383) : 46 Mad 300 (DB). (Gift to *samajam* or for the spread of Sanskrit language is outside the Section.)
('34) 21 AIR 1934 All 315 (317) (DB).
('14) 1 AIR 1914 All 394 (395) (DB).
('10) 32 All 503 (511) (DB).
('10) 33 Mad 265 (283, 284): 5 Ind Cas 4 (14) (FB).
('28) 15 AIR 1928 All 660 (662) : 51 All 30 (DB). (Provision that mutwalli should spend a portion of income on good deeds and charity—Outsider not entitled to benefit in lifetime of family members —Trust is private trust.)
('12) 34 All 468 (471) (DB). (Support of Fakirs of a sect.)
('85) 11 Cal 33 (36) (DB).
('21) 8 AIR 1921 Bom 338(350). (Advocate General is not concerned with private trusts.)
('91) 14 Mad 1 (8) (DB). (Trust of private nature—Feeding persons at Gurupriya and keeping water pandal during hot season.)
('31) 21 AIR 1934 P C 230 (234): 61 Ind App 405: 58 Mad 91 (PC).
†('36) 23 AIR 1936 Mad 449 (460) (DB).
('36) 14 Rang 575(592, 593). (A trust for the benefit of the poor members of a particular testator's family is not a trust "for a public purpose of a charitable nature" within the meaning of S. 92.)
†('39) 26 AIR 1939 Rang 203 (205) : 1939 Rang L R 520 (DB). (Where charity, prima facie for public purposes, is the expressed object of the settlor, this purpose is not in any way defeated by the reminder that members of his own family are eligible to benefit with other members of the public at large—Case not under Mahomedan law —Where nothing is said as to the charitable purposes being public or private, they are presumed to be of a public nature.)
[*See* ('32) 19 AIR 1932 Pat 33 (51) : 11 Pat 283 (DB). (Provisions for maintenance of *khankahs* and for distribution of alms and charities are objects of a public nature.)]

6. ('28) 15 A I R 1928 All 660 (662) : 51 All 30 (DB).

7. †('10) 32 All 503 (511) (DB).
('33) 20 A I R 1933 Oudh 22 (25) : 8 Luck 266 (DB). (No hard and fast rule can be laid—Should be judged from inferences drawn from the circumstances of each case.)
†('37) 24 AIR 1937 Cal 67 (79) : I L R (1937) 1 Cal 515 (DB). (Tests to see if trust is public or private discussed.)
('38) 25 AIR 1938 Cal 278 (280) (DB). (The court must look to the real substance of the trust and the primary intention of the creator of the trust in every case.)
[*See also* ('32) 19 AIR 1932 All 709 (709) (DB). (Whether a temple is public or private depends upon the facts of each case. In this case on proved facts held to be a public temple.)]

8. ('42) 29 AIR 1942 Cal 343 (349) : I L R (1942) 1 Cal 211 (DB).
('90) 3 C P L R 11 (13).
('33) 20 A I R 1933 Oudh 22 (25) : 8 Luck 266 (DB).
✣('22) 9 AIR 1922 All 519 (520) (DB).
('93-1900) 1893-1900 Low Bur Rul 645 (647).

more *ascertainable individuals* and the trust itself need *not* be a permanent one.[9] The fact that the uncertain and fluctuating body is only a *section* of the public or caste,[10] or the fact that such section levies poll-tax amongst themselves for the maintenance of the trust or holds caste meetings and erects buildings out of the income of the trust will not detract from the public character of the trust.[11] To see if a trust is a public or private one, the real substance of the trust and the primary intention of the creator of the trust must be looked to.[12] Trusts in favour of a Hindu idol, or temple,[13] or in favour of a Mahomedan mosque,[14] or a "Devadayam"[15] have all been held to be *prima facie* trusts for public purposes.

When a trust is created both for public and private purposes, this section will apply to such a trust although the public and charitable part of the trust is small as compared with the other parts of the trust.[16]

In order to create a trust there must be a *dedication* for the purposes of the trust.[17] Whether in any particular case a property has been validly dedicated to a trust is a question of fact to be determined by a reference to the terms of the document of dedication where there is one,[18] or, where there is no document or the terms thereof

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('37) 24 AIR 1937 Mad 862 (863). (Dharmadhayam grant—Grantee described as Dharmakartha and grant subject to condition of 'tope' being preserved and produce applied to charity — Tope utilized as place of shelter for villagers and cattle —Grant held public charitable trust and S. 92 therefore applied.)
[*See* ('32) 19 AIR 1932 Pat 33 (51) : 11 Pat 288 (DB). (In case of a public trust it is not necessary that there should be privity of contract between the grantor and the grantee on the one hand and the beneficiaries on the other.)]

9. ('42) 29 AIR 1942 Cal 343 (349) : I L R (1942) 1 Cal 211 (DB).
('22) 9 AIR 1922 All 519 (520) (DB).

10. ('42) 29 AIR 1942 Cal 343 (349): I L R (1942) 1 Cal 211 (DB).
('39) 26 AIR 1939 Mad 920 (921, 922) : I L R (1940) Mad 300 (DB). (Scheme of loans for educational purposes at low interest to Anglo-Indian youths of Madras Presidency is public trust.)
('11) 11 Ind Cas 166 (174) (DB) (All).
('32) 19 AIR 1932 Pat 33 (51) : 11 Pat 288 (DB).
('94) 1894 All W N 159 (160). (Endowment to a sect called Bhagwatas is public.)
('31) 18 AIR 1931 All 212 (214) : 53 All 422 (DB). (Bequest to a society — Society can sue in the interests of the trust.)
('38) 25 AIR 1938 Bom 471 (473) (DB). (Even if the use of a temple is restricted to persons professing a particular panth (sect), the temple might still be a public one.)
('39) 26 AIR 1939 Sind 13 (14, 15) : I L R (1939) Kar 325 (DB). (Allotting property for benefit of poor members of particular community is for public purpose of charitable nature.)

11. † ('17) 4 AIR 1917 Mad 426 (427, 428) (DB).

12. ('43) 30 AIR 1943 Oudh 186 (190).
('41) 28 AIR 1941 Pat 601 (602) (DB). (Dedication by Hindu executor to family idol — Dedication to idol absolute — Part of income intended to be spent for casual visitors—Option given to relations of executor to select outsider as mutawalli—*Held*, intention to convert private idol to public idol on executor's part, could not be inferred.)
('38) 25 AIR 1938 Cal 278 (280) (DB). (A I R 1929 Oudh 225 : 4 Luck 429 (FB) followed.)

13. ('88) 12 Bom 247 (262) (DB).
[See however ('42) 29 AIR 1942 Bom 291 (295) (DB). (It is well settled that family idols may be endowed with property without any question of a public trust arising, and the same may be said to be true of some idols which are not family idols.)]

14. ('88) 12 Bom 247 (266) (DB). (Trust in favour of Hindu idol.)
('34) 21 AIR 1934 Pesh 57 (63) (DB). (In Mahomedan law, there is no private mosque—Once dedicated it becomes public property.)
('24) 11 AIR 1924 Lah 432 (435) : 5 Lah 59 (DB). (Wakf.)
('18) 5 AIR 1918 Mad 1155 (1157) (DB). (Mosque founded to perpetuate the memory of departed men.)

15. ('24) 11 AIR 1924 Mad 491 (491) (DB).
† ('25) 12 AIR 1925 Mad 411 (413) (DB).

16. ('39) 26 AIR 1939 Sind 13 (15) : I L R (1939) Kar 325 (DB). (Reversing AIR 1935 Sind 235.)

17. ✣ ('02) 24 All 257 (265) (DB).
('05) 32 Cal 129 (141) : 31 Ind App 203 (PC). (In case of dedications to an idol the right of management belongs to the shebait.)
('96) 23 Cal 645 (655, 662) (DB). (Offerings of a more or less permanent character given to the idol of public worship partake of the character of trust.)
('26) 13 AIR 1926 Mad 1150 (1152). (There is nothing illegal for a person who builds a temple out of his own funds to create a trust directing in what manner it should be managed.)
[*See* ('33) 20 AIR 1933 Lah 189 (191). (Owner must completely divest himself of his ownership.)]

18. ('41) 28 AIR 1941 Cal 68 (72) (DB). (Will dedicating property to public library.)
('40) 27 AIR 1940 P C 7 (10) : 67 Ind App 1 : I L R (1940) Kar P C 25 : 15 Luck 1 (PC). (Grant made to individual and his heirs in perpetuity — Grant is not made for public religious purpose.)
('90) 13 Mad 66 (73) (SB).

are ambiguous,[19] to the *user*,[20] *treatment*,[21] *surrounding circumstances*[22] and also the *feelings* and *sentiments* of the religious community to which the parties belong.[23] The mere fact that the owner of a land built a temple on it and planted a grove thereon,[24] or the fact that a person was spending a large portion of his income from a certain property on a temple founded by him,[25] or the mere fact that the public worshipped there,[26] is insufficient by itself to establish a dedication. But these facts may be some evidence and may be considered in gathering the intention of the founder.[27]

In order that the dedication might be a *valid* one, it is essential that its objects and purposes should not be *vague*[28] or opposed to law. Under the Mahomedan law, a

('95) 18 Mad 201 (213) (DB).
('91) 15 Bom 625 (635) (DB). (Direction in sanad that the property should continue to *C* and his heirs for worship, jubilees, feeding of Brahmins in honour of deity — Grant is one made to the religious foundation and not to *C* or his descendants.)
('32) 19 AIR 1932 Cal 419 (422) (DB).

19. † ('18) 5 AIR 1918 Oudh 207 (208) (DB). (Deed of endowment silent as to nature of trust.)
('25) 12 AIR 1925 Mad 689 (690).
('25) 12 AIR 1925 Mad 411 (413) (DB).

20. † ('19) 6 AIR 1919 Mad 515 (521): 42 Mad 161 (SB). (In absence of evidence as to what was actually granted by Native rulers there is no presumption that only the 'melwaram' was granted—Kudivaram is included.)
† ('24) 11 AIR 1924 Pat 502 (503) (DB).
('17) 4 AIR 1917 Oudh 375 (378, 380) : 20 Oudh Cas 49 (DB). (Usages and traditions may be considered.)
✠('21) 62 Ind Cas 655 (659) (DB) (Mad). (Members of public all along invited and freely admitted to the temple—*Prima facie* the inference is dedication to the public.)
† ('28) 15 AIR 1928 Mad 879 (884) (DB). (Hindu public using temple freely for centuries is strong evidence of its being a public one.)
('14) 1 AIR 1914 Cal 813 (814) : 42 Cal 536 (DB).
('26) 13 AIR 1926 Oudh 578 (587) (DB). (But existence of residential apartments in temples would not detract from public character of the temples.)
[*See also* ('39) 26 AIR 1939 All 387 (389) (DB). (Residents of village accustomed to make offerings for long time at particular 'Isthan' situated in a house—It amounts to customary easement within the meaning of S. 18, Easements Act, giving them right to continue to make offerings.)
('34) 21 AIR 1934 Nag 48 (49, 50). (Presumption is in favour of public dedication.)]

21. ('19) 6 AIR 1919 Mad 225 (226) (DB). (Grant treated by Government with the consent of the grantees as an endowment of the mosque is a public religious trust.)
('18) 5 AIR 1918 Oudh 207 (208) (DB).
† ('21) 62 Ind Cas 655 (659) (DB) (Mad). (When user and treatment establish a temple to be a public one, the fact that management follows a particular line of descent does not rebut it.)
✠('20) 7 AIR 1920 Mad 42 (43, 52, 53) (FB). (Worship and contributions by the public, buildings of choultries by the public, installation of a copper idol by the founder, conduct of processions in public streets all these show that the shrine is dedicated to the public.)
† ('28) 15 AIR 1928 Mad 879 (881, 883) (DB). (Inam proceedings are of great importance in deciding the question.)
[*See also* ('32) 19 AIR 1932 Cal 419 (422) (DB). (From subsequent acts and conduct of parties.)]

22. ('21) 8 AIR 1921 Pat 511 (512) (DB). (Such words as indicating that beneficial interest vested in the public.)
('11) 11 Ind Cas 166 (174) (DB) (All). (Grant for charity which for over hundred years having been carried out by maintenance of fakirs and the trustee, is a grant for public trust. Karamat Hussain, J., contra.)
('12) 34 All 468 (473) (DB). (Property held for maintaining fakirs and giving alms — Trust must be presumed.)
† ('37) 24 AIR 1937 Cal 67 (79): ILR (1937) 1 Cal 515 (DB). (In the absence of a deed of dedication, the question depends on inferences to be drawn from facts not in dispute and from unambiguous evidence adduced in the suit.)

23. ('13) 1913 Pun Re No. 38, page 151 : 20 Ind Cas 295 (296).

24. ('94) 16 All 412 (414, 415) (DB).

25. ('15) 2 AIR 1915 Oudh 181 (184) (DB).
('11) 11 Ind Cas 308 (309) (DB) (All).

26. ('40) 27 AIR 1940 P C 7 (11) : 67 Ind App 1 : ILR (1940) Kar P C 25 : 15 Luck 1 (PC).
('21) 8 AIR 1921 Sind 1 (3) : 15 Sind L R 38 (DB).
[But see ('39) 26 AIR 1939 All 387 (388) (DB). (No particular act is necessary to signify a dedication—It is sufficient, if it is proved, that the public have been going there and making offerings.)

27. ('42) 29 AIR 1942 Bom 291 (295, 296) (DB).
('09) 36 Cal 1003 (1012) : 36 Ind App 148 (PC).
† ('38) 25 AIR 1938 Bom 471 (477) (DB). (Public user for a long period without objection can be relied upon as strong evidence of a public trust —Where properties have been acquired by a Sadhu, mahant of a temple, and have descended from chela to chela there is a presumption that they have been dedicated to religious uses.)

28. ('42) 29 AIR 1942 Bom 291 (295) (DB). (In order to constitute an express or constructive trust for a public purpose of a charitable or religious nature, the author or authors of the trust must be ascertained and the intention to create a trust must be indicated by words or acts with reasonable certainty, and further, the purpose of the trust, the trust property and the beneficiaries must be indicated so as to enable the Court to administer the trust if required—AIR 1935 P C 97 : 62 Ind App 146 : 57 All 330 (PC) followed.)

waqf or trust for public or charitable purposes is not valid unless express provision is made for the *ultimate devolution* of the *waqf* property to *charitable* or *religious* purposes[29] and unless the dedication is a *substantial* and not merely an illusory one.[30] The mere fact that some provision is made for the maintenance of the grantor's kindred and descendants will not render the *waqf* invalid.[31] A dedication will not also be invalid merely because it offends the rule against perpetuities[32] or because it is in favour of a nonsentient being like an idol.[33]

The *devolution* of the trust upon the death or default of the trustee depends upon the terms on which it was created or, in the absence thereof, upon the usages of the particular trust.[34] One of the accepted rules is that the office of the *shebait* of an idol is vested in the heirs of the founder in default of evidence that he has disposed of it.[35] Again, a person who has founded a temple, whether out of his own funds or out of funds collected by subscriptions, can, in the absence of any prohibition by the subscribers, direct in what manner the trust is to be managed, whether hereditarily or otherwise.[36] In cases of dedication of the completest character to a Hindu idol, the idol is regarded as a juridical person capable of holding property, but in dedications of every kind the *possession* and

('99) 23 Bom 725 (735) : 26 Ind App 71 (PC). (Trust for Dharm is void for vagueness.)
('82) 1882 Pun Re No. 50, p. 143 (151). (Bequest "bama sariff-in-dulla" is vague and indefinite.)
('21) 8 AIR 1921 Pat 125 (131) : 6 Pat L Jour 218 (DB). (Object to make a permanent provision for mohurram is not vague.)
('08) 30 All 111 (114) (DB). (Gift to Dharmasala is not vague — A gift to charity generally is not as vague as a gift to Dharma which includes philanthrophy, piety, etc., etc.)
('25) 12 AIR 1925 Mad 689 (690). (Vanabhojanam Dharmam is not a vague object of trust.)

29. ('89) 13 Bom 264 (274) (DB).
('82) 6 Bom 42 (51). (Wakf must be unconditional and must have a fixed final object.)
†('91) 13 All 261 (270) (DB).
('81) 6 Cal 744 (748, 749) (DB).
('17) 4 AIR 1917 Cal 835 (837) (DB). (Sanad for maintenance of mosque, feeding of travellers and the public offer of prayers—Trust is a public, religious and charitable one.)

30. ('42) 29 AIR 1942 Cal 1 (10) : ILR (1941) 2 Cal 434 (DB).
('40) 44 Cal W N 969 (973). (Where the bulk of the income from the wakf properties is to be spent for the family or family purposes, some portion for religious purposes which cannot be regarded as wholly public in Mahomedan law like *Mohurram* and *Ramzan* expenses, and the surplus, if any, is to go to *haj* expenses of the *mutawalli*, the wakf is not a trust created for public purposes within the meaning of S. 92, C. P. Code—The test is not merely a calculation of what goes to the different objects.)
✠('93) 20 Cal 116 (230, 231) (FB). (Overruling 19 Cal 412.)
('33) 20 AIR 1933 All 277 (280) (DB).
('90) 17 Cal 498 (509) : 17 Ind App 28 (PC).
('70) 13 Suth W R 235 (237) (DB). (Mere charge upon profits of certain items which must in time cease is not a valid wakf.)
('06) 8 Bom L R 245 (250).
('93) 17 Bom 1 (4) : 19 Ind App 170 (PC).
('97) 19 All 211 (214) (DB).
('01) 23 All 233 (246) : 28 Ind App 15 (PC). (Wakf not substantially dedicated to charity is not valid.)
† ('99) 21 All 329 (339) (DB).
('05) 8 Oudh Cas 379 (388) (DB).
('02) 24 All 257 (265) (DB). (Perpetual endowment on family with instructions to do certain ceremonial acts—Not a valid wakf.)
('81) 9 Cal L Rep 66 (75). (Wakf trying merely to create family settlement is not valid.)
('06) 4 Cal L Jour 442 (453) (DB). (True idea to tie up property in family—No valid wakf.)
('28) 15 A I R 1928 All 660 (662, 663) : 51 All 30 (DB). (Illusory dedication is no valid wakf.)
✠('95) 22 Cal 619 (622) : 22 Ind App 76 (PC). (Substance of deed decides validity of wakf.)
('75) 23 Suth W R 453 (455) (DB).
('20) 7 AIR 1920 Cal 379 (381) : 47 Cal 866 (DB). (The balance of income after necessary expenses to be divided between named charitable objects and the heirs in equal shares — This is a substantial dedication.)
('73) 10 Bom H C R 7 (13, 14). (The mere use of the word "wakf" is insufficient.)

31. ('92) 14 All 375 (376) (DB).
('33) 20 A I R 1933 Oudh 107 (112, 114) : 8 Luck 246 (DB).
('83) 9 Cal 176 (180) (DB).
('90) 17 Cal 498 (509, 510) : 17 Ind App 28 (PC).
('38) 25 AIR 1938 P C 184 (187) : 65 Ind App 198 : I L R (1938) Lah 383 : 32 Sind L R 749 (PC). (The fact that right is given to testator's heirs of private residence in sarai, for purposes of which wakf is created, does not make dedication invalid nor render it illusory.)

32. ('97) 25 Cal 112 (127, 128).
33. ('09) 37 Cal 128(140):3 Ind Cas 642(647)(FB).
34. ('09) 3 Ind Cas 408 (413) (DB) (Cal).
35. ('09) 3 Ind Cas 408 (413) (DB) (Cal).
('16) 3 AIR 1916 Cal 312 (315) (DB).
36. ('26) 13 AIR 1926 Mad 1150 (1152).
('31) 18 AIR 1931 All 765 (766) (DB). (Courts may, however, vary founder's rule of management in public interests.)

management still belongs to the trustees or *shebait* in whom is vested the right to sue for the protection of the property.[37]

As has been seen already in Note 2, a trust, for the purposes of section 92, may be either *express* or *constructive*. The words "express or constructive trust" are not limited to the meaning of the word "trust" as used in English law[38] but should be construed liberally and in a sense as favourable as possible to the assumption of jurisdiction by a Court under S. 92.[39] A "constructive trustee" would include a trustee *de son tort* who has without title taken upon himself the character of a trustee.[40] It would also include a person, who, though not a trustee *de son tort*, holds a fiduciary position whose obligation in such capacity can be enforced in a Court of law.[41]

The question whether the head of a *mutt* holds the *mutt* properties as a *life tenant* or as a *trustee* must depend upon the conditions on which they were given or which may be inferred from usage and treatment.[42] It has been held that he is not a "trustee" in the English sense of the term[43] but is *answerable as a trustee* for his administration.[44] Section 92 has accordingly been applied to the case of mutts

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37. ('05) 32 Cal 129(140,141) : 31 Ind App 203 (PC).

38. ('27) 14 A I R 1927 Mad 614 (617) : 50 Mad 567 (DB).
('32) 19 A I R 1932 Pat 33 (48) : 11 Pat 288 (DB). (Word "trust" is used in the ordinary sense in this Section and therefore the Section applies to Mahomedan wakfs and to Hindu debutters.)

39. ('11) 11 Ind Cas 308 (310) (DB) (All).

40. ('42) 29 AIR 1942 Cal 343 (346): I L R (1942) 1 Cal 211 (DB). (Suit against Government which purporting to act as trustee under Act XX of 1863 had been illegally spending income of trust property on purposes foreign to trust—Suit came under S. 92 and was against Government alleged to be trustee *de son tort*.)
('40) 27 AIR 1940 Pat 425 (429) (DB).
('25) 12 AIR 1925 Mad 212 (213) (DB). (Suit will lie against trustee *de son tort*.)
('34) 21 AIR 1934 Pat 321 (324) (DB). (Section applies to removal of a trustee *de son tort*.)
('14) 1 AIR 1914 Oudh 408 (409) : 18 Oudh Cas 38.
('10) 5 Ind Cas 515 (517) (Mad).
† ('06) 33 Cal 789 (806, 807). (Suit lies against trustee *de son tort*.)
('99) 23 Bom 659 (665) (DB). (Person taking charge of religious endowment and purporting to manage it is a constructive trustee or a trustee *de son tort*.)
('88) 12 Bom 247 (265) (DB). (Shevakas taking possession of trust properties held to be trustees *de son tort*.)
('17) 4 A I R 1917 All 264 (265) (DB). (Section applies to a trustee *de son tort*.)
('24) 11 A I R 1924 All 884 (890) : 47 All 17 (DB). (Suit lies against trustee *de son tort*.)
('22) 9 A I R 1922 All 542 (544) : 44 All 652 (DB).
('36) 23 A I R 1936 Sind 179 (182) : 30 Sind L R 104 (DB). (Constructive trustee — Such person intermeddling with charitable property and making himself trustee—Action is within S. 92.)
('37) 24 A I R 1937 Sind 230 (232) : 31 Sind L R 510 (DB). (Person in possession asserting property as his but admitting that he is executing trust—Such person is trustee, constructive or *de son tort* and not stranger and suit under S. 92 can be brought against him.)

41. ('40) 27 AIR 1940 Lah 356 (358). (Person succeeding to religious institution as son and chela of his father.)
('24) 11 AIR 1924 Bom 193 (201, 204) (DB). (Mahant of Mutt though not a trustee in the strict sense of the term occupies a fiduciary position and is an implied trustee.)
('21) 8 AIR 1921 Mad 479 (479) (DB). (Subordinate trustee is not a trespasser and is deemed to be a trustee.)
('25) 12 AIR 1925 All 759 (761) : 47 All 867 (DB)
('18) 5 AIR 1918 Lah 146 (147):1918 Pun Re No.97.
('17) 4 AIR 1917 Oudh 81 (85) (DB).
('23) 10 AIR 1923 Mad 376 (377) : 46 Mad 300 (DB). (Suit against heir-at-law in possession of trust property.)
† ('06) 33 Cal 789 (805, 806).

42. ('41) 28 AIR 1941 P C 130 (132) : 68 Ind App 130 : I L R (1941) Kar P C 176 : 21 Pat 96 (PC). (High priest of temple appointed trustee of all properties of temple God under S. 539 of old C. P. Code —*Held* high priest was trustee within the meaning of S. 10, Limitation Act.)
† ('10) 33 Mad 265 (272, 277): 5 Ind Cas 4 (8) (FB).
('20) 7 AIR 1920 Oudh 244 (247). (Temple built for and used for public worship—Mahant not absolute owner.)
('24) 11 AIR 1924 Oudh 261 (263) : 27 Oudh Cas 149 (DB). (Mahant is a trustee and can be removed in suit under S. 92.)

43. ('41) 28 AIR 1941 P C 130 (132) : ILR (1941) Kar P C 176 : 21 Pat 96 : 68 Ind App 130 (PC). (High priest of temple.)
('41) 28 AIR 1941 P C 1 (3) : ILR (1941) Mad 175: ILR (1941) Kar P C 1 : 67 Ind App 448 (PC).
('19) 6 AIR 1919 P C 62 (68, 69) : 46 Ind App 204 : 43 Mad 253 (PC).
('18) 5 AIR 1918 Mad 1016 (1025) (DB).
✠ ('22) 9 AIR 1922 P C 123 (126) : 48 Ind App 302 : 44 Mad 831 (PC).

44. ('41) 28 AIR 1941 P C 130 (132) : I L R (1941) Kar P C 176 : 21 Pat 96 : 68 Ind App 130 (PC). (High priest of temple.)
✠ ('27) 14 AIR 1927 Mad 614 (617) : 50 Mad 567 (DB). (Case law fully discussed.)

also.[45] The *acharya* of a temple can be sued under S. 92 as a constructive trustee as his fiduciary position is that of a custodian of property held for public purposes.[46] Similarly, the manager of a temple, as administrator of the temple properties, is a constructive trustee within the meaning of the section.[47] It may be noted at this stage that the mere fact that the defendant *does not admit* the trust but claims to be the owner of the trust properties, will not take the suit out of the scope of the section.[48] Nor will a suit, in which the defendant claims under a trust, be taken out of the section merely because the plaintiffs challenge the appointment of the defendant as a trustee.[49]

6. In case of alleged breach of trust or where the direction of the Court is deemed necessary for administration. — A suit under S. 92 is primarily against a trustee and can only be instituted on the ground either —

(1) that there has been a *breach of trust*,[1] or

(2) that the direction of the Court is deemed necessary for the administration of the trust.[2]

Where a breach of trust is alleged in a suit under S. 92, but the Court decides that there has been no misfeasance or breach of trust, its jurisdiction in the matter ends.[3] The

('19) 6 AIR 1919 Mad 571 (571) (DB). (Mahant of Mutt is a trustee in law.)
('35) 22 AIR 1935 Pat 111 (114) : 14 Pat 379 (DB).
45. ('27) 14 AIR 1927 Mad 614 (617) : 50 Mad 567 (DB).
('11) 11 Ind Cas 166 (173) (DB) (All). (Suit against Mahant.)
('35) 22 AIR 1935 Pat 111 (114) : 14 Pat 379 (DB).
46. ('24) 11 AIR 1924 Bom 193 (201) (DB).
47. ('06) 29 Mad 283 (289) : 33 Ind App 139 (PC).
48. ✠('11) 9 Ind Cas 358 (358) (DB) (Bom).
('34) 21 AIR 1934 Bom 257 (260) (DB).
('32) 19 AIR 1932 Pat 33 (52) : 11 Pat 288 (DB).
('24) 11 AIR 1924 Pat 657 (659,660):3 Pat 842 (DB).
† ('05) 2 Cal L Jour 460 (465) (DB).
('05) 2 Cal L Jour 431 (437) (DB).
('35) 22 AIR 1935 Cal 805 (807) : 63 Cal 74 (DB). (In such a case, it is open to the Court to decide the question whether the trust in respect of which the suit is brought is public trust.)
('36) 23 AIR 1936 Mad 449 (451) (DB).
('36) 23 AIR 1936 Sind 179 (182) : 30 Sind L R 104 (DB).
Also see Note 28.
49. ('25) 12 AIR 1925 Cal 1106 (1107) (DB).

Note 6

1. ('42) 29 AIR 1942 Bom 125 (128) : ILR (1942) Bom 293.
('37) 24 AIR 1937 Cal 67 (80) : I L R (1937) 1 Cal 515 (DB).
('38) 25 AIR 1938 Mad 999 (1004) : I L R (1939) Mad 121 (DB). (Suit by trustee against banker to recover from him trust monies which the trustee alleged had been wrongly applied by the banker in reduction of debt owed by another customer does not come within the provisions of S. 92.)
Also see Note 2.
2. ('16) 3 AIR 1916 Pat 306 (307) (DB).
('08) 10 Bom L R 87 (88) (DB).
† (1900) 24 Bom 170 (181) (DB).
('31) 18 AIR 1931 Bom 33 (35) (DB).
('32) 19 AIR 1932 Bom 65 (65) (DB).
(1862) 1 Bom H C R Appendix ix (xvi, xvii). (Suit to administer the funds of Hindu charity is competent.)
('28) 15 AIR 1928 Mad 401 (402) (DB). (No scheme can be framed if malversation, mismanagement, misappropriation or adverse claim of title is not proved.)
† ('19) 6 AIR 1919 Cal 179 (180) (DB). (The mere fact that the trustee is a party is not sufficient if no relief is asked for against him, or no direction is asked for from the Court for the administration of the trust.)
('15) 2 AIR 1915 All 25 (26) : 37 All 86 (DB). (No allegation of mismanagement — Section does not apply.)
('16) 3 AIR 1916 Bom 281 (281, 282) : 40 Bom 439 (DB). (No allegation of breach of trust— Plaintiff claiming to jointly manage with defendant—Section does not apply.)
('18) 5 AIR 1918 Bom 134 (136) : 42 Bom 742 (DB). (Breach of trust alleged—S. 92 will apply.)
('25) 12 AIR 1925 Pat 544(546):4 Pat 741 (DB). (Do.)
('02) 5 Oudh Cas 110 (112).
('30) 17 AIR 1930 All 582 (583) : 52 All 863 (DB). (Order under S. 5, Charitable and Religious Trust Act not complied with — Amounts to breach of trust—Suit lies.)
('07) 30 Mad 158 (165) (DB). (Removal of caste marks of temple is a breach of trust.)
('76) 25 Suth W R 557 (559) (DB). (Misappropriation of wakf funds—S. 92 applies.)
('17) 4 AIR 1917 Mad 248 (249) (DB). (Misappropriation by archakas is a breach of trust.)
('71) 7 Mad H C R 117 (118) (DB). (Suit for removal of trustee on ground of malveresation— Section applies.)
† ('39) 26 AIR 1939 Mad 757 (760,762) : 1939 Mad W N 418 (422, 425) (DB). (Putting new or additional namams on temple properties with a view to alter the character of the temple. Being a question relating to the administration of the trust, falls within S. 92.)
Also see Note 2.
3. ('16) 3 AIR 1916 Pat (306) (307) (DB).

words "an alleged breach of trust" do not mean that the trust alleged must be one *admitted* by the defendant.[4] A trustee setting up an *adverse* title of his own in the trust properties is guilty of a breach of trust, within the meaning of the section.[5]

Where a trust is partly public and partly private and a breach of trust is alleged in regard to the purposes of the trust which are of a private character, this section does not apply. The reason is that in such cases there is no allegation of a breach of a trust created for a *public* purpose, taking the word "trust" in its proper legal sense as denoting an obligation attaching to the owner of a property to administer the property in a defined way.[6]

The words "where the direction of the Court is deemed necessary for the administration of any such trust," must be interpreted as meaning "where the Court has to give direction in the nature of framing a scheme or otherwise for the administration of trust."[7] The mere appointment of a *mutawalli* is not such a "direction" as is contemplated by the section and therefore a suit for the appointment of a *mutawalli* without anything more is not within the section.[8] This section does not say that the direction of the Court can be asked for, only where there has been a breach of any express or constructive trust. It contemplates cases where the direction of the Court may be necessary even though there has been no such breach of trust.[9] Thus, a suit for accounts of the trust property and in effect asking for directions as regards the trust funds, is one which falls within the section.[10]

7. Suit must be in a representative capacity on behalf of the public.— Section 92 applies only where the suit brought is representative in its nature, that is to say, where the suit is brought by two or more persons as *representing the general public*, in order to secure the proper administration of a public trust.[1] A suit by the *whole* body of persons authorized to administer a trust or by *all* the persons interested in the trust is not within the section.[2] Again, where a person sues, not to establish the *general rights* of the public, but to remedy a particular infringement of his *individual* right in a public trust, the suit is not within the section.[3] The reason is that the object of the section is

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4. † ('11) 13 Bom L R 49 (53) (DB).
('31) 18 AIR 1931 Sind 87 (88).

5. † ('22) 9 AIR 1922 P C 325 (332) : 45 Mad 565 : 49 Ind App 237 (PC). (Dharmakartha claiming to hold the trust property in his own right.)
('34) 21 AIR 1934 Pesh 57 (63) (DB). (Person in charge of mosque claiming property as his private estate is removable.)
('12) 17 Ind Cas 779 (780) (DB) (Bom).

6. † ('39) 26 AIR 1939 Rang 254 (258) : 1939 Rang L R 140 (150).

7. † ('28) 15 AIR 1928 Cal 368 (370) : 55 Cal 1284 (DB).

8. ('28) 15 AIR 1928 Cal 368 (370) : 55 Cal 1284 (DB).
[*See* ('38) 25 AIR 1938 Rang 339 (342) : 1938 Rang L R 276. (Suit for appointment of new trustees on the ground that there do not exist any lawful trustees is one which falls within the purview of the words "where the direction of the Court is deemed necessary for the administration of such trust" in S. 92 — 26 Mad 450 followed.)]

9. ('34) 21 AIR 1934 Bom 26 (27, 28) (DB).
('38) 25 AIR 1938 Rang 339 (342) : 1938 Rang L R 276 (DB).

10. ('24) 11 AIR 1924 Bom 518 (520) (DB).

Note 7

1. ('40) 27 AIR 1940 Cal 376 (377) (DB). (Following AIR 1922 Mad 17 : 45 Mad 113 (FB) and 33 Cal 789.)
† ('17) 4 AIR 1917 Mad 389 (390) : 40 Mad 110 (DB).
('22) 9 AIR 1922 All 499 (500) : 44 All 217 (DB).
('16) 3 AIR 1916 Mad 332 (337) : 38 Mad 356 : 19 Ind Cas 694 (699) (DB). (Advocate-General has power to prevent misuse of the income of public charitable endowments.)
('12) 13 Ind Cas 232 (233) (Mad).

2. ('07) 29 All 27 (28) (DB). (Suit by all persons authorized by will to take action.)
('97) 24 Cal 418 (427).

3. ('42) 29 AIR 1942 Cal 343 (349): I L R (1942) 1 Cal 211 (DB).
✠('06) 33 Cal 789 (807). (Suit between two persons to decide which of them is the lawful trustee.)
('21) 8 AIR 1921 Pat 511 (512) (DB).
('14) 1 AIR 1914 Cal 356 (357) : 41 Cal 749.
('09) 33 Bom 509 (530) : 2 Ind Cas 701 (734, 735) (DB).
('10) 5 Ind Cas 515 (517) (Mad). (Section 539 was neither intended to bar the assertion of private rights on the one hand nor to afford a means of asserting them on the other.)

not to determine the conflicting rights of *private individuals* but to devise the method for fully carrying out the purposes of the trust.[4]

One consideration which is relevant in coming to a conclusion whether an individual right has been infringed is whether, apart from the infringement of the rights of the general body, there is some damage *special* to the plaintiff in which the other members of the general body are not concerned.[5] The right of the plaintiff to be *himself a trustee*[6] or to *share in the management* of the trust or to see that certain trusts are managed by persons entitled to manage them, are all individual rights, the enforcement

('13) 19 Ind Cas 740 (744). (Section should not be used to deprive individuals whose private rights have been infringed of their remedy.)

† ('22) 9 AIR 1922 Mad 17 (21) : 45 Mad 113 (FB). (Suit by one trustee against co-trustee for accounts.)

('27) 14 AIR 1927 Cal 130 (135) (DB).

('83) 7 Bom 323 (328) (DB). (Plaintiffs alleging personal injury by pollution of shrine.)

('85) 7 All 178 (183). (Right to use mosque.)

('10) 32 All 503 (513) : 6 Ind Cas 219 (223) (DB).

('13) 35 All 197 (199) : 18 Ind Cas 797 (798) (DB). (Suit for removal of hindrance caused to plaintiff with regard to his right of worship.)

('81) 3 All 636 (640, 641) (DB).

('17) 4 AIR 1917 Mad 868 (870). (Suit by plaintiff to enforce his right to perform a festival.)

('12) 17 Ind Cas 589 (590) (DB) (Mad). (Section does not repeal or affect individual rights of suit.)

('15) 2 AIR 1915 Mad 915 (916) (DB). (Party having special interest in trust can sue in his own behalf without sanction.)

('27) 14 AIR 1927 All 257 (258) : 49 All 435 (DB). (Claim of founder to appoint trustee does not require sanction under S. 92.)

('19) 6 AIR 1919 Low Bur 56 (57, 58). (Individual right of worship claimed.)

('23) 10 AIR 1923 Pat 309 (316, 317) (DB). (Chela claiming possession of office of mahant.)

('21) 8 AIR 1921 Bom 297 (299) : 45 Bom 683 (DB). (Pujari suing servants of temple for share of offerings.)

('86) 1886 Pun Re No. 76, page 162. (Suit for share of offerings appropriated wholly by defendants.)

('21) 8 AIR 1921 Mad 388 (392) : 44 Mad 205 (DB). (Claim for joint possession with person in possession.)

('90) 13 Mad 293 (308) (DB). (Exclusion from temple.)

('83) 6 Mad 151 (153) (DB). (Suit for wrongful prevention from taking part in public worship.)

('13) 18 Ind Cas 622 (623) (DB) (Mad). (Suit by person having special right — S. 92 is not applicable.)

('17) 4 AIR 1917 All 319 (320) (DB). (The bringing of a suit under this section for private purposes of some individuals is really an abuse of the process of the Court.)

('98) 21 Mad 406 (408) (DB). (General trustee may enforce obligation of special trustees without sanction.)

('23) 10 AIR 1923 All 120 (121) : 45 All 215 (DB). (Idol, as a juristic person, can sue persons who interfere unlawfully with the property of the idol or the income thereof—Such a suit has nothing to do with S. 92.)

† ('31) 18 AIR 1931 Lah 727 (728) (DB). (Suit claiming to enforce personal right as mahant.)

† ('31) 18 AIR 1931 Nag 198 (199, 200) : 27 Nag L R 299. (Suit claiming that plaintiff and certain others alone have the right to manage the school.)

('39) 26 AIR 1939 Mad 757 (759) : 1939 Mad W N 418 (420) (DB). (Right to recite Vedas and to the income and honours on account of a person being a member of a Goshti holding Vedaparayanam Mirashi office—Suit to enforce this right as office-holder does not fall within the ambit of S. 92.)

[*See* ('97) 1897 Pun Re No. 29, p. 139 (142). (Suit by pujaris to restrain alteration of temple property.) ('88) 11 Mad 283 (284, 286).]

[*See also* ('91) 15 Bom 309 (319, 321). (Suit for refusal to admission to mandir—Illustrative case.) ('83) 9 Cal 133 (136). (Suit by temple committee against their manager for damages.)]

4. ('16) 3 AIR 1916 P C 132 (136) : 43 Cal 1085 : 43 Ind App 127 (PC).

5. ('42) 29 AIR 1942 Cal 343 (349) : I L R (1942) 1 Cal 211 (DB).
('27) 14 AIR 1927 Mad 551 (555) (DB).

6. ('16) 3 AIR 1916 All 225 (225, 226) (DB).
('13) 18 Ind Cas 622 (623) (DB) (Mad).
('15) 2 AIR 1915 All 25 (26) : 37 All 96 (DB).
('28) 15 AIR 1928 All 33 (34) : 50 All 165 (DB).
† ('22) 9 AIR 1922 All 499 (500) : 44 All 721 (DB).
('25) 12 AIR 1925 Pat 544 (547) : 4 Pat 741 (DB). (It would be otherwise where a trustee is sought to be removed for a breach of trust.)
('24) 11 AIR 1924 Pat 502 (503) (DB). (Suit raising question between two rival claimants.)
('11) 36 Mad 364 (368) : 12 Ind Cas 449 (451). (Enforcement of right of hereditary trusteeship.)
† ('31) 18 AIR 1931 Mad 801 (802) : 54 Mad 1011 (DB). (Suit by removed trustee to enforce his hereditary right.)
† ('31) 18 AIR 1931 Rang 322 (324) : 9 Rang 459. (Suit for declaring that plaintiffs are lawfully appointed trustees of a waqf.)
('31) 18 AIR 1931 Bom 170 (172) (DB).
('13) 35 All 459 (463) : 20 Ind Cas 37 (39) (DB).
('27) 14 AIR 1927 Mad 338 (339). (Right to be a co-trustee or co-manager.)
† ('38) 25 AIR 1938 Lah 869 (874) (DB). (A suit by a person claiming to be a mutawalli of a certain mosque against a registered corporation which has been managing the mosque, for a declaration that he is the mutawalli of the mosque and as such entitled to manage all the affairs connected with it, does not fall under S. 92.)

of which falls outside the scope of the section.[7] The right of a Mahomedan to *use and to worship in a mosque* has been held to be a private right existing under the Mahomedan law, independently and wholly irrespective of the rights of other worshippers of the mosque,[8] though in an earlier decision of the Calcutta High Court it was held to the contrary.[9] The reasoning of the decision has not been followed in later cases and does not seem to be sound.[10]

A person having an interest in common with others is not *obliged* to seek any relief on *behalf* of all others but may maintain an action for the establishment of his *own rights*.[11] While so suing for the establishment of his private rights, he cannot, at the same time, be regarded as suing in the alternative, on behalf of others also similarly interested.[12] Where a person whose *individual rights* are affected sues a trustee for *reliefs specified in the section*, the suit will nevertheless not be governed by the section inasmuch as it is not a *representative* suit on behalf of the public but is one in enforcement of his *own rights*.[13] Thus, one trustee suing his co-trustee for accounts sues only in his individual capacity and the suit will, consequently, be outside the scope of the section.[14] The Bombay High Court has, however, held that such a suit is within S. 92

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7. ('40) 27 AIR 1940 Cal 376 (377) (DB). (Suit by trustees on their own behalf and in discharge of their own functions against former trustees for accounts is outside scope of S. 92.)
('96) 19 Mad 62 (64) (DB).
('87) 10 Mad 375 (506) (DB).
('27) 14 AIR 1927 Mad 948 (950) (DB). (Joint right of management claimed.)
('32) 19 AIR 1932 Bom 65 (66) (DB).
('05) 32 Cal 273 (276). (Suit to declare plaintiff a mutwalli and for possession is not a dispute of a public nature.)
† ('06) 33 Cal 789 (808).
('19) 6 AIR 1919 All 335 (336) (DB). (Right of plaintiff to jointly manage with defendant.)
('16) 3 AIR 1916 Bom 281 (281, 282): 40 Bom 439 (DB). (Suit for joint management of trust with the defendant.)
('21) 8 AIR 1921 Mad 403 (403) (DB). (Section 92 governs suits for the vindication of the rights of the public and not of the right of the trustees.)
('04) 28 Bom 20 (54) (DB). (Suit by trustees for vindication of right of management vested in them.)
('98) 22 Bom 496 (499) (DB). (Suit by trustee against co-trustee to share in management.)
('36) 63 Cal 326 (336) (DB). (Plaintiff alleging that he was appointed mahant and shebait of certain deities, and as such, entitled to properties—Possession asked for—No prayer for removal of defendant —Section 92 does not apply.)
('39) 26 AIR 1939 Mad 594 (594). (Suit by newly appointed trustee for recovery of moveable properties of the temple after taking an account of the trust money received by the previous trustees who have been lawfully removed by the members of the community is not governed by S. 92.)
[*See also* ('38) 25 AIR 1938 Mad 999 (1004): I L R (1939) Mad 121 (DB). (Suit by a trustee against a banker to recover trust money which he has misapplied is outside the scope of S. 92.)]

8. ('42) 29 AIR 1942 Cal 343 (349) : I L R (1942) 1 Cal 211 (DB).
✠ ('85) 7 All 178 (183) (FB). (Suit by Mahomedan worshipper to establish his right to effect repairs to the mosque.)
('83) 5 All 497 (500) (DB). (Suit by Mahomedan worshipper for declaration that the alienated mosque property is still waqf property and to set aside the sale.)

9. † ('82) 8 Cal 32 (40) (DB). (Such a right is a public right.)

10. ('93) 20 Cal 810 (816) (DB). (Reasoning of the Allahabad High Court approved.)
† ('24) 11 AIR 1924 P C 221 (224) : 47 Mad 884 (891) : 51 Ind App 282 (PC).

11. ('97) 24 Cal 385 (390) (DB).
('05) 9 Cal W N 594 (597).
('08) 1908 Pun L R No. 78, p. 218 (DB). (Suit by Mahomedan for declaration of a certain property as graveyard and for injunction lies — S. 92 does not apply to such a case.)
('19) 6 AIR 1919 Cal 179 (180, 181) (DB). (Mahomedan worshipper can enforce his individual rights without resort to this section.)
Also see O. 1 R. 1, Note 8.

12. ('78) 1 Mad 343 (348) (DB).

13. ('43) 30 AIR 1943 Mad 466 (469) (FB). (Applicability of section — Test—Court must go beyond relief sought and have regard to capacity in which plaintiffs are suing and to purpose of suit : A I R 1935 Mad 825 : 58 Mad 988 (FB) overruled — Suit by trustees of one temple against trustees of another for account and recovery of collections made by latter on behalf of former held did not fall under S. 92.)
('27) 14 AIR 1927 Mad 820 (823) (DB).

14. ('43) 30 AIR 1943 Mad 466 (469) (FB).
✠ ('22) 9 AIR 1922 Mad 17 (18, 19, 20) : 45 Mad 113 (FB). (The decision in A I R 1921 Mad 696 is no longer law.)
('06) 33 Cal 789 (807, 808).
('23) 10 AIR 1923 Nag 298 (299) (DB).
† ('38) 25 AIR 1938 Mad 92 (94): ILR (1938) Mad 39 (DB). (Nature of relief prayed for is not conclusive and exclusive test in determining applicability of Section 92.)

and cannot be instituted without the sanction of the Advocate-General.[15] Their Lordships base their conclusion on the ground that the reliefs claimed *being within the section*, the suit cannot be brought except in conformity with it. They do not advert to the principle that a suit must be a *representative* one also before the section is made applicable thereto. In this view the conclusions of the Bombay High Court do not seem to be sound. The Sind Judicial Commissioner's Court has held, accepting the principle abovementioned, that a trustee suing his co-trustee for accounts cannot be held to be suing on the basis of an infringement of individual rights and so the section will apply.[16] The Allahabad High Court has, in an *obiter dictum*, doubted whether, when a relief claimed falls within the section, there is any distinction between the enforcement of public rights and of private rights.[17]

It has been held by the Madras High Court that the mere fact that the plaintiffs in a suit are trustees will not necessarily preclude the application of the section if the reliefs sought relate not to the personal rights of the trustees but to the advancement of the interests of the institution itself by securing more efficient management.[18]

Where a trustee of a public charitable trust dies leaving behind him a widow as trustee and a next reversioner who would be in due course entitled to the management of the trust brings a suit against the widow alleging waste and mismanagement and prays for the appointment of a receiver for the management and preservation of the properties, the suit is not for the protection of his own *individual or personal rights*. The plaintiff is not in the position of a co-trustee because even in respect of the private properties of the deceased male holder, the position of the presumptive reversioner is merely that of a person with a *spes successionis*. The analogy of an action allowed to a Hindu reversioner under the Hindu law to maintain a declaratory suit during the lifetime of the widow cannot be invoked because, as regards trusteeship, there is no difference between a male holder of the office and a female holder of the office. The suit is therefore governed by this section and must be in conformity with its provisions.[19]

8. Who can sue — "Two or more persons having an interest in the trust." — A suit under this section can be brought by —

(1) the Advocate-General, or

(2) two or more persons having an interest in the trust, after getting the sanction of the Advocate-General.[1]

The first essential for a person other than the Advocate-General, to institute a suit under this section, is that he should have an *interest* in the trust. Unless he has this, even the written consent of the Advocate-General will not be of any avail.[2] The object of this condition is "to prevent people interfering by virtue of the section, in the administration of charitable trusts merely in the interests of others and without any real interest of their

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[*See also* ('13) 19 Ind Cas 740 (744) (Mad). (Suit for removal of trustee, based on infringement of private right.)]

15. ('92) 16 Bom 626 (628, 629).
('18) 5 A I R 1918 Bom 134 (136) : 42 Bom 742 (DB).
('24) 11 AIR 1924 Bom 518 (519) (DB).

16. ('10)4 Sind LR 152(156,157): 8 Ind Cas 926(928).

17. ('28) 15 AIR 1928 All 660 (664) : 51 All 30 (DB).

18. ('35) 25 AIR 1935 Mad 855 (856). (A suit the avowed object of which is the furtherance of the interests of the institution itself is a suit falling under Section 92.)

19. ('39) 26 AIR 1939 Mad 65 (65, 66) (DB).

Note 8

1. ('17) 4 AIR 1917 Mad 868 (870).
† ('20) 7 AIR 1920 Mad 133 (134): 43 Mad 707(DB).
('08) 10 Bom L R 87 (89) (DB).

2. ('24) 11 AIR 1924 PC 221 (223) : 47 Mad 884 : 51 Ind App 282 (PC).
('17) 4 AIR 1917 Cal 678 (678, 679) (DB).
('78) 2 Cal L Rep 128 (131). (Plaintiff must show that he has an interest.)

own."[3] The Advocate-General is entitled to intervene at any stage[4] and is entitled to be heard.[5]

Under the English Law, the plaintiff in a suit of the description mentioned in this section was required to have *direct interest* in the trust.[6] This rule was adopted by the Code of 1877 and re-enacted in S. 539 of the Code of 1882, which thus required the plaintiffs to have a *direct* interest in the trust.[7] The limitation of "direct interest" was not thought expedient in India and therefore, by S. 44 of the Civil Procedure Code (Amendment) Act, 1888, the word "direct" was omitted.[8] The effect of the amendment is to widen the class of persons entitled to institute a suit under this section.[9] But the interest required even under this section as amended must be a *clear* interest in the particular trust over and above that which men may be said to have by virtue of their religion, It must be a *real, substantive and an existing* interest and not merely a remote, fictitious or a contingent one,[10] though it need not be a direct interest in the sense that only a beneficiary can institute a suit.[11] Whether a person has an interest in a particular trust has to be determined on the facts bearing on the relation of the person to the trust with reference to which the suit is brought.[12]

The following persons have all been held to have a sufficient interest within the meaning of the section —

(1) The founder and his representatives or persons of same sect and form of religious worship as that of the founder of the religious endowment for carrying on the sectional worship.[13] So also are persons who have contri-

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3. ('24) 11 AIR 1924 P C 221 (224): 47 Mad 884: 51 Ind App 282 (PC).

4. ('67) 4 Bom H C R O C 203 (207).

5. (1846) 4 Moo Ind App 190 (195, 200) (PC).

6. (1819) 2 Swans 470 (518), In re Bedford Charity.

7. ('89) 12 Mad 157 (160) (DB).
('82) 8 Cal 32 (35, 36) (DB).
('88) 12 Bom 247 (266, 267) (DB). (Priests and worshippers have a direct interest to sue.)

8. ✠('24) 11 AIR 1924 P C 221 (224) : 51 Ind App 282 : 47 Mad 884 (PC).
('13) 7 Sind L R 129 (131) : 24 Ind Cas 712 (713).

9. ('05) 2 Cal L Jour 460 (470) (DB).

10. ('42) 29 AIR 1942 All 315 (317, 318) (DB). (The nature of the 'qualifying' interest may vary widely with the character of the trust itself. If the trust itself is clear, precise and narrow, it may well be that an 'interest' would, in order to qualify a plaintiff, have to be precise and clear cut too. In other trusts of a more vague and general kind, the qualifying interest might itself be less definite.)
✠('19) 6 AIR 1919 Mad 384 (396) : 42 Mad 360 (SB).
('20) 7 AIR 1920 Mad 238 (240) (DB).
('26) 13 AIR 1926 Mad 267 (268) (DB).
('93) 20 Cal 810 (817) (DB). (Mere possibility of an interest and of succession.)
('26) 13 AIR 1926 Mad 466 (467) (DB).
('05) 2 Cal L Jour 431 (441) (DB). (Presumptive heir of trustee has no interest merely as such to sue under this Section).
('09) 32 Mad 131 (134): 1 Ind Cas 995 (997) (DB). (Mere subscriber in a society has no sufficient interest to sue to remove office-bearers for misconduct.)

† ('24) 11 AIR 1924 P C 221 (224) : 51 Ind App 282 : 47 Mad 884 (PC). (Bare possibility that a Hindu might desire to resort to a particular temple is not enough.)
('38) 25 AIR 1938 Rang 339 (344): 1938 Rang L R 276 (DB).

11. ('23) 10 AIR 1923 Lah 518 (519) (DB).
('97) 24 Cal 385 (390) (DB).
('27) 14 AIR 1927 Mad 462 (464) : 50 Mad 726 (DB). (Need not be personally affected by any act of the person sued.)

12. ('42) 29 AIR 1942 All 315 (317) (DB). (Each case must be considered on its own facts — It is dangerous to apply conclusions of decided cases — But it is useful to observe what principles have been applied.)
('26) 13 AIR 1926 Mad 267 (268) (DB).
† ('21) 8 AIR 1921 Mad 563 (564) (DB).
('26) 13 AIR 1926 Lah 100 (106): 7 Lah 275 (DB). (Followers of Guru Govind Singh are a separate sect from the udasis and have no interest to sue in respect of an udasi shrine.)

13. ('80) 5 Cal 700 (705) (DB).
('33) 20 AIR 1933 Oudh 22 (24): 8 Luck 266 (DB).
('21) 8 AIR 1921 Mad 563 (564) (DB). (Descendants in female line.)
('20) 7 AIR 1920 Cal 210 (215) (DB).
† ('24) 11 AIR 1924 PC 221 (224) : 51 Ind App 282: 47 Mad 884 (PC). (Descendants in the female line from the founder.)
('12) 17 Ind Cas 589 (590) (Mad). (Persons of the same sect and form of worship as the founders.)
('29) 16 AIR 1929 Lah 428 (428) (DB). (Collaterals of the founder have an interest.)
('35) 22 AIR 1935 Pat 111 (115): 14 Pat 379 (DB). (Disciples of the sect.)

buted to the funds of a trust,[14] or who have devoted time and energy to the affairs of the trust.[15]

(2) Residents of the locality in which a choultry is situated and members of the community for which the choultry was founded.[16] But this test of locality is only to be applied in relation to actual user of the temple or mosque by such residents. Mere residence without user will not create any interest in the trust.[17]

(3) Persons lawfully in possession of the trust property.[18]

(4) Trustees of the trust.[19]

(5) Beneficiaries under the trust[20] such as persons entitled to receive food in a temple.[21]

(6) Persons authorised by law to sue.[22]

(7) Actual worshippers of a temple or mosque.[23]

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14. † ('25) 12 AIR 1925 Mad 1011 (1012) (DB).
('32) 19 AIR 1932 All 708 (709) (DB).

15. ('20) 7 AIR 1920 Mad 238 (240) (DB). (So also a person who has devoted time and energy in order to place the affairs of a chatram on a proper footing.)

16. ('19) 6 AIR 1919 Mad 943 (944) (DB).
† ('26) 13 AIR 1926 Mad 267 (268) (DB). (Residents in the neighbourhood of temple and attending the temple on important occasions are persons having a sufficient interest.)
('83) 7 Bom 323 (329) (DB). (Suit by member of Chitpawan community that other castemen have no right to enter temple.)
(1900) 24 Bom 50 (54) : 26 Ind App 109 (PC). (Hereditary patron and residents of the temple property have sufficient interest to maintain a suit.)
('10) 32 All 631 : 6 Ind Cas 835 (836) (DB). (Worshipper of mosque can sue for declaration that a certain land adjoining the mosque is wakf property.)
('34) 21 AIR 1934 Pesh 57 (61) (DB). (Residents of locality using mosque are persons interested to sue.)

17. ('26) 13 AIR 1926 Mad 466 (467, 468) (DB).

18. ('23) 10 AIR 1923 Mad 376 (377): 46 Mad 300 (DB). (Heir-at-law of creator of trust in possession.)

19. † ('25) 12 AIR 1925 Mad 820 (821) (DB).
(1900) 23 Mad 99 (100) (DB). (Suit for possession by trustee only but not by worshipper lies.)
(1900) 23 Mad 537 (540) (DB). (A worshipper and a general trustee.)
('35) 22 AIR 1935 Mad 855 (856). (The mere fact that the plaintiffs in a suit are in a sense trustees will not necessarily preclude the application of S. 92 if the reliefs sought relate not to the vindication of the personal rights of the trustees, but to the advancement of the interests of the institution itself by securing more efficient management.)
Also see Note 28.

20. † ('88) 12 Bom 247 (259) (DB). (Manager and priests.)
† ('27) 14 AIR 1927 All 518 (519).
('95) 8 C P L R 49 (51). (Pujari of temple has sufficient interest to sue.)
('98) 21 Mad 10 (13) (DB).
('99) 23 Bom 659 (663) (DB). (Pujari and worshippers have an interest.)
('21) 8 AIR 1921 Bom 297 (299):45 Bom 683(DB). (Hereditary pujari has an interest to maintain suit for share in offerings made to deity.)
('05) 2 Cal L Jour 448 (453) (DB). (Persons concerned in the performance of the worship of an idol and entitled to maintenance from the temple funds.)
† ('05) 2 Cal L Jour 460 (465, 471) (DB). (Pandas and officiating priests.)
('12) 15 Oudh Cas 202: 14 Ind Cas 731 (733) (DB). (Pujari of temple has an interest in the trust.)

21. ('28) 15 AIR 1928 Mad 268 (270) (DB).

22. ('75) 23 Suth W R 76 (76) (DB).

23. ('78) 3 Bom 27 (28) (DB).
('32) 19 AIR 1932 All 708 (709) (DB).
('34) 21 AIR 1934 Pesh 57 (61) (DB).
('20) 7 AIR 1920 Mad 665 (665):43 Mad 410 (DB). (Suit by worshippers for declaration that a lease by the trustee is invalid lies.)
('90) 3 C P L R 11 (13).
('13) 7 Sind L R 129 : 24 Ind Cas 712 (713). (As shevaka chella and as a worshipper.)
('24) 11 A I R 1924 Oudh 261 (264) : 27 Oudh Cas 149 (DB).
('21) 8 A I R 1921 P C 84 (86) : 48 Ind App 1: 44 Mad 283 (PC). (Lay disciples of a mutt or worshippers at the devasthanam can maintain suit under Section 92.)
('83) 6 Mad 151 (153) (DB). (Dancing girl entitled to worship in temple can sue.)
† ('97) 24 Cal 418 (427) (DB).
('91) 15 Bom 612 (623) (DB).
('91) 15 Bom 309 (319, 320) (DB).
('90) 13 Mad 293 (308) (DB). (Worshipper in shrine prevented from worshipping is entitled to sue.)
('05) 9 Cal W N 594 (597). (Person whose private right to worship is infringed has "interest" to sue under S. 539.)
('18) 5 AIR 1918 Oudh 207 (209) (DB).
('19) 6 AIR 1919 Cal 179 (180, 181) (DB). (Worshippers living in the vicinity of a mosque have interest.)
[*See* ('36) 23 AIR 1936 Mad 495 (496) (DB). (Trust for establishment of choultry and for building temple—Temple not built—Still, persons interested in the temple being built can sue under this section—The Court in such suit can deal with the whole trust.)]
Also see O. 1 R. 8, Note 8.

(8) There is a conflict of opinion as to whether the *mere* fact that a person is, as Hindu or Mahomedan *entitled* to worship in a temple or mosque, is enough to maintain a suit under S. 92. The Madras High Court has held that it is not. Thus, A living in Madras, and having gone to Tellicherry once or twice before and worshipped in a temple there, cannot be said to have a sufficient interest in the Tellicherry temple, to enable him to maintain a suit under this section.[24] The Lahore High Court has, in an earlier case,[25] disagreed with this view on the ground that the mere fact of being a worshipper, itself gives a substantial interest in the temple or mosque though in a later case of the same High Court[26] the view taken by the Madras High Court has been accepted. The Allahabad High Court and the Judicial Commissioner's Court of Sind are also inclined to the same view as that of the Lahore High Court in the earlier case.[27]

A suit under this section must be instituted by *two or more* persons having an interest in the trust.[28] As has already been observed, a suit brought by the *whole* body of persons authorised or interested is outside the section.[29] But the necessity of two persons suing is restricted to the *institution* of the suit. There is nothing which requires that all the plaintiffs to whom sanction has been given for filing the suit should, after filing the suit continue actively to prosecute the suit.[30] So also, a surviving plaintiff-appellant alone can carry on the appeal in the suit which was originally instituted by two or more persons as required.[31] Where a suit is instituted by two or more persons interested, the joining of a person also who is not interested will not affect the institution of the suit.[32] There is a difference of opinion as to whether, when the suit under this section is instituted by *one* plaintiff alone, the defect could be cured by subsequent amendment of the plaint by adding other persons as plaintiffs after getting the necessary consent. The Bombay High Court has held that the defect in the institution cannot be so cured.[33] Though the Madras High Court holds a contrary opinion,[34] it does not base its decision on any principle but simply purports to follow the previous rulings of that Court. It is submitted that the Madras view is not sound.

Where the Advocate-General having filed a suit at the instance of relators, has not appealed, the relators who were no parties to the suit were held incompetent to appeal on their own account.[35]

The consent of some of the original plaintiffs, later on, to let the property be managed by the original *mahant* for whose removal the suit was instituted will not affect the institution of the suit.[36]

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24. ('19) 6 AIR 1919 Mad 384 (392) : 42 Mad 360 (SB). (Referred to with approval in A I R 1924 P C 221 : 51 Ind App 282 : 47 Mad 884 (PC).)

25. ('25) 12 AIR 1925 Lah 189 (191) : 5 Lah 455 (DB).

26. ('30) 17 A I R 1930 Lah 1 (6) : 11 Lah 142 (DB).

27. † ('85) 7 All 178 (182, 183) (FB).
('81) 3 All 636 (640, 642) (DB).
('33) 20 AIR 1933 Sind 213 (220).

28. ('42) 29 AIR 1942 Bom 125 (128) : I L R (1942) Bom 293.
('08) 10 Bom L R 87 (88) (DB).

29. See Note 7.

30. ('42) 29 AIR 1942 Sind 137 (138) : I L R (1942) Kar 179 (DB).

31. ('15) 2 AIR 1915 Oudh 181 (182) (DB).

32. ('25) 12 AIR 1925 Mad 1011 (1012) (DB).

33. ('06) 30 Bom 603 (606) (DB).

34. ('20) 7 AIR 1920 Mad 134 (134) : 43 Mad 720 (DB). (Following 10 Mad 185 and AIR 1920 Mad 133 : 43 Mad 707. The latter was a case where neither of the parties who instituted the suit had the required interest. In such a case it was held that the Advocate-General could be added as plaintiff.)

35. See Note 36.

36. ('17) 4 AIR 1917 Oudh 375 (376) : 20 Oudh Cas 49 (DB). (Such a consent does not affect the jurisdiction of the Court to hear the appeal.)

The word "person" is not restricted to persons *sui juris*. Even an infant if he has the required interest and if he is properly represented by a next friend, is entitled to institute a suit under this section.[37]

9. The suit must be for one of the reliefs specified in the section. — The section is limited in its application to suits for reliefs *specified* in the section.[1] Unless, therefore, a suit prays for a relief so specified the section will not apply.[2] But the prayer need not be express. If in substance such a relief is *impliedly* asked for, the section will apply.[3] The relief mentioned in cl. (h) is limited by the words "as the nature of the case may require" in that clause and the words "In case of alleged breach of trust," etc., at the beginning of the section.[4] The section confers a very wide discretion upon a Court and does not make it obligatory upon the Court to make all the orders that are contemplated by the different clauses of the section.[5]

10. Effect of adding other reliefs. — A suit for a relief specified in *the* section will not be taken out of the scope of the section merely because a subordinate or consequential relief, not specified in the section, is asked *in addition* to a relief so

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37. ('10) 6 Ind Cas 119 (119) (DB) (Cal).

Note 9

1. † ('09) 33 Bom 509 : 2 Ind Cas 701 (733, 734) (DB). (Suits by non-converts to have it determined whether converts are entitled to trust funds is a suit within the section.)
('97) 21 Bom 48 (51) (DB). (Suit for removal of trustees and for accounts must be brought in conformity with Section 92.)
('92) 16 Bom 626 (628, 629). (Suit for accounts against trustees and for their removal for breach of trust—Section 92 applies.)
('24) 11 AIR 1924 Bom 518 (519) (DB). (Suit for accounts from trustees and for direction as to trust property.)
('18) 5 AIR 1918 Lah 146 (147) : 1918 Pun Re No. 97. (Suit for removal of mahant and appointment of new mahant is within the section.)
✠ ('35) 22 AIR 1935 Mad 825 (826) : 58 Mad 988 (FB). (The question whether a suit falls within S. 92, C. P. C., depends not upon the character in which the plaintiff sues but upon the nature of the reliefs sought.)

2. ('42) 29 AIR 1942 Cal 343 (347) : I L R (1942) 1 Cal 211 (DB).
('41) 1941 Nag L Jour 587 (588) (DB). (Where the settlors of a trust ask one of the several trustees to hand over trust property to them, the settlors, it is not the sort of case that is contemplated in S. 92, C. P. Code. The section is concerned with vesting of property in trustees, with accounts, and enquiries by trustees which requires payment of moneys found due by the trustees by somebody accountable to the trust or accountable in respect of the trust to trustees.)
('16) 3 AIR 1916 Cal 712 (713) (DB).
('33) 20 AIR 1933 Pat 246 (247) : 13 Pat 65. (Suit for permanent injunction restraining defendant from preventing general public from going to certain place for puja does not come under Section 92.)
('33) 20 AIR 1933 Lah 395 (396) (DB). (Prayer of ejectment cannot be entertained in a suit under this section.)
† ('19) 6 AIR 1919 Lah 190 (192). (Declaration that mortgage be declared ineffective as against wakf property.)
('18) 5 AIR 1918 Cal 483 (483) (DB).
('11) 33 All 660 : 11 Ind Cas 36 (37) (DB). (Suit for declaration of trust and possession not within section.)
('29) 16 AIR 1929 Bom 153 (156) (DB). (Suit for recovery of the share payable to an institution by trustee—Not within the section.)
('29) 16 AIR 1929 Bom 193 (194) (DB). (Suit to recover possession from trespassers—Not within section.)
('30) 17 AIR 1930 Mad 129 (129) : 53 Mad 223 (DB).
('30) 17 AIR 1930 Cal 583 (585) (DB). (Plaintiff's case is not for accounts.)
[*See* ('76) 23 Suth W R 76 (76) (DB). (Suit by person not authorised by law for resuming trust where the objects of the trust have not been carried out, is not within the section.)
('27) 14 AIR 1927 All 518 (519). (Suit by beneficiaries against trustees for encroachment by them but not praying for any reliefs under S. 92 is maintainable under the general law.)
† ('36) 23 AIR 1936 Mad 449 (453) (DB).

3. ('27) 14 AIR 1927 Mad 886 (886) (DB).
('19) 6 AIR 1919 Mad 159 (160):42 Mad 668 (DB). (Suit for declaration of invalidity of appointment of defendant as trustee is virtually one for his removal and falls within the section.)
† ('06) 33 Cal 789 (809, 810).
('39) 26 AIR 1939 Mad 102 (105). (Relief claimed by plaintiff in effect nothing more than prayer for framing scheme for reconstitution of obsolete temple office although the word 'scheme' is not used — Consent of Advocate-General under Section 92 is necessary.)

4. ('42) 29 AIR 1942 Cal 343 (347) : I L R (1942) 1 Cal 211 (DB).

5. ('37) 41 Cal W N 298 (304) (DB). (Court may decline to frame a detailed scheme if it considers it unnecessary to do so.)

specified.[1] Thus, in a suit for the removal of the trustee, the validity of an alienation of the trust property could be decided.[2] See Note 2.

11. "Such further or other relief as the nature of the case may require."—The words "such further or other relief as the nature of the case may require" must, on general principles of construction, be taken to mean relief *ejusdem generis* with (of the same nature as) those described in clauses (a) to (g) of the section, and not one wholly outside thereof.[1] They cover every subsidiary order or direction on any matter of detail necessary for carrying out the main purposes of the section.[2] The words must in fact be read with what has preceded, as referring to further or other relief to which the party may be entitled which arises out of the existence of the trust, in respect of which the suit has been brought.[3] But the clause uses the words "further or *other* relief." Though the other relief must be *ejusdem generis* with the reliefs specifically enumerated, it need not be one in *addition* to a relief which falls under any of the preceding clauses and which is claimed in the suit.[4]

Note 10

1. ('42) 29 AIR 1942 Bom 291 (293) (DB). (Mere fact that some issues have been raised which have no direct bearing on the issues which arose under S. 92 does not affect the maintainability of the suit.)
('28) 15 AIR 1928 Mad 205 (207) (DB).
† ('25) 12 AIR 1925 All 683(684): 47 All 770 (DB).
† ('18) 5 AIR 1918 Bom 134 (136): 42 Bom 742(DB). (Suit for possession of trust lands but in effect for removal of defendant trustee—Such a suit is within Section 92).
[*See* ('10) 13 Oudh Cas 177 (179): 7 Ind Cas 566(567) (DB). (Suit for removal of mahant and for declaration that property under his control is trust property.)]

2. ('26) 13 AIR 1926 Mad 280 (280) (DB).
† ('06) 28 All 112 (116, 117, 118, 121) (DB).
('10) 8 Ind Cas 528 (529) (DB) (Lah).

Note 11

1. ('42) 29 AIR 1942 Cal 343 (347) : I L R (1942) 1 Cal 211 (DB). (Relief to compel trustee to cease spending wakf income on secular objects and to apply entire income to religious purposes falls within cl. (h) as it is of same nature as that contemplated in cl. (e).)
('05) 2 Cal L Jour 431 (438) (DB). (Suit for ejectment against a trespasser.)
('32) 19 AIR 1932 Bom 65 (66, 67) (DB). (Suit for declaration of plaintiff's right of joint management of a mosque together with defendant—Suit is not within the section.)
('31) 18 AIR 1931 Rang 322 (324) : 9 Rang 459. (Suit for declaration that plaintiffs are trustees and that defendant is not a lawful trustee and for injunction is not within the section.)
✠ ('28) 15 AIR 1928 P C 16 (18) : 55 Ind App 96: 55 Cal 519 (PC).
('06) 33 Cal 789 (810).
('09) 33 Bom 509 : 2 Ind Cas 701 (734) (DB).
('30) 17 AIR 1930 Sind 204 (208). (Injunction alleging breach of trust is a relief included in cl. (h) of Section 92 (1).)
('30) 17 AIR 1930 Bom 167 (168). (Prayer for declaration that property is public charitable property and not personal property is not for a relief under Section 92.)
('25) 12 AIR 1925 All 683 (685) : 47 All 770 (DB). (Declaration that property is a wakf property is under Section 92.)
('37) 24 AIR 1937 Lah 660 (662). (Successor mahant bringing suit for possession of debutter property mortgaged by previous mahant—Section 92 (1) (h) is not applicable.)
('38) 25 AIR 1938 Lah 869 (874) (DB).
('39) 26 AIR 1939 Mad 757 (765) : 1939 Mad W N 418 (426) (DB). (Per Venkatasubba Rao, J.: A direction that in the administration of the trust, the trustee shall do a certain thing or abstain from doing it, is surely not alien to a scheme of management—That is a relief falling within cl. (h) *ejusdem generis* with the relief specifically mentioned in cl. (g).)
('36) 14 Rang 575 (582).
('36) 23 AIR 1936 Sind 179 (184): 30 Sind L R 104 (DB). (Clause (h) can come into operation though no relief coming under any of the previous clauses has been asked for.)
('37) 24 AIR 1937 Sind 230 (232) : 31 Sind L R 510 (DB). (Clause (h) does not so widen the provisions of S. 92 as to make S. 92 not otherwise applicable to suits against strangers, applicable to such suits.)
Also see Note 28.

2. ('17) 4 AIR 1917 All 336 (337) (DB).
('89) 12 Mad 157 (161) (DB).

3. ('03) 25 All 631 (635) (DB).
† ('19) 6 AIR 1919 All 83 (89) (DB). (Court can direct the removed trustee to deliver the trust property to the new trustee.)
('06) 28 All 112 (117) (DB). (Court can determine validity of particular alienations.)
('15) 2 AIR 1915 All 69 (69) (DB). (Court can grant relief by way of asking the trustee to account and pay up the monies found due.)
('27) 14 AIR 1927 Mad 416 (417) (DB). (Decree directing an account and to order payment of money found due is within the section.)
('31) 18 AIR 1931 All 212 (214) : 53 All 422 (DB). (Conversion of trust property into Government promissory notes.)

4. ('42) 29 AIR 1942 Cal 343 (347) : ILR (1942) 1 Cal 211 (DB).

12. Declarations. — It has already been seen in Note 5 that the section presupposes the *existence* of a trust and that consequently suits for declaration that certain properties are trust properties, are not within the section.[1] It has also been seen that S. 92 will apply only where the relief asked for is one of the reliefs *specified* in the section.[2] A suit, therefore, for a declaration that the plaintiff is the duly constituted trustee,[3] or that plaintiff is entitled to an office[4] or that plaintiff, as founder of the trust, has a right to appoint the trustees[5] is outside the scope of the section.

At the same time, when a suit is substantially one falling under section 92, its requirements cannot be evaded by asking for a bare declaration under the Specific Relief Act.[6] A declaration may also be granted where it is *ancillary* to the relief claimed in the section,[7] or where such relief cannot be granted without granting the declaration.[8]

13. Appointment of receiver. — In a suit under S. 92, the Court has power under the general cl. (b) of the section, to appoint a receiver *pendente lite* and take the management of the trust out of the hands of the trustees. See O. 40 R. 1, Note 7.

14. Costs. — The Court has power in a scheme suit to order that a party should bear his own costs or that the costs of all the parties should come out of the trust estate, or to pass such other order as it thinks fit.[1] Where, however, the Judge decides that

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Note 12

1. ('42) 29AIR 1942 Cal 1 (13) : ILR (1941) 2 Cal 434 (DB). (Declaration as to validity of wakf and that suit properties belong to wakf is beyond S. 92— Court can grant relief even if some of reliefs claimed could only be obtained under S. 92.)
('41) 28 AIR 1941 Cal 68 (72) (DB).
('40) 27 AIR 1940 Cal 236 (241) : ILR (1940) 1 Cal 575. (Bequest for education of Hindu boys and girls—Representative suit on behalf of Hindu boys and girls for declaration of trust in their favour— Suit does not fall under S. 92—Consent in writing of Advocate-General is not necessary.)
('40) 27 AIR 1940 Mad 81 (81). (Suit by certain persons on behalf of all the villagers for a declaration that the suit property belongs to the temple in their village, that certain alienations thereof by the pujaris are void and not binding on the institution is maintainable against the alienees apart from the provisions of S. 92.)
† ('03) 25 All 631 (634).
('33) 20 AIR 1933 Lah 670 (671).
† ('33) 20 AIR 1933 Pat 246 (247) : 13 Pat 65. (Suit for declaration that certain property is public property to which the Hindu community is entitled to go for worship is not within this section.)
('19) 6 AIR 1919 Lah 56 (57) (DB).
('20) 7 AIR 1920 Lah 455 (456).
('29) 16 AIR 1929 Lah 740 (741) (DB).
† ('99) 21 All 187 (188) (DB). (Suit for declaration that a land is a graveyard, etc.)
('08) 30 All 111 : 5 All L Jour 23 (29). (Declaration that charge is subject to trust.)
('34) 21 AIR 1934 Nag 277 (277). (Suit for declaration that certain property constitutes a public trust.)
Also see Note 5.
2. See Note 9.
3. See Note 6.
4. See Note 7.
5. ('27) 14 AIR 1927 All 257 (258): 49 All 435(DB).
6. ('26) 13 AIR 1926 Mad 1029 (1030).
('10) 5 Ind Cas 515 (517) (Mad).
('22) 9 AIR 1922 All 349 (351, 352):44All622(DB). Also see Note 4.
7. See Note 11.
('34) 21 AIR 1934 Bom 257 (260). (Declaration that property in question is trust property may be granted in addition to the reliefs specified in this section.)
('32) 19 AIR 1932 Pat 33 (52) : 11 Pat 298 (DB).
8. ('41) 28 AIR 1941 Cal 68 (72) (DB).

Note 14

1. ('42) 29 AIR 1942 Rang 75 (76) (DB). (Application by trustees under scheme to appoint another trustee to fill up vacancy among them — Trustees should not be saddled with costs — Unless it was proper to order objectors to pay the costs, the costs of the trustees should be ordered to be paid out of the trust funds.)
('12) 17 Ind Cas 441 (442) (PC). (Trustee ordered to pay costs in first instance and then recoup himself from the estate.)
('99) 1 Bom L R 743 (753) (DB). (Parties to bear their own costs.)
('03) 26 Mad 450 (453) (DB). (Costs in appellate Court to be costs in the suit.)
('05) 28 Mad 319 (328) (DB). (Costs to come out of funds of estate.)
('83) 7 Bom 19 (33) : 9 Ind App 86 (PC). (Appellant to bear his own costs as benefited by the decree as it stands.)
('80) 5 Cal 228 (245) (DB). (Decree relating to recovery of costs out of the estate reversed as far as one of the defendants was concerned.)
('36) 63 Cal L Jour 573 (578) (DB). (In a suit under Section 92, Civil Pro. Code, for removal of mutwallis of a mosque and other consequential reliefs, which has been instituted *bona fide* and in which after protracted proceedings it is found that the allegations of the plaintiffs are well founded and substantiated, it is only proper that the plaintiffs should get all their costs out of the funds of the wakf estate.)

there is no misfeasance, his jurisdiction in the matter ends and he cannot order that the costs should come out of the estate.[3] Costs of Advocate-General, as between attorney and client, come, as a rule, out of the trust fund;[3] so also the costs of the trustee defendants if they are incurred for purposes of administration of the trust; but the taxing officer's order to the contrary will not be set aside by the Court.[4] Where a suit brought by a trustee is dismissed for want of sanction of the Advocate-General under this section, the trustee cannot claim costs out of the trust estate.[5]

15. Removing a trustee — Clause (a). — This clause is new. Under the old Code there was a conflict of opinion as to whether a prayer, in a scheme suit, for the removal of the trustee could be granted by the Court. The Calcutta, Bombay, Allahabad and Lahore High Courts, following the undermentioned decisions[1] of the Madras High Court held that it could be granted, either as coming within the words "such further or other relief" or as being involved in the prayer for the appointment of a new trustee.[2] Other decisions of the Madras High Court, however, held that such a prayer could not be granted under the section.[3] The conflict is now set at rest by the introduction of this new clause[4] and a suit for removal of a trustee can now be brought under S. 92 even if the plaintiffs challenge the appointment of the defendant as a trustee.[5] The section applies also to a suit for the removal of a trustee *de son tort* or a person who is a *de facto* and not *de jure* trustee.[6]

There has been a difference of opinion as to whether a suit by some trustees, for a declaration that the appointment of the defendant as a co-trustee is invalid and for an injunction restraining him from interfering with his management, is a suit for the removal of a trustee falling within this section. The Madras and Patna High Courts held that the case *may be regarded* as one in which the direction of the Court is necessary for the

('36) 23 AIR 1936 Mad 495 (496, 497) (DB). (It is not customary to make a trustee personally liable unless he has done something that is not merely technically wrong but unreasonable and unrighteous. Where a trustee has utterly failed to carry out the directions in trust and takes up an obstructing attitude during the course of the litigation, the Court will be justified in awarding costs against the trustee.)

2. ('16) 3 AIR 1916 Pat 306 (307) (DB). (Each side to bear its own costs.)

3. † ('83) 7 Bom 19 (33) : 9 Ind App 86 (PC).

4. ('95) 20 Bom 301 (303).

5. ('42) 29 AIR 1942 Bom 125 (128) : ILR (1942) Bom 293. (A trustee must be deemed to know the provisions of S. 92.)

Note 15

1. † ('91) 14 Mad 186 (189) (SB). (Power of removal is implied in "such further or other relief.")
('11) 9 Ind Cas 168 (169) (DB) (Mad).
[*See also* ('89) 12 Mad 157 (163) (DB). (Doubting.)]

2. ('99) 21 All 200 (203) (DB). (Removal comes under "the appointment of new trustee.")
('98) 20 All 46 (51, 52) (DB).
† ('97) 24 Cal 418 (426) (DB).
('05) 2 Cal L Jour 460 (465) (DB). (Appointment involves removal.)
('91) 15 Bom 612 (624) (DB).
† ('97) 21 Bom 48 (51, 52) (DB). (Prayer is involved in appointment of new trustees.)
('98) 22 Bom 493 (494) (DB).
('99) 23 Bom 659 (665) : 1 Bom L R 118 (123) (DB).
† ('06) 33 Cal 789 (802).
('07) 1907 Pun Re No. 78, p. 398 (400).

3. † ('94) 17 Mad 462 (468) (FB).
('10) 7 Ind Cas 868 (869) (DB) (Mad).
('11) 11 Ind Cas 728 (729) (DB) (Mad). (Court cannot remove trustee but may associate another with him.)
('10) 5 Ind Cas 515 (517) (Mad).
('17) 4 AIR 1917 Mad 426 (430) (DB). (Removal cannot be granted.)
[But see ('99) 22 Mad 361 (364) (DB). (Power to remove trustee was however assumed.)]

4. † ('24) 11 AIR 1924 Oudh 261 (262) : 27 Oudh Cas 149 (DB). (Mahant is a trustee and can be removed.)
('09) 3 Ind Cas 503 (510) (DB) (All). (Court cannot however remove a sajjadanashin from his office as he is not a mere trustee.)
('12) 16 Ind Cas 9 (12) (DB) (Cal).
('13) 35 All 98 (101) : 18 Ind Cas 573 (574) (DB). (Suit for removal of trustee must be only under S. 92.)
† ('15) 2 AIR 1915 Mad 1044 (1047) (DB). (Cannot be removed without a suit under S. 92.)
('15) 2 AIR 1915 All 335 (335) (DB).
('18) 5 AIR 1918 Lah 76 (77) (DB).
('13) 20 Ind Cas 767 (767) (DB) (Mad). (Suit for removal of trustee and for settling scheme is within S. 92.)
('19) 6 AIR 1919 Mad 159 (159) : 42 Mad 668 (DB). (Court can question an appointment if it is not made reasonably.)
('36) 23 AIR 1936 All 97 (102) : 58 All 538 (DB).

5. ('25) 12 AIR 1925 Cal 1106 (1107) (DB).

6. ('40) 27 AIR 1940 Pat 425 (428, 429) (DB).

administration of the trust, and the relief claimed, *cognate* to the removal of a trustee, and that, therefore, the suit is governed by this section.[7] The Bombay High Court, on the other hand, holds that the mere fact that it *resembles* a suit for the removal of a trustee will not make the section applicable. The suit must be clearly one within the section and must be based on a breach of trust or on the necessity of the direction of the Court being given for the administration of the trust.[8]

The guiding principle in granting or refusing a prayer for the removal of a trustee under this section is to see whether in the particular case, it is for the *welfare of the trust* to do so,[9] having regard to the *original purposes* of the trust.[10] The primary duty of the Court is to consider the interests of the public or that part of the public for whose benefit the trust was created.[11] Every mistake, neglect of duty or inaccuracy of conduct is not necessarily a ground for removal.[12] Nor is even misconduct on the part of the trustee such a ground unless it is for the benefit of the trust to remove him.[13] On the other hand, a Court can always remove a trustee under this section even in the absence of proof of misconduct or misappropriation if it is in the interests of the trust to do so.[14]

The following grounds have been held sufficient, to order the removal of a trustee in the interests of the trust :

(1) Trustee, asserting a hostile title in himself to the trust properties or alienating the same[15] or claiming a right to utilise the income for his own purposes.[16] A *mere* assertion, however, that the trust properties are his private properties is not a sufficient ground for his removal unless his attitude is unreasonable or *mala fide*, and amounting to a breach of trust.[17] The fact that a trustee puts forth an unwarranted claim to the right of exclusive management is not a sufficient ground for his removal.[18]

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7. ('19) 6 AIR 1919 Mad 159(160):42 Mad 668(DB).
†('17) 4 AIR 1917 Mad 214 (215, 217) (DB). (Suit in substance for removal of trustee is one under the Section but where preferential right is claimed, suit is not one for removal. *Cf.* however 26 Mad 450.)
('25) 12 AIR 1925 Pat 544(546) : 4 Pat 741 (DB).
8. ✣('23) 10 AIR 1923 Bom 67(68):46 Bom 101 (DB).
9. ('20) 7 AIR 1920 Cal 210 (222) (DB).
('25) 12 A I R 1925 Mad 1011 (1012) (DB). (No misappropriation — Trustee as much interested in the trust as others—Removal not desirable.)
('18) 5 AIR 1918 Mad 56 (60) (DB).
('35) 22 AIR 1935 Pat 111 (115): 14 Pat 379 (DB).
10. ('99) 1 Bom L R 743(753)(DB). (No misconduct of any kind—Mahant is not liable to dismissal.) [*See* ('26) 13 A I R 1926 Lah 100 (108) : 7 Lah 275 (DB). (Original purposes of the trust must be looked to.)]
11. ('34) 21 AIR 1934 P C 53 (54) (PC). (Defendant mutawallis' removal on account of their insolvency and mismanagement and keeping the charity in a deplorable condition.)
12. †('28) 15 AIR 1928 Cal 225 (226) (DB).
('97) 21 Bom 556 (560) (DB). (Mere lax management is no ground for removal of a trustee.)
('23) 10 AIR 1923 Mad 163 (167) (DB). (Failure to keep accounts without any wilful default.)
('18) 5 AIR 1918 Mad 56 (60) (DB). (Misappropriation—Trustee removed.)
('29) 16 A I R 1929 All 433 (436) (DB). (Mere inaccuracy in accounts or petty neglect of duty or indebtedness—No ground for removal.)
13. ('19) 6 AIR 1919 Mad 575 (578) (DB).
('99) 1 Bom L R 743 (748) (DB). (Mahant—No case of misconduct proved.)
('99) 2 Oudh Cas 340 (343) (DB). (Misconduct, immorality and breach of trust held to be grounds for removal.)
('21) 8 AIR 1921 Mad 467 (470) (DB). (Hereditary archakas *bona fide* appropriating surplus income of lands—No ground for removal.)
14. ('41) 28 AIR 1941 Bom 317 (322): ILR (1941) Bom 556 (DB).
✣('25) 12 AIR 1925 Mad 1070 (1078) (SB).
15. ('27) 14 AIR 1927 Mad 1033 (1034) (DB).
('24) 11 AIR 1924 Lah 107 (108): 4 Lah 364 (DB). (Adverse title.)
('26) 13 AIR 1926 Mad 280 (280) (DB). (Alienating property.)
[*See* ('33) 20 AIR 1933 Oudh 22 (27) :8 Luck 266 (DB). (Adverse title and mismanagement.)]
16. ('91) 15 Bom 612 (623, 624) (DB).
†('22) 9 AIR 1922 P C 325 (332) : 45 Mad 565:49 Ind App 237 (PC).
17. ('41) 28 A I R 1941 Cal 68 (74) (DB). (Mere assertion in a suit under S. 92, C. P. Code, by a trustee that trust properties are private properties is not by itself a sufficient ground for his removal. If he committed any breach of trust before the suit, his conduct in the course of the suit is an important element to be taken into consideration in deciding whether the breach should be condoned and he should be allowed to retain the office.)
('28) 15 AIR 1928 Mad 879 (886) (DB).
18. ('41) 28 AIR 1941 Bom 317 (322) : ILR (1941) Bom 556 (DB).

(2) Trustee being guilty of a breach of trust or misappropriation of the trust funds[19] or having concurred in a breach of trust.[20]
(3) Falsification of accounts.[21]
(4) Trustee being guilty of *wanton* waste and neglect of duty.[22]
(5) Lack of capacity to manage.[23]
(6) Bad character.[24]

Where, in a suit by one trustee under this section for removal of a co-trustee the latter charges the plaintiff himself as being guilty of misconduct, the Court can go into the question and if necessary remove the plaintiff himself from the trusteeship.[25]

The High Court of Madras has held that the relief of removal of a trustee does not carry with it the relief of delivery of possession of the lands attached to the trust.[26] But the Judicial Commissioner's Court of Nagpur has held that, in a suit under this section for the removal of a trustee, a decree for delivery of possession of the trust properties to the new trustee could be granted.[27]

It was held by the Bombay High Court that where the Court frames a scheme in a suit under this section, it is desirable to provide therein for the removal of the trustees for breaches of trust, so that the removal of the trustee, in case of default, may be obtained by way of *execution* of the decree and without the trouble and expense of a regular suit.[28] The said decision has, however, been dissented from by the High Court of Madras[29] and the Court of the Judicial Commissioner of Nagpur[30] and does not appear to be a sound one in view of the decision of the Privy Council in the undermentioned case.[31] In any case, where the scheme does not provide for the removal of the trustee, an *application* for the removal of the trustee is not the proper procedure but a *suit* under this section is necessary.[32] Where a scheme provides for the removal of a trustee

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19. ('24) 11 A I R 1924 Cal 1024 (1025) (DB). (Breach of trust and other things.)
('10) 8 Ind Cas 545 (545) (DB) (Mad). (Misappropriation.)

20. ('24) 11 AIR 1924 Cal 1024 (1025) (DB).

21. ('22) 9 AIR 1922 P C 325 (332): 45 Mad 565 : 49 Ind App 237 (PC). (Falsification of accounts.)
('17) 4 A I R 1917 Oudh 375 (380) : 20 Oudh Cas 49 (DB). (Neglect and mismanagement—Accounts not produced.)
('99) 22 Mad 481 (483) (DB).

22. ('40) 27 AIR 1940 Lah 356 (358).
('07) 2 Mad L Tim 94 (95) (DB). (Gross neglect of duty.)
('24) 11 AIR 1924 Cal 1024 (1025) (DB).
('24) 11 AIR 1924 Mad 491 (492) (DB). (Not applying inam in a proper manner to the mosque.)

23. † ('24) 11 AIR 1924 Cal 1024 (1025) (DB).

24. ('40) 27 AIR 1940 P C 24 (27) : 67 Ind App 32 : ILR (1940) 1 Cal 266 : ILR (1940) Kar P C 47 (PC). (Suit for removal of mahant — Moral character of the mahant is directly relevant to the issue arising in the suit, viz., his fitness to remain in office.)
('40) 27 AIR 1940 Lah 356 (358). (Sanyasi of temple — Bad character — Worshippers, especially women, ceasing to go to temple.)

25. ('25) 12 AIR 1925 Mad 820 (821) (DB).

26. ('10) 8 Ind Cas 525 (525) (DB) (Mad).

27. ('34) 21 AIR 1934 Nag 48 (50).

28. (1900) 24 Bom 45 (49) (DB).
[*See also* ('37) 24 AIR 1937 Bom 124 (132, 133) (DB). (A scheme providing a means for the removal of a trustee without recourse to the Court does not offend any law. Section 92, Civil Procedure Code, does not render invalid or ineffectual a clause in a scheme that the trustee may be removed from his office by the District Judge of his own motion speaking of the District Judge as an individual, not the District Court. The District Judge may be validly empowered as a *persona designata* to remove trustees. The power to remove includes the power to suspend them and to appoint a manager to act during the period of suspension.)]

29. † ('26) 13 AIR 1926 Mad 559 (561) : 49 Mad 580 (DB).

30. ('31) 18 AIR 1931 Nag 82 (82).
[*See also* ('35) 22 AIR 1935 Sind 210 (210) : 29 Sind L R 308.]

31. ('25) 12 AIR 1925 P C 155 (156) (PC).

32. ('42) 29 AIR 1942 Oudh 135 (137) : 17 Luck 391 (DB).
('35) 22 AIR 1935 All 273 (275) (DB). (Although a scheme was originally drawn up in a proper proceeding under S. 92, Civil Procedure Code, that fact does not remove the necessity imposed by the section for the obtaining of sanction before the Court can act under the section and remove a trustee or appoint another trustee.)
† ('35) 22 AIR 1935 Sind 210 (210) : 29 Sind L R 308.

for unfitness, the power can be exercised in the course of proceedings arising out of the scheme, even though the trustee be found unfit by reason of a *breach of trust* and a *suit* under this section is not necessary.[33] Where a hereditary trustee is removed by a decree in a scheme suit, it is not proper to provide in the decree that the descendants of the trustee are for ever debarred from holding the office.[34]

A Court has power under this section to remove a trustee not only from his temporal position as manager of the trust properties but also from his position as spiritual head where the two offices are inseparable or closely connected together.[35]

As to whether a sajjadanashin can be removed under this section, see the undermentioned cases.[36]

Where a will creates a trust and the trustees are wrongly called 'executors,' the proper procedure for removal of the trustees is by a suit under this section and not by a petition under S. 301 of the Succession Act.[37]

Where a trustee is removed under this section, the Court should, before appointing a new trustee, give public notice in such a way as to enable claimants to the office to come forward and put in their respective claims.[38]

16. Appointment of a new trustee — Clause (b).—Under this section, the Court has complete discretion in appointing *any* person as a trustee and in arranging for the management of the trust.[1] One of the principles to be remembered in exercising the power of appointing a trustee is that *no right of inheritance* attaches to a religious institution. It is by *appointment* that one officer succeeds to another and such appointment is made either by the original founder, or by the superintendent of the trust, or failing these, by the ruling power. The appointment of a *mutawalli* to a *waqf* is a matter regarding religious usages within the meaning of Regulation XV of 1793 and must be determined with reference to the provisions of the Mahomedan law on the subject. In respect of waqfs created for public purposes of a religious nature, the District Judge may be assumed to have been authorised by virtue of S. 92 to exercise the powers of a Kazi.[2]

The duty of the Court is to appoint the *most suitable* persons available as trustees whether originally impleaded in the suit or not and, in doing so, it should take into consideration the *wishes* and rights of the founder, the *past history* of the institution and the way in which the management was carried out in the past.[3]

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33. ('37) 24 AIR 1937 Bom 124 (127) (DB).

34. ('19) 6 AIR 1919 Mad 515 (524) : 42 Mad 161 (SB).

35. ('40) 27 AIR 1940 P C 24 (29) : 67 Ind App 32 : ILR (1940) 1 Cal 266 : ILR (1940) Kar P C 47 (P C). (Matter one for consideration of Civil Court in each case — Where office is purely spiritual, the Court cannot remove the holder of the office.)

36. ('09) 6 All L Jour 632 (635) (DB). (No—When it is impossible.)
('34) 21 AIR 1934 Pat 443 (457) (DB). (Yes.)
('32) 19 AIR 1932 Pat 33 (52) : 11 Pat 288 (DB). (Yes.)

37. ('38) 25 AIR 1938 All 197 (198) (DB).

38. ('37) 41 Cal W N 298 (303) (DB). (The law, however, does not make any provision of this nature; and, therefore, it cannot be laid down as a hard and fast rule that in all suits under S. 92 of the Code that is the procedure necessarily to be resorted to.)

Note 16

1. ('20) 7 AIR 1920 Cal 379 (380):47 Cal 866 (DB).
† ('16) 3 AIR 1916 P C 132 (135):43 Cal 1085 : 8 Low Bur Rul 517 : 43 Ind App 127 (PC).
('11) 9 Ind Cas 168 (168) (DB) (Mad). (Suit for appointment of new trustee is within the section and requires sanction.)
('37) 24 AIR 1937 Oudh 193 (194) : 13 Luck 81 (DB). (Illegitimacy will not necessarily be a disqualification for appointment as trustee.)

2. † ('16) 3 AIR 1916 Cal 894 (900) : 43 Cal 467 (DB).
('24) 11 AIR 1924 Cal 441 (441) (DB).

3. ('41) 28 AIR 1941 Bom 317 (322) : ILR (1941) Bom 556 (DB). (Previous association of a person and his family with an institution is undoubtedly one of the matters which the Court should normally take into consideration—Jain family connected with management of Hindu temple for long time —Member belonging to family should not be deprived of his right to share in management of temple.)

Section 539 of the old Code contained the words "new trustees *under the trust.*" And this gave room for arguments that the appointment must be "in conformity with the *original constitution* of the trust or with the rules in force in respect of it." This argument was however negatived by decisions which accordingly held that it was competent for the Court to appoint new or additional trustees though not in conformity with the original constitution of the trust, if the interests of the trust demand it.[4] The same view will obviously prevail under the present Code.[5] A Court will, however, refrain from appointing a person declared not fit to be appointed, by the author of the trust.[6]

The words "new trustee" under the Code mean "new trustee *in the place of an old one*" and therefore the section applies only when a new trustee is sought to be appointed in the place of an old one and not to a case where there is no *mutawalli*, and the Court is asked to appoint a *mutawalli*.[7] In cases of the latter class the Court can appoint a *mutawalli* without a *suit under the section* and in the exercise of the powers of a *Kazi* under the Mahomedan law.[8] Under that law it was the duty of the *Kazi* whenever there was no one to administer the trust, to see that it was properly administered and for that purpose, to appoint a suitable trustee or manager of the property. That power, as has been already mentioned, now lies with the District Judge[9] and a Sub-Judge cannot recall the order of a District Judge or appoint a *mutawalli*.[10]

Where a trustee dies and the disciples of the *mutt* were authorised by custom in such cases to appoint a successor, a suit for a declaration by the disciples that the defendant was not validly appointed, that he should be ejected and that a successor of the deceased trustee should be appointed, is misconceived and does not lie under section 92.[11]

As to appointment of trustee for vacancy in trusteeship under a scheme, see Note 21.

('37) 41 Cal W N 298 (304) (DB). (Court ought to give public notice so as to enable claimants to office to come forward and put in their claims.)
('17) 4 AIR 1917 All 331 (334) (DB).
✠('28) 15 AIR 1928 Mad 955 (957) (DB).
('20) 7 AIR 1920 Cal 210 (215) (DB). (Founder has a right to nominate the shebait in certain events e. g., where the line originally indicated by the founder fails.)
('12) 17 Ind Cas 969 (971) (DB) (Cal). (Person having pecuniary interest in the trust or a creditor of the endowment not to be appointed to the committee of management.)
('35) 22 AIR 1935 Pat 111 (116) : 14 Pat 379 (DB). (Interest of institution is the governing factor — Arrangements should be made which will prevent mismanagement as has taken place.)

4. ('05) 28 Mad 319 (323, 324) (DB).
('19) 6 AIR 1919 All 83 (89) (DB). (Directing property to be delivered to new trustees.)
✝('28) 15 AIR 1928 Mad 955 (957) (DB). (Additional trustees may be appointed.)
('20) 7 AIR 1920 Mad 146 (146) (DB). (Additional trustees.)
('11) 11 Ind Cas 728 (729) (DB) (Mad). (Court can associate a new person with the trustee.)
✝('12) 16 Ind Cas 225 (234) (DB) (Mad). (Additional trustees can be appointed.)
('19) 6 AIR 1919 Mad 575 (578) (DB). (If appointment of additional trustee will lead to friction, existing trustee alone may be allowed to continue as the sole trustee on terms.)
('20) 7 AIR 1920 Cal 379 (380) : 47 Cal 866 (DB). (Stranger appointed as mutawalli.)

5. ('37) 41 Cal W N 298 (304) (DB). (Although regard must be paid to the line of devolution that may have been prescribed in the deed of endowment, it is permissible to the Court, in peculiar circumstances having regard to the exigency of the case to make a departure.)
6. ('09) 37 Cal 263 (268-270) : 3 Ind Cas 419 (421) (DB).
7. ('28) 15 AIR 1928 Cal 368 (369, 370) : 55 Cal 1284 (DB).
('03) 26 Mad 450 (452) (DB). (Suit for appointment of new trustee on the ground that defendants are not lawful trustees and therefore office of trustee is vacant held to be covered by cl. (b).)
[*See* ('38) 25 AIR 1938 Pat 537 (538). (But the District Judge has no general power to remove mutawalli in miscellaneous proceedings, his powers in this respect being limited and defined by S. 92. Nor has he power in such proceedings to require the mutawalli of a private endowment to render accounts.)]
[But see ('34) 21 AIR 1934 Oudh 118 (121) : 9 Luck 507.]
8. ('43) 30 AIR 1943 Oudh 278 (279). (Where there is an absolute vacancy in the office a mutawalli and a person has been nominated by the deceased mutawalli the District Judge can appoint him as such without any suit under S. 92, C. P. Code.)
9. ('28) 15 AIR 1928 Cal 368 (369, 370) : 55 Cal 1284 (DB).
10. ✝('16) 3 AIR 1916 Cal 894 (900) : 43 Cal 467 (491) (DB).
11. ('99) 22 Mad 117 (119) (DB).

17. Vesting any property in a trustee — Clause (c). — This clause gives power to the Court, where it removes a trustee and appoints a new trustee, to vest the trust property in the new trustee.[1] This clause refers to cases where a new trustee is appointed and is not intended to cover cases in which it is sought to recover possession of the trust property by ejecting trespassers who are wrongfully in possession of it.[2] See also Note 28.

18. Directing accounts and inquiries — Clause (d). — This clause is new. A relief for accounts was not one of the reliefs specifically provided for by S. 539 of the old Code. But the Bombay High Court held that a relief of the nature indicated in this clause came within the words "such further or other relief"[1] and that it was the first and most important thing to be done in such suits.[2] The new clause gives effect to the Bombay decisions. A suit for accounts of the trust property will now clearly fall within the section.[3]

An order for the payment of the amount found to be due on the taking of accounts will be within the section.[4] But a claim for damages for loss caused by the misconduct of the trustee is not one of the reliefs specified in the section and cannot be granted in a suit for directing accounts and inquiries.[5]

In taking accounts under this section, the claim of the trustee against the trust for moneys due to him may also be considered, even if his right to *sue* in respect of those items is barred by limitation. The reason is that though the *right to sue is* barred, the claim is otherwise unaffected.[6]

In a suit for accounts under this section, all the trustees must be joined as parties. They may be asked to account on one of two bases, (a) for the moneys they have received, or (b) for the moneys they ought to have received. In the latter case the suit will not be one for damages for negligence. It is only a case of taking accounts on a particularly onerous basis known as the basis of wilful default.[7] It is a general principle that *back accounting* will not be decreed except on proof of dishonesty and malversation.[8]

Note 17

1. ('06) 28 All 112 (117) (DB).
[*See* ('41) 1941 Nag L Jour 587 (588) (DB). (A suit in which persons interested in the trust, to wit, the settlors of the trust ask one of the trustees to hand over trust properties to them is not within the section.)]
2. ✣('32) 19 AIR 1932 Rang 132 (136) : 10 Rang 342 (DB).

Note 18

1. ('92) 16 Bom 626 (629).
('97) 21 Bom 48 (51) (DB).
('08) 10 Bom L R 87 (89) (DB).
('91) 15 Bom 612 (624) (DB). (Court actually ordered the taking of accounts.)
2. † (1900) 24 Bom 50 (54) : 26 Ind App 199 (PC). (On appeal from 12 Bom 247.)
('12) 17 Ind Cas 969 (971) (DB) (Cal). (Income of endowment uncertain and variable—It is extremely desirable that audits should be fairly frequent.)
3. † ('24) 11 AIR 1924 Bom 518 (519, 520) (DB).
('18) 5 AIR 1918 Bom 134(136):42 Bom 742 (DB).
('21) 8 AIR 1921 Mad 479 (479) (DB). (Claim for accounts by trustees against subordinate trustee.)
('24) 11 AIR 1924 Mad 882 (883). (Suit for mandatory injunction to compel defendant to deposit amount in Court is in effect a suit for accounts under S. 92.)
('15) 2 AIR 1915 All 69 (69) (DB).
† ('19) 6 AIR 1919 All 203 (205) (DB). (Suit for accounts against trustees appointed under a compromise.)
4. ('27) 14 AIR 1927 Mad 416 (417) (DB).
('21) 8 AIR 1921 Mad 479 (479) (DB). (Suit by trustee against subordinate trustee for accounts is within this section.)
✣('35) 22 AIR 1935 Mad 825 (826) : 58 Mad 998 (FB).
[But see ('34) 21 AIR 1934 Nag 48 (50).]
5. ('26) 13 AIR 1926 Mad (509) (510).
6. ('16) 3 AIR 1916 Mad 720 (723) : 39 Mad 365 (DB).
Also see O. 8 R. 6, N. 6.
7. ('41) 1941 Nag L Jour 587 (589) (DB). (The account being finally taken, it would then be a matter for direction as to which of the trustees is liable in the first place, though they all would be liable in the event — The primary liability would be on the trustee who has received the money, and the final liability on all together.)
8. † ('28) 15 AIR 1928 Mad 879 (887) (DB).
[*See also* ('41) 1941 Nag L Jour 587 (589) (DB). (Plaint should allege against one or more of the trustees acts which would justify the Court in taking accounts not in the ordinary way but on the footing of wilful default.)]

Where a trustee is removed under clause (a), it is not obligatory on the Court to make an order for accounts in every case.[9]

19. Declaring what proportion, etc. — Clause (e). — The words "what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust" have been substituted for the words "the proportion in which its objects are entitled" in order to make the clause more clear. A suit for a declaration as to whether the offerings made to a deity belong to the pujaris exclusively or should be divided between the pujaris and the temple servants and if so what proportion of the offerings should be allocated to the *pujaris* and the temple servants respectively, is one coming under this clause[1] inasmuch as the suit is in substance one to declare what the trust properties are and for the directions of the Court for the administration of the trust properties. The clause contemplates one of two cases, (a) where the creator of the trust had allotted a sum of money to several objects and the Court is asked to apportion such sum among them and (b) where on account of changed circumstances, the Court is asked to make new allotments to the several objects of the trust.[2] The essence of this clause and cl. (g) is the directions from the Court concerning the management of the trust.[3]

20. Authorising alienation of trust property—Clause (f).—As has already been seen in Note 16 the powers of a *Kazi* under the Mahomedan law are exercised by the District Judge in the mofussil[1] and where a *mutawalli* claims permission to execute a lease, it can be granted by the District Judge in the exercise of his powers as *Kazi* and without any *suit* for that purpose. It is only where *all* the essentials for the applicability of the section are present, that such a permission must be sought for by way of a suit.[2]

It is a general principle of law that though it is not competent as a rule for a *shebait* to alienate trust property, yet he will be entitled to do so where it is necessary for the benefit or preservation of the estate or for the purpose of preventing it from hostile or litigious attacks.[3] The position of a *shebait* or head of a *mutt* is, in fact, that of the manager of an infant heir and where debts are contracted by him for purposes binding on the *mutt*, a decree will be passed charging the income of the *mutt* for such debts.[4] Where the *shebait* or trustee as such commits trespass and is mulcted in damages against the estate, the *debutter* property will be liable for it.[5]

Debutter property is not absolutely inalienable but can be alienated for *legal necessity*. The trustee can create derivative tenures over the trust property conformable to usage[6] but a permanent lease at a fixed rent for all time cannot be a proper act of management and will be, on the other hand, a breach of duty.[7]

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9. ('37) 41 Cal W N 298 (306) (DB). (Income of endowment quite small—Expenditure not leaving much in shape of balance — Decree for accounts not passed.)
('40) 27 AIR 1940 P C 24 (30) : 67 Ind App 32 : I L R (1940) 1 Cal 266 : I L R (1940) Kar P C 47 (PC). (Scheme framed—New mahant appointed — Privy Council considered that on the whole the matter had better be left to the new trustee.)

Note 19

1. † ('21) 8 AIR 1921 Bom 297 (299) : 45 Bom 683 (DB).
2. ('42) 29 AIR 1942 Cal 343 (350) : I L R (1942) 1 Cal 211 (DB).
3. ('42) 29 AIR 1942 Cal 343 (350) : I L R (1942) 1 Cal 211 (DB).

Note 20

1. See Note 16.
2. ('20) 7 AIR 1920 Cal 129(130): 47 Cal 592 (DB).
3. ('07) 34 Cal 249 (255, 256) (DB).
† ('04) 27 Mad 435 (439, 455, 456) (DB).
('75) 23 Suth W R 253 (255, 256) : 2 Ind App 145 (PC).
4. † ('08) 35 Cal 226 (229, 231) (SB). (Hereditary trustee cannot alienate office of shebaitship except for necessity.)
('08) 31 Mad 47 (49) (DB).
5. † ('06) 10 Cal W N 1000 (1002, 1003).
6. ('04) 27 Mad 465 (472, 476) (FB).
('70) 13 Suth W R 18 (19) : 13 Moo Ind App 270 (PC).
7. ('09) 36 Cal 1003 (1013): 36 Ind App 148: 4 Ind Cas 449 (451) (PC).
('05) 28 Mad 391 (392) (DB).
('70) 13 Suth W R 18 (20) : 13 Moo Ind App 270 (PC).

21. Settling a scheme — Clause (g).—The Civil Court which in the British Indian system, has taken the place of the *Kazi* in the Mahomedan law, has a complete discretion in arranging for the management of a *public* trust, though "in giving effect to the provisions of this section and in appointing new trustees and settling a scheme it is entitled to take into consideration, not merely the wishes of the founder so far as they can be ascertained, but also the past history of the institution and the way in which the management has been carried out heretofore, in conjunction with other existing conditions that may have grown up since its foundation."[1] Such conditions would include the existing rights of individuals to the trusteeship of endowment, though the Courts are averse generally to the creation of a hereditary right to the office of a public trustee.[2]

The main thing to be remembered is the welfare and interests of the trust.[3] The jurisdiction of the Court to frame a scheme is not excluded by the fact that the temple, for which the scheme is to be framed, is subject to a temple committee[4] or is managed by a caste or section of the public.[5] It is desirable, however, that it should be framed in such a way as to meet the exigencies of the case without unduly interfering with the powers of the temple committee,[6] or impairing the authority of the *mahant* or the duly constituted manager of the institution.[7]

In framing a scheme under the section, the Court is not restricted to the arrangement contemplated by the author of the trust, though as a general rule, it ought not to depart therefrom except for very strong reasons.[8] Thus, the Court can provide for the management by co-trustees in rotation or otherwise alter the original scheme in the interests of the institution[9] such as by providing for new or additional trustees.[10]

The ground on which the relief for the settlement of a scheme should be granted does not depend upon any *charges* against the trustees at all, but upon its being necessary for the *welfare* of the trust and upon its being conducive to the better management of the

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Note 21

1. † ('16) 3 AIR 1916 P C 132 (135): 43 Cal 1085: 43 Ind App 127 : 8 Low Bur Rul 517 (PC).
('22) 9 AIR 1922 Mad 409 (411) (DB). (Not desirable to impose condition on hereditary trustee but where necessary in particular circumstances, the Court is entitled to impose it.)
('12) 17 Ind Cas 441 (442) (PC). (Frame of scheme is largely a matter for the discretion of the Court.)
[*See also* ('37) 41 Cal W N 298 (304) (DB). (Court has complete discretion in the matter — Court need not frame a detailed scheme if it thinks that certain directions given by it to the newly appointed trustee would be enough.)
('17) 4 AIR 1917 All 331 (334) (DB).
('06) 8 Bom L R 756 (757) (DB).]
2. ('12) 16 Ind Cas 225 (233) (Mad).
[*See* ('41) 28 AIR 1941 Bom 317 (322) : ILR (1941) Bom 556 (DB). (Association with institution is factor to be considered in appointing manager of institution.)]
3. ('42) 29 AIR 1942 Cal 343 (350) : ILR (1942) 1 Cal 211 (DB). (The essence of S. 92 (e) and (g) is directions from the Court concerning the management of the trust. A direction that in the administration of the trust, trustee should do a certain thing or abstain from doing a certain thing is not alien to a scheme of management.)
('26) 13 AIR 1926 Mad 1150 (1153).
4. ✠ ('17) 4 AIR 1917 Mad 551 (554, 560) : 39 Mad 700 (DB).
5. ('17) 4 AIR 1917 Mad 426 (427, 428) (DB).
6. ('17) 4 AIR 1917 Mad 551 (560) : 39 Mad 700 (DB). (Temple committee.)
7. ('07) 30 Mad 138 : 34 Ind App 78 : 9 Bom L R 588 (590) (PC). (Scheme framed without impairing the authority of the mahant.)
('30) 17 AIR 1930 Mad 466 (469) (DB). (Though there is general trustee, a scheme regulating daily worship by archakas, not objectionable.)
[*See* ('41) 28 AIR 1941 Cal 618 (622, 623) (DB). (Powers of mahant can be curtailed in scheme but only to extent indicated in scheme either expressly or by necessary implication.)]
[*See also* ('41) 28 AIR 1941 Bom 317 (321): ILR (1941) Bom 556 (DB). (Framing scheme may involve removal or appointment of trustees.)]
8. ('39) 26 AIR 1939 Mad 920 (921) : ILR (1940) Mad 300 (DB). (If provisions of a trust deed are likely to result in the frustration to a large extent of the objects of the trust, Court can permit deviation from the trust deed—Trust for giving loans for educational purposes—Trust deed providing for security being given by the students in a certain form—Court can alter the form of security.)
('23) 10 AIR 1923 Pat 420 (421) (DB).
('32) 19 AIR 1932 Pat 33 (54) : 11 Pat 288 (DB). (Court not bound by the terms of the grant or usage.)
9. ('04) 27 Mad 192 (198, 201, 202) (DB).
10. ('05) 28 Mad 319 (323, 324, 325) (DB).
('24) 11 AIR 1924 Rang 134 (135) (DB). (Mosque with majority of Bengali worshippers — Scheme should provide for majority of Bengali trustees.)

trust property.[11] When a scheme is working properly, the Court will, in fact, refuse to alter it on the mere allegation of mismanagement and malversation by the trustees.[12] Such a ground is not sufficient for *altering* the scheme itself, though it may be a ground for *removal* of the trustees.[13] Where, however, there is mismanagement and there is a large surplus income unspent,[14] or, where a temple has got temple properties and also *kattalai* properties (which are in the nature of distinct endowments themselves) and the management and mixing up of the various *kattalais* is likely to lead to embezzlement, it will be a sufficient ground to seek the aid of the Court in framing a scheme.[15] In fact, in that case, separate schemes should be framed for the temple properties and the *kattalai* properties.[16]

The Court may, and it is desirable that it should, do the following things in framing a scheme :

(1) Give necessary directions with reference *to the property of the trust and the income therefrom*.[17] A scheme which does not ascertain the income and expenses of the trust is an unsatisfactory scheme.[18]

(2) Provide some authority for *supervising* the administration by the trustees.[19] But a clause empowering the *Court* to exercise disciplinary jurisdiction over the trustees is invalid as it makes the Court practically the superintendent of the institution.[20]

(3) Provide that any person interested in addition to the trustee, shall be at liberty to ask the Court by way of *application* for *directions to carry out the scheme*.[21] There is a conflict of opinion as to whether a reservation of a right to a person or persons to ask the Court by way of *application* for a *relief coming within the section* is valid. The High Court of Madras and the Judicial Commissioner's Court of Nagpur have held that such a reservation is *ultra vires* inasmuch as such relief can only be granted in a *suit* under S. 92.[22] The High Courts of Calcutta and Patna, on the other hand, appear to be of the opinion that such a reservation is *intra vires*.[23]

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11. ('16) 3 AIR 1916 Mad 318 (319, 320) (DB).
('18) 5 AIR 1918 Oudh 207 (210) (DB).

12. ('16) 3 AIR 1916 Mad 530 (530, 531) (DB).
[*See* ('34) 21 AIR 1934 Pat 443 (454) (DB). (But where directions in a previous scheme prove ineffective for effecting due administration new scheme should be framed.)]

13. ('16) 3 AIR 1916 Mad 530 (530, 531) (DB).

14. ('16) 3 AIR 1916 Mad 318 (319) (DB).

15. ('24) 11 AIR 1924 Mad 168 (171, 172, 173) (DB).

16. ('28) 15 AIR 1928 Mad 955 (956) (DB).

17. ('17) 4 AIR 1917 Mad 355 (358) (DB).
('91) 15 Bom 612 (624).

18. † ('18) 5 AIR 1918 Mad 1006 (1009) (DB).
(1900) 24 Bom 50 (54) : 26 Ind App 199 (PC). (Trust funds not ascertained — Proper course is to take accounts before scheme is framed.)

19. ('12) 16 Ind Cas 225 (235) (DB) (Mad).

20. † ('26) 13 AIR 1926 Mad 559 (562) : 49 Mad 580 (DB).
('25) 12 AIR 1925 Mad 411 (414) (DB).
[*See* ('35) 22 AIR 1935 Mad 474 (475) (DB). (Clause investing Court with general powers and duties of superintendence over institution is *ultra vires*.)]

21. ('28) 15 AIR 1928 Mad 268 (271) (DB).
('32) 19 AIR 1932 Mad 41 (42, 44) : 54 Mad 345 (DB).
† ('30) 17 AIR 1930 Mad 918 (920) : 54 Mad 315 (DB).
('39) 26 AIR 1939 Mad 605 (607). (Applicants held entitled to apply to the Court for determination whether the person nominated for trusteeship was eligible for it. The Court had power to determine the question and direct the trustee to reject the nomination paper. Such direction was necessary for the carrying out of the scheme.)

22. ('28) 15 AIR 1928 Mad 268 (271) (DB). (The words "for modification of the term thereof" appearing in the scheme framed by the lower Court were held to be *ultra vires*.)
✣ ('27) 14 AIR 1927 Mad 1073 (1078) : 51 Mad 31 (FB).
† ('26) 13 AIR 1926 Mad 557 (558) (DB).
('26) 13 AIR 1926 Mad 655 (655) (DB).
† ('25) 12 AIR 1925 Mad 411 (414) (DB).
† ('29) 16 AIR 1929 Mad 322 (322).
('30) 17 AIR 1930 Mad 226 (227) (DB).
('31) 18 AIR 1931 Nag 82 (82) (FB).
[*See* ('35) 22 AIR 1935 Mad 474 (475). (It is not competent to the framers of a scheme to provide that where the ordinary law requires a suit to be brought, an application may be substituted for it.)]

23. ('18) 5 AIR 1918 Cal 530 (531) (DB).

There is also a conflict of opinion as to whether a reservation of a right to seek, by way of *application, a modification or alteration* of the scheme later on is or is not *ultra vires*. It was held in the undermentioned cases that such a reservation is *ultra vires* as it offends against S. 92 which requires that the remedy should be by way of a *suit*.[24] While a contrary view was taken in the cases noted below.[25] See also the undermentioned cases in which it was held that a scheme once framed by the Court can be altered by the Court, though only on substantial grounds.[26]

A provision in a scheme giving the Court authority to appoint a successor in place of a deceased trustee cannot be regarded as one for the modification of the scheme and hence is not *ultra vires*, even assuming that a provision for modification would be *ultra vires*.[27]

Where a scheme contains a clause reserving liberty to apply for directions to work out the scheme but the persons who are to apply are *not specified*, the proper persons who can apply under the liberty clause are the *parties to the suit*, and, in case they are dead or are colluding with the defendants or are negligent in applying, other persons wishing to so apply may be allowed to do so after bringing them on the record under O. 1 R. 10 of the Code.[28] Where, however, the persons who are to apply *are specified*, it is not open to *any other person* to make an application for directions.[29] Where a scheme provides for the modification of the scheme by the Court on the application of parties interested in the institution (assuming such provision is held to be *intra vires*) any person who may have an interest in the institution from time to time, whether or not he is a party or representative of a party to the original litigation, is entitled to make an application for the modification of the scheme.[30]

('23) 10 A I R 1923 Pat 420 (421, 422) (DB). (No power to depart from arrangement in the wakfnama.)
[*See also* ('34) 21 AIR 1934 Pat 443 (457). (Provision in scheme empowering Court to reduce the powers of managing trustee and even to remove him in specified contingencies is legal.)]

24. ✠('27) 14 AIR 1927 Mad 1073 (1078) : 51 Mad 31 (FB).
('29) 16 AIR 1929 Mad 625 (626) (DB). (The view expressed in A I R 1922 Mad 413 to the contrary cannot be considered to be good law.)
('29) 16 AIR 1929 Rang 20 (20): 6 Rang 594 (DB). (AIR 1928 Rang 168 : 6 Rang 97, not followed. See also a contrary opinion expressed by Twomey, J., in A I R 1914 Low Bur 226).
† ('27) 14 A I R 1927 Sind 1 (10) : 21 Sind L R 220.
('35) 22 A I R 1935 Sind 210 (212) : 29 Sind L R 308.

25. ('41) 28 AIR 1941 Cal 618 (622) (DB).
('24) 11 AIR 1924 Cal 330 (331) (DB).
('18) 5 AIR 1918 Cal 530 (531) (DB).
✠('31) 18 A I R 1931 Bom 391 (395): 55 Bom 414 (DB).
('31) 18 AIR 1931 Bom 388 (389) (DB).
('36) 23 AIR 1936 All 97 (100) : 58 All 538 (DB).
† ('37) 24 AIR 1937 Bom 124 (131) (DB). (It is open to the Court to include in schemes for the administration of charitable institutions clauses providing that the schemes may, from time to time and as occasion arises, be altered by the Court according to the practice of the Bombay High Court—Such a clause is a valid provision.)
[*See also* ('21) 8 A I R 1921 Bom 297 (299) : 45 Bom 683. (Once scheme framed no separate suit can be allowed relating to administration or apportionment.)]

26. ('42) 29 AIR 1942 Rang 75 (75) (DB).
('40) 27 A I R 1940 Oudh 421 (423) : 15 Luck 730 (DB). (Scheme, particularly one relating to a Muslim wakf, can be modified by an application under S. 151, C. P. Code.)
('11) 36 Mad 364 (369): 12 Ind Cas 449 (451) (DB).
('24) 11 AIR 1924 Cal 330 (331, 332) (DB).
('18) 5 AIR 1918 Cal 530 (532) (DB).
† ('05) 28 Mad 319 (325) (DB).
('36) 23 AIR 1936 All 97 (101) : 58 All 538 (DB). (The inherent power of the Court to modify a scheme prepared by itself should, however, be exercised where it is necessary to prevent abuse of the process of the Court or where the ends of justice plainly demand it.)
[*See* ('35) 22 AIR 1935 Pat 88 (89).]

27. ('37) 24 AIR 1937 Oudh 193 (194) : 13 Luck 81 (DB).

28. ('31) 18 AIR 1931 Bom 388 (389) (DB).

29. ✠('30) 17 AIR 1930 Mad 226 (227) (DB). (Others to bring a suit under Section 92.)
('37) 24 AIR 1937 Lah 490 (491).

30. ('37) 24 AIR 1937 Bom 124 (129) (DB).

Where a compromise decree is passed embodying a scheme whereby certain persons were to be elected trustees subject to confirmation by the High Court, the provision regarding confirmation is not *ultra vires*.[31]

But a suit to establish the private rights of the plaintiff which would, if established, alter the scheme framed, is not maintainable.[32]

The authority of the Court to deal with matters arising under the scheme is derived only from the scheme itself, and cannot be exercised *independently* of it.[33] Thus, where a scheme provides for an application to the Court for necessary directions in the management of the trust, the Court cannot order in execution that the trustee should pay the archakas their salaries.[34] Where in pursuance of a scheme framed by the Court, an application is made for the appointment of a trustee, the Court cannot refuse the same. If, however, the person suggested is not satisfactory, the Court may require another person to be suggested or appoint a person purely on its own discretion.[35]

A scheme once framed is to be interpreted in all respects as if it were an Act,[36] as reasonable a construction as possible being given to it when the provisions are doubtful or defective.[37]

In *Gopal Lal Sett* v. *Purna Chandra Basak*,[38] a decision of the Privy Council, the following passage occurs :

> ". . . . . they (their Lordships of the Privy Council) regard the gift as in effect a private trust to which the provisions of S. 92 of the Code of Civil Procedure would not apply, and consequently, the establishment of a scheme for its administration as provided by the decree of the High Court is inappropriate."

In *Tula Ram* v. *Tikam Singh*,[39] the Allahabad High Court also held that a scheme could be formed only if the trust was a public trust. But, in *Bimal Krishna* v. *Shebaits of Sri Sri Iswar Radha Ballav*,[40] the Calcutta High Court held that the Civil Court is competent to entertain a suit the object of which is to have a scheme established for the administration of a private *debutter*. In this case, the decision of the Privy Council in *Gopal Lal Sett* v. *Purna Chandra Basak*[41] was distinguished in the following words :

> "It is clear from the facts set out in that judgment (the Privy Council judgment) that in this case (i. e., the Privy Council case), there was no gift to the *idols* but the property was given to one Udoy who was made a trustee in the legal sense of the word and upon whom were cast certain duties both religious and secular in their nature. He was to perform the worship of a certain idol with the income of a particular property and the remainder of the income was given to three people whose names were given in the will. In a case like this, where a private trust was created not of a purely religious character and the ownership of the property was vested in the *trustee in the legal sense* of the word, the Court could not possibly frame a scheme for the administration of the trust estate. In a religious endowment, however, where the deity who is a perpetual infant is the legal owner of the property and the shebaits occupy the position of managers or guardians, the position is different . . . . In India, the Crown is the constitutional protector of all infants and as the deity occupies in law the position of an infant, the shebaits who represent the deity are entitled to seek the assistance of the Court in case of mismanagement or maladministration of the deity's estate and to have a proper scheme for management framed which would end the disputes amongst the guardians and prevent the debutter estate from being wasted or ruined."

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31. ('32) 19 AIR 1932 Mad 41 (43) : 54 Mad 345 (DB).

32. ('11) 36 Mad 364 : 12 Ind Cas 449 (451) (DB).

33. † ('26) 13 AIR 1926 Mad 659 (659).
('29) 16 AIR 1929 Mad 526 (527).

34. ('26) 13 AIR 1926 Mad 655 (655) (DB).

35. ('42) 29 AIR 1942 Rang 75 (75) (DB).

36. ('24) 11 AIR 1924 Mad 369 (369) : 47 Mad 139 (DB).

[*See also* ('30) 17 AIR 1930 Mad 226 (228)(DB). (In respect of class of persons to be appointed trustees.)]

37. ('14) 1 AIR 1914 Low Bur 226 (228) (DB).

38. ('22) 9 AIR 1922 P C 253 (256) : 49 Cal 459 : 49 Ind App 100 (PC).

39. ('34) 21 AIR 1934 All 315 (317) (DB).

40. ('37) 24 AIR 1937 Cal 338 (341) : I L R (1937) 2 Cal 105 (DB).

41. ('22) 9 AIR 1922 P C 253 (256) : 49 Cal 459 : 49 Ind App 100 (PC).

Where a scheme for a private trust has been settled by an award and a decree passed thereon, it cannot be varied or altered by consent of parties where the scheme itself does not provide for such alteration.[42]

Where a public trust has been constituted under a will, it is not necessary that a suit for administration of the estate should first be brought before a scheme could be framed under this section, except in a case where it is doubtful whether there would be funds sufficient for the charitable bequest.[43]

See also Notes 15 and 34.

22. Court's power to apply the cypres doctrine. — The Provincial Courts had originally no equitable jurisdiction to act on the *cypres* doctrine in the administration of trusts. Section 539 of the old Code remedied this defect and enabled the Courts to exercise such jurisdiction.[1] The doctrine should receive as extended an application as possible, so as to give effect to the true intent and aim of the donor or founder.[2] But in order to apply the doctrine, the Court should be satisfied that the original object cannot be carried out in the manner and form intended by the donor.[3] Thus, where the objects of the trust are not suited to modern conditions and there is a general charitable intention in the terms of the endowment, the Court is competent to apply the funds of the charity *cypres*.[4] Where the original object is *impossible* of performance or is *impracticable* in fact or would be *impolitic* to carry out literally, the doctrine can be applied, although *impossibility* of performance is not a *condition precedent* to its applicability.[5] Again, where the mode indicated by the donor *does not exhaust* the surplus and the same has accumulated in the hands of the trustees, it will be necessary, in order to prevent waste and embezzlement thereof, to prepare a scheme *cypres* for the utilization of the fund.[6] Where grants are made to religious institutions as a *general thanks-offering* it is proper and legitimate to apply them *cypres* to the promotion of knowledge.[7] A charitable bequest does not lapse into residue on the failure of the object of the bequest, and a Court can execute it *cypres*[8] unless upon the construction of the will a direction to the contrary can be implied.[9]

23. Sanction of the Advocate-General. — A suit under this section must be brought with the sanction of the Advocate-General.[1] The object of the sanction is to protect the trust property as well as the trustees from an indefinite number of reckless and harassing suits being brought against the trustees.[2] A sanction under the section

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42. ('19) 6 AIR 1919 Mad 731 (732) (DB).
43. ('23) 10 AIR 1923 Mad 376 (381, 382): 46 Mad 300 (DB).

Note 22

1. ✠('91) 14 Mad 186 (200) (SB).
2. ('19) 6 AIR 1919 Mad 659 (668) (DB).
3. ✠('08) 32 Bom 214 (224, 228, 231, 243).
4. ('19) 6 AIR 1919 Mad 659 (663, 664) (DB).
5. † ('08) 32 Bom 214 (228, 229, 231).
('86) 13 Cal 193 (196) (DB). (Bequest for education of boys in a particular school—School closing down — Bequest may be executed *cypres*.)
('11) 36 Bom 29 : 12 Ind Cas 577 (578) (DB). (Trustees dead at the time of the operation of the bequest — Object of bequest specific — Court will administer the trust.)
6. ('05) 28 Mad 319 (326) (DB).
† ('19) 6 AIR 1919 Mad 659 (663, 664) (DB).
7. ('19) 6 AIR 1919 Mad 659 (667) (DB).
8. ('85) 11 Cal 591 (595).
† ('75) 1 Cal 303 (319, 320) : 3 Ind App 32 (PC).
9. ('75) 1 Cal 303 (321) : 3 Ind App 32 (PC).

Note 23

1. ('93) 20 Cal 397 (400) (DB). (Permission of the Collector not taken — Suit dismissed.)
('14) 1 AIR 1914 Low Bur 169 (171):7 Low Bur Rul 333 (DB). (Suit for accounts on allegation of breach of trust though ostensibly to set aside compromise decree.)
('21) 8 AIR 1921 Mad 696 (697) (DB). (Suit for directing trustee to submit account is one under cl.(1) of the section and sanction must be got before suit; *cf*. Act XIV of 1920 as amended by Act XLI of 1923.)
('10) 4 Sind L R 152 : 8 Ind Cas 926(928). (Even the founder is not exempt from the operation of the section.)
2. ('41) 28 AIR 1941 Sind 88 (90) : I L R (1941) Kar 204 (DB).
('17) 4 AIR 1917 All 319 (320) (DB).
('09) 32 Mad 131 (135) (DB).
('06) 33 Cal 789 (804).

obviates, in respect of the classes of suits described in the section, the necessity of following the procedure for a suit brought in a representative capacity under O. 1, R, 8, Civil Procedure Code.[3] Under the old Code, it had been held that a suit coming within the section could be instituted without sanction by following the procedure under O. 1 R. 8 of the Code.[4] The present section is now clearly imperative, and a suit of the nature specified cannot be instituted except in conformity with the requirements of the section.[5]

An objection as to want of sanction is one which goes to the *jurisdiction* of the Court to entertain the suit and as such cannot, under general principles of law, be *waived*.[6]

It is only the *plaintiffs* in the suit under S. 92 that have to obtain the sanction of the Advocate-General. Persons who *seek to be made defendants* to a scheme suit need not obtain any sanction.[7]

24. Nature of and form of consent. — In granting the "consent in writing" required by the section, the Advocate-General or the Collector has to *exercise his judgment* and see whether the petitioners have an *interest* in the trust, whether the trust is one contemplated by the section, and whether there is a *prima facie* case of a *breach of trust*.[1] It should also be seen whether the proposed suit is of a nature contemplated by the section.[2] The fact that the Advocate-General or the Collector originally refused to grant sanction under this section will not preclude him from subsequently changing his mind on further consideration and granting the sanction.[3] But a wrong exercise or a non-exercise of judgment is only an irregularity *curable* under S. 99 of the Code.[4]

A consent, in order to be a vaild one, must be *unconditional*. A conditional consent is no consent at all for the purposes of the section.[5] The Advocate-General or the Collector giving consent under this section has no jurisdiction to impose any time limit within which the suit is to be brought and if he does so, the condition will not be binding.[6]

There is no particular *form* in which the consent ought to be given. In the Bombay Presidency it is the practice for the Advocate-General to endorse his consent upon the plaint.[7] But the consent must be a *specific* permission to two persons *by name*. A permission

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('05) 32 Cal 273 (276).
† ('97) 24 Cal 418 (421, 425, 428) (DB).
('97) 21 Bom 257 (263) (DB).
[*See also* ('91) 14 Mad 1 (15).]

3. ('41) 28 AIR 1941 Bom 317 (319) : I L R (1941) Bom 556 (DB).
('25) 12 AIR 1925 Mad 1070 (1071, 1072) (DB).

4. ('25) 12 AIR 1925 Mad 1070 (1071, 1072) (DB).

5. ('25) 12 AIR 1925 Pat 544 (547) : 4 Pat 741 (DB). (Reliefs coming under this section cannot be enforced except in a suit under the section.)
('30) 17 AIR 1930 Sind 204 (208). (Previous consent of Collector imperative.)
† ('35) 22AIR 1935 Mad 825(826):58 Mad 988 (FB).
('35) 22 AIR 1935 Oudh 96 (108) (DB).
✠('36) 23 AIR 1936 Mad 449 (453) (DB). (For every suit relating to trust, consent of Advocate-General is not necessary—Only for relief specified in section consent is necessary.)
('39) 26 AIR 1939 Mad 170 (172) (DB). (Public charitable trust—Management vested in members of family—Dispute among parties—Reference to arbitration—Award dealing with management and laying down scheme for future management—Suit to make award decree of Court cannot be instituted when the procedure prescribed by S. 92 has not been complied with.)
('39) 26 AIR 1939 Rang 254 (255) : 1939 Rang L R 140. (Trust falling under S. 92—Consent of Advocate-General applied for and refused does not relax provisions of S. 92 (2).)

6. ('26) 13 AIR 1926 Mad 970 (970) (DB).

7. ('27) 14 AIR 1927 Rang 180 (180) : 5 Rang 263 (DB).

Note 24

1. ('97) 24 Cal 418 (428) (DB).
('15) 2 AIR 1915 Bom 38 (39, 40) : 39 Bom 580 (DB). (Consent not to be given unless suit is such as the Collector would himself be justified in filing at the instance of relators.)
('30) 17 AIR 1930 Mad 129 (131) : 53 Mad 223 (DB). (Status and position of petitioners to be considered and notice given to the institution or the trustees.)

2. ('41) 1941 Nag L Jour 587 (588) (DB).

3. † ('34) 21 AIR 1934 Bom 257 (259) (DB).

4. ('97) 24 Cal 418 (428) (DB).
('21) 60 Ind Cas 570 (571) (DB) (Lah).

5. ('15) 2 AIR 1915 Bom 38 (39, 40) : 39 Bom 580 (DB).

6 ('37) 1937 Mad W N 1319 (1320).

7. ('15) 2 AIR 1915 Bom 38 (39, 40) : 39 Bom 580 (DB).

to one person named "and another" is not sufficient.[8] Where, however, two persons apply for permission and it is granted to one of them by name "and the *other applicant,*" it is a sufficient permission inasmuch as "the other applicant" is clearly ascertainable by name.[9] This section does not require that details as regards the names of the proposed defendants and the reliefs should be stated in the order granting the sanction.[10]

A permission granted "to institute a suit under S. 539" is not limited to any particular *species* of suits mentioned in the section or in the application for sanction.[11]

25. Consent, when necessary — Effect of consent. — The obtaining of a "consent in writing" of the Advocate-General is a *condition precedent* to a valid institution of a suit under this section. Where no such consent has been obtained, the suit must be dismissed, and cannot be rectified by any subsequent amendment.[1] The question whether this section applies to a suit depends on the prayers in the plaint at the date when the suit is instituted and the section cannot be evaded by an amendment of the plaint at a later date.[2] Where sanction *has been obtained* but the suit is *otherwise* defective and in order to remedy such defect the Court adds other parties who have subsequently obtained sanction, such sanction will *relate back* to the date of institution.[3]

Where in a suit instituted with the required sanction the Court adds a new defendant under O. 1 R. 10 in order to *effectually and completely* adjudicate upon all the questions involved in the suit, but such addition does not *alter the nature* of the suit, no new sanction need be obtained[4] nor need it be obtained for transposing a defendant to the array of plaintiffs.[5] Where such addition or other amendment *does alter* the nature of the

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8. ('42) 29 AIR 1942 Bom 291 (292) (DB).
('04) 26 All 162 (165) (DB).

9. ('11) 9 Ind Cas 358 (359) (DB) (Bom).
[*See also* ('42) 29 AIR 1942 Bom 291 (292) (DB). (If certain persons apply to the proper officer for permission to sue and he grants the application, the omission to set out the names of all the applicants in the permission order does not render it invalid, 9 Ind Cas 358 followed.)
('41) 28 A I R 1941 Sind 88 (91) : I L R (1941) Kar 204 (DB). (The phrase "two or more persons" in S. 92, C. P. Code, means two or more individuals who are named or so described in the consent that they can be identified.)]

10. ('33) 20 AIR 1933 Oudh 22 (24): 8 Luck 266 (DB).

11. ('21) 8 AIR 1921 P C 123 (124) : 48 Cal 493 : 17 Nag L R 37 : 48 Ind App 12 (PC).

Note 25

1. ('42) 29 AIR 1942 Bom 125 (128) : ILR (1942) Bom 293.
('41) 1941 Nag L Jour 587 (587) (DB).
† ('11) 36 Bom 168: 11 Ind Cas 726 (728). (Amendment not allowed.)
('92) 16 Bom 626 (628). (Consent not taken—Suit dismissed.)
('93) 1893 All W N 71 (71) (DB). (Suit dismissed for want of consent.)
('04) 26 All 162 (165, 166) (DB). (Amendment not allowed.)
('06) 30 Bom 603 : 8 Bom L R 751 (755) (DB). (Amendment not granted.)
('95) 1895 All W N 2 (2) (DB). (Suit dismissed for want of consent.)
('16) 3 AIR 1916 Cal 49 (50) (DB). (Whether consent required or not depends on the facts proved at trial and plaintiff suing without consent takes a risk.)
('39) 26 AIR 1939 Rang 254 (255) : 1939 Rang L R 140. (Sanction of Advocate-General applied for but refused by latter on the ground of there being no public trust — Still, if suit falls under this section, consent of Advocate-General is necessary.)

2. ('40) 27 AIR 1940 Bom 242 (246) (DB).
† ('36) 23 AIR 1936 Bom 412 (416) (DB).
('39) 26 AIR 1939 Sind 13 (15) : ILR (1939) Kar 325 (DB). (AIR 1931 Bom 33 relied on.)

3. ('87) 10 Mad 185 (186) (DB).
('20) 7 AIR 1920 Mad 134 (134): 43 Mad 720 (DB). (Plaintiffs having no necessary interest — Two persons having interest added—Suit valid.)
('20) 7 AIR 1920 Mad 133 (133, 134): 43 Mad 707 (DB). (Court can add parties to effectually dispose of the matters in dispute.)

4. ('25) 12 AIR 1925 Cal 187 (190) (DB).
('26) 13 AIR 1926 Mad 970 (970) (DB). (New sanction necessary if addition alters nature of the suit.)
✠ ('30) 17 AIR 1930 Mad 129 (131) : 53 Mad 223 (DB).
† ('29) 16 AIR 1929 Mad 635 (638).
('27) 14 AIR 1927 Rang 180 (180) : 5 Rang 263 (DB). (It does not appear whether the addition altered the nature of the suit or not.)
('23) 10 AIR 1923 Sind 35 (37) : 16 Sind L R 221.
('20) 7 AIR 1920 Mad 732 (735) (DB). (Plaintiff wishing to withdraw scheme suit — Court may make some defendants as plaintiffs and proceed with suit.)
('12) 13 Ind Cas 232 (233) (Mad). (Plaintiff not properly prosecuting case — Court can add other worshippers and proceed with suit.)

5. ('87) 2 Cal L Jour 448 (454) (DB).

suit, a fresh sanction is necessary.[6] Thus, an amendment relating to a fresh cause of action involving a fresh addition of parties and fresh reliefs against them requires the sanction of the Advocate-General.[7] The Calcutta High Court has held in the undermentioned decision[8] that where a representative suit relating to a trust has been instituted with the consent of the Advocate-General under this section, no fresh consent is necessary in the case of each fresh addition of a party and that any member of the public who is interested in the trust may come in and carry on the suit or appeal, as the case may be, without obtaining a fresh sanction. Where sanction is given on the basis of a breach of trust and the plaintiffs seek amendment later by giving *particulars* of the breach of the trust, such amendment does not alter the nature of the suit and no sanction is necessary for such amendment.[9] See also the undermentioned case.[10]

Where the addition of a relief which is not sanctioned is made to reliefs which are sanctioned, the suit should not on that ground be dismissed but the portion covered by the sanction should be heard and decided.[11] The said additional prayer may be withdrawn[12] or struck off and no sanction is necessary therefor.[13] On the other hand, where sanction is given for certain reliefs and the plaintiffs institute the suit for *some only* of the reliefs sanctioned, the suit as instituted will be materially different from that sanctioned originally and should, therefore, be rejected.[14]

Where sanction is granted to several persons, the suit cannot be validly instituted by *some* of them only. The suit as instituted must conform to the consent.[15] But it has been held that where sanction is obtained by several persons and one of them dies before the institution of the suit, the others can validly institute the suit.[16] When once a suit has been validly instituted with the consent of the Advocate General, it is a representative suit subject to all the incidents affecting suits in general and representative suits in particular and the requirement as to consent of the Advocate-General has no reference to any other stage than the *institution* of the suit.[17]

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6. ('28) 15 AIR 1928 Lah 717 (718). (Suit against wrong trustees tried to be converted into suit against real trustee—Sanction is necessary.)
† ('26) 13 AIR 1926 Mad 970 (970) (DB). (Sanction obtained against a person not a trustee cannot avail against a real trustee subsequently.)
✠ ('30) 1930 Mad W N 456 (466, 469) (DB). (Sanction obtained only against one of the defendants—Appellate Court can direct case to stand over to get sanction.)
('20) 7 AIR 1920 Mad 238 (238) (DB).

7. ('11) 36 Bom 168 : 11 Ind Cas 726 (727).

8. ('35) 62 Cal 1132 (1136) (DB).

9. ('07) 9 Bom L R 901 (902, 903).

10. ('41) 28 AIR 1941 Bom 317 (321): I L R (1941) Bom 556 (DB). (Amendments not substantially changing character of suit—Consent of Advocate-General not necessary — Amendment enlarging scope of suit may be made with consent of Advocate-General—But amendment substantially changing character of suit cannot be made even with Advocate-General's consent.)

11. ('19) 6 AIR 1919 Lah 82 (82) : 1919 Pun Re No. 144 (DB). (Court cannot grant relief not sanctioned.)
('07) 1907 Pun Re No. 110, p. 510. (Claim for relief not sanctioned will not be entertained.)
('97) 21 Bom 257 (266) (DB). (Matter not sanctioned cannot be enquired into.)
('23) 10 AIR 1923 Bom 428 (428) (DB).
('01) 1901 Pun Re No. 89, p. 303. (Court cannot grant relief not sanctioned.)

12. ('27) 14 AIR 1927 Mad 1033 (1034) (DB).

13. ('10) 7 Ind Cas 92 (93) (DB) (Cal).

14. † ('25) 12 AIR 1925 Mad 636 (638).
('88) 11 Mad 148 (150) (DB).

15. ('43) 30 AIR 1943 All 74 (76, 77): ILR (1943) All 112 (DB). (Person left out till stage of argument cannot be impleaded before pronouncing judgment — Suit should be dismissed — Basis of rule is that some alone cannot take it upon themselves to represent the public when all have been authorised to do so.)
('27) 14 AIR 1927 Lah 382 (383) (DB). (Two persons out of three who have got sanction cannot act.)
('25) 12 AIR 1925 Sind 1 (1, 2) (DB). (Except in case of death or collusion or the like, when they must be party defendants.)
('38) 25 AIR 1938 PC 184 (186): 65 Ind App 198: ILR (1938) Lah 383 : 32 Sind L R 749 (PC).
[*See* ('41) 28 AIR 1941 Sind 88 (89): ILR (1941) Kar 204 (DB). (Objection that suit not instituted by all who got consent—Not open for first time in appeal where facts are in dispute.)]

16. ('40) 27 AIR 1940 Lah 356 (358).

17. † ('38) 25 AIR 1938 PC 184 (186): 65 Ind App 198: ILR (1938) Lah 383: 32 Sind LR 749 (PC). (The requirement does not apply to appeal.)

The fact that a sanction has been obtained by the plaintiff from the Advocate-General is by itself no ground for framing a scheme in the suit.[18]

The motives actuating the persons who have obtained sanction do not affect the validity of the sanction.[19] Where a sanction has been granted under this section by the Legal Remembrancer the presumption is that the Legal Remembrancer when he dealt with the matter acted properly and in accordance with the law, and that he had been duly authorised by the Provincial Government to sanction suits under this section.[20] (See section 93).

26. Consent not necessary for appeal. — It has been held by the Privy Council that when sanction has been given by the Advocate-General to two or more persons to institute a suit under this section, an appeal from the decision in such suit can be filed by one or some only of such persons and need not be filed by all of them, the reason being that sub-s. (2) of this section only applies to the *institution of a suit* and not to the further stages of the suit.[1] The decisions cited below[2] are therefore no longer good law. In the undermentioned decision,[3] two persons who had obtained the consent of the Advocate-General sued under the section and also filed an appeal against the decision in such suit. Then, another person who was interested in the trust applied to the Court on the allegation that the two plaintiffs had been colluding with the defendant and praying that if they did not wish to prosecute the appeal she might be added as a party appellant on the record so that she might proceed with the appeal. It was held by the Calcutta High Court that the consent of the Advocate-General was not necessary for this. See also the undermentioned case.[4]

27. Function of the Advocate-General. — The position of the Advocate-General corresponds, by statutory enactments, to the position held by the Attorney-General in England.[1] He can himself initiate proceedings as well as grant sanction to others.[2]

The powers of the Advocate-General under S. 539 of the old Code were conferred on the Collector by a Government Resolution. And, by virtue of section 157 of this Code, the powers so conferred under the old Code operate under the present Code also.[3] The Collector can, in the mofussil, thus exercise the powers of the Advocate-General under this section.[4] (See section 93.)

The functions of the Advocate-General or the Collector under this section cannot be delegated to or exercised by, others. The reason is (that is the object of empowering them is) that the duties to be discharged by them are of a special nature which require *anxious* consideration by the very persons empowered. An Assistant Collector discharging

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18. ('28) 15 AIR 1928 Mad 401 (402) (DB).
19. ('88) 12 Bom 247 (259) (DB).
20. ('43) 30 AIR 1943 All 74 (76): ILR (1943) All 112 (DB).

Note 26

1. ('38) 25 AIR 1938 P C 184 (186) : 65 Ind App 198 : I L R (1938) Lah 383 : 32 Sind L R 749 (PC). (Reversing AIR 1935 Lah 251: 16 Lah 782 —View of Jai Lal, J. in AIR 1935 Lah 251 that in such cases the plaintiffs must be treated as one plaintiff so that O. 41 R. 4 does not apply, not accepted.)
2. ('27) 14 AIR 1927 Lah 382 (383) (DB).
('25) 12 AIR 1925 Sind 1 (1) (DB).
3. ('35) 62 Cal 1132 (1136) (DB).
4. ('36) 23 AIR 1936 Lah 361 (362) (DB). (Suit by residents of a certain locality for declaration that defendant was not lawful mutawalli of the mosque situated in the locality, for his removal and the appointment of a new mutawalli and for rendition of accounts—Suit dismissed by Subordinate Judge —On appeal District Judge concurring with Subordinate Judge in his conclusions but in interests of the trust itself, settling a scheme — *Held* that the sanction of the Collector was not necessary.)

Note 27

1. ('06) 30 Bom 474 (476).
('94) 17 Mad 462 (465) (FB).
2. ('94) 17 Mad 462 (465) (FB).
3. ('15) 2 AIR 1915 Bom 38 (38) : 39 Bom 580 (DB).
4. ('13) 7 Sind L R 129 : 24 Ind Cas 712 (714).
('10) 1910 Pun Re No. 104 : 8 Ind Cas 1160 (1160).

the functions of the Collector in certain matters, cannot exercise the power of granting sanction under the section.[5] But a sanction granted by the Collector is valid though it is *signed* by the Sheristadar "by order" of the Collector.[6]

28. Parties to a suit under the section. — It is a general principle to be remembered in dealing with cases under this section that the grant of reliefs against *third parties* is outside the scope of the section.[1] The reason is two-fold—firstly, the object of the section is to protect *trustees* from vexatious and harassing suits and *not to protect trespassers and third parties* from suits against them;[2] secondly, a relief against a third party is not one of the reliefs specified in the section and cannot be brought within the words "such further or other relief" which should be construed *ejusdem generis* with the preceding clauses, and not as including reliefs wholly outside them.[3]

It follows as a consequence that in a suit under section 92, no relief such as the recovery of *possession*, or *ejectment* or rendition of *accounts* can be granted against third parties such as trespassers or alienees of the trust properties;[4] and *vice versa* a suit for

5. ('11) 35 Bom 243 : 10 Ind Cas 803 (804) (DB).
6. ('28) 15 AIR 1928 Mad 205 (206) (DB).

Note 28

1. ✠('17) 4 AIR 1917 Mad 112 (119, 120) : 40 Mad 212 (FB). (Suit with leave under O. 1 R. 8 against committee of management (not trustees) and against archakas for declaration that transfer by committee to archakas of right to collect and receive offerings by pilgrims is invalid.)
† ('32) 19 AIR 1932 Rang 132 (135) : 10 Rang 342 (DB).
('16) 3 AIR 1916 Sind 60 (61) : 10 Sind L R 12. (Order for accounts and inquiries against third parties cannot be granted under the section.)
('12) 17 Ind Cas 586 (587) (DB) (Mad). (Restriction imposed by section is confined to cases where a person sued is a trustee.)
('10) 4 Sind L R 152 : 8 Ind Cas 926 (928). (Suit for accounts against third parties.)
('93) 16 Mad 31 (32) (DB).
('36) 23 AIR 1936 Mad 449 (451) (DB).
('37) 24 AIR 1937 Sind 230 (232) : 31 Sind L R 510 (DB). (Clause (b) does not make section applicable to suits against strangers.)
('38) 25) AIR 1938 Cal 278 (281) (DB).

2. ('14) 1 AIR 1914 Cal 356 (357) : 41 Cal 749 (DB).

3. ✠('28) 15 AIR 1928 P C 16 (19) : 58 Ind App 96 : 55 Cal 519 (PC).
('06) 28 All 112 (120) (DB). (Suit against alienee is not of the nature specified in S. 92.)
('13) 19 Ind Cas 973 (974) (All). (Ejectment of trespaeser.)
Also see Note 11.

4. ('37) 41 Cal W N 298 (302) (DB). (Ejectment of lessee of trust property cannot be asked for in a suit under S. 92.)
('14) 1 AIR 1914 Oudh 237 (237). (Suit for possession against trespasser.)
† ('32) 19 AIR 1932 Rang 132 (135) : 10 Rang 342 (DB). (Addition of such claim would make the suit bad for misjoinder both of parties and causes of action.)
('92) 1892 Pun Re No. 66, p. 243. (Suit by worshipper to contest alienation of trust property.)
('13) 19 Ind Cas 740 (744) (Mad). (Suit for removal of trustee and possession from alienee is not within section.)
† ('28) 15 AIR 1928 All 33 (33) : 50 All 165 (DB). (Suit for possession against trespasser.)
('11) 35 Bom 470 : 12 Ind Cas 30 (31) (DB).
('21) 8 AIR 1921 All 116 (117) (DB). (Suit for possession against trespasser.)
('13) 19 Ind Cas 973 (974) (All). (Ejectment of trespasser.)
('84) 8 Bom 365(367)(DB). (Recovery of possession.)
('11) 36 Bom 29 : 12 Ind Cas 577 (578). (Ejectment of trespasser.)
† (1900) 24 Bom 170 (181) (DB). (Recovery of possession from stranger.)
('12) 37 Bom 95 : 17 Ind Cas 665 (666) (DB). (Do.)
✠('05) 2 Cal L Jour 431 (436, 438) (DB). (Ejectment of trespasser ; Dissenting from 24 Cal 418.)
('99) 21 All 187 (188) (DB). (Ejectment of trespasser.)
† ('18) 5 AIR 1918 Cal 5 (7) (SB). (Do.)
('16) 3 AIR 1916 Cal 935 (935) : 42 Cal 1135.
('90) 1890 Pun Re No. 122, p. 395. (Suit by plaintiff as lawful mahant against alleged trespassing mahant.)
('24) 11 AIR 1924 Lah 131 (132) : 4 Lah 295 (DB). (Possession from trespasser.)
('93) 16 Mad 31 (32) (DB). (Suit by disciples of mutt with the real object of ejecting trespasser is outside the section.)
('25) 12 AIR 1925 Pat 544 (547) : 4 Pat 741 (DB). (Suit by trustee against non-trustee for possession and accounts.)
(1900) 3 Oudh Cas 299 (305) (DB). (Suit by mahant against late mahant as trespasser for possession.)
('11) 14 Oudh Cas 65 : 10 Ind Cas 712 (713). (Possession against trespasser.)
('06) 28 All 112 (119, 120) (DB). (But the decree can direct the trustee to get possession of the property by suit.)
('16) 3 AIR 1916 Mad 979 (980). (Possession from alienee.)
('21) 8 AIR 1921 Mad 403 (403) (DB). (Suit by trustee against dismissed trustee in possession.)
('32) 19 AIR 1932 Mad 234 (236) : 55 Mad 549 (DB). (Recovery of trust property from alienee.)

such reliefs against such third persons can be brought in the ordinary manner without following the procedure under S. 92.[5] But even in such a case it is only a person *entitled to sue* that can bring such a suit and not anyone by reason of his merely being a member of the public.[6] Thus, a *mere* worshipper cannot sue for possession of the trust properties, from an alienee thereof or from a trespasser.[7] It is only a trustee or a manager of the trust that can bring such a suit.[8] A member of the community may, however, bring a suit under O. 1 R. 8 as *representing* the whole community for a decree for possession in favour of the trustee.[9] But it has been held by the Calcutta High Court in the undermentioned case[10] that where a stranger receives property which he knows to be part of the trust estate, he is a *constructive* trustee and relief against him can be claimed in a suit under this section.

('13) 35 All 459 : 20 Ind Cas 37 (38) (DB). (Suit for declaration of mutawalliship and to eject trespasser.)
✠('06) 33 Cal 789 (805). (Previous cases referred to.)
('92) 1892 All W N 9 (10). (Suit by Mahomedan interested in trust in respect of trespass thereto.)
('15) 2 AIR 1915 Mad 517 (517) (DB).
('97) 24 Cal 418 (423) (DB). (The view that claim to eject alienee could be added has been dissented from in later decisions of the same Court : See foot-note (10).)
('38) 25 AIR 1938 Cal 278 (281) (DB). (Lessee from trustee.)

5. ('41) 28 A I R 1941 P C 1 (6) : I L R (1941) Mad 175 : I L R (1941) Kar P C 1 : 67 Ind App 448 (PC). (Suit by trustee against stranger to recover trust property—Consent of Advocate-General not necessary.)
('41) 28 AIR 1941 All 1 (7) : I L R (1940) All 815 (DB). (Suit by trustee for ejectment of defendant and for possession of trust property and office of mutwalli.)
('82) 4 Mad 157 (159) (DB).
('32) 19 AIR 1932 Mad 234 (235, 237) : 55 Mad 549 (DB).
('19) 6 AIR 1919 Lah 190 (191). (Suit to have alienation by manager of trust set aside.)
('99) 22 Mad 223 (228) (SB).
('21) 8 AIR 1921 All 116 (117) (DB).
('23) 10 AIR 1923 All 120 (121): 45 All 215 (DB). (Suit by idol against trespassers.)
('23) 10 AIR 1923 All 319 (319) : 45 All 335 (DB).
('85) 1885 Pun Re No. 94, p. 207. (Suit to set aside alienation of trust property by dismissed trustee.)
('25) 12 AIR 1925 All 683 (684): 47 All 770 (DB).
('91) 15 Bom 148 (151) (DB). (Ejectment of persons in wrongful possession.)
('94) 18 Bom 721 (731, 732) (DB). (Suit by trustees to eject defendant.)
('11) 33 All 660 : 11 Ind Cas 36 (37) (DB).
('93) 20 Cal 810 (816) (DB). (Dissenting from 11 Cal 33.)
('11) 5 Sind L R 103 : 12 Ind Cas 668 (669). (Suit against alienee from trustee for declaration that the alienation is null and void.)
('92) 15 Mad 241 (246) (DB). (Suit by trustees against trespassers.)
('37) 24 AIR 1937 Rang 483 (484) (DB).

6. ('68) 10 Suth W R 458 (459) (DB).
† ('89) 11 All 16 (26) (FB). (Suit by a mere member of the public.)
('94) 17 Mad 143 (144) (DB). (Manager or trustee is the proper person to sue to eject trespasser.)
('03) 26 Mad 450 (453) (DB). (Appointed trustees will be entitled to sue for possession person whose title to administer the trust is negatived.)
('31) 18 AIR 1931 Cal 281 (282) (DB). (Court cannot order substitution of parties so as to evade the section.)

7. † ('25) 12 AIR 1925 Rang 294 (294): 3 Rang 213 (DB).
('26) 13 AIR 1926 Lah 425 (425) (DB).
(1900) 23 Mad 99 (100) (DB).
('26) 13 AIR 1926 Mad 280 (280) (DB).
('19) 6 AIR 1919 Lah 56 (57) (DB).
[But see ('32) 19 AIR 1932 Lah 394 (395).]

8. ('41) 28 AIR 1941 All 1 (7) : I L R (1940) All 815 (DB).
('19) 6 AIR 1919 Lah 56 (57) (DB).
(1900) 23 Mad 99 (100) (DB).
('90) 1890 Pun Re No. 122, p. 395. (Suit by plaintiff as lawful mahant against mahant appointed by worshippers for possession.)
('78) 3 Bom 84 (88) (DB).
† ('99) 24 Bom 170 : 1 Bom L R 649 (658) (DB).
('23) 10 AIR 1923 Mad 276 (278) (DB).
('38) 25 AIR 1938 Pat 394 (395). (Hence, where property of a public endowment has been alienated by the shebait, the remedy, so far as the public is concerned, is to secure the removal of the shebait by proceeding under S. 92 and then to get another shebait appointed who would then have authority to represent the idol in any suit for recovery of the property.)
[But see ('19) 6 AIR 1919 Lah 190 (191). (Any person interested can sue.)]
Also see Note 8 and O. 1 R. 8, Note 8.

9. ('19) 6 AIR 1919 Cal 179 (180, 181) (DB).
('18) 5 AIR 1918 Mad 464 (464): 41 Mad 124 (DB). (Disciples of a mutt suing under O. 1 R. 8 for recovery of alienated property.)
('13) 19 Ind Cas 973 (974) (All.)
✠('17) 4 AIR 1917 Mad 112 (113): 40 Mad 212 (FB).
('23) 10 AIR 1923 Mad 276 (277).

10. ('35) 22 AIR 1935 Cal 805 (809): 63 Cal 74 (DB).
[*See also* ('37) 24 AIR 1937 Sind 230 (232): 31 Sind L R 510 (DB). (Person in possession asserting property as his but admitting that he is executing trust — Such person is trustee either constructive or *de son tort* and in either case he is not a stranger.)]

It would seem to logically follow from the principle that no *relief* can be granted against third parties under this section, that such third parties are not necessary or proper parties to the suit. There has, however, been a divergence of opinion on the point, and a least four different views have been expressed —

(a) The Calcutta High Court has held that it is not competent to the Court to implead an alienee at all in the suit.[11] The High Court of Rangoon also has held that strangers to the trust are not proper or necessary parties to a suit under this section and that in such a suit the plaintiffs who have wrongly impleaded third parties cannot pray in aid the provisions of O. 1 R. 3 or O. 1 R. 10.[12] The Patna High Court has held that only the trustee is a necessary party and not those who may be in possession of trust properties adversely to the trust.[13]

(b) The Madras High Court has held that an alienee cannot be made a party to the suit[14] against his will but may, if he himself desires it, be made a party.[15] If he is impleaded against his will, the suit should be dismissed against him.[16] Even if he is a party the Court is not bound to decide whether the alienation in his favour is binding on the institution.[17] In a later decision,[18] the Madras High Court has held that an alienee of the trust property though not a necessary party is a proper party to the suit under this section.

(c) The Allahabad High Court has held that the alienee though not a necessary party[19] is a *proper* party to the suit[20] and any decree passed in the suit will be binding on him.[21]

(d) The Bombay High Court has held that the alienee is a *necessary* party to the suit and that the suit could not be decided in his absence. Yet ejectment decree was not passed against him even though he was a party.[22]

It must not, however, be inferred from the above discussion that no *suit* can be brought against third parties under this section unless they are trustees *de jure* or *de facto* or *de son tort*. It is only when a *relief* outside the section is asked for (such as possession or ejectment) against a third party that it cannot be granted. A suit for a scheme or for the appointment of a new trustee or for directions, can, and sometimes can

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11. † ('18) 5 AIR 1918 Cal 5 (7) (SB). (Reversing decision of Greaves, J. in AIR 1916 Cal 935 : 42 Cal 1135.)
† ('06) 33 Cal 789 (805).
('05) 2 Cal L Jour 431 (439) (DB). (Dissenting from 24 Cal 418.)
('38) 25 AIR 1938 Cal 278 (281) (DB). (In a suit for the removal of a trustee under S. 92, the ijaradar from the trustee is not a necessary party and as it is not possible to grant any relief against him in a suit under S. 92 it is not proper that he should be joined as a party at all.)

12. ('32) 19 AIR 1932 Rang 132 (135) : 10 Rang 342 (DB).

13. ('32) 19 AIR 1932 Pat 33 (52) : 11 Pat 288 (DB).

14. ('16) 3 AIR 1916 Mad 979 (980) (DB). (Court cannot make declaration or decree for possession against alienee.)
('14) 1 AIR 1914 Mad 708 (711) : 38 Mad 1064 (DB). (It is doubtful if alienees or trespassers of trust property are parties to the suit.)

15. ('15) 2 AIR 1915 Mad 517 (518) (DB).
('18) 5 AIR 1918 Mad 1071 (1071, 1072) (DB). (Some of the trustees who claim hereditary trusteeship are entitled to be added as parties.)

16. ('15) 2 AIR 1915 Mad 517 (517, 518) (DB). (Alienee not bound by decree in suit against trustee.)
[*See* ('16) 3 AIR 1916 Mad 979 (980) (DB).]

17. ('18) 5 AIR 1918 Mad 1179 (1182) (DB).

18. ('36) 23 AIR 1936 Mad 449 (456) (DB).

19. ('25) 12 AIR 1925 All 759 (761) : 47 All 867 (DB).
('98) 20 All 46 (49) (DB).

20. ('25) 12 AIR 1925 All 759 (761) : 47 All 867 (DB).
('25) 12 AIR 1925 All 683 (685) : 47 All 770 (DB).
† ('06) 28 All 112 (116, 119) (DB).

21. ('11) 33 All 752 : 11 Ind Cas 218 (219) (DB). Also see Note 41.

22. ('11) 35 Bom 470 : 12 Ind Cas 30 (31) (DB).

only be brought against persons in possession of trust property, who either claim the same as their own, or who deny the validity of the trust.[23] Otherwise, the result will be that no suit can be brought under this section in a case where all the trustees are dead or refuse to act.

Where an alienee is made a party and a declaration is granted against the alienee and the latter appeals therefrom, the trustee is not a necessary party to the appeal as a relief could be granted to the alienee in appeal without the presence of the trustees.[24]

Under O. 1 R. 10, a Court can join the Advocate-General as a party to a suit brought by persons interested under S. 92, in order to effectually and finally adjudicate upon the questions relating to the administration of the trust.[25] See also the undermentioned decisions.[26]

29. Compromise of suit. — In earlier decisions of the Calcutta High Court it was held that as long as the question whether the endowment is a *public* one or not is still in dispute, or if it is proved that the endowment is a public one, a suit under S. 92 cannot be compromised.[1] This view has been dissented from in a later decision of the same Court. It was there held that O. 23 of the Code does not exclude suits under this section and that there is nothing in law to prevent the Court from passing a compromise decree.[2] The Madras High Court has assumed the correctness of this view but holds that a compromise under which any portion of the trust properties is given to a stranger ought not to be sanctioned by the Court.[3] See also the cases cited below.[4]

30. Abatement of suit. — Before the decision of the Judicial Committee in *Raja Anand Rao* v. *Ramdas Daduram*[1] there was a conflict of decisions as to whether, where one of the two plaintiffs dies, the suit abates unless some other person who has the necessary interest and who has obtained the required sanction is brought on record in his place. The Allahabad High Court held that it did,[2] while the Madras High Court and the

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23. † ('23) 10 AIR 1923 Mad 376 (377) : 46 Mad 300 (DB). (Heir-at-law in possession of trust property is a proper party.)
('27) 14 AIR 1927 Mad 710 (712).
('24) 11 AIR 1924 Bom 518 (520) (DB). (Claim for accounts and directions against defendants in actual management.)
('11) 35 Bom 470 (472,473): 12 Ind Cas 30 (31) (DB).
('19) 6 AIR 1919 Mad 439 (440) : 50 Ind Cas 58 (58).
('24) 11 AIR 1924 Pat 657 (660) : 3 Pat 842 (DB).
('11) 9 Ind Cas 358 (558) (DB) (Bom).
('07-08) 4 Low Bur Rul 183.
('91) 15 Bom 612 (621, 622) (DB).
('89) 11 All 18 (22, 25) (FB).
Also see Note 5.

24. ('14) 1 AIR 1914 Mad 708 (711) : 38 Mad 1064 (DB).

25. ('20) 7 AIR 1920 Mad 133 (133) : 43 Mad 707 (DB).
[*See also* ('42) 29 AIR 1942 All 315 (319) (DB). (Suit under S. 92—Appellate Court reversing trial Court's judgment holding that plaintiff had no interest — Advocate-General held should not be allowed to be impleaded as co-plaintiff at stage of appeal.)]

26. ('41) 1941 Nag L Jour 587 (589) (DB). (Suit for accounts against trustees—All of them must be joined as parties.)
('37) 24 AIR 1937 Oudh 229 (232) : 13 Luck 255 (DB). (In a suit under S. 92, Civil Procedure Code, for settling a scheme for a trust, it is necessary to implead as a defendant a person who is not merely a beneficiary but is a near relation of the founder of the trust and has got the necessary qualification which, under the terms of the trust-deed, entitles him to be made a trustee, in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit.)

Note 29

1. ('15) 2 AIR 1915 Cal 193 (194) (DB).
2. ('25) 12 AIR 1925 Cal 187 (189) (DB).
3. ('19) 6 AIR 1919 Mad 659 (661) (DB).
4. ('42) 29 AIR 1942 Pat 79 (80) (DB). (Suit relating to trust—Compromise decree—Subsequent suit for declaration that compromise and decree were obtained by fraud — Transfer of suit for trial to Munsif—Munsif finding allegation as to fraud proved—Munsif has no jurisdiction to make new decree under S. 92.)
('39) 26 AIR 1939 Rang 108 (109) : 1938 Rang L R 252. (Suit relating to public charity—Case involving allegations of serious breaches of trust by trustees — It is improper to allow collusive compromises between plaintiffs and defendants. It is better if Advocate-General is brought on record in all such cases.)

Note 30

1. ('21) 8 AIR 1921 P C 123 (124) : 48 Cal 493 : 17 Nag L R 37 : 48 Ind App 12 (PC).
2. ('15) 2 AIR 1915 All 59 (59) : 37 All 296 (DB).

Chief Court of the Punjab held that it did not abate, on the ground that the suit is a *representative* one instituted on behalf of all the persons interested in the trust, and that the Court could add parties even without their obtaining the sanction of the Advocate-General.[3] According to the Oudh Judicial Commissioner's Court, the necessity for co-operation of two or more persons is confined to the *institution* of the suit, and therefore when one plaintiff dies, the surviving plaintiff can alone carry on the suit or appeal.[4]

The Judicial Committee, in the abovementioned case, has held that a suit under S. 92 is not prosecuted by individuals for their own interests but as representatives of the general public, and that such a suit does not fail on the death of the parties who originally filed the suit.[5] The Allahabad view is therefore no longer law.[6]

Where in a suit under this section against a trustee, the *defendant* trustee dies, the question whether the suit abates depends upon the relief claimed in the suit. If the relief claimed is solely the removal of the trustee, the suit will, of course, abate. But if, in addition to the removal, other reliefs, such as the framing of a scheme, are prayed for; the suit will not abate but will survive against the successor-in-office of the deceased defendant. See O. 22 R. 1, Note 17.

31. Suit, if can be brought in forma pauperis. — It has been held that the provisions of Order 33 of the Code could not have been intended by the Legislature *to be combined with those of section 92* and therefore a suit under S. 92 cannot be instituted *in forma pauperis* especially when the plaintiffs' intention to sue as paupers was not brought to the notice of the Advocate-General before granting sanction.[1]

32. Suit under the section need not be contentious. — Section 539 of the old Code did not contain the words "whether contentious or not" but it was nevertheless held by the Calcutta and Madras High Courts that a suit under that section need not be contentious.[1] The said words have been now introduced in the present section in order to give effect to those decisions and to make the section clear on the point.

33. Section is mandatory—Sub-section (2). — Under the Code of 1859 there were no special provisions for the institution of suits relating to public charities. Suits, therefore, relating to such matters could under that Code be brought in the ordinary Courts by certain persons as plaintiffs. For instance, persons who were appointed to supervise over trustees could sue for their removal for misconduct, in the ordinary Courts[1] and members of a community could, under S. 30 (O. 1 R. 8 of the Code), bring a

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3. ('17) 4 AIR 1917 Mad 389 (390) : 40 Mad 110 (DB).
('18) 5 AIR 1918 Lah 146 (147) : 1918 Pun Re No. 97.
4. ('15) 2 AIR 1915 Oudh 181 (182) (DB).
5 ('21) 8 AIR 1921 P C 123 (124) : 48 Cal 493 : 17 Nag L R 37 : 48 Ind App 12 (PC). (Suit for appointment of new trustee — Defendant dying —Scheme can be ordered.)
[*See also* ('33) 20 AIR 1933 Mad 854 (854, 855): 57 Mad 153 (DB). (Two out of the three plaintiffs dropping out after filing suit.)
('25) 12 AIR 1925 Mad 244 (244) (DB).
('38) 25 AIR 1938 P C 184 (186) : 65 Ind App 198 : I L R (1938) Lah 383 : 32 Sind L R 749 (P C).]
6. ('34) 21 AIR 1934 All 1 (2) : 55 All 687 (DB). (Plaintiffs appellants —Death of one after institution of appeal.)
[*See also* ('36) 23 AIR 1936 Lah 361 (361) (DB).
† ('37) 24 AIR 1937 Pat 149 (151). (Parties permitted by Court to sue or to be sued in representative capacity — Death of some parties during pendency of suit or appeal—Suit or appeal does not abate by failure to bring on record the legal representatives of such persons, within time — Court can permit parties to proceed with suit or appeal against remaining parties—Provisions of O. 22, C. P. Code, cannot be made applicable to suits or appeals in representative capacity under Section 92, or O. 1 R. 8 of the Code.)]

Note 31

1. ('12) 15 Oudh Cas 202 (206) : 14 Ind Cas 731 (732) (DB).

Note 32

1. ('93) 20 Cal 810 (817) (DB).
('91) 14 Mad 186 (222).

Note 33

1. ('98) 21 Mad 406 (408) (DB). (Suit by general trustee.)

representative suit also in the ordinary Courts for declarations, etc., with reference to the trust.[2] Section 539 was introduced for the first time by the Code of 1877 and was repeated in the Code of 1882, but there was no provision therein corresponding to sub-s. (2) of the present section. (Section 539 of the Code of 1877, moreover, did not apply to *religious* trusts or to trusts which were religious as well as charitable.[3])

There was consequently a conflict of opinion whether S. 539 was *mandatory* or whether it was merely a *directory* and an *enabling* provision, having no restrictive effect on any *independent* rights of suit.[4] It was with a view to settle this conflict that the Legislature introduced sub-s. (2) of the present section, clearly removing the classes of suits specified therein from the cognizance of ordinary Courts, and constituting a *special tribunal* for the trial thereof.[5] The cases before 1908, therefore, holding that the section was only an enabling one which did not bar independent rights of suit, in regard to the reliefs specified in the section, are no longer good law.[6]

In considering if the section is applicable, it is not merely the right of the plaintiff that must be looked to but also the *nature of the relief* claimed and if that is one specified in the section the direction laid down in sub-section (2) must be obeyed.[7] Thus, a District Judge cannot order the suspension or *removal* of a *mahant* on a mere *report* instead of in a *suit* as required by this section.[8] A suit does not cease to be one under S. 92 and subject to its mandatory provisions simply because reliefs not within the section are claimed *in addition* to reliefs within the section.[9] And conversely, the fact that some of the reliefs asked for in the plaint cannot be granted on account of the absence of the consent in writing of the Advocate-General, would not disentitle the plaintiff to the other reliefs.[10] The expression "reliefs specified" in sub-s. (1) includes not only the reliefs which are particularised and specially described in cls. (a) to (g) but also those coming under the *residuary* clause (h).[11]

The sub-section which speaks of a suit claiming any of the reliefs specified in sub-s. (1) must be read with the latter sub-section and if it is so read, it follows that it is

('07) 29 All 27 (28) (DB).

2. ('06) 33 Cal 905 (907) (DB).

3. ('82) 5 Mad 383 (384) (DB).
('85) 11 Cal 33 (36, 37) (DB).
('83) 5 All 497 (500) (DB).

4. ('07) 29 All 27 (28) (DB). (Section does not affect independent rights of suit.)
('89) 11 All 18 (22, 23, 25, 26, 27) (FB). (Suit by worshippers for directions in the nature of scheme and for declaration is one falling under S. 539 and is not maintainable without sanction.)
('98) 21 Mad 406 (408, 409) (DB). (Section 539 is only an enabling one.)
('91) 14 Mad 1 (15) (DB). (Do.)
('84) 8 Bom 432 (451). (Section 539 is directory only.)
('06) 33 Cal 905 (910) (DB). (Section is not mandatory.)
('06) 33 Cal 789 (801, 803) (DB). (Section 539 is not restrictive but cumulative.)
('07) 1 Sind L R 155 (158) (DB). (Section 539 is directory.)
('92) 16 Bom 626 (628). (Section 539 is mandatory.)
('85) 11 Cal 33 (36) (DB). (Do.)
('97) 21 Bom 48 (51, 52) (DB). (Do.)

5. ('12) 5 Sind L R 184 : 13 Ind Cas 264 (266).
('19) 6 AIR 1919 Low Bur 56 (57).
('13) 20 Ind Cas 767 (767) (DB) (Mad).
✠('18) 5 AIR 1918 Mad 1179 (1181) (DB).

6. ('25) 12 AIR 1925 Pat 544 (547) : 4 Pat 741 (DB).
('25) 12 AIR 1925 Rang 294 (294, 295) : 3 Rang 213 (DB).

7. † ('19) 6 AIR 1919 All 203 (205) (DB).
('33) 20 AIR 1933 Mad 70 (70, 71).
('17) 4 AIR 1917 Cal 678 (678) (DB). (Section 92 cannot be avoided by persons having no interest in the trust on suing as representing "the whole Hindu population.")
('15) 2 AIR 1915 Bom 38 (40) : 39 Bom 580 (DB).
('18) 5 AIR 1918 All 2 (8) : 41 All 1 (DB).
✠('18) 5 AIR 1918 Mad 1179 (1181) (DB).
('27) 14 AIR 1927 All 526 (529) : 49 All 191 (DB). (Suit against trespasser — Question of breach of trust and nature of property would not arise.)
('15) 2 AIR 1915 Mad 915 (916) (DB). (Suit not under S. 92—No sanction is necessary.)
[*See* ('35) 22 AIR 1935 Mad 825 (826) : 58 Mad 988 (FB). (Whether suit falls under S. 92 depends upon nature of reliefs sought and not on character plaintiff sues in.)]

8. ('18) 5 AIR 1918 All 218 (219) (DB).

9. ('18) 5 AIR 1918 Mad 1179 (1181) (DB).

10. ('33) 20 AIR 1933 Pat 246 (248) : 13 Pat 65.

11. ('42) 29 AIR 1942 Cal 343 (347) : ILR 1942) 1 Cal 211 (DB).

not every suit in which any of the reliefs specified in sub-s. (1) is claimed that requires the sanction of the Advocate-General but that such sanction is necessary only in the case of those suits in which besides the relief claimed being covered by sub-s. (1), the suit is brought in a representative capacity on behalf of the public.[12] See Note 7.

The proper remedy for obtaining any of the reliefs enumerated in the section under the circumstances mentioned therein is by a *suit* instituted with the consent of the Advocate-General. Hence, in such cases an *application* made without the consent of the Advocate-General cannot be treated as permissible under the section.[13]

Disputes having arisen regarding the management of a public charity, the matter was referred by the parties to arbitration. The arbitrator drew up an award stating his conclusions about the management and framing a scheme. One of the parties filed a suit for the award being made a decree of the Court. It was held that the suit was precluded by the terms of sub-s. (2) because, by embodying the award in a decree of Court the Court would be practically framing a scheme for the management of the institutions in question and it would be an evasion of the provisions of the section to allow it to be done under the guise of an award when the procedure prescribed by the section had not been complied with. It was also held that the award not having exceeded the terms of the reference, it was not open to the Court to separate such portions of the award as related to reliefs contemplated by this section and limit the decree to the rest of the portions thereof.[14]

There is, however, a saving in respect of suits coming under the Religious Endowments Act. Where, therefore, a suit comes under *both* S. 92 and under the Religious Endowments Act, the plaintiffs have the *choice* of proceeding under either provision though they may not proceed under both.[15] (In this connexion, see Note 4.)

34. Execution of scheme decree. — Under the old Code a decree under S. 539 was held enforceable by way of execution under S. 260 of that Code, and the misconducting trustee could be both imprisoned and his property attached.[1] The application, however, had to conform to the requirements of S. 260; otherwise it was liable to be rejected.[2] That section provided the procedure for enforcing a decree for the specific performance of a contract or for restitution of conjugal rights or "*for the performance of, or the abstention from any other particular act*" and it was held that the enforcement of the scheme decree came under those words. The corresponding provision under this Code, namely O. 21, R. 32 has omitted the italicised words and inserted instead "or for injunction."

The views expressed in cases under the new Code are not all harmonious. It is generally agreed that a decree under S. 92 is of a merely declaratory nature and where that is so, there is nothing to enforce in *execution*.[3] It is also agreed that a provision in a

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12. † ('38) 25 AIR 1938 Mad 92 (94) : ILR (1938) Mad 39 (DB).

13. ('37) 24 AIR 1937 Oudh 381 (384) : 13 Luck 523 (DB). (Death of mutwallis of wakf appointed by Court in suit under S. 92 — Applications by some persons for their own appointment — Wakf property actually in possession of certain persons who were managing it as mutwallis—Applications not maintainable—Suit under S. 92 is necessary.)

14. † ('39) 26 AIR 1939 Mad 170 (172) (DB).

15. ('14) 1 AIR 1914 Mad 593 (593, 594) : 37 Mad 184 (DB).
('18) 5 AIR 1918 Mad 1179 (1181) (DB).

Note 34

1. (1900) 24 Bom 45 (49) (DB).
('05) 28 Mad 319 (327) (DB). (Directions in scheme can be enforced in execution.)
2. ('95) 19 Bom 34 (35) (DB).
3. ('41) 28 AIR 1941 Cal 618 (621) (DB). (*Held* that the order interpreting the scheme and deciding the general questions concerning the rights of the parties did not fall within the purview of S. 47 and therefore was not appealable.)
('31) 18 AIR 1931 All 765 (765) (DB). (Order of District Judge under scheme is not one under S. 47.)
('28) 15 AIR 1928 Rang 168 (171) : 6 Rang 97 (DB). (Decision of the Court appointed by a scheme framed in a suit under S. 92, confirming or refusing to confirm the election of a trustee under the scheme was a decree in the suit.)
('27) 14 AIR 1927 Mad 1110 (1110) (DB). (Do.)
('26) 13 AIR 1926 Mad 799 (799) (DB).

scheme for the *removal* of a trustee is *ultra vires* and on that ground cannot be enforced in execution.[4] But there is a difference of opinion as to whether a scheme decree *containing clauses* amount to a *direction* to the defendant to perform some duty cannot be enforced in execution. In *Ranganatha* v. *Krishnasami*,[5] the Madras High Court held that once a scheme is asked for and framed, there was nothing more to be done, and that no further remedy provided in the scheme can be enforced in execution. The same Court in later cases[6] has dissented from that view and held that the question whether a scheme decree is executable or not depends upon the intention of the decree and where the directions in the scheme are intended to be enforced in execution, they can be so executed. The Bombay and Rangoon High Courts and the Nagpur Judicial Commissioner's Court appear to hold the same view.[7] The Madras High Court has, in its recent decisions,[8] affirmed the view in *Ranganatha* v. *Krishnasami* above cited.

The Bombay High Court has held that the District Judge acting under a scheme of management framed by a Court acts as a *persona designata* and not as a Court, and so his orders are not capable of execution.[9] (See also Note 36.) The Madras High Court has, however, held that a Judge carrying out the provisions of a scheme decree passed under this section acts as a *Court* and not as a *persona designata*.[10] The High Court

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('25) 12 AIR 1925 P C 155 (156) (PC). (Orders passed relating to a scheme formed and sanctioned by the Court in a scheme suit are not orders in execution of a decree and are not therefore appealable.)
('28) 15 AIR 1928 Mad 61 (64) (DB).
('26) 13 AIR 1926 Mad 659 (660) (DB). (There was nothing to execute in the case though it purports to follow AIR 1924 Mad 369 : 47 Mad 139.)
('26) 13 AIR 1926 Mad 655 (655) (DB).
[*See* ('34) 21 AIR 1934 Pesh 43 (44). (Where in consequence of a decree removing a mahant from office, an order is made in a miscellaneous application for appointing a committee to appoint a new mahant, the order, not being a decree nor an order under S. 47 nor an order made appealable under O. 43 R. 1 is not appealable.)]
[*See also* ('27) 14 AIR 1927 Bom 422 (423) (DB). (Where a scheme of management of a religious institution impliedly provided that the District Judge was also to exercise control generally in regard to any question of management that might properly be brought before him and the District Judge on application divided the offerings to the deity in a certain proportion among the claimants —*Held* that the decision of the District Judge did not relate to the execution of the decree framing the scheme, that the District Judge was a final authority in the matter and that no appeal would lie to the High Court from his decision.)
('35) 18 Nag L Jour 110 (115) (DB). (Scheme framed—*Held* there was no executable decree.)]

4. ✣('26) 13 AIR 1926 Mad 559 (560, 561) : 49 Mad 580 (DB).
('26) 13 AIR 1926 Mad 130 (130) (DB).
[*See* ('37) 24 AIR 1937 Lah 490 (491). (Scheme decree — Decree not providing for removal of mahant on failure to perform conditions — Mismanagement by mahant—Application for execution is not competent for removal of mahant.)]

5. † ('24) 11 AIR 1924 Mad 369 (370, 371) : 47 Mad 139 (DB).

6. ✣('28) 15 AIR 1928 Mad 61 (64) (DB). (Dissenting from AIR 1924 Mad 369 : 47 Mad 139 and coming in line with its older view in 28 Mad 319.)
† ('32) 19 AIR 1932 Mad 41 (44) : 54 Mad 345 (DB). (Direction for delivery of trust property and money to new trustees.)
('31) 60 Mad L Jour 178 (178) (DB). (Do.)

7. ('26) 13 AIR 1926 Nag 326 (327). (Direction in scheme decree can be enforced in execution.)
[*See* ('27) 14 AIR 1927 Bom 422 (423) (DB).
('38) 25 AIR 1938 Rang 363 (364) (DB). (Where orders are passed merely for carrying out a scheme, they are orders in execution and appealable under S. 47.)]

8. ('42) 29 AIR 1942 Mad 748 (750, 751) (DB). (Test of executability is not if the provision is declaratory or directory—Test is whether it forms part of the scheme — If so it cannot be executed even if it is directory — Clause vesting trust properties in trustee and empowering him to realise them through Court if necessary in execution — *Held* that it was not executable and that realisation of trust properties was an essential part of the scheme.)
✣('36) 23 AIR 1936 Mad 581 (582, 583) : 59 Mad 751 (DB).
('37) 24 AIR 1937 Mad 326 (327) (DB). (Where a decree provides for a scheme the proper way of dealing with such decree is to separate the scheme part from the rest of the decree and when that is done, no provision in the scheme part is executable, whether it is directory or declaratory.)
('38) 25 AIR 1938 Mad 256 (256) (DB).
('33) 1933 Mad W N 183 (184, 185) (DB).

9. ('42) 29 AIR 1942 Bom 97 (98) (DB). (Order for costs made by him though legal is not capable of execution.)

10. ('39) 26 AIR 1939 Mad 969 (970, 971). (Court or Judge has power in such cases to appoint trustees to vacancies in the office of trustees which have arisen.)

can modify or alter rules framed under a scheme[11] but the *scheme itself* cannot be modified in execution proceedings.[12]

A person not a party to the suit under S. 92 and not having the same interest with the plaintiffs, but claiming certain rights under the decree, cannot apply for enforcement of the decree.[13]

35. Arbitration. — The Court has no jurisdiction, in a suit under this section, to entertain an application for filing an award or for referring the matter to arbitration.[1] The reason is that the matter is one *not merely concerning the parties*, but is one in which the *State* is interested and consequently the scheme should be considered and framed by the *Court itself*.[2] It is the prerogative of the Crown to protect the interests of infants, lunatics and charities and it cannot therefore be delegated.

36. Appeal. — An appeal lies from a scheme decree, as in the case of other decrees under S. 96 of the Code. An *order* of a District Judge on an application made under a scheme decreed by the Court, is not appealable unless it is appealable as being one in execution of a decree under S. 47.[1] Whether orders passed on applications made for enforcing the scheme are orders in *execution* depends upon the question whether a scheme decree under the section is at all enforceable in execution. There is a conflict of opinion on this point[2] which has been discussed in Note 34 which may be referred

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11. ('26) 13 AIR 1926 Bom 179 (186) (DB).
12. ('14) 1 AIR 1914 Low Bur 226 (228).
13. ('91) 14 Mad 57 (60, 61) (DB).

Note 35

1. ('10) 32 All 503 : 6 Ind Cas 219 (223) (DB).
('37) 24 AIR 1937 Sind 174 (176) : 30 Sind L R 478 (DB). (A suit for a declaration that certain property is trust property does not fall under S. 92, C. P. Code, and therefore, a declaration in the award of the arbitrators to that effect does not offend against law — But an award which grants reliefs which could only be granted in a suit under S. 92 is without jurisdiction, e. g., the framing of a scheme for the administration of trust property is beyond the powers of the arbitrators.)
[*See* ('34) 21 AIR 1934 All 368 (370) : 56 All 721 (DB). (Parties litigating for title and possession of mutt in their own rights—Mutt not of nature of public charity—Dispute between parties *inter se* can be referred to arbitrator.)]
2. ('23) 10 AIR 1923 Nag 112 (114) (DB).
3. ('10) 32 All 503 : 6 Ind Cas 219 (221) (DB).

Note 36

1. ('41) 28 AIR 1941 Cal 618 (621) (DB). (Order interpreting the scheme and deciding the general questions concerning the rights of the parties *held* not to fall within S. 47.)
✠('25) 12 AIR 1925 P C 155 (156) (PC). (Under a scheme settled by Privy Council power is given to temple committee to make rules subject to sanction of District Judge—Order of sanction by District Judge not appealable.)
('27) 14 AIR 1927 Mad 427 (429) (DB).
('18) 5 AIR 1918 Mad 927 (927, 928) (DB).
('26) 13 AIR 1926 Mad 799 (799, 800) (DB). (Order of removal of trustee on application is not one in execution.)
('37) 24 AIR 1937 Oudh 381 (383) : 13 Luck 523 (DB). (Death of mutwallis of wakf appointed by Court — Applications by some persons for their own appointment—Order appointing applicants — Appeal is incompetent, neither S. 96 nor S. 47 bing applicable — But appeal may be treated as revision.)
('38) 25 AIR 1938 Rang 363 (364) (DB). (Where orders are passed merely for carrying out a scheme they are orders in execution, and appeals lie from such orders under S. 47.)
[*See* ('34) 21 AIR 1934 Pesh 43 (44). (Where in consequence of a decree removing a mahant from office, an order is made in a miscellaneous application for appointing a committee to appoint a new mahant, the order not being a decree nor an order under S. 47 is not appealable.)]
2. ('26) 13 AIR 1926 Mad 130 (130) (DB). (Order of Court made in exercise of power given by scheme.)
('24) 11 AIR 1924 Mad 369 (370) : 47 Mad 139 (DB). (Order granting or refusing further remedy provided in scheme is not an order under S. 47.)
('18) 5 AIR 1918 Mad 927 (927, 928) (DB). (Order on application to remove trustees after a scheme was settled is not appealable.)
('27) 14 AIR 1927 Mad 1110 (1110) (DB). (Order in relation to a scheme already made is not one in execution.)
('26) 13 AIR 1926 Mad 659 (660) (DB). (Order in matter of execution of scheme—No appeal lies.)
('26) 13 AIR 1926 Mad 559 (560) : 49 Mad 580 (DB). (Provision in scheme for application to amend scheme—Application to amend—Order on, is not appealable under S. 47.)
† ('31) 18 AIR 1931 Bom 391 (396) : 55 Bom 414 (DB). (Provision in scheme for application to modify or alter—Order on such application not one under Section 47.)
('31) 18 AIR 1931 All 765 (766) (DB). (Order approving appointment to vacancy of trustee pursuant to scheme—Not appealable under S. 47.)
('25) 12 AIR 1925 Mad 175 (176) (DB). (*Quære.*)

to in this connexion. Where the Court reserves to itself the right to confirm elections held under a scheme passed by it, an order regarding the same is a *decree* and is appealable as such.[3]

Where a decree framing a scheme of management of a trust expressly kept the suit pending and provided that in case of difficulty or doubt, the parties might apply to the Court in the suit itself, an order of the Court on such an application was held to be a decree and appealable as such.[4]

Where the Advocate-General himself has filed the suit and the same is dismissed, it is he who must file the appeal, and not the relators[5] as they are no parties to the suit.[6]

Where a scheme expressly empowers the "District Judge" to select the trustees, he is a *persona designata* and an order by him is not one by the *District Court* and therefore no appeal will lie.[7] See also Note 34.

Where an appeal is filed but is returned for re-presentation and is not so re-presented in time by the appellants *mala fide*, other persons interested in the trust can re-present the same even after the time fixed. Section 5 of the Limitation Act will apply to such a case.[8]

See also the undermentioned cases.[9]

37. Revision. — The order of a District Judge in a suit under this section will not be open to revision where he has exercised jurisdiction in a proper manner.[1] But where he has misdirected himself in a manner which will show that the order cannot be accepted as satisfactory, a revision will lie.[2] A revision petition can be entertained from a decision on an issue as to whether the suit was maintainable under this section.[3] But there can be no interference in revision merely because the lower Court's order proceeds on a mistake of law.[4] An order of a Collector granting permission to sue under this section is an executive order and is, therefore, not revisable.[5]

38. Jurisdiction to entertain suit under the section. — A suit under S. 92 must be brought in the special tribunal constituted by the section, namely, "the principal Civil Court of original jurisdiction or any other Court empowered by the Provincial Government in that behalf within the local limits of whose jurisdiction the whole or any

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3. ('42) 29 AIR 1942 Rang 75 (75) (DB).
('28) 15 AIR1928 Rang 168 (171): 6 Rang 97(DB).
4. ('41) 28 AIR 1941 Cal 618 (621) (DB).
5. ('08) 32 Bom 155 (156) (DB).
6. ('42) 29 AIR 1942 Bom 97 (98) (DB).
(1841) 3 Beav 447, Attorney-General v. Wright.
(Referred in 21 Bom 257; Followed in 32 Bom 155.)
(1891) 2 QB 100 (106), Attorney-General v. Logan.
[*See also* ('35) 22 AIR 1935 Pat 261 (263) : 14 Pat 236 (DB). (Where the District Judge has in formulating a scheme in pursuance of the High Court's order, appointed a person as manager, another person who was no party to the original action but was a defeated candidate in election to managership, has no *locus standi* to appeal from the order.)]
7. ('26) 13 AIR 1926 Bom 167 (167) (DB).
[*See also* ('37) 24 AIR 1937 Bom 124 (127) (DB). (District Judge empowered under scheme to remove trustee—District Judge suspending trustees and appointing receiver pending enquiry—Order appointing receiver not appealable — Such order is passed by the District Judge as *persona designata* in his administrative capacity.)]
Also see Ss. 100 & 101 N. 7.
8. † ('28) 15 AIR 1928 Mad 456 (457, 458) (DB).
9. ('40) 27 AIR 1940 Oudh 421 (422) : 15 Luck 730 (DB). (Appeal against order amending scheme under S. 92 incompetent — Appeal can, however, be treated as revision application if jurisdiction of Court to make amendment is challenged.)
('38) 25 AIR 1938 Rang 166 (168) (DB). (Removal of mutawalli—Discretion of Court—Interference in appeal — When the discretion of the lower Court is not influenced by sound reasoning nor exercised judicially, it can be interfered with by the High Court.)

Note 37

1. ('87) 10 Mad 98 (100).
2. † ('27) 14 AIR 1927 Mad 427 (427) (DB).
('31) 18 AIR 1931 All 332 (332) (DB). (District Judge wrongly refusing to exercise jurisdiction.)
3. ('35) 22 AIR 1935 Mad 282 (283) : 58 Mad 771 (DB).
4. ('37) 24 AIR 1937 Oudh 193 (194): 13 Luck 81 (DB).
5. ('10) 1910 Pun Re No. 104 : 8 Ind Cas 1160 (1160).

part of the subject-matter is situate."[1] Where a suit is brought in a District Court for a declaration that a compromise decree passed under this section was obtained by fraud and the suit is transferred to a Munsif for disposal, if the Munsif finds that the facts are as alleged, he has no jurisdiction himself to make a fresh decree under this section as that is a matter within the exclusive jurisdiction of the District Court. The Munsif can only declare the previous decree as vacated and it will then be for the parties to approach the District Court again for relief under this section.[2]

The words "principal Civil Court of original jurisdiction" will include an Additional District Judge who is assigned by the District Judge the function of the District Judge under S. 8 (2) of the Bengal Civil Courts Act (XII of 1887),[3] or under S. 7 of the Oudh Civil Courts Act (XIII of 1879)[4] (now see Oudh Courts Act, IV of 1925, S. 24 (2)) but not if such functions are not so assigned.[5]

The expression "any other Court empowered by the Provincial Government in that behalf" probably refers to Courts such as that of the Subordinate Judges.[6] It does not enable the Provincial Government to empower any particular *Judge* to try any particular pending suit. Such a notification will be *ultra vires*.[7] But, where a notification was issued empowering a certain Judge by name to hear suits under this section, it was held that the notification did not empower the Judge as a *persona designata* but duly empowered the *Court* over which he presided to entertain suits under this section.[8]

Where a District Judge transfers a suit under S. 92 to a Subordinate Judge specifically empowered by the Provincial Government to try such suits, but after the transfer the Provincial Government by a subsequent notification confines his power to a specified area, his jurisdiction over the case given by the previous notification is not taken away and he can try the suit.[9]

Although a District Judge has the powers of a Kazi under the Mahomedan law to deal with an application for the appointment of a *mutawalli*, he may nevertheless relegate the petitioner to a suit under S. 92.[10] A District Court in which a suit could not have been instituted as being not one within the section[11] or a Sub-Judge finding that necessary sanction has not been obtained,[12] should return the plaint and not dismiss the suit.

An application for the *modification* of a scheme framed by the District Court and confirmed by the High Court can be entertained only by the High Court but the District Court can give such *directions* as may be necessary to carry out the modified scheme.[13]

Note 38

1. ('97) 21 Bom 48 (52) (DB).
('23) 10 AIR 1923 Nag 112 (114) (DB). (Power of Court cannot be exercised by the arbitrators.)
† ('24) 11 AIR 1924 P C 95 (102) : 20 Nag LR 33: 51 Ind App 72 : 51 Cal 861 (PC). (Property not within the Court's jurisdiction—It cannot entertain suit.)
† ('94) 18 Bom 551 (561). (Trustees and trust fund within jurisdiction but execution outside jurisdiction—Court passed decree declaring trust but refused to settle scheme.)
('32) 19 AIR 1932 Cal 444 (445,446) : 59 Cal 357. (Trust of deposit at Madras with a firm—Firm carrying on business at Calcutta—Section 92 overrides Clause 12, Letters Patent of Calcutta High Court—Subject-matter at Calcutta—Calcutta High Court has jurisdiction.)
('35) 22 AIR 1935 Mad 983 (986).
2. ('42) 29 AIR 1942 Pat 79 (80) (DB).
3. † ('21) 8 AIR 1921 Cal 210 (211): 48 Cal 53 (DB).
4. ('19) 6 AIR 1919 Oudh 311 (313): 22 Oudh Cas 93.
5. ('14) 1 AIR 1914 Cal 616 (616) : 41 Cal 866 (DB).
6. ('21) 8 AIR 1921 Cal 210 (211) : 48 Cal 53 (DB).
7. ('12) 39 Cal 116 : 13 Ind Cas 243 (244) (DB).
8. † ('37) 24 AIR 1937 Bom 275 (278, 279): ILR (1937) Bom 655 (FB).
9. ('16) 3 AIR 1916 Mad 960 (961) (DB).
10. ('19) 6 AIR 1919 Cal 615 (616) (DB).
11. ('99) 21 All 187 (188) (DB).
12. ('03) 25 All 631 (633) (DB).
13. ('12) 17 Ind Cas 969 (970, 972) (DB) (Cal).

The Court of a Subordinate Judge is not disentitled or debarred from entertaining a suit for the administration of the estate of a deceased testator, simply because the will contains directions for applying some portion of the estate for charitable purposes. But he may appoint a receiver in respect of such properties until directions thereto are obtained by the Advocate-General or the Collector from the District Court.[14]

Section 92 does not confer on the High Court powers to entertain suits in its original jurisdiction, in respect of charities in the mofussil.[15]

The District Court has no power to transfer to a Subordinate Court a suit under this section instituted before itself.[16] (See Note 11 on section 24.)

39. Valuation of suit. — The reliefs claimed in a suit under S. 92 are incapable of valuation and are therefore chargeable under Art. 17 cl. (vi) Sch. II of the Court-fees Act, 1870.[1] Even a prayer for *possession* or for a declaration and *consequential* relief under this section will not take it out of the operation of Art. 17, cl. (vi) of the Court-fees Act and bring the same under S. 7 of the said Act.[2] The reason is that the plaintiffs in a suit under S. 92 do not claim the reliefs for their *own advantage* but as representing the public.[3] The Bombay High Court has held that where in addition to the reliefs claimed under S. 92, a relief for an *account* is also asked for, the suit is chargeable with a court-fee under S. 7 (iv) (f) of the Court-fees Act.[4] This view, being opposed to the opinion of all the other High Courts, does not seem to be a sound one.

A suit of the nature specified, filed in the High Court, is not exempt from court-fees on the ground that the court-fees payable under the schedules thereto have no application to suits filed in the ordinary original jurisdiction of the High Court, but *will* have to be taxed under the High Court-fees Rules of that Court.[5]

It may be noted in this connection that the Madras Court-fees (Amendment) Act of 1922 specifically provides in Sch. II Art. 17 (iii) for a suit under section 92 of the Code, charging a fixed fee of Rs. 50 therefor.

40. Limitation. — Reference may be made to the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., for this question. It will be noted that the Limitation Act does not contain a specific provision as to limitation for suits under this section. The question will depend on the nature of the relief claimed in each suit and the defendant against whom the suit is brought. If the suit is brought against an express trustee as defined by S. 10 of the Limitation Act and is of the nature contemplated by that section, there will be no period of limitation for the suit. Otherwise, the suit will be subject to the various periods of limitation prescribed by the Limitation Act according to the nature of the reliefs claimed in the suit.

41. Decision under the section, whether operates as res judicata. — A decree passed in a suit under S. 92 is binding not only on the trust and the trustee but

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14. ('16)3AIR1916 Bom 281(282):40 Bom439 (DB).
15. ('10) 5 Ind Cas 729 (732) (Mad).
16. ('35) 22 A I R 1935 Bom 172 (173): 59 Bom 412 (DB).

Note 39

1. ('43) 30 AIR 1943 Oudh 186 (190) (DB).
('10) 7 Ind Cas 92 (93) (DB) (Cal).
('28) 15 AIR 1928 Lah 113 (113): 8 Lah 730.
('97) 19 All 60 (63).
('99) 21 All 200 (203).
('18) 5 A I R 1918 Lah 146 (147): 1918 Pun Re No. 97.

2. † ('25) 12 AIR 1925 Mad 722 (722).
('28) 15 AIR 1928 Lah 113 (113, 114): 8 Lah 730 (DB). (Suit does not come under Section 7 (iv) (c).)

3. ('28) 15 A I R 1928 Lah 113 (114) : 8 Lah 730 (DB).
[*See* ('42) 29 AIR 1942 Pat 79 (80) (DB). (Suit by the plaintiffs as members of the public with a view to asserting certain rights of the public which are not of ownership need not be valued according to the value of the property.)]

4. ('85) 9 Bom 22 (24) (DB).

5. ('27) 14 AIR 1927 Mad 940 (942, 943).

also on all worshippers of the temple.[1] The reason is that a suit under S. 92 is a *representative* one, the plaintiffs representing *all* persons interested in the trust.[2] The actual *parties* to the suit will also be bound by the decree. Thus, the transferee of trust property, who is made a party to the suit is debarred from going behind it in any subsequent suit.[3] Where, however, the suit is *fraudulently* withdrawn, it cannot operate as *res judicata*.[4] Again, when a suit under S. 92 *ceases* to be a representative one, it ceases also to be binding except on the *actual parties* thereto. Thus, where a suit filed with sanction was amended by adding strangers and claiming reliefs not covered by the sanction, the suit ceases to be a representative one and cannot bind the public.[5] Similarly, where the order of the Court has not been passed after "hearing and finally deciding" the matter there is no *res judicata*.[6]

A previous litigation in a *private* capacity is not *res judicata* in a subsequent suit in a *public* capacity under this section.[7]

See also S. 11 Note 60.

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[a]**93.** [S. 539, last para.] The powers conferred by sections 91 and 92 on the Advocate-General may, outside the Presidency-towns, be, with the previous sanction of the [b][Provincial Government] exercised also by the Collector or by such officer as the [b][Provincial Government] may appoint in this behalf.

Exercise of powers of Advocate-General outside Presidency-towns.

[1877, S. 539, last para.]

a. This section and S. 92 have no application as regards Tirumalai-Tirupati Devasthanams : See the Tirumalai-Tirupati Devasthanams Act (Madras Act XIX of 1933), S. 44 (2).

b. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

1. May be exercised by the Collector. — The Collector cannot delegate his functions to any one else.[1] Where the Collector refuses to give the sanction it may be granted by the Advocate-General.[2]

2. Or by such officer as the Provincial Government may appoint. — For a list of such officers, see foot-note 1 below.

Note 41

1. † ('25) 12 AIR 1925 Mad 1070 (1071) (SB).
†('11) 36 Mad 364 : 12 Ind Cas 449 (452) (DB). (Scheme framed by Court — A trustee though not a party to the suit cannot subsequently sue to establish his private rights which would interfere with the scheme.)

2. ('21) 8 A I R 1921 P C 123 (124) : 48 Cal 493 (497, 498) : 17 Nag L R 37 : 48 Ind App 12 (PC).
('22) 9 AIR 1922 Mad 394 (396) (DB).
('09) 33 Bom 509 (562 to 569) (DB).

3. ('11) 33 All 752 : 11 Ind Cas 218 (219) (DB). Also see Note 28.

4. ('28) 15 AIR 1928 Mad 268 (271) (DB).

5. †('28) 15 A I R 1928 P C 16 (20) : 55 Ind App 96 : 55 Cal 519 (PC).

6. ('37) 41 Cal W N 298 (303) (DB). (New trustee appointed without enquiry, by consent of parties before the Court—Appointment is not binding on non-consenting claimant to office.)

[*See also* ('40) 27 A I R 1940 P C 7 (9) : 15 Luck 1 : 67 Ind App 1 : ILR (1940) Kar P C 25 (PC). (Decision of District Judge on application under S. 3 of Charitable and Religious Trusts Act of 1920 is a decision in a summary proceeding —It does not preclude a defendant to a suit under S. 92, C. P. Code from disputing that the suit temple is the subject of a public religious trust.)]

7. ('26) 13 AIR 1926 Oudh 578 (583) : 1 Luck 489.

Section 93 — Note 1

1. See Note 27 on Section 92.

2. ('28) 15 AIR 1928 Mad 401 (401) (DB).

Note 2

1. *(a)* In Lower Burma, by the Government Advocate (See Burma Gazette, 1893, Pt. I, p. 99.)
(b) In Moulmein in respect of the trust for the maintenance of certain pagodas, by the Deputy Commissioner (See Burma Gazette, 1889, Pt. I, p. 221.)
(c) In Mandalay, by the Deputy Commissioner (See Burma Gazette, 1890, Pt. I, p. 22.)

3. **Visitatorial powers of the Collector.** — See Note 4 on S. 92 and the undermentioned case.[1]

4. **Previous sanction of the Provincial Government.** — The section provides for two distinct matters : (1) the appointment of an officer to exercise the powers conferred by Ss. 91 and 92 on the Advocate-General, and (2) the grant of "previous sanction" by the Provincial Government to the exercise of such powers. Both the appointment and the previous sanction must exist before S. 93 can be applied.[1] Accordingly a suit instituted without such previous sanction is liable to be dismissed.[2] The fact that the Provincial Government has appointed an officer under this section generally is no bar to its appointing the Collector or any other person to exercise such powers in any particular case.[3]

After the decision of the Privy Council in *Prem Narain* v. *Ram Charan*[4] the Public Suits Validation Act (XI of 1932) has been passed whereby —

(1) the institution of suits *pending* at the commencement of the Act is not to be deemed to be invalid by reason of the "previous sanction" not having been obtained as required by this section ;

(2) suits dismissed after the 30th day of November 1931 (the date of the decision in *Prem Narain's case*) and before the commencement of the Act, solely on the ground of want of such previous sanction are to be restored to file on an application made therefor within six months from the commencement of the Act ; and

(3) appeals dismissed between the said dates on the said ground, are to be re-tried on an application made therefor within six months from the commencement of the Act.

See also the undermentioned cases.[5]

And in cases where the suit is pending on the date of the passing of the above-mentioned Act, it is not necessary for the plaintiffs to obtain sanction from the Provincial Government during the pendency of the suit.[6]

Where a suit was brought with the permission of the Collector but without the sanction of the Provincial Government and a decree was passed in such suit before the decision of the Privy Council in *Prem Narain's case*, it was held that the decree was not a nullity for want of jurisdiction.[7]

Where a suit is restored under the Public Suits Validation Act of 1932, the suit must be proceeded with and tried in accordance with law. The suit cannot be again dismissed on the ground that there has been no *valid* consent given by the Collector.[8]

(d) In the Central Provinces, by the Secretary to the Chief Commissioner (See Central Provinces List of Local Rules and Orders, Edn., 1896, p. 157.)
(e) In the Madras Presidency, by all Collectors, except the Collector of Madras (See Madras List of Local Rules and Orders, Edn., 1898, Vol. I, p. 197.)
(f) In the North-Western Provinces and Oudh, by the Legal Remembrancer (See North-Western Provinces and Oudh List of Local Rules and Orders, Edn. 1894, p. 114.)

Note 3

1. ('82) 12 Bom 247 (260).

Note 4

1. ('32) 19 AIR 1932 P C 51 (54): 59 Ind App 121: 53 All 990 (PC).
2. ('32) 19 AIR 1932 P C 51 (54): 59 Ind App 121: 53 All 990 (PC).
[*See also* ('31) 18 A I R 1931 P C 121 (124) : 53 All 910 : 58 Ind App 460 (PC).]
3. ('31) 18 AIR 1931 P C 121 (124) : 53 All 910 : 58 Ind App 460 (PC).
4. ('32) 19 AIR 1932 PC 51 (54) : 59 Ind App 121: 53 All 990 (PC).
5. ('34) 21 AIR 1934 Bom 257 (259) (DB).
('33) 20 AIR 1933 Oudh 22 (24): 8 Luck 266 (DB).
6. ('33) 20 AIR 1933 Oudh 22 (24) : 8 Luck 266 (DB).
7. ('35) 22 AIR 1935 Nag 28 (29).
8. † ('36) 23 AIR 1936 Cal 815 (816) (DB).

PART VI.

SUPPLEMENTAL PROCEEDINGS

94. [New.] In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed, — Supplemental proceedings.

(*a*) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;

(*b*) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;

(*c*) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;

(*d*) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(*e*) make such other interlocutory orders as may appear to the Court to be just and convenient.

[See Orders 38, 39, 40.]

1. Scope of the section. — This is a leading provision summing up the general powers of the Courts in regard to the various kinds of interlocutory orders. The details of procedure have been relegated to the rules.[1] By virtue of S. 7, clauses (c) and (e) of the section do not extend to Provincial Small Cause Courts.[2]

2. "If it is so prescribed." — "Prescribed" means prescribed by rules. See S. 2, cl. (16). It has been held by the High Court of Madras that the Courts have power to pass the orders referred to in cls. (a) to (e) of the section *only* if it is so prescribed by the rules and that this would exclude the inherent power of the Court under S. 151 to pass such orders where they are not prescribed by rules.[1] The Lahore High Court has, on the other hand, taken the view that the Court has an inherent power to act *ex debito justitiæ* even in cases not prescribed by rules.[2] The High Court of Patna and the Judicial

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Section 94 — Note 1

1. See Notes on Clauses.
2. ('19) 6 AIR 1919 Cal 6 (6) : 46 Cal 717 (DB).

Note 2

1. ('26) 13 AIR 1926 Mad 258 (258).
('27) 14 AIR 1927 Mad 687 (687, 688).
('28) 15 AIR 1928 Mad 491 (492) (DB). (Test in (1919) 1 K. B. 410, Cohen v. Rothfield, not applicable to this case.)
('33) 20 AIR 1933 Mad 500 (501) : 56 Mad 563.
† ('32) 19 AIR 1932 Mad 180 (181).
2. † ('20) 7 AIR 1920 Lah 436 (437) (DB).
('33) 20 AIR 1933 Lah 73 (74). (But plaintiff must establish that there is no other remedy and if injunction not granted injury would be caused.)
('33) 20 AIR 1933 Lah 437 (439) : 14 Lah 68. (Proceedings under the Companies Act—Court has power to make summary order under this Section for the protection of the property to which the Company is prima facie entitled.)

Commissioner's Court of Sind have taken the same view as the Lahore High Court.[3] The High Court of Allahabad seems to be of the same view as that of the Madras High Court.[4] In a case before the Bombay High Court a person brought a suit under O. 21 R. 103 and applied for an injunction restraining the defendant from taking possession of the property pending disposal of the suit. The injunction was refused on the ground that the provisions of Rr. 1 and 2 of O. 39 did not apply.[5] No question, however, of inherent jurisdiction was either advanced or considered in the case. See also Notes 3 and 22 on O. 39 R. 1.

3. Warrant of arrest — Clause (a). — See Order 38.

4. Order for security or attachment — Clause (b). — See Order 38.

5. Temporary injunction — Clause (c). — The applicant for an injunction must make out a *prima facie* case therefor.[1] A mere apprehension of interference with the plaintiff's collection of rent and of the breach of the peace does not justify the grant of an injunction.[2] Nor will the Court exercise a proper discretion in granting an injunction restraining the opposite party from the *bona fide* exercise of his statutory rights.[3] Order 39 must be read with this clause. Order 39 R. 2 (3), empowering the Court to punish a party for disobedience of an injunction is not confined to suits of the nature specified in O. 39, R. 2 but applies to disobedience generally of an injunction granted by the Court whether under O. 39 or under section 94.[4]

An injunction cannot be issued by one Court to another *Court*. See O. 39 R. 1, Note 13.

For a fuller discussion of the subject, see O. 39 Rr. 1 and 2.

6. Appointment of Receiver — Clause (d). — See O. 40 R. 1 and Section 51.

7. "Such other interlocutory orders." — Clause (e). — When a witness summoned to produce a document under O. 16 R. 6 fails to comply with the summons, he may be punished by arrest and imprisonment or attachment under O. 16 R. 10.[1] An order directing the furnishing of security and submission of accounts is an order of the kind contemplated by section 94 clause (e).[2]

('23) 10 AIR 1923 Lah 144 (145) (DB). (Though the case is not covered by the provisions of O. 39.)

('27) 14 AIR 1927 Lah 833 (834). (But plaintiff to establish a strong case that if injunction not granted, injury will ensue.)

3. ('18) 5 AIR 1918 Pat 214 (215) : 3 Pat L Jour 456 (DB). (But it must be shown that making of that order was in accordance with the principles of justice, equity and good conscience.)

('34) 21 AIR 1934 Sind 179 (179). (Suit for money — Plaintiff, deliberately choosing Civil Court as forum — Plaintiff receiving part of the money and attempting to recover the rest by summary procedure under District Local Boards Act—Injunction under inherent power of Court can be issued.)

† ('09) 3 Sind L R 128 (129): 4 Ind Cas 609 (610).

4. † ('15) 2 AIR 1915 All 277 (278) : 37 All 423 (DB). (If case does not come under O. 38 or O. 39, the Court can pass order under this section in exceptional cases only.)

5. ('14) 1 AIR 1914 Bom 148 (149) (DB).

Note 5

1. ('28) 15 AIR 1928 Cal 464 (465) : 55 Cal 978 (DB). (Case under Section 84, Calcutta Port Act (III of 1890).)

✠ ('36) 23 AIR 1936 Pesh 11 (11).

2. ('26) 13 AIR 1926 Cal 604 (605) (DB).

3. ('20) 7 AIR 1920 Pat 423 (423) : 5 Pat L Jour 76 (DB). (A Civil Court has no jurisdiction to issue an injunction to a party to a proceeding under Section 40, Bengal Tenancy Act.)

4. † ('18) 5 AIR 1918 Mad 340 (341).
† ('26) 13 AIR 1926 Mad 574 (575) (DB).

Note 7

1. ('28) 15 AIR 1928 Mad 299 (305) : 51 Mad 1 (SB).

2. † ('12) 17 Ind Cas 361 (362) (DB) (Cal).

Compensation for obtaining arrest, attachment or injunction on insufficient grounds.

95. [Ss. 491, 497.] (1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted[3] under the last preceding section,—

(a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds,[4] or

(b) the suit of the plaintiff fails[5] and it appears to the Court that there was no reasonable or probable ground for instituting the same,

the defendant may apply to the Court,[6] and the Court may, upon such application, award against the plaintiff by its order[1] such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury[7] caused to him :

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

(2) An order determining any such application shall bar any suit[13] for compensation in respect of such arrest, attachment or injunction.

[1877, Ss. 491 and 497; 1859, Ss. 88, 96; S. 94 and O. 38 to O. 40.]

Synopsis

1. Legislative changes.
2. Analogous law.
2a. Scope of the section.
3. Arrest or attachment before judgment.
4. The attachment or arrest must have been applied for on insufficient grounds.
5. "Or the suit of the plaintiff fails."
6. Procedure for obtaining compensation under this section.
7. Amount and basis of compensation.
8. Court other than that by which the arrest, etc., was ordered cannot grant compensation.
9. Provincial Small Cause Court.
10. Undertaking, effect of.
11. Chartered High Court, power of.
12. Counter-claim for compensation as defence to suit.
13. Regular suit, if and when barred.
14. Limitation *(Omitted.)*
15. Appeal.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Applicability to conditional and *ex parte* attachments. See Note 3.
Compensation for excessive attachment, even if suit be decreed. See Note 13.
Compensation not only for "special damages" but also for "general damages." See Note 7.
Formal application—A counter petition is sufficient. See Note 6.
Formal application—Claim in a counter-statement of an applicant. See Note 13.
Formal application—Necessity of. See Note 6.
Order under this section, when to be passed. See Notes 1 and 6.
Right of defendant to apply even prior to service of suit summons. See Note 3.

1. Legislative changes. — This section amalgamates and corresponds to Ss. 491, and 497 in the Code of 1882. The material changes introduced are :

(a) The words "by its order" have been substituted for the words "in its decree" thereby showing that the order for compensation must be *separately* made and must not be embodied in the decree, as was required under the old Code.[1]

Section 95 — Note 1

1. ('07) 17 Mad L Jour 310 (311). (A case under old Code—Order should be embodied in the decree and not postponed.)
('93-1900) 1893-1900 Low Bur Rul 411 (412, 413, 414). (Do.)
('13) 21 Ind Cas 756 (757) (Mad).

(b) The words "order determining any such application" in sub-s. (2) have been substituted for the words "award under this section," making it clear that it is not only when a compensation has been *granted* under this section but also when it has been applied for and *refused* that a suit for compensation is barred. See Note 13.

2. Analogous law. — This section is analogous to section 250 of the Criminal Procedure Code which provides for compensation being awarded to an accused person against whom a frivolous or vexatious complaint is made.[1] But the difference between the two sections is that while the award of compensation, under section 250, Criminal Procedure Code, is no bar to a suit for compensation the determination of an application for compensation under S. 95 of the Civil Procedure Code precludes a separate suit for compensation.[2]

2a. Scope of the section. — The section applies also to cases in which the plaintiff is a minor represented by a next friend.[1] In such a case, the section authorises an order for compensation only against the *plaintiff* but not against his next friend. But a separate suit for compensation against the next friend is not barred.[2]

The section applies to arrest or attachment *before judgment.* There is no corresponding provision in the Code as regards proceedings in *execution* of a decree.[3]

3. Arrest or attachment before judgment. — No compensation is awardable under this section unless the attachment or arrest has been *actually effected.*[1] The mere obtaining of an *order* for attachment or arrest is not enough.[2] But it is not necessary that the defendant arrested should have received the summons in the suit.[3] The section applies also to temporary attachments under O. 38 R. 5[4] and a creditor attaching before judgment, goods not belonging to his debtor will be liable in damages to the person to whom the goods belong even though he has acted honestly.[5]

4. The attachment or arrest must have been applied for on insufficient grounds. — It is incumbent on an applicant under this section for compensation for wrongful attachment to prove affirmatively that the attachment was applied for on insufficient grounds.[1] The words "on insufficient grounds" must be taken to mean "without reasonable or probable cause."[2] Where in an application for attachment before judgment, the only ground put forward was that unless the attachment was made the

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Note 2

1. *See the following cases :*
('11) 35 Mad 598 (601) : 12 Ind Cas 507 (509) (DB).
('03) 30 Cal 123 (129) (FB).
2. ('11) 35 Mad 598 (601) : 12 Ind Cas 507 (509) (DB).

Note 2a

1. ('35) 22 AIR 1935 Mad 886 (887) : 59 Mad 415.
2. ('41) 28 AIR 1941 Mad 719 (720) : ILR (1941) Mad 985 (DB).
3. ('39) 26 AIR 1939 Pat 13 (16, 17).

Note 3

1. ('17) 4 AIR 1917 Mad 145 (147) : 39 Mad 952 (DB). (Mere interlocutory application, however malicious, would not found an action.)
† ('25) 12 AIR 1925 Bom 357 (358, 359) : 49 Bom 629. (Section does not apply where attachment was applied for but had not been levied.)
2. ('39) 26 AIR 1939 Rang 260 (261).
See also the cases in foot-note (1).
3. ('91) 15 Bom 160 (163).
4. ('19) 6 AIR 1919 Mad 20 (20) (DB).
('32) 19 AIR 1932 Cal 92 (93). (Even though the conditional attachment is withdrawn on security being furnished.)
('31) 1931 Mad W N 956 (957). (Even though suit is decreed and attachment is made absolute—The portion of this section relating to attachment before judgment is extended to suit under the Bengal Rent Act (VI of 1862) or under Act X of 1859.)
5. See Note 4 on S. 62.

Note 4

1. ('40) 27 AIR 1940 Mad 77 (80). (It is not sufficient for this purpose to show that he has properties which are greater in value than the amount at stake in the suit. He must show that the plaintiff was unjustified in suggesting to the Court that he the defendant was about to defeat the object of the suit by making alienations.)
2. ('94) 18 Bom 717 (720).

plaintiff, in the event of success, would have difficulty in realizing the decretal amount, the application is made on insufficient grounds and the defendant is entitled to reasonable compensation.[3] Where, as a matter of fact, there have been sufficient grounds for applying for attachment or arrest, the mere fact that the grounds have not been mentioned in the application for attachment or arrest before judgment will not make the plaintiff liable for compensation.[4] Where on the defendant depositing the amount towards the plaintiff's claim, the attachment before judgment is withdrawn on account of such deposit and not on the ground that the attachment had been obtained on insufficient grounds, it has been held that no compensation can be claimed under this section.[5]

5. "Or the suit of the plaintiff fails." — A defendant in a suit in which an arrest or attachment has been effected or a temporary injunction granted will be entitled to compensation under this section, if —

(1) the plaintiff's suit fails, *and*

(2) there was no reasonable or probable ground for instituting it.

It is *not* necessary to show in such a case that the arrest or attachment was *applied for on insufficient grounds*. The mere fact that the plaintiff's suit for injunction was dismissed because his conduct had been fraudulent,[1] will not enable the defendant to claim compensation under this section. The reason is that there was *no want of reasonable and probable cause for instituting the suit*, the same being dismissed on the ground of plaintiff's fraudulent conduct. Nor will mere evidence of malice prove the absence of reasonable or probable ground for instituting the suit.[2]

6. Procedure for obtaining compensation under this section. — An application by the defendant is necessary for obtaining compensation under the section. Beyond this there is no particular procedure or formality to be followed.[1] But it is conceived that the application is to be made only after the suit is heard and not before.[2] See also Note 1. Further, an application for compensation for wrongful attachment of property cannot be entertained by the Court unless the order of attachment has been set aside[3] as having been obtained on insufficient grounds.[4] But it has been held in the case cited below[5] that the setting aside of the order of attachment is not an essential preliminary to the grant of compensation under the section.

It has been held that the Court has power under this section to permit the

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3. ('34) 21 AIR 1934 Oudh 429 (430) : 10 Luck 199 (DB).

4. ('37) 24 AIR 1937 Nag 126 (127) : ILR (1938) Nag 361.

5. ('42) 29 AIR 1942 All 261 (263) : I L R (1942) All 360.

Note 5

1. ('03) 13 Mad L Jour 70 (71) (DB).

2. ('15) 2 AIR 1915 Cal 173 (174, 175) : 42 Cal 550 (DB).

Note 6

1. ('17) 4 AIR 1917 Mad 885 (885). (A counter petition is sufficient.)

2. ('23) 10 AIR 1923 Mad 352 (353).
('31) 1931 Mad W N 956 (957).

3. ('34) 21 AIR 1934 Mad 638 (639). ((1878) 7 Ch D 866, Lees v. Patterson, followed.)

4. ('42) 29 AIR 1942 All 261 (262, 263) : I L R (1942) All 360. (Application for removal of attachment dismissed—Attachment withdrawn on deposit of amount—No allegation in application that attachment was obtained on insufficient grounds —Subsequent application for compensation under S. 95, not maintainable.)

5. ('40) 27 AIR 1940 Mad 77 (78). (Nor would the passing of an absolute order of attachment be a bar to an application under S. 95 for compensation for wrongful attachment — No such preliminary step has been prescribed in S. 95 which alone governs the procedure and a Court would not be justified in hedging this remedy round with restrictions borrowed from English law, which the section itself does not import. AIR 1934 Mad 638 dissented from. NOTE. — In this case, an application for cancellation of attachment and one for compensation were both before the Court. The order on the former application was withheld pending the disposal of the latter application. It was held that the latter application could not be dismissed on the ground that the attachment had not been cancelled.)

conversion of an application for compensation into a suit for compensation upon payment of the necessary court-fees.[6]

7. Amount and basis of compensation. — Under this section the Court can grant damages only to the extent of Rs. 1000. There is also a further restriction and that is that it cannot award, as compensation, any sum in *excess of its pecuniary jurisdiction.* The grant of compensation under this section is a matter of discretion and the discretion has to be exercised in a judicial manner. Where a Court gives no reasons for refusing an application under this section, the order is not one according to law.[1]

The section authorises the award of reasonable compensation to the defendant for the expense and injury caused to him. There is a conflict of decisions as to whether humiliation and loss of prestige will be included in the term 'injury.' The Calcutta High Court has held that such humiliation and loss of prestige will *not* be included in the term and that no compensation can be awarded under this section on such grounds,[2] while the contrary view has been held by the Madras High Court.[3]

In the case of a suit by a third party for damages for wrongful attachment of his property in execution of a decree passed against another person, it was held by the Privy Council that the wrong was actionable *per se* and that the plaintiff was entitled to general damages although he did not prove any special damage.[4]

8. Court other than that by which the arrest, etc., was ordered cannot grant compensation. — Under this section compensation can be awarded only by the Court by which the arrest, etc., was ordered and the application for compensation has to be made only to that Court.[1]

9. Provincial Small Cause Court. — A Provincial Small Cause Court can neither order the attachment of *immovable property* nor award compensation under this section for any such attachment.[1] But it can order the attachment of *moveables* and also award compensation for a wrongful attachment thereof under this section.[2] A *suit* for damages for illegal attachment is not cognizable by a Small Cause Court.[3] See also section 7 (b) (1) and Order 38 Rule 13.

10. Undertaking, effect of. — Where a temporary injunction restraining the defendant from executing a decree obtained by him in another suit is granted on an

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6. ('12) 16 Ind Cas 443 (444) (DB) (Cal). (Art. 42, Limitation Act applies to such suit.)
Also see S. 149, Note 11.

Note 7

1. ('34) 21 AIR 1934 Oudh 429 (431) : 10 Luck 199 (DB).
2. ('36) 164 Ind Cas 73 (73, 74) (Cal). (Humiliation and damage to prestige by reason of attachment before judgment — No right to damages or compensation.)
('32) 19 AIR 1932 Cal 695 (696) : 59 Cal 1082 (DB). (Injunction—Person against whom injunction has been obtained must show that he suffered loss by his inability to do one or more of the things which the injunction restrained him from doing.)
3. ('40) 27 AIR 1940 Mad 77 (79). (Special damage not necessary; general damage is enough.)
('17) 4 AIR 1917 Mad 885 (886). (Words "expense and injury" are not confined to some tangible injury that can be measured directly in money but include also general damage due to injury to reputation or the humiliation caused of necessity by the arrest.)
[*See also* ('26) 13 AIR 1926 Mad 962 (962). (Where in action for damages for arrest before judgment on insufficient grounds, no evidence as to damages suffered is given, the Court should award general damages; AIR 1917 Mad 885 relied on.)
('09) 32 Mad 170 (172) (DB). (Suit for damages for attachment before judgment on insufficient grounds—General damages for loss of credit and reputation can be awarded.)]
4. ('66) 10 Moo Ind App 563 (575) (PC).

Note 8

1. ('98) 22 Bom 42 (46) (DB).
(1865) 3 Suth W R Misc 28 (28) (DB).

Note 9

1. ('07) 1907 Pun Re No. 77, p. 397 (398).
2. ('03) 26 Mad 504 (504).
('15) 2 AIR 1915 Mad 1072 (1072).
3. ('13) 18 Ind Cas 695 (695) (All). (Vide Art. 35 (j), Sch. II, Provincial Small Cause Courts Act (IX of 1887).)

undertaking by the plaintiff to compensate the defendant for the loss that he may suffer on account of such injunction, and the suit of the plaintiff is dismissed, the undertaking is to be enforced by application not to the Court *executing the defendant's decree* but to the Court which granted the injunction.[1]

11. Chartered High Court, power of. — The question as to the applicability of S. 95 to suits entertained by a Chartered High Court on its original side has arisen in Bombay and the view expressed in the latest decision of that Court on the point is that the section does not apply to such suits and that hence the High Court can on an application by the defendant award under R. 329 of the Bombay High Court Original Side Rules, compensation exceeding Rs. 1000 for wrongful attachment before judgment.[1] But a different view was taken in an earlier decision of the same High Court.[2]

12. Counter-claim for compensation as defence to suit. — In a summary suit on a negotiable instrument under O. 37, a defendant who has been arrested before judgment and who claims compensation for such arrest, can, on that ground, apply for leave to defend the suit.[1]

13. Regular suit, if and when barred. — It has been seen in S. 9[1] that, as a general principle, where two proceedings or two remedies are provided by law, one of them must not be taken as operating in derogation of the other.[2] It has also been seen[3] that a regular suit, according to the general principle, will not be barred by a summary and concurrent remedy being also provided therefor, but that if a party has *elected to pursue* his remedy under one provision, he is bound by it and cannot on his failing therein proceed under the other provision.

Applying these principles, it follows that a regular suit for compensation is not barred by the omission to proceed under the summary procedure provided for by this section[4] but that if an *application* is made and disposed of under this section such disposal would operate as a bar to a regular suit, whatever may be the result of the application.[5] A claim for compensation made in a *counter affidavit* against a petition for attachment before judgment is not an *application* for compensation required by S. 95 and cannot bar a regular suit.[6] The suit barred under this section and the application barred under this section must be *ejusdem generis* with the same cause of action. Thus, an application under this section is no bar to a subsequent suit for damages caused by reaping and removal of crop from the land, which the plaintiff was prevented from entering by the Court's injunction.[7]

There is, however, a difference between the conditions necessary for the maintainability of an application under this section, and those necessary for the maintainability of a regular suit. In a *suit* for compensation the plaintiff must not only prove want of reasonable or probable cause for obtaining the arrest, attachment or injunction, but also

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Note 10

1. ('98) 22 Bom 42 (46) (DB).

Note 11

1. ('26) 13 AIR 1926 Bom 523 (524).
2. ('08) 10 Bom L R 1002 (1002, 1003).

Note 12

1. ('94) 18 Bom 717 (720).

Note 13

1. See Section 9, Notes 62 to 64.
2. † ('86) 8 All 354 (361) (FB).
('15) 2 AIR 1915 Mad 197 (199) : 37 Mad 29 : 12 Ind Cas 664 (667) (DB).
3. See Section 9, Note 63.
4. ('66) 1 Agra 101 (105).
('69) 11 Suth W R 143 (143) (DB).
5. ('74) 21 Suth W R 375 (376) (DB).
† ('11) 11 Ind Cas 917 (918) (DB) (Low Bur) (The words "an order determining an application" mean to grant an application or to refuse it.)
('70) 13 Suth W R 305 (306) (DB). (Decision under the Code of 1859 that unsuccessful application did not bar suit is no longer law.)
6. ('20) 7 AIR 1920 Mad 397 (399) (DB). (See the finding of the District Judge which is accepted by the High Court.)
7. ('32) 1932 Mad W N 536 (536, 537) (DB).

that the defendant was actuated by *malice*.[8] Malice is not necessarily hatred or enmity, but any improper motive. A plaintiff acts improperly in making use, for putting undue pressure on his debtor, of a process intended to prevent fraudulent conduct on the part of the debtor.[9] A suit therefore lies for maliciously and wrongfully obtaining a temporary injunction[10] or an excessive attachment of property.[11] When property is wrongfully attached and afterwards made away with, in collusion with the attaching officer, it is not necessary for maintaining a suit for compensation that a criminal prosecution should be previously instituted.[12] The mere institution of a malicious civil suit will not give rise to a cause of action for a suit for compensation. When therefore a decree for a *perpetual* injunction is made by the first Court but is set aside in appeal, the defendant cannot maintain a suit for damages caused by the said suit having been brought.[13]

There is a distinction between cases where the plaintiff in the suit for damages for wrongful attachment was a *party* to the suit in which the goods were wrongfully attached and cases where he was not such a party. It is only in the former cases that *malice* and want of reasonable or probable cause is to be proved by the plaintiff. In the latter case a suit will lie even though the attachment may have been made in good faith.

Where the plaintiff is a minor suing by a next friend, compensation cannot be awarded against the *next friend* under this section. But a separate suit can be brought against the next friend for compensation.[16]

14. Limitation *(Omitted)*

15. Appeal. — See Section 104, clause (g) and Note 17 on the Commentary thereto.

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8. ✣('11) 35 Mad 598 (602) : 12 Ind Cas 507 (509) (DB).
('70) 2 N W P H C R 353 (357) (DB).
('72) 4 N W P H C R 42 (44) (DB).
('95) 1895 Pun Re No. 86, p. 407 (410) (DB). (But proof of want of sufficient grounds for suit will raise presumption of malice.)
('72) 18 Suth W R 440(440) (DB). (Suit for damages cannot be maintained merely because the prior suit ended in plaintiff's favour—He must further make out that there was not good and sufficient cause for the cause taken by the then plaintiff.)
('26) 13 AIR 1926 Cal 757 (759). (Collector of Customs made to detain goods by representation made maliciously and without reasonable cause — Suit for damages lies.)
('28) 15 AIR 1928 Cal 1 (6) (DB). (Article 40, Limitation Act applies.)
('69) 1 N W P H C R 91 (92) (DB). (It is sufficient to prove legal not actual malice.)
Also see O. 38 R. 5, Note 22.
[But see ('10) 13 Oudh Cas 357 (362) : 9 Ind Cas 60 (64) (DB).]

9. ('11) 35 Mad 598 (602) : 12 Ind Cas 507 (510) (DB).

10. ('27) 14 AIR 1927 Cal 247 (249) : 53 Cal 1008 (DB).
✣('26) 13 AIR 1926 Cal 757 (760).
('11) 11 Ind Cas 729 (732) (DB) (Cal).
('15) 2 AIR 1915 Cal 173 (175) : 42 Cal 550 (DB). (Doubted whether such suit is maintainable in the absence of undertaking to pay compensation.)
('22) 9 AIR 1922 Lah 303 (304) (DB). (Malice can be properly inferred from the fact that there were no substantial grounds.)

11. ('66) 6 Suth W R Misc 24 (25) (DB).

12. ('72) 18 Suth W R 27 (28) (DB).

13. ('15) 2 AIR 1915 Cal 173 (175) : 42 Cal 550 (DB).

14. ✣('24) 11 AIR 1924 Rang 302 (307) : 2 Rang 181.
See also cases cited in Note 4 on S. 62.
[*See also* ('20) 7 AIR 1920 Cal 846 (847, 848) (DB).]

15. ('41) 28 AIR 1941 Mad 719 (720): I L R (1941) Mad 985 (DB).

PART VII.

APPEALS

APPEALS FROM ORIGINAL DECREES

96. [S. 540.][10] (1) Save where otherwise expressly provided in the body of this Code[2] or by any other law[22] for the time being in force, an appeal[3] shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized[4] to hear appeals from the decisions of such Court.

Appeal from original decree.

(2) An appeal may lie from an original decree passed ex parte.[12]

(3) No appeal shall lie from a decree passed by the Court with the consent[15] of parties.

[1877, Ss. 540, 575; 1861, S. 23; See Order 41.]

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. "Appeal," meaning of.
4. "Court authorized to hear appeals."
5. Powers of Appellate Court. See Notes on Section 107.
6. Who can appeal.
7. Co-plaintiffs.
8. Co-defendants.
9. Appeal by minor.
10. Right of appeal, when lost.
11. Execution proceedings.
12. Appeal against ex parte decree.
13. Appeal against amended decree.
14. Appeal against decree passed without jurisdiction.
15. Appeal against consent decree.
16. Appeal as to costs. See Section 35, Notes 29, 32 and 33.
17. Nature of grounds. See O. 41, R. 1, Notes 11 and 12.
18. Valuation for purposes of appeal.
19. Court-fee.
20. Abatement of appeal. See Order 22.
21. Limitation. See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn.
22. Appeals under other laws.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Abatement of appeal by subsequent supersession of decree by amendment in trial Court. See Note 2.

Advocate-General and relators — Appeal by, under Section 92. See Note 6.

Appeal against fresh decree on remand where no appeal from original decree. See Note 10.

Appeal by a party with no subsisting interest. See Note 6.

Appeal by agent. See Note 6.

Appeal by benamidar. See Note 6.

Appeal by party exonerated or struck out. See Note 6.

Appeal by persons not parties to the suit or decree. See Note 6.

Appeal by representatives of parties to the suit. See Note 6.

Appeal by transferee after decree. See Note 6.

Appeal fruitless owing to subsequent events — Dismissal. See Note 3.

Appeal is continuation of suit. See Note 3.

Burden of proving right of appeal. See Note 6.

Clause (3) and orders by consent. See Note 15.

Compromise decree—Matters outside suit—Appealability. See Note 15.

Decree—Definition. See Note 6; see section 2, sub-section (2) and Notes.

Decree on disputed compromise—Appealability of. See Note 15.

Decree on oath — Appeal by non-consenting party. See Note 15.

Ex parte decree not set aside — No bar to appeal. See Note 12.

Failure to draw up a formal decree — No appeal. See Note 6.
Hindu reversioner — Appeal by. See Note 6.
Inapplicability of the section to Letters Patent Appeals. See Note 2.
Inapplicability of the section to "Orders." See Note 2 and Section 2 (2) Notes.
Judgment or finding—No appeal from. See Note 6.
Nature of right of appeal. See Note 2.
Power of lower Appellate Court to re-hear, pending second appeal. See Note 12.
Powers of original Court in respect of *ex parte* decrees on appeal. See Notes 2 and 12.
Remedies against *ex parte* decrees. See Note 12.
Second appeal against *ex parte* decree in first appeal. See Note 12.
Second appeal by parties, not impleaded in first Appeal. See Note 6.
Second appeal without appealing from the order refusing to re-hear the appeal. See Note 12.
Successful party — Appeal by. See Note 6.
Valuation by consent of parties. See Note 18.
Valuation for jurisdiction as per law on date of appeal and not suit. See Note 4.
Valuation for jurisdiction different from that for court-fee. See Note 19.

1. Legislative changes. — This section corresponds to S. 540 of the Code of 1882. Under that section an appeal lay "from the decrees or from any part of the decrees" so that *provisional* decrees were also appealable.[1] This was, however, interpreted to mean that the decree or part of the decree should, in order to be appealable, be a decision relating to the disposal of the *entire* suit.[2] The words "from the decrees or from every part of the decrees" have now been omitted and the words "from every decree" substituted therefor.

Sub-section (3) is entirely new and gives legislative sanction to the view that had been held that no appeal lay from a consent decree.[3] It corresponds with S. 375 of the Code of 1882 except that certain words which occurred at the end of S. 375 have now been omitted : see Note 15.

It is useful in this connection to compare S. 49 of the Judicature Act of 1873 which provides that "no order made by the High Court or by any Judge thereof, by consent of parties, shall be subject to any appeal except by leave of the Court or Judge making such order."

2. Scope and object of the section. — It is a general principal of law that a right of appeal is not a natural or inherent right attaching to litigation.[1] A litigant having a grievance of a civil nature has, independently of any statute, a right to institute a *suit* in some Court or other unless its cognizance is expressly or impliedly barred.[2] But a right of *appeal* does not exist and cannot be assumed unless *expressly* given by *statute* or by rules having the force of statute.[3] Where a right of appeal is created after the

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Section 96 — Note 1

1. (95) 18 Mad 73 (87) (DB). (Decree directing accounts to be taken—Provisional decree.)
2. ('81) 3 Mad 13 (14) (DB).
3. See the Report of the Select Committee.

Note 2

1. ('41) 45 Cal W N 181 (183, 185) (DB).
† ('12) 39 Ind App 197 (200) : 40 Cal 21 (PC). (There must be statutory right.)
✠ ('36) 62 Cal 701 (705) : 163 Ind Cas 75 (77) (DB). (The litigant may have independently of any statute a right to institute a suit for nullifying the effect of any decision of a Court.)
('96) 18 All 375 (378) (SB). (Only the Court having jurisdiction can hear appeal.)
† ('08) 1908 All WN 211 (214). (Right must be given by statute or some equivalent authority—Overruled on another point in AIR 1923 All 490 : 45 All 506 (FB).)
('16) 3 AIR 1916 Mad 4 (5) (DB).
('12) 36 Bom 360 : 15 Ind Cas 512 (512) (DB). (Land Acquisition Act (I of 1894), Ss. 53, 54 — Award—No second appeal.)
2. See S. 9 Note 2.
3. ('43) 30 AIR 1943 All 243 (244). (Application by employee under S. 15, Payment of Wages Act, rejected as time-barred—No appeal lies.)
('42) 29 AIR 1942 Bom 279 (280) (DB). (No inherent power to sit in appeal.)
('42) 29 AIR 1942 Cal 230 (231) : I L R (1941) 2 Cal 366.
('42) 29 AIR 1942 Lah 201 (203) (DB). (Appeal is creature of statute — Legislature may delegate power to create right of appeal to other authority.)
('41) 28 AIR 1941 All 355 (356). (There is no provision in the U. P. Tenancy Act which gives a right of appeal against an order of remand passed by a District Judge in an appeal against a decree of Assistant Collector of the first class in a suit for profits under S. 227, Agra Tenancy Act.)

commencement of a proceeding the right will not apply retrospectively to the proceeding so as to make orders therein appealable, unless there is express provision to the contrary.[4] Nor can parties confer a right of appeal upon themselves in any matter by *agreement* or mutual *consent*.[5]

An appeal lies under this section only from a *decree*. No appeal lies from a *finding* in a judgment.[6] As to the meaning of decree, see S. 2 (2). As to whether an appeal will lie before a decree is formally drawn up, see S. 2 (2), Note 8. See also Note 6.

('41) 28 AIR 1941 Cal 530 (532) : ILR (1941) 2 Cal 402 (DB). (Application by judgment-debtor under S. 36 (6) (a) (i) of Bengal Money Lenders Act refused—No appeal.)
('41) 28 AIR 1941 Mad 577 (578).
('41) 28 AIR 1941 Oudh 590 (591) (DB).
('41) 28 AIR 1941 Pat 225 (225) : 20 Pat 561 (SB).
('41) 45 Cal W N 181 (183) (DB). (The decision of the election tribunal under S. 47 of the Calcutta Municipal Act is intended to be final and no appeal lies.)
('40) 44 Cal W N 753 (754) (DB) (Order under S. 38 of the Landlord and Tenant Procedure Act does not come within S. 47, C. P. Code—No second appeal lies from such an order.)
('40) 27 AIR 1940 Oudh 196 (197) : 15 Luck 456. (Decree in a suit under S. 33, U. P. Agriculturists Relief Act (XXVII of 1934) is governed by C. P. Code—Decree is appealable.)
('39) 26 AIR 1939 Cal 717 (717) (DB). (The Bengal Tenancy Act does not provide for an appeal against an order in a proceeding under S. 26G though it makes such provision in other sections.)
('39) 26 AIR 1939 Cal 705 (705) : ILR (1939) 2 Cal 366 (DB). (In Bengal Tenancy Act the words "shall have the effect of a decree" do not provide for an appeal.)
('88) 11 Mad 309 (312) (FB).
('88) 11 Mad 319 (321) (DB). (Application to set aside sale in execution dismissed for default — No appeal.)
('35) 22 AIR 1935 P C 5 (6) (PC).
('35) 22 AIR 1935 Pat 261 (262) : 14 Pat 236 (DB).
('35) 22 AIR 1935 Rang 267 (270) : 13 Rang 457 (FB).
('36) 62 Cal 701 (705) : 163 Ind Cas 75 (77) (DB).
('36) 23 AIR 1936 All 376 (377) (DB).
('36) 23 AIR 1936 Cal 424 (425).
('36) 23 AIR 1936 Cal 688 (690) : I L R (1937) 1 Cal 699 (SB). (Right of appeal must be given by express enactment—It cannot be implied.)
('36) 23 AIR 1936 Mad 514 (516) : 59 Mad 551 (DB). (Case governed by special statute—No right of appeal except as provided therein.)
('37) 24 AIR 1937 Oudh 381 (383) : 13 Luck 523 (DB).
('37) 24 AIR 1937 Cal 427 (429).
('38) 25 AIR 1938 Oudh 18 (19).
†('34) 21 AIR 1934 Mad 103 (104, 110, 111) : 57 Mad 271 (FB). (Order of District Judge under S. 84 (2) of Madras Hindu Religious Endowments Act (II of 1927)—Not appealable.)
('34) 21 AIR 1934 Mad 360 (364) : 57 Mad 670 (DB). (Right of appeal—Creature of statute—Rests with persons in whom statute vests it.)
('88) 11 Mad 26 (34) : 14 Ind App 160 (P C). (Order of District Judge filling vacancy on committee not appealable—Pagoda Act.)
('11) 36 Mad 16 (17) : 10 Ind Cas 879 (879, 880) (DB).
†('22) 9 AIR 1922 Lah 369 (376, 377) : 3 Lah 296 (DB).
('29) 16 AIR 1929 Rang 198 (199). (In cases under the Code, right of appeal exists only if given by the Code.)
†('25) 12 AIR 1925 All 380 (382) : 47 All 513 (FB). (A right of appeal is a right conferred on the suitor.)
('25) 12 AIR 1925 Oudh 260 (261). (Express rule or rule by unavoidable implication.)
('12) 40 Cal 21 (27) : 39 Ind App 197 : 16 Ind Cas 188 (189) (PC).
('13) 20 Ind Cas 763 (765) (PC).
('14) 1 AIR 1914 Bom 32 (32) : 38 Bom 337 (DB).
†('16) 3 AIR 1916 Cal 361 (364) : 43 Cal 857 (SB).
('18) 5 AIR 1918 Cal 435 (436) : 45 Cal 926 (DB).
('87) 9 All 445 (446).
('01) 23 All 227 (232) : 28 Ind App 11 (PC).
('06) 28 All 545 (550) (FB).
('96) 20 Bom 803 (806) (DB).
('04) 27 Mad 504 (508) (DB).
(1891) 1891 App Cas 210 (213), Lane v. Esdaile.
[*See also* ('33) 20 AIR 1933 Cal 132 (134) : 60 Cal 618 (DB). (Limits on appeal by Indian Legislature.)
('36) 23 AIR 1936 Pat 119 (120). (A wrong decision, even though it relates to jurisdiction, would not give a right of appeal where otherwise no appeal lay.)]

4. ('43) 30 AIR 1943 Mad 208 (208) (DB). (AIR 1929 Mad 381 : 52 Mad 361 followed.)

5. ('41) 28 AIR 1941 Rang 199 (200) (DB).
('11) 38 Cal 639 (669) : 12 Ind Cas 464 (476) (DB). (Court hearing an appeal, when it is not authorized to do so, its order will be a nullity.)
†('12) 13 Ind Cas 170 (171) (DB) (Cal).
('13) 16 Oudh Cas 36 (41) : 18 Ind Cas 122 (124).
('89) 13 Bom 650 (652) (DB).
('02) 1902 Pun Re No. 36, p. 135 (137) (FB).
('37) 24 AIR 1937 Cal 427 (429).
(1878) 3 Q B D 1 (4), Sandbank v. North Stratford-hire Railway.
✠('67) 7 Suth W R 222 (223).
('05) 2 Cal L Jour 384 (387) (DB).

6. ('42) 29 AIR 1942 Bom 279 (280) (DB). (Section 6-F of the Mussalman Wakf Act, provides that a finding recorded under S. 6C shall be final—*Held* no appeal lay—Further held the Court will not hear appeals from decrees which have not been drawn up but hear appeals only from decrees which have been properly drawn up.)
('41) 28 AIR 1941 Oudh 590 (592) (DB). (Finding as to maintainability of suit—No appeal.)
('38) 42 Cal W N 492 (493, 494). (No appeal can be taken to Court authorized to hear appeals unless a decree is drawn up.)

Section 104 deals with appeals from *orders* and S. 96 with appeals from *decrees*. The latter section does not, however, confer a right of appeal from *all* adjudications which are decrees, but confers such right only where it is not expressly otherwise provided in the body of the Code or by any other law for the time being in force.[7] Where an order comes under S. 104, it is appealable notwithstanding a decree has been passed subsequently and the decree is not appealed against.[8]

The expression "Court authorised to hear appeals" in the section has been held to mean either the Court authorised to hear appeals from the Courts in question generally, or else the Court authorised to hear such appeals as the appeal in question.[9]

This section does not apply to appeals within the High Court, that is from a single Judge of the High Court to a Bench thereof. Such appeals are regulated by the Letters Patents issued to the respective High Courts.[10] But as regards *procedure*, the Code and the rules contained therein apply to such appeals save in so far as the Code specially provides to the contrary.[11]

By a settled course of practice the procedure in Vice-Admiralty cases is governed

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† ('36) 62 Cal 701 (704) : 163 Ind Cas 75 (77, 79). ('38) 25 AIR 1938 Oudh 18 (19).

7. ('90) 12 All 129 (155) (FB).
('84) 8 Bom 269 (270) (DB). (It is not provided that no appeal shall lie from a decree under S. 77, Registration Act, III of 1877.)
† ('39) 26 AIR 1939 All 233 (234). (In the absence of any provision in the C. P. Code or any other Act restricting appeals, S. 96 will apply to all the decrees which are passed by any Civil Court exercising original jurisdiction.)
('39) 26 AIR 1939 All 552 (554) : I L R (1939) All 557 (DB) (Declaration contemplated by cl. (2), S. 33 of U. P. Agriculturists' Relief Act, amounts to a decree and is appealable — There is no provision in that Act or in any other law barring appeals from decree passed in such a case — Such decree is therefore appealable under the general provisions of S. 96.)

8. *See also* ('33) 20 AIR 1933 Pat 634 (635) (DB). (Order refusing to recognise adjustment under O. 21 R. 2 appealable even th ugh final decree has followed the said order and has not been appealed against.)

9. ('86) 13 Cal 232 (235) (DB). (This section confers rights on parties and not jurisdiction on Court.)

10. ('40) 27 AIR 1940 Nag 39 (39) : I L R (1940) Nag 141 (FB).
('16) 3 AIR 1916 Cal 973 (973) : 43 Cal 90 (DB). (Clause 15 of the Charter.)
✣ ('23) 10 AIR 1923 Bom 218 (224, 225) (DB). (Letters Patent (Bom), Clause 36.)
('36) 23 AIR 1936 Mad 134 (135) : 59 Mad 293 (DB).
('37) 24 AIR 1937 Rang 268 (269): 1937 Rang L R 97 (DB).
† ('19) 6 AIR 1919 Bom 1 (7, 9) : 43 Bom 433 (FB). (Clause 36, Letters Patent.)
('02) 25 Mad 555 (558) (DB).
('09) 33 Bom 216 (218) : 2 Ind Cas 294 (295) (DB). (Order of Single Judge of High Court deciding rights of parties — Appeal lies under the Letters Patent.)
('13) 18 Ind Cas 253 (253, 254) (SB) (Cal). (Letters Patent (Cal), Clause 15 — Dissentient appellate judgment—Further appeal lies therefrom.)
('16) 3 AIR 1916 Mad 883 (885) : 39 Mad 1196 (DB). (Order by Single Judge on claim petition.)
('16) 3 AIR 1916 Mad 1220 (1221) : 39 Mad 235 (FB). (Order of Single Judge refusing to interfere in revision is a "judgment.")
('16) 3 AIR 1916 Mad 745 (745). (Order of Single Judge staying further trial is not "judgment.")
('15) 2 AIR 1915 Cal 771 (771): 42 Cal 735 (DB). (Order of Single Judge for security before granting leave to defend summary suit—No appeal lies.)
('17) 4 AIR 1917 Bom 62 (78) (SB). (Appeal from the original side was heard by Bench of two Judges — Upon their differing, appeal should be decided by senior Judge—Clause 36, Letters Patent.)
('13) 37 Bom 572 (574) (DB).
('17) 4 AIR 1917 Cal 494 (495) (DB).
('16) 3 AIR 1916 Cal 838 (840). (Order discharging rule under S. 115 is not a judgment.)
('08) 35 Cal 1096 (1098) (DB). (Order of remand of Single Judge is judgment.)
† ('07) 34 Cal 619 (624) (SB). (Order granting leave to sue under Cl. 12 of the Letters Patent is a judgment.)
✣ ('06) 33 Cal 1323 (1341, 1343) (SB). (Order refusing to enlarge time for preferring appeal is not a judgment.)
('90) 17 Cal 66 (83) (DB). (Order of one Judge in exercise of Admiralty or Vice-Admiralty jurisdiction — Appeal lies under Letters Patent.)
('09) 34 Bom 1 (9) : 1 Ind Cas 14 (20) (DB). (Order amounting to "judgment" within Cl. 15 of the Letters Patent is appealable.)
('09) 2 Ind Cas 157 (158) (DB) (Bom). (Formal order or order regulating procedure is not judgment.)
('07) 30 Mad 143 (144) (DB). (Order refusing to issue commission for examination of witnesses is a judgment.)

11. † ('21) 8 AIR 1921 P C 80 (82, 83): 48 Cal 481: 48 Ind App 76 (PC).
Also see S. 117 N. 3, S. 129 N. 2, S. 141 N. 5, O. 41 R. 10, N. 5 and L. P. Cl. 15, N. 18.

by the Code of Civil Procedure.[12] This chapter on appeals will also, therefore, it is to be presumed, apply to such cases.

3. "Appeal," meaning of. — The word 'appeal' has not been defined in the Code and has therefore to be construed in its natural and ordinary meaning. It has been held to mean "the removal of a cause from an inferior to a superior Court for the purpose of testing the soundness of the decision of the inferior Court."[1] It is thus a remedy provided by law for getting the decree of the lower Court cancelled[2] and is, in fact, a complaint made to the higher Court that the decree of the lower Court is unsound and wrong.[3]

An appeal is not a fresh suit but is only a continuation of the original proceedings and a stage in the suit itself.[4] The decree passed by the Appellate Court is a decree in the suit[5] and the appellate judgment stands in the place of the original judgment for all legal purposes.[6]

An appeal differs from a *review* in that the primary intention of the review is the reconsideration of the subject by the *same Judge* under certain conditions, while an appeal is a rehearing by *another tribunal*.[7]

An appeal differs also from a revision. In an appeal the points to be decided are those on which the parties are at variance. But a revision is a matter between a higher Court and a lower Court; in fact revisional powers may, in certain cases, be exercised without an appeal or an application by any of the parties concerned.[8]

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12. ('90) 17 Cal 337 (340). (Section applies to High Court in ordinary civil suits and in its Vice-Admiralty jurisdiction.)
('90) 17 Cal 66 (83) (DB).

Note 3

1. ✠('99) 22 Mad 68 (80) (FB). (The explanation of the term in Wharton's Law Lexicon.)
† ('08) 1908 All W N 211 (213). (It is a continuation of a litigation commenced by a suit — Overruled on another point in AIR 1923 All 490 : 45 All 506 (FB).)
2. ✠(99) 22 Mad 68 (85) (FB).
† ('33) 20 AIR 1933 Bom 255 (257, 260) : 57 Bom 338 (DB). (Appeal against order granting review is also appeal, though incompetent.)
('32) 19 AIR 1932 P C 165 (167): 59 Ind App 283: 60 Cal 1 (PC). (Application to Appellate Court, asking it to set aside or revise decision of a subordinate Court is an appeal, though it is irregular or incompetent.)
3. ('73) 6 N W P H C R 19 (21) (FB).
('15) 2 AIR 1915 Mad 548 (549) (DB). (Appellant must show that judgment is wrong even if one of the respondents does not contest.)
[*See also* ('32) 19 AIR 1932 Bom 90 (92): 55 Bom 785 (DB).]
4. ('36) 23 AIR 1936 Lah 583 (583).
('15) 2 AIR 1915 Mad 1133 (1134) (DB).
('72) 18 Suth W R 261 (269) (DB). ("Subject-matter in dispute" would mean dispute in suit.)
('03) 26 Mad 91 (95, 96) (FB). (The final decree in the appeal will thus be final decree in suit.)
('14) 1 AIR 1914 Mad 564 (565) : 37 Mad 1: 7 Ind Cas 202 (204) (DB)
† ('15) 2 AIR 1915 Mad 1223 (1229, 1233): 39 Mad 195 (FB).
('16) 3 AIR 1916 Mad 732 (732). (Order 41 R. 32 leads to the same conclusion.)
('16) 3 AIR 1916 Mad 883 (884) : 39 Mad 1196 (DB).
('14) 1 AIR 1914 Cal 614 (615) (DB). ("Suit" includes appealable stage thereof.)
('18) 5 AIR 1918 Mad 998 (1002, 1006) : 40 Mad 1 (FB). (Value of subject-matter must be valuation at institution—26 Mad 91 (FB) followed.)
('19) 6 AIR 1919 Lah 180 (181) : 1919 Pun Re No. 79 (DB). (Therefore no person can appeal unless he is party to the suit.)
('01) 24 Mad 39 (41, 42) (DB). (Right of appeal subsisting on date of suit not lost by subsequent repeal of right of appeal—See S. 8, Madras General Clauses Act, 1891.)
Also see S. 10 N. 7.
5. † ('17) 4 AIR 1917 Mad 597 (598) (DB). (And on the filing of an appeal judgment ceases to be *res judicata* and becomes *sub judice*.)
('88) 15 Cal 94 (99) (DB).
('01) 28 Cal 23 (27) (DB).
('08) 31 Mad 268 270) (DB).
('03) 26 Mad 91 (95) (FB).
✠('15) 2 AIR 1915 Mad 1223 (1230, 1231) : 39 Mad 195 (FB).
('94) 18 Bom 203 (205) (DB). (Though appeal be against a part of the decree, and appeal simply confirms decree of lower Court.)
[*See also* ('31) 18 AIR 1931 Nag 17 (18) : 27 Nag L R 251. (Difference between appeal and revision pointed out.)]
Also see S. 2 (2) Note 9.
6. ('15) 2 AIR 1915 Mad 1133 (1134) (DB). (Therefore possession taken by a person pending an appeal is subject to the result of the appeal.)
[*See also* ('33) 20 AIR 1933 Pat 209 (209) (DB).]
7. (1859) 7 Moo Ind App 283 (304) (PC).
8. ('32) 19 AIR 1932 All 651 (653) : 54 All 891.

The expression "appeal under the Civil Procedure Code" is not restricted to an appeal the *right* to prefer which is conferred by that Code but means an appeal the *procedure* in regard to which is governed by the Code.[9]

The use of the words "an appeal" in the section does not mean "one appeal only." Where an appeal is dismissed for default, a fresh appeal will not be barred if brought within the period of limitation for filing the appeal.[10]

An appeal which, even if successful, would be entirely fruitless should be dismissed as being incompetent. Thus, where in execution the Court directed the sale in a particular order and the judgment-debtor appealed but before the appeal was heard the properties were sold, the appeal, even if successful, will become infructuous and should be dismissed.[11]

4. "Court authorized to hear appeals." — This section does not deal with *jurisdiction* of Courts but only with the *right of appeal.*[1] The jurisdiction to entertain appeals is given by the various Acts in the different Provinces[2] and it is only that Court to which jurisdiction is so given in any particular matter that can hear the appeal.[3]

A general rule adopted in the various Acts is that an appeal from a decree or order of a District Judge or an Additional District Judge or of a Sub-Judge in suits of the value of over Rs. 5000[4] will lie to the High Court; but that an appeal from all other decrees or orders of a Sub-Judge and from all those of a District Munsif will lie to the District Judge,[5] or if specially authorized by the Local Government to an Assistant Judge

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('33) 20 AIR 1933 Sind 200 (202) : 28 Sind L R 167 (DB)
Also see S. 115 Note 3.

9. † ('20) 7 AIR 1920 Mad 407 (408) : 43 Mad 51 (DB).
[*See also* ('29) 16 AIR 1929 Mad 223 (225) (DB).]

10. ('23) 10 AIR 1923 Pat 514 (516) : 2 Pat 739 (DB). (It can be held barred only if the order of dismissal of first appeal would operate as *res judicata*.)
('21) 8 AIR 1921 Cal 455 (456) : 48 Cal 157 (DB). (Which seems to support the contrary view is a case under the special provision of the Bengal Tenancy Act and is clearly distinguishable.)
Also see O 41, R. 17, N. 9.

11. (12) 15 Ind Cas 529 (529) (DB) (Cal).
† ('16) 3 AIR 1916 Cal 272 (274) (SB). (Unless before filing the appeal, the appellant has obtained an order for stay.)
[*See also* ('32) 19 AIR 1932 Nag 121 (126, 127) : 28 Nag L R 233 (FB). (A case under Criminal Procedure Code.)]

Note 4

1. ('86) 13 Cal 232 (235) (DB).
2. See the Bengal, Agra and Assam Civil Courts Act, XII of 1887, Ss. 20 and 21; The Bombay Civil Courts Act, XIV of 1869, Ss. 8, 16, 17, 26 and 27; The Madras Civil Courts Act, III of 1873, S. 13; The Punjab Courts Act, VI of 1918, Ss. 38 and 39; The Oudh Courts Act, IV of 1925, Ss. 38, 39; The C. P. Courts Act, I of 1917, S. 20; The Sind Courts Act, VII of 1926; The Sambalpur Civil Courts Act, IV of 1906, S. 2.
3. ('96) 18 All 375 (378) (FB).
('18) 5 AIR 1918 Cal 435 (436) : 45 Cal 926 (DB).
('97) 24 Cal 249 (251) (DB). (Suit for rent against several tenants collectively — Aggregate amount sued for exceeding Rs. 100—Appeal lies to the Judicial Commissioner. (Bengal Act I of 1879).)
[*See also* ('39) 26 AIR 1939 Cal 705 (705) : I L R (1939) 2 Cal 366 (DB). (The C. P. Code makes no provision for the hearing of appeals from the decision of revenue officers—Court is competent to hear appeals from a decision under S. 26 G, sub-s. (5), Bengal Tenancy Act.)]
4. ('92) 15 Mad 69 (70) (DB). (Suit for partition—Value of the suit is value of the share claimed less than Rs. 5000—Appeal to District Court.)
('37) 24 AIR 1937 Oudh 12 (15) : 12 Luck 586 (DB). (Valuation of suit above Rs. 5000—Suit decided by Subordinate Judge before Chief Court added explanation to R 268, Oudh Civil Rules — Appeal lies to High Court.)
† ('79) 5 Cal 489 (493) : 4 Cal L Rep 491 (496, 497) (DB). (Suit for property valued at more than Rs. 5000—Appeal lies to High Court.)
('97) 1897 Bom P J 144 (145) (DB). (District Judge has no jurisdiction to hear an appeal, where the value of the subject-matter exceeded Rs. 5000.)
5. See the various Local Acts cited in foot-note 2.
('31) 18 AIR 1931 Cal 159 (160) : 59 Cal 829 (DB). (Mortgage suit for less than Rs 5000—Decree for more than Rs. 5000 — Appeal lies to District Judge.)
† ('12) 36 Bom 360 (366) : 15 Ind Cas 512 (514) (DB). (Amount in dispute less than Rs. 5000—Appeal lies to District Court. (Bombay Civil Courts Act, XIV of 1869, Section 16).)
('09) 33 Bom 371 (372) : 2 Ind Cas 492 (492) (DB). (Compensation in land acquisition case awarded less than Rs. 5000—Appeal lies to District Court.)
('95) 19 Bom 198 (201) (DB). (Suit for account valued at Rs. 130—Order rejecting plaint—Appeal lies to District Judge.)
('14) 1 AIR 1914 Bom 32 (32) : 38 Bom 337 (DB). (Court authorized to hear appeals from the Assistant Judge's Court is the District Court—Bombay.)
('89) 12 Mad 472 (473) (DB).

or a Sub-Judge.[6]

It is an oft-repeated principle of law that the failure to raise a plea of want of jurisdiction in the Appellate Court does not clothe that Court with a jurisdiction not given to it.[7] But the parties may waive *inquiry as to facts* necessary for the determination of the question of jurisdiction where that question depends upon facts to be ascertained.[8]

A Court is not precluded from hearing an appeal by the mere fact that at one time the plaint had been presented in that very Court.[9]

Where a suit was tried by Court A and after decree, the *venue* was transferred to Court B on account of re-distribution of districts, an appeal from the decree of Court A lies to the Court to which appeals would lie from the Court B.[10]

5. Powers of Appellate Court. — See Notes on S. 107.

6. Who can appeal. — In order to sustain an appeal it is necessary to show that the party desirous of appealing has the *right of appeal* and that the Court to which he would prefer the appeal has the *right to entertain* it.[1] As a general principle no one can appeal from a decree unless he was a *party* to the action or was treated as such or is the legal representative of the party, or unless his privity in estate, title, or interest is apparent on the face of the record.[2]

In order to give a person a right of appeal *under this section*, two conditions must be satisfied—

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6. ('13) 16 Oudh Cas 197 (198) : 21 Ind Cas 388 (388) (DB). (Sub-Judge authorised to entertain application under Succession Certificate Act — Proviso to S. 26 (2)—Appeal lies to District Court.)
7. ('89) 13 Bom 650 (653) (DB).
('35) 22 AIR 1935 Mad 723 (724).
✠('12) 16 Ind Cas 940 (942) (DB) (Cal).
('09) 34 Bom 171 (175) : 4 Ind Cas 830 (831) (DB). (Conduct of the parties did not give jurisdiction.)
('10) 35 Bom 24 (27) : 7 Ind Cas 950 (952) (DB).
8. See S. 9 Note 5.
9. ('15) 2 AIR 1915 All 5 (5) (DB).
10. † ('15) 2 AIR 1915 Mad 362 (363) : 37 Mad 477.
('06) 28 All 93 (94, 95) (DB). (*Vide* S. 17 (1) of Act XII of 1887.)
† ('07) 34 Cal 636 (640) (DB).
('10) 7 Ind Cas 864 (864) (DB) (Mad). (Doubted whether first Court will lose jurisdiction in a matter decided by it by there-distribution of areas.)

Note 6

1. ('86) 13 Cal 232 (235) (DB).
2. ('19) 6 AIR 1919 Lah 180 (181) : 1919 Pun Re No. 79 (DB). (Party to the suit.)
† ('35) 22 AIR 1935 Pat 261 (263) : 14 Pat 236 (DB). (District Judge formulating scheme in pursuance of High Court's order—Person appointed as manager—Another person not party to original action has no *locus standi* to appeal from order of District Judge.)
✠('34) 21 AIR 1934 Mad 360 (363) : 57 Mad 670 (DB). (Decree against Official Receiver—A creditor not a party to the suit cannot appeal under C. P. Code though he may under the Provincial Insolvency Act.)
('75) 24 Suth W R 259 (259) (DB).
(1862) 1 Mad H C R 8 (9).
('91) 13 All 290 (294, 295). (Party treated as representative can appeal.)
('08) 32 Bom 155 (156) (DB). (Suit by Advocate-General under S. 92—Relators cannot appeal.)
('83) 9 Cal 629 (630) (DB). (The defendant appealed in first Appellate Court making the 'next friend' alone respondent — Next friend appealed to High Court—Defendant cannot object.)
† ('99) 26 Cal 539 (541, 542) (DB). (Auction-purchaser though not party to a suit is a party to a proceeding—Second appeal lay at his instance.)
† ('05) 9 Cal W N 584 (588). (Whether a party is aggrieved by decree—Question of fact.)
('93) 16 Mad 290 (292) (DB). (Second appeal against person not party to first appeal does not lie.)
('92) 1892 All W N 139 (139).
† ('10) 6 Ind Cas 244 (247) (DB) (Cal). (Second requisite — That appellant has an interest in subject-matter—Third requisite—He had been prejudicially affected by judgment—Hindu wife.)
('12) 16 Ind Cas 693 (694) (DB) (Mad). (Decree against person not party to first appeal—He cannot prefer second appeal.)
('18) 5 AIR 1918 Pat 364 (365) (DB). (Not a party to suit.)
('18) 5 AIR 1918 Lah 263 (263). (Must be a party to a suit and aggrieved by decree.)
('04) 14 Mad L Jour 139 (140) (DB). (Suit on mortgage by Hindu widow — Reversioner made party as claiming under settlement can appeal from decree.)
('09) 12 Oudh Cas 390 (392) : 4 Ind Cas 781 (783). (Person made defendant under order of Court has a right of appeal.)
[*See* ('38) 25 A I R 1938 Lah 70 (70). (Necessary party impleaded in suit but not in appeal—Such party has right of second appeal.)]
See also cases in foot-note (18).

(1) the subject-matter of the appeal must be a decree,[3] that is, a conclusive determination of "the rights of the *parties* with regard to all or any of the *matters in controversy* in the suit,"[4] and,

3. ('43) 30 AIR 1943 Cal 177 (179) (DB). (Order under S. 26 (g) of Bengal Tenancy Act has force of decree and so is appealable as a decree — Contra AIR 1939 Cal 717 (717) : Such order is not appealable as it is not passed in a suit and S. 96 only applies to decrees passed in a suit.)
('42) 29 AIR 1942 Mad 406 (406) (DB). (Where the lower Court has dealt and decided a question between a judgment-debtor and a stranger auction-purchaser regarding delivery as one under S. 47 its decision is the determination of any question within S. 47 within the meaning of the definition of "decree" and is open to appeal.)
('41) 28 A I R 1941 Cal 530 (532) : I L R (1941) 2 Cal 402 (DB). (An order made under S. 36 (6) (a) (i) of the Bengal Money-lenders Act, either granting or refusing a prayer for reopening a decree does not come under S. 47, C P. Code, and is not appealable as such. If the decree is reopened and a new decree made, an appeal would undoubtedly lie against the new decree which supersedes the old, under S. 96 C. P. Code.)
('41) 28 AIR 1941 Mad 817 (819) : I L R (1942) Mad 60 (DB). (The dismissal of application for a final decree in a suit for sale on a mortgage is appealable as a decree under S. 96, C. P. Code.)
('40) 27 AIR 1940 Oudh 196 (197) : 15 Luck 456. (Decree in a suit under S. 33, U. P. Agriculturists' Relief Act (XXVII of 1934) — Suit governed by C. P. Code—Decree is appealable.)
('35) 22 AIR 1935 Lah 302 (303) : 16 Lah 990 (DB). (Order under S. 73 is appealable as a decree if it falls under S. 47.)
†('73) 6 N W P H C R 19 (21, 23) (FB). (There is no appeal from a decision which is not a decree.)
('92) 19 Cal 485 (487) (DB). (Order made by Munsif under Bengal Tenancy Act, authorizing the zamindar to acquire raiyat's holding is not decree—Not appealable.)
('87) 14 Cal 312 (313) (DB). (Application under S. 93, Bengal Tenancy Act — Not a suit — No appeal.)
† ('34) 21 AIR 1934 Oudh 307 (309):9 Luck 701 (DB). (Plaintiff's suit claiming contribution from talukdari estate of defendant—Finding in favour of plaintiff but amount not determined—Finding amounts to preliminary decree.)
† ('35) 22 AIR 1935 Mad 373 (377) (DB). (Order in proceeding under S. 44 of the Madras Hindu Religious Endowments Act is not decree.)
† ('36) 62 Cal 701 (704):163 Ind Cas 75 (77, 79) (DB). (Appeal cannot lie against a finding in a judgment.)
('36) 23 AIR 1936 Peah 79 (79, 80) (DB). (Order of remand under inherent powers under S. 151, C. P. Code, 1908, is not decree—No appeal lies.)
('36) 23 A I R 1936 Sind 166 (167) : 30 Sind L R 170 (DB) (Order in exercise of inherent jurisdiction in execution proceedings is not decree and hence not appealable.)
('37) 24 AIR 1937 Oudh 381 (383) : 13 Luck 523 (DB). (Court ordering appointment of certain persons as trustees of wakf on their mere applications, not as Civil Court but as kazi under Mahomedan law — Order appointing mutawallis not being 'decree' as not having been made in suit, appeal therefrom is not competent under S. 96.)
('38) 25 AIR 1938 Oudh 18 (19). (There is no provision for any appeal against a mere finding irrespective of the decree or order.)
('39) 26 AIR 1939 All 552 (554) : I L R (1939) All 557 (DB). (Declaration contemplated by cl. (2) of Section 33, U. P. Agriculturists' Relief Act, is a decree and is appealable.)
('39) 26 AIR 1939 Bom 65 (65, 66). (Order of Appellate Court refusing to stay execution is not appealable as it is not a decree.)
('39) 26 AIR 1939 Bom 182 (183) : I L R (1939) Bom 389 (DB). (Order passed on petition praying that value of property to be sold in execution of decree should be stated in sale proclamation is not decree and is not appealable.)
('10) 34 Bom 182 (188):4 Ind Cas 829 (830) (DB). (A decree is something different from a judgment.)
† ('12) 8 Nag L R 92 (96) : 15 Ind Cas 935 (936). (Until the decree has been drawn there can be neither appeal nor execution.)
('12) 16 Mad Cas 45 (46) (DB) (Mad).
('25) 12 AIR 1925 Cal 932 (932):52 Cal 662 (DB). (Right to pass a decision which is appealable as a decree is also appealable as such.)
('08) 4 Nag L R 54 (56). (Order refusing to pass order absolute on a conditional decree in a mortgage suit is appealable as a decree.)
('83) 7 Bom 464 (466) (DB). (Appeal does not lie from a judgment but only from the decree.)
('68) 9 Suth W R 309 (311) (SB). (If there is no decree there is no appeal under this section.)
[*See also* ('43) 30 AIR 1943 Mad 381 (382) (DB). (Court holding stranger to decree to be representative of party to suit under S. 47 and passing order against him—Stranger can appeal against order.)
('40) 44 Cal W N 753 (754) (DB). (Order under S. 38 of the Landlord and Tenant Procedure Act does not come under S. 47, C. P. Code. No second appeal from such order.)
('37) 24 AIR 1937 Nag 132 (133) : I L R (1937) Nag 6. (Where two suits are consolidated there is only one judgment and one decree in one suit and only one appeal is necessary.)
('24) 11 AIR 1924 Cal 1006 (1007) (DB).
('37) 24 AIR 1937 Lah 800 (801). (Suit on pronote executed by *A*, *B*, *C* and *D*—Court ordering that suit could not proceed against *A* on ground that pronote was signed by him at place beyond that Court's jurisdiction — Order *held* was tantamount to rejection of plaint as regards *A*, and appeal therefore was competent — Even if no appeal lay, revision was competent as there was a case decided.)]
[See however ('29) 16 AIR 1929 Mad 223 (225) (DB). (Appeal under S. 96 though decision may not be a decree.)]

4. See Section 2 (2).
('43) 30 AIR 1943 Cal 155 (155). (The order staying execution proceedings against one of the judgment-debtors and allowing them to go against

(2) the party appealing must have been *adversely affected* by such determination.[5] Further, he can appeal only in such matters as have adversely

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others under S. 3 of Assam Act, I of 1941, conclusively determines the claim of the decree-holder to execute the decree. It amounts to a decree within the meaning of C. P. Code and is therefore appealable.)

('43) 30 AIR 1943 Nag 204 (209) : ILR (1943) Nag 241 (FB).

('41) 28 AIR 1941 Oudh 590 (592) (DB). (An affirmative finding on the preliminary question whether the suit for partial pre-emption was maintainable is not a decree within the meaning of S. 2 (2) and therefore is not appealable.)

('41) 28 AIR 1941 Pat 1 (2): 19 Pat 862 (DB) (An order determining instalments under S. 11 of the Bihar Money-lenders Act is not appealable as an order under S. 47, C. P. Code.)

('41) 28 AIR 1941 Pat 385 (387):20 Pat 417 (DB). (An order striking off the names of those defendants against whom the suit is held not to be maintainable is a decree within the meaning of S. 2 (2) and is appealable as such even though the Court erroneously refers to the order as being one under O. 1 R. 10, C. P. Code.)

('34) 21 AIR 1934 Mad 103 (107) : 57 Mad 271 (FB). (Order of District Judge under S. 84 (2) of the Madras Hindu Religious Endowments Act, is not a decree since the proceeding commenced by petition and so cannot be regarded as a suit.)

('37) 24 AIR 1937 All 694 (695) (DB). (Partition suit—Order passed between preliminary and final decree is an interlocutory order and not appealable.)

('28) 15 AIR 1928 Lah 931 (931). (Order refusing instalment decree under O. 20 R. 11 not appealable unless incorporated in the decree.)

† ('30) 17 AIR 1930 Lah 187 (188 to 190):11 Lah 402 (DB). (Order for staying execution is a decree and is appealable—Conflict of views and case law discussed.)

('29) 16 AIR 1929 Rang 198 (200). (Order under S. 73 of the Code is not appealable unless it comes under S. 47.)

('15) 2 AIR 1915 Cal 272 (274) (DB). (Preliminary decree—Absence of formal expression will not prevent appeal.)

('12) 8 Nag L R 92 (94) : 15 Ind Cas 935 (937). (Preliminary adjudication not finally expressed is not appealable.)

† ('11) 12 Ind Cas 745 (750) (DB) (Cal). (Conditional order is no order until condition is fulfilled.)

('19) 6 AIR 1919 Lah 418 (418). (Lower Court expressed opinion on points not necessary to decision—No appeal from such opinion.)

† ('26) 13 AIR 1926 Pat 457 (459) : 6 Pat 160 (DB). (Order of remand under S. 151 merely setting aside decree of lower Court but without deciding any of the matters in controversy is not a decree.)

('83) 7 Bom 464 (466) (DB). (No appeal lies against a merely incidental decision.)

('91) 18 Cal 469 (472) (DB). (Incidental order is not appealable.)

('12) 15 Ind Cas 566 (566) (DB) (All). (Preliminary adjudication not expressed in a decree not appealable.)

('13) 21 Ind Cas 387 (388) (DB) (Cal). (Decision on preliminary issues not appealable.)

(1861) 7 Suth W R 222 (222). (Preliminary issues decided—No appeal lies.)

('95) 18 Mad 73 (87) (DB). (A provisional decree is appealable.)

† ('31) 18 AIR 1931 Mad 471 (473, 474) : 54 Mad (337) (DB). ('Decree' appealable though termed 'order' or 'decretal order.')

('29) 16 A I R 1929 Mad 404 (405) (DB). (To be a decree for appeal, the decision must be a final disposal whichever way it has been or may have been decided.)

† ('27) 14 AIR 1927 Rang 148 (149) : 5 Rang 838 (DB). (Order refusing adjournment and dismissing suit is a decree appealable.)

('13) 19 Ind Cas 922 (924) (DB) (Sind). (Set-off claimed—Suit dismissed as barred by limitation—Decision not being one deciding both the claim and set-off is not a decree and no appeal lies.)

[*See also* ('34) 21 AIR 1934 Pat 13 (14). (Order of remand without adjudication on merits but order drawn up in the form of a decree — *Held* not decree but non-appealable order.)]

5. ('42) 29 AIR 1942 Cal 1 (17):ILR (1941) 2 Cal 434 (DB).

('41) 28 AIR 1941 Cal 530 (532):ILR (1941) 2 Cal 402 (DB). (Order under S. 36 (6) (a) (i), Bengal Money-Lenders Act whether granting or refusing prayer is not appealable — If new decree is made, appeal lies against such new decree — If application is refused, remedy is by way of revision.)

† ('17) 4 AIR 1917 Pat 585 (587, 589) (DB).

('36) 62 Cal 701 : 163 Ind Cas 75 (77) (DB). (Whether a party is adversely affected by a decree is a question of fact to be determined in each case according to its peculiar circumstances.)

('37) 24 AIR 1937 Pat 428 (429). (Suit against two persons—Claim to relief against both or either — Decree against one only — Appeal claiming relief against other is competent.)

('34) 21 AIR 1934 All 677 (679). (Appeal lies only against that part of the decree which adversely affects him.)

† ('32) 19 AIR 1932 Bom 78 (79, 80) : 56 Bom 16 (DB). (Mere fact that they were parties in lower Court does not invest them with a right to appeal.)

('28) 15 AIR 1928 Mad 854 (855) (DB).

('99) 26 Cal 539 (544) (DB).

('15) 2 A I R 1915 Cal 658 (659) : 42 Cal 1 (DB). (Order refusing rateable distribution not affecting judgment-debtor—Latter cannot appeal.)

† ('05) 9 Cal W N 584 (585).

('24) 11 AIR 1924 Oudh 52 (53): 26 Oudh Cas 374. (Though the decree is not specifically passed against him.)

('31) 18 AIR 1931 Oudh 242 (243) (DB).

('68) 10 Suth W R 94 (94) (DB).

('98) 22 Bom 718 (721) (DB).

† (83) 6 Mad 185 (186, 187) (DB). (Suit for redemption—Defendant in possession on behalf of mortgagee and not claiming any interest in himself cannot appeal.)

affected him and not from every part of the decree.[6]

The word "parties" in the first condition refers to those persons only who are ranged on *either* side as plaintiffs and defendants. Such parties, if they are adversely affected by the decree, have a right of appeal against it.[7] The words "matters in controversy in the suit" are those matters which, from the pleadings, appear to be in dispute between parties ranged on one side as plaintiffs and on the other side as defendants.[8]

With regard to the second condition it may be said as a general rule that a decision cannot be said to *adversely affect* a person unless it will operate as *res judicata* against him in any future suit.[9] Thus, a *pro forma* defendant against whom the decree will not operate as *res judicata* cannot appeal and open out the case between the plaintiff and the other defendants.[10] In order to find out whether a decision will operate as *res judicata* and will thus *adversely affect* a party, the *substance* of the decree and the judgment, and not the form must be considered,[11] and for this purpose the parties may go behind the decree and see what really the adjudication was.[12] Where a decree is

('76) 1 All 266 (267) (DB).
('05) 1905 All W N 162 (162). (Appeal by unsuccessful party—Party losing all interest in subject-matter, since—Appeal must be dismissed.)
('21) 8 AIR 1921 Cal 380 (381). (Suit dismissed — Plaintiff can appeal notwithstanding some findings in his favour.)
('94) 7 C P L R 93 (95). (Unsuccessful party can appeal though he has lost his interests in the subject-matter since the decree.)
('07) 4 Low Bur Rul 95 (98) (DB). (Suit by agent dismissed on the ground that the agent cannot sue —Principal can appeal.)
('06) 3 All L Jour 844 (845). (Suit for pre-emption —Vendee has right to appeal.)
('16) 3 A I R 1916 P C 14 (15, 16) : 38 All 440 (446) : 43 Ind App 170 (PC). (Party setting up a claim which he afterwards admits to be unfounded cannot appeal.)
('21) 8 A I R 1921 Lah 349 (350) (DB). (Stakeholder is not aggrieved by decision between claimants.)
('71) 15 Suth W R 536 (536) (DB). (Person having no *locus standi* cannot contest decree in appeal.)
('15) 2 A I R 1915 Mad 1150 (1152) (DB). (Person having no title and no *locus standi* cannot contest decree.)
('16) 3 AIR 1916 Lah 270 (270, 271) : 1916 Pun Re No. 26 (DB). (Decree against principal and agent — Principal withdrawing from contest — Agent cannot appeal.)
('09) 4 Ind Cas 629 (631) (DB) (Lah).
† ('24) 11 AIR 1924 Mad 79 (80): 46 Mad 811 (DB).
† ('15) 2 AIR 1915 Mad 294 (295) : 37 Mad 25 : 12 Ind Cas 167 (169) (DB).
('24) 11 AIR 1924 Cal 850 (851) (DB). (Decree refusing exclusive but awarding joint possession aggrieves plaintiff.)
('14) 1 AIR 1914 All 83 (83) (DB). (A party has no right to appeal against a decision in his favour on the ground that one of the findings is against him.)
('23) 10 AIR 1923 Lah 504 (504, 505) (DB). (Person not aggrieved cannot appeal.)
('23) 10 AIR 1923 Pat 404 (405). (Decree in favour of defendant 2 — He cannot appeal—He not being impleaded in first appeal by plaintiff, his rights cannot be affected in second appeal.)

See also cases in Foot-note (17).

6. ('38) 42 Cal W N 492 (494). (Decree allowing plaintiff's claim provided certain condition is fulfilled — He can appeal as to the imposition of the condition.)
('34) 21 AIR 1934 All 677 (679).
7. ('13) 16 Oudh Cas 350: 20 Ind Cas 898 (899) (FB).
('37) 24 AIR 1937 Mad 843 (845) : I L R (1937) Mad 970 (DB). (Mortgage in favour of manager of joint Hindu family—Suit by manager for rent of mortgaged land — Junior member also impleaded — Prayer for decree in favour of manager or in favour of junior member — Dismissal of suit — Appeal by junior member maintainable.)
† ('23) 10 AIR 1923 Cal 90 (91) (DB). (Transferee of a tenancy interest was sued along with his landlord by a mortgagee purchaser for possession—He can appeal since his tenancy was questioned.)
8. † ('13) 16 Oudh Cas 350 : 20 Ind Cas 898 (899).
9. See Note 46 on S. 11.
('38) 42 Cal W N 492 (495).
† ('83) 7 Bom 464 (467) (DB).
('36) 62 Cal 701 : 163 Ind Cas 75 (79).
10. ('67) 7 Suth W R 366 (366) (DB).
('75) 23 Suth W R 86 (87) (DB).
('37) 24 AIR 1937 All 368 (369) (DB).
('35) 22 AIR 1935 All 984 (985). (Landlord selling his interest—Landlord vendee bringing suit against tenants for arrears of rent joining vendor as *pro forma* defendant — Court holding tenants to be proprietors and not tenants—Vendor is aggrieved party and can appeal against such decree as decision will operate as *res judicata* against him—21 All 117 followed.)
[See however ('42) 29 AIR 1942 Cal 1 (17): ILR (1941) 2 Cal 434 (DB). (*Pro forma* defendant should ordinarily be bound by a decree obtained in his presence—If *pro forma* defendant considers that his interests with reference to the subject-matter of the suit have been prejudiced an appeal by him would be competent.)]
11. ('13) 19 Ind Cas 448 (448) (DB) (Mad). (Substance of order and not the provision of law quoted should be looked to, to see whether the appeal is competent.)
('21) 8 AIR 1921 Mad 417 (418). (Do.)
12. ('13) 21 Ind Cas 15 (18) (DB) (Mad).

absolutely in favour of a party but some issues are found against him, he has no right of appeal against the decree or the findings[13] because he is, *firstly*, not *adversely affected* thereby and *secondly* because such findings are not embodied in and do not form part of the decree.[14] As has been observed by the Calcutta High Court in *Krishna* v. *Mohesh*,[15] "the question who may appeal is determinable by the commonsense consideration that there can be no appeal where there is nothing to appeal about." But there may be cases where a decision, though on the face of it is entirely in favour of a party defendant, really negatives his right as against the plaintiff and the other defendants. In such a case he does not lose his right of appeal. Thus, where A owes a debt to B who assigns it first to C and then to D and D sues both B and C on the debt alleging that the assignment to C was void, and the suit is decreed against B and dismissed against C, the decree, though on the face of it is in favour of C, necessarily implies that the assignment in his favour is void and C has therefore a right of appeal against it.[16]

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13. ('43) 30 AIR 1943 Mad 297 (301) : ILR (1943) Mad 357 (DB). (No right to appeal simply because there is some error in the reasoning which led to the making of the decree or order.)
('70) 13 Suth W R 1 (2) (DB).
('11) 9 Ind Cas 1030 (1031) (Lah). (Issues which are against may not be regarded as *res judicata*.)
✠('85) 7 All 606 (611) (FB).
('38) 25 AIR 1938 Oudh 18 (19, 20).
('39) 26 AIR 1939 Rang 59 (62) (DB).
('12) 1912 Pun Re No. 42, p. 153. (Suit for pre-emption dismissed—Vendee cannot appeal.)
('96) 6 Mad L Jour 86 (88).
('80) 6 Cal 206 (208).
('04) 1904 Pun L R No. 84, p. 296 (301). (Wife's suit for judicial separation decreed—Finding as to adultery against her—She cannot appeal.)
('81) 3 All 152 (157) (SB). (Suit for pre-emption dismissed—Appeal against finding as to the validity of sale—Not admissible.)
('95) 17 All 174 (191) (DB).
('83) 7 Bom 464 (466) (DB).
('89) 13 Bom 650 (652) (DB). (7 Mad 145 followed.)
† ('94) 18 Bom 597 (602) (DB).
✠('85) 11 Cal 301 (306) : 12 Ind App 23 (PC).
('91) 18 Cal 647 (651) (DB).
('97) 24 Cal 900 (906) (DB).
('08) 8 Cal L Jour 552 (553) (DB).
('21) 8 AIR 1921 Cal 217 (218) (DB). (Party cannot appeal simply to attack the grounds in support of the decree.)
('21) 8 AIR 1921 Lah 349 (350) (DB).
('21) 8 AIR 1921 Lah 395 (395).
(30) 17 AIR 1930 Lah 190 (191). (No appeal by person whose prayer, e. g. for stay of sale, has been granted in effect.)
('29) 16 AIR 1929 Pat 586 (587) : 8 Pat 617 (DB).
('84) 7 Mad 145 (149) (DB).
('25) 12 AIR 1925 Mad 264 (264, 265) (DB). (Dissenting from AIR 1920 Mad 871.)
('16) 3 AIR 1916 Pat 306 (306) (DB). (Suit dismissed for want of cause of action — Defendant cannot appeal on findings of certain facts.)
('24) 11 AIR 1924 Mad 858 (859) (DB). (Findings in judgment dismissing suit not implied or embodied in the decree is no ground for appeal by defendant.)
('05) 9 Cal W N 584 (588). (However, after considering the case-law it was held that such party in this case had a right of appeal.)
† ('15) 2 AIR 1915 Mad 294 (295) : 37 Mad 25 : 12 Ind Cas 167 (169) (DB).
('15) 2 AIR 1915 Cal 276 (278) (DB).
('14) 1 AIR 1914 All 83 (83) (DB).
('16) 3 AIR 1916 Mad 618 (618) (DB).
('18) 5 AIR 1918 Nag 91 (91, 92).
('75) 23 Suth W R 86 (86) (DB). (*Pro forma* defendant against whom no judgment is given, cannot appeal.)
('73) 6 N W P H C R 19 (24, 25) (FB).
('73) 6 N W P H C R 412 (414) (DB).
('88) 1888 Bom P J 293 (DB).
('89) 1889 Bom P J 208 (208). (Not bound to appeal against adverse findings, if decree favourable.)
('19) 6 AIR 1919 Lah 418 (418).
[*See* ('36) 23 AIR 1936 Mad 58 (59).]
[But see ('85) 11 Cal 544 (545) (DB). (Submitted not correct.)]
14. † ('93) 18 Bom 597 (602, 603) (DB).
('81) 6 Cal 319 (323) (FB). (If a party wishes to appeal against findings he should get them embodied in the decree.)
('81) 6 Cal 206 (209).
15. ('05) 9 Cal W N 584 (588).
16. ('99) 21 All 117 (119) (DB).
('07) 30 Mad 447 (449) (DB). (Decision dismissing suit being in fact against the defendant.)
('05) 9 Cal W N 584 (588). (Decree apparently in favour of defendant but negativing his defence by implication.)
('24) 11 AIR 1924 Mad 689 (690) : 47 Mad 633.
('26) 13 AIR 1926 Mad 974 (975).
† ('78) 2 All 497 (499, 500, 501) (FB).
('80) 3 All 75 (76) (DB). (Implied negation of defendant's claim.)
('81) 6 Cal 19 (21) (DB).
('12) 1912 Pun Re No. 42 : 16 Ind Cas 127 (128) (DB).
('13) 21 Ind Cas 15 (18) (DB) (Mad).
('17) 4 AIR 1917 Pat 350 (352). (Findings operating as *res judicata* against party by implication.)
('10) 1910 Mad W N 719 (720) (DB).
('72) 4 N W P H C R 120 (121).
† ('35) 62 Cal 701 (708) (DB). (There are observations in the judgment which are liable to be interpreted as meaning that there is an exception to the rule that an appeal is a creature of the statute and that such an exception has been created by judi-

It will follow from the above general principles that the following persons are entitled to appeal under this section :

(1) A *party* to the suit who is *adversely affected* by the decree.[17] Indeed a person who is not a party to the suit or his legal representative cannot be affected by the decision in any way and therefore cannot appeal.[18] The following persons are not 'parties' for the purpose of preferring an appeal—

(a) Defendants who are exempted from the operation of a decree.[19]

(b) Persons against whom the suit has been dismissed in appeal and the case remanded.[20]

(c) Persons who ought not to have been impleaded, such as *pro forma* defendants, but who are impleaded.[21]

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cial decisions to the effect that an appeal lies from a finding although the decree itself is in the party's favour—It is submitted that the judgment read as a whole does not mean this — It affirms the proposition that an appeal lies only if permitted by the statute and that an appeal against a mere finding is not possible under the Code—But the judgment proceeds on the ground that the Code does not prescribe as to who can appeal against a decree and hence, even a person in whose favour a decree may appear to have been passed may, under the peculiar circumstances of a case, be really adversely affected by such decree and in such a case he can appeal against the decree.)

[*See also* ('38) 42 Cal W N 492 (495). (Appealability of adverse finding in decree—Test is whether it will operate as *res judicata*.)]

17. ('41) 28 AIR 1941 Mad 577 (578). (The right to prefer an appeal by parties to a suit can be safely deduced from O. 41 R. 4 though the object of its enactment was different.)

('39) 26 AIR 1939 P C 201 (205) : I L R (1939) Kar 350 (PC). (Suit by person who was aggrieved by deed of trust — Trustees and members of advisory committee appointed under deed of trust, made parties — Suit decreed — Member of advisory committee is aggrieved by decree and can appeal.)

('18) 5 AIR 1918 Lah 263 (263).

('98) 22 Bom 718 (721) (DB). (The right of a party adversely affected is not affected by the fact that one of the other appellants is dead.)

('37) 24 AIR 1937 Mad 843 (845) : I L R (1937) Mad 970 (DB).

('16) 3 AIR 1916 Lah 401 (402) (DB). (One appellant can proceed with appeal though another is dead.)

(1865) 2 Suth W R 227 (231) (DB).

('75) 1 All 266 (267) (DB).

('80) 3 All 75 (76) (DB).

('80) 3 All 152 (157).

†('85) 7 All 606 (620) (FB).

('09) 12 Oudh Cas 390 (392) : 4 Ind Cas 781 (786) (DB). (Person impleaded under an order which is within the discretion of the Court to pass can appeal.)

('80) 6 Cal 19 (21).

('15) 2 AIR 1915 Cal 579 (581, 583) (DB). (Decree for one of two alternative reliefs claimed—Plaintiff can appeal stating that the other relief ought to have been granted.)

('21) 8 AIR 1921 Cal 380 (381).

See also cases in Foot-note (5).

18. ('41) 28 AIR 1941 Mad 577 (578). (Failure or refusal by Official Receiver to file appeal—Creditor not party to litigation—Official Receiver is neither representative of, nor trustee for creditors—Creditor cannot file appeal—Nor can S. 75, Provincial Insolvency Act, be invoked to confer right of appeal on creditor by analogy—Official Receiver in litigation appears in his individual capacity — Proper procedure to be followed by creditor stated.)

('18) 5 AIR 1918 Pat 364 (365) (DB).

†('34) 21 AIR 1934 Mad 360 (362, 363) : 57 Mad 670 (DB). (Decree against Official Receiver — A creditor, not a party cannot appeal under C. P. C., though he can under Provincial Insolvency Act.)

('10) 6 Ind Cas 244 (247) (DB) (Cal).

('37) 24 AIR 1937 Bom 63 (64): I L R (1937) Bom 425 (DB). (Trustee—Alienation by — Beneficiary allowed simply to appear and argue not as party respondent — Advocate-General representing all beneficiaries—Beneficiary has no right of appeal.)

('37) 24 AIR 1937 Lah 313 (313).

('37) 24 AIR 1937 Lah 347 (349).

('08) 32 Bom 155 (156) (DB). (Relators not party to suit cannot appeal where the Advocate-General does not think fit to appeal.)

('92) 1892 All W N 139 (139).

('19) 6 AIR 1919 Lah 180 (181) : 1919 Pun Re No. 79 (DB).

[*See also* ('40) 27 AIR 1940 Pat 147 (149) (DB). (Partition decree—Execution—Objection proceeding by one party — Others not made parties, except the decree holder — Objection allowed — Appeal by decree holder—Only objector impleaded —Other parties not joined—Appeal not bad.)]

See also cases in Foot-note (2).

19. †('03) 30 Cal 134 (141) (DB).

20. ('12) 16 Ind Cas 693 (694) (DB) (Mad).

('21) 8 AIR 1921 Cal 156 (156) (DB). (New defendant ordered to be added in place of wrongly impleaded defendant—But latter disallowed costs — He can appeal for costs.)

21. ('17) 4 AIR 1917 Pat 585 (587) (DB). (But a person improperly brought on record as legal representative and his objection thereto was allowed but without costs — He can appeal on the question of costs—See 13 All 290 (291.))

('82) 4 All 237 (238). (Overruled on another point in 13 All 575.)

On substitution of the Court of Wards in place of the original plaintiffs in a suit, the latter have no *locus standi* to appeal against the order dismissing the suit.[22]

(2) The legal representative of a deceased party affected by the decree can appeal if the right of the deceased party survives to him but he must first get himself impleaded as such in the suit record.[23]

(3) The transferee of the interest of a party *pending the suit* who is so far as such interest is concerned, bound by the decree, can appeal from the decree provided he also gets himself placed on the record of the suit.[24] Where a decree has been passed against the transferor and his transferee, the former alone cannot appeal as he has no interest and is not affected by the decree.[25] A transferee *after the decree* cannot, however, apply to be impleaded for the purpose of preferring[26] or continuing[27] the appeal against the concluded decree. Similarly, a person whose name is brought on the record *after the decree* on the ground that he is the real owner, cannot appeal.[28]

(4) Where pending an appeal the appellant is declared an insolvent, the Official Receiver who represents the estate can continue the appeal.[29]

(5) A *benamidar* may appeal on behalf of the real owner.[30]

(6) The auction-purchaser can appeal from an order setting aside the execution sale on the ground of fraud.[31]

(7) Where a decree is passed against a firm, each member is jointly and severally liable to pay the amount under the decree. Any individual member can, therefore, appeal against the decree.[32]

It has been held by the Madras High Court that where a decree has been passed against the manager of a joint Hindu family in his representative capacity, any other member of the family can appeal against the decree.[33] But the Sind Judicial Commissioner's Court has taken a contrary view.[34]

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22. ('35) 22 AIR 1935 Oudh 486 (488)(DB). (Plaintiff substituted by Court of Wards cannot appeal against withdrawal under O. 23 R. 1, C. P. Code.)
23. ('18) 5 AIR 1918 All 309 (313) (DB).
('66) 5 Suth W R 133 (134) (DB). (Appeal by legal representative not to be admitted without allowing his name to be entered in the register of suits.)
('83) 1883 All W N 134 (135).
('96) 18 All 285 (287).
(1900) 22 All 231 (232) (DB).
('71) 15 Suth W R 485 (485) (DB).
('18) 5 AIR 1918 Mad 409 (410) (DB). (Person claiming under a party can appeal.)
[*See also* ('43) 30 AIR 1943 Mad 381 (383) (DB). (Court holding stranger to decree to be representative of party to suit under S. 47 C. P. Code and passing order against him—Stranger can appeal against order.)]
24. ('78) 2 Bom 248 (250). (In this case, such person was not allowed to continue the appeal.)
('71) 15 Suth W R 121 (123).
('84) 8 Bom 323 (336, 337, 338.)
('35) 22 AIR 1935 Lah 640 (640). (Suit on mortgage — Purchaser of property pending suit impleaded — Decree passed — No appeal filed by mortgagor—Vendee can prefer appeal.)
('85) 9 Bom 151 (155, 156, 157).
25. *See* ('17) 4 AIR 1917 Pat 585 (587).
('75) 23 Suth W R 86 (87).
26. ('71) 15 Suth W R 485 (485). (Transferee after disposal of suit cannot appeal unless he joins transferors as appellants.)
('71) 15 Suth W R 106 (107). (Do.)
('72) 18 Suth W R 438 (438). (Transferee after disposal of suit cannot appeal.)
27. ('77) 2 Bom 248 (251).
28. ('20) 7 AIR 1920 Pat 142 (143) : 5 Pat L Jour 256 (DB).
29. ('19) 6 AIR 1919 Cal 1006 (1006). (Insolvent himself cannot appeal.)
('18) 5 AIR 1918 Mad 294 (294).
('13) 18 Ind Cas 922 (922) (Mad).
30. ('06) 28 All 44 (46).
('15) 2 AIR 1915 Cal 454 (455).
31. See Notes on Section 47.
32. ('40) 27 AIR 1940 All 81 (82).
33. ('37) 24 AIR 1937 Mad 843 (845): ILR (1937) Mad 970.
34. ('37) 24 AIR 1937 Sind 94 (95) : 30 Sind L R 467.

Where the appellant's right to appeal is challenged, it is incumbent upon the appellant to establish his right to appeal[35] though the practice in the Calcutta High Court is to require the respondent at the outset to indicate the grounds upon which his objections are based.[36]

In cases of doubt as to the existence of the right of appeal, it has been held that the appellant should get the benefit of the doubt.[37]

7. **Co-plaintiffs.** — It has been seen in NOTE 6 above that one of the conditions necessary for enabling a party to prefer an appeal is that the subject-matter of the appeal must be a "matter in controversy in the suit." It follows therefore that the matters which form the subject of dispute between the plaintiffs *inter se* but which do not *also* form the matter in controversy between the plaintiffs and defendants, will be outside the conditions,[1] and one plaintiff cannot be allowed to appeal against his co-plaintiff in respect of such matters.[2]

8. **Co-defendants.** — The same principles equally apply to appeals by one co-defendant against another. Where a case is raised not only between the plaintiffs and defendants, but between the defendants themselves *inter se* and the decision therein adversely affects a defendant, he is entitled to appeal against his co-defendants.[1] As has already been seen in NOTE 6, a decision cannot be said to adversely affect a person, unless it will operate as *res judicata* against him in any future suit[2] and where in *substance* a decision will so operate between the defendants it would be contrary to all principles of justice and equity to hold that a defendant is precluded from agitating the matter in appeal against the co-defendants.[3]

Illustrations.

1. *A* brings a suit against *B* and *C*. A decree is passed against *B* alone, the suit being dismissed as against *C*. *B* can appeal against *C* and *A* in order to make *C* also liable for *A's* claim.[4] The reason is that the liability of *B* and *C* to *A* was a question in controversy between *A*, the plaintiff, and *B* and *C*, the defendants, and that the decision on that point making *B* solely liable has adversely affected him.

2. *A* sues *B* and *C* to enforce his right of pre-emption on the allegation of a sale by *B* to *C*. *B* denies the sale to *C* but *C* asserting the sale, pleads waiver by the plaintiff of his right of pre-emption. The suit is dismissed on the finding that *B* did not sell to *C*. It was held that *C* cannot appeal against *B* and *A* against the finding because the said finding will not operate as *res judicata* against *C* and therefore does not adversely affect him.[5]

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35. ('16) 3 AIR 1916 Cal 361 (364) : 43 Cal 857.
('11) 12 Ind Cas 745 (747) (Cal).
('36) 62 Cal 701 (705) : 163 Ind Cas 75 (77).
[*See* ('35) 1935 All W R 1197 (1201). (Burden of proof lies on appellant to show that judgment appealed from is wrong.)
('25) 12 AIR 1925 Cal 561 (562, 563).]

36. ('11) 12 Ind Cas 745 (747) (Cal). (NOTE.—And the cases cited therein may also be referred to.)

37. ('26) 13 AIR 1926 Cal 1113 (1114).

Note 7

1. ('87) 9 All 447 (450, 451).
('13) 16 Oudh Cas 350 : 20 Ind Cas 898 (899).

2. ('91) 15 Bom 145 (147). (Decree in favour of one of two co-plaintiffs — Appeal by the other is incompetent.)
('13) 16 Oudh Cas 350 : 20 Ind Cas 898 (899).
('96) 1896 Bom P J 742 (DB).
('80) 5 Bom 264 (266, 267) (DB). (As an exceptional case, High Court allowed the appeal to be argued by consent of parties to avoid future litigation.)

Note 8

1. ('94) 18 Bom 520 (521) (DB).
('12) 16 Ind Cas 127 (128) (DB) (Lah). (Where it is open for a co-defendant to take a matter on appeal and he does not do so, it will operate as *res judicata*.)

2. See Note 46 on Section 11.

3. † ('24) 11 AIR 1924 Mad 689 (690) : 47 Mad 633.
('35) 22 AIR 1935 All 984 (985).

4. † ('04) 31 Cal 643 (646) (FB).
(1865) 2 Suth W R 227 (230, 231).
('09) 12 Oudh Cas 260 : 3 Ind Cas 917 (918) (DB).
('05) 28 Mad 229 (232) (DB).
[But see ('67) 7 Suth W R 366 (366) (DB).
('72) 17 Suth W R 373 (374) (DB).]

5. ('68) 10 Suth W R 326 (328) (DB).
('81) 3 All 152 (157) (FB).

Where a suit is dismissed and the judgment contains findings between the co-defendants which are not embodied in the decree, nor necessarily implied therein, such findings cannot adversely affect the defendants and no appeal lies therefrom by one co-defendant against another.[6]

It is irregular for defendants with different defences to a suit and with different grounds of appeal, to join in a single appeal.[7]

9. Appeal by minor. — When once a guardian *ad litem* is appointed in a suit for a minor, the appointment unless and until revoked by the Court, continues not only for the term of the suit, but also for purposes of appeal. He is the only person therefore who can file an appeal from the decree passed against the minor.[1] If he does not choose to appeal against the decree, no other person, even though he be the natural guardian, can assume guardianship and prefer the appeal[2] unless perhaps where the guardian *ad litem* is acting against the interest of the minor. But the mere fact that he does not prefer the appeal does not necessarily show that he is acting in dereliction of his duty. The natural inference, on the other hand, would be that he does not think it advisable in the interests of the minor to carry on the litigation further.[3] See also Notes on Rules in Order 32.

10. Right of appeal, when lost. — Whatever may be a party's right of appeal under the general law, there is no doubt that he may *agree* not to appeal or may *waive* or forgo his right of appeal, or may be *estopped* by his conduct from asserting such right.[1] Where a party *agrees* to abide by a decision and not to appeal therefrom, the agreement will be binding on him, provided it is a lawful one.[2] An agreement, for instance, by the guardian of a minor not to appeal is not binding on the minor in law as the same is not for his benefit.[3] The agreement not to appeal must, however, be a *clear* one.[4] A failure to abide by the terms of the decree does not disentitle a party to appeal.[5] Where a party *waives* or *abandons* his right of appeal, the Appellate Court will refuse to allow him to prosecute the appeal.[6] Whether a party has waived such right is a question of fact

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6. ('11) 12 Ind Cas 167 (169) (DB) (Mad).
7. † ('01) 23 All 137 (142) : 27 Ind App 168 (PC). Also see O. 41 R. 3, N. 3.

Note 9

1. See O. 32 R. 5, Note 3.
2. † ('22) 9 AIR 1922 All 332 (333) : 44 All 619 (DB).
('93) 1893 All W N 161 (162).
('24) 11 AIR 1924 All 79 (80) : 45 All 623 (DB).
('23) 10 AIR 1923 Lah 271 (272) : 3 Lah 417 (DB). (Guardian *ad litem* in first Court had left the place and gone away—On first appeal by plaintiff, minor not at all represented — Second appeal on behalf of minor by any other next friend competent without formal removal of previous guardian.)
3. ('05) 2 All L Jour 489 (490, 491).

Note 10

1. † ('71) 14 Moo Ind App 203 (207) (PC).
(1859) 8 Moo Ind App 91 (102) (PC).
[*See* ('36) 23 AIR 1936 Cal 424 (425) (DB). (The right of appeal given to a person by statute should not ordinarily be taken away, unless the appellant brings himself definitely within those classes of cases in which it has been laid down that by his conduct he has lost the right of appeal.)]
2. ✻('75) 1 All 267 (269) (FB).
† ('25) 12 AIR 1925 All 503 (506) : 47 All 637 (FB).
† ('82) 8 Cal 455 (458) (DB). (Agreement by judgment-debtor not to appeal on immediate release from arrest.)
('35) 22 AIR 1935 Cal 239 (240) : 62 Cal 229. (Where the parties to a suit agree and say that the determination of their disputes by a third person is to be final between them, it is to be regarded as an undertaking not to appeal.)
('31) 18 AIR 1931 Nag 126 (127). (1 All 267 (FB) followed.)
('29) 16 AIR 1929 Oudh 451 (452, 453) : 5 Luck 391 (DB). (Agreement not to adduce evidence and to abide by any decision of Court is not void, and no appeal lies.)
('79) 3 Cal L Rep 574 (575) (DB). (If a party prefers an appeal contrary to agreement, he will be liable in damages in a separate suit.)
('86) 12 Cal 511 (514) (FB). (Consent to submit to a summary decree under Act XX of 1866.)
3. (1889) 22 Q B D 577 (578), Rhodes v. Swithenbank.
Also see Section 147 Note 4.
4. ('96) 1896 Bom P J 424 (424) (DB).
5. ('34) 21 AIR 1934 All 531 (533).
6. ('02) 29 Cal 577 (580) (DB). (Agreement to allow execution sale to stand good on certain conditions — Parties cannot appeal thereafter and contest legality of sale.)

depending upon the circumstances of the case.[7]

Where a party *accepts* the order of a Court, *acts* under it and thereby gets *benefited* by it, he will be estopped from questioning the order later on.[8] Thus, where a dismissal for default is set aside and the case remanded by the Appellate Court conditionally on the appellant paying a certain amount to the respondent as compensation, and the respondent *accepts* the compensation money, he will thereafter be estopped from appealing against the order of remand.[9] But, where a plaintiff in a partition suit takes possession of the properties allotted to him under the partition decree, this does not preclude him from appealing against the decree on the ground that he is entitled to more. The reason is that his claiming a larger share of properties in appeal is in no way inconsistent with his taking possession of the share allotted under the decree appealed against and there is no question of estoppel.[10] Where a vendee in a pre-emption suit appeals and obtains a stay of execution on his making a certain deposit, but before the appeal is heard he withdraws the deposit, he will lose his right of appeal.[11]

11. Execution proceedings. — This section does not apply to execution proceedings where the orders passed are not decrees within the meaning of S. 2 (2) of the Code.[1]

('02) 29 Cal 306 (309) (DB). (Agreement to refer certain issues of fact to Commissioner and to abide by his decision — Parties cannot appeal from the decision.)

('15) 2 AIR 1915 Mad 1074 (1074). (Consent to refer to Court as arbitrator and not to appeal— Parties cannot appeal from the decision.)

7. ('90) 1890 Pun Re No. 35, page 95. (Judgment-debtor paying up amount decreed does not lose his right of appeal.)

('88) 1888 Pun Re No. 142, page 380. (Do.)

('71) 15 Suth W R 572 (573) (DB). (Decree in favour of *A* as against *B* and *C* — *B* appealing— Remand of suit for fresh disposal — Decree afresh in favour of *A*—*C* does not lose his right of appeal against the new decree by reason of his not having appealed from the earlier decree.)

('07) 1907 Pun Re No. 31, p. 370 (FB). (Decree of claim in part — Decree-holder taking out execution in part does not lose his right as to the rest.)

† ('19) 6 AIR 1919 Cal 447 (448) (DB). (Return of plaint for re-presentation—Plaintiff complying with order, without giving up right of appeal, does not lose his right of appeal.)

('15) 2 AIR 1915 All 325 (325). (Mere application by vendee to withdraw price of pre-emption deposited in Court does not take away his right of appeal.)

('23) 10 AIR 1923 P C 13 (20, 21) (PC). (Appellant seeking to recover possession of lands—Respondent contending that appellant is entitled only to certain sum and depositing the same — Appellant offering a portion of it as security for respondent's costs—*Held* no estoppel — If success, no need for security for costs — If failure, it is appellant's money.)

('20) 7 AIR 1920 Cal 96 (97). (Decree imposing conditions on plaintiff — Conditions not complied with — He does not thereby lose his right of appeal.)

('17) 4 AIR 1917 Lah 28 (28) : 1917 Pun Re No. 17 Cr (DB). (Appeal from redemption decree lies though redemption money ordered by lower Court is not deposited.)

('30) 17 AIR 1930 Oudh 434 (437) (DB). (A resolution of the District Board to withdraw appeal, but not acted upon, is no bar to the appeal.)

8. † ('17) 4 AIR 1917 Cal 546 (547) (SB).

('13) 35 All 168 : 18 Ind Cas 525 (526) (DB). (Party accepting compensation and waiving right of appeal is estopped.)

('36) 23 AIR 1936 Cal 424 (425, 426) (DB). (The benefit must be one conferred by the decree or order itself — *A*'s election as Municipal Commissioner declared invalid by lower Court's decree — Afterwards Local Government nominating *A* as Municipal Commissioner — *A* accepting appointment not precluded from appealing against decree.)

('10) 8 Ind Cas 79 (80) (DB) (Cal). (But if party accepts the order under protest, he can appeal.)

9. ('13) 35 All 168 : 18 Ind Cas 525 (526) (DB).

10. ('35) 22 AIR 1935 Mad 465 (466). (Person taking benefit under partition decree is not estopped from claiming more in appeal when he is entitled to what is already given.)

11. ('06) 1906 Pun L R No. 76, p. 227 (230) (DB).

Note 11

1. ('24) 11 AIR 1924 Pat 346 (347) (DB). (Section is restricted to suits only and cannot be extended to execution proceedings.)

('24) 11 AIR 1924 All 794 (795). (Order refusing to restore a miscellaneous application in execution department—Not a decree.)

('25) 12 AIR 1925 All 66 (66). (Order determining party's right to be the representative of deceased party is a 'decree' and is appealable.)

('24) 11 AIR 1924 Pat 683 (685) (DB). (Every order in execution is not necessarily appealable.)

('25) 12 AIR 1925 Cal 318 (319) (DB). (Determination of question under O. 21 R. 66 is an order under S. 47—Appeal lies.)

Also see S. 47 Note 86.

12. Appeal against ex parte decree.—The Code of 1859 prohibited an appeal against an *ex parte* decree, but by judicial decisions the prohibition was held to apply only to cases where the defendant did not appear *at all* and not to cases where, he having once appeared, subsequently failed to appear.[1] The Code of 1877 removed the prohibition, but neither that Code nor that of 1882 made any *express* provision for an appeal against an *ex parte* decree. The conflict of decisions therefore continued as to whether, and under what circumstances, an appeal lay against an *ex parte* decree.[2]

In order to remove the doubt and the conflict clause (3) was added by S. 45 of the Civil Procedure (Amendment) Act, VII of 1888.[3] It is now quite clear that an appeal will lie from *every ex parte* decree whether the defendant has appeared once, or not at all.

There are four remedies open to a person to question a decree that has been passed *ex parte* against him, viz. —

(1) an application under Order 9 Rule 13 ;
(2) an appeal under section 96 clause (2) ;
(3) an application for review under Order 47; and
(4) a suit on the ground of fraud.

Both the remedies (1) and (2) can be prosecuted *concurrently* as long as no decision is given in either of them. The mere fact that one remedy has been resorted to will not *ipso facto* bar the other.[4] Nor does the fact that no application has been filed under O. 9 R. 13 affect the maintainability of the appeal.[5] See also O. 9 R. 13, Note 8.

Where the Appellate Court gives a *decision* in the appeal, then the decree of the first Court is *superseded* and that Court cannot proceed with the application to set aside the *ex parte* decree.[6] The Appellate Court may, however, withdraw the application from the first Court and deal with it itself.[7] Where during the pendency of the appeal, the application under O. 9 R. 13 is granted by the first Court, the decree appealed against becomes non-existent and the appeal abates.[8]

But suppose the first Court *refused* to set aside the *ex parte* decree. How does it affect the powers of the Appellate Court to deal with the appeal? There is a *consensus* of judicial opinion that neither the rejection of the application under O. 9 R. 13, nor the omission to file an appeal against that order is a bar to an appeal from the decree itself.[9]

Note 12

1. ('78) 2 All 67 (71) : 5 Ind App 233 (PC).
2. ('82) 4 All 387(394)(FB). (Defendant who has not applied under S. 108 (O. 9 R. 13) cannot appeal.)
('86) 8 All 354 (357) (FB). (Appeal — Respondent not appearing at hearing and not applying under O. 41 R. 21 may appeal against the Appellate Court decree.)
('78) 2 Bom 644 (648) (DB). (Appeal is not unmaintainable because procedure under S. 108 (O. 9 R. 13) was not adopted.)
('82) 8 Cal 272 (273) (DB). (Procedure to set aside *ex parte* decree not adopted— Appeal will still lie.)
('78) 2 Mad 75 (77, 78) (DB). (Non-application for rehearing is no bar to appeal.)
('81) 3 Mad 264 (265) (DB). (Non-applying under S. 108 (O. 9 R. 13) is no bar to an appeal.)
('86) 9 Mad 445 (446) (DB). (4 All 387 (FB) dissented from.)
('09) 12 Oudh Cas 25 : 1 Ind Cas 329 (330, 331). (Appeal lies though course under S. 108 (O.9 R. 13) was not adopted.)
3. †('86) 8 All 354 (357) (FB).
4. ('09) 3 Ind Cas 468 (469) (DB) (Cal). (Affirming 12 Cal W N 885.)
See also Note 10 on O. 9 R. 13 for other cases.
5. ('86) 9 Mad 445 (446) (DB).
†('07) 30 Mad 54 (55) (FB). (See referring order.)
('82) 8 Cal 272 (274) (DB).
('83) 1883 Pun Re No. 60.
('22) 9 AIR 1922 Bom 267 (267):46 Bom 184 (DB).
('09) 12 Oudh Cas 25 : 1 Ind Cas 329 (330).
[But see ('82) 4 All 387 (394) (FB). (Which held to the contrary—The case however was one under the Code of 1877 and was dissented from in a later Full Bench case, 8 All 354.)]
6. ('15) 2 AIR 1915 All 2 (3) : 37 All 208 (DB).
('17) 4 AIR 1917 Nag 26 (28) : 14 Nag L R 30. (First Court's power is extinguished under O. 41 Rule 21.)
Also see O. 9 R. 13, Note 11.
7. ('12) 15 Ind Cas 565 (566) (Nag).
8. ('17) 4 AIR 1917 Nag 26 (28) : 14 Nag L R 30. (Where the *ex parte* decree is set aside pending second appeal the second appeal abates and cannot be proceeded with.)
9. ('78) 2 All 567 (568) (DB). (Second appeal without appealing from the order refusing to re-hear the appeal.)

It has also been held that where the application is refused on the merits by the first Court, the Appellate Court is precluded in an appeal against the *ex parte* decree from discussing the *propriety* of the *ex parte order itself* apart from the *merits* of the case on the law and the evidence.[10] This is in accordance with reason, because a special remedy by way of appeal against the order is provided for in the Code and where the law points out the remedy in particular way, it is in general that way that must be followed and not another. But where the application is dismissed in default of parties and there is no finding on the merits, it is competent for the Appellate Court to go into the question of the propriety of the *ex parte* order.[11]

But where *no* application is filed under O. 9 R. 13 and only an appeal is preferred against the *ex parte* decree, there is a conflict of opinion as to the power of the Appellate Court to question the propriety of the *ex parte* order itself and to remand the case for re-trial on that point. All the High Courts, except the High Courts of Allahabad and Rangoon and the Chief Court of Oudh, agree in holding that the Appellate Court *can* go into the question and, if necessary, remand the case under O. 41, R. 23 or under S. 151 for a fresh decision on the sufficiency of the cause for non-appearance.[12] The Allahabad and the Rangoon High Courts, and the Oudh Chief Court, on the other hand, hold a contrary view, namely, that the Appellate Court is *restricted* to a consideration of the *merits* of the case *only* on the question of law and the evidence let in, and cannot enter into the question of the sufficiency of the cause for the non-appearance of the defendant at the hearing.[13] In view of O. 41 R. 33 under which the Appellate Court has wide powers of passing any order which the trial Court ought to have made, there does not seem to be any good reason why the Appellate Court should be prevented from discussing the question of the non-appearance of the party in cases where he has not applied under O. 9 R. 13, Civil

('09) 1 Ind Cas 86 (88) (DB) (Cal).
[*See also* ('97) 24 Cal 546 (551) (DB). (In this case the unsuccessful applicant instead of preferring an appeal, instituted a suit on the ground of fraud—*Held* suit was maintainable.)
('01) 28 Cal 475 (478) (PC). (Do.)
('02) 29 Cal 395 (399):29 Ind App 90 (PC). (Do.)]

10. † ('20) 7 AIR 1920 Mad 962 (963) (DB).
('27) 14 AIR 1927 Mad 1114 (1114).
('36) 23 AIR 1936 Pesh 1 (2). (Decree passed *ex-parte*—Defendant trying to set aside *ex parte* decree under O. 9 R. 13, failing to prove want of due service of summons— Defendant barred to agitate the same question in appeal or revision and *vice versa*.)
('90) 23 Mad 260 (261) (DB).
('99) 23 Mad 445 (446) (DB). (Court refused to go into the question but remanded the case for re-trial under its inherent powers.)
('17) 4 AIR 1917 All 475 (476) : 39 All 143 (DB).
('09) 1 Ind Cas 86 (88) (DB) (Cal). (Application under S. 108 dismissed for default — Propriety of the *ex parte* order can be gone into.)

11. ('37) 24 AIR 1937 Nag 268 (269): I L R (1937) Nag 519.

12. ('19) 6 AIR 1919 Cal 727 (728) (DB).
† ('07) 30 Mad 54 (60) (FB). (Dissenting from 23 Mad 260.)
(1900) 23 Mad 445 (446) (DB).
('24) 11 AIR 1924 Mad 107 (108) (DB). (30 Mad 54 (FB) followed.)
('28) 113 Ind Cas 409 (409) (Mad). (Do.)
('22) 9 AIR 1922 Bom 267 (270) : 46 Bom 184.
('16) 3 AIR 1916 Sind 34 (34) : 9 Sind L R 191.
('28) 15 AIR 1928 Cal 812 (814). (Dissenting from 23 Cal 738.)
('22) 9 AIR 1922 Lah 439 (440) : 3 Lah 357.
('25) 12 AIR 1925 Pat 534 (535).
('29) 16 AIR 1929 Pat 609 (612) : 9 Pat 408. (30 Mad 54 (FB) followed.)
[But see ('17) 4 AIR 1917 Lah 362 (362).
('04) 1904 Pun Re No. 91.
('08) 1908 Pun Re No. 138.]

13. ('17) 4 AIR 1917 All 475 (476) : 39 All 143.
('34) 21 AIR 1934 Oudh 131 (131).
('01) 23 All 167 (171, 174). (Court under the circumstances has an inherent power of remand.)
('24) 11 AIR 1924 Rang 137 (138) : 2 Rang 108. (*Held* that question of due service of summons not subject-matter of an appeal.)
('09) 12 Oudh Cas 35 : 1 Ind Cas 329 (330, 331).
('25) 12 AIR 1925 Oudh 645 (646) : 28 Oudh Cas 85. (AIR 1923 Oudh 177 : 26 Oudh Cas 10 disapproved.)
[See however ('23) 10 AIR 1923 All 287 (290) : 45 All 311 (DB). (Appellate Court reversing *ex parte* decree on merits may remand case if plaintiff had been misled into not giving his full evidence by the Court intimating that the evidence already let in was sufficient for passing an *ex parte* decree.)]
[But see ('20) 7 AIR 1920 Upp Bur 37 (37) : 3 Upp Bur Rul 198.]

Procedure Code. As stated by Mahmood, J., in *Ajudhia Prasad* v. *Balmukund*,[14] "where two proceedings or two remedies are provided by statute, one of them must not be taken as operating in derogation of the other."

13. Appeal against amended decree. — An amended decree supersedes the original decree and obviously, against this decree, which is the decree in the suit, an appeal lies.[1]

14. Appeal against decree passed without jurisdiction.—A decree made without jurisdiction possesses nonetheless the qualities of a decree as between the parties thereto, and if there is a statutory appeal from decrees made in suits of that character, an appeal is competent though the decree is made without jurisdiction;[1] and similarly, where jurisdiction is usurped by a Court in passing an *order* against which an appeal would lie if it had been passed with jurisdiction, an appeal cannot be defeated on the ground that the order was made without jurisdiction.[2]

15. Appeal against consent decree. — Sub-section (3) is new. The words "decree passed with the consent of parties" in the clause imply and involve an *agreement* between the parties[1] and therefore a mere failure to raise an objection to the grant of a relief[2] or a mere acceptance of an order offered by the Court[3] or the mere fact that the defendant remains *ex parte*[4] cannot make the decree a consent decree. The consideration for the agreement involved in a consent decree is that both sides *give up* their right of appeal.[5] Accordingly, a judgment by consent operates as an estoppel,[6] and all decrees, once they have been established to be by consent, are, by the policy of the Code, made unappealable[7] and are as valid and binding on the parties as any other decree, unless and

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14. ('86) 8 All 354 (361) (FB).
[*See also* ('15) 2 AIR 1915 Mad 197 (199) : 37 Mad 29 : 12 Ind Cas 664 (667).]

Note 13

1. † ('27) 14 AIR 1927 Cal 114 (116) (DB). (Therefore no revision lies against an order amending decree.)
('31) 18 AIR 1931 Cal 578 (579) (DB). (Amended by review or under S. 152 and no appeal lies from original decree.)
('06) 3 Cal L Jour 188 (190, 191) (DB). (9 Cal W N 605 followed.)
('01) 24 Mad 646 (650) (DB).
('05) 9 Cal W N 605 (607) (DB).
('05) 32 Cal 908 (909) (DB).
† ('15) 2 AIR 1915 Nag 37 (39) : 11 Nag L R 92.
('93) 15 All 121 (122) (DB). (At first sight this decision appears to negative the right of appeal, but read carefully shows that the right of appeal is assumed to exist.)
('28) 15 AIR 1928 All 194 (196) (DB). (The only ground of such appeal may be error in the amendment.)
[*See also* ('10) 5 Ind Cas 304 (305) (Cal).
('32) 19 AIR 1932 Nag 143 (144) : 28 Nag L R 245.)]
Also see S. 152 N. 19.
[But see ('24) 11 AIR 1924 Cal 898 (899). (Appeal by one of the defendants is not affected by a subsequent review of the decree as against other defendants to which the appellant is neither a party nor by which the appellant is affected.)]

Note 14

1. † ('17) 4 AIR 1917 Cal 320 (325) (DB).
2. † ('10) 8 Ind Cas 26 (27) (DB) (Cal).
('91) 13 All 575 (576) (DB). (High Court has right to set right the proceedings of lower Court.)
('12) 16 Ind Cas 940 (942) (DB) (Cal). (8 Ind Cas 26 followed.)
Also see Ss. 100 & 101 N. 15.

Note 15

1. (1890) 1890 W N 116 (116), Aldam v. Brown.
('17) 4 AIR 1917 Cal 564 (565) (DB).
2. ('18) 5 AIR 1918 Nag 66 (67) : 15 Nag L R 39.
3. (1890) 1890 W N 116 (116), Aldam v. Brown.
(1893) 10 T R 139, Hadida v. Fordham.
('39) 26 AIR 1939 Cal 500 (502).
4. ('43) 30 AIR 1943 Mad 133 (133).
5. ('21) 8 AIR 1921 Mad 696 (700).
6. ('41) 28 AIR 1941 Nag 271 (272) : I L R (1942) Nag 498. (It is binding as between the consenting parties and their successors in interest.)
(1895) 1 Ch 37 (49), Re S. American Co.
('33) 20 AIR 1933 Sind 29 (31) : 26 Sind L R 395.
('37) 24 AIR 1937 Sind 177 (178) : 31 Sind L R 197 (DB).
7. ('40) 27 AIR 1940 All 190 (192) : I L R (1940) All 185 (DB). (Agreement between parties intimated to Court and recorded by it, and Court passing a decree—No appeal from decree.)
('21) 8 AIR 1921 Mad 696 (700) (DB).
('32) 19 AIR 1932 P C 251 (251,252) (PC).(Same as AIR 1931 P C 107 : 27 Nag L R 139 (PC) after findings.)
('26) 13 AIR 1926 Bom 39 (40) (DB).
('29) 16 AIR 1929 Bom 68 (70) (DB). (Section 30, Workmen's Compensation Act VIII of 1923.)
('22) 9 AIR 1922 Lah 309 (311) : 3 Lah 175 (DB).

until they are set aside by a proper judicial proceeding.[8] A consent decree, however, passed under the *compulsion of the Court* is not a decree that can be said to have been passed with the consent of the parties.[9]

Where one party *alleges* and the other *denies* or *withdraws from* a compromise entered into by the parties out of Court, and the Court finds in favour of the compromise and passes a decree, is such a decree "a decree passed with the consent of the parties?" There is a conflict of opinion on the point.

The Nagpur and the Sind Judicial Commissioner's Courts answer the question in the negative. The Nagpur Court holds that where a Court records a compromise notwithstanding the denial thereof by one party, it is really a finding very much *against* the consent of one party. Another reason advanced is that the removal of the words "and such decree shall be final" from S. 375 of the old Code, corresponding to O. 23 R. 3, shows that a decree passed under O. 23 R. 3 is not *final* unless consented to by the parties before the Court, *at the time* the decree is passed.[10] The Sind Court agrees that an appeal will lie from a decree passed under O. 23 R. 3 on the ground that the appellant did not consent

('12) 1912 Pun Re No. 8: 16 Ind Cas 957 (957, 958) (DB). (Compromise decree.)
('13) 18 Ind Cas 758 (760, 761) (DB) (Lah). (Decree on plaintiff agreeing to be bound by oath of defendant.)
† ('01) 5 Cal W N 877 (878) (DB).
('11) 9 Ind Cas 210 (211) (DB) (Cal). (Validity of consent decree cannot be gone into in appeal. 5 Cal W N 877 followed.)
('30) 125 Ind Cas 587 (589) (DB) (All). (Pleaders of minor parties agreeing to abide by decision of Court after local inspection and necessary evidence — No leave got for compromise — Minors can impugn validity of consent decree by appeal.)
† ('29) 16 AIR 1929 Oudh 451 (452, 453) : 5 Luck 391 (DB). (Agreement not to adduce evidence and to abide by any decision of the Court — Appeal barred under sub-section (3).)
('26) 13 AIR 1926 Cal 512 (513) (DB).
('11) 36 Bom 77 : 11 Ind Cas 568 (569). (Consent decree cannot be set aside by a rule or motion but only by a separate suit.)
(1838) 4 M & C 215 (228), Morrison v. Morrison.
[*See also* ('22) 9 AIR 1922 Oudh 189 (193, 194) : 25 Oudh Cas 213 (DB). (Award as modified by later compromise.)
('31) 18 AIR 1931 P C 107 (108) : 27 Nag L R 139 (PC).]

8. ('39) 26 AIR 1939 Sind 251 (252) : ILR (1939) Kar 580 (DB). (Compromise decree by mother on behalf of minors — Minors on attaining majority not suing to set it aside within time cannot challenge its validity and binding force.)
(1877) 6 Ch D 297 (302), Flower v. Lloyd. (A bill to be filed in the original decree.)
('36) 23 AIR 1936 Bom 301 (303, 304) (DB). (Compromise decree is good and binding even though it sanctions what is prohibited by law.)
† ('37) 24 AIR 1937 Sind 177 (178) : 31 Sind L R 197 (DB). (Consent decree offending against law of perpetuities—So long as the decree is in force the defendant cannot escape its provisions.)
('89) 13 Bom 137 (146). (Application for review of suit in original Court.)
('91) 15 Bom 594 (598) (DB). (The only mode for setting aside compromise decree is either by review or by a suit. (1877) 6 Ch D 297, Flower v. Lloyd followed.)
(1896) 1 Ch 673 (676, 680), Ainsworth v. Wilding.
✠ ('84) 10 Cal 612 (615) (DB).
(1878) 9 Ch D 259 (268), Gilbert v. Endean.
(1895) 2 Ch 273 (284), Huddersfield v. Lister.
(1897) 2 Ch 534 (550, 552), Wilding v. Sanderson.
('21) 8 AIR 1921 All 310 (310) : 43 All 266 (DB).
('24) 11 A I R 1924 All 570 (571) : 46 All 710 (DB).
('25) 12 A I R 1925 All 271 (272) : 47 All 456 (DB).
('03) 26 Mad 76 (77) (DB).
† ('17) 4 AIR 1917 Mad 578 (580) : 40 Mad 177 (DB).
✠ ('20) 7 AIR 1920 Cal 724 (724) (DB).
('12) 16 Ind Cas 988 (989) (DB) (Cal).
('20) 7 AIR 1920 P C 139 (140) : 47 Ind App 200 (PC). (Defendants consenting to decree notwithstanding claim barred by limitation — Decree is consent decree and no appeal lies.)
('13) 18 Ind Cas 758 (760) (DB) (Lah). (Case of confession of judgment by defendant.)
('26) 13 AIR 1926 Bom 39 (40) (DB).
[*See also* ('37) 24 AIR 1937 Nag 413 (415). (The Court has jurisdiction to set aside the consent decree on any ground which would invalidate an agreement between the parties. Section 74, Contract Act, applies to the case of a compromise decree and it is open to a Court executing such decree to interfere with a stipulation by way of penalty contained in the compromise.)]

9. ('23) 10 AIR 1923 Lah 129 (130) (DB). (Under the circumstances parties are not estopped from appealing.)
[*See* ('35) 22 A I R 1935 Cal 231 (234) : 62 Cal 223. (On premature threat from Bench, pleader agreeing to settlement of case — Counsel held intimidated and Court had inherent power to set aside settlement.)]

10. † ('18) 5 AIR 1918 Nag 129 (130).

to it.[11] The Calcutta, Madras, Lahore and Patna High Courts, on the other hand, take the opposite view, the latter Court expressly dissenting from the Nagpur view.[12] According to the Madras High Court[13] the expression "a decree passed with the consent of parties" is not limited to a decree passed with the consent expressed *at the moment the decree is passed*, but includes decrees based on consent *proved* to have been given out of Court, though subsequently withdrawn or repudiated before the Court. The reason is that a decree can be passed in one of two ways —

(a) by deciding the dispute on the merits, and

(b) on the consent of the parties.

There is no third way of passing a decree, so that a decree on a finding that parties have consented out of Court, if it does not fall under the first category, must necessarily fall under the second category of consent decrees.

The Lahore High Court[14] gives a further reason in support of the conclusion arrived at by the Madras High Court, viz., that where a compromise is proved to have been effected outside Court, the Court *must*, under O. 23 R. 3, pass a decree in accordance therewith. The parties also, must, at the time of the consent, have contemplated the issue of the decree as a matter of course. The decree so passed is only a *formal expression* of the agreement of the parties and, under such circumstances, must be deemed to be one passed with the consent of the parties.

Having regard to the fact that in O. 43 R. 1 (m) an appeal is newly provided for from an order recording or refusing to record a compromise and construing this provision with sub-s. (3) of S. 96, it seems clear that the *only* appeal intended by the Legislature is an appeal against the "recording or refusing to record" the alleged agreement and not a further appeal again from the decree recording the compromise.[15] The views of the Madras and Lahore High Courts are therefore to be preferred. See also O. 43 R. 1, Note 7.

The proper method, therefore, of questioning a consent decree is either by *review* or by a regular *suit* and not by way of appeal.[16] Where a suit is filed to set aside a

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11. ('29) 16 AIR 1929 Sind 32 (35) (DB).
('13) 6 Sind L R 166 : 19 Ind Cas 450 (450) (DB) (*Obiter.*)

12. ('21) 8 AIR 1921 Mad 696 (699, 700) (DB).
('35) 22 AIR 1935 Cal 239 (240) : 62 Cal 229.
('22) 9 AIR 1922 Lah 309 (310, 311) : 3 Lah 175 (DB).
✣('33) 20 A I R 1933 Pat 306 (427) : 12 Pat 359 (DB).

13. ('21) 8 AIR 1921 Mad 696 (699) (DB). (Consent by pleaders on both sides. It dissents from A I R 1915 Mad 322.)

14. ('22) 9 AIR 1922 Lah 309 (311): 3 Lah 175 (DB). [*See also* ('10) 6 Ind Cas 857 (859) (All).]

15. ('14) 1 A I R 1914 Lah 112 (113) : 1914 Pun Re No. 96 (DB). (Order directing a compromise to be recorded is appealable under O. 43 R. 1, and not under Section 96 (3).)
('33) 20 A I R 1933 Bom 205 (207, 208) : 57 Bom 206 (DB). (Order not challenged but decree can be challenged by review or under Section 151—As to appealability the second Judge took different view.)
('33) 20 AIR 1933 Cal 94 (95) (DB). (Appeal from order lies though decree is passed before filing of appeal and no appeal against it—A I R 1926 Cal 412 held overruled by A I R 1929 Cal 689: 57 Cal 1013 (FB).)
('29) 16 AIR 1929 Lah 472 (472).
('16) 3 A I R 1916 Mad 1083 (1084) (DB). (Order under O. 23 R. 3 not appealed against—No appeal against decree.)
†('29) 16 A I R 1929 Pat 318 (320) : 8 Pat 528 (DB). (Order recording compromise appealable even though followed by a decree.)
('33) 20 AIR 1933 Pat 306 (427): 12 Pat 359 (DB).
('22) 9 AIR 1922 Mad 446 (446) (DB). (Doubted in AIR 1925 Mad 606.)
('25) 12 AIR 1925 Mad 606 (607) (DB). (Order and decree passed together — Appeal lies against order.)
('24) 11 AIR 1924 Lah 466 (468). (Order followed by decree—Order appealable.)
[*See* ('36) 23 A I R 1936 Mad 385 (386). (Order recording compromise is appealable even when a decree is passed in terms of compromise.)
('36) 23 AIR 1936 Sind 59 (60): 29 Sind L R 437 (DB). (Order recording compromise under O. 23 R. 3 is appealable under O. 43 R. 1 (m).)]

16. ✣('09) 2 Ind Cas 129 (136) (DB) (Cal). (Cases reviewed fully.)
('32) 19 AIR 1932 P C 251 (252) (PC).
('84) 10 Cal 612 (615) (DB).
('03) 30 Cal 613 (615) (DB).
† ('36) 62 Cal 642 : 164 Ind Cas 561 (564).

consent decree, it can be set aside on any ground which would invalidate an agreement[17] such as fraud, misrepresentation or mistake. But it is necessary to see in every case *what* it is that the parties have consented to.

If the parties merely agree to certain *deviations* in the procedure of the Court, as, for instance, by dispensing with particular kinds of evidence, but there is no clear agreement that they would be bound by the *conclusions* arrived at by the Court, the decree is not a "consent decree."[18]

If the parties clearly *agree to be bound* by the conclusions of the Court and such agreement results in the Court assuming jurisdiction *extra cursum curiæ*, then the Court is in the position of an arbitrator, and its decision will be a consent decree not open to appeal.[19] Even where the Court has not proceeded outside its ordinary jurisdiction (*extra*

('36) 23 A I R 1936 Mad 385 (386). (Party alleging that owing to fraudulent action of his vakil he was committed to compromise — Remedy is not by adducing evidence of fraud in appeal but by taking proper action to get decree set aside.)

('36) 156 Ind Cas 1035 (1035) (Pesh). (A decree passed by a Court on the basis of statements filed by the plaintiff and defendant specifically praying that a decree may be granted in favour of the plaintiff against the defendant, as claimed is a decree passed with the consent of the parties and is therefore not open to appeal.)

('36) 23 AIR 1936 Rang 389 (390). (But review on ground of fraud or mistake does not lie—Remedy is by way of separate suit.)

('26) 13 AIR 1926 Cal 512 (513) (DB). (Objection by consenting party can be entertained only in review or in suit.)

('01) 5 Cal W N 877 (878) (DB).

('02) 6 Cal W N 82 (86) (DB). (Compromise by advocate under a valid authorisation is binding.)

('29) 16 AIR 1929 Lah 472 (472).

✠(1896) 1 Ch 673 (680), Ainsworth v. Wilding.

✠(1894) 2 Ch 273 (284), Huddersfield v. Lister.

(1897) 2 Ch 534 (552), Wilding v. Sanderson.

('91) 15 Bom 594 (598).

('11) 36 Bom 77 : 11 Ind Cas 568 (569).

(NOTE.—Whether one remedy bars the other, See Note 63 on Section 9.)

[*See also* ('37) 24 AIR 1937 Cal 222 (224). (High Court has no inherent power to vary consent decree by consent.)]

[See however ('30) 17 AIR 1930 Bom 362 (363, 364) : 55 Bom 372. (Interlocutory consent order not in the nature of final order can be set aside in the same suit on proper grounds.)]

17. See O. 23 R. 3 Note 28.

('39) 26 AIR 1939 Lah 439 (451):ILR (1939) Lah 433 (DB).

('39) 26 AIR 1939 Sind 251 (252) : I L R (1939) Kar 580 (DB).

18. ('27) 14 AIR 1927 Lah 382 (382) (DB). (Suit under Section 92 — Party merely approving of appointment of X as a member of the committee of management — Decree is not thereby a consent decree.)

('34) 21 AIR 1934 Lah 67 (67) : 15 Lah 305 (DB). (Decree on oath of defendant—Not consent decree —Appealable.)

('23) 10 AIR 1923 All 373 (373, 374). (Offer by one party to abide by Judge's decision not accepted by other party.)

('25) 12 AIR 1925 All 348 (349). (Counsel on both sides at trial stating that the Judge may dispense with oral evidence and decide the case on the document filed and on local inspection—Decision accordingly—Not a consent decree.)

('29) 16 AIR 1929 All 116 (117). (Do.)

('23) 10 AIR 1923 Mad 444 (445, 446):47 Mad 39 (DB). (Parties requesting the Court to have a local inspection and agreeing to abide by its decision — Right to appeal is not lost.)

('24) 11 AIR 1924 Sind 134 (136) : 18 Sind L R 306 (DB).

[*See* ('34) 21 AIR 1934 Mad 397 (397, 398) : 58 Mad 31. (Mere deviation from ordinary procedure does not necessarily render proceeding *extra cursum curiæ*—In such cases right of appeal is not taken away unless it has been waived.)]

19. ('25) 12 AIR 1925 All 558 (558) : 47 All 921 (DB).

('34) 21 AIR 1934 Lah 176 (177) : 15 Lah 726.

('18) 5 AIR 1918 Upp Bur 14 (15) : 3 Upp Bur Rul 36. (Though the High Court might interfere under S. 115.)

†('39) 26 AIR 1939 Pat 514 (516) : 18 Pat 261 (DB).

('30) 17 AIR 1930 All 127 (128) (DB). (Parties requiring Court to decide on local inspection and oral statements on the spot—No appeal lies.)

('29) 16 AIR 1929 All 577 (577) : 51 All 886 (DB). (Parties agree to accept decision of Court on local inspection and documentary evidence — Decision is virtually award — No appeal lies.)

†('26) 13 AIR 1926 All 90 (92). (Agreeing to be bound by decision on documentary evidence alone.)

('26) 94 Ind Cas 7 (7) (All). (Consent to be bound by decision after local inspection.)

('28) 15 AIR 1928 Mad 127 (128) (DB). (Decree for maintenance passed with other party's consent in order to avoid litigation — Decree is a consent decree.)

('25) 12 AIR 1925 Nag 463 (464) : 21 Nag L R 84.

('20) 7 AIR 1920 P C 139 (140) : 47 Ind App 200 (PC). (Defendant waiving plea of limitation though suit was barred — Decree is a consent decree.)

('11) 38 Cal 421 : 9 Ind Cas 296 (297) (DB). (Consent to be bound by decision after local inspection.)

†('23) 10 AIR 1923 Mad 444 (445, 446) : 47 Mad 39 (DB).

cursum curiæ) no appeal will lie if the parties have clearly agreed before the decision that they would be bound by it and would not appeal against it.[20]

Where a party offers to be bound by the statement on oath of a third person, the decree passed on such oath is not a consent decree. The statement is only conclusive evidence under the Oaths Act, on the basis of which the Court passes the decree.[21]

Under S. 375 of the old Code a consent decree was *final so far as it related to the subject-matter of the suit* and it was held that an appeal would lie from a consent decree if it dealt with matters outside the suit and that in such appeal the Appellate Court would modify the decree by omitting such extraneous matters.[22] It was also held under the old Code that an appeal would lie from a consent decree if the agreement or compromise in terms of which the decree was drawn up was not *lawful*.[23]

Under the present sub-s. (3) of S. 96, there is no appeal from a consent decree in any case, though the *order* itself recording the compromise is appealable.[24]

Notwithstanding the above discussion there are nevertheless cases in which decrees, *though passed with the consent* of the parties, can be appealed against:

(1) Where the dispute is over the *nature* of the compromise and the appellant wants to show what the compromise was.[25]

(2) Where the consent decree is passed without an order recording the compromise.[26] The reason is that such recording is not a mere matter of form and the absence of it deprives the party of a right of appeal against the order, if it had been passed. See O. 23 R. 3, Note 17.

(3) Where the appellant was *not a party* to the consent decree[27] and the decree affects him prejudicially.[28]

('99) 23 Bom 752 (755) (DB).
('02) 29 Cal 306 (310) (DB).
('24) 11 AIR 1924 Cal 940 (945, 946, 951, 952, 953) (DB). (Agreement in one suit to abide by the decision in another of two cross suits binding on the parties.)
[*See* ('28) 113 Ind Cas 365 (366) (Nag). (A I R 1925 Nag 463 : 21 Nag L R 84 followed.)
('34) 21 AIR 1934 Mad 397 (398) : 58 Mad 31. (If the proceeding is *extra cursum curiæ*, the decision is in the nature of an arbiter's award and generally the right of appeal is barred. If, on the other hand, it is not *extra cursum curiæ*, unless there is a clear waiver of the right, the right of appeal will not be lost — Agreement to be bound by decision of Court amounts to such waiver.)
('36) 23 AIR 1936 Mad 856 (857). (When a party invites the Court to adopt a special procedure which is not contemplated by the Code of Civil Procedure, and is in fact a procedure *extra cursum curiæ*, he cannot afterwards turn round and say that the Court is to blame for adopting that procedure.)]

20. ('34) 21 AIR 1934 Mad 397 (398): 58 Mad 31.
('29) 16 AIR 1929 Oudh 451 (452, 453) : 5 Luck 391 (DB).
('26) 13 AIR 1926 All 90 (92).
('21) 8 AIR 1921 All 310 (310) : 43 All 266 (DB).

21. ('34) 21 AIR 1934 Lah 67 (67) : 15 Lah 305. (Agent of Court of Wards challenging defendant to take oath — Oath taken and decreed — *Held*, it is not consent decree and appeal lies.)
('38) 25 AIR 1938 Nag 64 (65) : I L R (1940) Nag 310.

22. ('95) 18 Mad 410 (414) (DB).
('07) 30 Mad 421 (423) (DB).
('95) 5 Mad L Jour 145 (147) (DB).
('08) 1908 Pun Re No. 77, page 359. (The terms so excluded might be enforced in a separate suit as a contract. See 34 Cal 456 (463).)

23. ('92) 16 Bom 202 (212) (DB).
(1900) 23 Mad 101 (105, 106) (DB).

24. † ('29) 16 AIR 1929 Sind 32 (36) (DB).
('10) 6 Ind Cas 857 (859) (DB) (All).
('89) 1889 Pun Re No. 105, p. 368. (See O. 43 R. 1 (m).)

25. ('28) 15 AIR 1928 Cal 108 (109) (DB).

26. ('17) 4 AIR 1917 Cal 607 (607) : 43 Cal 85.

27. ('28) 15 AIR 1928 Mad 922 (922) (DB).
('85) 11 Cal 250 (257) (DB).
✠('11) 9 Ind Cas 210 (211) (DB) (Cal). (Suit for partition of joint property when decree has been made by the consent of some only of the parties to the litigation.)
('15) 2 AIR 1915 Cal 473 (474) (DB).
('16) 3 AIR 1916 Cal 783 (785) (DB).
('18) 5 AIR 1918 Lah 126 (127) : 1918 Pun Re No. 83 (DB). (Decree on oath taken by one party — Other parties not joining in the challenge can appeal.)

28. ('25) 12 AIR 1925 Cal 421 (422) (DB).

(4) Where the appellant appeals on the ground that it was not a decree passed with the consent of the parties.[29]

Section 96 (3) does not apply to *orders* passed by consent of parties.[30]

16. Appeal as to costs. — See Section 35, Notes 29, 32 and 33.

17. Nature of grounds. — See Order 41 Rule 1, Notes 11 and 12.

18. Valuation for purposes of appeal. — There has been a great divergence of judicial opinion on this subject. It is, of course, clear that the pecuniary jurisdiction of the Appellate Court is determined (as the various Acts conferring such jurisdiction themselves state) by "the value of the original suit."[1] It is *that* valuation and *not* that

† ('27) 14 AIR 1927 P C 57 (59): 51 Bom 442 : 54 Ind App 111 (PC). (Person not party to consent but who had transferred all his property to consenting party cannot appeal.)

29. ('13) 6 Sind L R 166 : 19 Ind Cas 450 (450) (DB).
('31) 18 AIR 1931 P C 107 (108, 109) : 27 Nag L R 139 (PC).
('18) 5 AIR 1918 Mad 656 (657):41 Mad 233 (DB). (Vakils consenting without authority—Parties not consenting may appeal.)
† ('30) 125 Ind Cas 587 (589) (DB) (All). (Minors parties—No leave got for compromise—Not a consent decree—Appeal by minors lies—AIR 1925 All 558 : 47 All 921 and AIR 1928 All 497 followed.)
✠ ('29) 16 AIR 1929 Oudh 385 (387, 388) : 4 Luck 562 (FB). (Person consenting not having authority to compromise for party.)
('11) 1911 Pun Re No. 24 : 10 Ind Cas 850 (851). (Plea that decree does not accord with compromise can only be taken in appeal.)
('01) 5 Cal W N 877 (879) (DB).
('06) 9 Oudh Cas 365 (371, 372) (DB). (Parties at variance as to the meaning of compromise.)
[*See* ('35) 22 AIR 1935 Pesh 104 (106).]
✠ [See however ('33) 20 AIR 1933 Bom 205 (206, 207, 208): 57 Bom 206 (DB). (Invalidity of consent by pleaders or mukhtyars — Not raised in first Court — Order and decree not appealable on that ground.)]

30. ('40) 27 AIR 1940 Rang 153 (155) (DB).
('16) 3 AIR 1916 Mad 795 (797) (DB). (Order directing the appointment of Commissioner.)

Note 18

1. ('88) 10 All 524 (528) (DB).
† ('91) 13 All 320 (322) (DB).
('94) 16 All 286 (289) (DB).
('31) 18 AIR 1931 Cal 159 (160) : 58 Cal 829 (DB). (Mortgage suit for less than Rs. 5000—Preliminary decree for sale for more than Rs. 5000—Appeal lies to the District Judge and not to High Court.)
('35) 22 AIR 1935 Mad 723 (724). (Appeal from order on application numbered as suit under para. 20, Sch. 2, C. P. Code — Valuation for purposes of appeal is same as valuation in original application.)
('37) 24 AIR 1937 Oudh 12 (15) : 12 Luck 586 (DB). (Valuation of suit above Rs. 5000 — Suit decided by Subordinate Judge before Chief Court added Explanation to Rule 260, Oudh Civil Rules — Appeal lies to High Court.)
('90) 12 All 581 (586).
('11) 9 Ind Cas 574 (575) (DB) (All). (Suit for two reliefs together amounting to more than Rs. 5000 as valued in plaint—Same value in appeal.)
('84) 8 Bom 31 (34) (DB).
('72) 9 Bom H C R 286 (288).
('25) 12 AIR 1925 Cal 1076 (1081):53 Cal 14 (FB).
('90) 17 Cal 680 (683) (DB).
('96) 23 Cal 536 (542, 543) (DB).
('79) 5 Cal 489 : 4 Cal L Rep 491 (496, 497) (DB). (Suit for property of more than Rs. 5000 in value—No appeal lies to District Court.)
† ('02) 6 Cal W N 346 (348) (DB).
('92) 15 Mad 69 (70) (DB).
✠ ('74) 7 Mad H C R 356 (357) (SB). (Suit for over Rupees 5000—Decree for less—Appeal lies to the High Court.)
('15) 2 AIR 1915 All 349 (349). (Do.)
('27) 14 AIR 1927 Mad 977 (980) : 50 Mad 857 (FB).
('26) 13 AIR 1926 Nag 71 (72) (DB).
('10) 5 Ind Cas 18 (19, 20) (DB) (Cal). (Course of appeal is determined by the value of the claim as brought and not only the decision on the claim.)
('22) 9 AIR 1922 Pat 400 (402) : 1 Pat 32 (DB). (Forum of appeal in a rent suit not altered by the revival of the suit at a later stage in respect of a portion only of the subject-matter.)
('27) 14 AIR 1927 Lah 187 (188).
('11) 33 All 634 : 11 Ind Cas 934 (935) (DB). (Value of suit is the value of the main relief claimed in the suit and not incidental reliefs such as declarations claimed.)
('12) 15 Ind Cas 272 (273) (DB) (Lah). (Suit for declaration that an alienation is null and void as against plaintiff is thirty times the assessment.)
('12) 1912 Pun Re No. 88 : 15 Ind Cas 847 (850) (DB). (Pre-emption suit of land valued at less than Rs. 5000—Decree for payment of more than Rs. 5000—Appeal lies to District Judge.)
† ('11) 15 Ind Cas 407 (407) (DB) (Lah). (Do.)
('14) 1 AIR 1914 Lah 432 (433) (DB). (Do.)
('17) 4 AIR 1917 Cal 812 (814) (DB). (Pre-emption suit for Rs. 4500 — Decree for Rs. 7000—Appeal to District Judge is competent.)
('20) 7 AIR 1920 Pat 822 (825) : 4 Pat L Jour 447 (DB).
('07) 4 Low Bur Rul 279 (281) (DB). (In administration suit value of share claimed by plaintiff determines jurisdiction.)
('73) 5 N W P H C R 108 (109) (FB). (Suit for over Rs. 5000 — Decree for less — Appeal lies to High Court.)

set up by the plea in defence[2] or the amount awarded by the decree[3] that governs the course of appeal. Where a plaintiff values his claim *definitely*, as in a suit for a debt, that value will determine the appellate *forum also*[4] unless by fraud or misrepresentation the plaintiff deliberately *overvalues* or *undervalues* the claim for the purpose of choosing his own *forum*.[5] In the latter case, it is the *true* value at which the plaint *ought* to have been valued that will represent the "value of the suit" for purposes of appeal.[6]

But in cases where the plaintiff is entitled to value his suit approximately or tentatively as in a suit for accounts or mesne profits, what is the value of the suit? It is on this point that there has been considerable divergence of opinion and four different views at least have been expressed :

(1) The Madras and Allahabad High Courts have held[7] that the "value of the suit" in such cases means the statutory value of the suit, that is, the value which the plaintiff was entitled to give under the Suits Valuation Act (1887) or other enactments. The Calcutta High Court in the undermentioned Full Bench case[8] expressed a similar view but did not refer to a contrary view expressed in an earlier Full Bench decision of the same Court.[9] The Bombay High Court also held a similar view originally[10] but has, in later decisions, held a different view.[11] The Patna High Court has also held that ordinarily the value of the suit as given by the plaintiff in his plaint is to be the determining factor in such cases as regards the value of the appeal.[12]

(2) The second view which has been held by Calcutta and Lahore High Courts is that the "value of the suit" which determines the course of appeal means the value of the suit as *decreed* by the Court, and not the tentative value given

('03) 6 Oudh Cas 255 (261). (Ordinarily in pre-emption suit, value of property determines jurisdiction even for appeal unless plaintiff misrepresented the value or acted recklessly or adopted wrong method of calculation.)

† ('72) 18 Suth W R 261 (269) (SB). (Sum claimed and not that awarded by Court determines forum of Appellate Court — But the valuation must be according to law at the date of the appeal and not at the date of the suit which led to it.)

[*See* ('82) 4 Mad 220 (224, 225) (DB).]

[*See also* ('33) 20 AIR 1933 All 4 (6, 7) : 54 All 459 (DB). (Subject-matter of suit or appeal is not necessarily identical with subject-matter in dispute between parties.)]

Also see S. 106 N. 1.

2. ('80) 2 All 778 (780) (DB).

† ('88) 10 All 524 (528) (DB).

('86) 8 Bom 31 (33) (DB).

('88) 12 Bom 675 (677) (DB).

('71) 9 Bom H C R 286 (288).

('68) 9 Suth W R 598 (598) (DB).

3. ('33) 20 AIR 1933 Lah 8 (9).

4. ('95) 1895 Bom P J 228 (228). (Suit for declaration.)

('13) 20 Ind Cas 473 (473) (DB) (Lah). (Redemption suit.)

5. † ('91) 13 All 320 (323) (DB). (Exaggerated claim — Fraud.)

('93) 15 All 363 (365). (Value assigned by plaintiff —Fraud and negligence excepted.)

('11) 35 Bom 239 : 10 Ind Cas 746 (747). (Consent of party cannot make value of suit different.)

('12) 16 Ind Cas 940 (941) (DB) (Cal).

('72) 17 Suth W R 243 (243) (DB).

('11) 38 Cal 639 : 12 Ind Cas 464 (476) (DB). (Parties cannot by consent confer jurisdiction.)

6. ('90) 17 Cal 680 (683) (DB).

('91) 13 All 320 (323) (DB).

[*See also* ('26) 13 AIR 1926 Oudh 428 (429) : 1 Luck 202 (DB).

('04) 31 Cal 849 (856) (DB).]

Also see S. 6, Note 4.

7. †('18) 5 AIR 1918 Mad 998 (1002) : 40 Mad 1 (FB). (Principles well set forth in the order of reference.)

('33) 20 AIR 1933 Mad 330 (331, 332) : 56 Mad 705 (DB).

('33) 20 AIR 1933 Mad 721 (722) : 57 Mad 186 (DB).

('25) 12 AIR 1925 All 376 (377) : 47 All 534 (DB). (Following 16 All 286 and 33 All 97 and dissenting from 32 All 222 and 34 Cal 954 (FB).)

8. ('25) 12 AIR 1925 Cal 1076 (1081) : 53 Cal 14 (FB). (This decision must be deemed to have overruled AIR 1915 Cal 352 : 43 Cal 650 and AIR 1920 Cal 517 which held that a Court cannot pass decree beyond its pecuniary jurisdiction.)

9. ('07) 34 Cal 954 (959) (FB).

10. ('84) 8 Bom 31 (33) (DB).

11. ('96) 20 Bom 265 (268, 269) (DB). (But the correctness of this case is questioned in 22 Bom 963.)

('13) 21 Ind Cas 783 (788, 789) (DB) (Bom).

12. ('35) 22 AIR 1935 Pat 396 (400) : 14 Pat 658 (SB).

by the plaintiff in his plaint.[13] According to the Full Bench decisions of the Lahore High Court there is a further distinction between a case where the decree is in *excess* of the amount claimed and a case where the decree is for a sum less than the amount claimed. In the former case it is the amount *decreed* that will be "value of the suit" while in the latter case it will be the tentative valuation originally given by the plaintiff.[14]

(3) The third view which has been held by Mr. Justice Mukerjee in the Full Bench case[15] is that the "value of the suit" for purposes of appeal is the value as *decreed and as accepted* by the plaintiff by payment of court-fees on the additional amount decreed.[16]

(4) The fourth view is that, in case of Courts of limited pecuniary jurisdiction, as that of the Munsifs and Second Class Subordinate Judges, the value of a suit *can in no case* exceed the pecuniary jurisdiction of the Court and the appeal will therefore always lie to the District Court.[17]

It is impossible to reconcile this divergence of opinion on legal principles. This conflict has arisen owing to the wrong method of interpreting statutes. When an enactment such as the Suits Valuation Act *entitles* the plaintiff to value a suit for accounts or for mesne profits in a particular manner, it is not in accordance with the accepted rules of interpretation to assume that that is not the value but something else, such as the amount *decreed* by the Court or the amount *decreed* and *accepted* by the plaintiff subsequent to the decree. In this view the first of the views set forth above must be taken as the soundest one.

Where on a plea of set-off, a Court gives a decree to the defendant for over Rs. 5000, it is nevertheless the value of the suit as originally framed that determines the *forum* of appeal.[18] Formerly, however (under S. 216 of the old Code), the amount of the *decree* in favour of the defendant determined the *forum* of appeal.[19] See also Note 2 on Order 20 Rule 19.

In suits for partition the proper valuation of the suit is the value of the share sought to be separated and not the value of the entire property.[20]

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13. † ('07) 34 Cal 954 (959, 960) (FB). (Suit for mesne profits valued at less than Rs. 5000 — Decree for more than Rs. 5000 — Appeal lies to High Court.)

('26) 13 AIR 1926 Cal 378 (379) (DB). (Suit for Rs. 4000—Decree for over Rs. 5000—Appeal lies to High Court. Simply follows 34 Cal 954 (FB) without referring to AIR 1925 Cal 1076 : 53 Cal 14 (FB).)

('25) 12 AIR 1925 Cal 212 (212) (DB). (Decree for Rs. 9000—Payment of Rs. 8000—Appeal on execution side—Value is value of decree as passed.)

('04) 31 Cal 365 (369) (DB).

('13) 16 Ind Cas 940 (941) (DB) (Cal).

('90) 17 Cal 704 (706) (DB).

† ('28) 15 AIR 1928 Lah 670 (671) (DB). (Pre-emption suit.)

('28) 15 AIR 1928 Lah 157 (158) : 9 Lah 23 (DB). (Suit for accounts.)

('33) 20 AIR 1933 Lah 568 (569) (DB). (Suit for accounts — Amount decreed over Rs. 10,000 — Appeal to High Court.)

('02) 1902 Pun Re No. 58.

[*See also* ('25) 12 AIR 1925 Lah 534 (534) (DB). (Appeal from an order in execution — Value is value of suit and not value of the matter in dispute in the execution proceedings.)]

[But where in an account suit in which the claim is less than Rs. 5000 a preliminary decree is passed which does not award any sum, the value of suit will determine the *forum* of appeal. See ('09) 4 Ind Cas 929 (930) (Lah).]

14. † ('34) 21 AIR 1934 Lah 488 (491, 492) : 15 Lah 151 (FB).

('34) 21 AIR 1934 Lah 545 (547) : 15 Lah 512 (FB). (A I R 1934 Lah 488 : 15 Lah 151 (FB) followed.)

15. ('07) 34 Cal 954 (970) (FB).

16. ('19) 6 AIR 1919 Cal 447 (448) (DB). (34 Cal 954 (FB) followed.)

17. † ('13) 21 Ind Cas 783 (788, 789) (DB) (Bom).

18. See O. 20 R. 19 (2).

19. ('88) 10 All 587 (593, 594) (DB).

[*See also* ('93) 20 Cal 527 (531, 532).]

20. See S. 15, Note 13.

In suits for restitution of conjugal rights, the plaintiff's valuation must be accepted unless it is found that he has overvalued or undervalued it with any ulterior motives.[21]

In suits for redemption, the court-fee is payable on the principal sum secured[22] and this fixes also the *forum* of appeal when the mortgagor appeals.[23] As to the *forum* of appeal when the mortgagee appeals, see the undermentioned case.[24]

For the valuation of the above and other classes of suits, see the Suits Valuation Act (VII of 1887).

19. Court-fee. — The valuation of a suit for purposes of stamp duty is a different thing from the valuation of the suit for the purposes of fixing the appellate *forum*.[1]

It is the duty of the Appellate Court to see that proper court-fees are paid both in the Appellate Court and in the Court below.[2] As to the effect and scope of a decision under section 12 of the Court-fees Act, see O. 7, R. 11, Note 11.

As a general rule, when a question arises as to whether the appellant has paid deficient court-fee in the Court below, it is desirable that the appeal should be admitted before the point is decided so that no question of jurisdiction may arise[3] and the matter dealt with at the earliest possible moment[4] so that the parties may not be kept in suspense upon this question.[5] The rule is, however, subject to the discretion of the Court, to postpone the determination of the point in exceptional cases.[6] The question of the sufficiency of stamp on the memorandum of appeal must always be regarded as open until the appeal is finally heard and disposed of.[7]

20. Abatement of appeal. — See Order 22.

21. Limitation. — See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn.

22. Appeals under other laws. — The provisions of the Code with regard to appeals will apply to appeals under other Acts in so far as they are made applicable by such Acts.

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97. [New.] Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

Appeal from final decree where no appeal from preliminary decree.

21.*('06) 28 All 545 (551) (FB).
('86) 13 Cal 232 (236) (DB). (Such a suit is not one to which any special money value can be attached for the purposes of jurisdiction.)
('91) 18 Cal 378 (381) (DB).
('07) 34 Cal 352 (356) (DB).
Also see S. 15 Note 7.
22. ('86) 10 Bom 41 (46, 47).
('91) 14 Mad 480 (483).
('33) 20 AIR 1933 Lah 155 (156) (DB).
('91) 13 All 94 (97).
23. ('09) 1909 Pun Re No. 23 : 1 Ind Cas 870 (870) (DB). (This was, however, a case under the Punjab Courts Act, S. 40 (1) (b).)
24. ('33) 20 AIR 1933 Lah 155 (156) (DB). (Value of the subject-matter in redemption suit was the amount adjudicated by trial Court.)

Note 19

1. Compare the Court-fees Act, VII of 1870 and the Suits Valuation Act of 1887.

†('80) 5 Cal 489 (492, 493) (DB).
('10) 1910 Pun Re No. 41: 6 Ind Cas 715(716) (DB).
[*See also* ('33) 20 AIR 1933 Pat 81 (83, 84) : 12 Pat 188. (Decree for mesne profits—Valuation is amount as per decree. A I R 1932 Pat 228 : 11 Pat 532 followed.)]
2. ('18) 5 AIR 1918 Pat 623 (624) : 3 Pat L Jour 101 (DB).
3. ('21) 8 AIR 1921 Pat 88 (89) : 6 Pat L Jour 293 (FB).
4. ('12) 16 Ind Cas 963 (965) (DB) (Cal).
†('21) 8 AIR 1921 Pat 88 (89) : 6 Pat L Jour 293 (FB).
5. ('12) 16 Ind Cas 963 (965) (DB) (Cal).
('21) 8 A I R 1921 Pat 88 (89) : 6 Pat L Jour 293 (FB).
6. ('12) 16 Ind Cas 963 (965) (DB) (Cal).
('21) 8 AIR 1921 Pat 88(89):6 Pat L Jour 293(FB).
[*See also* ('32) 19 AIR 1932 Pat 228 (230): 11 Pat 532 (DB).]
7. ('33) 20 AIR 1933 Pat 234 (235) : 12 Pat 694.

1. Scope and object of the section. — This section is new. Under the old Code objections to the preliminary decree could be raised in the appeal against the final decree.[1] This was felt to be unreasonable as, thereby, a party was permitted to wait till proceedings were carried on to a final stage and large costs were incurred, and then, after the final decree, raise objections which could have been taken at an earlier stage.[2] It is, therefore, enacted by the present section that the failure to appeal against a preliminary decree is a bar to raising any objection to it in the appeal against the final decree.[3] But the bar under this section does not apply to an *interlocutory order* (between the preliminary decree and final decree) not amounting to a supplementary preliminary decree.[4]

A Court while passing a final decree cannot re-open questions determined by a preliminary decree.[5]

2. Preliminary decree. — See Section 2 (2).

3. Effect of not drawing up a preliminary decree. — This section does not apply unless a preliminary decree is actually *drawn up*.[1] As to whether there is a right of appeal even when no such decree is drawn up, see the discussion in Note 8 on S. 2 (2). It has been held in the undermentioned cases that no appeal will lie against a mere finding even if such finding is recorded in the form of a decree.[2]

4. Two or more preliminary decrees, if can be drawn up.—See Note 10 on Section 2 (2) where the subject is fully discussed.

5. Effect of final decree being passed pending appeal against preliminary decree. — Under the old Code an appeal from an order in the nature of a

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Section 97 — Note 1

1. ('84) 12 Moo Ind App 157 (184, 185) (PC).
('09) 1 Ind Cas 86 (87, 88) (DB) (Cal).
('02) 1902 Pun Re No. 49, p. 176 (178) : 1902 Pun L R No. 56, p. 203 (206).
('96) 23 Cal 406 (412, 413) (DB). (Dwarris on Statutes and Maxwell on Interpretation of Statutes considered.)
('02) 29 Cal 758 (767) (FB). (Overruling 23 Cal 279.)
(1900) 24 Bom 302 (305) (DB).
('89) 14 Bom 232 (235) (DB). (Following the reasoning in 7 Moo Ind App 223 at pp. 302, 303 (PC).)
('15) 2 AIR 1915 Cal 118 (118) (DB).
(1865) 10 Moo Ind App 413 (423) (PC).
(1865) 10 Moo Ind App 340 (361) (PC).
(1859) 7 Moo Ind App 283 (302) (PC).
2. *See* Statement of Objects and Reasons.
[*See also* ('12) 36 Bom 536 (539): 16 Ind Cas 159 (160) (DB).]
3. ('40) 27 AIR 1940 Pat 204 (207, 209): 19 Pat 1 (DB).
('30) 17 AIR 1930 Oudh 10 (12) (DB).
('37) 24 AIR 1937 Rang 494 (496) (DB).
† ('36) 23 AIR 1936 Oudh 81 (82) (DB).
('35) 22 AIR 1935 Oudh 11 (12) : 10 Luck 233 (DB).
† ('33) 20 AIR 1933 Oudh 352 (354, 355) : 9 Luck 51 (FB).
('29) 124 Ind Cas 669 (670) (DB) (Oudh).
('30) 17 AIR 1930 Lah 24 (26).
('19) 6 AIR 1919 Cal 538 (539) (DB).
† ('15) 2 AIR 1915 PC 116 (117): 42 Cal 914 (PC).
('19) 6 AIR 1919 Pat 420 (422) : 4 Pat L Jour 306 (DB).
('24) 11 AIR 1924 Cal 80 (81) (DB).
('24) 11 AIR 1924 Nag 419 (422) (DB).
† ('17) 4 AIR 1917 Cal 701 (704) (DB). (Test suggested for determining whether an adjudication is or is not final and conclusive.)
('16) 3 AIR 1916 Cal 249 (250) (DB).
('16) 3 AIR 1916 Bom 305 (307): 40 Bom 321 (DB).
('14) 1 AIR 1914 Cal 804 (804) (DB).
('12) 36 Bom 536 (539) (DB).
('30) 17 AIR 1930 Pat 557 (558) (DB).
4. ('40) 27 AIR 1940 Pat 204 (207): 19 Pat 1 (DB). (Orders passed for guidance of Commissioner appointed for taking accounts or making partition or ascertaining mesne profits are not preliminary decrees — Order after preliminary decree in suit for dissolution of partnership and for accounts, but before final decrees, directing the Commissioner to credit the plaintiff with a particular sum is an interlocutory order and not a supplementary preliminary decree.)
5. ('29) 16 AIR 1929 All 252 (253) (DB).
('29) 16 AIR 1929 All 65 (66) (DB).

Note 3

1. † ('24) 11 AIR 1924 Bom 33 (34) (DB). (Provisions of S. 97 whether applicable or not—Test applied.)
('12) 37 Bom 60 (63) : 17 Ind Cas 637 (637) (DB). (Overruled on another point in AIR 1914 Bom 149 : 39 Bom 339 (FB).)
('13) 37 Bom 480 (483) : 19 Ind Cas 894 (895) (DB).
('14) 1 AIR 1914 Bom 23 (25) : 38 Bom 331 (DB). (No adverse inference as to his right of appeal to be drawn from an omission on the part of a party to ask the Court to draw up a decree.)
† ('24) 11 AIR 1924 Cal 1006 (1007, 1008) (DB).
('10) 34 Bom 182 (188) (DB).
('12) 8 Nag L R 92 (95) : 15 Ind Cas 935 (936).
2. ('26) 13 AIR 1926 Bom 237 (238) (DB).
† ('21) 8 AIR 1921 Bom 220 (223, 224) : 45 Bom 627 (DB).
Also see S. 2 (2), Note 8.

preliminary decree could not be preferred or maintained after a final decree was passed in the case.[1] Under this Code a preliminary decree is a "decree" within S. 2 (2) and is appealable under this section. Two questions have arisen in this connection —

(1) Where an appeal is preferred against the preliminary decree, does the passing of the final decree by the first Court affect the maintainability of the appeal ?

(2) Is an appeal against the preliminary decree preferable *after* the final decree has been passed in the suit ?

On the first point, all the High Courts have held that a passing of a final decree subsequent to the institution of the appeal will not affect the maintainability of the appeal.[2] On the second point there is a conflict of opinion. The High Courts of Madras,[3] Allahabad[4] and Patna[5] and the Judicial Commissioner's Court of Peshawar[6] have held that an appeal can be preferred against the preliminary decree even *after* the final decree has been passed. The basis of the view is that the final decree is dependent on the preliminary decree and that if the latter is set aside on appeal, the former falls with it.[7]

Note 5

1. ('09) 36 Cal 762 (765) (DB).
('10) 32 All 225 (227) (DB).
[*See also* ('11) 33 All 528 (529) : 11 Ind Cas 517 (517) (DB).]

2. ('14) 1 AIR 1914 Mad 473 (474) : 37 Mad 455 : 14 Ind Cas 394 (396) (DB).
('38) 25 AIR 1938 Bom 222 (222) (DB). (This will be so even if the appellant has not asked for stay of proceedings after institution of his appeal or has not filed an appeal against the final decree.)
('38) 40 Pun L R 123 (123) (DB).
† ('35) 22 AIR 1935 Lah 482 (483):17 Lah 53 (DB).
† ('15) 2 AIR 1915 Mad 197 (199):37 Mad 29 : 12 Ind Cas 664 (668) (DB).
('13) 18 Ind Cas 730 (731) (DB) (Mad).
('28) 15 AIR 1928 Mad 107 (115) (DB). (Appeal from preliminary order allowed — Appeal against final order on same grounds is unnecessary.)
('19) 6 AIR 1919 Mad 870 (871) (DB).
('19) 6 AIR 1919 Mad 91 (91, 92) (DB).
† ('14) 1 AIR 1914 All 380 (380,381):36 All 532(FB).
('26) 13 AIR 1926 All 665 (667) : 48 All 611 (DB). (Final decree — Appeal dismissed for default—A pending appeal from preliminary decree not affected.)
('12) 34 All 493 (495) : 16 Ind Cas 157 (159) (DB). (Dissenting from 33 All 528.)
('28) 15 AIR 1928 Cal 804 (804, 805) (DB). (Appeal from preliminary order in execution limiting decree-holder's right to mesne profits—Execution subsequently dismissed—Appeal is still maintainable — Execution will proceed as per appellate judgment.)
('27) 14 AIR 1927 Cal 559 (560) (DB). (If the appeal from preliminary decree is filed before final decree is passed the appeal can be continued and this principle applies also to second appeal.)
('23) 10 AIR 1923 Cal 282 (282) (DB).
† ('16) 3 AIR 1916 Pat 370 (371) : 1 Pat L Jour 406 (FB). (Preliminary decree is not extinct after the passing of final decree.)
('16) 3 AIR 1916 Cal 43 (46) (DB).
('13) 20 Ind Cas 576 (577) (DB) (Cal).
('13) 19 Ind Cas 630 (631) (DB) (Cal).
('13) 21 Ind Cas 510 (512) (DB) (Cal). (If appeal against preliminary decree is allowed the final decree will cease to be operative.)
† ('19) 6 AIR 1919 Cal 893 (894) (DB). (Right to appeal against the preliminary decree is not taken away by the passing of final decree.)
('03) 30 Cal 683 (684) (DB).
('26) 13 AIR 1926 Bom 43 (44) (DB). (But appellant must appeal against the final decree also or at least inform the Court of the passing of the final decree.)
('26) 13 AIR 1926 Lah 534 (534). (If allowed, final decree will fall to the ground.)
('28) 15 AIR 1928 Nag 68 (68).
('25) 12 AIR 1925 Oudh 39 (42) (DB).
† ('25) 12 AIR 1925 Sind 178 (180) : 18 Sind L R 133 (DB). (Passing of the final decree does not render the appeal from the preliminary decree nugatory.)
[*See* ('42) 29 AIR 1942 Cal 153 (155, 167) : ILR (1942) 1 Cal 326 (DB). (Final decree passed pending appeal from preliminary decree—Preliminary decree modified in appeal—Final decree was vacated.)]
[But see ('12) 16 Ind Cas 380 (381) (DB) (Mad).]

3. *See* ('15) 2 AIR 1915 Mad 197 (199) : 37 Mad 29 (DB).
See also the Madras cases cited in foot-note (2).

4. ('14) 1 AIR 1914 All 380 (380) : 36 All 532 (FB). (The object of appeal against the final decree would be to keep the appeal against the preliminary decree alive.)

5. ('30) 17 AIR 1930 Pat 177 (177) (FB).

6. ('34) 21 AIR 1934 Pesh 57 (60) (DB).

7. ('40) 27 AIR 1940 Pat 668 (669) (DB).
('13) 18 Ind Cas 730 (731) (DB) (Mad).
[*See* ('40) 27 AIR 1940 Pat 204 (224) : 19 Pat 1 (DB). (The function of the final decree is merely to re-state and apply with precision what the preliminary decree has ordained and the final decree is not only based on but is also controlled by the preliminary decree and cannot travel beyond it.)
('15) 2 AIR 1915 Mad 197 (199): 37 Mad 29 (37) (DB).
('14) 1 AIR 1914 All 380 (380) : 36 All 532 (FB).]

Four different views at least were expressed by the Calcutta High Court on this point. One class of cases held that such an appeal was not competent;[8] a second class of cases held that it was incompetent unless an appeal was preferred from the *final decree also*;[9] a third class of cases held that appeal may be amended so as to *convert* it into an appeal against *both the decrees*;[10] and in the undermentioned case[11] the view of the Madras and the Allahabad High Courts was adopted as the correct one. The conflict has now been set at rest by the Full Bench decision in *Taleb Ali* v. *Abdul Aziz*,[12] in which the view of the Madras and Allahabad High Courts has been adopted as the correct one.

The Lahore High Court held in earlier decisions that an appeal is not competent *after* the final decree has been passed[13] but has taken a different view in a later decision.[14] The Bombay High Court in an earlier decision[15] and the Sind Judicial Commissioner's Court[16] have held that when a party has the facility of time to appeal against the final decree also, he cannot be allowed to appeal against the preliminary decree only, as thereby he has a chance of getting a reversal of the final decree without paying court-fee for the same. But in a later decision, the Bombay High Court has expressed a contrary view.[17] In an earlier case of the Nagpur Court it was held that an appeal cannot be preferred against the preliminary decree after the final decree was passed.[18] A contrary view has, however, been taken in a later case in the same Court.[19]

This section does not prevent a party from filing a combined appeal against *both* the preliminary and final decrees if the dates permit him to do so.[20]

A final decree passed pending an appeal from the preliminary decree is not thereby rendered invalid, and if the appeal is dismissed, the final decree passed will not be affected in any way.[21]

6. Effect of reversal of preliminary decree on final decree. — See Note 5.

7. **Court-fees.** — An appeal from a preliminary decree or from a final decree must be stamped *ad valorem* on the amount of the subject-matter in dispute in the appeal.[1] But where a preliminary decree for partition declares plaintiff's rights to mesne

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[*See also* ('42) 29 AIR 1942 Cal 153 (155, 167) : ILR (1942) 1 Cal 326 (DB). (Preliminary decree modified—Final decree was vacated.)
See also the cases in foot-note (2).

8. ('08) 12 Cal W N 590 (593, 598) (DB).
('16) 3 AIR 1916 Cal 178 (178) (DB).
('21) 8 AIR 1921 Cal 109 (110) : 48 Cal 1036 (DB).
('25) 12 AIR 1925 Cal 790 (791) (DB).
('26) 13 AIR 1926 Cal 412 (412) (DB). (Appeal does not lie—Final decree passed.)
('27) 14 AIR 1927 Cal 492 (492) : 54 Cal 328 (DB). (No steps taken to set aside the final decree — Appeal against the preliminary decree infructuous.)

9. ('13) 21 Ind Cas 516 (517) (DB) (Cal).
('26) 13 AIR 1926 Cal 557 (558) (DB).
('24) 11 AIR 1924 Cal 543 (543) (DB).

10. ('21) 8 AIR 1921 Cal 109 (110) : 48 Cal 1036 (DB).
('28) 15 AIR 1928 Cal 167 (168) (DB).
('25) 12 AIR 1925 Cal 218 (219) (DB). (The appeal was however allowed to be converted into one againt the final decree.)
[*See* ('24) 11 AIR 1924 Oudh 299 (300) (DB). (But where an appeal is preferred before the passing of the final decree, it cannot be converted into an appeal against the final decree passed subsequently.)]

11. ('28) 15 AIR 1928 Cal 720 (721) (DB). (Per B. B. Ghose, J.)

12. ('29) 16 AIR 1929 Cal 689 (697) : 57 Cal 1013 (FB).

13. ('21) 8 AIR 1921 Lah 265 (266).
('28) 15 AIR 1928 Lah 73 (74) (DB).

14. † ('35) 22 AIR 1935 Lah 482 (483) : 17 Lah 53 (DB). (That right cannot be taken away by a final decree being passed either before or after the presentation of an appeal from the preliminary decree—If that appeal is accepted the final decree falls with the preliminary decree.)

15. ('16) 3 AIR 1916 Bom 228 (229) (DB).

16. ('25) 12 AIR 1925 Sind 178 (180) : 18 Sind L R 133 (DB).

17. ('38) 25 AIR 1938 Bom 222 (222) (DB).

18. ('22) 9 AIR 1922 Nag 179 (180).

19. ('29) 16 AIR 1929 Nag 349 (350) : 27 Nag L R 197.

20. ('16) 3 AIR 1916 Bom 202 (202) (DB).

21. ('29) 16 AIR 1929 All 287 (289) : 51 All 640 (DB).

Note 7

1. ('10) 32 All 517 (522). (Not a fixed fee of Rs. 10.)
('14) 1 AIR 1914 Lah 507 (507) : 1915 Pun Re No. 7 (DB).

profits and makes provision for its *subsequent determination*, an appeal against the preliminary decree need not bear a court-fee in respect of the mesne profits, even where the decision as to mesne profits is challenged in appeal.[2] Where a party appeals first from a preliminary decree and pays *ad valorem* fee thereon and subsequently appeals to the same Court from the final decree also, he need not pay *ad valorem* court-fee again on the *entire* amount awarded by the final decree but only on the amount, if any, in *excess* of that on which court-fee was already paid.[3] An appellant can prefer a single combined appeal from both the preliminary and final decrees if the dates permit him to do so, but court-fee must be paid only on the larger of the subject-matters in dispute in respect of the two decrees.[4]

See also Order 34 R. 5, Note 25.

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98. [S. 575.] (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

Decision where appeal heard by two or more Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed :

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law,[6] they[7] may[11] state the point of law upon which they differ and the appeal shall then be heard upon that point only[8] by one or more of the other Judges,[9] and such point shall be decided according to the opinion of the majority[10] (if any) of the Judges who have heard the appeal, including those who first heard it.

[a](3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court.[12]

[1877, S. 575; See Letters Patent.]

a. Inserted by the Repealing and Amending Act, 1928 (XVIII of 1928), Section 2 and Schedule I.

('28) 15 A I R 1928 Rang 194 (195) : 6 Rang 285 (DB). (Appeal from final decree.)

('27) 14 AIR 1927 Sind 251 (252): 23 Sind L R 277 (DB). (Appeal from preliminary decree.)

('25) 12 AIR 1925 All 734 (735): 47 All 926. (Decree for foreclosure.)

('23) 10 AIR 1923 Mad 19 (19) : 49 Mad 280 (DB). (An appeal from a final decree passed under O. 20, R. 12 (2), C. P. Code, in respect of subsequent mesne profits.)

† ('22) 9 AIR 1922 Oudh 82 (84) : 25 Oudh Cas 30 (DB). (Appeal in foreclosure and redemption suits.)

Also see O. 34 R. 4, Note 16.

2. ('30) 17 AIR 1930 Mad 597 (599, 600): 53 Mad 540 (DB).

3. † ('32) 19 AIR 1932 Mad 453 (455): 55 Mad 664 (DB). (Suit for accounts.)

('12) 15 Ind Cas 572 (572) (DB) (Cal).

('23) 10 AIR 1923 Lah 632 (632): 4 Lah 406 (DB). (Appeal from a final decree does not contest anything beyond what is contested in the appeal from the preliminary decree.)

('24) 11 AIR 1924 Pat 694 (694): 3 Pat 815 (DB).
('29) 16 AIR 1929 Cal 815 (817) : 57 Cal 463.

4. ('21) 8 AIR 1921 Mad 406 (407).

Synopsis

1. Legislative changes.
2. Amendments after 1908.
3. Scope and applicability of the section.
4. Difference of opinion in the decision of preliminary objection.
5. Difference of opinion as to part of decree.
6. "Differ in opinion on a point of law."
7. Reference, whether can be made by one of the differing Judges alone.
8. "The appeal shall then be heard upon that point only."
9. Reference to be to one or more of the other Judges of the Court.
10. Decision to be according to the opinion of the majority.
11. Differing Judges not stating the point of law—Effect.
12. Sub-section (3)—Clause 36 of the Letters Patent—Effect of.
13. Letters Patent appeal, whether lies from a confirming judgment, under sub-section (2) of Section 98.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Income-tax Act reference—Section applicable to. See Note 3.
Land Acquisition Act—Appeals under—Applicability of the section. See Note 3.
Question of fact—Difference of opinion on. See Notes 6 and 12.
Second appeals—Applicability of Letters Patent to. See Note 12.
Senior Judge—Opinion of—When to prevail. See Note 12.

1. Legislative changes.—This section corresponds to S. 575 of the old Code. The most important change is : the words "they may *state the* point of law upon which they differ and the appeal shall then be heard *upon that point only* by one or more of the other Judges and such point shall be decided" in the proviso to cl. (2) have been substituted for the words "*the appeal may be referred to* one or more of the other Judges of the same Court *and shall be decided.*" See Notes 6 and 8.

2. Amendments after 1908.—Sub-section (3) has been newly added by the Repealing and Amending Act, XVIII of 1928. See Note 12.

3. Scope and applicability of the section.—This section deals with the question as to how a decision is to be arrived at in an appeal which is heard by a Bench of two or more Judges.

The section refers in terms to appeals. But the question has arisen whether by virtue of S. 141 of the Code it is applicable to *other* proceedings. Under the old Code it was held that by virtue of S. 647 (corresponding to S. 141) S. 575 applied to miscellaneous proceedings[1] and applications to the High Court in its extraordinary jurisdiction.[2] But while the words used in S. 647 of the old Code were "the *procedure herein* prescribed" the words used in the present S. 141 are "the procedure provided in this Code *in regard to suits.*" It has accordingly been held that S. 98, which prescribes the procedure in regard to *appeals*, cannot be extended by S. 141 to miscellaneous proceedings such as revision applications.[3]

It was held by the Calcutta High Court in the undermentioned case[4] that a reference to the High Court under S. 66 of the Income Tax Act is not an *appeal from*

Section 98 — Note 3

1. ('79) 3 Bom 204 (205).
2. ('81) 5 Bom 680 (681).
[*See also* ('01) 25 Bom 478 (484). (Question not decided.)]
3. ('15) 2 AIR 1915 Mad 1193 (1196). (Proceedings held to be regulated by Clause 36, Letters Patent (Madras).)
('25) 12 AIR 1925 Mad 281 (285, 287). (Clause 36, Letters Patent (Madras), applies.)
[Even prior to the present Code it was held in ('70) 2 N W P H C R 117 that Section 575 did not apply to application for revision. In ('01) 25 Bom 478 (484) : 3 Bom L R 58 (63) it was doubted whether in view of the Explanation to Section 647 under which that section was not applicable to execution proceedings, S. 575 could be extended to an application for revision in an execution matter—But in ('02) 25 Mad 548 (551) S. 575 was applied to a revision case.]
4. ('24) 11 AIR 1924 Cal 668 (685) : 51 Cal 504. (Clause 36, Letters Patent (Madras), applies.)

any decree and S. 98 cannot be applied to such a proceeding by recourse to S. 141. The Income Tax Act has now been amended by Act XXIV of 1926 by adding S. 66A by which the provisions of S. 98 of the Code are expressly made applicable to reference under S. 66 of that Act.[5]

By virtue of S. 54 of the Land Acquisition Act, 1894, this section applies to appeals in land acquisition cases.[6]

As to the effect of this section on S. 10 (2) of the Punjab Courts Act, VI of 1918, and S. 10 of the Central Provinces Courts Act, I of 1917, see the undermentioned cases.[7]

4. Difference of opinion in the decision of preliminary objection. — The decision of a preliminary objection to the hearing of an appeal is not a "hearing" of the appeal but precedes the hearing. Section 98 does not apply to a difference of opinion in such a decision, the words of the section being "where an appeal is *heard*," etc.[1]

5. Difference of opinion as to part of decree. — Where the Judges agree that a part of the decree should be reversed, but differ as to the rest, then according to the Calcutta,[1] Madras[2] and Allahabad[3] High Courts, the part as to which the Judges agree should be reversed, and rest of the decree confirmed. The Lahore High Court, on the other hand, has held that the *whole* decree should be confirmed in a such case.[4]

6. "Differ in opinion on a point of law." — The reference under S. 98 to other Judges must be only on a *question of law* and not on a question of fact.[1] For instances of points of law, see the undermentioned cases.[2] See also Notes on S. 100.

7. Reference, whether can be made by one of the differing Judges alone. — The use of the pronoun "*they*" in the present section seems to show that the reference to other Judges must be made by *both* the differing Judges. The wording in the previous Code "the appeal may be referred" permitted a different view being held.[1]

8. "The appeal shall then be heard upon that point only." — Under the old Code when the Judges hearing an appeal differed on a point of law, the *whole case* was referred to one or more of the other Judges.[1] Under the present section, it is

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5. ('31) 18 AIR 1931 Lah 578 (580) : 12 Lah 725 (FB).
6. ('19) 6 AIR 1919 Mad 626 (628) : 41 Mad 943.
7. ('16) 3 AIR 1916 Lah 113 (125) : 1917 Pun Re No. 71 (FB). (On a difference of opinion on a point of law, reference must be under S. 98, C. P. Code and not S. 10 (2) of the Punjab Courts Act, as that section applies only in the absence of any other provision.)
('32) 19 A I R 1932 Nag 88 (89) : 28 Nag L R 80. (This section applies only to appeals while S. 10 of the C. P. Court's Act applies to all other cases.)

Note 4

1. ('89) 11 All 176 (181) (SB). (Objection that the appeal was barred by limitation.)

Note 5

1. ('16) 3 AIR 1916 Cal 582 (588) (SB).
2. † ('28) 15 A I R 1928 Mad 180 (188, 190) : 51 Mad 291 (DB).
3. ('33) 20 AIR 1933 All, 473 (474) : 55 All 564 (DB). (Dissenting from AIR 1926 Lah 65: 7 Lah 179.)
4. † ('26) 13 A I R 1926 Lah 65 (71) : 7 Lah 179 (DB).

Note 6

1. ('32) 19 A I R 1932 Nag 88 (88, 89) : 28 Nag L R 80 (DB). (But if difference is on question of fact, lower Court's decree to be confirmed.)
2. ('16) 3 AIR 1916 Lah 113 (125) : 1917 Pun Re No. 71 (SB). (Whether there is any presumption that special training received by plaintiff, a Hindu, was at family expense.)
('94) 21 Cal 568 (569) (FB). (Whether what the plaintiff brought was an "actionable claim" within the meaning of S. 135 of the Transfer of Property Act.)
('94) 21 Cal 437 (455). (Whether suit prohibited by S. 244, C. P. Code.)
('16) 3 AIR 1916 Cal 764 (770) : 43 Cal 558 (570) (SB). (Whether interest of unregistered purchaser of portion of patni tenure is encumbrance within S. 161 of the Bengal Tenancy Act.)

Note 7

1. ('80) 1880 Pun Re No. 90, p. 215 (218) (DB).

Note 8

1. ('12) 39 Cal 353 (369) : 13 Ind Cas 353 (360) (SB).
('01) 11 Mad L Jour 10 (18, 19) (FB).

only the *point of law on which they differ* that can be so referred and the Judges hearing the reference can only hear arguments on the *specific* point and not the whole appeal.[3]

9. Reference to be to one or more of the other Judges of the Court. — The reference should be heard by one or more of the *other* Judges of the Court, according to the practice of the Bombay,[1] Calcutta[2] and Lahore[3] High Courts. The Allahabad High Court, however, holds that the Bench hearing the reference should *include* also the Judges who originally heard the appeal.[4] See also the undermentioned case of the Madras High Court.[5]

10. Decision to be according to the opinion of the majority. — Though the reference is, under the section, to be *heard* by a Judge or Judges other than those who heard the case originally, the *decision* upon the point must be according to the opinion of the majority of the Judges who heard the appeal including those who first heard it.[1]

11. Differing Judges not stating the point of law — Effect. — If the Judges differ on a point of law, but do not *state the point* for the decision of other Judge or Judges, the decree appealed from should be confirmed.[1] Where the differing Judges have, without stating the point as required by the section, delivered their judgments without any reservation, they cannot *subsequently* state the point of law.[2]

12. Sub-section (3) — Clause 36 of the Letters Patent — Effect of. — Under Clause 36 of the Letters Patent as it originally stood where there was a difference of opinion among the Judges hearing an appeal, the opinion of the *senior* Judge was to prevail,[1] while, under the present S. 98, if there is no majority concurring in reversing or varying a decree, the decree *shall be confirmed*.[2] After the amendment of the Letters Patent in 1928, the procedure under Clause 36 of the Letters Patent on a difference of opinion is the same as that under S. 98[3] except that —

(1) a reference under cl. 36 is *obligatory*, while it is *optional* under S. 98, and

(2) the reference under clause 36 may be on a *point of fact as well as of law*, while under S. 98 it can only be on a *point of law*.

Before sub-s. (3) of this section was introduced by the Repealing and Amending Act (XVIII of 1928), there was a difference of opinion as to whether S. 98 or Cl. 36 of the Letters Patent was to be applied in appeals to Chartered High Courts. The view generally

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('98) 21 Mad 179 (215) (SB).
('07) 14 Bur L Rep 59 (FB).
[But see ('99) 2 Oudh Cas 149 (194).]

2. ('13) 35 All 487 (498) : 40 Ind App 182 : 16 Oudh Cas 247 : 21 Ind Cas 288 (293) (PC).
('33) 20 AIR 1933 All 861 (874, 875) (DB).
† ('14) 1 AIR 1914 Cal 592 (594). (The differing Judges must come to a complete decision except on the question of law.)
('22) 9 AIR 1922 Oudh 189 (194) : 25 Oudh Cas 213 (SB). (However, reference may be made to the facts for purpose of elucidating the point of law in the reference.)
('22) 9 AIR 1922 Cal 544 (549).
Also see L. P. (Cal), Cl. 36 N 4.

Note 9

1. ('91) 15 Bom 424 (427) (SB).
✣('04) 6 Bom L R 131 (209, 210).
2. ('94) 21 Cal 437 (454) (SB).
3. ('87) 1887 Pun Re No. 15, p. 32 (37) (DB).
4. ('84) 6 All 468 (476) (SB). (Dissented from in 27 Bom 189.)
5. ('91) 14 Mad 186 (191) (SB).

Note 10

1. ('04) 6 Bom L R 131 (211).

Note 11

1. (1900) 27 Cal 724 (762) (DB). (No reference made to other Judge or Judges.)
2. ('87) 9 All 625 (643) (FB). (Such reference is *ultra vires*.)

Note 12

1. † ('70) 13 Suth W R 209 (212).
2. ('25) 12 AIR 1925 Mad 1032 (1033) (DB).
('07) 14 Bur L Rep 257.
3. ('32) 19 AIR 1932 All 195 (196) (DB).
('33) 20 AIR 1933 All 861 (875) : 56 All 39 (SB). (Hearing by other Judges is confined to the specific points stated and does not cover the whole case.)

taken was that S. 98 applied to appeals from *subordinate* Courts[4] but that Cl. 36 applied to appeals preferred under the Letters Patent.[5] The Calcutta High Court held that S. 98 should be applied in all cases.[6] The introduction of sub-s. (3) shows clearly that the applicability of Cl. 36 is not in any way controlled by this section. It has accordingly been held by a Full Bench of the Madras High Court that Cl. 36 applies to *all appeals* to Chartered High Courts, whether from subordinate Courts or under the Letters Patent, and that S. 98 applies only to High Courts *other than Chartered High Courts*, e. g., the Chief Courts and Courts of Judicial Commissioners.[7] The High Courts of Allahabad,[8] Lahore[9] and Patna[10] have followed the view taken by the High Court of Madras.

13. Letters Patent appeal, whether lies from a confirming judgment, under sub-section (2) of Section 98. — Before the amended Letters Patent of 1928 was passed, it was held that an appeal under Cl. 15 of the Letters Patent lay against the confirming judgment passed under sub-s. (2) of this section.[1] Under the amended Letters Patent no such appeal lies to the High Court.[2] See also Letters Patent (Cal.) Cl. 15, Note 9.

Even before the Letters Patent was amended, there was no appeal against a decision arrived at *after the reference* under the proviso to sub-s. (2), because the decision was necessarily that of a *majority* of the Judges, and the Letters Patent provided for an appeal only where there was an *equal* division of opinion between the Judges.[3]

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99. [S. 578.] No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

[1877, Ss. 577 and 578; 1859, S. 350; see O. 1, Rr. 1 and 3 and O. 2 R. 3.]

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4. ('19) 6 AIR 1919 Bom 1 (4) : 43 Bom 433 (FB). (Second appeal.)
('25) 12 AIR 1925 Pat 625 (667) : 4 Pat 510. (No conflict between the Code and the Letters Patent.)
*('26) 13 AIR 1926 Cal 121 (132, 139) : 52 Cal 1018 (DB).
('26) 13 AIR 1926 Lah 65 (71) : 7 Lah 179 (DB).
5. ('21) 8 AIR 1921 P C 6 (7) : 45 Bom 718 : 48 Ind App 181 (PC). (Clause 36 of the Letters Patent (Bom) is not controlled by this section.)
('24) 11 AIR 1924 Rang 148 (152) : 1 Rang 584. (Clause 34 of the Letters Patent (Rang) does not override the provisions of this section in all cases.)
('17) 4 AIR 1917 Bom 62 (78, 79) (SB).
('06) 29 Mad 1 (24) (DB).
('04) 26 All 10 (13) (DB).
†('23) 10 AIR 1923 Bom 218 (224, 225) (DB).
('25) 12 AIR 1925 Pat 625 (667) : 4 Pat 510.
6. ('25) 12 AIR 1925 Cal 845 (846, 847) : 52 Cal 894 (FB). (Per Suhrawardy, J.)
7. ('29) 16 AIR 1929 Mad 641 (659) : 52 Mad 563 (FB). (If, at any time, Clause 36 ceases to exist, S. 98 will come into operation.)
8. ('38) 25 AIR 1938 All 641 (647, 649) : ILR (1938) All 972 (FB).
[But see ('32) 19 AIR 1932 All 195 (196). (Not good law after above Full Bench decision.)]
9. ('33) 20 AIR 1933 Lah 648 (648). (Difference of opinion on a question of fact — Clause 26, Letters Patent applies.)
('34) 21 AIR 1934 Lah 371 (379) : 15 Lah 425 (FB).
10. ('33) 20 AIR 1933 Pat 67 (68, 69) : 11 Pat 772.

Note 13

1. ('86) 8 All 105 (107).
('94) 18 Bom 355 (362).
('89) 13 Bom 449 (458).
('16) 3 AIR 1916 Cal 811 (811).
('01) 28 Cal 517 (520).
('93) 20 Cal 762 (766).
('84) 10 Cal 814 (816) (FB). (Notwithstanding the terms of S. 575 (old Code).)
('02) 25 Mad 548 (550, 551).
2. *See* Amended Clause 15 of the Letters Patent (Madras, Bombay and Calcutta); Amended Cl. 10 of the Letters Patent (Allahabad, Lahore and Patna); Amended Cl. 13 of the Letters Patent (Rangoon).
3. ('04) 6 Bom L R 230 (231).

Synopsis

1. Alterations in the section.
2. Scope and object of the section.
3. Retrospective operation of the section.
4. Misjoinder and non-joinder.
5. Error, defect or irregularity, not affecting the merits of the case or the jurisdiction of the Court.
6. Analogous provisions of law.
7. Objections to error, etc., when to be raised.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Affecting merits or jurisdiction. See Note 2.
"Any proceedings in the suit"—Proceedings subsequent to institution. See Note 2.
Appeals from appellate decrees and Section 99. See Note 2.
Error, etc., in court-fee, stamp or valuation. See Note 2.
"Jurisdiction." See Note 2.
Other Statutes—Indian Evidence Act. See Note 6.
Suits Valuation Act. See Note 6.
Stamp Act. See Note 6.
Wrong admission or rejection of evidence. See Note 6.
Wrong order of remand. See Note 5.

1. Alterations in the section. — The words "any misjoinder of parties or causes of action" have been newly added. (See Note 4 and also O. 2 Rr. 3, 4.)

The words "whether in the decision or in any order passed in the suit or otherwise" have been omitted and the words "in any proceedings in the suit" have been substituted instead.

2. Scope and object of the section. — This section contains one of the most salutary rules of law. Its aim is "to prevent technicalities from overcoming the ends of justice, and from operating as a means of circuity of litigation."[1] In other words, a decision which is correct on the merits and is within the jurisdiction of the Court, should not be upset merely for technical and immaterial defects.[2] The section deals with objections raised in appeal as regards errors, defects or irregularities of procedure in the lower Court. As laid down by their Lordships of the Privy Council in *Maharajah Mahashur Singh* v. *Baboo Hurruck Narain*,[3] "the law that an error or irregularity cannot be raised as a ground of appeal only refers to errors, defects or irregularities of *procedure*, not to rules of law or conditions which affect the substantive rights of the parties." A non-compliance with every rule of procedure does not *ipso facto* destroy the validity of the whole proceeding. The purpose of the rule violated must, in each case, be examined.[4]

An error, defect or irregularity of procedure must, in order to be a valid ground of appeal, be a material one, that is, should have either —

(a) affected the *merits* of the case,[6] or

Section 99 — Note 2

1. † ('86) 8 All 365 (375) (DB).
†('37) 24 AIR 1937 P C 233 (234) : I L R (1937) All 655 : 64 Ind App 250: 31 Sind L R 590 (PC).
[*See also* ('33) 20 AIR 1933 All 295 (297) : 55 All 216 (DB).]

2. ('92-96) 1892-1896 Upp Bur Rul 282.
('91) 1891 Pun Re No. 65, p. 319 (320).
('26) 13 AIR 1926 Cal 95 (96) (DB). (Appellant's case extremely weak — Court should not interfere under S. 99 with irregular order.)
('87) 1887 All W N 231 (231) (DB).
('26) 13 AIR 1926 Cal 1101 (1103) (DB).
('26) 13 AIR 1926 Lah 402 (402).

3. † (1861) 9 Moo Ind App 268 (282) (PC).
[*See also* ('09) 32 Mad 83 (85) (DB). (Section has no application to illegalities but only to irregularities.)]

4. † ('20) 7 AIR 1920 Cal 597 (598, 599) : 46 Cal 978 (DB).

5. ('28) 15 AIR 1928 Mad 919 (921) (DB). (Defendant contesting at the instance of co-defendant, examining himself as his own witness and cross-examined by co-defendant.)
('11) 36 Bom 58 (61) (DB). (Attachment of properties at the instance of assignee decree-holder without hearing objections of the judgment-debtor is not condoned.)
('11) 9 Ind Cas 977 (978) (All). (Death of sole appellant — Appeal heard without any application to bring legal representatives on record.)
('88) 1888 All W N 61 (62) (DB). (Non-compliance with O. 41 R. 31 (old S. 574) is not condoned.)

(b) affected the *jurisdiction* of the Court.[6]

The merits of a case are said to be affected when the flaw or error has resulted in an error of judgment.[7] The term "jurisdiction" in this section is used in the sense of pecuniary or local jurisdiction or jurisdiction relating to the subject-matter; it does not mean the legal authority of a Court to do certain things.[8]

A mere irregularity, therefore, which does not affect the merits of the case or the jurisdiction of the Court, is no ground for reversing or varying a decision in appeal.[9]

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† ('25) 12 AIR 1925 Cal 98 (100) (DB). (Admission of important additional evidence in appeal without necessity and without recording reasons.)
† ('23) 10 AIR 1923 Nag 58 (59, 60) (DB). (Improper refusal to examine important witnesses.)
('86) 1886 All WN 285 (286) (DB). (Non-compliance with S. 574, i. e., O. 41 R. 31.)
('84) 1884 All W N 99 (99) (DB). (Do.)
('24) 11 AIR 1924 Pat 245 (247) (DB). (First Appellate Court dealing with a number of cases together thus affecting the merits.)
('12) 37 Bom 289 (294) : 17 Ind Cas 891 (892) (DB). (Order of remand contrary to S. 562.)
('09) 2 Ind Cas 404 (404) (DB) (Cal). (Judgment without reasons.)
('31) 18 AIR 1931 Cal 164 (165) (DB). (Judgment —Judge's failure tc apply his mind to the case.)
('74) 11 Bom H C R 129 (135) (DB). (Objection to validity of document is one affecting merits).)
('71) 15 Suth W R 534 (535) (DB). (Decree against party not liable is an error affecting merits.)
('82) 8 Cal 834 (836) (DB). (Dismissal of suit instead of return of plaint under S. 57 (O. 7 R. 10).)
('73) 20 Suth W R (Civ) 2 (3) (DB).
('04) 1904 Pun Re No. 91, p. 345 (348) : 1905 Pun LR No. 5, p. 40 (DB). (Judgment without hearing parties or their pleaders.)

6. ('42) 29 AIR 1942 Pat 1 (25) : 21 Pat 1 (FB). (District Judge entertaining an appeal which does not lie to his Court — He acts without jurisdiction —Per Dhavle, J.)
(1900) 27 Cal 488 (493) (DB). (Transferee Court recognizing assignment of decree acts without jurisdiction.)
('35) 22 AIR 1935 Pesh 151 (152) (DB).
('33) 20 AIR 1933 Lah 749 (752) : 15 Lah 123 (DB).
('17) 4 AIR 1917 Nag 99 (101) : 14 Nag L R 71. (Death of party—Court proceeding to trial without legal representative on record acts without jurisdiction.)
('89) 12 All 510 (514) (FB). (Infringement of S. 564 of old Code affected jurisdiction.)
('25) 12 AIR 1925 Lah 209 (210): 5 Lah 492 (DB). (Omission to pass order under S. 22 (4) of the Punjab Pre-emption Act is an illegality.)
† ('26) 13 AIR 1926 All 650 (652).
('11) 33 All 645 (647) : 11 Ind Cas 935 (935) (DB). (Omission to refer dispute to arbitrator as per agreement of parties affects jurisdiction.)
† ('18) 5 AIR 1918 Cal 435 (436):45 Cal 926 (DB). (Lower Court entertaining and deciding appeal which it had no jurisdiction to do.)
('17) 4 A I R 1917 Cal 320 (325) (DB). (Per Mookerjee, J.)
('10) 6 Ind Cas 464 (465) (DB) (All). (Order affecting jurisdiction covered.)
('07) 1907 Pun Re No. 109, p. 506 (510) (DB). (Want of authority in agent is fatal.)
('12) 37 Bom 289 (294): 17 Ind Cas 891 (892)(DB). (Illegal order of remand contrary to provisions of Section 562.)
('09) 2 Ind Cas 677 (680) (All). (Order without jurisdiction is not cured.)
('83) 6 Mad 192 (196) (DB). (Want of jurisdiction cannot be cured.)
† ('30) 17 AIR 1930 Mad 714 (718) (DB). (Decree passed affecting persons not impleaded—Want of jurisdiction cannot be cured.)
† ('12) 16 Ind Cas 940 (942) (DB) (Cal). (Decree without jurisdiction not covered by Section 99.)

7. See cases cited in foot-note (5).

8. ('01) 28 Cal 324 (330) (DB).
For exhaustive discussion on question of jurisdiction, see Section 9.
[*See also* ('73) 5 N W P H C R 55 (59) (DB). (Decree by Judge who had no jurisdiction to receive the plaint.)]

9. ('43) 30 AIR 1943 Oudh 109 (112) (DB). (Suit against Hindu widow by plaintiffs as reversioners for declaration that alienation by widow was void and injunction to restrain widow from committing waste—Right of some plaintiffs to sue admitted—Issue whether remaining plaintiffs were entitled to sue not decided—Remand is not necessary.)
('41) 28 AIR 1941 Sind 9 (11) : I L R (1941) Kar 135 (DB).
('40) 27 AIR 1940 Pat 33 (36). (Lower appellate Court erroneously allowing new defence to be raised —Merits of decision held to be affected.)
('01) 5 Cal W N 627 (629) (DB). (Application under Ss. 244 and 623, C. P. Code—Court acting under S. 244 whereas really S. 623 applied.)
('35) 22 AIR 1935 Nag 56 (57) : 31 Nag L R 266. (Plaintiff allowed to withdraw suit with permission to bring fresh suit on payment of defendant's costs —Order fixing no date for payment—It is irregularity curable under S. 99.)
† ('35) 22 AIR 1935 Rang 240 (243) (DB). (Firm having only one sole proprietor — Suit brought in firm's name in contravention of O. 30 R. 1.)
('36) 23 AIR 1936 Nag 246 (248). (Court instead of passing separate order with respect to filing of award combining it and judgment into one.)
('91) 15 Bom 309 (320) (DB). (Two suits tried together, such trial not affecting merits or jurisdiction.)
('70) 14 Suth W R (Civ) 141 (142) (DB).
('09) 30 All 136 (137) (DB). (Proceedings on Sunday with consent of parties.)

It has been held under the Code of 1882 that the error, defect or irregularity should have been *subsequent to the institution* of the suit and not in the frame or institution.[10] The present section however will apply to *all* irregularities whether subsequent to the suit or not. But irregularities in *prior* suits and *different* proceedings are, of course, not within the section.[11]

('24) 11 AIR 1924 Lah 545 (548): 5 Lah 218 (DB). (Absence of party on date on which case is posted for arguments—Decision under O. 17 R. 3.)
('69) 11 Suth W R (Civ) 177 (178) (DB). (Return of plaint under S. 31 of the old Code.)
('27) 14 AIR 1927 Oudh 468 (469). (Suit under S. 108 (16), Oudh Rent Act—Enquiry into defendant's liability.)
('69) 14 Suth W R O C 11 (14) (DB). (Striking out names of parties against whom there was no cause of action.)
('23) 10 AIR 1923 Nag 7 (7). (Judge not signing deposition of witness.)
('91) 1 Mad L Jour 478 (479) (DB). (Judge omitting to date his order.)
('87) 9 All 508 (510) (DB). (Want of permission under S. 3 of the Bengal Minors Act, XL of 1858.)
('93) 15 All 380 (381) (DB).
('81) 3 All 824 (827) (DB). (Proceeding on wrong onus of proof without objection by parties.)
('23) 10 AIR 1923 Nag 62 (63). (Wrong view by Court as to onus—Merits unaffected.)
('14) 1 AIR 1914 Low Bur 210 (212) : 7 Low Bur Rul 347 (DB). (Wrong party beginning the case and no prejudice.)
('99) 27 Cal 61 (64, 65) (DB). (Oral reference to arbitration.)
('97) 24 Cal 418 (428) (DB). (Grant of permission by the Collector under S. 539 (S. 92) without adverting to plaintiff's interest in the trust.)
('01) 5 Cal W N 91 (98) (DB). (Non-compliance with S. 347 of the Code of 1882.)
† ('78) 2 Cal L Rep 257 (258, 259) (DB). (Technical error not affecting merits.)
('31) 18 AIR 1931 Oudh 22 (25): 5 Luck 116 (DB). (Modification of prior order by consent.)
('26) 13 AIR 1926 Cal 95 (96) (DB). (Appellant's case extremely weak—Appellate Court will not interfere with lower Courts irregular order.)
('84) 10 Cal 1061 (1068) (DB). (Delay in filing suit.)
† ('13) 19 Ind Cas 918 (919) (FB) (Cal). (Allowing claim to set off without court-fees being paid thereon.)
('03) 6 Oudh Cas 135 (139). (Insufficiency of court-fees.)
('25) 12 AIR 1925 Rang 65 (67) : 2 Rang 462. (Error as to court-fees.)
('92) 15 Mad 288 (289) (DB). (Order of Appellate Court to pay additional court-fees not obeyed—Suit cannot be dismissed on that ground.)
('02) 29 Cal 651 (654) (DB). (Non-payment of full court-fee.)
('79) 2 All 889 (890, 891). (Deficiency of court-fee.)
('84) 7 Cal 348 (352) (DB). (Insufficiency of court-fee.)
('71) 15 Suth W R 179 (180) (DB). (Decision as to stamp not affecting merits.)
('75) 24 Suth W R (Civ) 167 (167). (Not taking proper court-fee is no ground for interference.)
('19) 6 AIR 1919 Cal 799 (799) (DB). (First Subordinate Judge inviting Second Subordinate Judge to read his judgment in Court.)
('92) 15 Mad 241 (246) (DB). (Suit triable by Court *A* tried by Court *B* also having jurisdiction to try the suit.)
† ('28) 15 AIR 1928 Pat 438 (439) (DB). (Judge allowing another to examine witnesses.)
('26) 93 Ind Cas 291 (292) (Oudh). (Decision given without hearing arguments.)
('28) 15 AIR 1928 Nag 306 (307). (Question of paramount title in mortgage suit raised and decided without objection.)
('28) 15 AIR 1928 Bom 425 (427) (DB). (Case treated in first Court under Dekkhan Agriculturists' Relief Act—Second Court treating it as an ordinary suit without getting plaint amended.)
('24) 11 AIR 1924 Pat 613 (616): 3 Pat 244 (DB). (Question of paramount title in mortgage suit raised and decided.)
('15) 2 AIR 1915 Mad 446 (447) (DB). (Case remanded to District Judge—Latter transferring it for disposal to Sub-Judge.)
('17) 4 AIR 1917 All 153 (155) (DB). (Order passed under O. 38 Rr. 5 and 6 instead of under O. 21 R. 42.)
('07) 34 Cal 396 (398, 399) (DB). (Recording evidence in English which is not the language of the Court.)
('14) 1 AIR 1914 Nag 8 (10) : 10 Nag L R 150. (Order impliedly amounting to a redemption but not formally so.)
('09) 34 Bom 72 (75, 82) : 2 Ind Cas 173 (174) (DB). (Decree obtained against a firm instead of against the individual partners.)
† ('03) 2 Low Bur Rul 117 (120).
† ('30) 17 AIR 1930 Bom 225 (227) (DB).
('31) 18 AIR 1931 All 453 (454) : 53 All 669 (DB). (Failure to give full ten days time for objections to award—No prejudice proved.)
[*See* ('29) 16 AIR 1929 Sind 12 (12, 13) (DB). (Decree in terms of compromise without a formal order recording the compromise.)
('37) 24 AIR 1937 Pat 147 (148) (DB). (Heirs of deceased defendant not formally substituted.)]
[*See also* ('41) 1941 Nag L Jour 625 (626) (DB). (Central Provinces Courts Act (I of 1917), S. 26, (prior to amendment)—Construction—Additional District Judge taking on file case which he ought not to have tried according to the distribution memorandum — He does not act without jurisdiction.)]

10. ('02) 26 Bom 259 (266) (DB).
('10) 37 Cal 552 (558) : 5 Ind Cas 577 (578) (DB). (Error affecting the admission of the suit itself.)

11. ('01) 23 All 499 (500, 501) (DB). (Execution application made by a general attorney of the decree-holder.)
('37) 24 AIR 1937 Pat 147 (148) (DB).

This section applies to objections raised in appeals against original decrees as well as in appeals from *appellate* decrees by virtue of S. 108 of the Code.[12] Though the section refers in terms to *decrees*, yet, it is illustrative of a *general* principle.[13]

In *Muhammad Husain Khan* v. *Babu Kishva Nandan*,[14] their Lordships of the Privy Council held that although the provisions contained in the Civil Procedure Code do not regulate the procedure of the Privy Council in hearing appeals from India, yet, as the rule embodied in this section proceeds upon a sound principle, and is calculated to promote justice, the rule should be followed by the Privy Council also.

It will be useful in dealing with this section to refer to the provisions of S. 105 which provides *affirmatively* that an error, defect or irregularity in any order affecting the decision of the case can be raised as a ground of appeal in an appeal from the decree in the suit.[15]

The section applies to proceedings under the Agra Tenancy Act.[16]

3. Retrospective operation of the section. — This section regulates the *procedure* of the Appellate Court and therefore is applicable to all appeals heard after the new Code came into force even though the suit itself was instituted under the old Code.[1]

4. Misjoinder and non-joinder. — Section 578 of the old Code provided that no decree should be varied or reversed "on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit or otherwise not affecting the merits of the case or the jurisdiction of the Court." This, as has been seen already in Note 2 was interpreted to mean errors and irregularities subsequently committed in a suit which had been *properly instituted*.[1] A mere *misjoinder of causes of action* which did not affect the merits of the case or the jurisdiction of the Court was held cured by the section.[2] But a misjoinder whether of parties or causes of action or of both which affected the *very institution* of the suit was held to be outside the scope of the section.[3] The introduction of the words "on account of any misjoinder of parties or causes of action" in the present section makes it clear that the Appellate Court cannot now dismiss a suit for such misjoinder[4] unless it affected the merits of the

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12. ('18) 5 AIR 1918 Cal 435 (436) : 45 Cal 926 (929) (DB).

13. † ('35) 22 AIR 1935 Nag 33 (34) : 31 Nag L R 212. (Principle governs insolvency proceedings so far as may be.)

14. ('37) 24AIR 1937 P C 233 (234) : ILR (1937) All 655 : 64 Ind App 250 : 31 Sind L R 590 (PC). Also see Section 112 Note 5.

15. ('27) 14 AIR 1927 Rang 150 (154) : 5 Rang 80 (DB). (These two sections are supplementary rather than mutually destructive.)

16. ('36) 23 AIR 1936 All 200 (202).

Note 3

1. ('12) 22 Mad L Jour 225 (226, 227)(DB). (Even though instituted before new Act.)

Note 4

1. ('02) 26 Bom 259 (266) (DB).

2. †('10) 34 Mad 55 (57) : 6 Ind Cas 15 (16) (DB).
('10) 6 Ind Cas 248 (249) (DB) (Cal).
('81) 7 Bom H C R A C 19 (20) (DB).
† ('09) 36 Cal 780 (798) : 36 Ind App 103 : 1909 Pun Re No. 93 : 3 Ind Cas 382 (385) (PC).
('05) 2 All L Jour 91 (94) (DB). (Defendants not prejudiced.)
† ('04) 2 Cal L Jour 602 (608, 609) (DB). (Mookerjee, J., case law reviewed.)
('03) 30 Cal 794 (800).
('19) 6 AIR 1919 Pat 325 (327).
('70) 2 N W P H C R 443 (444) (DB).
Also see O. 2 R. 7, Note 1.

3. ('02) 26 Bom 259 (266).
('07) 1 Sind L R 181 (183) (DB).
('97) 24 Cal 540 (544, 545) (DB).

4. ('42) 29 AIR 1942 Oudh 73 (74) : 17 Luck 284. (Suit for damages for trespass.)
('42) 29 AIR 1942 Pat 243 (244 (DB). (Original holding split up into two — Rent suit to recover rent for different periods in respect of two holdings —Two causes of action are improperly joined.)
('41) 28 A I R 1941 Oudh 56 (59) : 16 Luck 113. (A vendee of mortgagee rights in his suit against the mortgagors impleading his vendor, the original mortgagee as well and asking for relief against him in alternative.)
('41) 22 Pat L Tim 196 (199). (Suit on mortgage by assignee of mortgage — Prayer for decree on mortgage and in alternative against assignor.)
† ('12) 22 Mad L Jour 225 (226) (DB). (Misjoinder of causes of action.)

case[5] or the jurisdiction of the Court.[6] It may, however, in order to meet the ends of justice, allow a party to amend the plaint[7] or to withdraw the suit against the misjoined defendants with liberty to bring a fresh suit,[8] or give a finding against each misjoined defendant separately.[9]

Though the section uses the words "misjoinder of parties *or* causes of action," a misjoinder of *both* the parties and causes of action has also been held to be within the section.[10] There is some conflict of opinion as to whether the word "misjoinder" in this section includes "non-joinder."[11] This has been due to the fact that the Legislature, while it has newly introduced the word "non-joinder" in O. 1 R. 9 (which provides that no suit shall be defeated by reason of misjoinder or *non-joinder* of parties) has not so done in section 99.

This section is limited in its application to where an appellant raises an objection that *there has been a misjoinder* in the lower Court. It does not deal with a case where the lower Court decides that there is a misjoinder and the appellant contends that there is *no misjoinder*. The observations of the Lahore High Court in the undermentioned case,[12] treating such a case as being one under the section, do not seem to be sound.

5. Error, defect or irregularity, not affecting the merits of the case or the jurisdiction of the Court. — The following irregularities of procedure under

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('17) 4 AIR 1917 Lah 96 (96):37 Ind Cas 197(197).
✠('37) 24 AIR 1937 P C 42 (45) : 16 Pat 149 (PC).
('39) 26 A I R 1939 Oudh 145 (148) : 14 Luck 595 (DB).
('15) 2 AIR 1915 Mad 859 (859) (DB).
('14) 1 AIR 1914 Cal 813 (815) : 42 Cal 536 (DB).
('15) 2 AIR 1915 Mad 320 (320) (DB).
('11) 1911 Pun Re No.40:10 Ind Cas 515 (520)(DB).
('69) 6 Bom H C R A C 177 (179, 180) (DB).
† ('10) 5 Ind Cas 466 (467) (DB) (Mad).
('70) 13 Suth W R 175 (176) (DB).
('20) 7 AIR 1920 Cal 35 (37) (DB).
('24) 11 AIR 1924 Oudh 337 (337):27 Oudh Cas 35.
('18) 5 AIR 1918 Mad 705 (705) (DB).
('13) 21 Ind Cas 537 (538) (DB) (Cal). (Trial Court holding no misjoinder — Appellate Court cannot dismiss.)
('10) 8 Ind Cas 889 (889) (DB) (All).
('29) 16 AIR 1929 All 148 (149) (DB).
('26) 13 AIR 1926 Mad 57 (58).
('30) 17 AIR 1930 Sind 170 (173):24 Sind L R 145 (DB).
('28) 108 Ind Cas 544 (544) (DB) (Mad).
('68) 10 Suth W R 45 (46) (DB).
[*See* ('30) 122 Ind Cas 597 (598) (DB) (All). (Non-joinder of necessary party.)]

5. ('94) 16 All 279 (283) (DB). (Where it was held that the misjoinder of parties and causes of action would most probably affect the merits of the case.)
† ('26) 13 AIR 1926 Cal 416 (417) (DB). (Merits affected by non-joinder—Section does not apply.)
('88) 1888 Pun Re No. 189, p. 487 (488) (DB). (Misjoinder of causes of action — Defendants not jointly interested—It is not a mere irregularity.)
('97) 24 Cal 540 (544) (DB). (Misjoinder of causes of action—Plaintiff not jointly interested.)
('93) 17 Mad 168 (175, 176) (DB). (Misjoinder affecting merits cannot be condoned.)
('10) 34 Mad 55 (57): 6 Ind Cas 15 (16) (DB). (Misjoinder affecting merits is not to be treated as a mere irregularity.)
('04) 27 Mad 80 (84) (DB). (Misjoinder which would affect merits of the case cannot be taken as a mere irregularity.)
('20) 7 AIR 1920 Lah 19 (20): 1 Lah 295(297)(DB).
† ('15) 2 AIR 1915 Mad 320 (320) (DB).
('24) 11 AIR 1924 Oudh 309 (310).

6. ('13) 21 Ind Cas 438 (441) (DB) (Cal).
('11) 11 Ind Cas 274 (276) (DB) (Sind). (Misjoinder in arbitration proceedings does not involve question of jurisdiction.)

7. ('93) 15 All 380 (381) (DB).
[*See* ('14) 1 AIR 1914 Cal 795 (795) (DB).]

8. ('93) 15 All 380 (381) (DB).

9. ('11) 34 Mad 55 (57) (DB).

10. † ('26) 13 AIR 1926 Lah 145 (146) (DB).
('05) 2 All L Jour 91 (94) (DB). (Case under the old Code.)
✠('37) 24 AIR 1937 P C 42 (45) : 16 Pat 149 (PC).
('13) 17 Cal W N 128 (129) (DB).
('94) 16 All 279 (283) (DB). (Case under old law.)

11. ('23) 10 AIR 1923 Mad 337 (337) (DB). (Whether mis-joinder includes non-joinder.)
('33) 20 AIR 1933 Mad 664 (667). (Does not include non-joinder.)
('93) 17 Mad 122 (126, 127) (DB). (Appears to include non-joinder.)
('10) 33 Mad 436 (438) : 5 Ind Cas 774 (775) (DB). (Includes non-joinder.)
('09) 1 Ind Cas 530 (534) (DB) (Cal). (Do.)
('69) 1869 Pun Re No. 3. (Non-joinder was held covered by S. 350 of the Code of 1859.)
('22) 9 AIR 1922 Mad 317 (320). (Includes non-joinder.)
(1843) 3 Moo Ind App 229 (242) (PC). (Non-joinder —No objection in lower Court—Not allowed in appeal to Privy Council.)
('84) 6 All 57 (58, 59) (DB). (Non-joinder not affecting merits—Section applies.)
('22) 9 AIR 1922 Mad 439 (440) (Do.)

12. ('20) 7 AIR 1920 Lah 19 (20) : 1 Lah 295 (DB). (*Cf.* 22 Mad L Jour 225 (227).)

the Code have been held to be *mere* irregularities which do not entail a reversal or variation of the decree of the lower Court. For other cases of irregularities, see Note 2.

(a) (Section 15). Court of higher grade trying suit triable by a Court of lower grade.[1]

(b) (Section 26). Receiving a plaint presented on a Sunday or holiday.[2]

(c) (Section 50). According to the High Courts of Calcutta, Lahore and Patna, an application for substitution of legal representative of judgment-debtor entertained by the Court to which the decree is transferred for execution.[3] For the views held by the other High Courts, see S. 42, Note 1.

(d) (Section 92). Collector granting permission under S. 92 without adverting to the plaintiff's interest in the trust.[4]

(e) (Order 2 R. 2). Splitting up of claims and filing separate suits thereon.[5]

(f) (Order 2 R. 4). Leave not obtained to try other causes of action in suit for immovable property.[6]

(g) (Order 3 R. 2). Institution of suit under a defective power of attorney.[7]

(h) (Order 6 Rr. 3, 14 and 15). Defective frame[8] or signature[9] or verification[10] of plaint or petition.

(i) (Order 6 R. 17). Allowing amendment of plaint at a late stage.[11]

Note 5

1. ('90) 17 Cal 155 (159) (DB).
✠('85) 7 All 230 (243) (FB). (Rule of procedure and not of jurisdiction.)
('99) 23 Mad 367 (371) (DB). (Ganjum and Vizagapatam Agency Courts Act—Rule of procedure and not of jurisdiction.)
('88) 1888 Pun Re No. 184, p. 480 (481) (DB).
[*See* ('25) 12 AIR 1925 All 569 (570) : 47 All 925 (DB). (Part heard small cause — Trial concluded by Munsif with no small cause powers — No prejudice.)
Also see S. 15 N. 3.

2. ('71) 16 Suth W R 230 (231) (DB).
('08) 30 All 136 (137) (DB). (Proceedings on Sunday with consent of parties.)

3. ('41) 28 AIR 1941 Pat 139 (140) : 19 Pat 838 (DB).
('95) 22 Cal 558 (562) (DB).
† ('26) 13 AIR 1926 Lah 34 (35) (DB).

4. ('97) 24 Cal 418 (428) (DB).

5. ('68) 5 Bom H C R A C 30 (32).

6. ('41) 28 AIR 1941 Bom 247 (250, 259) : I L R 1941 Bom 361 (DB).
('24) 11 AIR 1924 Pat 613 (616) : 3 Pat 244 (DB).

7. † ('23) 10 AIR 1923 Bom 44 (44) : 47 Bom 227 (DB).
('37) 24 AIR 1937 Rang 482 (483) (DB).
('31) 18 AIR 1931 All 507 (512) : 54 All 57 (SB). (Plaint — Irregularity in presentation — No substantial defect.)
Also see O. 3 R. 3 Note 4.
[But see ('07) 1907 Pun Re No. 109 p. 506 (508) : 1907 Pun W R No. 199, p. 875 (DB). (Want of authority of agent is fatal.)]

8. ('16) 3 AIR 1916 Nag 84 (86) : 12 Nag L R 90.
('24) 11 AIR 1924 Oudh 309 (310). (Suit by municipal council — Insertion of chairman's name also as a plaintiff.)
[*See also* ('29) 16 AIR 1929 Cal 445 (447, 448) (DB). (Want of Court's permission under O. 1 R. 8 but plaintiff duly authorized.)
† ('31) 18 AIR 1931 Oudh 375 (377) (DB). (Do.)]

9. ('11) 7 Nag L R 33 (35) : 10 Ind Cas 731 (732).
✠('99) 22 All 55 (59) (DB). (Plaint presented by advocate not signed by plaintiff — Presumption is that advocate had authority to present, and the want of signature is a mere irregularity.)
('24) 11 AIR 1924 Pat 114 (117) (DB). (Person authorized to instruct pleader signing plaint to the knowledge of the litigant.)
† ('28) 15 AIR 1928 Pat 51 (53). (Agent of plaintiff signing plaint without power — But subsequent ratification by plaintiff — *Held*, defect cured.)
('23) 10 AIR 1923 Rang 206 (206) : 1 Rang 42. (Plaintiff not signing pleadings — No objection raised — Section 99 applies.)
('26) 13 AIR 1926 Sind 145 (149) : 20 Sind L R 277. (Plaint not signed by plaintiff—Only a formal defect.)
† ('30) 17 AIR 1930 Lah 735 (735).
('96) 1896 Pun Re No. 48, p. 133 (137). (Plaint signed by two out of four plaintiffs.)
† ('20) 7 AIR 1920 Pat 636 (638). (Application under O. 21 R. 66 not signed by decree-holder but by his karapardar.)
('07) 4 Low Bur Rul 284 (286). (Plaint signed by authorized agent only.)
('06) 10 Cal W N 841 (844) (DB). (Plaint on behalf of Government signed by Collector and a pleader.)
Also see O. 6 R. 14, Note 3.

10. † ('96) 18 All 396 (399, 400) (SB).
('12) 15 Ind Cas 583 (584) (DB) (Cal). (Non verification of plaint.)
Also see O. 6 R. 15, Note 4.

11. † ('82) 1882 Pun Re No. 186, p. 542 (546) (DB.)

(j) (Order 13 R. 2). Enlarging time to file the documents.[12]

(k) (Order 13 R. 10). Refusal to send for a document.[13]

(l) (Order 14). Issues not framed or wrongly framed.[14]

(m) (Order 16). Refusal to summon witnesses at a late stage.[15]

(n) (Order 20 Rr. 1 and 8). Delivery of judgment out of Court,[16] or in the absence of parties and without notice to them,[17] or by a successor on the depositions taken by his predecessor,[18] or by one Judge for and at the request of another.[19] See also the case cited below.[20]

(o) (Order 21 R. 13). Omission to verify inventory of property in execution application.[21]

(p) (Order 21 R. 16). Recognizing assignment of decree without a formal application.[22]

(q) (Order 21 R. 30). Execution sale without attachment.[23]

(r) (Order 22 R. 3). Appeal on behalf of minor decided without knowledge of the fact of the death of the next friend pending appeal.[24]

(s) (Order 26). Refusal to issue a commission to examine a *purdanashin* lady[25] or to administer oath under the Oaths Act[26] or the omission to file the depositions taken on commission with the report of the commissioner.[27] So also, the issue of a commission behind the back of the defendant.[28]

(t) (Order 30 R. 3). Service on partner without obtaining directions under O. 30 R. 3.[29]

(u) (Order 32 Rr. 3, 4 and 15). Absence of a formal order of appointment of a guardian *ad litem* for a minor party, when the minor was as a fact represented,[30] or the absence of notice to the guardian when he actually

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('28) 15 AIR 1928 Cal 57 (58) (DB). (Or addition of formal party defendant in course of suit.)

12. (1865) 2 Suth W R 237 (238) (DB).
† ('09) 2 Ind Cas 946 (948) (DB) (Cal).

13. ('09) 2 Ind Cas 953 (953) (DB) (Cal).

14. ('42) 29 AIR 1942 Pat 366 (368) (DB).
† ('26) 13 AIR 1926 Bom 384 (385) (DB).
('13) 18 Ind Cas 625 (630) (Cal).

15. † ('94) 16 All 218 (220) (DB). (Refusal not affecting merits.)
('29) 16 AIR 1929 Cal 459 (461). (Do.)

16. (1863) Marsh 327.
Also see O. 20 R. 1, Note 10.

17. ('33) 20 AIR 1933 Nag 12 (12, 13) : 28 Nag L R 308 (DB).

18. ('67) 4 Bom H C R A C 98 (100) (SB).

19. ('19) 6 AIR 1919 Cal 799 (799) (DB).
Also see O. 20 R. 1, Note 4.

20. † ('20) 7 AIR 1920 Cal 597 (598, 599) : 46 Cal 978 (DB).

21. ('06) 28 All 244 (245, 246) (DB).

22. ('99) 26 Cal 250 (253) (DB).
('30) 1930 Mad W N 166 (167, 168). (Omission of notice under O. 21 R. 16.)

23. ('18) 5 AIR 1918 Mad 1262 (1263, 1264) (DB).

24. ('06) 28 All 328 (330) (DB).
Also see O. 32 R. 10, Note 1.

25. ('98) 25 Cal 807 (815, 816) : 25 Ind App 117 (PC).

26. ('94) 7 C P L R 122 (124).

27. ('82) 1882 Pun Re No. 161, p. 485 (486) (DB).

28. ('38) 25 AIR 1938 Nag 530 (532).

29. ('32) 19 AIR 1932 Cal 541 (542) : 59 Cal 496 (500).

30. † ('97) 1897 Pun Re No. 67, p. 308 (310) (DB).
('16) 3 AIR 1916 Low Bur 87 (88).
('87) 14 Cal 754 (756, 757) (DB). (Minor not really represented, hence decree set aside.)
† ('10) 32 All 287 : 37 Ind App 77 : 13 Oudh Cas 123 : 6 Ind Cas 788 (788) (PC). (Appointment of guardian *ad litem* but affidavit not forthcoming.)
('89) 1889 Pun Re No. 166, p. 577.
('87) 9 All 508 (510) (DB). (Court allowing suit to proceed in the absence of certificate of guardianship of minor plaintiff.)
✠ ('86) 14 Cal 204 (209) (FB). (Minor properly represented — No formal order appointing guardian *ad litem*.)
✠ ('03) 30 Cal 1021 (1032) : 30 Ind App 182 (PC). (Do.)
('16) 3 AIR 1916 Cal 51 (56) (DB). (Absence of next friend in suit by lunatic.)
('21) 8 AIR 1921 Nag 152 (153). (Petition by next friend of minor dismissed—Allowing another next friend to represent him in appeal.)
† ('83) 10 Cal 626 (634) (PC). (Minor who had a right to sue, represented by manager of Court of Wards without authority.)
Also see O. 32 R. 3, Note 6.

appears in the suit,[31] or the want of a proper description of the minor as required by O. 32 R. 1.[32] Where the minor is not represented, the absence of an order of appointment as guardian *ad litem* would be fatal to the suit.[33] Major defendant represented as a minor but himself appearing and contesting the case without objection.[34]

(v) (Order 34). Allowing execution of preliminary mortgage decree to proceed without a final decree being passed.[35]

(w) (Order 41 R. 1). Allowing decree copy to be filed after the filing of the appeal but within the period of limitation.[36]

(x) (Order 41 R. 23). Improper order of remand. See O. 41 R. 23, Note 28.

(y) (Order 41 R. 27). Improper admission of additional evidence in appeal.[37]

(z) (Order 41 R. 31). Irregular mode of hearing or deciding an appeal.[38]

(z1) Wrong exercise of discretion[39] as distinguished from an arbitrary exercise of it.[40]

(z2) Allowing the wrong side to begin.[41]

6. Analogous provisions of law. — The principle of this section that a technical objection should not stand in the way of upholding a decision which is substantially just and correct on the merits, has been recognised in other Acts also.

Under S. 167 of the Evidence Act, an improper admission or rejection of evidence is not of itself a ground, for a new trial or reversal of any decision in any case, if it appears that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision,[1] or that if the rejected evidence had been received, it would not have varied the decision.[2]

Under S. 11 of the Suits Valuation Act it is provided that an undervaluation or overvaluation of a suit or appeal will not be a ground of appeal *even if it affects the pecuniary jurisdiction of* the Court trying the suit or appeal, unless

(a) the objection thereto is taken at the earliest possible opportunity or,

(b) by reason of such overvaluation or undervaluation the disposal of the suit or appeal has been affected *on the merits*.[3]

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31. ('16) 3 AIR 1916 Pat 375 (378) (DB).
32. ('86) 14 Cal 159 (163) (FB).
Also see O. 32 R. 1, Note 8.
33. † ('21) 8 AIR 1921 Cal 534 (535) (DB).
('82) 1882 Pun Re No. 100 p. 282 (283) (DB). (No appointment of guardian *ad litem* and no representation.)
('86) 11 Bom 53 (56) (DB). (Minor not represented.)
34. ('24) 11 AIR 1924 All 94(95): 45 All 608 (DB).
35. † ('27) 14 AIR 1927 Bom 131 (133) : 51 Bom 125 (DB). (Formal defect.)
('03) 5 Bom L R 389 (392) (DB).
Also see O. 34 R. 3, N. 7 and O. 34 R. 5, N. 4.
36. ('67) 2 Agra 35 (35).
37. ('15) 2 AIR 1915 Mad 762 (762) (DB).
('19) 6 AIR 1919 Cal 311 (312).
('21) 8 AIR 1921 Sind 155 (157) : 16 Sind L R 17 (DB). (Case not coming under O. 41 R. 27—Additional evidence allowed—Merits unaffected.)
Also see O. 41 R. 27, N. 18.
38. ('83) 1883 All W N 220 (221) (DB).
('81) 8 Cal L Rep 597 (599) (DB). (Appellate Court adopting lower Court's view without reasons, the point being simple.)
('20) 7 AIR 1920 Sind 12 (13) : 14 Sind L R 132 (DB). (Omission to comply strictly with O. 41 R. 31.)
39. ('86) 8 All 365 (376) (DB). (Irregular exercise of discretion under S. 42, Specific Relief Act.)
('87) 9 All 622 (624) (DB). (Do.)
40. ('01) 28 Cal 37 (52) (DB). (Arbitrary refusal to grant time to party to produce evidence.)
41. ('81) 3 All 824 (827) (DB).

Note 6

1. ('95) 5 Mad L Jour 81 (82) (DB). (Admission of copy of document.)
('74) 11 Bom H C R 129 (131) (DB).
('75) 24 Suth W R 392 (393) (DB).
('68) 10 Suth W R 130 (130) (DB).
('19) 6 AIR 1919 Nag 3 (5). (Admission of secondary evidence without proof of the loss of original.)
('86) 8 All 576 (607) (FB).
('14) 1 AIR 1914 Cal 255 (256) (DB). (Admission of inadmissible evidence affecting case on merits.)
('81) 7 Cal 293 (296) (DB).
('04) 31 Cal 380 (384) (DB).
('17) 4 AIR 1917 Cal 28 (28) (DB). (Admissibility of irrelevant evidence.)
† ('18) 5 AIR 1918 Cal 971 (973) : 45 Cal 159 (DB).
2. ('24) 11 AIR 1924 Cal 370 (371). (Decided without reference to S. 167 of the Evidence Act.)
('84) 8 Bom 408 (410) (DB).
3. ('10) 8 Ind Cas 545 (545) (DB) (Mad).

Before the Act was passed, an overvaluation or undervaluation of a suit was considered as an irregularity governed by the provisions of S. 350 of the Code of 1859 or S. 578 of the Code of 1882, corresponding to S. 99 of the present Code. Accordingly it was held that where such valuation affected the jurisdiction of the Court it was a valid ground of appeal.[4] Under the present Act, even if such valuation *affects jurisdiction*, it will not be a ground of appeal unless the merits of the case are also affected thereby.[5]

The section has however been held to be restricted in its applicability to cases where the valuation depends upon the *discretion* of the parties or the Court. It is not applicable to cases where the valuation is in violation of the *rules* of the Court-fees Act.[6]

Under S. 36 of the Stamp Act, 1899, where an instrument has been admitted, the admission cannot be called into question at any subsequent stage of the proceeding, whether in the original Court itself or in the Appellate Court on the ground that the instrument has not been duly stamped.[7] But the Appellate Court may make a declaration that the document is not stamped or is insufficiently stamped, and may cause it to be sent

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† ('33) 20 AIR 1933 All 249 (252):55 All 315(FB).
('90) 14 Mad 183 (185)(DB). (Overvaluation enabling higberCourt to try suit.)

4. ('69) 11 Suth W R 257 (257) (DB).
('68) 10 Suth W R 207 (207) (DB).
('70) 14 Suth W R 195 (196) (DB).
('82) 8 Cal 834 (836) (DB).
('82) 4 All 289 (291) (DB). (Valuation not affecting jurisdiction.)
(1864) 1 Bom H C R 163 (164) (DB). (Error in valuation not affecting jurisdiction is no ground for interference.)
('75) 24 Suth W R 225 (226) (DB). (Error not affecting jurisdiction is no ground for interference.)
('69) 4 Beng L R A C 139 (142) (DB). (Undervaluation not affecting jurisdiction is no ground for interference.)
('70) 13 Suth W R 325 (326) (DB). (Valuation not affecting jurisdiction.)

5. ('97) 1 Cal W N 136 (137) (DB). (If suit is not prejudicially affected, defect of jurisdiction is cured by S. 11, Suits Valuation Act, VII of 1887.)
† ('03) 25 All 174 (178) (FB).
('14) 1 AIR 1914 All 128 (128): 36 All 58 (DB).
('97) 24 Cal 661 (667) (DB).
('17) 4 AIR 1917 All 79 (80) (DB).
('04) 31 Cal 849 (856) (DB).
('12) 16 Ind Cas 46 (47) (DB) (Cal).
('05) 15 Mad L Jour 487 (488) (DB).
('01) 24 Mad 43 (45) (DB).
('18) 5 AIR 1918 Mad 590 (591). (A mere change of *forum* due to undervaluation cannot be said to affect the case on the merits.)
('18) 5 AIR 1918 Lah 369 (370) : 1918 Pun Re No. 21. (Case heard by inferior Court which should have been heard by superior Court.)
('19) 6 AIR 1919 Cal 984 (985) (DB). (District Munsif trying suit triable by higher Court may be said to cause prejudice to the trial.)
[*See* ('17) 4 AIR 1917 Cal 812 (814) (DB).]
Also see S. 21 N. 1 and Ss. 100 & 101 N. 24.

6. ('94) 1894 Pun Re No. 132, p. 500 (501).
† ('15) 2 A I R 1915 Lah 185 (185). (Case under rules framed under the Suits Valuation Act.)
('10) 1910 Pun L R No. 214, p. 654 (655).
('20) 7 A I R 1920 Lah 112 (112). (Valuation fixed by the rules of Chief Court.)

7. ('07-09) 1907-09 Upp Bur Rul, Stamp Act, page 3: 4 Ind Cas 1086 (1088). (Admission of pronote with an uncancelled stamp.)
('23) 10 A I R 1923 Lah 143 (144) (DB).
('10) 7 Ind Cas 582 (583) (DB) (Cal).
† ('15) 2 AIR 1915 Cal 280 (281) (DB).
('19) 6 AIR 1919 Cal 235 (239) (DB).
('16) 3 AIR 1916 Upp Bur 2 (3).
('94) 18 Bom 737 (738) (DB).
('79) 2 All 554 (559)(DB). (Mere irregularity under S. 578 of the Code of 1882.)
('82) 5 Mad 220 (221) (DB). (Reception of unstamped document held not to be a ground of appeal under S. 578 of the Code of 1882.)
('78) 1 All 725 (726) (DB). (Reception of unstamped document held to be a mere irregularity under S. 350 of the Code of 1859.)
('74) 11 Bom H C R 129 (131) (DB). (Mere irregularity under S. 578 of the prior Code.)
('67) 8 Suth W R 367 (368) (DB).
('69) 3 Beng L R A C 235 (237) (DB).
('98) 8 Mad L Jour 66 (68) (DB). (Case under S. 34 of the Stamp Act of 1879 (present Section 36).)
('75) 23 Suth W R 170 (170).
('78) 3 Cal 787 (788, 789) (DB).
('82) 4 Mad 137 (140) (DB).
('70) 5 Beng L R A C 10 (10) (DB).
('81) 5 Bom 621 (627) (DB).
('69) 3 Beng L R A C 126 (130) (DB).
('71) 16 Suth W R 6 (7) (DB).
(1865) 2 Mad H C R 321 (321, 322) (DB).
('66) 3 Mad H C R 297 (228) (DB). (Admission of unstamped document—Objection in second appeal — High Court should require the payment of penalty. The case was one under the Stamp Act of 1869.)
('12) 16 Ind Cas 96 (97) (Mad). (Where an *ex parte* decree on an unstamped pronote is set aside and the trial is started *de novo*, the proceedings are not a subsequent stage of the original *ex parte* proceedings and objections to the stamp can be taken in the *de novo* trial.)

to the Collector for action under S. 61 of the Stamp Act for prosecution or recovery of penalty.[8]

7. Objections to error, etc., when to be raised. — Section 99 does not expressly state when an objection to a misjoinder or error, defect or irregularity should be taken. The following provisions show that an objection to the irregularities mentioned therein should be taken at the *earliest possible opportunity* —

(1) Under S. 21 of the Code, an objection as to the *place of suing* should be taken at the earliest possible opportunity, and in all cases where issues are settled, at or before such settlement, see Notes on S. 21.

(2) Under O. 1 R. 13 of the Code, an objection as to *non-joinder or misjoinder of parties* should be similarly taken at the earliest possible opportunity. See O. 1 R. 13, Note 2.

(3) Under Order 2 Rule 7 of the Code, an objection as to *misjoinder* of *causes of action* should be similarly taken at the earliest possible opportunity. See O. 2 R. 7, Note 2.

(4) Under S. 11 of the Suits Valuation Act, an objection as to *under-valuation or overvaluation of suits or appeals* should be taken, in the Court of first instance, at or before the settlement of issues, or in the lower Appellate Court in the memorandum of appeal to that Court.[1] Also see S. 21, Note 1.

As regards other errors, defects and irregularities not specified above, it has been held that an objection not raised at the earliest possible opportunity will be taken as *waived*.[2] Similarly, parties who have *accepted* an irregularity cannot object to or go back upon it afterwards.[3] There cannot, however, be a waiver of a total want of jurisdiction,[4] or of an objection affecting Government revenue,[5] nor can the mere failure to appeal against an illegal order be taken to operate as a consent to the passing of such an order.[6]

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8. ('86) 12 Cal 64 (67) (DB). (Case under Stamp Act of 1879, S. 50 (Section 61 of the persent Act).)

Note 7

1. ('74) 22 Suth W R 433 (434) (DB).
('17) 4 AIR 1917 All 79 (80) (DB).
2. †('86) 8 All 576 (580) (FB). (Case closed by predecessor Judge except for argument — Successor hearing arguments and pronouncing judgment.)
† ('20) 7 AIR 1920 Cal 597 (598, 599) : 46 Cal 978 (DB). (Judgment signed by one Judge and pronounced by another—Objection not raised.)
('83) 10 Cal 626 (634) : 11 Ind App 26 (PC). (Irregular representation of minor plaintiff.)
('96) 1896 Pun Re No. 48, p. 133 (137). (Defect in signing a plaint.)
('07) 4 Low Bur Rul 284 (285, 286). (Plaint not signed by plaintiff but by authorised agent.)
('07) 6 Cal L. Jour 22 (25) (DB).
('05) 3 Low Bur Rul 49 (50). (Admissibility of copy of document.)
('97-01) 2 Upp Bur Rul 237. (Re-opening of case under S. 103 of the old Code.)
('69) 12 Moo Ind App 495 (503) (PC). (Improper rejection of evidence.)
('87) 11 Bom 320 (324) (DB). (Admission of copy of a copy.)
('82) 1882 Pun Re No. 161, p. 485 (486) (DB). (Omission to file record of evidence with report of commission.)
('81) 6 Cal 666 (670) (DB). (Document received in Court below without objection.)
3. ('14) 1 AIR 1914 Lah 339 (341) (DB). (Commissioner not formally appointed — Parties accepting the appointment.)
('18) 5 A I R 1918 Pat 315 (316). (Acceptance of pecuniary jurisdiction in lower Court will cure defect.)
('24) 11 AIR 1924 All 94 (95) : 45 All 608 (DB). (Major defendant represented in suit as minor, but himself conducting the case without objection.)
[*See also* ('42) 29 AIR 1942 Pat 243 (244) (DB). (Where the party does not appeal from a decree in suit in which two distinct causes of action were joined and does not raise any objection to the frame of the suit on that ground, the validity of the decree cannot be subsequently questioned in another suit on ground of want of jurisdiction.)]
4. † ('09) 2 Ind Cas 677 (680) (All).
('69) 6 Bom H C R A C 20 (22) (DB). (Non-objection to defect affecting jurisdiction.)
('85) 7 All 230 (243) (FB). (Per Mahmood, J.)
('01) 1901 Pun Re No. 35, p. 104 (106) : 1901 Pun L R No. 47, p. 147 (DB).
(1864) 2 Bom H C R 162 (166) (SB). (Failure to object limitation.)
5. ('79) 2 All 554 (559, 560) (DB).
6. † ('09) 32 Mad 83 (85): 1 Ind Cas 746 (746) (DB).

APPEALS FROM APPELLATE DECREES

100. [S. 584.] (1) Save where otherwise expressly provided in the body of this Code[3] or by any other law for the time being in force,[4] an appeal shall lie to the High Court[6] from every decree[8] passed in appeal[5] by any Court subordinate[7] to a High Court, on any of the following grounds, namely :—

Second appeal.

(a) the decision being contrary to law[12-20] or to some usage having the force of law ;[21]

(b) the decision having failed to determine some material issue of law or usage having the force of law ;[22]

(c) a substantial[24] error or defect in the procedure[25-27] provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.[24]

(2) An appeal may lie under this section from an appellate decree passed ex parte.[64]

[1877, S. 584; 1859, S. 372.]

Second appeal on no other grounds.

101. [S. 585.] No second appeal shall lie except on the grounds mentioned in section 100.[28-64]

[1877, S. 585.]

SECTIONS 100 & 101

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NOTE to the Synopsis. See the Notes indicated for the following topics :

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Pleas which can be taken for the first time in second appeal. See Notes 55 to 60.
Refusal to extend time for filing first appeal. See Notes 16 and 41.
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Second appeal where there is no first appeal. See Note 2.
Special appeal under Bengal Rents Act. See Notes 2 and 4.
Valuation and stamp. See Notes 8, 23, 24, 26 and 55.

1. Legislative changes. — The following are the changes introduced in section 100 :

(1) The words "save where" have been substituted for the words "unless when" which occurred in the old section.

(2) The word "expressly" is new. Even under the old Code, it had been held that the right of second appeal conferred by the Code was a valuable substantive right, that such a right could not be taken away by mere implication ; and that when the Legislature intended to take away the right it would do so expressly. The insertion of the word "expressly"

in the present section makes the position clear.[1] (In this connection, see Note 3.)

(3) The words "body of" are new.

(4) The words "for the time being in force" are new.

(5) The word "specified" which occurred before the word "law" in the old section has been omitted. This change was introduced to set at rest certain doubts entertained under the old section, as to whether the words "specified law" meant statute law or law specified in the memorandum of appeal.[2]

(6) The word "some" occurring before the word "usage" is new.

Section 101 corresponds to S. 585 of the Code of 1882 without any change.

2. Scope, object and applicability of the sections. — It has been seen in Note 2 on S. 96 that a right of appeal is not a natural or inherent right attaching to litigation, and does not exist and cannot be assumed unless *expressly given by statute* or by rules having the force of statute.[1] It has also been seen that parties cannot confer a right of appeal upon themselves in any matter by agreement or mutual consent.[2] These principles apply with equal force to second or special appeals and therefore, a right of second appeal does not exist unless expressly given by statutory provisions. Section 100 is such an express provision, and it declares that a second or special appeal shall lie from every decree passed in first appeal on the grounds mentioned therein. Section 101 enacts that no second appeal shall lie except on the grounds mentioned in S. 100.[3]

The scope of a first appeal differs from that of a second appeal in that the former is *not limited to any particular grounds of appeal* such as those provided by this section. The provision restricting the grounds that may be taken in second appeal is based on the ground of public policy expressed in the maxim *interest reipublicæ ut sit finis litium*—it concerns the State that there be an end to litigation.[4] The conditions mentioned in the section must therefore be strictly fulfilled before a second appeal can be maintained and no Court in India or elsewhere has any power to add to or enlarge those grounds.[5] When a second appeal is brought up for admission, the Judge has jurisdiction to see whether the grounds mentioned in the section exist and to reject the appeal if no such grounds exist.[6] And even if an order of admission had been passed *ex parte* by a single Judge of the High Court, it may be impugned and set aside by the *Bench* before whom the appeal is brought up for hearing, on the ground that the reasons for the admission are erroneous or inadequate.[7]

Sections 100 & 101 — Note 1

1. ('94) 17 Mad 167 (168) (DB).
('83) 9 Cal 838 (839) (DB).
2. † ('91) 18 Cal 23 (26) : 17 Ind App 122 (PC).
('93) 20 Cal 93 (99, 100) : 19 Ind App 228 (PC). (Overruling 7 All 649 (FB).)

Note 2

1. ('42) 29 AIR 1942 Mad 73 (75) : 1LR (1942) Mad 236.
† ('35) 62 Cal 701 (705) (DB).
[*See also* ('88) 11 Mad 26 (34, 35, 36) : 14 Ind App 160 (PC).
('96) 19 Mad 199 (200).]
2. See also (1862) Marsh 4.
3. ('39) 26 AIR 1939 Rang 59 (63) (DB). (Section 100, C. P. C., is an enabling Section—S. 101 however restricts power.)
4. ('21) 8 AIR 1921 Oudh 98 (99) : 24 Oudh Cas 221. (Even at the cost of occasional error.)
[*See also* ('18) 5 AIR 1918 P C 92 (94) : 46 Cal 189 : 45 Ind App 183 (PC). (There must be some measure of finality in cases where the balance of evidence arises for decision.)]
5. † ('91) 18 Cal 23 (30) : 17 Ind App 122 (PC).
('80) 5 Cal 711 (712) (DB).
('89) 16 Cal 753 (755) : 16 Ind App 125 (PC).
('99) 26 Cal 53 (70) (SB).
('34) 21 AIR 1934 Cal 633 (635) : 61 Cal 365.
6. ('06) 1906 All W N 63 (64).
('93) 15 All 367 (369) (DB).
7. † ('75) 1 All 34 (37, 38, 39, 43) (FB).
('87) 9 All 11 (15) (DB). (Being barred by limitation.)
('86) 9 Mad 450 (451) (DB).

Sections 100 and 101 read together make it quite clear that —

(1) a second appeal will lie *only* on the ground of an error in *law* or *procedure*[8] and that

(2) a second appeal will *not* lie merely on the ground of an error on a *question of fact*.[9]

It is the decision of the *lower Appellale Court* that is to be referred to in the grounds of second appeal, and not that of the original Court,[10] and no decree can be asked for in second appeal against a person against whom there was no first appeal.[11] Further, the decision of the lower Appellate Court will be considered only on the point raised by the appellant, and the rejection of the appeal does not mean that the High Court necessarily affirms all the findings which the lower Appellate Court may have incidentally come to.[12]

A decision that a particular question is not in dispute cannot be attacked in special appeal; the proper procedure in such a case is to apply for review.[13]

The rule that a finding of fact cannot be attacked in second appeal does not apply to second appeals to which the provisions of Ss. 100 and 101 of the Civil Procedure Code do not apply.[14]

As to the jurisdiction of the lower Courts, after an appeal is filed, over the subject-matter of the litigation and the effect of the exercise of such jurisdiction on the second appeal, see section 96, Note 2.

The grounds of appeal set forth in this section have been extended to second appeals under various local or special enactments.[15]

The High Court will not set aside, in second appeal, a decree of the lower Appellate Court unless it is shown to be wrong.[16]

3. "Save where otherwise expressly provided in the body of this Code." — A second appeal will always lie to the High Court from an appellate decree of a Court subordinate to a High Court, unless precluded by some express provision of law.[1] Thus, where any section of the Code has declared that any decision shall be *final*, no second appeal will lie from such decision. The following are some of such provisions—

(i) Section 102;[2] (ii) Section 104;[3]

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8. ('39) 26 AIR 1939 Pat 402 (403) : 18 Pat 204 (DB). (Question whether entry of rent in settlement rent roll is conclusive and whether party can prove it to be incorrect is question of law)
('36) 23 AIR 1936 Pat 96 (97).
[*See* ('34) 21 AIR 1934 Lah 291 (292).]

9. See Note 56.

10. ('13) 7 Low Bur Rul 39 (40) : 21 Ind Cas 232 (232) (DB).

11. ('08) 12 Cal W N 625 (627) (DB).

12. ('71) 15 Suth W R 91 (92) (DB).

13. ('26) 13 AIR 1926 Cal 941 (942, 943) (DB).

14. ('06) 1906 All W N 186 (186). (An appeal under the Agra Tenancy Act, 1901, is not a second appeal of the description referred to in this section.)
('27) 14 AIR 1927 Cal 802 (804, 805) : 55 Cal 228 (DB). (Appeal to High Court under Calcutta Municipal Act, S. 142, is not a second appeal within S. 100.)
('28) 15 AIR 1928 Cal 450 (451, 452). (Do.)
[*See also* ('91) 18 Cal 302 (310) : 17 Ind App 392 (PC). (Appeals before the Punjab Chief Court from the Assistant Commissioner.)

15. Agra Tenancy Act, No. III of 1926, Ss. 246 and 254; N W P and Oudh Act, No. XX of 1890, Ss. 116 and 119-B; Madras, Ganjam and Vizagapatam Act, XXIV of 1839, Rules 47 (2) and 48; The Bengal Tenancy Act, VIII of 1885, S. 109 (A) (3); The Provincial Insolvency Act, V of 1920, S. 75; See also the Burma Courts Act, XI of 1922 Section 11.

16. ('38) 25 AIR 1938 All 116 (117).

Note 3

1. ('14) 1 AIR 1914 P C 87 (89) : 37 Mad 443 : 41 Ind App 258 (PC).
[*See also* ('12) 39 Cal 241 (243, 244) : 13 Ind Cas 193 (193, 194) (DB).]

2. See Section 102, Note 1.
('43) 47 Cal W N 664 (666) (DB).

3. ('78) 1 Mad 401 (402) (DB).

(iii) Order 47 Rule 7;[4]

(iv) Paragraph 16 clause (2) of the second schedule[5] (now repealed).'

4. "Or by any other law for the time being in force." — The following are instances of other laws barring second appeal —

(1) Section 27 of the Provincial Small Cause Courts Act declaring that the decrees and orders of a Small Cause Court are *final*.

(2) Section 388 of the Succession Act, 1925 corresponding to section 26 of the Succession Certificate Act, 1889 now repealed.[1]

(3) Section 109A clause (3) of the Bengal Tenancy Act (VIII of 1885).[2]

See also the undermentioned cases.[3]

5. "Appeal shall lie to the High Court from every decree passed in appeal." — An appeal will lie under this section to the High Court from every decree passed on appeal by any Court subordinate to the High Court, and the jurisdiction of the High Court in this respect cannot be limited without express words in any law to this effect.[1] A second appeal will lie from the decree of an Appellate Court disallowing the

('33) 20 AIR 1933 Mad 838 (838). (Case falling under O. 21 R. 90—No second appeal lies.)
('11) 33 All 479 (480) : 9 Ind Cas 666 (667) (DB).
('02) 4 Bom L R 138 (139). (Case falling under O. 39 R. 1—No second appeal lies.)
('26) 13 AIR 1926 Cal 229 (231) (DB). (Do.)
('24) 11 AIR 1924 Pat 803 (803) (DB). (Do.)
('35) 22 AIR 1935 Lah 962 (962). (Application under O. 21 R. 90—No second appeal lies.)
('35) 22 AIR 1935 Pat 109 (110). (No second appeal lies from order modifying an award against which an appeal lies under S. 104 (c) of C. P. C. But if the appeal is preferred from the decree and not from the order the form of the appeal might justify an admission of second appeal.)
('39) 26 AIR 1939 Sind 62 (63) : ILR (1939) Kar 417 (DB). (Order under O. 21 R. 92 — Second appeal does not lie.)
('36) 23 AIR 1936 All 763 (764) (DB). (No second appeal lies from an order rejecting application under Order 21 Rule 90.)
('36) 23 AIR 1936 Pat 119 (120). (Order allowing deposit and setting aside execution sale — Second appeal does not lie.)
Also see Section 104 Note 21.

4. See O. 47 R. 7, Note 9.

5. ('88) 10 All 8 (12).
('26) 92 Ind Cas 600 (600) (DB) (All).
† ('28) 15 AIR 1928 Oudh 1 (3) : 3 Luck 1 (FB). (Trial Court setting aside award—Lower Appellate Court decreeing suit in terms of award — Second appeal lies.)

Note 4

1. ('94) 17 Mad 167 (168) (DB). (The words "shall be final" in S. 26, cl. 3 were held to preclude second appeal.)
('81) 6 Cal 40 (41) (DB). (No appeal lies from any order of the District Judge refusing an application to re-call a certificate granted under Act XXVII of 1860, Succession Certificate Act.)
('93) 20 Cal 641 (642) (DB). (No appeal from any order directing security for grant of certificate.)
[*See also* ('75) 1 Cal 127 (130). (S. 6 of Act XXVII of 1860 limited to propriety or otherwise of a grant of certificate — No special appeal as to any other matter.)]

2. ('41) 28 AIR 1941 Cal 58 (59) : ILR (1940) 2 Cal 334. (Where the decree which was sought to be executed was in respect of a sum of Rs. 19-11-6 only it was held that having regard to the provisions of S. 153 (a) Ben. Ten. Act, appeal did not lie to the High Court.)
('36) 23 AIR 1936 Cal 323 (323) (DB). (Question as to whether certain rent is payable or nothing at all is one deciding question of amount of rent annually payable by tenant — Second appeal is competent.)
('88) 15 Cal 231 (233) (DB). (Section 153, Bengal Act VIII of 1885 — Suit for arrears of rent— Amount below Rs. 100 — No question of title to land or interest in land—No second appeal.)
(1900) 27 Cal 484 (488) (DB). (Do.)
('89) 16 Cal 596 (597) (DB).

3. ('43) 30 AIR 1943 Cal 177 (179) (DB). (Bengal Tenancy Act, 1885 as amended by Act XVIII of 1940 —Order rejecting application under S. 26 (g) (5) falls under S. 26 (g) (6) and is appealable as decree —Second appeal lies.)
('43) 30 AIR 1943 Mad 369 (370). (S 75 (1) of the Provincial Insolvency Act makes the order of the District Judge final except that a person aggrieved by decision of the District Court on appeal from a decision of a Subordinate Court under S. 4 may appeal to the High Court on any of the grounds mentioned in sub-s. (1) of S. 100, C. P. C.)
('40) 44 Cal W N 753 (754) (DB). (No second appeal lies from a decision by the Collector under S. 38 of the Bengal Landlord and Tenant Procedure Act.)

Note 5

1. † ('83) 9 Cal 838 (839) (DB).
('14) 1 AIR 1914 Bom 30 (31) : 38 Bom 340 (DB). (A special appeal from the decision of the Civil Judge at Vinchur under Bombay Regulation XIII of 1830, Cl. 5, lies to the High Court.)
('97) 1 Cal W N 341 (343) (DB). (A second appeal lies from the judgment of the Judicial Commissioner under Chota Nagpur Landlord and Tenant Procedure Act, I of 1879, S. 144.)

cross-objections of the respondent.[2] It does not matter in what *character* the appeal reaches the first Appellate Court. Where an appeal was preferred to the District Court against the dismissal of certain claim proceedings under the Madras Forest Act, 1882, and it was contended that no second appeal lay from the decree of the District Court, their Lordships of the Privy Council observed as follows :

> "In their Lordships' opinion this objection is not well founded. Their view is that where proceedings of this character reach the District Court that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders and decrees the ordinary rules of the Civil Procedure Code apply . . . . If the ordinary Courts of the country are seized of a dispute of that character it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation."[3]

Where the subject-matter of the appeal is not a *decree* at all, no second appeal will lie.[4]

Appeals are to be preferred against the *decree* and not against the judgment.[5] Consequently, a person who has obtained a decree in his favour cannot prefer an appeal on the ground that he is dissatisfied with some particular expressions or findings against him.[6] A party must, if he wishes to appeal against the finding on a particular issue against him, apply for amendment of the decree by embodying therein the decision on the issue.[7] But, where a decree is *apparently* in favour of a party but really affects him adversely, he is entitled to appeal against such decree. Thus, where a suit for pre-emption is brought against the purchaser of certain property and the vendor thereof and the suit is dismissed on the ground that there is no valid sale and that therefore the plaintiff has no cause of action, the purchaser of the property is entitled to appeal against the decree although it is one *dismissing* the suit against him.[8] See Note 6 on S. 96 for a full discussion.

6. "High Court," meaning of.—The expression "High Court" is not defined in the Code, and must therefore be taken to have the meaning given to it by the General Clauses Act, 1897. Under S. 3 (24) of that Act "High Court" used with reference to civil proceedings "shall mean the highest Civil Court of appeal (not including the Federal Court) in the part of British India in which the Act or Regulation containing the expression operates." Thus, the expression is not limited to *Chartered* High Courts, i. e.,

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('84) 10 Cal 761 (763, 764) (DB). (A second appeal lies to the High Court from Sonthal Parganas in all Civil suits whereof the matter in dispute exceeds Rs. 1,000—Bengal Act XXXVII of 1855.)

('14) 1 AIR 1914 Mad 135 (136, 137): 38 Mad 655 (DB). (Decree of a Deputy Collector under S. 213 of the Madras Estates Land Act — Appeal to District Judge therefrom—Second appeal from appellate decree lies.)

('22) 9 AIR 1922 Mad 119 (121, 122) : 44 Mad 697 (DB). (Decree for rent under the Madras Estates Land Act—Second appeal lies even if the subject-matter is less than Rs. 500 — S. 102, Civil Procedure Code, does not apply.)

('88) 11 Mad 309 (314) (FB). (An appeal lies to the High Court from a decision of the District Court passed under S. 10 of the Madras Forest Act, 1882, on appeal from decision of a Forest Settlement Officer.)

✠('16) 3 AIR 1916 P C 21 (23) : 39 Mad 617 : 43 Ind App 192 (PC). (Do.)

† ('14) 1 AIR 1914 P C 87 (89) : 37 Mad 443 : 41 Ind App 258 (PC). (Even if there was an implied rule against second appeals under the Madras Rents Recovery Act, VIII of 1865, a second appeal lies unless the right is taken away by any express enactment.)

(1900) 10 Mad L Jour 398 (399, 400) (DB). (Second appeal lies against the decision of the District Judge passed in appeal against the decision of a Collector in suits under the Madras Rents Recovery Act, VIII of 1865.)

('31) 18 AIR 1931 Rang 56 (57) : 8 Rang 485. (Appeals under S. 11, Burma Courts Act, are in addition to appeals under this section.)

('35) 22 AIR 1935 Cal 89 (89) (DB). (Application under S. 173, Bengal Tenancy Act, to set aside sale — Question under S. 47, C. P. C. — Second appeal lies.)

2. ('33) 20 AIR 1933 Lah 400 (402) (DB).

3. ('16) 3 AIR 1916 P C 21 (23) : 39 Mad 617 : 43 Ind App 192 (PC).

4. See Note 8.

('30) 17 AIR 1930 Lah 125 (125). (But the fact that no formal decree is prepared in accordance with the decision, is no bar to second appeal.)

5. ('81) 6 Cal 319 (323) (FB).

6. See S. 96 Note 6.

7. ('81) 6 Cal 319 (323) (FB).

8. ('36) 62 Cal 701 (706): 163 Ind Cas 75 (77) (DB).

High Courts established by Letters Patent. The expression is wide enough to include Judicial Commissioners' Courts and Chief Courts.

7. "Court subordinate to a High Court." — Section 100 only applies to appeals from Courts *subordinate* to the High Court. As to what are such Courts, see Notes on S. 3. Appeals *within* the High Court are not appeals to the High Court from a *subordinate* Court. Hence this section does not apply to such appeals.[1]

The Court of the Political Agent of the Southern Maratha Country has been held to be a Court subordinate to the High Court, and a second appeal will lie therefrom to the High Court.[2] Where under a scheme-decree of the High Court directing the District Judge to select a trustee the latter does so, he acts simply as a *persona designata* and no appeal will lie to the High Court from his selection.[3]

8. "Decree," meaning of. — See section 2 (2). As to decrees passed without jurisdiction and the right of appeal therefrom, see Note 15. It is only where the decision of the lower Appellate Court amounts to a decree that an appeal lies therefrom to the High Court under this section;[1] otherwise not.[2]

9. Execution cases. — Where an order in execution amounts to a decree under S. 2 (2) read with S. 47, a second appeal will lie therefrom as in the case of every other

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Note 7

1. ('40) 27 AIR 1940 Nag 39 (39) : I L R (1940) Nag 141 (FB).
2. ('69) 6 Bom H C R A C 75 (76) (DB).
3. ('26) 13 AIR 1926 Bom 167 (167) (DB).

Note 8

1. † ('81) 6 Cal 319 (323) (FB).
('03) 26 Mad 224 (229) (DB).
('17) 4 AIR 1917 All 134 (135, 136) (DB).
('15) 2 AIR 1915 Mad 322 (322) (DB). (First Court's compromise decree confirmed in appeal — Second appeal lies.)
('87) 10 Mad 292 (294) (DB). (Decree disallowing cross-objections.)
('26) 13 AIR 1926 Cal 1105 (1105) (DB). (Order that appeal was not admissible as being time-barred is a decree.)
('86) 12 Cal 30 (31) (DB). (Do.)
('04) 8 Cal W N 64 (65). (Rejection of appeal on the ground that no appeal lies, amounts to a decree.)
('29) 16 AIR 1929 Rang 166 (166) : 7 Rang 136. (Suit for enforcement of award praying also that award be filed —Second appeal lies.)
('07) 10 Oudh Cas 245 (246). (Dismissal of suit in appeal—Second appeal lies.)
('37) 24 AIR 1937 All 284 (285). (Application by appellant's pleader for postponement on ground of inability to argue — Appeal dismissed for want of prosecution—Dismissal of appeal amounts to decree and second appeal is maintainable.)
('38) 25 AIR 1938 Cal 639 (640) (DB). (Order that appeal abates not only with regard to deceased respondent but with regard to all respondents is a decree and as such appealable.)
('82) 1882 Pun Re No. 185 p. 541 (DB). (An order returning plaint in appeal for presentation to proper Court—Appeal lies.)
[*See* ('42) 29 AIR 1942 Mad 73 (74): ILR (1942) Mad 236. (Order does not become decree merely because it happens to be order which is final so far as Court passing it is concerned.)]
2. ('42) 29 AIR 1942 Mad 73 (74) : I L R (1942) Mad 236. (Appeal to District Court from order of Collector under S. 74, Madras Estates Land Act— Order affirmed — No appeal under S. 100 as order of District Judge is not decree.)
('42) 29 AIR 1942 Mad 599 (600): ILR (1942) Mad 959. (Appeal to District Judge against decision of Collector under S.20 A, Madras Estates Land Act— No second appeal lies as decision of District Judge though styled decree is only an appellate order.)
('14) 1 AIR 1914 Cal 795 (795) (DB). (No second appeal for dismissal of suit for misjoinder of parties.)
† ('33) 20 AIR 1933 Mad 695 (696) : 56 Mad 984. (Application under S. 4 (2) is not suit and order refusing it is not a decree.)
('05) 15 Mad L Jour 487 (488)(DB). (No appeal lies against the decision of an Appellate Court to exercise the powers conferred by S. 11 of the Suits Valuation Act, VII of 1887.)
('15) 2 AIR 1915 Lah 213 (213). (If lower Appellate Court dismisses appeal on the ground that notices were not served within three weeks as required by S. 169, Companies Act, second appeal is not competent.)
('97) 24 Cal 319 (320) (DB). (Order granting review of judgment set aside on appeal—No second appeal lies.)
('01) 28 Cal 177 (179) (DB). (Order under S. 206 of the old Code amending decree is not a decree and no second appeal lies.)
† ('28) 15 AIR 1928 Lah 352 (353) : 9 Lah 176 (DB). (Appellate order under S. 151 or S. 152 of the Code correcting omissions in judgment — No second appeal.)
('02) 29 Cal 60 (62, 63) (DB). (Order dismissing a suit for default of appearance is not a decree—First or second appeal barred.)
[*See* ('82) 8 Cal 126 (129) (DB).]

decree.[1] Where, however, a second appeal is barred in the suit itself, e.g., suits of a small cause nature, no second appeal will lie from an order in execution in such a suit though such order may fall under S. 47 and amount to a decree.[2] In the case of orders in execution which do not amount to decrees, no second appeal will lie, though a *first appeal* may lie if the order falls under section 104, as an appealable order.[3]

10. Separate appeals against separate decrees. — Where, in appeals relating to the same matter between the same parties, the lower Appellate Court passes separate decrees, then separate appeals should be filed with respect to those decrees.[1] As to when can a consolidated appeal be preferred, see O. 41 R. 1, Note 15.

11. Grounds of second appeal — General. — A second appeal will lie on the following grounds and on none other —

(1) The decision being *contrary to law*. See Note 12.
(2) The decision being *contrary to usage* having the force of law. See Note 21.
(3) Failure to determine some material issue of law.
(4) Failure to determine some material issue of usage having the force of law.
(5) Substantial error or defect in procedure which may possibly have affected the decision of the case on the merits. See Note 23.

12. Contrary to law—General. — A Court commits an error of law if it acts contrary to, or fails to apply the provisions of, any law[1] or any legal principle.[2] Thus, the failure to draw a presumption under Ss. 79 to 85 of the Evidence Act, 1872, is an error of law. But the word "law" is not limited to statute law alone[3] but will also include *general principles of law*.[4] In deciding disputes before them, Courts should act in accordance with such principles of law. Thus,

(1) They should clearly understand the issue or the matter in dispute before them. A *misconception* of issue or of the true questions in controversy in the case is an error of law.[5]
(2) They should arrive at their findings of fact *from the evidence* tendered before them. A finding based on *no evidence* or in *disregard* of evidence

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Note 9

1. † ('33) 20 AIR 1933 All 57 (59) : 54 All 1031 (DB).
2. See Section 102, Note 1.
3. See Section 104, Clause (2).
('40) 27 AIR 1940 All 28 (28). (Under Agra Tenancy Act an order in execution passed by a Revenue Court is not a decree — Second appeal, therefore, does not lie.)

Note 10

1. ('88) 11 Mad 280 (282) (DB).

Note 12

1. ('05) 27 All 688 (691) (SB). (Refusal to apply the law to the case.)
[*See* ('36) 164 Ind Cas 315 (316) (Pat).]
2. ('26) 13 AIR 1926 Lah 653 (654) (DB). (Error as to onus of proof.)
('32) 19 AIR 1932 Lah 56 (57). (Raising a legal presumption not warranted by law.)
3. (93) 20 Cal 93 (99, 100): 19 Ind App 228 (PC).
4. ('93) 20 Cal 93 (99, 100): 19 Ind App 228 (PC).
5. ('40) 27 AIR 1940 Mad 299 (301) (DB). (Lower Court falling into serious errors of law in dealing with principal questions arising in case and also failing to view some of the questions from the correct standpoint — High Court considered the questions.)
('26) 13 AIR 1926 Lah 535 (536). (Decision based upon the finding which is dead against case.)
('22) 3 L R All Rev 222 (224).
('75) 23 Suth W R 87 (88, 89) (DB).
† ('25) 12 AIR 1925 Lah 251 (251). (Misconception as to the nature of claim.)
(1865) 2 Mad H C R 441 (442) (DB).
('82) 8 Cal 975 (980) (DB). (Decision on alternative title by twelve years adverse possession not alleged in the plaint.)
('12) 13 Ind Cas 455 (456) (DB) (Cal).
('19) 6 AIR 1919 P C 29 (31) : 47 Cal 107 : 46 Ind App 140 (PC).
('03) 27 Bom 271 (276) (DB).
('73) 19 Suth W R 267 (267) (DB).
('74) 23 Suth W R 160 (161) (DB).
('27) 14 AIR 1927 Nag 180 (184).
✠ ('38) 25 AIR 1938 Nag 470 (472): ILR (1938) Nag 535.

or on *inadmissible* evidence[6] or on assumptions of facts without inquiry[7] is an error of law.

(3) They are *bound to draw*, for the purpose of deciding the issue before them, such inferences of fact as are reasonable from the facts placed before them.[8] A refusal to draw *any* inference from proved facts one way or the other[9] or the drawing of an inference which cannot be drawn from, and is not warranted by the facts is an error of law.[10]

(4) The Appellate Court is bound to remember the rule that the *onus* is on the appellant to show that the decision of the lower Court is wrong.[11] The overlooking of this principle is an error of law.[12]

13. Decision not based on legal evidence. — A decision of a Court must, in law, be based on the evidence, oral and documentary, legally adduced in the case. A Court will therefore be committing an error of law —

(1) if it bases its decision on no evidence at all,[1] and on mere surmises and conjectures;[2]

(2) if it bases its decision on irrelevant[3] and inadmissible evidence[4] as such evidence is no *legal* evidence;

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6. ('37) 24 AIR 1937 Sind 36 (36) (DB). (No evidence to support finding.)
See Also note 13.
7. ('16) 3 AIR 1916 Cal 691 (691) (DB).
8. ('30) 17 AIR 1930 Lah 443 (444). (Documents creating obligation in hands of the obligor—Court may presume that the obligation is discharged.)
[*See* ('40) 27 AIR 1940 All 349 (350) (DB). (The High Court in second appeal is entitled to come to a finding of fact where the lower appellate Court has omitted to arrive at such a finding.)]
9. See Note 32.
10. ('66) 11 Moo Ind App 7 (23) (PC).
See also Notes 28, 29 and 53.
11. ('22) 9 AIR 1922 Lah 127 (130) (DB).
12. (17) 4 AIR 1917 Lah 297 (300) : 1917 Pun Re No. 106 (DB).

Note 13

1. ('40) 27 AIR 1940 Oudh 35 (37) : 15 Luck 191 (DB). (Decision against a party because he did not produce certain exhibit in the Court which in fact was not in his power to produce—*Held*, error of law.)
('24) 11 AIR 1924 Pat 67 (68) (DB).
✠('90) 17 Cal 875 (882) (PC).
('29) 16 AIR 1929 Rang 257 (258) : 7 Rang 731.
('32) 19 A I R 1932 Lah 293 (294) : 13 Lah 116 (DB).
('07) 11 Cal W N 83 (84) (DB).
('06) 4 Cal L Jour 198 (203) (DB). (A misreading of evidence is not a ground of second appeal.)
('76) 25 Suth W R 101 (101) (DB). (Finding on basis of document not proved.)
('87) 14 Cal 740 (747) : 14 Ind App 101 (PC). (When possession for a long period is proved, there is not an entire absence of evidence of ownership.)
† ('19) 6 AIR 1919 P C 29 (30) : 47 Cal 107 : 46 Ind App 140 (PC).
† ('14) 1 AIR 1914 P C 67 (71) : 41 Cal 972 : 41 Ind App 110 (PC).
[See however ('14) 1 AIR 1914 Mad 118 (119) (DB). (A finding though based on no positive evidence but upon probabilities and circumstances will not be disturbed.)]
2. ('82) 1882 All W N 6 (6) (DB).
('20) 7 AIR 1920 Pat 264 (266) (DB).
('26) 13 AIR 1926 Lah 659 (660) : 8 Lah 30 (DB).
('30) 17 AIR 1930 Lah 150 (151) (DB).
('24) 11 AIR 1924 Lah 465 (466) (DB).
('18) 5 AIR 1918 Pat 632 (633) (DB).
✠('85) 7 All 649 (654) (FB). (Conjecture — Case overruled on another point in 19 Ind App 228 : 20 Cal 93 (PC).)
('35) 22 AIR 1935 Mad 190 (191) (DB).
('07) 34 Cal 456 (461) (DB). (Finding being merely an expression of opinion and does not indicate on what grounds it is based.)
[*See also* ('42) 29 AIR 1942 Pat 386 (387) (DB). (No interference in second appeal, as finding on question of fraud, could not be said to be merely a surmise or conjecture.)]
3. ('13) 20 Ind Cas 810 (810) (DB) (Cal).
('12) 36 Mad 168 (176): 17 Ind Cas 353 (356, 359) (DB). (Personal knowledge of Judge of facts but not proved by evidence.)
† ('27) 14 AIR 1927 Pat 209 (212) : 6 Pat 698 (FB). (Question of fact decided by Court holding itself bound by a previous decision of its High Court.)
4. ('86) 1886 Bom P J 284 (DB).
('32) 33 Pun L R 225 (227) (DB).
('21) 63 Ind Cas 811 (811) (DB) (All).
('23) 10 AIR 1923 Lah 630 (631) (DB). (Inadmissible evidence cannot be made admissible by consent of parties.)
('20) 7 AIR 1920 Lah 322 (323). (Basing judgment on document not tendered and not on record.)
('73) 20 Suth W R 474 (475, 476) (DB).
('11) 9 Ind Cas 621 (622) (Cal). (Admission by a pleader based on erroneous construction of an enactment.)

(3) if it misreads the evidence, i. e., assumes certain evidence to exist where there is none[5] or *vice versa*;[6]

(4) if it disregards or fails to consider material evidence in arriving at the conclusion.[7]

See also Note 21.

But the mere *non-mention* of a particular evidence or document in the judgment will not mean that it has not been considered,[8] though if evidence of obvious weight and importance, or the evidence relied upon by the first Court, has not been dealt with in the judgment, it may be regarded as sufficient proof that the evidence has not been considered.[9] But the High Court will not interfere in second appeal with the judgment of the first Appellate Court on the ground of the failure to consider material evidence, if such evidence had not been brought to the notice of the lower Appellate Court[10] or if it had not been relied upon before the said Court.[11]

14. Misconception of issue. — See Note 12.

('91) 13 All 537 (541).
† ('35) 22 AIR 1935 Oudh 41 (43) : 10 Luck 423 (DB).
[*See* ('74) 22 Suth W R 272 (273) (DB). (Comparison of signatures is a method contrary to law.)]
[But see (1900) 24 Bom 591 (594, 596) (DB). (Where a deposition made in another suit, to which special appellant was not a party, was admitted and used by the first Court without any objection on the part of the special appellant, it was held that he could not be allowed to object to it on a special appeal.)]

5. ('75) 24 Suth W R 119 (119, 120) (DB).
('32) 19 AIR 1932 Lah 128 (128).
('21) 4 Lah L Jour 307 (308).
('16) 3 AIR 1916 Lah 36 (37): 1916 Pun Re No. 81.
('28) 15 AIR 1928 Oudh 333 (334). (Acting on supposed admission which was never made.)
('12) 15 Ind Cas 515 (516) (DB) (Cal).

6. ('18) 5 AIR 1918 Cal 544 (544) (DB).
('74) 22 Suth W R 278 (279) (DB).
('73) 20 Suth W R 474 (475, 476) (DB).
('96) 20 Bom 753 (754) (DB).

7. ('41) 28 AIR 1941 Oudh 468 (472) : 16 Luck 626.
('41) 28 AIR 1941 Oudh 615 (617) : 17 Luck 109 (DB). (Failure by lower appellate Court to consider evidence in case is error of law though it has not upset the trial Court's finding.)
('40) 27 AIR 1940 P C 192 (196, 197): ILR (1940) Kar P C 380: I L R (1941) Bom 107 (PC). (When the existence of a document does not appear from the judgment of the first appellate Court to have been appreciated by it, and no effect whatever is given to the statutory presumption arising from the document, the questions of fact as well as of law are open in second appeal as well as in Privy Council appeal.)
('40) 27 AIR 1940 Oudh 35 (38) : 15 Luck 191 (DB). (To disregard the evidence of a witness on the ground that he has made a statement which he has in fact not made is a mistake of law.)
('40) 27 AIR 1940 Pat 137 (140): 18 Pat 768 (DB). (Ignoring Record of Rights.)
('81) 7 Cal 263 (267).
('02) 6 Cal W N 357 (359) (DB).
('91) 16 Bom 477 (479) (DB).
('28) 15 AIR 1928 Cal 136 (137) (DB). (Appellate Court discarding evidence before commissioner.)
('22) 9 AIR 1922 Pat 562 (563) (DB). (Commissioner's report — Failure of lower Appellate Court to consider.)
('09) 9 Cal L Jour 415 (421) (DB). (Where in the absence of better evidence the lower Appellate Court did not accept a topographical survey map as evidence of possession at the time the map was made, it erred in law.)
('15) 2 AIR 1915 Lah 414 (415). (Considered as material irregularity in procedure.)
('07) 11 Cal W N 1028 (1030) (DB). (Wrong exclusion of settlement proceedings.)
('03) 30 Cal 207 (210) (DB).
('87) 10 Mad 363 (365) (DB).
('85) 11 Cal 499 (501) (DB).
('35) 22 AIR 1935 Oudh 394 (399) : 11 Luck 209 (DB). (Finding based solely on erroneous legal presumption without considering oral evidence.)
('35) 22 AIR 1935 Mad 701 (703).
Also see Note 53.

8. ('18) 5 AIR 1918 Pat 291 (294, 295).
('34) 21 AIR 1934 All 941 (942).
('18) 5 AIR 1918 All 244 (245).
('12) 13 Ind Cas 495 (495) (DB) (Cal).
('19) 6 AIR 1919 Oudh 187 (188). (Need not refer to every portion of the evidence.)
('37) 24 AIR 1937 Cal 371 (372).
† ('39) 26 AIR 1939 Nag 221 (223) : I L R (1939) Nag 510 (DB).
('37) 1937 Mad W N 393 (395).
('35) 22 AIR 1935 All 351 (353).

9. † ('19) 6 AIR 1919 Oudh 44 (45) : 22 Oudh Cas 312 (DB).
[*See also* ('34) 21 AIR 1934 Pat 66 (67). (Finding of fact arrived at without proper discussion of evidence is not binding in second appeal.)]

10. ('17) 4 AIR 1917 Pat 578 (579) : 2 Pat L Jour 231 (DB).

11. ('29) 11 Lah L Jour 381 (384) (DB).

15. Appellate Court assuming jurisdiction. — An Appellate Court acts contrary to law if it acts without jurisdiction in any matter.[1] It has already been seen in Note 14 on S. 96 that a decree made without jurisdiction possesses nonetheless the qualities of a "decree" and that an appeal is competent from such decree. The same principles apply to first appellate decrees which are appealable under this section.[2]

But every decree, whether passed with or without jurisdiction, is appealable under this section *only where there is no express provision to the contrary in the body of the Code or in any other law for the time being in force.* Thus, S. 27 of the Provincial Small Cause Courts Act, 1887, provides that a decree or order of a Small Cause Court shall be final. Similarly, an order passed under O. 21 Rr. 60, 61, 98, 99 or 101 has been declared by O. 21 Rr. 63 and 103 to be *conclusive.* Where in such cases an appeal is entertained by the lower Appellate Court, no second appeal will lie even though the adjudication of the first Appellate Court may amount to a *decree.* It has accordingly been held by the Madras High Court in the undermentioned case[3] and by the Bombay High Court[4] that no second appeal will lie from the decree of the first Appellate Court where the first appeal itself is not competent in law. The Allahabad,[5] Calcutta,[6] Lahore[7] and Patna[8] High Courts and the Madras High Court in the cases noted below[9] have, however, held that a second appeal will lie even if no appeal lay to the first Appellate Court. The decisions are merely based on the view that a decree passed without jurisdiction is nevertheless a decree and is open to appeal. The fact that even a decree is appealable only "save as otherwise expressly provided" was not adverted to in those decisions. It is submitted that the decisions cannot be accepted as correct. In the undermentioned case[10]

Note 15

1. † ('18) 5 AIR 1918 Cal 435 (436) : 45 Cal 926 (DB).
('36) 23 AIR 1936 Lah 575 (576) (DB). (Absence of jurisdiction to hear appeal is good ground for second appeal.)
2. † ('18) 5 AIR 1918 Cal 435 (436) : 43 Ind Cas 758 (759) : 45 Cal 926 (DB).
('33) 20 AIR 1933 All 403 (404) (DB).
✠('12) 16 Ind Cas 940 (942) (DB) (Cal).
('93) 3 Mad L Jour 231 (236) (DB).
('10) 8 Ind Cas 26 (27) (DB) (Cal). (Order not under S. 47 dealt with as if it is under S. 47.)
('31) 18 AIR 1931 Lah 96 (96).
('26) 13 AIR 1926 Mad 1089 (1089) (DB).
('26) 13 AIR 1926 Pat 164 (165) (DB).
('28) 15 AIR 1928 Oudh 224 (225) (DB).
3. ('21) 8 AIR 1921 Mad 612 (614) (DB). (Remedy is by revision petition.)
4. ('04) 28 Bom 458 (460) (DB).
5. ('24) 11 AIR 1924 All 183 (185).
('26) 13 AIR 1926 All 401 (401, 402).
('91) 13 All 575 (576) (DB).
('14) 1 AIR 1914 All 402 (402).
† ('25) 12 AIR 1925 All 737 (738) : 47 All 934 (DB).
('39) 26 AIR 1939 All 22 (23).
('34) 21 AIR 1934 All 825 (826) (DB).
6. ('41) 28 AIR 1941 Cal 441 (441). (A I R 1925 Cal 1032, doubted but followed.)
† ('25) 12 AIR 1925 Cal 1032 (1032) (DB).
('19) 6 AIR 1919 Cal 368 (369) (DB).
('17) 4 AIR 1917 Cal 320 (325) (DB).
(1900) 27 Cal 362 (363) (DB).
('36) 165 Ind Cas 249 (250, 251) (Cal).
[*See* ('27) 14 AIR 1927 Cal 633 (635) (DB).]
[But see ('02) 6 Cal W N 614 (615) (DB). (Where no appeal lies to the first appellate Court no second appeal will lie.)]
7. ('30) 17 AIR 1930 Lah 1065 (1066).
('35) 22 AIR 1935 Lah 319 (319).
('36) 23 AIR 1936 Lah 212 (213).
(See however ('34) 21 AIR 1934 Lah 79 (80). (*Held*, doubtful—Second Appeal treated as revision petition.)]
8. ('42) 29 AIR 1942 Pat 369 (370). (If an appellate Court entertains an appeal which does not lie to that Court, a second appeal lies against the decision of that Court — Order not under S. 47 dealt with as an order under that section.)
('41) 28 AIR 1941 Pat 616 (617) (DB). (Even assuming that second appeal is incompetent, decision of lower Court being one without jurisdiction, is liable to be set aside in revision under S. 115, C.P. Code, the second appeal being treated as revision application.)
† ('30) 17 AIR 1930 Pat 280 (282) : 9 Pat 685 (DB).
('37) 24 AIR 1937 Pat 136 (137) (DB). (*Obiter.*)
[But see ('36) 23 AIR 1936 Pat 119 (120).]
9. ('43) 30 AIR 1943 Mad 185 (186) : I L R (1943) Mad 297 (DB).
('42) 29 AIR 1942 Mad 741 (741, 742).
('33) 20 AIR 1933 Mad 475 (477).
10. ('42) 29 AIR 1942 Mad 741 (741, 742). (If the lower Court wrongly entertains an appeal and dismisses it on the merits, the only order which can be properly passed in second appeal is to set aside the incompetent appellate order — There is no justification for going into the trial Court's order in such a case which is unaffected by the incompetent appellate decision—Should the High Court, when hearing a second appeal against an incom-

the Madras High Court held that even though a second appeal may lie from a decree passed in an incompetent appeal, such a second appeal will not lie if the lower Appellate Court has *dismissed* the appeal as incompetent.

No second appeal will, in any case, lie against the decision of the lower Appellate Court without jurisdiction where such decision will not be appealable even if passed with jurisdiction. Thus, where the first Appellate Court entertains without jurisdiction an appeal against an *order*, no second appeal will lie because no such appeal will lie under S. 104 cl. (2) even if the first Appellate Court had entertained the appeal with jurisdiction.[11] But where the lower Appellate Court erroneously dismisses an appeal on the ground that no appeal lies to it, the dismissal is nevertheless a *decree* and is open to second appeal.[12]

16. Exercise of discretion by the lower Appellate Court. — Where a discretion to do or not to do a particular act is vested in the Court by the provisions of the Code, the Court is *bound to exercise such discretion* in one way or other. A refusal to exercise it or a non-exercise of it is an *error or defect in procedure* within the meaning of the section.[1] Where a Court does exercise its discretion it must do so judicially,[2] i.e., *on sound legal principles*.[3] An exercise of discretion in an arbitrary,[4] unreasonable[5] or non-judicial[6] manner or which is based on wrong conclusions of fact[7] is an *error of law* which will be a valid ground of second appeal. But where the Court has exercised its discretion in a judicial manner, there is no error either of law or of procedure and consequently, such exercise of discretion cannot be interfered with in second appeal.[8] The

petent appellate order come to the conclusion that the trial Court's order is wrong on the merits, in a proper case the High Court will interfere in revision with the order of the trial Court.)

[*See also* ('43) 30 AIR 1943 Mad 185 (186) : ILR (1943) Mad 297 (DB). (Lower appellate Court wrongly assuming appellate jurisdiction, but declining to interfere with trial Court's decree—No second appeal lies.)]

11. ('21) 8 AIR 1921 Lah 156 (157).

12. ('04) 8 Cal W N 64 (65). (Provided a second appeal is otherwise entertainable having regard to the nature of the original suit.)
('10) 5 Ind Cas 158 (160) (Cal).

Note 16

1. ('42) 29 AIR 1942 Oudh 485 (486) (DB).
('40) 27 AIR 1940 Pat 546 (547) (DB). (Failure to exercise discretion in matter of interest under S. 8, Bihar Money-lenders Act, 1938.)
† ('01) 23 All 121 (122) (DB).
('25) 12 AIR 1925 All 288 (289) : 47 All 412 (DB). (Additional evidence rejected not in exercise of a discretion but due to supposed insuperable difficulty —Second appeal lies.)

2. See Note 6 on the Preamble.
('39) 26 AIR 1939 Nag 110 (112) : ILR (1939) Nag 452.

3. ('42) 29 AIR 1942 Oudh 485 (487) (DB).
See Note 6 on the Preamble and the cases cited in foot-notes (4) to (6).

4. ('26) 13 AIR 1926 Cal 677 (678).
('33) 20 AIR 1933 All 294 (295) (DB).
† ('37) 24 AIR 1937 Sind 263 (271) (DB).
('36) 23 AIR 1936 Lah 742 (743). (Lower Court arbitrarily rejecting plea under S. 5, Lim Act.)

5. ('14) 1 AIR 1914 All 74 (75) : 36 All 510 (512) (DB).

[See however ('34) 21 AIR 1934 Cal 5 (6, 7) (DB). (Where it was held that the question whether or not there had been a proper discretion in issuing certificates is question of fact.)]

6. ('42) 29 AIR 1942 Oudh 485 (487) (DB).
('40) 27 AIR 1940 Pat 502 (504) (DB).
('08) 12 Cal W N 312 (316) (DB). (Improper admission or rejection of documents.)
('26) 13 AIR 1926 Lah 445 (446) (DB).
† ('23) 10 AIR 1923 All 455 (456) : 45 All 432 (DB)
('36) 23 AIR 1936 Lah 742 (743). (Plea under S. 5, Lim. Act—Discretion used non-judicially.)
('37) 24 AIR 1937 Sind 263 (267, 271) (DB).

7 ('19) 6 AIR 1919 Pat 503 (505) : 4 Pat L Jour 381 (DB).
† ('28) 15 AIR 1928 Pat 537 (538) (DB). (Improper exercise of discretion under O. 13 R. 1.)
('12) 13 Ind Cas 120 (122) (Cal). (Erroneous reasons as to applicability of S. 90, Evidence Act.)
('34) 21 AIR 1934 All 469 (471) (DB). (Misapprehension of fact.)

8. ('42) 29 AIR 1942 Oudh 485 (487) (DB).
('40) 27 AIR 1940 Pat 423 (424) (DB). (Reduction of interest — Case under S. 8 of Bihar Money-Lenders Act, 1938.)
('40) 27 AIR 1940 Pat 502 (504) (DB).
('12) 15 Ind Cas 429 (430) (Low Bur). (Even if the discretion is exercised wrongly.)
('67) 7 Suth W R 208 (208) (DB). (On a question of costs alone.)
† ('99) 23 Bom 513 (517, 518) (DB).
('04) 26 All 327 (328) (DB).
('87) 9 All 244 (246) (DB).
('02) 25 All 71 (72) (DB).
('72) 17 Suth W R 314 (314, 315) (DB).
('12) 17 Ind Cas 315 (316) (Oudh).
('20) 7 AIR 1920 Cal 24 (25) (DB).

Patna High Court has in the undermentioned case[9] observed as follows: "In short, these exercises of discretion by lower Courts, whether the trial Court or the first Appellate Court, must be remedied, if at all, at once by the superior Court on the application of the party aggrieved and it is too late if that party allows the case to proceed and then seeks to interfere with the discretion in appeal." The above observations do not appear to be sound as the assumption on which they are based viz., that the aggrieved party would, in every case, have a remedy even apart from an appeal from the ultimate decision of the case, is not correct. The question whether an appeal lies or not from any particular exercise of discretion is, however, largely an academic one, as it is necessary to examine in each case the facts of the case, before the question can be answered. If on such examination the exercise of the discretion is found to be vitiated by any of the above-mentioned circumstances, the second appeal will be allowed. If, on the other hand, it is found to have been exercised judicially, the appeal would fail.[10] The following are all discretionary matters in which the High Court will not, in second appeal, interfere unless the discretion has not been exercised by the lower Appellate Court in a judicial manner and in accordance with legal principles:

Granting of adjournments, summoning and enforcing the attendance of witnesses. — Granting adjournments;[11] enforcing the attendance of a witness by any particular method of coercive process;[12] refusing to punish a recusant witness;[13] refusing to summon plaintiff as a witness for the defendant;[14] and refusing to allow the calling of more witnesses after the case is closed.[15]

Regarding omission to examine a witness tendered, see Note 27.

Admission or refusal to admit documents.—Refusal of an adjournment in order to send for documents;[16] admitting or refusing to admit documents not produced at the first hearing.[17]

Admission or rejection of secondary evidence. — Admission or rejection of secondary evidence;[18] disallowing presumptive evidence;[19] and drawing a presumption under S. 90 of the Indian Evidence Act for or against the genuineness of documents.[20]

('29) 16 AIR 1929 Rang 221 (222) : 7 Rang 561 (DB). (Matter of discretion — Appellate Court is always reluctant to interfere.)
('05) 28 Mad 508 (512) : 32 Ind App 261 (PC). (Amount of maintenance.)
('22) 9 AIR 1922 All 335 (335) (DB).
('70) 13 Suth W R 22 (23) (DB). (Award of damages within legal limits.)
('30) 17 AIR 1930 Mad 707 (707). (Refusal to act under O. 41 R. 33 is not error of law.)
('31) 18 AIR 1931 Lah 370 (371) (DB). (Discretion in application of O. 41 R. 33 not properly exercised — Still no interference.)
('84) 10 Cal 505 (506) (DB). (Dismissal of a suit under O. 11 R. 21 — Overruled on another point in 18 Cal 420 (422).)
('68) 10 Suth W R 174 (174) (DB). (Dismissing or decreeing a suit for non-attendance of a party when ordered by the Court to attend in person)
† ('01) 23 All 121 (122) (DB). (Refusal in the exercise of discretion to admit additional evidence is not an error or defect.)
('36) 23 AIR 1936 Lah 708 (709).
('35) 22 AIR 1935 Pat 256 (260) (DB).
('36) 23 AIR 1936 Lah 200 (201).
('38) 25 AIR 1938 Sind 206 (209) : 31 Sind L R 167 (DB).
('35) 22 AIR 1935 All 174 (178).

9. ('37) 24 A I R 1937 Pat 550 (552) : 16 Pat 600 (SB).
10. † ('28) 15 AIR 1928 Oudh 224 (225) (DB).
11. ('14) 1 AIR 1914 All 230 (232).
('37) 24 AIR 1937 All 284 (285). (Lower Appellate Court dismissing application for adjournment of appeal in exercise of its discretion—No ground for second appeal.)
Also see O. 17 R 1, Note 8.
12. ('27) 14 AIR 1927 Lah 424 (424).
13. † ('67) 7 Suth W R 460 (461).
14. ('68) 10 Suth W R 134 (134) (DB).
15. ('69) 12 Suth W R 455 (456) (DB).
16. ('81) 7 Cal 560 (565) (DB).
17. See O. 13 R. 2, Note 3.
18. ('24) 11 AIR 1924 Lah 303 (304) (DB).
('30) 17 AIR 1930 All 550 (551) (DB).
('35) 22 AIR 1935 Rang 502 (503, 504).
[*See* ('41) 28 AIR 1941 Mad 612 (614). (Admission of secondary evidence by trial Court without objection justified by lower Appellate Court for good reasons—No interference.)]
19. ('23) 10 AIR 1923 Cal 285 (286).
20. ('26) 13 AIR 1926 Oudh 362 (363).
('37) 24 AIR 1937 Lah 17 (18) (DB). (Discretion properly exercised in not drawing presumption — High Court will not interfere.)

Directions for local investigation or inquiry. — Directing local investigation or local enquiry,[21] or refusal to issue a commission,[22] or refusal to remand the case for further enquiry when the Court is not satisfied with the local inquiry made.[23] But where a previous commission to examine a witness had returned unexecuted, a refusal to examine the witness on commission on the ground that his evidence was not important, was held to be a ground of second appeal.[24]

Amendment of plaint and addition of parties.—Refusal of application to amend the plaint[25] and refusal to add parties.[26]

Declaration and injunctions. — Granting declaratory decrees though not asked for,[27] granting injunctions[28] and refusing a specific performance of a contract on the ground of delay.[29]

Award or refusal of costs.[30] — Where however the lower Appellate Court interferes with the discretion properly exercised by the trial Court in the matter of award of costs, a second appeal will lie on the ground that the action of the lower Appellate Court is contrary to law.[31]

Award or refusal of damages. — Refusal to award damages in a suit for defamation,[32] and award of damages under section 10 of the Bengal Rent Act, X of 1859, which though excessive is within legal limits.[33]

Award of future interest.[34]

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21. See O. 26 R 9, Note 9.
22. ('33) 20 AIR 1933 Pat 542 (543).
23. ('19) 6 AIR 1919 Cal 672 (673) (DB).
24. † ('75) 23 Suth W R 457 (457) (DB).
25. ('68) 10 Suth W R 87 (88) (DB).
✠('38) 25 A I R 1938 Nag 388 (389) : I L R (1939) Nag 194 (DB). (Judge allowing an amendment on a wrong view of law—High Court can interfere.)
26. (1864) 1 Suth W R 228 (228) (DB).
(1865) 2 Suth W R 158 (158) (DB).
('68) 10 Suth W R 108 (110) (DB).
('35) 22 AIR 1935 Rang 23 (24). (Addition of defendants—Trial Court exercising discretion properly by adding them — Appellate Court setting aside order—Order of Appellate Court *set aside* in second appeal.)
[*See* ('37) 24 AIR 1937 Mad 520 (522). (Lower Court wrongly refusing equitable relief under O. 1 R 9 — High Court can interfere in second appeal.)]
27. ('77) 1877 Pun Re No. 55, p. 139.
('30) 17 AIR 1930 All 620 (621) (DB). (Discretion in granting declaration as a fit relief — No interference.)
28. ('05) 27 All 688 (691) (SB).
('26) 13 AIR 1926 Cal 536 (537) (DB).
29. † ('84) 10 Cal 1061 (1068, 1069) (DB).
30. ('42) 29 AIR 1942 Pesh 39 (40) (DB).
('40) 27 AIR 1940 Mad 589 (589).
('26) 13 AIR 1926 All 419 (420).
('34) 21 AIR 1934 Lah 739 (739).
('33) 20 AIR 1933 Nag 49 (50) : 29 Nag L R 8.
('33) 20 AIR 1933 Oudh 455 (457) (DB).
('76) 1 Cal 385 (388) (DB).
† ('28) 15 AIR 1928 Oudh 224 (225) (DB). (Interference of lower Appellate Court with a non-appealable order of awarding costs—Second appeal lies.)
('29) 16 AIR 1929 Oudh 406 (412) (FB).
('30) 17 AIR 1930 Mad 707 (708). (Costs refused to party trying to profit by his fraud — Discretion is not improperly exercised.)
('12) 15 Ind Cas 429 (429, 430) (Low Bur).
('86) 12 Cal 179 (181) (DB). (But when matter of principle is involved second appeal lies.)
('21) 8 AIR 1921 Cal 604 (605) (DB). (Do.)
('19) 6 AIR 1919 Pat 257 (258). (Do.)
† (1864) 1 Suth W R 97 (98) (DB).
† ('05) 8 Oudh Cas 251 (252, 253) (DB).
('66) 3 Mad H C R 113 (114). (Ordering defendant to pay plaintiff's costs, while plaintiff's suit is dismissed for want of cause of action is a ground of second appeal.)
('86) 12 Cal 271 (272) (DB). (Do.)
('03) 7 Cal W N 647 (648, 649). (Do.)
✠('03) 6 Oudh Cas 52 (57). (Do.)
('66) 4 Bom H C R A C 41 (42). (Awarding costs to losing party can be questioned in second appeal.)
('30) 17 AIR 1930 Lah 229 (230). (Successful party deprived of costs illegally—Second appeal allowed.)
('74) 6 N W P H C R 222 (224) (FB). (Arbitrary order.)
('93) 15 All 333 (333, 334) (DB). (Do.)
('23) 10 AIR 1923 Lah 513 (514). (Do.)
('26) 27 Pun L R 391 (393). (Do.)
Also see Section 35 Note 29.
[But see ('66) 1 Agra 270 (271). (Costs disallowed by the lower Court for no reason—In appeal costs were awarded.)
('19) 6 AIR 1919 Lah 418 (418). (The High Court in this case interfered with the order of costs passed by the lower Court.)]
31. ('40) 27 AIR 1940 Mad 589 (589).
('40) 27 AIR 1940 Mad 620 (621).
† ('34) 21 AIR 1934 Oud 259 (260).
('20) 2 Lah L Jour 310 (311, 312).
('21) 64 Ind Cas 962 (963) (All).
† ('28) 15 AIR 1928 Oudh 224 (225) (DB).
32. ('76) 25 Suth W R 22 (22) (DB).
33. † ('70) 13 Suth W R 391 (392) (DB).
34. ('23) 10 AIR 1923 Lah 513 (514).

Payment of decrees by instalments. — Directing payment of decree amount in instalments is a matter of discretion in which the High Court will not examine whether the discretion has been properly exercised or not, where, at the time of second appeal the decree-holder has already recovered a substantial sum and there is no hardship.[35] But a decree for payment in instalments without any provision for interest is arbitrary and is liable to be set aside in second appeal.[36]

Direction as to mode of execution. — Order for execution of a decree by arrest of the judgment-debtor instead of by sale and attachment of his property[37] and direction as to the manner of execution of a joint decree.[38]

Excusing delay under Section 5 of the Limitation Act. — See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., S. 5, Note 38.

Refusal to allow a guardian to go on with an appeal after the minor on whose behalf the appeal was filed had attained majority.[39]

Refusal by the lower Appellate Court to allow a point not mentioned in the memorandum of appeal.[40] — But allowing a point to be raised when the finding on it has not been appealed from will be a ground of second appeal.[41]

Admission of additional evidence in appeal.[42] — In a case, however, where the lower Appellate Court had not exercised its discretion judicially but had refused to admit additional evidence on the ground that there would be no end to litigation, it was held broadly by a majority of the Full Bench of the High Court of Madras[43] that a *refusal* to admit additional evidence is, in no case, a ground of second appeal. Sadasiva Ayyar, J., dissented from this view and held that the question whether the discretion was exercised *properly* was a question of law and could be interfered with in second appeal. The view of the majority of the Full Bench is based on no other reason than that it has been the *practice* of the Courts not to entertain second appeals on that point and that whether the lower Appellate Court "requires" any additional evidence is for that Court alone to say, and it is not for a superior Court to control its discretion. It is respectfully submitted that the view of the Full Bench is not correct.

Withdrawal of appeal. — Refusal to allow an appeal to be withdrawn[44] and refusal to restore an appeal withdrawn.[45]

Discretion under Order 41 Rule 4.[46]

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35. ('11) 11 Ind Cas 736 (737) (DB) (Cal).
[*See also* ('38) 25 AIR 1938 All 52 (53).]
36. ('66) 1 Agra 116 (117).
37. ('67) 8 Suth W R 318 (320) (DB).
38. ('75) 24 Suth W R 286 (287) (DB).
39. ('69) 3 Beng L R App 115 (116).
40. ('28) 15 AIR 1928 Lah 536 (537) (DB).
41. ('82) 9 Cal 635 (636, 637) (DB).
42. ('11) 33 All 379 : 9 Ind Cas 265 (266) (DB).
('33) 20 AIR 1933 Lah 1014 (1014).
(1900) 1900 All W N 195 (195, 196).
† ('85) 11 Cal 139 (142, 143) (DB). (Mere failure to record reasons for taking additional evidence is no ground of second appeal.)
('86) 12 Cal 37 (38) (DB). (Do.)
('32) 19 AIR 1932 Lah 93 (94). (Order 41 Rule 27 —Refusal to admit material document—Matter of discretion—No interference.)
('31) 18 AIR 1931 Lah 506 (506). (Refusal to admit additional evidence—No ground for second appeal.)
('37) 24 AIR 1937 Lah 115 (116). (Appellate Court examining witness on its own motion for good reasons—High Court cannot interfere in second appeal.)
[*See* ('38) 25 AIR 1938 Rang 170 (172). (Refusal by lower Appellate Court to admit new evidence is not substantial error or defect in procedure—But in peculiar circumstances of case, the documents in question were held to be not new evidence, that the trial Court committed a substantial error in procedure in refusing to admit these documents and that the lower Appellate Court perpetuated this error by refusing to admit these documents.)]
Also see O. 41 R. 27, Note 18.
43. † ('19) 6 AIR 1919 Mad 1166 (1171): 42 Mad 737 (FB). (Followed in AIR 1927 Mad 1099.)
44. ('66) 6 Suth W R Act X 24 (24).
45. ('70) 13 Suth W R 167 (168) (DB).
46. ('14) 1 AIR 1914 All 74 (75): 36 All 510 (DB). (Refusal in the proper exercise of discretion—No second appeal.)
† ('85) 8 Mad 192 (195) (DB).

17. Omission to consider facts, evidence and proof. — See Note 13.

18. Findings on no evidence, or on surmises or on irrelevant and inadmissible evidence. — See Note 13.

19. Misappreciation of evidence. — See Note 13.

20. Disbelieving witnesses on grounds opposed to law. — It is the function of the Court to come to a conclusion after weighing the evidence let in on both sides. Its decisions as to the *credibility* of the witnesses is neither an error of law nor of procedure and will not be interfered with in second appeal[1] unless the witnesses are disbelieved *on grounds which are opposed to law.*[2] Thus, where a witness is disbelieved on *vague* or *general grounds,*[3] e. g., that he belongs to a particular class and witnesses of that class are not credible,[4] the Court commits an error of law which can be attacked in second appeal.

21. Contrary to usage having the force of law. — The expression "usage having the force of law" means a *local or family* usage as distinguished from the general law.[1] A usage is a rule obtaining in a particular family or in a particular local area in derogation of the ordinary law.[2] A decision on the question whether parties in a particular case belong to one system of law and not to another is not a decision on any *usage.*[3]

In order that a usage may have the force of law it is essential that it should be *ancient, invariable, certain and reasonable.*[4] Questions as to existence of a custom or usage having the force of law are generally questions of mixed law and fact,[5] the Judge

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Note 20

1. ('14) 1 AIR 1914 Mad 106 (106) (DB).
† ('76) 25 Suth W R 166 (168) (DB).
('75) 24 Suth W R 13 (14).
('14) 1 AIR 1914 Oudh 123 (124) : 17 Oudh Cas 1: 20 Ind Cas 894 (895).
('75) 24 Suth W R 61 (61) (DB). (Inference from fact against credibility—No second appeal.)
('70) 2 N W P H C R 207 (208) (DB).
('66) 6 Suth W R 292 (292) (DB). (Disbelieving a witness as being interested—No error of law.)
('25) 12 AIR 1925 Oudh 537 (537). (Trial Court disbelieving witnesses with reference to certain statements — Appellate Court believing them as to other statements—No second appeal lies.)
('17) 4 AIR 1917 All 35 (38, 39) : 39 All 426 (DB). (Sufficiency of evidence for finding is not open to second appeal.)
('35) 22 AIR 1935 All 293 (294).
('35) 22 AIR 1935 Bom 371 (376) (DB).
2 Hay 421.
2. ('76) 25 Suth W R 137 (138). (Disbelieving witness on the ground that he, a Naib Patwari, has signed a document as Patwari.)
3. ('15) 29 Ind Cas 673 (673) (DB) (U P B R).
('73) 20 Suth W R 474 (475, 476) (DB).
('75) 24 Suth W R 251 (252) (DB).
† ('74) 21 Suth W R 436 (438) (DB).
('73) 19 Suth W R 299 (300) (DB). (Assumption that witness being tenant of a large landholder must have given false evidence.)
4. ('72) 17 Suth W R 161 (161, 162) (DB). (Because they are weavers or cultivators.)
✠ ('11) 12 Ind Cas 751 (764) (DB) (Mad).

Note 21

1. † ('93) 20 Cal 93 (99) : 19 Ind App 228 (PC). (Overruling 7 All 649.)
[But see ('18) 5 AIR 1918 Mad 1166 (1167) : 40 Mad 1108 (DB). (The decision does not refer to the Privy Council decision in 20 Cal 93 : 19 Ind App 228 (PC), but approves of the decision in 7 All 649 which was overruled by the Privy Council decision. It cannot therefore be accepted as correct.)]
2. † ('75) 3 Ind App 259 (285) (PC).
('17) 4 AIR 1917 Mad 255 (256) (DB).
3. ('15) 2 AIR 1915 Mad 711 (716) : 38 Mad 1052 (DB).
('17) 4 AIR 1917 Mad 255 (256).
('16) 3 AIR 1916 Lah 97 (98) (DB).
4. ('42) 29 AIR 1942 Cal 26 (30): ILR (1941) 2 Cal 258 (DB).
('41) 28 AIR 1941 P C 21 (32) : ILR (1941) Lah 154 : ILR (1941) Kar P C 22 : 68 Ind App 1 (PC).
('75) 3 Ind App 259 (285) (PC).
✠ ('72) 14 Moo Ind App 570 (585, 586) (PC).
('36) 160 Ind Cas 990 (992) (Nag).
5. ('42) 29 AIR 1942 Cal 26 (28) : I L R (1941) 2 Cal 258 (DB).
('42) 29 AIR 1942 Oudh 213 (214) : 17 Luck 567 (DB). (Question depending on interpretation of documents.)
('42) 29 AIR 1942 Oudh 401 (406) (DB).
('39) 26 AIR 1939 All 437 (441) : I L R (1939) All 406 (DB).
† ('17) 4 AIR 1917 P C 33 (39) : 40 Mad 709 : 44 Ind App 147 (PC).
('33) 20 AIR 1933 Mad 390 (391) (DB).
('10) 32 All 363 (373) : 37 Ind App 191 (PC). (Question involved one of fact.)
('22) 9 AIR 1922 All 88 (89) (DB).
('31) 18 AIR 1931 Bom 167 (168) (DB).
✠ ('31) 18 AIR 1931 All 499 (502) : 54 All 6 (SB).
('22) 9 AIR 1922 Mad 290 (298) (DB). (Custom.)

first finding what were the *things actually done* in the alleged pursuance of custom and then determining whether these facts so found satisfy the requirements of law.[6] The former is a question of fact[7] and the latter one of law.[8] Where, therefore, a question relating to usage having the force of law is raised in second appeal, the High Court cannot interfere with the findings on all *facts* from which the custom or usage having the force of law was inferred,[9] or with the *credibility* or sufficiency of the evidence in support of those facts.[10] Thus, the High Court cannot interfere with the findings as to the *instances* adduced for or against the custom,[11] or as to the prevalence of a certain

('38) 25 AIR 1938 Bom 492 (494) (DB).
('39) 26 AIR 1939 All 500 (501) : 1939 R D 234 (234) (DB).
('39) 26 AIR 1939 Oudh 210 (213) : 14 Luck 515 : 181 Ind Cas 70 (73).
[*See* ('29) 16 AIR 1929 Lah 426 (427) : 10 Lah 868 (DB). (Question to be decided on authorities —Question involved one of law.)]
('35) 22 AIR 1935 Oudh 208 (208). (Finding that custom has fallen into desuetude is one of fact.)
('35) 22 AIR 1935 All 754 (755). (Whether a right of privacy exists by custom and the nature and limits of such a custom, if it does exist, are questions of fact and the findings of the lower Appellate Court if based on admissible and relevant evidence are conclusive.)
('35) 22 AIR 1935 P C 71 (72) (PC). (The question whether by custom women are excluded from inheritance is one of fact.)]
[*See also* ('35) 22 AIR 1935 Bom 371 (375) (DB). (Question as to existence of custom—Lower Court applying law as to requirements of valid custom correctly—Its conclusion is one of fact and binding in second appeal.)
('35) 22 AIR 1935 All 501 (501). (Finding on question of custom is finding of fact in so far as it records what happened and in so far as it gives weight to the opinion evidence.)]
Also see S. 112 Note 6.

6. ('42) 29 AIR 1942 Cal 26 (28) : I L R (1941) 2 Cal 258 (DB).
† ('17) 4 AIR 1917 P C 33 (39) : 40 Mad 709 : 44 Ind App 147 (PC).
('37) 24 AIR 1937 Cal 245 (250) : I L R (1937) 2 Cal 86 (DB). (Question as to reasonableness of custom is one of law.)
('39) 26 AIR 1939 Oudh 210 (213) : 14 Luck 515.
('34) 21 AIR 1934 All 890 (891) (DB).

7. ('40) 27 AIR 1940 All 535 (536) : I L R (1940) All 726 (DB). (Whether a custom exists or not is question of fact—AIR 1930 P C 234:53 Mad 597: 57 Ind App 264 (PC) followed.)
✠ ('30) 17 AIR 1930 P C 234 (235) : 53 Mad 597 : 57 Ind App 264 (PC). (Finding as to existence of custom is a question of fact — Their Lordships' observations must be taken to mean that the finding of fact from which the existence of custom is inferred must be accepted as binding.)
('28) 15 AIR 1928 Oudh 121 (121) (DB). (Existence of custom is a question of fact.)
('68) 10 Suth W R 153 (153) (DB). (Do.)
('70) 13 Suth W R 420 (422) (DB). (Do.)
('30) 17 AIR 1930 Pat 562 (563) (DB). (Do.)
('31) 134 Ind Cas 475 (476) (Oudh).
('32) 19 AIR 1932 Rang 6 (8) : 9 Rang 585 (DB). (Existence of commercial usage is a question of fact.)
✠ ('09) 31 All 557 (570) : 36 Ind App 210 (PC). (Finding arrived on the ground that the evidence offered did not show the existence of the custom is one of fact.)
('91) 18 Cal 448 (457) : 18 Ind App 59 (PC). (The peculiar constitution of trust in a particular place is a question of fact.)
('10) 32 All 363 (373) : 37 Ind App 191 (PC).

8. ('41) 28 AIR 1941 Oudh 468 (471) : 16 Luck 626.

9. ('26) 13 AIR 1926 All 43 (43) : 48 All 77 (DB).
† ('18) 5 AIR 1918 Mad 1 (14, 15, 16) : 41 Mad 374 (FB). (Overruling 29 Mad 24.)
('35) 22 AIR 1935 Bom 371 (375).
('39) 26 AIR 1939 All 500 (501) (DB).
('36) 23 AIR 1936 All 443 (448) : 58 All 889 (DB). (Lower Court coming to a finding that parties who are Mahomedans are governed by Hindu law of succession after considering oral and documentary evidence—High Court will accept finding as one of fact.)

10. ('42) 29 AIR 1942 Cal 26 (28) : I L R (1941) 2 Cal 258 (DB).
('14) 1 AIR 1914 Oudh 336 (337). (But is entitled to consider whether that evidence amounts to an adequate proof of custom.)
('18) 5 AIR 1918 Mad 1166 (1167) : 40 Mad 1108 (DB).
('24) 11 AIR 1924 All 146 (147) (DB). (Presumption as to custom of pre-emption arising from entry in wajib-ul-arz — Question whether it has or has not been rebutted.)
('11) 9 Ind Cas 839 (839) (Cal).
('13) 20 Ind Cas 810 (810) (DB) (Cal).
('21) 8 AIR 1921 Oudh 116 (117).
† ('26) 13 AIR 1926 All 153 (155). (But the question as to which of two wazib-ul-arzes should be held to govern a case can be re-opened.)
† ('26) 13 AIR 1926 Oudh 460 (460, 461).
('26) 13 AIR 1926 Oudh 143 (143).
('30) 17 AIR 1930 Oudh 330 (332).
('35) 22 AIR 1935 Oudh 459 (460) : 11 Luck 397.
[*See* ('36) 23 AIR 1936 All 443 (449) : 58 All 889 (DB).]

11. † ('18) 5 AIR 1918 Mad 1 (14, 15): 41 Mad 374 (FB). (Overruling 29 Mad 24.)
('34) 21 AIR 1934 All 890 (890) (DB).
('18) 5 AIR 1918 Cal 979 (981, 982) : 45 Cal 285 (DB).
('37) 24 AIR 1937 All 290 (291) (DB).
('36) 23 AIR 1936 All 119 (120) (DB). (Custom — Actual instances showing practice approved as facts —High Court is bound by lower Court's finding if no error of law exists.)

practic But the question whether the facts found *establish the essential legal elements* of cu[illegible]n can be gone into in second appeal.[13] Thus, the High Court can see whether the num[illegible]r of instances adduced show *invariability* and *ancient origin* of the practice and wh[illegible]ier they are *reasonable* and *certain*.[14]

As will be seen in Note 53, even the findings of fact of the lower Appellate Court [illegible]n be attacked in second appeal where they are based on no evidence,[15] irrelevant[16] or [illegible]legal evidence[17] or on the improper rejection of any evidence[18] or on the misinterpretation of a document,[19] or on a misconception of well-established principles of law,[20] or where the evidence does not warrant the finding arrived at.[21] See also Note 13.

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12. ('33) 20 AIR 1933 All 306 (307) (DB).
('36) 23 AIR 1936 Nag 95 (97) : ILR (1936) Nag 13. (Although legal inferences which flow from them may be questions of law.)
13. ('42) 29 AIR 1942 Cal 26 (29) : ILR (1941) 2 Cal 258 (DB).
('41) 28 AIR 1941 Oudh 468 (471) : 16 Luck 626.
('97) 21 Bom 110 (115, 116) (DB).
('33) 20 AIR 1933 All 306 (307) (DB).
('18) 5 AIR 1918 Mad 1 (16) : 41 Mad 374 (FB).
('84) 7 Mad 3 (10, 16) (FB).
('08) 12 Cal W N 539 (542) (DB).
† ('18) 5 AIR 1918 Cal 979 (982) : 45 Cal 285 (DB).
('17) 4 AIR 1917 Nag 147 (148).
('20) 7 AIR 1920 Mad 277 (282) (DB).
('23) 10 AIR 1923 Oudh 102 (108) (DB).
('85) 8 Mad 464 (465) (DB). (So assumed.)
('27) 14 AIR 1927 All 201 (201, 202).
† ('31) 18 AIR 1931 All 499 (503) : 54 All 6 (SB).
('25) 12 AIR 1925 Bom 380 (382) (DB).
('25) 12 AIR 1925 Nag 179 (179).
('21) 8 AIR 1921 Mad 694 (696) (DB).
('84) 10 Cal 138 (139) (DB).
('22) 9 AIR 1922 Nag 52 (55) : 18 Nag L R 163.
('23) 10 AIR 1923 All 341 (341) (DB).
('26) 13 AIR 1926 Bom 153(154): 50 Bom 133(DB).
('35) 22 AIR 1935 Oudh 459 (460) : 11 Luck 397. (Whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage is a question of law.)
('36) 160 Ind Cas 990 (992) (Nag). (Question whether a customary right can be inferred from the evidence is one of law.)
('37) 24 AIR 1937 Pat 458 (460) (DB).
('37) 24 AIR 1937 All 290 (291) (DB).
('36) 23 AIR 1936 All 119 (120) (DB). (Whether instances amount to custom is a question of law.)
('37) 24 AIR 1937 Cal 245 (250) : I L R (1937) 2 Cal 86 (DB). (Reasonableness of custom is a question of law and can be gone into in second appeal.)
[*See* ('32) 19 AIR 1932 Lah 274 (275) : 13 Lah 31 (34, 35) (DB). (Finding on remanded issue as to prevailing or mercantile usage open to attack in second appeal.)]
[*See also* ('98) 22 Bom 430 (437) (DB).]
14. † ('16) 3 AIR 1916 Cal 67 (68) (DB).
('06) 29 Mad 24 (28) (DB).
('34) 21 AIR 1934 All 890 (891) (DB).
15. ('32) 19 AIR 1932 Lah 61 (62) (DB).
16. ('18) 5 AIR 1918 Mad 1 (16):41 Mad 374(FB).
('13) 20 Ind Cas 810 (810)(DB) (Cal). (Inadmissible evidence.)
† ('18) 5 AIR 1918 Cal 979 (981, 982) : 45 Cal 285 (DB).
('99) 26 Cal 184 (187) (DB). (Exclusion of relevant evidence.)
('96) 23 Cal 427 (429) (DB). (Do.)
† ('25) 12 AIR 1925 Bom 380 (382) (DB). (Do.)
('96) 23 Cal 179 (186) (DB).
17. ('09) 2 Ind Cas 490 (491) (DB) (All).
('22) 9 AIR 1922 All 241 (242).
('09) 3 Ind Cas 558 (559) (All).
('06) 28 All 698 (699).
('29) 116 Ind Cas 799 (800) (All).
† ('31) 18 AIR 1931 All 104 (105) : 53 All 308 (DB). (Approaching a question from a wrong stand point, and throwing burden wrongly, are also good grounds.)
18. ('41) 28 AIR 1941 Oudh 468 (472) : 16 Luck 626.
19. ('22) 9 AIR 1922 All 88 (89) (DB).
† ('28) 15 AIR 1928 Oudh 269 (269, 270) (DB).
20. ('97) 21 Bom 110 (115) (DB).
21. † ('09) 3 Ind Cas 6 (6) (DB) (All).
('09) 32 All 125 : 4 Ind Cas 304 (305) (DB).
('12) 14 Ind Cas 12 (13) (Oudh).
('12) 15 Ind Cas 247 (248) (Oudh).
† ('14) 1 AIR 1914 Cal 289 (289) : 18 Cal W N 55 (57) (DB).
('16)3 AIR1916 Mad 700(702,705):39 Mad 664(DB).
('15) 2 AIR 1915 Mad 363 (367) (DB).
('14) 1 AIR 1914 Oudh 336 (337).
('21) 8 AIR 1921 Mad 694 (696) (DB).
('24) 11 AIR 1924 All 477 (477).
('25) 12 AIR 1925 All 718 (718).
† ('25) 12 AIR 1925 Bom 380 (382) (DB).
('25) 12 AIR 1925 Nag 179 (179).
('27) 14 AIR 1927 All 201 (202).
('27) 14 AIR 1927 All 605 (607).
('29) 16 AIR 1929 Mad 751 (754).
('24) 11 AIR 1924 Pat 147 (157) (DB). (High Court can consider whether the kabuliyats have been properly interpreted.)
('26) 13 AIR 1926 All 215 (215).
('08) 30 All 311 (313) (FB).
('07) 11 Cal W N 83 (84) (DB).
('11) 9 Ind Cas 839 (839) (Cal).
('31) 18 AIR 1931 All 583 (584) (DB). (Usage not pleaded with precision — Evidence vague and inconsistent — Finding may be upset.)
('39) 26 A I R 1939 All 500 (501). (Finding that custom is not proved—High Court can interfere on the ground that there is considerable evidence for existence of custom.)
[*See* ('36) 23 A I R 1936 All 443 (449) : 58 All 889.]
Also see Note 53.
[But see ('33) 20 AIR 1933 All 603 (606) (DB).]

Where the lower Court has held that no question of custom is involved the case, it was held that the High Court can see whether such a question was involved or not.[22]

In the Punjab, a question of custom cannot be taken up in second appeal without a certificate under section 41, clause (3) of the Punjab Courts Act, 1918. See also the undermentioned cases.[23]

22. Failure to determine any issue of law or usage having the force of law. — Failure to determine an issue of law or usage having the force of law is a ground of second appeal.[1]

23. Errors or defects in procedure — General — Clause (c). — Section 99, which applies to appeals from *original decrees*, provides that no decree shall be reversed or varied on account of any error, defect or irregularity *not affecting the merits of the case*. In other words, where an error or defect *could not* or *does not* affect the merits of the case, the Appellate Court cannot upset the decision of the original Court.[1] Section 100 cl. (c) provides that an error or defect in procedure which is substantial enough to have possibly *produced an error or defect in the decision of the case on the merits* is a ground of second appeal.[2] The reason for the difference between the two sections lies in the fact that a Court of second appeal *cannot go into a question of fact* as the first Appellate Court can, and that without doing so, it would not be possible to say in any given case whether the error or defect *does* or *does not*, in fact, affect the decision of the case on the merits.

The word 'procedure' as used in this clause must be understood in its most generic sense, as including all the rules contained in the Civil Procedure Code or any other law regulating the investigation of cases by the Civil Courts.[3] An erroneous *finding of*

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22. ('25) 12 AIR 1925 Lah 82 (82) (DB.)

23. ('14) 1 AIR 1914 Lah 422 (423). (A question of custom cannot be taken up in second appeal without the required certificate.)
('33) 20 AIR 1933 Lah 115 (116) (DB).
('23) 10 AIR 1923 Lah 53 (54). (Gift—Power of—By custom—Certificate necessary.)
('22) 9 AIR 1922 Lah 426(427):3 Lah 344 (DB). (In second appeal the question of custom must be confined to that set out in the certificate granted by the lower Appellate Court.)
('15) 2 A I R 1915 Lah 351 (351) : 1915 Pun Re No. 110 (DB). (The question of valid necessity may be one of law or of customary law or one of fact according to the peculiar circumstances of each case.)
('15) 2 AIR 1915 Lah 403 (404) : 1916 Pun Re No. 34 (DB). (Where the question raised is whether the validity or existence of a custom was a question properly before the lower Appellate Court certificate is not necessary.)
('25) 12 AIR 1925 Lah 82 (82) (DB). (When the lower Appellate Court holds that no question of custom is involved in a case and rejects an application for a certificate to enable the appellant to file a second appeal, it is open to the second Appellate Court to hold that a question of custom is involved and to remand the case to lower Court to consider whether the certificate can be granted.)
('14) 1 AIR 1914 Lah 247 (248) : 1915 Pun Re No. 19 (DB). (It is only in those cases where the contention is that the custom alleged is invalid or that a particular custom does or does not exist that a certificate is necessary.)
('24) 11 AIR 1924 Lah 455(455,456):5Lah268(DB).
('24) 11 AIR 1924 Lah 263 (263).
('21) 8 AIR 1921 Lah 77 (78) : 2 Lah 348 (DB).
('38) 25 AIR 1938 Lah 191 (192, 193) (DB).

Note 22

1. ('68) 5 Bom H C R A C 57 (59) (DB).
('25) 12 AIR 1925 Oudh 384 (385).

Note 23

1. See S. 99 and Notes thereon.
[*See also* ('41) 28 AIR 1941 Nag 152 (155). (Objection that execution application was defective as not mentioning previous application must be disallowed to be raised for first time in second appeal.)]
2. ('85) 7 All 649 (659) (FB). (Per Mahmood, J.— Overruled on another point in 19 Ind App 228:20 Cal 93 (PC).)
('02) 6 Cal W N 185 (188) (DB).
† ('17) 4 AIR 1917 Cal 573 (573) (DB).
3. ('43) 30 AIR 1943 All 209 (209) : I L R (1943) All 196. (Trial by Revenue Court instead of by civil Court amounts to substantial error or defect in procedure — Appeal lies under S. 269, U. P. Tenancy Act, to High Court from appellate decree of District Judge.)
('85) 7 All 649 (657) (FB). (Per Mahmood, J. — Overruled on another point in 19 Ind App 228:20 Cal 93 (PC).)

fact is a different thing from an error or defect in procedure[4] and the fact that the lower Appellate Court believed witnesses on the one side in preference to those on the other is not an error of *procedure*[5] even if the reasons therefor are bad.[6]

The following are examples of errors in procedure :

(i) Basing the decision against the admission of parties[7] or on a point not raised by them and as to which no evidence has been adduced.[8]

(ii) Basing the decision on the report of a commissioner to whom no regular commission was issued[9] or determining a case without awaiting the return of a commission regularly issued.[10]

(iii) Trying together distinct and independent causes of action.[11]

(iv) Allowing a party to change the nature of his case in the lower Appellate Court.[12]

(v) Disposing of an appeal after the party is dead.[13]

(vi) Rejecting an appeal on the ground that no appeal lies.[14]

(vii) Dismissing an appeal for deficient court-fee without giving the party an opportunity to make good the deficiency[15] and directing the party after the disposal of the appeal to pay court-fee.[16]

(viii) Rejecting the commissioner's report without directing further enquiry in a case requiring investigation.[17]

(ix) Admitting a review without enquiry as to the existence of the grounds therefor.[18]

(x) The lower Appellate Court requiring a standard of proof higher than that laid down by S. 3 of the Evidence Act.[19]

See also Notes 25 to 27.

24. The errors or defects must be substantial and must be such as to possibly produce error or defect in the decision on the merits.—An error or defect in procedure will not be a ground of second appeal unless it is substantial and unless it is likely to have caused an error or defect in the decision of the case on the merits.[1] Thus, the judgment of the lower Appellate Court which is meagre and not in

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4. ('29) 16 AIR 1929 P C 190 (193) : 56 Ind App 280 : 25 Nag L R 121 (PC).
† ('91) 18 Cal 23 (30) : 17 Ind App 122 (PC).
Also see Note 52.
5. ('24) 11 AIR 1924 Oudh 265 (266).
6. ('72) 18 Suth W R 110 (110, 111) (DB).
7. ('17) 4 AIR 1917 Lah 297 (300) : 1917 Pun Re No. 106 (DB).
8. ('42) 29 AIR 1942 Oudh 180(182): 17 Luck 472 (Setting up new case for party.)
† ('04) 29 Bom 1 (12) : 21 Ind App 154 : 1 All L Jour 637 (640) (PC).
('10) 6 Ind Cas 1010 (1011) (Lah).
('18) 5 AIR 1918 Low Bur 69 (70).
('24) 11 AIR 1924 Pat 341 (342).
9. ('22) 9 AIR 1922 Lah 47 (49): 3 Lah 209 (DB).
10. ('94) 16 All 342 (343) (DB).
11. ('68) 10 Suth W R 279 (279).
12. ('79) 4 Cal 46 (50) (DB).
13. ('29) 16 AIR 1929 Lah 119 (119).
14. ('04) 8 Cal W N 64 (65).
15. ('70) 5 Mad H C R 330 (333) (DB).
16. ('85) 7 All 528 (533, 534) (DB).
17. ('17) 4 AIR 1917 Cal 573 (573) (DB).
('38) 25 AIR 1938 Pat 569 (570): 17 Pat 358 (DB). (Judge not accepting evidence of Commissioner nor report submitted by him and refusing to call futher Commissioner's report — Failure to do so does not amount to error of law, when both sides have given evidence on the point.)
18. ('76) 25 Suth W R 324 (325) (DB).
† ('73) 20 Suth W R 84 (85, 86) (FB).
('75) 24 Suth W R 186 (188).
19. ('43) 30 AIR 1943 Mad 38 (39).
('37) 1937 Mad W N 188 (189).

Note 24

1. ('40) 27 AIR 1940 Pat 33 (36).
† ('71) 15 Suth W R 8 (8) (DB).
('73) 19 Suth W R 430 (431) (DB).
('74) 6 N W P H C R 101 (103) (DB).
('74) 6 N W P H C R 114 (117) (DB).
('74) 21 Suth W R 57 (59) (DB).
✠ ('86) 8 All 111 (115) (FB).
('29) 16 AIR 1929 Pat 609 (612) : 9 Pat 408 (DB).
('15) 2 A I R 1915 Bom 68 (71) : 39 Bom 149 (DB).
('37) 24 AIR 1937 All 105 (107) (DB).

accordance with the rules is an irregularity; but unless the error is *substantial* and is likely to have affected the decision on the merits, i. e., unless it can be shown that the said Court failed to apply its mind properly to the case or to the evidence or that the appellants are prejudiced in any way, the error will not be a ground of second appeal.[2] In the following cases of errors or defects, it has been held that no second appeal will lie, unless it is shown that they have affected the decision on the merits :

(i) Basing decision on evidence recorded in another suit without recording reasons therefor.[3]

(ii) Making a mistake regarding the applicability of a rule of law.[4]

(iii) Misjoinder[5] or non-joinder[6] of parties.

(iv) Misjoinder of claims or causes of action.[7] But where an objection on the ground of misjoinder of causes of action taken in first appeal is allowed and the suit is dismissed, a second appeal will lie.[8]

(v) Omission to frame issues.[9]

(vi) Failure to take down the deposition of a witness in the manner prescribed.[10]

(vii) An irregular order of remand.[11]

(viii) Where a big suit was taken up after court hours and on defendants' vakil not being prepared to cross-examine the plaintiffs' witnesses the suit was decreed, the High Court declined to interfere in second appeal in the absence of an affidavit in the lower Appellate Court explaining the facts and showing how the appellant was prejudiced.[12]

In the following cases, the error or defect was held not likely to have affected the decision on the merits :

(i) Omission to write judgment till after the decree is passed.[13]

(ii) Basing decision on evidence recorded by predecessor-in-office.[14]

(iii) Admitting document insufficiently stamped.[15]

(iv) Admitting secondary evidence of a lost deed not stamped.[16] But where a copy of the deposition of a dead person in a previous suit was admitted without proof that the copy was a correct one and where the original deposition was not in the records of the previous suit, it was held that such admission was a ground of second appeal especially when great weight had been attached to such evidence.[17]

(v) Omission to draw the witnesses' attention to previous contradictory statements.[18]

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2. ('18) 5 AIR 1918 Mad 811 (812) (DB).
3. ('78) 2 Cal L Rep 33 (38) (DB).
4. (1862) 1862 Suth W R 16 (16, 17) (SB).
('66) 5 Suth W R Misc 29 (29, 30) (DB).
5. ('72) 18 Suth W R 313 (314).
† ('81) 3 Mad 359 (363) (DB).
('17) 4 AIR 1917 Lah 96 (96) : 1916 Pun Re No. 18.
('70) 2 N W P H C R 443 (444) (FB). (Misjoinder of parties by itself not affecting merits—No second appeal.)
6. ('74) 22 Suth W R 288 (288) (DB).
('77) 3 Cal 26 (29) (DB). (Non-joinder —Not affecting merits.)
7. (1864) 1 Suth W R 114 (114) (DB).
('29) 16 AIR 1929 All 148 (149) (DB).
8. ('73) 20 Suth W R 240 (241) (DB).
9. ('71) 13 Moo Ind App 573 (588) : 15 Suth W R 15 (16) (PC).
10. ('72) 18 Suth W R 112 (113) (DB).
11. See O. 41 R. 23, Note 28.
12. ('17) 4 AIR 1917 Mad 408 (409) (DB).
13. ('66) 4 Bom H C R A C 109 (109).
14. See Order 18 Rule 15.
[*See also* ('66) 4 Bom H C R A C 98 (103). (Case dealing with examination of witnesses on the transfer of suit.)]
15. ('75) 23 Suth W R 170 (170).
16. ('73) 20 Suth W R 63 (63) (DB).
17. ('74) 21 Suth W R 257 (257) (DB).
18. ('75) 24 Suth W R 312 (313) (DB).

(vi) Refusing to allow local investigation when both parties have gone into evidence.[19]

(vii) Omission to employ a regular officer of Court for making local enquiry.[20] Where the appointment of an *amin* as commissioner to effect partition was acquiesced in, in the first Court, no objection to such appointment should be allowed to be taken in appeal. The allowing of such an objection in first appeal was held to be a ground of second appeal.[21]

(viii) Hearing an appeal before the date fixed in the presence of the pleaders of the parties.[22]

(ix) Committing an error as to valuation not affecting the jurisdiction.[23]

The following have been held to be *no errors or defects* in procedure, much less substantial errors or defects :

(i) Omission to make specific mention of a document in the judgment.[24]

(ii) Refusal by the lower Appellate Court to take notice of a question not raised in the memorandum of appeal.[25] On the other hand, if the lower Appellate Court takes up any such question, it will be a ground of second appeal.[26]

(iii) Dismissing a suit for misjoinder of parties.[27]

(iv) Making a mistake in the matter of accounts[28] or making a mistake in the calculation of the claim decreed.[29]

25. Omission to frame or try issues of facts properly. — An omission to frame proper issues is an error or defect in procedure, and if it would have possibly affected the decision on the merits, it would be a ground of second appeal.[1] Where, however, the lower Court framed wrong issues but the findings were what they would have been if the correct issues had been framed, the High Court will not interfere inasmuch as the decision of the case on the merits has not been affected.[2] Similarly, an objection that a matter was not raised in the pleadings and did not properly form the subject of an issue, will not be allowed to be taken in second appeal when the parties had let in evidence on the point and the matter had been argued in the lower Courts and no prejudice was established.[3] The failure to try, determine and decide a *material issue* is a good ground of second appeal.[4]

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19. ('03) 30 Cal 536 (537) (DB).
20. ('67) 8 Suth W R 6 (7) (DB).
21. ('81) 7 Cal 318 (321) (DB).
22. (1864) 1 Suth W R 246 (246).
Also see O. 41 R. 16, N. 5 and R. 17 Note 10.
23. ('68) 10 Suth W R 32 (33).
('68) 5 Bom H C R A C 153 (155) (FB).
('01) 24 Mad 43 (45) (DB).
('25) 12 AIR 1925 Rang 65 (67) : 2 Rang 462.
Also see S. 99 Note 6.
24. ('12) 13 Ind Cas 495 (495) (DB) (Cal).
25. ('19) 6 AIR 1919 Mad 130 (132) DB).
26. ('21) 8 AIR 1921 Lah 228 (229).
27. ('73) 20 Suth W R 147 (148) (DB).
28. ('74) 22 Suth W R 310 (310, 311) (DB).
29. ('76) 25 Suth W R 63 (64).

Note 25

1. ('32) 19 AIR 1932 P C 28 (30) : 59 Ind App 29 (PC). (A finding of fact based on failure to discharge onus by party on whom onus was wrongly cast is not a finding on positive evidence and is not binding in second appeal.)
('74) 22 Suth W R 31 (32) (DB).
('32) 19 AIR 1932 Cal 351 (353). (Finding of fact arrived by wrongly placing onus can be challenged.)
('20) 7 AIR 1920 Lah 322 (322).
('66) 11 Moo Ind App 25 (27) (PC).
† ('70) 13 Moo Ind App 573 (583) (PC).
('96) 1896 All W N 104 (104).
[*See also* ('37) 24 AIR 1937 Sind 263 (270).]
2. ('97) 21 Bom 325 (327) (DB).
('70) 13 Moo Ind App 573 (583) (PC). (Omission to settle the issue — But no consequent failure of justice.)
3. ('26) 13 AIR 1926 Mad 156 (156).
('31) 18 AIR 1931 Lah 220 (221) (DB). (Wrong allocation of onus not preventing production of evidence—Finding cannot be challenged.)
4. ('67) 8 Suth W R 333 (333) (DB). (Question of possession.)
('67) 8 Suth W R 477 (478) (DB).
('71) 16 Suth W R 49 (50) (DB).
† ('71) 16 Suth W R 150 (151) (DB). (But an omission to try any point from mistake, the non-decision on that point forms no good ground.)

26. Defective judgment. — Parties to a suit are entitled to the benefit of a proper discussion of the materials on record based upon a correct view of the law applicable to them.[1] In this view the Code has in O. 41 R. 31 prescribed that the judgment of the Appellate Court shall be in writing and shall state —

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is varied or reversed, the relief to which the appellant is entitled.

A judgment of the first Appellate Court which does not contain the said particulars is no judgment at all and will be set aside in second appeal.[2] Thus, where a suit was dismissed arbitrarily on the ground that the subject-matter involved was very small, the dismissal was set aside in second appeal.[3] Similarly, where the lower Appellate Court

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('72) 17 Suth W R 279 (280) (DB).
('75) 23 Suth W R 166 (167) (DB).
† ('81) 7 Cal 148 (150) (DB).
('88) 1888 Unrep Print Judgt., p. 47.
('88) 1888 Unrep Print Judgt., p. 146.
('92) 16 Bom 545 (547) (DB).
('93) 1893 Unrep Print Judgt., p. 15.
('93) 1893 Unrep Print Judgt., p. 175.
† ('95) 17 All 117 (120).
('20) 7 AIR 1920 Lab 322 (322).
('20) 7 AIR 1920 Pat 359 (362).
('24) 11 AIR 1924 Nag 91 (94) : 20 Nag L R 17.
† ('31) 18 AIR 1931 Rang 312 (313, 314). (Issue of fact.)

Note 26

1. ('08) 11 Oudh Cas 264 (266, 267).
[*See* ('35) 22 AIR 1935 Mad 803 (807) : 58 Mad 893 (FB).]
[*See also* ('41) 28 AIR 1941 Rang 76 (78) : 1940 Rang L R 777 (DB). (Lower appellate Court agreeing with trial Court not bound to take every sentence of trial Court and say that it agrees with it.)]

2. ('43) 30 AIR 1943 Pat 177 (180) : 22 Pat 154 (DB). (Finding arrived at without considering the facts.)
('41) 28 AIR 1941 Mad 393 (393). (Lower appellate Court not adverting to documentary evidence of party and giving no reason for rejecting opinion of trial Judge as to credibility of witness.)
('41) 28 AIR 1941 Mad 539 (545) : I L R (1941) Mad 785 (FB). (Opinion of trial Court that evidence was true — Lower appellate Court reversing that finding without stating reasons.)
('40) 42 Pun L R 136 (138). (Court should examine the entire evidence, and its judgment should indicate that it had done so.)
('40) 42 Pun L R 275 (276). (A final Court of fact, especially when it reverses the decision of the Court of first instance should consider the entire evidence on the record and its judgment should indicate that its conclusion has been arrived at after a consideration of all the materials on record.)
† ('11) 11 Ind Cas 915 (915) (Low Bur).
('12) 16 Ind Cas 382 (383) (DB) (Cal).
('10) 5 Ind Cas 829 (830) (DB) (Mad).
('08) 31 Mad 469 (470, 471) (FB).
('09) 2 Ind Cas 404 (404) (DB) (Cal).
✻ ('87) 9 All 26 (27, 33) (DB).
('23) 10 AIR 1923 Cal 278 (278) (DB).
('84) 10 Cal 932 (935) (DB). (Omission of reasons for the finding.)
('17) 4 AIR 1917 Pat 443 (445) (DB). (A finding that "on a consideration of all the circumstances of the case" the suit is barred by limitation is defective and unsatisfactory.)
('27) 14 AIR 1927 Oudh 95 (96):29 Oudh Cas 330: 1 Luck 458. (Mere general statement that on a perusal of all the evidence the Court is satisfied about a conclusion, is not sufficient judgment.)
('09) 1 Ind Cas 205 (206) (DB) (Cal). (Appellate Court not considering the evidence dealt with by the Court of first instance.)
('23) 10 AIR 1923 Pat 275 (276).
('75) 23 Suth W R 266 (268) (DB). (Pronouncing first Court's reasons to be good without going into the merits of the case and recording its view of evidence.)
('07) 11 Cal W N 112 (116) (DB). (Judgment without reasons.)
('16) 3 AIR 1916 Upp Bur 9 (11) : 2 Upp Bur Rul 92. (Judgment involving decisions of facts—Reasons have to be given.)
('38) 25 AIR 1938 Pat 330 (332) (DB). (Appellate Court's judgment not dealing with merits of case in accordance with law — Judgment can be set aside in second appeal.)
('38) 25 AIR 1938 Pat 609 (610). (Lower Appellate Court dismissing appeal, simply reiterating findings of trial Court without any discussion of evidence—Judgment is not proper.)
('37) 24 AIR 1937 All 284 (285). (Application for adjournment by appellant's pleader — Court dismissing application and also appeal without pronouncing judgment on merits — Judgment is vitiated — Appeal cannot be dismissed for want of prosecution merely because appellant or his pleader is unable to argue the appeal.)
('37) 24 AIR 1937 Mad 282 (283) : I L R (1937) Mad 299. (Finding by Appellate Court in reversal of trial Court's decision without giving reasons and without discussing evidence, only reason given being that evidence is not satisfactory.)

3. ('17) 4 AIR 1917 Lah 210 (210).

reversed the decision of the first Court merely saying that the evidence was meagre, a second appeal was held to lie.[4] But the mere fact that the judgment does not deal with *all* the evidence[5] or *all* the circumstances[6] relied upon by the first Court, or the fact that the discussion of the evidence is unsatisfactory,[7] or that the judgment contains certain mis-statements,[8] or that the judgment is written in a few lines,[9] is not a ground of second appeal if it does not affect the decision on the merits. Similarly, the fact that the reasons for differing from the lower Court's judgment are not specifically stated in the judgment, is not in itself a ground of second appeal where the reasons are evident and it is otherwise clear that the evidence has been considered in arriving at the finding.[10] See also O. 41 R. 31, Notes 11 and 12.

The following have also been held to be defects in judgment which will justify a second appeal :

(i) Where the judgment is uncertain in its meaning.[11]

(ii) Where from the judgment it is difficult to discover what the conclusions are which have been arrived at on evidence.[12]

(iii) Where a finding is vague and indefinite[13] or not legal.[14]

(iv) Where the decision of a lower Appellate Court is based on an objection to court-fee taken for the first time before it.[15]

(v) Where additional evidence is admitted in appeal without recording reasons as required by O. 41 R. 27.[16]

27. Admission or rejection of evidence. — The admission and rejection of documents is a matter of procedural law. In this sense the admissibility of evidence is question of law[1] and an error or defect therein is a ground of second appeal,[2] provided it is one which may possibly have affected the case on the merits.[3] Thus, where the

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4. ('25) 12 AIR 1925 Cal 408 (410) (DB).
5. ('40) 42 Pun L R 94 (95). (Certain documents not referred to in the judgment.)
('25) 12 AIR 1925 Cal 993 (994).
('22) 9 AIR 1922 Lah 140 (141) (DB).
6. ('25) 12 AIR 1925 Oudh 313 (314).
('15) 2 AIR 1915 Cal 99 (99) (DB). (Not disposing seriatim of all the reasons given by the first Court.)
7. ('15) 2 AIR 1915 Mad 463 (464) (DB).
8. ('27) 14 AIR 1927 Mad 1181 (1183).
9. ('39) 26 AIR 1939 Pat 267 (268) (DB).
10. † ('69) 12 Suth W R 272 (273) (DB).
('75) 24 Suth W R 296 (296, 297) (DB).
('16) 3 AIR 1916 P C 126 (128) : 43 Cal 1104 : 43 Ind App 172 (PC). (Case of the lower Appellate Court seeing no reason for differing from the conclusions of the trial Court.)
('72) 18 Suth W R 473 (473) (DB). (Do.)
† ('86) 12 Cal 199 (203) (DB).
('74) 21 Suth W R 260 (261) (DB). (Reasons for believing witnesses not given.)
('66) 5 Suth W R 178 (178).
11. ('14) 1 AIR 1914 Cal 784 (784) (DB).
12. ('24) 11 AIR 1924 Mad 710 (711).
13. ('25) 12 AIR 1925 Lah 357 (358).
14. ('26) 92 Ind Cas 30 (30) (Mad).
15. ('74) 22 Suth W R 433 (434) (DB).
16. † ('25) 12 AIR 1925 Cal 98 (100) (DB).
[*See* ('38) 25 AIR 1938 Sind 198 (200) (DB). (Additional evidence admitted by lower Appellate Court in total disregard of O. 41 R. 27 — Second appeal—Maintainability of.)]

Note 27

1. † ('18) 5 AIR 1918 P C 92 (94) : 46 Cal 189 : 45 Ind App 183 (PC).
('22) 9 AIR 1922 Oudh 98 (98).
('26) 13 AIR 1926 Cal 727 (727) (DB).
('37) 24 AIR 1937 Rang 225 (225) (DB).
('35) 39 Cal W N 311 (313). (When the finding is based really on other evidence, and the inadmissible evidence is only used for the purpose of further support, that does not vitiate the finding or necessitate a remand.)
('35) 39 Cal W N 277 (280). (A finding based on evidence which is not legally admissible in evidence is not binding in second appeal.)
[*See* ('36) 23 AIR 1936 P C 258 (259) (PC). (Finding of fact — Question as to use of document as secondary evidence is not one of fact but of procedure.)]
2. ('83) 7 Bom 123 (124) (DB).
('89) 16 Cal 753 (755) : 16 Ind App 125 (PC). (Admission of secondary evidence.)
('16) 3 AIR 1916 Cal 691 (692) (DB). (Receiving document assuming it to be public document.)
[*See also* ('68) 9 Suth W R 517 (517).]
3. ('41) 28 AIR 1941 Pat 118 (127) (DB). (Consideration of inadmissible evidence by lower Courts vitiates findings in absence of other sufficient evidence to support them.)
('40) 27 AIR 1940 All 441 (443).
('39) 26 A I R 1939 All 663 (665). (Admission of additional evidence in appeal—Rebuttal evidence not allowed.)

objection to the admission of evidence is based on a formal defect,[4] or where the lower Court has arrived at the decision *independently of the evidence wrongly admitted*,[5] the High Court will not interfere in second appeal. Nor will it interfere where the improper admission of evidence objected to was due to the conduct of the party complaining of it.[6]

The improper *rejection* of evidence is an error in procedure which ordinarily is likely to affect the decision of the case on the merits, and is therefore a good ground of second appeal.[7] But where such a ground is taken, it will not be sufficient to merely file an affidavit stating that an oral request was made to examine witnesses and that it was refused. There must have been a written application made to the lower Court to that effect.[8] Where the first Court has recorded that a party has closed his case, or has made an admission, he cannot urge in appeal that the Court has refused to record the whole of his evidence without conclusively proving that the record is wrong.[9] Nor can he urge a plea that the lower Court has wrongly rejected evidence where such rejection was due to his own conduct.[10]

28. Question of law, question of fact and mixed questions of law and fact — General. — It has already been observed in Note 2 that a second appeal will lie on the ground of an *error of law or procedure* and that it will not lie on any *question of fact*. Questions of law and fact are sometimes difficult to disentangle.[1]

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‡ ('75) 24 Suth W R 392 (393) (DB).
[*See also* ('34) 21 AIR 1934 Cal 269 (270). (Additional evidence by lower appellate Court not affecting right decision — High Court will not interfere.)]

4. ('75) 7 N W P H C R 124 (126) (DB). (Document not sufficiently stamped.)
† ('26) 13 AIR 1926 Cal 988 (990) (DB).
('36) 23 AIR 1936 Lah 788 (789). (Document not properly tendered in evidence.)
[*See* ('39) 26 AIR 1939 Nag 220 (221) : I L R (1940) Nag 671 (DB). (Document not duly stamped admitted—S. 36, Stamp Act, comes into play.)]

5. ('41) 28 AIR 1941 Pat 253 (254) : 20 Pat 556 (DB).
✠ ('81) 7 Cal 293 (296) (DB).
('34) 21 AIR 1934 Pat 55 (56). (Case under S. 167 of the Evidence Act.)
('34) 21 AIR 1934 Nag 124 (126).
('30) 17 AIR 1930 Lah 1067 (1068).

6. ('41) 28 AIR 1941 Pat 253 (254) : 20 Pat 556 (DB). (Finding based on judgment—Admissibility not challenged — Finding supported by other evidence—No interference.)
('31) 18 AIR 1931 Cal 480 (480) (DB). (Insufficiently stamped pronote admitted without objection.)
[*See* ('40) 27 AIR 1940 Lah 308 (309). (If a party has clearly agreed to a certain evidence being relied on in the trial Court, he is estopped in appeal from challenging the procedure of the trial Court on that ground.)

7. ('10) 8 Ind Cas 990 (991) (Low Bur). (Failure to examine witnesses.)
('93) 20 Cal 740 (743, 744) (DB). (Do.)
('73) 20 Suth W R 203 (204). (Do.)
('34) 21 AIR 1934 Pat 48 (49) (DB).
('34) 21 AIR 1934 Nag 44 (45).
('33) 20 AIR 1933 Sind 121 (122). (Omission by the lower Court to give effect to an admission by a party to a suit.)
('24) 11 AIR 1924 Pat 208 (208). (Refusal to admit document though produced at late stage.)
('75) 24 Suth W R 297 (297) (DB).
† ('08) 8 Cal L Jour 147 (151) (DB). (Refusal of documentary evidence.)
('72) 17 Suth W R 161 (162) (DB). (Rejection of evidence.)
('07) 11 Cal W N 230 (235) (DB). (Refusing to accept a topographical survey map in the absence of better evidence.)
('28) 15 AIR 1928 Cal 408 (410) (DB).
('23) 10 AIR 1923 Cal 378 (379) (DB).
('35) 22 AIR 1935 All 293 (294). (Document rejected in appeal even though there was no objection to its admissibility in trial Court.)
Also see O. 18 R. 4 N. 1.
[But see (1865) 2 Mad H C R 418 (419) (DB). (Probably the rejection in this case did not affect the merits.)]

8. ('69) 13 Moo Ind App 209 (225, 226) (PC).
† ('70) 14 Suth W R 419 (420) (DB).

9. ('14) 1 AIR 1914 Lah 207 (207).
('66) 5 Suth W R 196 (196). (Admission.)

10. ('39) 26 AIR 1939 All 663 (665). (Court admitting in appeal genuine public documents as additional evidence but without stating reasons for doing so—Evidence in rebuttal not allowed to be adduced but plaintiff not insisting on his right — Error in procedure held did not produce defect in decision of case on merits.)
('76) 25 Suth W R 550 (551).
('38) 25 AIR 1938 Sind 206 (209) : ILR (1939) Kar 140.

Note 28

1. ✠ ('18) 5 AIR 1918 P C 92 (93):46 Cal 189 : 45 Ind App 18 (PC).
('32) 19 AIR 1932 Oudh 283 (284) : 7 Luck 116.
† ('27) 14 AIR 1927 P C 102 (104) : 54 Ind App 178 : 8 Lah 573 (PC).
('22) 9 AIR 1922 Oudh 98 (98).
('24) 11 AIR 1924 Oudh 349 (351):27 Oudh Cas 89.

But broadly speaking, a question of fact may be defined as anything which is the subject of testimony, and a question of law as the general law of the land and general principles of law of which Courts will take judicial cognizance.[2] It will also be advantageous, in this connection, to refer to the definition of "fact" in the Evidence Act, 1872. Under S. 3 of that Act, "fact" means and includes —

(1) any thing, state of things, or relation of things capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

A question whether any such fact exists or does not exist is a question of fact, and a finding thereon is a finding of fact.[3]

('17) 4 AIR 1917 P C 77 (77) (PC). (Question of what constitutes exclusion form a joint estate may well in many cases be a question of law.)

('32) 19 AIR 1932 Lah 328 (329). (Whether Hindu law or Succession Act governs a person—Question of law.)

('38) 25 AIR 1938 Pat 413 (421): 17 Pat 507 (DB).

2. Best on *Evidence*, page 19.

3. *For instances of findings of facts, see generally Notes 29 to 51 and also the following cases* :—

('43) 30 AIR 1943 Lah 166 (168). (Question whether a person was debtor within the meaning of S. 7(2) of Punjab Relief of Indebtedness Act (VII of 1934 as amended by Act XII of 1940) is one of fact.)

('43) 30 AIR 1943 Mad 38 (39, 40). (Date of publication of book is question of fact.)

('43) 30 AIR 1943 Mad 311 (311). (Findings that landlord had both warams and tenant had no permanent tenancy rights are findings of fact.)

('43) 30 AIR 1943 Pat 68 (68, 69). (The question whether an alleged adoption took place in fact or whether and if so when the plaintiff came to know of the adoption.)

('42) 29 AIR 1942 All 233 (234) : I L R (1942) All 832 (FB). (Finding that party purchased property from his private savings and was sole owner.)

('42) 29 AIR 1942 All 308 (314) : I L R (1942) All 478 (DB). (Question of benami — Source of purchase money.)

('42) 29 AIR 1942 All 425 (426). (Subsistence of mortgage.)

('42) 29 AIR 1942 Cal 607 (609). (Computation of fair rent under S. 7 (3), Bengal Tenancy Act — Question of allowance for collection charges or for profits of tenure-holders is one of fact.)

('42) 29 AIR 1942 Lah 92 (93). (Findings that husband had not failed without reasonable cause to perform marital obligations for three years and had not assaulted wife are of fact.)

('42) 29 AIR 1942 Lah 135 (136). (A finding that a cosharer had failed to prove that he had been treating the property as though it belonged to him exclusively to the knowledge of the other cosharers.)

('42) 29 AIR 1942 Lah 186 (190) (DB). (Question of laches.)

('42) 29 AIR 1942 Mad 129 (130). (Question whether husband and wife had access to each other.)

('42) 29 AIR 1942 Mad 622 (623):ILR (1943) Mad 15 (FB). (Some of cosharers mortgaging certain items of joint property — Suit by other cosharers for partition — Finding that mortgage property cannot be allotted to share of mortgagors without causing hardship to other sharers is one of fact.)

('42) 29 AIR 1942 Pat 348 (348) (DB). (An objection to a final mortgage decree on the ground that it was based on the preliminary decree as passed by the trial Court and not on the preliminary decree as modified by the Appellate Court involves a question of fact.)

('42) 29 AIR 1942 Pat 429 (430). (Finding that person incurred civil death in particular year.)

('42) 29 AIR 1942 Pat 479 (480) (DB). (Finding as to which is the true statement between the two conflicting statements.)

('41) 28 AIR 1941 All 289 (289). (Question whether the burden of an easement would increase on account of certain facts.)

('41) 28 AIR 1941 Oudh 226 (228) (DB). (Finding that a mortgage deed was not executed by a lady as the guardian of her minor grandson.)

('41) 28 AIR 1941 Oudh 412 (414). (Finding on the question of title.)

('41) 28 AIR 1941 Oudh 429 (431) (DB). (Do.)

('40) 27 AIR 1940 Mad 761 (761). (Adoption — Illatom adoption—Findings of fact.)

('40) 27 AIR 1940 Nag 241 (243) : ILR (1942) Nag 24. (Finding that there was partition.)

('40) 27 AIR 1940 Pat 245 (246) (DB). (A finding that a document was tampered with.)

('40) 27 AIR 1940 Pat 324 (327): 19 Pat 739 (FB). (Finding as to share of party's liability.)

('31) 18 AIR 1931 Nag 182 (182) : 27 Nag L R 125. (Whether a house is for agricultural purposes.)

('22) 4 Lah L Jour 457 (459) (DB). (Finding that a gift was an absolute one.)

('29) 16 AIR 1929 Oudh 83 (84) : 4 Luck 265 (DB). (Whether document is benami.)

('31) 133 Ind Cas 440 (440) (DB) (Lah). (Do.)

('24) 11 AIR 1924 Lah 39 (40) (DB). (Consideration.)

('12) 16 Cal W N 227 (230) (DB). (Inadequacy of the price if the consequence of the irregularity.)

('31) 18 AIR 1931 Oudh 424 (425). (That transaction is one of sale in a pre-emption suit.)

('31) 18 A I R 1931 Lah 618 (619). (Whether presumption arising from entry in riwaj-i-am has been rebutted by evidence.)

('30) 17 A I R 1930 Mad 569 (569). (Whether an estate is a jagir.)

('31) 18 AIR 1931 All 338 (340). (Question of notice under Section 40, T. P. Act.)

('31) 18 AIR 1931 All 556 (557) (DB). (Question of accrual of cause of action in a particular place.)

An *inference of fact* must be distinguished from an *inference of law*. Where, from evidentiary facts[4] and documents[5] an inference is drawn as to the existence or non-existence of another fact, then the inference is one of *fact* and the question as to the inference, a *question of fact*.[6] But when the question is whether certain facts give rise to a *legal right or liability*, the inference is one of *law*, and the question of such inference, a *question of law*.[7] Even an inference of fact must be drawn in a *legal manner*, i. e.,

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('31) 18 AIR 1931 All 113 (119) (DB).
('39) 26 AIR 1939 Lah 88 (89). (Question whether place is town or village is one of fact.)
('36) 23 AIR 1936 Cal 17 (18): 62 Cal 979. (Question of promptness in *shafiat* ceremonies for pre-emption under Mahomedan law.)
('35) 22 AIR 1935 Rang 190 (190). (Jewish woman divorcing her husband — Question of alimony depends on personal law of Jews which is to be ascertained as a question of fact upon the evidence adduced in that behalf.)
('36) 23 AIR 1936 Cal 245 (246). (A finding on the question of title.)
('35) 22 AIR 1935 Pat 42 (44). (Apportionment of compensation money among persons interested in land compulsorily acquired is a finding of fact.)
('37) 1937 Mad W N 1188 (1189). (No absolute rule of law that in no circumstances should waste lands belonging to a trust be given on permanent lease —The question is one of degree depending on a number of circumstances and accordingly is a question of fact.)
('35) 22 AIR 1935 Oudh 30 (33) : 10 Luck 250. (Question as to nature of gift.)
('35) 22 AIR 1935 Mad 70 (70). (Whether inam register is right or wrong is question of fact.)
('35) 22 AIR 1935 Lah 440 (440). (Question whether rate of interest is excessive.)
('38) 25 AIR 1938 Rang 468 (470). (Question whether interest of guardian *ad litem* is adverse to minor.)
('38) 25 AIR 1938 P C 34 (35) : 65 Ind App 93 : I L R (1938) Mad 551 : 32 Sind L R 328 (P C). (Finding that there was no express authority of the husband for adoption.)

4. ('42) 29 AIR 1942 Cal 505 (508) : I L R (1942) 2 Cal 427. (Public right of way—Presumption of dedication from continuous user is question of fact.)
('18) 5 AIR 1918 P C 92 (93, 94) : 46 Cal 189 : 45 Ind App 183 (P C).
('19) 6 AIR 1919 Lah 221 (221).
† ('20) 7 AIR 1920 Cal 361 (362, 363) (DB). (When from a certain set of facts a Court infers a lost grant, the decision is on a question of fact and not of law and cannot be challenged in second appeal.)
('28) 15 AIR 1928 Lah 608 (609): 9 Lah 298 (DB). (The inference that a document is not a fictitious transaction is a finding of fact.)
('30) 17 AIR 1930 All 218 (219) (DB).
('25) 12 AIR 1925 Pat 748 (750) (DB). (Inference of grant of easement from evidence.)
('24) 11 AIR 1924 Oudh 164 (164, 165). (Inference of gift being incomplete for want of acceptance.)
('28) 15 AIR 1928 Nag 76 (78) : 23 Nag L R 156 (DB).
† ('31) 18 AIR 1931 Nag 67 (67) : 27 Nag L R 8. [*See also* ('24) 11 AIR 1924 Pat 305 (306).]

5. ('25) 12 AIR 1925 All 39 (40).
('25) 12 AIR 1925 All 353 (354).
† ('26) 13 AIR 1926 All 542 (543) : 48 All 588 (DB).
('25) 12 AIR 1925 Oudh 611 (612).
('18) 5 AIR 1918 P C 92 (94) : 46 Cal 189 : 45 Ind App 183 (P C).
('24) 11 AIR 1924 Cal 562 (563) : 51 Cal 110 (DB).
('26) 99 Ind Cas 183 (184) (DB) (Oudh).
('16) 3 AIR 1916 Pat 59 (60) (DB).
('30) 17 AIR 1930 Pat 319 (320). (Inference from survey record of rights.)
✠ ('28) 15 AIR 1928 P C 243 (245, 247, 248) : 55 Ind App 380 (P C). (Inference as to whether payment was made in time, drawn from jama wasul baki.)
Also see Note 29.

6. ('42) 29 AIR 1942 Oudh 19 (20) : 17 Luck 158 (DB).
('42) 29 AIR 1942 Pat 170 (174) (DB). (Admission of liability or acknowledgment.)
('42) 29 AIR 1942 Pat 317 (318) (DB). (Inference of knowledge as to possession of certain land.)
('41) 28 AIR 1941 Oudh 412 (414). (Finding as to title.)
('40) 27 AIR 1940 Bom 263 (264). : I L R (1940) Bom 505.
('40) 27 AIR 1940 Sind 43 (47) : I L R (1940) Kar 174 (DB). (Instances of burial proved in particular cases—Sufficiency for inference of dedication.)
('30) 17 AIR 1930 Lah 1056 (1057).
('38) 25 AIR 1938 Lah 357 (359) (DB). (Question whether a fact has been proved when evidence for and against has been properly admitted is a question of fact.)
('37) 24 AIR 1937 Rang 225 (225) (DB). (Do.)
('36) 23 AIR 1936 Pat 96 (97).
('35) 22 AIR 1935 Mad 70 (71). (A question of fact is nonetheless a question of fact if part of the proof depends upon inferences.)
('39) 26 AIR 1939 Pat 218 (218).
† ('36) 23 AIR 1936 Nag 186 (188).
('35) 39 Cal W N 888 (893).
('33) 20 AIR 1933 All 603 (606) (DB).
[*See* ('37) 24 AIR 1937 Nag 230 (231, 232). (Inferences drawn from proved facts or admitted facts are not always questions of law.)]
See also Note 29.

7. ('43) 30 AIR 1943 Pat 169 (176) : 22 Pat 55 (DB). (The question, whether on the facts proved the assessee is possessed of the assets as an individual or the assets should be considered as belonging to the undivided Hindu family of which the assessee is a member is a question of law.)
('42) 29 AIR 1942 Lah 42 (45) (DB). (Interpretation of document of title.)

in a manner neither unreasonable nor illogical nor unwarranted by the facts from which it is drawn. If not so drawn, it is an error of law. The question, therefore, whether an inference of fact is reasonable or is warranted by facts, is also a *question of law*.[8]

A mixed question of law and fact is one where in order to give a finding thereon it is necessary to answer a question of fact and also a question of law. Thus, as has already been seen in Note 21 where the question is whether a valid custom exists, it is necessary to

('42) 29 AIR 1942 Oudh 19 (20) : 17 Luck 158 (DB).
('41) 28 AIR 1941 All 31 (35). (Subsequent agreement to separate cancelling prior agreement to separate—Question whether subsequent agreement amounts to re-affirmation or cancellation of intention to separate in prior agreement is one of law—*Obiter*.)
('40) 27 AIR 1940 Bom 263 (264) : I L R (1940) Bom 505.
('40) 27 AIR 1940 Sind 138 (140) (DB). (Partition, question as to.)
('18) 5 AIR 1918 PC 92 (93) : 46 Cal 189 : 45 Ind App 183 (PC).
('31) 18 AIR 1931 Pat 236 (238): 10 Pat 264 (DB). (Whether from proved facts, abandonment under S. 87 of Bengal Tenancy Act follows is a question of law.)
('31) 18 AIR 1931 Bom 295 (296). (Concession by pleader — Binding nature — Question of law. NOTE.—This case is overruled on another point in AIR 1937 Bom 19.)
✠('27) 14 AIR 1927 P C 102 (104) : 54 Ind App 178 (PC). (The question whether a tenancy is permanent or precarious is one of legal inference.)
('96) 19 Mad 485 (493) (DB). (Inference of abandonment or loss of right.)
('24) 11 AIR 1924 Cal 92 (95) (DB). (Legal standard of care required—S. 151 of the Contract Act.)
('07) 34 Cal 36 (40, 41). (Per Woodroffe, J.—Whether sale is binding on minor.)
('23) 10 AIR 1923 All 75 (76) (DB). (Inference of abandonment.)
('29) 16 AIR 1929 All 872 (872, 873) (DB). (Inference of adequacy of consideration.)
('28) 15 AIR 1928 Cal 315 (317) : 55 Cal 355 (DB). (Inference as to permanency of tenancy.)
('32) 19 AIR 1932 Cal 198 (199) (DB). (Do.)
('32) 19 AIR 1932 Cal 398 (400) (DB). (Do.)
('28) 15 AIR 1928 Cal 891 (891) (DB). (Inference of abandonment.)
('17) 4 AIR 1917 Lah 439 (440): 1917 Pun Re No. 69 (DB). (Inference of acquiescence is a legal inference.)
('11) 9 Ind Cas 41 (44) (DB) (Mad). (Inference of implied contract.)
('11) 38 Cal 278 (282) : 9 Ind Cas 394 (395) (DB). (Inference as to whether a person is a tenant.)
('25) 12 AIR 1925 Nag 58 (58). (Conclusion that delay disentitles a person from claiming a particular relief.)
† ('03) 25 All 1 (17) : 29 Ind App 203 (PC). (Inference of notice to principal from notice to the agent.)
('28) 15 AIR 1928 Nag 87 (88) : 23 Nag L R 192. (Inference of grant from long user is one of law. But see AIR 1920 Cal 361 *contra*.)

('26) 13 AIR 1926 Oudh 128 (130). (Whether an admission is conclusive evidence.)
† ('97) 21 Bom 91 (94) (DB). (Mixed question.)
('27) 14 AIR 1927 All 601 (601).
('29) 16 AIR 1929 Nag 270 (271).
('03) 5 Bom L R 225 (230) (DB).
('24) 11 AIR 1924 Pat 373 (374) (DB). (Inference as to the fixity of rent.)
(25) 12 AIR 1925 Rang 68 (68):2 Rang 459. (Sale, what amounts to.)
† ('31) 18 AIR 1931 Bom 371 (372, 376) (DB). (Inference from document and surrounding circumstances as to whether transaction amounts to a sale or a mortgage.)
('90) 13 Mad 47 (51). (Question of what passes at a sale in execution of a decree—Mixed question.)
('15) 2 AIR 1915 Mad 208 (208) : 37 Mad 22 : 12 Ind Cas 389 (390) (DB). (Do.)
('14) 1 AIR 1914 Cal 305 (306) (DB). (Do.)
('26) 13 AIR 1926 Mad 851 (851, 852). (Do.)
('30) 17 AIR 1930 Lah 1060 (1060). (Reducing period of redemption—Question of law.)
('32) 19 AIR 1932 Lah 56 (57). (Raising a legal presumption as to extinguishment of mortgage when mortgagee purchases equity of redemption.)
('37) 170 Ind Cas 831 (832) (Lah). (Interpretation to be placed on admitted facts is question of law.)
('39) 26 AIR 1939 Mad 783 (786) : 49 Mad L W 664 (668). (Inference from proved facts.)
('36) 23 AIR 1936 P C 77 (81, 82) : 63 Ind App 384 : 17 Lah 644 (PC). (Legal effect of proved facts is a question of law.)
('35) 18 Nag L Jour 172 (177). (Whether custom can be inferred from evidence.)
('36) 23 AIR 1936 Pat 572 (575). (Whether under given circumstances sale is void.)
('36) 23 AIR 1936 Rang 383 (385). (Question of partnership is legal inference to be drawn from proved facts and is matter of law.)
✠ ('28) 15 AIR 1928 P C 243 (245) : 55 Ind App 380 (PC).
[*See also* ('43) 30 AIR 1943 Oudh 29 (33). (Whether custom recorded in wajib-ul-arz prejudicial to tenants but not verified by them can be enforced against tenants is pure question of law.)]
Also see Note 30.
8. ('41) 28 AIR 1941 Rang 76 (76, 77): 1940 Rang L R 777 (DB).
('40) 27 AIR 1940 Pat 201 (203) (DB). (Inference of fraud from circumstantial evidence.)
('19) 6 AIR 1919 P C 60 (61) : 42 All 152 : 46 Ind App 197 (PC). (Inference held not to be warranted by fact.)
✠ ('93) 20 Cal 93 (99) : 19 Ind App 228 (PC). (Do.)
† ('09) 36 Cal 1 (18) : 35 Ind App 195 (PC). (Considerations of law at every point in the reasoning not regarded.)
See also Notes 29 and 53.

find, *first*, that there were a number of *instances* in which a course of conduct was followed, and *secondly*, that such instances are sufficient to establish the legal elements of a custom, namely, reasonableness, certainty and ancient origin. The first is a question of fact and the second, one of law. The question of custom is, therefore, one of mixed law and fact.[9] Another example of a mixed question of law and fact is the question of adverse possession.[10] A mixed question of law and fact will be open to second appeal where the lower Appellate Court has committed an error on the matter of *law* involved in the mixed question of law and fact, but not if it has committed an error only on the matter of *fact* so involved.[11] For other examples of mixed questions of law and fact, see the undermentioned cases.[12]

29. Construction of documents. — The expression 'construction of a document' involves several questions :

(i) The meaning of the words used which is a question of fact.[1]

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9. See Note 21.
10. See Note 36.
('41) 28 AIR 1941 Oudh 436 (439) (DB).
11. See Note 21.
('30) 17 AIR 1930 Cal 392 (396) : 57 Cal 25. (Reasonable and probable cause—Facts known or believed by the defendant — Whether he showed reasonable care in believing and acting as he did later can be assailed in second appeal.)
('25) 12 AIR 1925 Mad 768 (768) (DB). (Question whether a person is a partner or agent—Arrangement to share in profits—If inference of partnership follows therefrom is question of law.)
('39) 26 AIR 1939 Oudh 210 (213) : 14 Luck 515. (Finding of Court as to existence of custom based upon wrong inference drawn from certain instances — Court not applying decisions of its own High Court—Finding can be interfered with.)
[*See also* ('42) 29 AIR 1942 Oudh 213 (214) : 17 Luck 567 (DB).
('12) 16 Oudh Cas 76 (77) : 17 Ind Cas 303 (304) (DB). (Question whether a property was wakf property — User as public graveyard found — Whether this is sufficient to establish wakf is a question of law.)]
[But see ('29) 16 AIR 1929 Lah 266 (267). (Which seems to suggest that a mixed question of law and fact is not open to second appeal. The proposition is not correct as broadly stated.)]
12. ('43) 30 AIR 1943 Nag 77 (79) : I L R (1943) Nag 226. (Structure whether permanent is partly inference of law and partly of fact.)
('41) 28 AIR 1941 Lah 62 (63) (DB). (Whether the interpretation of a particular order is a question of fact, or a question of law, or a mixed question of fact and law depends on the circumstances of each particular case. The general rule is this. Where intention is to be inferred from the terms of a document, in this case the order, the question is one of law, or mixed question of fact and law; where the intention is to be inferred from the other facts and circumstances tending to show what was the real intention of the Judge in passing that particular order, then the question may be either a question of pure fact or, again, may be a question of mixed fact and law.)
('40) 27 AIR 1940 All 500 (503) : I L R (1940) All 681 (DB). (Point that transfer was invalid having been made when property was under control of Collector having powers under Sch. III, Paras. 1 to 10, C. P. Code, 1908, is a mixed question of law and fact—Case of first appeal.)
('40) 27 AIR 1940 Lah 35 (35). (The question whether an application in question is a fresh application within S. 48 is a mixed question of fact and law.)
('31) 18 AIR 1931 Bom 430 (431). (Question of constructive notice.)
('34) 21 AIR 1934 Pat 14 (15). (Question whether information given to police is directed against another.)
('31) 18 AIR 1931 Cal 383 (384) : 58 Cal 259 (SB). (Question of domicile under the Divorce Act.)
('31) 18 AIR 1931 Sind 170 (173) : 25 Sind L R 493. (Question whether a Hindu can inherit to a Mahomedan father.)
('35) 22 AIR 1935 All 1008 (1010) (DB). (Whether partnership is dissolved.)
('35) 22 AIR 1935 P C 1 (2) : 13 Rang 63 (PC). (Question whether misdescription in insurance policy is material.)
('35) 22 AIR 1935 All 588 (589) (DB). (Whether certain land is part of occupancy holding is mixed question of law and fact.)
('36) 23 AIR 1936 Pat 572 (575): 15 Pat 561 (DB). (Whether particular sale is void.)
('35) 22 AIR 1935 Oudh 163 (164). (Question whether a certain land is governed by S. 4 (3) of the Oudh Rent Act.)
('35) 22 AIR 1935 Cal 713 (715) (DB). (Question of notice is not a pure question of law.)
('36) 23 AIR 1936 Lah 192 (193) (DB). (Validity of gift.)
('39) 26 AIR 1939 All 163 (164) : I L R (1939) All 167 (DB). (Whether there has been a failure of justice is not a pure question of law.)
('36) 23 AIR 1936 Lah 629 (634) : 17 Lah 737 (DB). (Question as to when cause of action arose is mixed question of law and fact.)
[*See also* ('36) 23 AIR 1936 Oudh 143 (145) : 11 Luck 481.(Finding that sale took place in execution of both decrees held not to be a pure finding of fact.)]

Note 29

1. ('43) 76 Cal L Jour 251 (257). (Construction of mortgage deed to ascertain whether it contains admission.)

(ii) Inference of fact from *evidentiary* documents, which is also a question of fact.[2]

† ('14) 1 AIR 1914 Cal 836 (838, 839) (DB). (Meaning of words.)
('33) 20 AIR 1933 Oudh 102 (103) (DB). (Do.)
('34) 21 AIR 1934 Cal 461 (463) : 61 Cal 45 (DB). (Do.)
('28) 15 AIR 1928 Oudh 121 (121) (DB). (Do.)
('26) 13 AIR 1926 Lah 21 (22). (Do.)
('25) 12 AIR 1925 Lah 150 (151). (Do.)
('31) 18 AIR 1931 Bom 570 (573, 574) (DB). (Do.)
† ('23) 10 AIR 1923 Lah 626 (627, 628) (DB). (Meaning of evidence mistaken—No second appeal.)
('22) 9 AIR 1922 Cal 185 (186) (DB). (Meaning and effect of admission in document.)
('26) 13 AIR 1926 Bom 493 (494) (DB). (Do.)
† ('73) 19 Suth W R 222 (223) (DB). (Meaning as to supposed admission in evidence.)
('23) 10 AIR 1923 Cal 358 (359) (DB). (Do.)
('11) 10 Ind Cas 325 (327) (DB) (Cal). (Mistake as to meaning of some portion of the evidence in writing—No second appeal.)
('09) 1 Ind Cas 530 (534) (DB) (Cal). (Do.)
('35) 22 AIR 1935 Lah 902 (902). (Meaning of word 'Maujudgi' as used in agreement.)
('36) 23 AIR 1936 Cal 49 (50). (Misconstruction of the words of a document is not a question of law.)
† ('37) 24 AIR 1937 Oudh 295 (297).
('35) 22 AIR 1935 Lah 378 (379).
('35) 22 AIR 1935 Lah 877 (878) (DB). (Whether the language used in an entry contains a distinct promise to pay—Question of fact.)
[*See also* ('36) 23 AIR 1936 Pat 287 (288) (DB).]
Also See Note 31.

2. ('43) 30 AIR 1943 Bom 146 (148) (DB). (Transaction mortgage rather than sale.)
('43) 30 AIR 1943 Nag 117 (128) : ILR (1943) Nag 176 (FB).
('41) 28 AIR 1941 Cal 506 (507). (Inference from entries in settlement record.)
('40) 27 AIR 1940 Bom 255 (256) (DB). (Question if title passed—The words in the documents were explicit and required no construction and hence there was no question of misconstruction.)
('40) 27 AIR 1940 Oudh 217 (220) : 15 Luck 418 (DB). (Settlement khasra and map mere pieces of evidence and not document of title—Interpretation by lower Court cannot be disturbed in second appeal.)
✠ ('23) 10 AIR 1923 P C 187 (187) (PC). (Evidentiary value.)
('12) 14 Ind Cas 331 (332) (Lah). (Do.)
('12) 13 Ind Cas 206 (208) (Cal). (Do.)
('12) 13 Ind Cas 425 (426) (DB) (Cal). (Do.)
('23) 10 AIR 1923 All 442 (442, 443). (Do.)
('23) 10 AIR 1923 Pat 154 (155). (Do.)
('25) 12 AIR 1925 All 39 (40). (Do.)
† ('26) 13 AIR 1926 All 542 (543) : 48 All 588 (DB). (Do.)
('31) 18 AIR 1931 Nag 189 (190) : 27 Nag L R 213. (Inference of fact from document not involving question of construction.)
('26) 13 AIR 1926 Lah 21 (22). (Do.)
('26) 13 AIR 1926 Oudh 151 (152). (Construction of Commissioner's report.)
('13) 21 Ind Cas 841 (841) (DB) (All). (Do.)
('24) 11 AIR 1924 Oudh 185 (185). (Do.)
('25) 12 AIR 1925 All 353 (354). (Do.)
('25) 12 AIR 1925 Oudh 611 (612). (Do.)
('25) 12 AIR 1925 Pat 795 (796) (DB). (Do.)
('27) 14 AIR 1927 Oudh 541 (542) (DB). (Do.)
('28) 15 AIR 1928 Oudh 18 (19). (Do.)
('09) 3 Ind Cas 173 (173, 174) (Cal). (The construction of the deposition of a witness is what the Court thinks proved by it. It is a misapplication of the term to speak of it as a construction, so as to make it a question of law.)
('30) 17 AIR 1930 Lah 691 (691). (Interpretation of document which is not a document of title.)
('30) 17 AIR 1930 Lah 1056 (1057) (DB). (Do.)
('31) 18 AIR 1931 Lah 417 (417). (Interpretation of post card as to fact of suretyship.)
('30) 124 Ind Cas 26 (26) (DB) (All). (Interpretation of settlement record as to pedigree.)
('30) 17 AIR 1930 Pat 319 (320). (Inference drawn from survey record as to relationship of landlord and tenant.)
('34) 21 AIR 1934 Lah 291 (292).
('34) 21 AIR 1934 All 709 (710) (DB).
✠ ('33) 20 AIR 1933 P C 171 (175) : 60 Ind App 231 : 29 Nag L R 210 (PC). (Unless there has been misconstruction, mistaken inference from documents is an error not of law but of fact.)
† ('34) 21 AIR 1934 P C 5 (7) : 61 Ind App 93: 13 Pat 254 (PC).
✠ ('34) 21 AIR 1934 P C 112 (113) : 61 Ind App 163 : 57 Mad 652 (PC).
('38) 25 AIR 1938 Cal 690 (692). (Construction of dakhila with regard to question of splitting up of joint tenancy.)
('38) 25 AIR 1938 Lah 445 (446, 447) (DB). (Letters Patent appeal reversing AIR 1937 Lah 410.)
† ('37) 24 AIR 1937 Sind 51 (52, 55) : 30 Sind LR 371 (DB). (Mistake in drawing inference from document is not an error of law.)
('37) 24 AIR 1937 Pat 414 (415). (Construction placed by lower Court not unreasonable—No interference in second appeal.)
('37) 24 AIR 1937 Oudh 370 (372) ((DB). (Unless instruments of title are involved, finding of fact of Court of first appeal cannot be questioned in second appeal though documentary evidence has to be considered.)
('37) 24 AIR 1937 Oudh 226 (229).
('39) 26 AIR 1939 Mad 564 (568). (Inference from documents on which finding is based.)
('36) 23 AIR 1936 Oudh 201 (201, 202). (Pukhtadari khewat is not an instrument of title — Even if misconstrued, no second appeal lies.)
('36) 23 AIR 1936 Pat 129 (130) (DB). (Construction of documents which are not documents of title.)
('35) 22 AIR 1935 Lah 115 (115). (Interpretation of decree which is not a document of title.)
('35) 22 AIR 1935 Cal 282 (284). (Misconstruction of a document, which is only a piece of documentary evidence, does not raise a question of law.)
('34) 21 AIR 1934 Lah 406 (407).

(iii) The legal effect of the words used in a document, which is a question of law.[3] It is in this aspect that a misconstruction of a document is regarded as a ground of second appeal.[4]

The construction of a document as regards its legal effect will only arise where the document is an instrument of title or is a contract or is otherwise the direct foundation of legal rights.[5]

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† ('28) 15 AIR 1928 P C 243 (247) : 55 Ind App 380 (PC). (Mere fact that a writing had to be read and understood in order to determine the question as to the payment does not make it a question of law.)
('39) 26 AIR 1939 Nag 197 (198) : ILR (1939) Nag 580. (A I R 1931 Nag 189 : 27 Nag L R 213 followed.)
('37) 24 AIR 1937 All 197 (197).
('38) 25 AIR 1938 Pat 110 (111). (Inference from record of rights as to nature of holding is a question of fact.)
[*See also* ('39) 26 AIR 1939 All 510 (513). (Writing to be read and understood to determine answer to question—That does not make it question of law.)]
Also see Note 28.

3. ('43) 30 AIR 1943 Nag 117 (128) : I L R (1943) Nag 176 (FB). (Construction of a document going to the root of title.)
('43) 9 Cut L Tim 27 (30). (Construction of lease.)
('42) 29 AIR 1942 Lah 42 (45) (DB). (Interpretion of document of title.)
('41) 28 AIR 1941 Cal 446 (448). (Interpretation of lease.)
('40) 27 AIR 1940 All 441 (443). (Construction of receipt.)
('26) 13 AIR 1926 All 75 (76).
('38) 25 AIR 1938 Cal 541 (542) (DB).
('37) 1937 Mad W N 292 (292). (Construction of decree.)
[*See* ('30) 17 AIR 1930 Cal 764 (766). (Question whether land is accretion involving construction of and inference from material documents.)
('37) 24 AIR 1937 Nag 170 (171) : I L R (1938) Nag 276 : 19 Nag L Jour 308 (311). (Construction of an order of Court is a pure question of law.)
† ('37) 24 AIR 1937 Sind 51 (52, 54) : 30 Sind L R 371 (DB). (Construction of documents such as letters and newspapers is question of law.)]

4. ('39) 26 AIR 1939 All 672 (677) : ILR (1939) All 713 (DB).
('12) 34 All 579 (585) : 39 Ind App 247 : 16 Ind Cas 67 (68, 69) (PC).
('26) 13 AIR 1926 Mad 652 (654) (DB). (Document of title.)
('18) 5 AIR 1918 Bom 158 (160): 42 Bom 344 (DB).
('18) 5 AIR 1918 Lah 362 (363, 364). (Whether two documents formed parts of a single transaction or were independent.)
('29) 16 AIR 1929 Lah 833 (834) (DB). (Whether a document is a mortgage.)
('25) 12 AIR 1925 Oudh 64 (64). (Whether entry in wajib-ul-arz is of custom or contract.)
'25) 12 AIR 1925 Mad 37 (38). (Whether a transaction amounts to a mortgage by conditional sale or to an absolute sale is not a pure question of fact.)
('13) 19 Ind Cas 301 (301) (Lah). (Question whether the transaction amounts to a sale or exchange.)
† ('28) 15 AIR 1928 Nag 308 (310). (Will or gift.)
('28) 15 AIR 1928 P C 44 (47) : 6 Rang 113 (PC). (Whether a power of attorney was effective up to a particular time is a mixed question of law and fact.)
('36) 23 AIR 1936 Pat 287 (288) (DB). (Document of title.)
[*See* ('32) 19 AIR 1932 Bom 230 (231). (But it is a question of fact when it depends on appreciation of oral evidence and not merely on construction of documents.)]
[But see ('19) 6 AIR 1919 Lah 246 (247). (Sale or exchange is a question of fact.)]

5. ('42) 29 AIR 1942 Oudh 414 (416) (DB). (Wajib-ul-arz—Misinterpretation—Second appeal lies.)
('40) 27 AIR 1940 Lah 278 (279). (Misconstruction of a document which is not a document of title is, no doubt, no ground for a second appeal. But where a document has been held to contain an admission by a party when as a matter of fact no such admission exists, it is not entirely a question of drawing a wrong inference from a certain document, not being a question of title, but a question of misreading of evidence and a second appeal would, therefore, lie.)
('40) 27 AIR 1940 Lah 486 (487) : I L R (1941) Lah 601 (DB). (Document being one of title and foundation of suit—Its construction is question of law.)
✠ ('23) 10 AIR 1923 P C 187 (187) (PC).
† ('24) 11 AIR 1924 Oudh 266 (268) : 27 Oudh Cas 77.
† ('26) 13 AIR 1926 All 542 (543) : 48 All 588 (DB).
('39) 26 AIR 1939 Lah 264 (264). (Document of title—Question as to which of two alternative meanings of a certain word in a document should in context be held applicable is one of interpretation of document.)
('39) 26 AIR 1939 Pat 364 (367) (DB). (Construction of Rubkari.)
('37) 24 AIR 1937 Pat 572 (574) : 16 Pat 527 (DB). (Construction of plaint.)
✠ ('37) 24 A I R 1937 Nag 230 (233). (Partition deed.)
('35) 22 AIR 1935 Oudh 217 (225) : 10 Luck 392 (FB). (Instrument of title—Whether a particular document is a perpetual lease of under-proprietary rights.)
[*See* ('37) 24 AIR 1937 Lah 656 (656). (The interpretation of documents which are not instruments of title but are evidence of title is a question of fact.)
('37) 39 Pun L R 376 (376). (Misconstruction of document which is not a document of title not good ground of second appeal.)]

While the construction of a document *by itself* may be a question of law, it becomes a question of fact if it is one which is to be decided on the document *together with other circumstances or extraneous evidence.*[6] Where the nature and character of a document are clear and the only question in dispute is whether the real contract between the parties is something different from that contained in the document, no question of the construction of document is involved and no second appeal lies.[7] Similarly, where the words are clear and the only question is whether property has been sufficiently specified,[8] or whether a particular property is included in it,[9] the question involves no construction of documents. Again, where, two interpretations are possible, the fact that the lower Appellate Court has adopted one rather than the other is no error of law or procedure and is no ground of second appeal.[10] Where the question is whether two documents executed on the same day are connected, so that one is a consideration for the other, the question is not one of interpretation of documents and if the lower Courts ascertain their connexion on evidence other than that of the documents themselves, the finding is one of fact which cannot be challenged in second appeal.[11]

A finding that a document is so worded as to obscure its meaning and prevent parties from understanding its nature or effect has been held to be a question of fact having nothing to do with construction of the document.[12]

A conclusion based on a *misreading of a document* is like one based on a misreading of evidence and as such is an error of law which can be corrected in second appeal.[13] See Note 13.

Where the question is whether it is open to a person to plead the existence of a transaction at variance with the tenor of a deed to which he was a party it is purely a question of law.[14]

[*See also* ('36) 23 AIR 1936 Oudh 97 (99) (DB). (Status of person, or his right or title to land is mixed question of law and fact dependent on interpretation of documents of title.)]

6. ('40) 27 AIR 1940 Bom 225 (226) : ILR (1940) Bom 453 (DB). (Finding not based purely on legal effect of award but on admissions and other evidence of contemporaneous acts must be accepted in in second appeal—Per Wassoodew, J.)

† ('17) 4 AIR 1917 Lah 156 (157).
('23) 10 A I R 1923 All 586 (588) : 45 All 581 (DB).
('25) 12 AIR 1925 Cal 656 (658, 659) (DB).
('26) 92 Ind Cas 42 (43) (Lah). (Mortgage or sale.)
('27) 14 AIR 1927 All 689 (689) (DB). (Ambiguity.)
('28) 15 AIR 1928 Lah 667 (668). (Mortgage or sale.)
('32) 19 AIR 1932 Bom 230 (231). (Do.)
('28) 15 AIR 1928 Lah 930 (931).
('30) 17 AIR 1930 Lah 806 (807).
('19) 6 AIR 1919 Lah 275 (275) : 1919 Pun Re No. 36. (Where a sale deed is silent on the point, the question whether a *pro rata* share in the shamilat was intended to be conveyed to the vendee is one of fact.)

7. † ('24) 11 AIR 1924 Lah 260 (261).
('07) 1907 Pun Re No. 16, p. 74 (78) : 1908 Pun L R No. 104, p. 325 (329) (DB).
('97) 1897 Unrep Print Judgt. 129.

8. ('25) 12 AIR 1925 Cal 1195 (1199) (DB).

9. ('26) 91 Ind Cas 423 (424) (DB) (Cal).

10. (30) 17 AIR 1930 Lah 139 (140).
('31) 18 AIR 1931 Mad 137 (138)(DB). (Interpretation of lower Court not impossible though strained —No interference.)
† ('31) 18 AIR 1931 Lah 594 (595) (DB). (Interpretation not free from difficulty—Both the lower Courts agreed in a particular construction — No interference in second appeal.)
('35) 22 AIR 1935 Lah 378 (379).

11. ('34) 21 AIR 1934 All 948 (949).

12. ('29) 16 AIR 1929 Nag 343 (345).
[*See* ('28) 15 AIR 1928 P C 243 (245, 247) : 55 Ind App 380 (PC). (Fact that there is difficulty about the meaning of certain entries—It does not follow from that alone that the case raises any point of law.)]

13. ('40) 27 AIR 1940 Lah 278 (279).
('40) 27 AIR 1940 Sind 74 (75) (DB).
✠ ('31) 18 AIR 1931 All 499 (503, 504) : 54 All 6 (SB).
('68) 9 Suth W R 366 (366) (DB).
('12) 13 Ind Cas 629 (630) (Oudh).
('20) 7 AIR 1920 All 82 (85) (DB).
('27) 14 AIR 1927 Mad 1167 (1179) (DB).

14. ('42) 29 AIR 1942 Nag 103 (104) : ILR (1942) Nag 349 (DB).

30. Legal effect of document or transaction. — The legal effect of documents,[1] or of proved facts,[2] or of transactions,[3] is a question of law. But the effect of a document, as merely *evidence* of a question of fact, is, as has been seen in Note 29 not a question of law.[4] Questions relating to the fact of the *execution* of documents or the *existence* of facts or transactions[5] and questions of the *genuineness* of documents,[6] are all questions of fact.

31. Meaning of words. — The ordinary *meaning* of words is a question of fact[1] but the *effect* of the words is one of law.[2] Thus, the meaning of the word "assessment" in a resolution is a question of fact.[3] So also is the question whether the words "insolent upstart" are defamatory of the plaintiff in a particular case.[4] But in the case of words having a technical or scientific or special *legal* significance, the interpretation

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Note 30

1. ('42) 29 AIR 1942 Nag 103 (104) : ILR (1942) Nag 349 (DB).
('41) 28 AIR 1941 Lah 62 (63) (DB).
('40) 27 AIR 1940 Bom 225 (226) : ILR (1940) Bom 453 (DB). (Legal effect of award.)
('26) 13 AIR 1926 All 75 (76) (DB).
('29) 16 AIR 1929 All 519 (520) (DB).
('30) 17 AIR 1930 Cal 113 (121) : 57 Cal 170 (DB).
('35) 22 AIR 1935 Lah 132 (134). (Question whether notice of expulsion to one partner operates as dissolution of partnership.)

2. ('40) 27 AIR 1940 Bom 263 (264) : I LR (1940) Bom 505. (AIR 1930 P C 91 : 11 Lah 199 : 57 Ind App 86 (PC) relied on.)
✠('18) 5 AIR 1918 P C 92 (93) : 46 Cal 189 (P C).
('34) 21 AIR 1934 All 103 (106). (Whether a statement made by tenant amounts to forfeiture.)
✠('27) 14 AIR 1927 P C 102 (104) : 54 Ind App 178 : 8 Lah 573 (PC).
('13) 20 Ind Cas 951 (952) (All).
('28) 15 AIR 1928 Cal 315 (317) : 55 Cal 355.
('28) 15 AIR 1928 Lah 774 (775) : 10 Lah 360 (DB).
('29) 16 AIR 1929 Cal 37 (39) : 56 Cal 738 (DB).
('38) 25 AIR 1938 Lah 357 (359) (DB).
('39) 26 AIR 1939 Pat 448 (449) : 18 Pat 571 (DB).
('38) 25 AIR 1938 Pat 413 (421): 17 Pat 507 (DB).
('37) 24 AIR 1937 Oudh 254 (255,256) (DB). (Whether certain bond is executed owing to undue influence.)
('35) 22 AIR 1935 Lah 206 (208). (Question as to whether certain proved facts amount to misconduct is not purely one of fact.)
† ('36) 23 AIR 1936 Rang 383 (385). (Whether proper effect of proved facts is to establish partnership.)
('36) 23 AIR 1936 PC 77 (81,82) : 63 Ind App 140 (PC).
Also see Note 28.

3. † ('10) 6 Nag L R 78 (80).
('29) 16 AIR 1929 All 519 (520) (DB).
('35) 22 AIR 1935 Mad 268 (272).

4. ('95) 22 Cal 609 (618) : 22 Ind App 51 (P C).

5. ('09) 5 Nag L R 85 (86).
('22) 9 AIR 1922 Nag 46 (47).
('26) 13 AIR 1926 Oudh 546 (546).
('28) 15 AIR 1928 Oudh 500 (501).
† ('29) 16 AIR 1929 All 419 (420).
('36) 23 AIR 1936 Sind 7 (8) (DB). (Finding that a document has not been proved that it was never executed by the alleged executor.)
('37) 167 Ind Cas 724 (724) (Oudh). (Finding that mortgage deed alleged in plaint not proved.)
('39) 26 AIR 1939 Rang 59 (61) (DB). (The question whether a person executed a deed of gift jointly with others.)

6. ('41) 28 AIR 1941 Nag 306 (306) : I L R (1942) Nag 680.
('40) 27 AIR 1940 Nag 80 (81). (Finding that sale is not genuine but a colourable transaction is finding of fact.)
('67) 8 Suth W R 356 (357) (DB).
('22) 3 L R All (Rev) 248 (248).
✠('38) 25 AIR 1938 Lah 357 (359, 360) (DB).
† ('37) 1937 Mad W N 188 (188).
('35) 22 AIR 1935 Pat 349 (350) (DB).
('36) 23 AIR 1936 Sind 7 (8) (DB). (Finding that document is collusive.)
[*See also* ('37) 166 Ind Cas 531 (532) (Pat). (Genuineness of signature is a question of fact.)
('39) 26 AIR 1939 Pat 276 (277) (DB). (The question of the correctness of an entry in the record of rights cannot be opened in second appeal.)
('39) 26 AIR 1939 Pat 229 (230) (DB). (Question whether entry in record of rights is correct is one of fact.)]

Note 31

1. ('28) 15 AIR 1928 P C 243 (245) : 55 Ind App 380 (P C).
('09) 1 Ind Cas 530 (534) (DB) (Cal).
('09) 4 Ind Cas 732 (733) (DB) (Cal).
† ('16) 3 AIR 1916 Cal 77 (79) (DB).
('18) 46 Ind Cas 794 (795) (Nag).
('23) 10 AIR 1923 All 337 (337).
('25) 12 AIR 1925 Cal 1209 (1209) (DB).
('37) 24 AIR 1937 Oudh 295 (297).
('35) 22 AIR 1935 All 586 (588). (Finding as to what was meant by witness by use of particular word is one of fact.)
[*See* ('22) 9 AIR 1922 Lah 423 (423).]
[*See also* ('41) 28 AIR 1941 Pat 488 (489) (DB). (Meaning of word 'belagan'—No interference in Letters Patent appeal.)]
Also see Note 29.

2. ('23) 10 AIR 1923 All 337 (337).
('26) 13 AIR 1926 Oudh 360 (361) : 2 Luck 216 (DB).
('37) 24 AIR 1937 Oudh 295 (297).

3. ('26) 13 AIR 1926 Cal 607 (608) : 53 Cal 453 (DB).

4. ('12) 9 All L Jour 253 (256) (DB).

will be a question of law.[5] Similarly, the question whether a word has been used in a *restricted sense* is a question of law.[6]

32. Inference from proved facts — Presumptions and onus of proof. — It has been observed in Note 28 that an *inference of fact* from proved facts is a question of fact, but that a *legal inference* from proved facts is one of law. A Court is bound, in law, to draw the necessary inferences, whether of fact or of law, in coming to a conclusion on the question to be decided. A failure to draw *any inference at all one way or the other is an error of law.*[1] Thus, where only one inference is possible from proved facts, the failure to draw it is an error of law.[2] Where, however, one out of *two possible inferences* is drawn there is no error of law.[3] Similarly, drawing of an inference which is not improper,[4] or the omission to draw an inference which does not necessarily follow,[5] are not errors of law and are not grounds of second appeal.

A *presumption of fact* is really an inference of fact depending on the facts and circumstances of each case and where a Court draws such a presumption or refuses to draw it on a consideration of the facts of the case, it will not be interfered with in second appeal.[6] But where the Court fails to direct its mind to the question *whether it should draw the presumption or not*, it commits an error of law inasmuch as it is its legal duty to make up its mind to draw the presumption or not to draw it for reasons to be given by it.[7] A Court will also commit an error of law if it deals improperly with the presumptions which the law raises.[8] For instances of presumptions of law, see sections 79 to 90 of the Evidence Act. Even in the case of a presumption of law where a Court "may presume" a particular thing, e. g., the genuineness of an ancient document under S. 90 of

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5. ('26) 13 AIR 1926 Nag 435 (439).
6. ('22) 9 AIR 1922 Bom 416 (417, 419) : 47 Bom 18 (DB).

Note 32

1. ('38) 25 AIR 1938 Nag 470 (472) : I L R (1938) Nag 535.
[*See* ('30) 17 AIR 1930 Lah 443 (444).
('12) 14 Ind Cas 1007 (1008) (Mad).]
2. ('11) 9 Ind Cas 169 (171) (DB) (Mad).
('96) 21 Bom 91 (95) (DB).
3. † ('11) 9 Ind Cas 169 (171) (DB) (Mad).
('26) 13 AIR 1926 Lah 672 (672) (DB).
† (18) 46 Ind Cas 794 (795) (Nag).
('23) 10 AIR 1923 Lah 239 (239).
('24) 11 AIR 1924 Nag 160 (161)
('30) 17 AIR 1930 Nag 200 (203) (DB).
• ('30) 17 AIR 1930 Lah 936 (936).
4. ('72) 17 Suth W R 418 (418) (DB).
('72) 17 Suth W R 349 (350) (DB).
('72) 17 Suth W R 472 (474) (DB).
('20) 7 AIR 1920 Sind 25 (26) : 14 Sind L R 128.
('21) 8 A I R 1921 Sind 20 (22) : 15 Sind L R 84 (DB).
5. ('76) 25 Sind W R 503 (504) (DB).
6. ('34) 21 AIR 1934 Cal 215 (216) (DB).
('30) 17 AIR 1930 Lah 557 (557). (Presumption based on probabilities deduced from evidence.)
('25) 12 AIR 1925 Nag 168 (169). (Presumption of user as of right from long and open user.)
('15) 2 A I R 1915 Mad 1113 (1119) : 39 Mad 304 (DB).
('13) 19 Ind Cas 66 (67) (DB) (Cal.)
† (32) 19 AIR 1932 Mad 343 (346, 350) (DB).
('39) 26 AIR 1939 Nag 78 (80) : I L R (1939) Nag 160. (Presumptions under S. 114, Evidence Act, are rebuttable presumptions of fact.)
('36) 23 AIR 1936 Cal 582 (584) (DB). (Question whether presumption that tenancy was fixed rate one can or cannot arise from tenant having held at uniform rate of rent and other circumstances is a question of fact.)
('35) 22 AIR 1935 Cal 413 (418). (The presumption of dedication from certain facts is not a presumption *juris et de jure* and hence cannot be interfered with in second appeal.)
[*See* ('28) 15 AIR 1928 All 16 (18) : 50 All 145 (DB). (In this case, a distinction is drawn between a presumption of fact and an inference of fact and it is held that where the lower Appellate Court has failed to apply a presumption of fact a second appeal will lie and not where the question is one of inference of fact.)]
7. ('30) 17 AIR 1930 Lah 443 (444).
('20) 7 AIR 1920 Lah 354 (355) : 1 Lah 206.
[*See* ('35) 22 AIR 1935 Lah 912 (913). (Land entered as grave-yard in revenue records—Court disregarding entries, and holding land not as grave-yard in disregard of presumption under S. 44, Land Revenue Act—Finding not binding in second appeal.)]
8. † ('68) 9 Suth W R 338 (342) (DB).
('32) 19 AIR 1932 Lah 56 (57). (Where the Court raises a legal presumption that when the equity of redemption is purchased by the mortgagee, the mortgage is extinguished, there is a question of law for purposes of second appeal.)
[*See also* ('32) 19 A I R 1932 Mad 415 (415) (DB).]

the Evidence Act, the matter is in the *discretion* of the Court and, unless such discretion is exercised in a non-judicial manner, it cannot be interfered with in second appeal.[9]

The question whether a statutory presumption is *rebutted* is a question of fact.[10] The question of *burden of proof* is one of law and if it has been placed on the wrong party it is a ground of second appeal.[11] Where, however, the parties have adduced evidence in support of their cases, the question of onus disappears and therefore does not arise in second appeal.[12]

33. Admission or rejection of evidence and documents. — See Note 27.

34. Relevancy and sufficiency of evidence. — The relevancy of evidence is a question of law.[1] So also the question whether there is *any evidence* to support a finding.[2] But where there is evidence from which a conclusion of fact can be drawn, the *weight* of the evidence[3] or the *sufficiency* of

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9. ('12) 15 Cal L Jour 7 (10) (DB).
('15) 2 AIR 1915 Mad 839 (840) (DB).
('32) 19 AIR 1932 Lah 43 (44).
('35) 22 AIR 1935 Oudh 96 (101) (DB). (Question arising in first appeal.)

10. ✣('30) 17 AIR 1930 PC 91(93):11 Lah 199 (PC).
('32) 19 AIR 1932 Mad 343 (350) (DB).
('32) 19 AIR 1932 Mad 173 (174).
('18) 5 AIR 1918 Cal 597 (597) (DB).
('22) 65 Ind Cas 527 (529) (DB) (Cal).
('24) 11 AIR 1924 Lah 444 (447) : 5 Lah 84 (DB).
('31) 18 AIR 1931 Lah 605 (605).
('25) 12 AIR 1925 Cal 1133 (1134) (DB). (Rebuttal of presumption raised under S. 50, Bengal Tenancy Act.)
('38) 25 AIR 1938 Lah 445 (446, 447) (DB). (Letters Patent appeal reversing AIR 1937 Lah 410.)
('38) 25 AIR 1938 Lah 357 (359) (DB).
[*See also* ('35) 22 AIR 1935 Pat 415 (416) (DB). (Rebuttal of presumption attached to entry in record of rights.)
('37) 24 AIR 1937 Lah 468 (470) (DB). (Question whether presumption attaching to particular document is rebutted is a question of fact.)
('39) 26 AIR 1939 Cal 366 (368.) (Finding that presumption as to entry of record of rights is rebutted, if justified by evidence, should not be disturbed.)
('36) 165 Ind Cas 763 (764) (DB) (Pat). (Question whether the presumption arising out of an entry in the record of rights is rebutted by the evidence adduced by a party is entirely a question of fact.)]

11. ('41) 28 AIR 1941 Nag 188 (191) : I L R (1942) Nag 441 (DB).
† ('21) 8 AIR 1921 Lah 128 (128):2 Lah 249 (DB).
('32) 19 AIR 1932 Cal 351 (353).
('21) 8 AIR 1921 Lah 199 (200) (DB).
('22) 65 Ind Cas 745 (746) (Lah).
('24) 11 AIR 1924 Lah 195 (195).
('18) 5 AIR 1918 Oudh 103 (105).
('20) 7 AIR 1920 Lah 295 (296) : 1 Lah 429 (DB).
† ('30) 17 AIR 1930 Cal 591 (593) (DB).
('38) 25 AIR 1938 Lah 760 (762).
('34) 21 AIR 1934 Nag 253 (254) (DB).
('38) 25 A I R 1938 Nag 522 (525) (DB). (Evidence equally balanced — Conclusion being impossible, Court using onus as determining factor—Question of onus is one of law.)
('36) 23 A I R 1936 Rang 256 (260) : 14 Rang 242 (FB).
[*See* ('37) 24 AIR 1937 Nag 230 (233, 234). (Primarily onus of proof means duty of establishing case — It never shifts and is question of law— Secondary sense is duty of adducing evidence— It shifts constantly throughout trial and is question of fact.)
('39) 26 AIR 1939 Nag 78 (80) : ILR (1939) Nag 160. (The question of burden of proof is a question of law only when it is used as a final deciding factor in the case.)]
[*See also* ('36) 23 AIR 1936 Rang 262 (265).
('32) 19 A I R 1932 P C 28 (30) : 59 Ind App 29 (PC).]

12. ('41) 45 Cal W N 177 (180).
† ('09) 3 Ind Cas 431 (431) (DB) (Cal).
✣('32) 19 AIR 1932 P C 228 (230) : 13 Lah 687:59 Ind App 366 (PC).
('17) 4 AIR 1917 Pat 703 (704).
('14) 1 AIR 1914 Oudh 341 (342).
('24) 11 AIR 1924 Lah 335 (335) (DB).
('34) 21 AIR 1934 Nag 253 (254, 255).

Note 34

1. ('97) 19 All 76 (92) : 23 Ind App 106 (PC).
2. † ('86) 12 Cal 93 (95) (DB).
('22) 9 AIR 1922 Oudh 98 (98).
('35) 22 AIR 1935 All 720 (722).
('35) 22 AIR 1935 Mad 26 (26).
[*See* ('36) 23 AIR 1936 Pat 96 (97). (Court's conclusion that no evidence exists or evidence is not evidence supporting point — Question of law arises.)]

3. ('72) 17 Suth W R 314 (315) (DB).
('32) 19 A I R 1932 Oudh 225 (227). (Value of account books.)
('07) 29 All 267 (270) (DB).
('09) 4 Ind Cas 329 (329, 330) (DB) (Cal).
('15) 2 AIR 1915 All 239 (240) : 37 All 524 (DB).
('15) 2 AIR 1915 Oudh 194 (195).
('15) 2 AIR 1915 Oudh 132 (133).
('17) 4 AIR 1917 Cal 407 (408) (DB).
('18) 5 AIR 1918 Cal 685 (685) (DB).
('32) 19 AIR 1932 Mad 415 (415,416) (DB). (Finding of fact — Not coloured by wrong view of onus —Binding.)
('31) 18 A I R 1931 Nag 97 (97). (Finding that burden not discharged is one of fact.)
† ('19) 6 AIR 1919 Cal 721 (721):46 Cal 152 (DB)

proof[4] is a question of fact and will not be interfered with in second appeal.

35. Nature of tenancy. — The question of tenancy is a mixed question of law and fact. It is one of fact so far as the *length* of the tenancy, the *fixity of rent* and other similar matters are concerned[1] and it is one of law in so far as the inference as to the *nature of tenancy* from the facts found is concerned.[2] But though a second appeal will

('20) 7 AIR 1920 Pat 726 (726).
('21) 8 AIR 1921 Oudh 256 (256).
('21) 8 AIR 1921 Pat 275 (276) (DB).
('22) 9 AIR 1922 Pat 384 (386) : 1 Pat 246 (DB).
('23) 10 AIR 1923 All 442 (443).
('24) 11 AIR 1924 Cal 977 (978) (DB).
† ('25) 12 AIR 1925 Oudh 367 (368).
('25) 12 AIR 1925 Oudh 691 (692).
('26) 13 AIR 1926 Cal 727 (727) (DB).
('26) 13 AIR 1926 Cal 822 (824) (DB).
('28) 15 AIR 1928 Oudh 301 (301) (DB).
('29) 16 AIR 1929 Oudh 41 (42) (DB).
('39) 26 AIR 1939 Nag 78 (80): I L R (1939) Nag 160.
('39) 26 AIR 1939 Nag 210 (211): ILR (1939) Nag 636.
('35) 22 AIR 1935 All 501 (501). (Value and sufficiency of expert evidence cannot be questioned in second appeal.)
('35) 22 AIR 1935 Cal 316 (330) :62 Cal 749 (DB). (Question of evidentiary value of accounts.)
('36) 165 Ind Cas 763 (764) (DB) (Pat).
('34) 60 Cal L Jour 569 (571).

4. (40) 27 AIR 1940 Sind 43 (46):ILR (1940) Kar 174 (DB). (Truth or otherwise of the oral evidence.)
('18) 5 AIR 1918 P C 92 (93) : 46 Cal 189 : 45 Ind App 183 (PC).
('33) 20 AIR 1933 Oudh 15 (16): 8 Luck 204 (DB). (Grounds for divorce if made out is question of fact.)
('24) 11 AIR 1924 Oudh 349 (351): 27 Oudh Cas 89.
('13) 19 Ind Cas 789 (789) (DB) (All).
('12) 14 Ind Cas 741 (742) (Mad). (Decision based on comparison of signatures in absence of other evidence.)
(1865) 2 Bom H C R 27 (32) (SB). (Court proceeding on admission of parties — Decision cannot be attacked on the ground of want of evidence.)
† ('81) 7 Cal 293 (296) (DB).
('11) 9 Ind Cas 427 (428) (Oudh).
('12) 34 All 140 (141): 13 Ind Cas 19 (20) (DB).
† ('15) 2 AIR 1915 Oudh 132 (133).
('16) 3 AIR 1916 Oudh 336 (336).
('31) 134 Ind Cas 125 (126) (DB) (Lah).
('30) 17 AIR 1930 Oudh 97 (100):5 Luck 658 (DB). (Whether entry in certificate of guardianship is sufficient evidence of age.)
('18) 5 AIR 1918 Pat 413 (415) (DB). (Sufficiency of evidence to constitute negligence.)
('24) 11 AIR 1924 All 146 (147) (DB). (Sufficiency of rebutting evidence.)
† ('25) 12 AIR 1925 Cal 1133 (1134) (DB).
('26) 92 Ind Cas 670 (672) (DB) (Oudh).
('39) 26 AIR 1939 Lah 141 (142). (Finding that alleged exchange is not proved is one of fact.)
('39) 26 AIR 1939 Lah 309 (310).
('36) 23 AIR 1936 Sind 184 (184): 30 Sind L R 146 (DB). (Finding that payment by person is not proved.)

Note 35

1. ('41) 28 AIR 1941 Pat 488 (490) (DB). (Finding that lessee agreed to pay fluctuating rent.)
† ('12) 13 Ind Cas 606 (608) (DB) (Cal).
('34) 21 AIR 1934 Pat 31 (32). (Amount of rent which is fair and equitable.)
('33) 20 AIR 1933 Cal 319 (320). (Rent whether payable in money or kind.)
('32) 19 AIR 1932 Lah 43 (44). (Length of the tenancy.)
('30) 17 AIR 1930 P C 221 (223) (PC). (Whether a particular tenure existed prior to permanent settlement.)
('31) 18 AIR 1931 Mad 577 (579). (Whether a tenant has proved kayamgeni right.)
('36) 23 AIR 1936 Pat 96 (96). (Questions regarding area of land and payment of rent.)
† ('36) 23 AIR 1936 Cal 582 (584) (DB). (Whether tenant has held at uniform rate for number of years.)
('36) 1936 R D 259 (260). (A finding that a certain land is held at a favourable rate of rent within the meaning of the law is really one of fact, although it might be open to challenge in second appeal on the ground that the manner in which the lower Courts have calculated is not in accordance with law.)
('36) 23 AIR 1936 Cal 582 (584). (Question whether presumption that tenancy was at a fixed rate one can or cannot arise from tenant having held at uniform rate of rent and other circumstances is question of fact.)
[*See also* ('38) 1938 R D 672 (672, 674). (The question of admission to tenancy might be interpreted as a mixed question of law and fact.)]
Also see S. 11, Note 10.
2. ('41) 28 AIR 1941 Pat 228 (231) : 20 Pat 115 (DB). (Whether tenancy was permanent.)
('40) 27 AIR 1940 P C 192 (196): I L R (1940) Kar P C 380 : ILR (1941) Bom 107 (PC). (Tenancy whether permanent or not.)
('12) 13 Ind Cas 606 (608) (Cal).
('34) 21 AIR 1934 Cal 288 (289): 61 Cal 32 (DB).
('34) 21 AIR 1934 Cal 51 (53) (DB). (Whether tenancy is permanent.)
† ('32) 19 AIR 1932 Cal 398 (400) (DB).
† ('04) 8 Cal W N 774 (778) (FB). (Tenancy whether one at will or a yearly one.)
('10) 7 Ind Cas 785 (786) (DB) (Cal).
✣ ('27) 14 AIR 1927 P C 102 (104) : 54 Ind App 178: 8 Lah 573 (PC). (Permanent tenancy or a precarious one.)
('17) 4 AIR 1917 Cal 496 (496): 44 Cal 119. (Whether tenancy at will or permanent.)
('22) 9 AIR 1922 Lah 329 (334). (Do.)
('32) 19 AIR 1932 Cal 198 (199) (DB). (Whether tenancy permanent or not.)
('24) 11 AIR 1924 Cal 465 (467) (DB).
('25) 12 AIR 1925 Cal 309 (310): 52 Cal 43 (DB).

lie on the question as to the nature of tenancy, the High Court will not interfere with an inference drawn or with a refusal to draw an inference by the lower Court, unless such inference or the refusal to draw the inference, as the case may be, can be shown to be demonstrably wrong.[3] The incidents of a "joti" tenancy are in the nature of a contract and consequently a decision on the question whether a certain "joti" is a tenure or a *raiyati* holding is a finding of fact.[4] Similarly, a finding as to joint tenancy,[5] or as to the date of commencement of a tenancy,[6] or as to whether the tenant has held at a uniform rate for 20 years or more,[7] or as to whether a tenancy has been forfeited by denial of the title of the landlord,[8] or as to whether certain charges are parts of rent or not,[9] is a finding of fact.

The question whether the legal right of a tenant has determined is a question of law.[10]

See also the cases cited below.[11]

36. Nature of possession. — A question as to the factum of possession is a question of fact.[1] But the question whether possession is adverse or not though often one of fact, may also be a question of law or a mixed question of law and fact.[2] Where both the facts and the legal inference to be drawn therefrom are in dispute, the question will

('28) 15 AIR 1928 Cal 597 (599) : 55 Cal 1029 (DB).
('28) 15 AIR 1928 Lah 720 (720).
('30) 17 AIR 1930 Bom 39 (40) (DB).
('36) 23 AIR 1936 Pat 384 (385). (Question whether tenancy is permanent or precarious.)
('39) 26 AIR 1939 Pat 448 (449):18 Pat 571:1939 Pat W N 394 (399) (DB). (Whether tenancy is permanent.)
('38) 25 AIR 1938 Pat 333 (334). (Inference of permanent tenancy from facts found.)
[*See* ('39) 26 AIR 1939 Pat 350 (351) : 179 Ind Cas 940 (941). (Whether tenancy is permanent or not is a mixed question of law and fact.)]
Also see S. 11 Note 10.

3. ('26) 13 AIR 1926 Cal 592 (593) (DB).
4. ('18) 5 AIR 1918 Cal 517 (518) (DB).
5. ('24) 11 AIR 1924 All 231 (232).
[*See* ('36) 162 Ind Cas 334 (335) (Oudh). (Finding that the plot in suit belongs jointly to the parties is a finding of fact.)]
6. ('41) 28 AIR 1941 Cal 368 (370) (DB). (Finding that gati tenure came into existence before permanent settlement.)
† ('23) 10 AIR 1923 P C 187 (187, 189) (PC).
('26) 13 AIR 1926 All 542 (543) : 48 All 588 (DB).
7. ('26) 13 AIR 1926 Cal 359 (360) (DB).
† ('25) 12 AIR 1925 Cal 632 (633) (DB).
('36) 23 AIR 1936 Cal 582 (584) (DB).
8. ('33) 20 AIR 1933 Lah 377 (378).
[*See also* ('36) 23 AIR 1936 Pat 275 (280) (DB).]
9. ('15) 2 AIR 1915 Cal 17 (18) (DB).
10. ('12) 15 Ind Cas 857 (859) (Oudh).
11. ('41) 28 AIR 1941 Pat 11 (13). (Question that a person is settled raiyat raised for first time in second appeal—Not allowed as it depended on evidence.)
('39) 26 AIR 1939 Cal 593 (594) (DB). (Whether jote lands purchased by proprietor become his khas lands under S. 22, Bengal Tenancy Act, is question of fact.)
('36) 23 AIR 1936 Pat 411 (412). (Whether a new tenancy has been created can never be said to be a pure question of law; it is a question of mixed fact and law and a question which certainly depends upon a number of facts.)

Note 36

1. ('43) 30 AIR 1943 Cal 91 (92) : I L R (1942) 2 Cal 406 (DB). (Finding as to dispossession.)
('42) 29 AIR 1942 Oudh 93 (95) : 17 Luck 205 (DB). (Joint possession.)
('42) 29 AIR 1942 Pat 325 (327).
('41) 28 AIR 1941 Cal 556 (556) (DB). (Finding as to dispossession.)
('41) 28 AIR 1941 Nag 306 (306) : I L R (1942) Nag 680. (Question of delivery of possession.)
('41) 28 AIR 1941 Pat 422 (424):20 Pat 497 (DB). (Finding that party was in possession of land through mokararridar.)
('40) 27 AIR 1940 Lah 225 (226).
('92) 15 Mad 101 (108) : 18 Ind App 149 (P C).
('14) 1 AIR 1914 Cal 50 (51) : 41 Cal 52 : 21 Ind Cas 431 (431) (DB).
('16) 3 AIR 1916 All 181 (182, 183) (DB).
('22) 67 Ind Cas 152 (153) (DB) (Lah).
('25) 12 AIR 1925 Oudh 170 (170). (Finding of continuance of possession is one of fact.)
('10) 6 Ind Cas 1009 (1009) (Lah). (Whether an entry by one co-heir is on behalf of himself or on behalf of all co-heirs.)
('34) 21 AIR 1934 Cal 703 (705):61 Cal 879 (DB).
('38) 25 AIR 1938 Pat 10 (11).
[*See also* ('26) 13 AIR 1926 All 465 (466). (Finding that a person did not share in the cultivation of another is one of fact.)]

2. ('41) 28 AIR 1941 Nag 343 (344):I L R (1942) Nag 608.
('41) 28 AIR 1941 Oudh 436 (439) (DB).
✠ ('92) 19 Cal 253 (262, 263) : 19 Ind App 48 (PC).
('33) 20 AIR 1933 Lah 25 (27) : 13 Lah 677 (DB). (Question of adverse possession is a mixed question of law and fact.)
('32) 19 AIR 1932 All 393 (396):54 All 628(DB).(Do.)
('11) 10 Ind Cas 63 (64) (DB) (Mad). (Question of a widow's acquisition of a prescriptive title and the extent of the title acquired is one of fact.)

be one of mixed law and fact.[3] Where the question of adverse possession is a matter of evidence merely, it is one of fact.[4] But where the facts are not in dispute, the legal inference to be drawn from them is a question of law, which is open to examination in second appeal.[5] Even where the question is one of legal inference from the facts found, the High Court will not interfere unless such inference is obviously wrong or unless the finding could not be legally arrived at upon the evidence.[6] A finding on the question whether a person in possession is an ostensible owner or as to who is the true owner, is a finding of fact.[7]

37. Nature of property. — The question as to the nature of a particular property is one of fact unless it involves a consideration of legal principles, in which case it will be a question of mixed law and fact. Thus, the question whether a particular property is ancestral property[1] or a grove[2] or a "parjaut" land[3] or forms part of an estate[4] or is a separate sub-division[5] or was thrown into partnership assets[6] or is joint family property[7] or is moveable property,[8] is a pure question of fact. But the question whether a property is a "*talukdari* property"[9] or a "*sulka stridhana*"[10] or has ceased to be part of a mahal[11] or is saleable[12] or transferable,[13] has been held to involve

('21) 8 AIR 1921 Lah 264 (264). (*Held* to be one of fact.)
('32) 135 Ind Cas 680 (681) (DB) (Lah). (Do.)
('23) 10 AIR 1923 All 382 (382) (DB). (Do.)
† ('21) 60 Ind Cas 298 (301) (Cal).
('35) 22 AIR 1935 Cal 760 (760) (DB).
('36) 23 AIR 1936 Lah 741 (742). (Mixed question of fact and law.)
3. ('42) 29 AIR 1942 Pat 341 (342, 343) : 21 Pat 441. (Effect of submergence of land.)
('11) 11 Ind Cas 185 (186) (DB) (Cal).
4. ('42) 29 AIR 1942 All 221 (222) : I L R (1942) All 667 (FB). (Title by adverse possession.)
('42) 29 AIR 1942 Mad 725 (725). (Assertion of adverse title more than 12 years before suit.)
('34) 21 AIR 1934 All 692 (693).
('39) 26 AIR 1939 Mad 564 (568).
('38) 25 AIR 1938 Oudh 238 (245) (DB). (Question as to date from which adverse possession commenced.)
5. ('42) 29 AIR 1942 Mad 725 (725). (Whether certain facts amounted to open assertion of adverse title.)
('42) 29 AIR 1942 Nag 75 (78) : I L R (1942) Nag 781 (DB). (Adverse possession, finding as to—Case concerning pardanashin ladies.)
('41) 28 AIR 1941 Oudh 436 (439) (DB).
('17) 4 AIR 1917 All 42 (42) (DB).
('32) 19 AIR 1932 Lah 72 (72).
('34) 21 AIR 1934 All 288 (290).
✠ ('19) 6 AIR 1919 P C 60 (61) : 42 All 152 : 46 Ind App 197 (P C).
† ('22) 9 AIR 1922 Cal 54 (55) (DB).
† ('21) 60 Ind Cas 298 (301) (DB) (Cal).
('26) 13 AIR 1926 Cal 881 (881) (DB).
('35) 22 AIR 1935 Cal 760 (760) (DB).
('38) 25 AIR 1938 Sind 215 (216) : I L R (1939) Kar 136 (DB).
[*See also* ('39) 26 AIR 1939 Nag 260 (261) : 1939 Nag L Jour 391 (392). (Effect of adverse possession against a Hindu widow on the reversionary right.)]
6. ('95) 21 Bom 91 (96) (DB).
('11) 33 All 757 (763) : 11 Ind Cas 52 (54) (FB).
7. ('14) 1 AIR 1914 All 232 (234) : 36 All 308 (312) (DB).
('21) 8 AIR 1921 Lah 117 (118) (DB).
('31) 133 Ind Cas 551 (552) (DB) (Lah). (That a person is a benamidar.)

Note 37

1. ('21) 8 AIR 1921 Lah 138 (138).
('34) 21 AIR 1934 Lah 517 (518).
('34) 21 AIR 1934 Lah 406 (407). (Finding that land is not ancestral.)
('34) 21 AIR 1934 Lah 351 (352) : 15 Lah 791 (DB). (Do.)
('34) 21 AIR 1934 Lah 274 (275) : 15 Lah 645.
('33) 20 AIR 1933 Lah 765 (765) (DB).
('33) 20 AIR 1933 Lah 350 (350).
('23) 10 AIR 1923 Lah 532 (533).
('24) 11 AIR 1924 Lah 263 (263).
('31) 18 AIR 1931 Lah 704 (704) (DB).
('31) 18 AIR 1931 Cal 666 (667) (DB). (Finding that separate properties were thrown into common stock.)
[*See* ('38) 25 A I R 1938 Pat 372 (374) (DB). (Question whether certain properties proceeded against in execution of a decree are or are not the personal properties of the legal representative of the judgment-debtor is a question of fact.)]
2. ('24) 11 AIR 1924 Oudh 306 (306) : 27 Oudh Cas 26.
3. ('26) 13 AIR 1926 All 83 (84) (DB).
4. ('24) 11 AIR 1924 Mad 117 (118) (DB).
('27) 14 AIR 1927 Cal 457 (458) (DB).
5. ('34) 21 AIR 1934 Lah 424 (425).
6. ('28) 15 AIR 1928 P C 135 (137) (PC).
7. ('32) 19 AIR 1932 Oudh 144 (145).
('34) 21 AIR 1934 Oudh 177 (177) (DB). (Finding that certain properties were joint properties.)
8. ('22) 9 AIR 1922 All 45 (45) (DB).
9. ('14) 1 AIR 1914 Oudh 206 (207) (DB).
[*See also* ('31) 18 A I R 1931 Mad 213 (215). (Communal character of land—Mixed question of law and fact.)]
10. ('29) 16 AIR 1929 All 25 (27) (DB).
11. ('14) 1 AIR 1914 All 517 (517) : 36 All 231 (DB).
12. ('25) 12 AIR 1925 All 652 (652) : 47 All 900 (DB). (Pension whether saleable.)
13. ('28) 15 AIR 1928 All 721 (724) : 50 All 391 (DB). (Transferability of right to offerings.)

questions of law. It has been held by the Allahabad,[14] Calcutta[15] and Lahore[16] High Courts that the question whether a property has been dedicated to a religious or charitable purpose is a question of fact. The Oudh Chief Court has, however, held that such a question is one of law or at any rate a mixed question of law and fact.[17]

A finding as to ownership is a finding of fact[18] though where it depends upon legal presumptions, it will be a mixed question of law and fact.[19]

Whether a wall erected by a co-owner on top of a joint wall is a joint wall or not is a question of law.[20]

See also the undermentioned cases.[21]

38. Nature of contract or transaction. — Whether a contract can be implied from certain facts may be a question of fact or of law according to circumstances. If it is based on offer and acceptance, for instance, it is a question of fact. If it is a matter of inference of law to be drawn from proved facts or documents, it will be a question of law.[1] Thus, the question whether certain representations made amount to a warranty, is a question of law.[2] Even in the latter case if the presumption to be drawn for or against such contract is one depending upon the circumstances of the case, the lower Court's decision drawing or refusing to draw the presumption will be no error of law.[3]

The following findings with reference to contracts generally are findings of fact :

(1) A finding as to whether a contract has been superseded or not.[4]

(2) A finding as to the legal origin of a presumed contract.[5]

(3) A finding as to whether time was of the essence of a contract.[6]

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14. ('27) 14 AIR 1927 All 377 (377).

15. ('11) 9 Ind Cas 650 (650) (Cal).

16. ('21) 8 AIR 1921 Lah 343 (343) (DB).
('32) 33 Pun L R 288 (289).
('33) 20 AIR 1933 Lah 342 (342). (Whether property was made wakf.)
('23) 5 Lah L Jour 11 (12) (DB).
('13) 1913 Pun Re No. 38 : 1913 Pun L R No. 264, p. 890 (891).
('19) 6 AIR 1919 Lah 130 (131): 1919 Pun Re No. 1.
('30) 17 AIR 1930 Lah 744 (745) (DB).
('30) 17 AIR 1930 Lah 1056 (1057).
('30) 12 Lah L Jour 320 (320, 321). (Dedication to graveyard or not.)
('31) 18 AIR 1931 Lah 170 (172) (DB). (Dedication whether real or nominal.)
('31) 18 AIR 1931 Lah 607 (608) : 12 Lah 540 (DB). (Whether property is wakf.)

17. ('12) 16 Oudh Cas 76 (77) : 17 Ind Cas 303 (304) (DB).
('38) 25 AIR 1938 Oudh 238 (240) (DB). (Question whether a building is a private or public mosque.)
[*See also* ('37) 24 AIR 1937 Sind 230 (231) : 31 Sind L R 510 (DB). (But when all facts are on record question whether such facts show a trust to be within provisions of S. 92, C. P. Code, is a question of law.)].

18. ('23) 10 AIR 1923 Lah 611 (612).
('28) 113 Ind Cas 886 (887) (Nag). (Whether a site belongs to public or an individual.)
('38) 25 AIR 1938 Oudh 214 (215).
('38) 25 AIR 1938 Oudh 186 (187) : 14 Luck 138 (DB).

19. ('14) 1 AIR 1914 Cal 811 (811) (DB).

20. ('39) 26 AIR 1939 Lah 28 (29).

21. ('40) 27 AIR 1940 All 373 (376) : ILR (1940) All 603 (FB). (Finding that rights in certain muafi Jagirs are not connected with grant of pension within meaning of Pensions Act is one of fact — Fact that finding involved interpretation of documents is immaterial.)
('40) 27 AIR 1940 Lah 205 (208). (Finding that a house was no part of the assets of the firm but formed part of the joint family property is a finding of fact.)
('35) 22 AIR 1935 Bom 47 (49, 50). (Question whether sanadi inam lands are kadim or jadid is one of law.)
('39) 26 AIR 1939 Lah 12 (13, 14). (Finding as to dedication of a well for public use is one of fact.)
('35) 22 AIR 1935 Cal 413 (418). (Whether *khal* is dedicated to public user is question of fact.)
('35) 22 AIR 1935 Rang 129 (130). (Whether property is payin or lettetpwa is not purely question of fact.)
('36) 23 AIR 1936 Oudh 154 (155) (DB). (Question whether a road is a public road or a private road is rather a question of law than a question of fact and in any case it is partly a question of law.)
('39) 26 AIR 1939 Oudh 48 (48). : 14 Luck 269. (Question whether character of grove land has changed is question of law.)

Note 38

1. † ('11) 9 Ind Cas 41 (44) (DB) (Mad).
('36) 23 AIR 1936 Rang 383 (385). (Whether facts proved establish partnership is question of law.)
2. ('12) 14 Ind Cas 135 (135) (DB) (All).
3. ('94) 17 Mad 43 (47) (DB).
4. ('86) 1886 All W N 18 (19) (DB).
5. ('30) 17 AIR 1930 Mad 339 (340).
6. ('15) 2 AIR 1915 Mad 546 (547) (DB).

(4) A finding as to whether a contract is hard and unconscionable or not binding.[7]

(5) A finding as to who committed breach of a contract.[8]

(6) A finding as to the damaged condition of goods in a contract for sale of goods.[9]

(7) A finding as to whether a tender was or was not within time.[10]

(8) A finding as to whether certain money was received as a deposit or by way of loan.[11]

(9) A finding as to the consideration for the contract being the love and affection between the parties.[12]

(10) Finding as to adequacy of consideration.[13]

The following question is a question of law :

(1) Whether an agreement is in restraint of trade within the meaning of S. 27 of the Contract Act.[14]

See also the undermentioned cases.[15]

39. State of mind, acquiescence, good faith, consent, intention, negligence, wilful neglect, misconduct, reasonable care, reasonable and probable cause and waiver. — The state of mind of a person is a fact and a question relating thereto is a question of fact.[1] A finding therefore as to the intention,[2]

('22) 1922 Pun W R No. 37.
('31) 18 AIR 1931 Lah 696 (701) (DB).
7. ('18) 5 AIR 1918 Lah 264 (265).
('29) 16 AIR 1929 Mad 673 (673).
8. ('21) 8 AIR 1921 Lah 316 (317) (DB).
('35) 22 AIR 1935 Nag 111 (112): 31 Nag L R 250.
9. ('24) 11 AIR 1924 Pat 240 (241) (DB).
10. ('25) 12 AIR 1925 Lah 353 (354).
11. ('34) 21 AIR 1934 Nag 219 (220).
12. ('34) 21 AIR 1934 Pat 44 (45).
13. ('41) 28 AIR 1941 Oudh 479 (484) : 16 Luck 789. (Sale.)
14. ('34) 21 AIR 1934 Lah 110 (111).
15. ('42) 29 AIR 1942 Cal 476 (477): I L R (1942) 2 Cal 389 (DB). (Whether assignment is *bona fide* is question of fact.)
('42) 29 AIR 1942 Mad 483 (484) : I L R (1942) Mad 862 (DB). (Finding as to nature of transaction binding in second appeal.)
('42) 29 AIR 1942 Mad 716 (717) (Whether agreement to sell had merged in conveyance is one of fact or in any case one of mixed law and fact.)
('42) 29 AIR 1942 Mad 730 (730). (Existence of consideration is question of fact.)
('42) 29 AIR 1942 Pat 210 (211, 212) : 20 Pat 798 (DB). (Question whether conveyance by Mahomedan to wife and relinquishment by latter of dower debt is gift or sale is question of fact.)
('42) 29 AIR 1942 Pat 406 (406): 21 Pat 300 (DB). (Finding as to genuineness of transaction.)
('42) 29 AIR 1942 Pesh 81 (82). (Existence of consideration.)
('41) 28 AIR 1941 Mad 727 (731). (Whether a deed is invalid on the ground of its being opposed to public policy within S. 23, Contract Act and hence void is a mixed question of law and fact when its decision involves taking of evidence.)
('40) 42 Pun L R 246 (247). (A finding that a sale is not fictitious, right or wrong, is a finding of fact.)
('36) 38 Pun L R 590 (592) (SB). (A conclusion of the lower Appellate Court that a certain contract was not acted upon by the parties is a finding of fact.)
('37) 24 AIR 1937 All 363 (365). (Finding by the lower Appellate Court as to when an agency terminated is binding in second appeal.)
('37) 1937 All L Jour 1385 (1385). (Finding that no actual damage or loss has been caused to the plaintiff by a breach of contract is one of fact.)
('35) 22 AIR 1935 Lah 877 (878) (DB). (Finding whether a certain entry contains a distinct promise to pay within the meaning of S. 25 (3) of the Contract Act is one of fact.)
('37) 24 AIR 1937 Pat 572 (577) : 16 Pat 527. (Whether a hand-note is the sole consideration for an advance and not merely a conditional payment or a collateral security, must be a question of fact.)
('35) 22 AIR 1935 Pesh 121 (122). (Whether an agreement is void as opposed to public policy within the meaning of Ss. 23 and 25 of the Contract Act is a question of law.)
('39) 26 AIR 1939 Lah 284 (285). (Finding as to genuineness of mortgage is one of fact.)

Note 39

1. See Note 28.
('35) 22 AIR 1935 Cal 168 (174): 61 Cal 1005 (DB).
2. ('43) 30 AIR 1943 Mad 369 (370). (Partition — Intention to divide is question of fact.)
('43) 30 AIR 1943 Mad 459 (461). (Finding as to benami nature of transaction is of fact.)
('43) 30 AIR 1943 Nag 129 (137): ILR (1943) Nag 42 (DB). (Finding that a rent note was nominal and not intended to have effect.)

or state of mind of a person,[3] or his good or bad faith,[4] or a finding as to misrepresenta-

('42) 29 AIR 1942 All 331 (332) : ILR (1942) All 745 (DB). (Agreement to alienate property.)
('42) 29 AIR 1942 Lah 42 (45) (DB). (But legal inference as to intention from document of title is question of law. (Per Din Mohammad, J.))
('42) 29 AIR 1942 Pat 386 (387) (DB). (Finding as to benami nature of transaction.)
('40) 27 AIR 1940 Oudh 324 (326) : 15 Luck 586 (FB). (In the Order of Reference — The question whether deed of wakf was made with intention to defeat or delay the creditors by the wakif involves the determination of certain questions of fact and High Court cannot allow this plea to be raised for the first time.)
('40) 27 AIR 1940 Rang 126 (128) : 1940 Rang L R 180 (DB). (Finding that mortgage by Burmese Buddhist husband was executed with consent of wife is one of fact.)
('16) 3 AIR 1916 Lah 85 (86) : 1916 Pun ReNo.68.
('33) 20 AIR 1933 Lah 588 (589).
('33) 20 AIR 1933 Lah 33 (33).
('18) 5 AIR 1918 Pat 593 (593) (DB).
('28) 15 AIR 1928 All 61 (62) : 50 All 208 (DB).
('30) 17 AIR 1930 Mad 590 (592).
('29) 16 AIR 1929 Lah 90 (90). (Intention of executant of document — Finding as to, is finding of fact.)
('21) 8 AIR 1921 Lah 263 (264) (DB). (Intention —To pass title to particular property—Finding as to, is one of fact.)
('31) 133 Ind Cas 440 (440) (DB) (Lah). (Benami —Question of fact.)
('31) 133 Ind Cas 551 (552) (DB) (Lah).
('26) 92 Ind Cas 42 (43) (Lah). (Intention—Mortgage or sale—Finding as to, is finding of fact.)
('29) 16 AIR 1929 Lah 530 (531). (Do.)
('28) 110 Ind Cas 408 (409) (DB) (Mad). (The question as to whether a particular document is executed on account of natural love and affection or not, is a question of fact.)
† ('16) 3 AIR 1916 Lah 60 (61) : 1916 Pun Re No. 102 (DB). (The question as to whether a person made a transfer of his property with intent to defeat or delay his creditors within S. 4 (b) of the Insolvency Act is merely one of fact.)
('25) 12 AIR 1925 Oudh 541 (541) (DB). (The question whether the legatees signing the will as witnesses did not intend to attest the will is a question of fact.)
('26) 13 AIR 1926 Mad 33 (35). (Question of intention to create joint tenancy is one of fact.)
('26) 13 AIR 1926 Mad 963 (964). (The question whether a member of a joint Hindu family who had made certain self-acquisitions has thrown such acquisitions into the common stock is essentially a question of fact.)
('26) 13 AIR 1926 Oudh 614 (615). (Whether there was intention to partition.)
('27) 14 AIR 1927 Cal 538 (542) (DB). (Creditor, instead of being actually paid taking renewed pronote — Whether new note is a substitution of old one is a question of fact.)
('28) 15 AIR 1928 Lah 924 (925): 9 Lah 487 (DB). (Intention to abandon a trade-mark — Finding as to, is one of fact.)
('31) 18 AIR 1931 Mad 804 (806) : 55 Mad 408 (DB). (Whether ratification is of whole or part of the transaction.)
† ('25) 12 AIR 1925 Mad 1217 (1217, 1218). (Intention to keep alive mortgage.)
('37) 24 AIR 1937 Sind 263 (266, 269) (DB). (Per Haveliwala, A. J. C.; Rupchand Bilaram, A. J. C., *contra*.)
† ('37) 24 AIR 1937 Nag 230 (232, 233). (Question whether there was an intention amongst the members of a joint Hindu family to separate is pure question of fact.)
† ('38) 25 AIR 1938 P C 34 (35) : ILR (1938) Mad 551 : 65 Ind App 93 : 32 Sind L R 328 (PC). (Inference of intention from circumstances.)
('36) 23 AIR 1936 Bom 160 (161) : 60 Bom 226. (Benami—Question of fact.)
('36) 23 AIR 1936 Cal 178 (179) : 63 Cal 846 (DB). (Do.)
('36) 23 AIR 1936 Lah 685 (687) (DB). (Whether the assured committed suicide deliberately and intentionally is a question of fact.)
('36) 38 Pun L R 577 (578). (Finding that certain transaction was intended to defeat and delay creditors and was collusive is one of fact.)
('38) 25 AIR 1938 Pat 278 (280): 17 Pat 430 (DB). (Finding whether the institution of a partition suit is evidence of clear intention to separate from the joint family is one of fact.)
('36) 23 AIR 1936 Rang 256 (260) : 14 Rang 242 (FB). (Whether transfer is benami.)
('36) 23 AIR 1936 Nag 186 (188). (Whether two persons agree on a certain matter and whether they have requisite mental intention necessary to give validity to their outward forms or acts of agreement are questions of fact.)
[*See* ('36) 19 Nag L Jour 301 (304). (Whether there was agreement to forgo balance of consideration is question of fact.)]
[But see ('36) 23 AIR 1936 All 553 (554). (Question whether in given circumstances the occupier of a house should be deemed to have abandoned it depends upon the inference of the occupier's intention from the proved facts and is not necessarily one of fact.)]

3. ('11) 12 Ind Cas 730 (732) (All).
('36) 23 AIR 1936 Lah 685 (687). (Whether the assured was of sound mind.)
† ('38) 25 AIR 1938 P C 91 (97) (PC). (The state of mind of a person is as much a fact as the state of his digestion.)
('35) 22 AIR 1935 Cal 168 (174): 61 Cal 1005 (DB).

4. ('41) 28 AIR 1941 Lah 271 (272) (DB).
('40) ILR 1940 Lah 60 (63) (DB). (Whether suit was collusive is finding of fact.)
('39) 26 AIR 1939 Oudh 230 (231) : 14 Luck 621 (DB). (Whether transferee is *bona fide* transferee for consideration.)
† ('16) 3 AIR 1916 Lah 232 (233) : 1916 Pun Re No. 75 (DB).
('34) 21 AIR 1934 Pat 121 (122) (DB).
('32) 19 AIR 1932 Lah 531 (532) : 14 Lah 106.
('16) 3 AIR 1916 Lah 57 (57) : 1916 Pun Re No.63 (DB).
('25) 12 AIR 1925 Lah 505 (506).

tion,[5] or the fraudulent nature of a transaction,[6] or the position to dominate the will in case of undue influence,[7] or a finding as to notice,[8] is a finding of fact and will not be interfered with in second appeal unless the inferences are *not warranted* by the facts from which they are drawn.[9] Similarly, the question whether a transaction is collusive is one of fact.[10] So also, the question as to the existence of malice is one of fact.[11]

Questions of *waiver*, *acquiescence* and *estoppel* are not questions of fact but inferences of law from facts proved and are, therefore, open to examination in second appeal.[12]

('32) 19 AIR 1932 Lah 322 (323). (Question whether conduct was *bona fide*.)
('97) 24 Cal 825 (829) (DB).
('70) 5 Beng L R App 59 (60) (DB). (Whether proceedings which had been taken to execute a decree had been taken *bona fide*.)
('74) 13 Beng L R App 1 (2) (DB).
('26) 92 Ind Cas 670 (672) (DB) (Oudh).
('37) 24 AIR 1937 Cal 314 (318) (DB).
[But see ('38) 25 AIR 1938 Lah 704 (706). (Question whether party acted in good faith within the meaning of S. 14, Limitation Act, on facts found by lower Appellate Court is mixed question of law and fact.)]

5. † ('21) 8 AIR 1921 Mad 198 (199) (DB).
('23) 10 AIR 1923 Cal 165 (165) (DB).
('26) 13 AIR 1926 Mad 39 (39, 40).
('35) 22 AIR 1935 Bom 326 (327) : 29 Bom 502. (Question as to whether an instrument was obtained from a person by undue influence and misrepresentation is a question of fact.)

6. ('43) 30 AIR 1943 Mad 369 (370). (Partition whether fraudulent and collusive.)
('42) 29 AIR 1942 Mad 522 (523). (Whether alienation was in fraud of creditors under S. 53, T. P. Act.)
('42) 29 AIR 1942 Oudh 206 (207) : 17 Luck 555 (DB). (Fictitious sale to defraud creditors.)
('42) 29 AIR 1942 Oudh 217 (218) : 17 Luck 341.
('42) 29 AIR 1942 Pat 392 (393).
('42) 29 AIR 1942 Pesh 81 (82). (Sale deed if obtained by fraud.)
('41) 28 AIR 1941 Nag 188 (191) : ILR (1942) Nag 441 (DB). (Fraudulent preference.)
('41) 28 AIR 1941 Oudh 341 (344) (DB).
('41) 28 AIR 1941 Pat 529 (530). (Sale under the Public Demands Recovery Act.)
('29) 16 AIR 1929 All 458 (458).
('26) 13 AIR 1926 Oudh 501 (502).
✠('19) 6 AIR 1919 P C 39 (41) (PC).
('20) 7 AIR 1920 Lah 24 (25).
('28) 107 Ind Cas 490 (491) (DB) (Lah).
('35) 22 AIR 1935 Oudh 443 (443) (DB). (Partition — Finding that it is neither fictitious nor fraudulent is a finding of fact.)
('38) 25 AIR 1938 All 150 (151).
† ('32) 19 AIR 1932 P C 89 (90): 59 Ind App 147: 7 Luck 64 (PC). (Finding that fraud and undue influence are established is finding of pure fact.)

7. † ('32) 19 AIR 1932 P C 89 (90) : 59 Ind App 147 : 7 Luck 64 (PC).
('01) 25 Bom 126 (128) (DB).
('28) 15 AIR 1928 All 394 (394) (DB).
[But see ('37) 24 AIR 1937 Oudh 254 (255, 256) (DB). (Finding that bond was executed owing to undue influence is one of law being a legal inference from the fact of the case—Submitted not correct.)]

8. ('21) 8 AIR 1921 Lah 146 (146) (DB).
† ('32) 19 AIR 1932 All 540 (542):54 All 557(DB).
('34) 21 AIR 1934 Pat 167 (167). (Knowledge.)
('26) 13 AIR 1926 Oudh 257 (258).
('29) 16 AIR 1929 Oudh 316 (317) : 5 Luck 172.

9. See Notes 28 and 32 and also the following cases :
('18) 5 AIR 1918 Pat 632 (633) (DB).
('33) 20 AIR 1933 Lah 458 (459). (Inference as to person being of unsound mind.)
('32) 19 AIR 1932 Lah 322 (323, 324). (Finding on no evidence.)
('10) 5 Ind Cas 398 (400) (DB) (Cal).
('12) 16 Ind Cas 811 (813) (DB) (Cal).
('16) 3 AIR 1916 Oudh 139 (140) : 19 Oudh Cas 367. (Question of good faith within the meaning of S. 14, Limitation Act, is mixed question of law and fact and can be questioned in second appeal.)
('38) 25 AIR 1938 Pat 147 (148). (High Court can see if inference of fraud or conspiracy is warranted by the facts found.)
[*See also* ('36) 23 AIR 1936 All 553 (554). (Abandonment of house is not necessarily a question of fact as it depends upon inference of occupier's intention from proved facts.)]

10. † ('39) 41 Pun L R 462 (463) (DB). (Finding that certain suit was not collusive is one of fact.)

11. ('42) 29 AIR 1942 Mad 343 (344). (Defamation case—Findings that allegations were not true and were malicious are of fact.)
('39) 26 AIR 1939 Mad 783 (786):49 Mad L W 664 (668).
('39) 26 AIR 1939 Pat 190 (193) (DB).
('35) 22 AIR 1935 Bom 355 (356).
✠('38) 25 AIR 1938 P C 91 (97) (PC).
('39) 26 AIR 1939 Pat 13 (14). (The finding of the lower Appellate Court as to the absence of reasonable and probable cause and to the existence of malice in a suit for damages for malicious arrest is one of law.)
('34) 21 AIR 1934 Lah 907 (908).

12. † ('29) 16 AIR 1929 Cal 437 (439) : 56 Cal 201 (DB).
✠('99) 21 All 496 (504) : 26 Ind App 58 (PC). (Acquiescence.)
('01) 28 Cal 738 (741) (DB). (Do.)
('21) 8 AIR 1921 Nag 167 (168). (Do.)
('25) 12 AIR 1925 Cal 288 (289). (Do.)
('26) 13 AIR 1926 Nag 416 (422). (Do.)
('16) 3 AIR 1916 Lah 370 (371) : 1916 Pun Re No. 107 (DB). (Do.)

The question of *negligence* is a question of fact.[13] But whether the inference as to the negligence is warranted by the facts is a question of law.[14] Again, where there is a special legal significance attached by statute to the word "negligence," the question whether there has been *such* negligence is a question of law.[15] Similarly, the legal standard of *reasonable care* required S. 151 of the Contract Act,[16] or by S. 41 of the Transfer of Property Act, is a question of law.[17]

Whether misconduct *can* be inferred from a set of facts is a question of law.[18]

The question of the existence or otherwise of reasonable and probable cause for the doing of a thing is a question of fact,[19] though the question whether the proved facts warrant the inference of a reasonable and probable cause is one of law.[20] The High

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('27) 14 AIR 1927 Cal 220 (224) (DB). (Representation and acquiescence giving rise to estoppel—Question of the conduct is one of fact.)
('10) 6 Ind Cas 138 (141) (DB) (Cal). (Waiver—Mixed question of law and fact.)
('17) 4 AIR 1917 Mad 47 (49). (Do.)
('13) 37 Bom 480 (483) : 19 Ind Cas 894 (895) (DB). (Waiver is primarily, and in most cases very largely, an inference to be drawn from facts, though in certain classes of cases this inference has come to be looked on as an inference of law.)
('03) 27 Bom 1 (13) (FB). (Whether there has been waiver of the creditor's right to claim the whole on default of an instalment is a mixed question of fact and law.)
('16) 3 AIR 1916 Mad 901 (902) (DB). (Reversioners consent inferred from proved facts is matter of law.)
[But see ('36) 23 AIR 1936 Lah 159 (161) (DB). (The question whether abstinence from suing coupled with other circumstances would amount to waiver is largely, if not wholly, a question of fact.)
('19) 6 AIR 1919 Oudh 384 (385).
('15) 2 AIR 1915 All 255 (256) : 37 All 350 (DB).]

13. ('43) 30 AIR 1943 Cal 59 (61) (DB).
('43) 30 AIR 1943 Pat 111 (115) : 21 Pat 764 (DB).
('40) 27 AIR 1940 Sind 254 (255) (DB).
✠('20) 7 AIR 1920 P C 88 (90) (PC).
('33) 20 AIR 1933 All 214 (215). (Contributory negligence.)
('33) 20 AIR 1933 Lah 337 (338).
† ('27) 14 AIR 1927 Mad 443 (444) (DB).
('22) 9 AIR 1922 Cal 317 (319) (DB).
('27) 14 AIR 1927 Oudh 478 (478) (DB).
('30) 17 AIR 1930 Pat 283 (286) : 9 Pat 733 (DB).
('28) 15 AIR 1928 All 166 (168). (Finding of no negligence.)
('18) 5 AIR 1918 Pat 413 (415) (DB). (Wilful negligence.)
† ('24) 11 AIR 1924 Lah 594 (594). (Do.)
('26) 13 AIR 1926 All 394 (395) : 48 All 766 (DB). (Do.)
('26) 94 Ind Cas 348 (348) (Lah). (Do.)
('36) 23 AIR 1936 Pat 84 (85). (Finding of no neglect or misconduct is not one of law.)
[*See* ('36) 23 AIR 1936 All 771 (775) : 58 All 771 (DB). (Negligence is at least a mixed question of law and fact — Lower Court approaching it neither from wrong standpoint not evidence pointing only to converse conclusion — No legal defect in finding — Such finding cannot be upset in second appeal.)]
[*See also* ('33) 20 AIR 1933 All 158 (159) (DB). (Reasonable diligence is question of fact.)]

14. ('29) 16 AIR 1929 Rang 17 (18) : 6 Rang 643.
('25) 12 AIR 1925 Mad 258 (258). (What is gross negligence is a mixed question of law and fact.)
('26) 13 AIR 1926 Mad 905 (905).
('32) 19 AIR 1932 All 139 (139) (DB). (Finding not approached from proper legal standpoint—Question not one of fact.)
('37) 24 AIR 1937 Mad 472 (474). (Certain facts whether amount to negligence or not can be considered in second appeal.)
[*See* ('35) 22 AIR 1935 Mad 81 (86) (DB). (Minor—Decree against—Setting aside decree for negligence of guardian—Negligence must be such as leads to loss of a right, which must have been successfully asserted if the suit had been conducted with due care—Question of mixed law and fact.)]

15. ('21) 8 AIR 1921 All 314 (316) : 43 All 29 (DB). (Whether acts and omissions constituted negligence within S. 167 (2) of the Agra Tenancy Act, 1901.)
('22) 9 AIR 1922 All 421 (421) (DB). (Do.)
('24) 11 AIR 1924 All 613 (613) (DB). (U. P. Land Revenue Act.)
✠('28) 15 AIR 1928 Lah 774 (775) : 10 Lah 360 (DB). ("Wilful neglect" under the Railways Act, S. 72 was held to have a special legal significance.)
† ('28) 15 AIR 1928 Lah 837 (838) : 10 Lah 329 (DB). (Do.)

16. ('24) 11 AIR 1924 Cal 92 (95) (DB).

17. ('27) 14 AIR 1927 All 158 (159) (DB). (Mixed question of law and fact.)
[But see ('40) 27 AIR 1940 Pat 480 (481) (DB).
('27) 14 AIR 1927 Nag 41 (42).]

18. ('37) 24 AIR 1937 Pat 289 (292).

19. † ('01) 25 Bom 332 (336) (PC).
('25) 12 AIR 1925 Oudh 359 (359) : 28 Oudh Cas 387.
('26) 91 Ind Cas 112 (113) (Oudh).
('29) 16 AIR 1929 All 429 (430).
('39) 26 AIR 1939 Mad 783 (786) : 49 Mad L W 664 (668).
('35) 22 AIR 1935 Bom 355 (356). (Suit for malicious prosecution.)
('36) 23 AIR 1936 All 441 (441, 442).
('39) 26 AIR 1939 All 554 (557) : I L R (1939) All 424 : 1939 All L Jour 367 (371) (DB).
Also see O. 39 R. 1, Note 26.

20. ('42) 29 AIR 1942 Lah 94 (95). (Question if facts found by the lower appellate Court are such as to constitute 'sufficient cause' within the meaning of S. 5 of the Limitation Act.)

Court of Patna[21] has, however, held that it is a question of law. The High Court of Lahore has expressed conflicting views.[22] It is submitted that the view of the Patna High Court is not correct. The attempt made in the Patna case to distinguish the Privy Council decision in *Pestonji Modi* v. *Queen Insurance Co.*,[23] is not satisfactory and the decisions which are purported to be followed only lay down the rule that the *propriety of the inferences* from facts is a question of law.

40. Existence of liability. — Questions relating to the existence of liability depend upon principles which are generally principles of law. Consequently, such questions involve questions of law.[1] See also Note 28.

41. Existence of custom. — See Note 21.

42. Status.—Where the question of status depends upon certain legal conditions being made out, it is a question of law.[1] Otherwise, it is a question of fact.[2] Where the

('40) 27 AIR 1940 Oudh 320 (322) : 15 Luck 404. (Suit for malicious prosecution.)
('01) 24 Mad 549 (552, 553) (DB). (But if the inference is not warranted by facts there will be an error of law.)
('01) 28 Cal 591 (593) (DB). (Propriety of inference is a question of law.)
('10) 6 Ind Cas 675 (680) (Cal). (Whether facts warrant inference is a question of law.)
('11) 11 Ind Cas 729 (734) (Cal). (Whether the inference drawn therefrom is legitimate is a question of law.)
('30) 17 AIR 1930 Cal 392 (396): 57 Cal 25. (Inference open to second appeal.)
† ('33) 20 AIR 1933 Nag 23 (26): 28 Nag L R 312.
('32) 19 AIR 1932 All 386 (389) (DB). (Reasonable and probable cause is a question of law and fact.)
† ('39) 26 AIR 1939 Mad 783 (786) : 49 Mad L W 664 (668).
[*See also* ('32) 19 AIR 1932 Mad 601 (603) : 35 Mad L W 495 (496). (Reasonable and probable cause is a question of law and fact.)
21. ('16) 3 AIR 1916 Pat 174 (175) : 1 Pat L Jour 149.
('32) 19 AIR 1932 Pat 91 (92) : 10 Pat 842.
('39) 26 AIR 1939 Pat 13 (14).
22. ('32) 19 AIR 1932 Lah 183 (185). (It is a question of law.)
('33) 20 AIR 1933 Lah 263 (264) : 14 Lah 46. (It is a question of fact.)
('35) 22 AIR 1935 Lah 765 (767) : 17 Lah 190 (DB). (Question whether facts found amount to absence of reasonable and probable cause is one of law—Distinguishing 25 Bom 332 (PC).)
23. (1900) 25 Bom 332 (336) (PC).

Note 40

1. ('06) 33 Cal 1047 (1061) : 33 Ind App 165 : 2 Nag L R 130 (PC). (Though a person may not have been duly appointed executor, he may render himself responsible as executor if he intermeddles with the estate of the deceased—Misapplication of law on this point is a good ground for a second appeal.)
('13) 7 Low Bur Rul 39 (39) : 21 Ind Cas 232 (232) (DB). (The question if a trustee could divest himself of his office is a question of law.)
('28) 15 AIR 1928 Cal 123 (124) (DB). (Question as to personal liability on a pronote is one of law.)
('30) 17 AIR 1930 Cal 815 (816) : 58 Cal 585 (DB). (Whether a person is a legally constituted agent or not upon certain admitted facts is a question of law.)

Note 42

1. ('40) 27 AIR 1940 Sind 138 (140) (DB). (Question of joint or divided status.)
('16) 3 AIR 1916 Pat 417 (417): 1 Pat L Jour 157.
('25) 12 AIR 1925 Cal 1238 (1239) (DB). (Tenancy.)
('27) 14 AIR 1927 Pat 209 (212) : 6 Pat 698 (FB). (Whether questions determining status of tenure-holders are themselves questions of law—*Quære.*)
('11) 38 Cal 278 (281) : 9 Ind Cas 394 (395) (DB). (Tenancy.)
('25) 12 AIR 1925 Cal 761 (765). (Do.)
('25) 12 AIR 1925 Mad 768 (768, 769). (Partnership.)
('24) 11 AIR 1924 Nag 410 (411) : 21 Nag L R 12. (Inference of unequivocal declaration of intention to separate is one of law.)
('36) 23 AIR 1936 Nag 29 (30). (Question whether ancestors of party were 'inferior holders' or 'tenants' or occupied some other position is purely one of law.)
† ('37) 24 AIR 1937 Nag 230 (233). (Actual severance of status is a question of law.)
('35) 22 AIR 1935 Mad 268 (272, 273). (Question as to whether relationship of landlord and tenant exists.)
[*See also* ('36) 23 AIR 1936 Mad 130 (131, 132). (Whether person takes limited or absolute estate is not question of fact.)
('36) 23 AIR 1936 Oudh 97 (99) (DB). (Status of person or his right or title to land is a mixed question of law and fact dependent on interpretation of documents of title.)
2. ('43) 30 AIR 1943 Cal 203 (205) (DB). (Whether certain person was *de facto* guardian.)
('43) 30 AIR 1943 Mad 538 (540) (DB). (Question of re-union after partition.)
('42) 29 AIR 1942 Pat 230 (231) : 20 Pat 855 (DB). (Whether *A* is father *B*.)
('41) 28 AIR 1941 Pesh 8 (8). (Whether person is agriculturist within N. W. F. P. Agriculturists Debtors' Act and whether he had made such payments as to entitle him to relief under the Act.)

principles of law applicable to the question have been misconceived,[3] or where there has been a misapprehension of the evidence,[4] or an entire misconception, of the real question that has to be tried,[5] there will be an error of law. See also Note 28. The question whether a certain woman is a 'public prostitute' within the meaning of a particular enactment (e. g., S. 152 (2) of the Punjab Municipal Act), is a question of law.[6]

43. Merger. — The question as to whether there has been a merger of interest or not, is a mixed question of law and fact.[1]

44. Limitation. — Questions of limitation are ordinarily mixed questions of law and fact.[1] Similarly, the question whether the facts proved come within any provision

('40) 27 AIR 1940 Lah 278 (279). (Whether plaintiff in a pre-emption suit is collaterally related to the vendor.)
('40)27 AIR 1940 Mad 761(761). (Illatom adoption.)
('40) 27 AIR 1940 Pat 310 (310) : 19 Pat 382 (DB). (Finding as to relationship.)
('40) 27 AIR 1940 Pat 585 (586). (Nearness of relationship of competing reversioners.)
† ('25) 12 AIR 1925 PC 49(50, 51):52 Ind App 83: 48 Mad 254 (PC). (Whether a Hindu family is joint or divided.)
('33) 20 AIR 1933 Lah 451 (452). (Finding that lady is not pardanasbin is one of fact.)
('34) 21 AIR 1934 Nag 44 (45). (Minority is question of fact.)
('34) 21 AIR 1934 Pat 48 (49) (DB). (Finding as to jointness or separateness is one of fact.)
('33) 20 AIR 1933 Oudh 27 (28) (DB). (Finding of non-separation is one of fact.)
('21) 8 AIR 1921 Lah 267 (267) (DB). (Whether a Hindu family is joint or divided.)
('26) 13 AIR 1926 Lah 443 (443) (DB). (Do.)
('23) 10 AIR 1923 Lah 626 (627, 628) (DB).
('28) 109 Ind Cas 458 (459) (Lah). (Tenancy.)
('15) 2 AIR 1915 Lah 279 (279). (Fact that woman has taken to life of immorality.)
('16) 3 AIR 1916 Lah 97 (98) (DB). (Question whether parties follow Mahomedan law.)
('20) 7 AIR 1920 Lah 480 (480) (DB). (Legitimacy.)
('27) 14 AIR 1927 All 410 (411). (Do.)
('25) 12 AIR 1925 Pat 367 (368). (Minority.)
('21) 8 AIR 1921 Lah 380 (381) (DB). (Plaintiff's relationship.)
('27) 14 AIR 1927 Mad 185 (187) (DB). (Whether certain persons acted as heirs or administrators in contracting a certain debt.)
('28) 15 AIR 1928 Nag 150 (151). (Whether a person is a hereditary Joshi.)
('37) 24 AIR 1937 Nag 237 (239) : ILR (1938) Nag 221 (DB). (Findings that a Hindu family is joint and that certain person is its manager—Questions of fact.)
('37) 24 AIR 1937 Sind 312 (315) (DB). (Whether person is manager of property, nature of management and extent of his powers as manager are questions of fact.)
('36) 23 AIR 1936 Cal 269 (273). (Separation of one member of the joint family—Whether others are separate is a question of fact.)
('36) 23 AIR 1936 Pat 129 (129) (DB). (Whether a person is legal heir and agnate.)
('35) 22 AIR 1935 Bom 333 (336). (Question of relationship is one of fact.)
('38) 25 AIR 1938 Cal 724 (728) (DB). (Finding that tenants have occupancy rights and are raiyats.)
('35) 22 AIR 1935 Pat 256 (260) (DB). (Whether plaintiff is son of a certain person.)
('35) 22 AIR 1935 Oudh 80 (81) : 11 Luck 499 (DB). (Question whether plaintiff is legitimate son and heir of a certain person.)
('35) 22 AIR 1935 Lah 108 (109) (DB). (Finding that the parties are related as described in the pedigree table.)
('39) 26 AIR 1939 Lah 309 (309). (Whether a person is a reversioner of another.)
('35) 157 Ind Cas 865 (865) (Lah). (A finding that the plaintiff is not the adopted son is one of fact.)
† ('39) 26 AIR 1939 Nag 260 (261) : I L R (1939) Nag 624 : 1939 Nag L Jour 391 (392). (Whether woman is mistress or is remarried.)
† ('35) 22 A I R 1935 Pat 342 (344) : 14 Pat 785 (SB). (Question whether person is member of a joint undivided family.)
('34) 21 AIR 1934 Lah 968 (969) (DB). (Adoption.)
('35) 22 AIR 1935 All 351 (353). (Finding that *A* is son of *B* is one of fact.)
[*See* ('41) 28 AIR 1941 Nag 100 (101):ILR (1941) Nag 144 (DB). (Minority as a plea for extension of limitation.)]
[But see ('34) 21 AIR 1934 Nag 13 (14). (Disruption of Hindu family—Finding is not one of fact —It is inference of legal effect of facts found.)]

3. ('26) 13 AIR 1926 Nag 389(390):24 Nag L R 68.
4. ('34) 21 AIR 1934 Nag 44 (45).
('34) 21 AIR 1934 Pat 48 (49) (DB). (Finding based on exclusion of evidence.)
5. ('25) 12 AIR 1925 Nag 284 (287).
6. ('26) 13 AIR 1926 Lah 461 (462).
† ('30) 17 AIR 1930 Lah 824 (825) (DB).

Note 43

1. ('27) 14 AIR 1927 Cal 136 (139) (DB).
('18) 5 AIR 1918 Pat 651 (652) (DB).
[*See* ('35) 39 Cal W N 694 (696). (Finding that the holder of a superior interest acquiring an inferior interest intends to keep the two interests separate and that consequently there is no merger, is properly one of fact and cannot be challenged in second appeal.)]
[*See also* ('42) 29 AIR 1942 Mad 716 (717). (Question whether agreement to sell had merged in conveyance is one of fact or of mixed law and fact.)]

Note 44

1. ('27) 14 AIR 1927 Cal 30 (31) (DB).

of the Limitation Act is a mixed question of law and fact.[2]

But the following questions are questions of fact :

(1) Whether a plaintiff filed a prior suit in a wrong Court in good faith and conducted it diligently so as to secure exclusion of time under S. 14 of the Limitation Act.[3]

(2) Whether a person had attained majority at any particular time.[4]

(3) The time requisite for obtaining copies which has to be deducted in calculating the time for preferring an appeal.[5]

(4) Whether there is sufficient cause for extending time under section 5 of the Limitation Act.[6]

45. Existence of legal necessity for, and binding nature of, transaction. — The question of legal necessity for an alienation is ordinarily a question of fact,[1] unless the application of any *principle of law* is also in question, in which case it will be a question of law.[2] As in the case of other findings of fact, the *propriety of the inference* drawn from facts is always a question of law and can be examined in second appeal.[3] The question whether a guardian was justified in entering into a compromise on behalf of a minor,[4] and the question of the sufficiency of notice in connexion with an objection that an award is not binding,[5] are questions of fact. Similarly, the question

† ('39) 26 AIR 1939 Rang 42 (44) (DB).
[*See* ('35) 22 AIR 1935 All 716 (717). (Facts admitted—Question of limitation thereon is one of law.)]
2. ('27) 14 AIR 1927 Pat 256 (256) (DB).
3. ('27) 14 AIR 1927 Lah 909 (910).
4. ('08) 31 Mad 540 (543) (DB).
† ('07) 29 All 29 (32) : 34 Ind App 1 (PC).
5. ('94) 1894 Pun Re No. 6, p. 8 (9).
('18) 5 AIR 1918 Lah 29 (29, 30) : 1918 Pun Re No. 100.
('22) 9 AIR 1922 Lah 423 (423).
6. ('16) 3 AIR 1916 Lah 146 (148) : 1916 Pun Re No. 88.
† ('31) 18 AIR 1931 All 28 (28) (DB).
('30) 123 Ind Cas 83 (83) (Lah).
[*See* ('30) 17 AIR 1930 Lah 1068 (1070). (Judicial discretion wrongly exercised in refusing extension —Refusal on ground that appeal bad on merits —High Court interfered.)
('30) 17 AIR 1930 Oudh 184 (184). (Grounds for refusal of extension invalid — Court interfered in second appeal.)]

Note 45

1. ('43) 30 AIR 1943 All 63 (64) : I L R (1943) All 171 (DB).
('43) 30 AIR 1943 Cal 203 (204) (DB).
('43) 30 AIR 1943 Lah 33 (37) (FB).
('43) 30 AIR 1943 Mad 57 (58).
('41) 28 AIR 1941 All 31 (38).
('41) 28 AIR 1941 Nag 306 (306) : I L R (1942) Nag 680.
('21) 8 AIR 1921 Lah 304 (307) (DB).
('32) 19 AIR 1932 Lah 473 (474) : 13 Lah 826. (Absence of legal necessity.)
† ('33) 20 AIR 1933 Lah 343 (343) : 14 Lah 584.
('33) 20 AIR 1933 Oudh 31 (32): 8 Luck 182 (DB).
('32) 33 Pun L R 607 (608) (DB).
('14) 1 AIR 1914 Lah 120 (120).
('14) 1 AIR 1914 Lah 314 (314).
('15) 2 AIR 1915 Lah 374 (375) (DB).
† ('22) 9 AIR 1922 Lah 398 (398) (DB).
† ('23) 10 AIR 1923 All 20 (21) (DB).
('23) 10 AIR 1923 All 28 (28) (DB).
('23) 10 AIR 1923 Lah 669 (670).
1 Hay 257.
('24) 11 AIR 1924 Lah 685 (685).
('27) 14 AIR 1927 Lah 605 (607) : 8 Lah 340.
('34) 21 AIR 1934 Lah 517 (519).
('35) 22 AIR 1935 Mad 431 (432). (Alienation by Hindu father—Question whether debts are incurred for necessary purposes binding on the family is one of fact.)
('37) 24 A I R 1937 Nag 330 (332) : I L R (1937) Nag 111.
† ('36) 23 AIR 1936 Pat 275 (278) (DB).
('35) 22 AIR 1935 Pat 175 (176) (DB). (Alienation by Hindu widow whether for legal necessity or not, is a question of fact.)
[*See* ('36) 23 AIR 1936 Pat 426 (428). (Legal necessity is a mixed question of law and fact.)]
2. † ('25) 12 AIR 1925 Oudh 557 (557) : 27 Oudh Cas 329. (Alienation by Hindu widow — Enquiry by alienee as to legal necessity—Sufficiency of enquiry is question of law.)
('12) 13 Ind Cas 945 (946) (DB) (All).
('27) 14 AIR 1927 Lah 896 (897).
† ('36) 23 AIR 1936 Pat 275 (279, 280) (DB). (Question whether the lower Appellate Court misdirected itself in presuming that there was legal necessity is a question of law.)
('35) 22 AIR 1935 Lah 440 (440). (Hindu widow — Question whether provision for marriage of daughter's daughter is a legal necessity.)
3. † ('26) 13 AIR 1926 Nag 332 (333).
('26) 13 AIR 1926 Nag 486 (487).
4. † ('25) 12 AIR 1925 Mad 1285 (1287) (DB).
5. ('27) 14 AIR 1927 Cal 619 (621) (DB).

whether a family arrangement,[6] or an alienation by the guardian is binding on a minor, is a question of fact.[7] The existence of an antecedent debt is also a question of fact.[8] It has been held in the undermentioned case[9] that the question whether the guardian of a minor is justified in alienating the property of the minor for necessity is a mixed question of law and fact. A finding that an elder brother had no authority to bind his younger brother with a promise to pay a barred debt is one of fact.[10]

46. Existence of nuisance. — A finding that no nuisance has been proved,[1] a finding that a public lane has not been narrowed so as to cause damage to the residents in the lane,[2] a finding that a latrine is not likely to cause pollution to the water of a well,[3] or would constitute a nuisance[4] and a finding that water flowing through a municipal drain into the plaintiff's lake is polluted and would cause injury to crops and fish[5] are all questions of fact.

47. Interpretation and applicability of the law. — Questions relating to the interpretation and applicability of law are obviously questions of law. Thus, the question whether correct tests have been applied in determining the infringement of legal rights,[1] or whether on the facts proved a relief prayed for should be granted,[2] or, whether in the circumstances of a case an appeal lies,[3] or as to what constitutes exclusion from a joint estate,[4] or whether an estoppel arises on the facts found,[5] or whether the requisites for *res judicata* are proved,[6] or whether on the facts proved a person can be called a "trespasser"[7] or whether the occasion on which a libellous statement is alleged to have been made was a privileged one,[8] is a question of law. Similarly, the question whether a particular section of an Act applies or not, to the facts proved in a case, is a question of law.[9] Thus, the question whether a stipulation in a deed is by way of penalty under S. 74 of the Indian Contract Act,[10] is a question of law.

The following questions have been held to be mixed questions of law and fact :

(1) Whether an alteration in a document is 'material' or not.[11]

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6. ('21) 8 AIR 1921 Lah 291 (291) (DB).
7. ('41) 28 AIR 1941 Oudh 226 (228) (DB).
('06) 34 Cal 36 (38): 4 Cal L Jour 485 (487) (DB).
8. ('26) 13 AIR 1926 Oudh 33 (33, 34).
9. ('34) 21 AIR 1934 Lah 329 (330).
10. ('43) 30 AIR 1943 All 63 (64) : I L R (1943) All 171 (DB).

Note 46

1. ('25) 12 AIR 1925 Lah 424 (424).
2. † ('29) 16 AIR 1929 All 504 (505).
3. ('26) 13 AIR 1926 Nag 50 (50).
4. ('41) 28 AIR 1941 Mad 650 (650).
5. ('41) 28 AIR 1941 All 78 (79) : ILR (1941) All 141 (DB).

Note 47

1. ('14) 1 AIR 1914 P C 45 (47) : 42 Cal 46 : 41 Ind App 180 (PC).
2. ('13) 35 All 487 (498) : 40 Ind App 182 (PC).
3. ('14) 1 AIR 1914 Cal 592 (594) (DB).
4. ✠ ('17) 4 AIR 1917 P C 77 (77) (PC).
5. ('18) 5 AIR 1918 Lah 281 (282) : 1918 Pun Re No. 46.
6. † ('33) 20 AIR 1933 Lah 606 (609).
7. ('16) 3 AIR 1916 Pat 381 (382):1 Pat L Jour 47.
8. ('39) 26 AIR 1939 Pat 190 (193) (DB).
9. ('42) 29 AIR 1942 Oudh 499 (501) (DB). (Mortgage deed—Whether S. 77 or S. 76 (b), T. P. Act, applies is question of law.)
('23) 10 AIR 1923 All 583 (584) : 45 All 520 (DB).
('26) 13 AIR 1926 Pat 495 (497) (DB). (Whether facts amount to "notice" under the Bengal Tenancy Act.)
('29) 16 AIR 1929 Cal 366 (367). (Division of tenancy under S. 88 of the Bengal Tenancy Act.)
('15) 2 AIR 1915 Lah 143 (143) : 1915 Pun Re No. 69 (DB). (Whether building is a "shop" within S. 13, Punjab Pre-emption Act.)
('30) 17 AIR 1930 Lah 141 (142). (Whether transfer is a "sale" under the Punjab Pre-emption Act.)
('37) 24 AIR 1937 Lah 284 (285). (Question whether property forms part of village or urban immovable property under the Punjab Pre-emption Act, S. 3.)
† ('38) 25 AIR 1938 Pat 622 (624) (DB). (Finding that on particular evidence, service of notice under S. 7, Bihar and Orissa Public Demands Recovery Act, is valid is decision on point of law.)
('39) 26 AIR 1939 Sind 97 (98) : I L R (1939) Kar 269 (DB). (Question, whether a transfer comes within S. 53, Transfer of Property Act, can be considered in second appeal.)
[*See* ('13) 20 Ind Cas 383 (384) (DB) (Cal). (But a question of sufficiency of notice is a question of fact.)]
10. ('21) 8 AIR 1921 Lah 212 (213).
† ('25) 12 AIR 1925 Mad 84 (84).
[*See also* ('25) 12 AIR 1925 Mad 177 (179).]
11. ('25) 12 AIR 1925 Nag 243 (244).

(2) What is the reasonable time for presentment for payment of a bill of exchange.[12]

(3) What are "necessaries" within the meaning of the term, under S. 68 of the Indian Contract Act.[13]

(4) Whether there has been a proper investigation of a claim preferred under O. 21 R. 58 of the Code so as to make an order therein binding on the claimant.[14]

(5) Whether a deposit of decretal amount by an unregistered purchaser of a transferable under-tenure is sufficient under the Sale of Under Tenures Act (VIII of 1865).[15]

(6) Whether there was a partnership as defined in the Contract Act.[16]

However, where the law and its application are clear and the only question relates to *facts and their proof*, the finding will be a finding of fact.[17]

48. Abandonment. — Abandonment is a question depending on the nature of evidence adduced in each case.[1] It is largely a question of fact in the sense that the lower Court's inference for or against abandonment will not, ordinarily, be interfered with in second appeal.[2] But the High Court can always consider the *propriety of the lower*

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12. ('29) 16 AIR 1929 Lah 577 (577) : 11 Lah 34 (DB).
13. ('24) 11 AIR 1924 Nag 360 (361).
14. ('17) 4 AIR 1917 Oudh 99 (100): 19 Oudh Cas 357.
15. ('13) 20 Ind Cas 337 (339) (DB) (Cal).
16. ('22) 9 AIR 1922 Nag 96 (97).
17. ('42) 29 AIR 1942 Pat 279 (281) (DB). (Questions whether the requirements of O. 21, Rr. 100 and 101 have been satisfied and whether the applicant was in possession and was subsequently dispossessed are questions of fact.)
('29) 16 AIR 1929 Lah 154 (155). (Finding that a partnership is dissolved.)
† ('27) 14 AIR 1927 All 215 (215) (DB). (Whether notice under Railways Act, S. 140 was duly served.)
('16) 3 AIR 1916 Cal 554 (557): 42 Cal 888 (DB). (Whether "silk" is manufactured or not within the meaning of Sch. II of the Railways Act.)
('07) 34 Cal 718 (722) : 34 Ind App 133 : 11 Cal W N 794 (800) (PC). (Whether the erection of an indigo factory will render land unfit for agriculture.)
('20) 7 AIR 1920 All 246 (247) : 42 All 319 (326) (DB). (Whether a suit was contentious within the meaning of S. 52, Transfer of Property Act.)
('21) 63 Ind Cas 169 (170) (DB) (Cal). (Fraudulent nature of transfer.)
('29) 16 AIR 1929 All 330 (331). (Question whether the particular trees could or could not be removed.)
('23) 10 AIR 1923 Lah 443 (444). (Whether a place is a town.)
('26) 13 AIR 1926 Lah 542 (542). (Town or village.)
('21) 8 AIR 1921 Lah 201 (202) (DB). (Factum of marriage between the parties.)
('24) 11 AIR 1924 Lah 188 (189) (DB). (Do.)
('14) 1 AIR 1914 Lah 377 (378). (Do.)
('90) 1890 Pun Re No. 135. (Marriage whether had taken place by Chader Andazi.)
('07) 9 Bom L R 382 (387) (DB). (Sufficiency of accommodation for residence of Hindu widow.)
† ('22) 9 AIR 1922 Cal 429 (434) : 49 Cal 477 (DB). (Whether or not a particular illness constitutes Marz-ul-mout.)
('24) 11 AIR 1924 Lah 382 (382). (Existence of wakf.)
('17) 4 AIR 1917 Mad 671 (671) (DB). (Misjoinder.)
('30) 17 AIR 1930 Cal 315 (318) (DB). (Notice to quit.)
† ('26) 13 AIR 1926 Lah 21 (23). (Question whether an Ala malik had rights in Shamilat.)
('27) 14 AIR 1927 Lah 879 (880). (Whether the plaintiff had sufficient cause for not producing his evidence under O. 17 R. 1, C. P. Code.)
('39) 26 AIR 1939 Pat 161 (161) (DB). (Tenant committing breach of S. 22, Chota Nagpur Tenancy Act, by using land for building huts—Finding of Court that land has been rendered unfit for tenancy is one of fact.)
[*See* ('26) 13 AIR 1926 All 1 (3): 48 All 126 (DB). (But the form of marriage is a question of law.)]
[*See also* ('31) 18 AIR 1931 Oudh 344 (344) (DB). (Finding that a gift is invalid under S. 53, T. P. Act.)]

Note 48

1. ('10) 1910 Pun W R No. 13, page 34.
† ('35) 22 AIR 1935 Cal 80 (82) : 61 Cal 937.
2. ('13) 20 Ind Cas 198 (199) (DB) (Cal).
('34) 21 AIR 1934 Lah 163 (163).
('16) 3 AIR 1916 Cal 155 (156) (DB).
('19) 6 AIR 1919 Lah 299 (299) : 1919 Pun Re No. 41 (DB).
('21) 8 AIR 1921 Lah 162 (162).
('24) 11 AIR 1924 Cal 366 (367) (DB).
† ('25) 12 AIR 1925 Pat 741 (743) : 4 Pat 838 (DB).
('26) 13 AIR 1926 Cal 751 (752).
('29) 16 AIR 1929 Cal 120 (121).
('28) 15 AIR 1928 Lah 924 (925) : 9 Lah 487 (DB).
('32) 19 AIR 1932 Cal 405 (408) (DB). (Mixed question of law and fact.)

Court's inference from the facts established by evidence.[3] And such a question, viz., whether the facts found warrant the inference of abandonment, will be a question of law.[4]

49. Foreign law. — What a foreign law is on any particular point is a question of fact.[1]

50. Acquisition of easement and customary rights of privacy. — A finding as to the acquisition of a right of easement[1] or as to the infringement thereof[2] is a question of fact. Similarly, a question as to whether an easement is one of *necessity*,[3] or as to whether a customary right of privacy exists in a particular place,[4] or as to whether such right has been infringed,[5] is a question of fact.

51. Miscellaneous — *Representation* — It has been held by the High Court of Madras that, where the facts are known, the question whether a Hindu son was effectively represented in a former suit, is an inference of law from facts, and is therefore a question of law.[1] The High Court of Calcutta has, however, held that the question whether one heir of a tenant represents another or the tenancy, is a question of fact.[2]

Quantum of damages. — The measure of damages awardable in a particular case is a question of fact.[3]

Question of market-value of property. — The question of the market-value of a property is a question of fact.[4]

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3. See Note 28.
4. ('30) 17 AIR 1930 Lah 215 (215).
('21) 8 AIR 1921 Lah 229 (231).
† ('28) 15 AIR 1928 Cal 891 (891) (DB).
('36) 23 AIR 1936 All 553 (554). (Abandonment of house.)
('35) 22 AIR 1935 Cal 80 (82) : 61 Cal 937.

Note 49

1. ('26) 13 AIR 1926 Mad 218 (219).

Note 50

1. ('42) 29 AIR 1942 Cal 505 (507) : ILR (1942) 2 Cal 427. (Public right of way — Whether there has been dedication is question of fact.)
('42) 29 AIR 1942 Mad 392 (394).
('30) 17 AIR 1930 Lah 177 (177).
('69) 11 Suth W R 285 (286) (DB). (Right of user.)
('24) 11 AIR 1924 Lah 488 (489). (Finding that no right of way was granted.)
[*See also* ('35) 22 AIR 1935 Lah 346 (346).]
2. ('28) 15 AIR 1928 Lah 980 (991, 982). (Finding as to deprivation of light not inconveniencing user so as to entitle him to injunction is a finding of fact.)
('31) 18 AIR 1931 Mad 128 (131) (DB). (Whether a particular user of passage right imposes additional burden on servient heritage.)
('35) 22 AIR 1935 Lah 558 (559). (Suit for infringement of right to easement of light and air—Finding that if defendant builds in particular way, plaintiff will get sufficient light is one of fact.)
3. ('27) 14 AIR 1927 Mad 963 (963). (Easement of necessity.)
4. ('21) 8 AIR 1921 Sind 155 (156) : 16 Sind L R 17. (Customary right of privacy.)
5. ('10) 6 Ind Cas 398 (399) (DB) (All). (Right of privacy.)
('29) 16 AIR 1929 Oudh 535 (536) (DB). (That there had been no fresh or substantial interference with the plaintiff's former right of privacy was held to be a finding of fact.)

Note 51

1. ('27) 14 AIR 1927 Mad 406 (408).
2. † ('11) 10 Ind Cas 116 (116) (DB) (Cal).
('26) 13 AIR 1926 Cal 517 (518).
('27) 14 AIR 1927 Cal 81 (82) (DB).
('29) 16 AIR 1929 Cal 28 (30).
3. ('41) 28 AIR 1941 Mad 259 (262) : ILR (1941) Mad 406 (DB). (Concurrent finding as to amount of damages — Quantum of damages cannot be questioned in second appeal.)
(1865) 2 Suth W R 235 (236) (DB).
('34) 21 AIR 1934 All 392 (393) (DB). (The High Court however dealt with the question in second appeal.)
('34) 21 AIR 1934 Pat 16 (18).
('33) 20 AIR 1933 Nag 29 (30) : 28 Nag L R 320. (But the finding may be vitiated in special circumstances by matters which raise a question of law.)
('68) 10 Suth W R 164 (165) (DB).
('06) 3 Cal L Jour 140 (141) (DB).
† ('09) 31 All 333 (334, 335) (DB).
† ('11) 9 Ind Cas 984 (985) (DB) (All).
('21) 8 AIR 1921 Pat 341 (341) (DB).
('12) 17 Ind Cas 517 (517) All). (Reasonable compensation.)
('32) 19 AIR 1932 Nag 118 (119) : 28 Nag L R 142 (DB).
('36) 23 AIR 1936 Nag 70 (70). (Adequacy of damages, ordinarily a question of fact.)
[But see ('14) 1 AIR 1914 Lah 531 (534) : 1915 Pun Re No. 1.]
4. ('26) 13 AIR 1926 Oudh 68 (69).
('29) 16 AIR 1929 Lah 137 (138).
('29) 16 AIR 1929 Oudh 244 (246) : 4 Luck 643 (DB).
('30) 17 A I R 1930 All 363 (365) : 52 All 532 (DB).

The following have also been held to be questions of fact:

(1) Whether a caste was split up or not.[5]

(2) Whether two houses have a common entrance.[6]

(3) Whether a person is the owner of a particular property.[7]

(4) Whether a particular standard of measurement prevails in a particular place.[8]

(5) Whether certain lands appertain to one village or another.[9]

(6) Whether parties agreed to a certain decree being passed.[10]

(7) Question as to what portion of a property is mortgaged.[11]

(8) Whether a *kotha* was built within 12 years.[12]

(9) Whether a partnership was dissolved.[13]

(10) Question of non-access.[14]

(11) Whether a certain unpublished manuscript was handed over to a party and whether it was improperly used by him in breach of confidence.[15]

See also the cases cited below.[16]

52. Finding of fact binding in second appeal. — An error of fact is not one of the grounds of second appeal mentioned in S. 100. The reason, as has already been pointed out in Note 2, is that public interest requires that there should be an end to litigation even at the risk of occasional error, and Ss. 100 and 101 taken together distinctly prohibit second appeals on questions of fact,[1] unless in the process of arriving at a finding of fact the Court has committed an *error of law* or a substantial error of procedure.[2] Thus, the High Court can neither investigate the grounds on which the finding has been

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5. ('26) 13 AIR 1926 Bom 69 (70) : 50 Bom 124 (DB).

6. ('25) 12 AIR 1925 Lah 257 (258) (DB).

7. ('26) 13 AIR 1926 Mad 1052 (1053) (DB).
('33) 20 AIR 1933 All 603 (604) (DB).

8. ('18) 5 AIR 1918 P C 92 (93, 94) : 46 Cal 189 : 45 Ind App 183 (PC).
('21) 8 AIR 1921 Cal 220 (222) (DB). (As to the length of the unit of measurement on the basis of which rent has to be paid.)

9. ('29) 16 AIR 1929 Oudh 524 (524) (DB).
('34) 21 AIR 1934 Oudh 449 (450) (DB).

10. ('29) 16 AIR 1929 Bom 68 (69) (DB).

11. ('34) 21 AIR 1934 All 152 (155) : 56 All 496 (DB).

12. ('34) 21 AIR 1934 Lah 529 (530) (DB).

13. ('33) 20 AIR 1933 Pat 78 (79) : 12 Pat 139 (DB).
('34) 21 AIR 1934 Lah 557 (557) (DB).
† ('35) 22 AIR 1935 All 1008 (1010) (DB). (Question of dissolution of partnership is mixed question of law and fact.)

14. † ('34) 21 AIR 1934 Nag 124 (125).
('35) 22 AIR 1935 Lah 628 (629, 630).

15. ('33) 20 AIR 1933 P C 26 (27) (PC).

16. ('41) 28 AIR 1941 Mad 506 (507). (Finding that the election was not held in fact is a finding of fact.)
('41) 28 AIR 1941 Mad 699 (700) :ILR (1941) Mad 970 (DB). (Oral authority to widow to adopt.)
('41) 28 AIR 1941 Pat 404 (404). (Finding as to area of holding is one of fact.)
('41) 28 AIR 1941 Pat 422 (427) : 20 Pat 497 (DB). (Whether channel is natural stream is question of fact.)
('41) 28 AIR 1941 Pat 449 (450) (DB). (Question whether deed was acted upon is one of fact.)
('40) 27 AIR 1940 All 414 (414). (Question of consideration in pre-emption suit.)
('37) 24 AIR 1937 Nag 139 (140) : ILR (1937) Nag 214.

Note 52

1. ('42) 29 AIR 1942 Mad 632 (633) : ILR (1943) Mad 47 (DB). (Finding that person was guilty of fraud supported by evidence is conclusive in second appeal.)
('40) 27 AIR 1940 Pat 245 (246) (DB). (Finding that a document was tampered with is a finding of fact.)
('40) 27 AIR 1940 Pat 324 (327): 19 Pat 739 (FB).
('14) 1 AIR 1914 P C 87 (89) : 37 Mad 443 : 41 Ind App 258 (PC).
† ('92) 19 Cal 249 (252) : 19 Ind App 1 (PC).
('93) 20 Cal 93 (99) : 19 Ind App 228 (PC).

2. See Note 11.
('34) 21 AIR 1934 Cal 633 (634): 61 Cal 365. (Misconception of or mistake in consideration of evidence.)
('36) 23 A I R 1936 All 443 (448) : 58 All 889 (DB).

arrived at[3] nor interfere with it.[4] It may be that the evidence is unsatisfactory or insufficient[5] or that it has not been properly appreciated;[6] it may be that the High Court is inclined to take a different view[7] or that the decision is open to doubt;[8] it may even be that the finding may seem to be grossly and inexcusably erroneous[9] : still if there is some (legal) evidence for the finding,[10] and there is no such error or defect as mentioned above, then the High Court cannot entertain a second appeal on the finding. The findings need not be concurrent.[11] The fact that the trial Court and the lower appellate Court have

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3. ('27) 14 AIR 1927 P C 117 (119) : 54 Ind App 196 : 54 Cal 586 (PC).
('34) 21 AIR 1934 All 990 (992).
('19) 6 AIR 1919 Cal 672 (673) (DB).
('70) 13 Suth W R 50 (51) (DB). (Weight to be attached to evidence.)
('30) 17 AIR 1930 Mad 590 (592).

4. ('43) 30 AIR 1943 All 183 (184) (DB). (High Court will not interfere on ground that finding was contrary to pleadings.)
('43) 30 AIR 1943 Nag 129 (138) : ILR (1943) Nag 42 (DB). (Findings on issues remanded.)
('41) 28 AIR 1941 Pat 90 (93) : 20 Pat 162 (DB). (Objection that lower Court's finding was arithmetically incorrect not allowed.)
('40) 27 AIR 1940 Cal 532 (534) (DB). (Positive evidence on record justifying finding of lower appellate Court—Mere fact that Judge did not refer to particular contradiction does not justify High Court in rejecting his finding.)
('89) 16 Cal 753 (755) : 16 Ind App 125 (PC).
('90) 17 Cal 291 (298) : 16 Ind App 233 (PC).
('18) 5 AIR 1918 P C 92 (94) : 46 Cal 189 : 45 Ind App 183 (PC).
†('27) 14 AIR 1927 PC 117 (119) : 54 Ind App 196 : 54 Cal 586 (PC).
('28) 15 AIR 1928 P C 219 (221) (PC).
('35) 22 AIR 1935 All 329 (333) : 57 All 85 (DB). (But if lower Court has not discussed evidence of witnesses, it may differ from finding of the lower court.)

5. ('43) 30 AIR 1943 Pat 180 (181) : 22 Pat 99 (DB). (Finding whether the defendants purchased certain land.)
('42) 29 AIR 1942 Pat 429 (430). (Evidence uncorroborated.)
('41) 28 AIR 1941 Pat 371 (371). (Finding that plaintiff has not proved rate of rent payable by defendant cannot be interfered with in second appeal even if document by which rate was sought to be proved was rejected by lower Court on unsatisfactory reasonings.)
('92) 19 Cal 249 (252) : 19 Ind App 1 (PC).
('15) 2 AIR 1915 Mad 680 (681) (DB).
('18) 5 AIR 1918 Cal 590 (594, 595) (DB).
('23) 10 AIR 1923 Cal 279 (279) (DB).
('26) 13 AIR 1926 Cal 941 (943) (DB).
('28) 111 Ind Cas 376 (376) (DB) (Oudh).
('28) 15 AIR 1928 Oudh 353 (354) (DB).
('29) 16 AIR 1929 Pat 98 (99) (DB).

6. ('42) 29 AIR 1942 Mad 730 (730).
('40) 27 AIR 1940 Pat 310 (311) : 19 Pat 382 (DB).
('21) 8 AIR 1921 Lah 284 (286) (DB).
('36) 23 AIR 1936 Pat 270 (272) : 15 Pat 422 (DB). (Lower Court erring in its reasoning and arguing in a circle.)
('35) 22 AIR 1935 Bom 371 (376) (DB).

7. ('39) 26 AIR 1939 Lah 548 (553) (DB).
('29) 16 AIR 1929 All 885 (886) (DB).
('33) 20 AIR 1933 Nag 185 (186).
('33) 20 AIR 1933 Oudh 115 (116).

8. ('17) 4 AIR 1917 Lah 363 (364) : 1917 Pun Re No. 89 (DB).
('39) 26 AIR 1939 Lah 12 (13).
('39) 26 AIR 1939 Pat 386 (386).

9. ('41) 28 AIR 1941 Lah 345 (347).
('41) 22 Pat L Tim 196 (198). (Extremely unsatisfactory and erroneous.)
('40) 27 AIR 1940 Lah 118 (119). (Even erroneous finding cannot be interfered with.)
('40) 27 AIR 1940 Pat 675 (676).
('40) 27 AIR 1940 Rang 8 (8) : 1940 Rang L R 172.
('40) 27 AIR 1940 Rang 126 (128) : 1940 Rang L R 180 (DB).
('29) 16 AIR 1929 P C 190 (193) : 56 Ind App 280 : 25 Nag L R 121 (PC).
('29) 16 AIR 1929 P C 152 (155): 56 Ind App 223: 52 Mad 538 (PC).
†('91) 18 Cal 23 (30) : 17 Ind App 122 (PC).
('93) 20 Cal 93 (99) : 19 Ind App 228 (PC).
Also see Note 23.

10. ('42) 29 AIR 1942 Mad 730 (730).
('41) 28 AIR 1941 Lah 271 (272) (DB).
('29) 16 AIR 1929 P C 286 (287) : 56 Ind App 388 (PC).
†('29) 16 AIR 1929 P C 190 (193) : 56 Ind App 280 (PC).
('87) 14 Cal 740 (748) : 14 Ind App 101 (PC).
†('39) 26 AIR 1939 Lah 284 (285) (DB).
('35) 22 AIR 1935 Cal 210 (211) (DB). (Finding of fact based on evidence is final.)
('35) 22 AIR 1935 Lah 389 (390) : 16 Lah 1060 (DB).
('35) 22 AIR 1935 Lah 641 (641): 17 Lah 280 (DB).
✠('35) 22 AIR 1935 Lah 765 (769): 17 Lah 190 (DB).
('35) 22 AIR 1935 Mad 26 (26).
('35) 22 AIR 1935 Oudh 30 (33) : 10 Luck 250 (DB).
('36) 23 AIR 1936 Cal 22 (23) (DB). (Conclusions of the lower Courts on evidence partly documentary are as binding in second appeal as conclusions of oral evidence.)
('37) 24 AIR 1937 Rang 225 (226) (DB).
('36) 23 AIR 1936 Rang 488 (490) (DB).
('39) 26 AIR 1939 Nag 210 (211) : ILR (1939) Nag 636.
[*See* ('33) 20 AIR 1933 Mad 460 (460). (Civil Miscellaneous appeals stand on the same footing as second appeal—They can be argued only on question of law. NOTE.—It is not clear from the report from what kind of order the appeal had been filed.)

11. ('28) 15 AIR 1928 Rang 303 (303); 6 Rang 586.
('37) 24 AIR 1937 Oudh 165 (166) : 12 Luck 516 (DB).

differed on the point is immaterial;[12] nor would the fact that the finding has been based by the lower Appellate Court on *additional evidence* recorded by it,[13] or on evidence treated as inadmissible by the trial Court,[14] give the High Court a right to interfere with it. Further, though the lower Appellate Court should not (ordinarily) reject witnesses accepted by the trial Court in respect of credibility, still the fact that it has rejected witnesses accepted by the trial Court will be no ground for interference on a question of fact, when the lower Appellate Court has given satisfactory reasons for doing so.[15]

It has also been held that if a finding of fact given by the trial Court has not been challenged in the first appeal, it cannot be challenged in second appeal on any ground.[16]

See also the undermentioned case.[17]

See also section 107, Notes 12 to 15.

53. Finding of facts, when not binding in second appeal. — As observed in Notes 2 and 52, sections 100 and 101 prohibit the entertainment of a second appeal on the ground of an error on a question of *fact*. But where in the process of arriving at the finding of fact the lower Appellate Court has committed an *error of law* such as has been referred to in Notes 13 to 20 or has adopted an erroneous or defective procedure such as has been referred to in Notes 23 to 27, the finding of fact will be open to attack on the ground of such error or defect.[1] Thus, a finding of fact can be set aside in second appeal in the following cases :

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12. ('40) 27 AIR 1940 Rang 126 (127) : 1940 Rang L R 180 (DB). (Finding of fact by lower appellate Court is binding on High Court in second appeal not because the finding is a concurrent finding.)
('15) 2 AIR 1915 Oudh 132 (132).
('32) 33 Pun L R 628 (629) (DB).
('16) 3 AIR 1916 All 181 (182)(DB).
('20) 7 AIR 1920 Mad 789 (790) (DB).
('27) 14 AIR 1927 Nag 158 (159).
[*See also* ('37) 24 AIR 1937 Sind 36 (36). (Lower Appellate Court considering a case from a different aspect from that of the trial Court.)]

13. ('85) 12 Cal 37 (38) (DB).
('15) 2 AIR 1915 Cal 568 (569) (DB).
('32) 19 AIR 1932 Lah 93 (94). (So also refusal to admit additional evidence in appeal is no ground for interference in second appeal unless lower Court exercised discretion perversely or contrary to law.)
('35) 22 AIR 1935 Pat 105 (107).

14. † ('33) 20 AIR 1933 Rang 35 (36, 37).

15. ('25) 12 AIR 1925 Rang 117 (117).
('23) 10 AIR 1923 P C 156 (158) : 1 Rang 451 (PC).
Also see S. 107 N. 14.

16. ('29) 16 AIR 1929 Rang 213 (214).
('31) 18 AIR 1931 Nag 147 (148). (Want of enquiry into circumstances evidencing legal necessity for alienation by Hindu widow not challenged in the lower Appellate Court—Matter cannot be re-opened in second appeal.)
[*See also* ('33) 20 AIR 1933 Pat 270 (271).]

17. ('40) 27 AIR 1940 Lah 118 (119). (As the Court was not sure that it would have come to the same finding on the question of fact as the lower appellate Court, the parties were left to bear their own costs throughout.)

Note 53

1. ('43) 30 AIR 1943 All 82 (84). (Saying that certain papers on the record are something which they obviously are not — In such case there is an obvious mistake of law just as there is a mistake of law if a decision on facts has been arrived at on evidence which was inadmissible and hence can be questioned in second appeal.)
('43) 30 AIR 1943 Mad 38 (39). (Requiring higher standard of proof than laid down by Evidence Act.)
('41) 28 AIR 1941 All 289 (289). (Question of fact decided without reference to evidence and as if it were question of law.)
('41) 28 AIR 1941 Cal 88 (89). (Finding based on untenable view of law.)
('41) 45 Cal W N 177 (180). (Wrong onus of proof —Evidence of only one side considered.)
('41) 28 AIR 1941 Pat 118 (127,128)(DB). (Finding as to stream being artificial based on incorrect view as to what in law constitutes natural channel.)
('40) 27 AIR 1940 Lah 329 (331). (Lower Appellate Court's finding of fact is binding on High Court only when it is honest, is arrived on facts uninfluenced by extraneous considerations, is based on correct appreciation of material on record and is based on evidence and not on surmises and conjectures.)
('40) 27 AIR 1940 Oudh 35 (37) : 15 Luck 191 (DB). (Evidence not legally sufficient.)
('24) 11 AIR 1924 Oudh 154 (155).
('33) 20 AIR 1933 Mad 565 (568).
('02) 6 Cal W N 185 (188) (DB).
('15) 2 AIR 1915 Lah 156 (157). (Ignoring patent facts and principles established by Courts for dealing with cases of old alienations.)
('23) 10 AIR 1923 Lah 41 (42). (Mistake of rules and maxims relating to legal necessity for an alienation under Hindu law.)
('23) 10 AIR 1923 Lah 660 (661). (Do.)
('25) 12 AIR 1925 Oudh 740 (741). (Do.)

(1) Where it is not based on any evidence or on legal evidence,[2] or on a judicial

(1863) 10 Moo Ind App 151 (164) (PC). (Finding that if property had not been sold it must have been mortgaged.)
('29) 16 AIR 1929 All 557 (558). (Mistake as to the nature and quantum of evidence required.)
('29) 16 AIR 1929 Lah 772 (773). (Erroneous presumption of law.)
('13) 17 Cal W N 494 (495) (DB). (Disregarding a legitimate presumption.)
('28) 15 AIR 1928 Cal 751 (752) (DB). (Do.)
('24) 11 AIR 1924 Lah 689 (690). (Do.)
('25) 12 AIR 1925 Nag 270 (271). (Do.)
† ('28) 15 AIR 1928 All 16(18): 50 All 145(DB). (Do.)
('15) 2 AIR 1915 Mad 1113 (1119) : 39 Mad 304 (DB). (But where a presumption which a Court ought to raise is fixed by no rule of law the privilege of raising it entirely rests with the Court of fact and the High Court cannot in second appeal interfere with it.)
('09) 4 Ind Cas 495 (497) (DB) (Lah). (Misapplication of the burden of proof.)
('24) 11 AIR 1924 Pat 310 (310) : 2 Pat 919 (DB). (Do.)
('30) 17 AIR 1930 Lah 97 (98). (Finding of fact based entirely on presumption arising out of a rule of Mahomedan law.)
('30) 17 AIR 1930 Oudh 17 (18, 19). (Finding of fact based entirely on presumption—Validity of presumption can be gone into.)
† ('94) 21 Cal 504 (512) : 21 Ind App 39 (PC).
('25) 12 AIR 1925 Mad 1226 (1228). (But misconstruction of documents not affecting finding will not vitiate finding of fact.)
('11) 9 Ind Cas 4 (4) (Cal). (And a solitary statement securing to throw onus on the wrong party while the whole evidence was considered does not vitiate the finding of fact.)
('09) 4 Ind Cas 329 (330) (DB) (Cal). (And it is not sufficient ground for second appeal that the lower Appellate Court has misunderstood the result of the first Court's local investigation or that it has erred in the importance attached to certain documents which were admissible in evidence.)
† ('05) 32 Cal 719 (723, 724) (DB). (And no second appeal lies because some portion of the evidence may be in writing and the Judge makes a mistake as to its meaning.)
† ('24) 11 AIR 1924 Lah 719 (719). (Reliability of entries apart from construction is purely a question of fact.)
('35) 22 AIR 1935 All 774 (776). (A finding of fact which has been arrived at in complete disregard of the legal propositions involved.)
('34) 21 AIR 1934 Lah 662 (662) (DB). (Finding not binding if based on incorrect interpretation of document and on plea which did not arise in the case.)
('34) 21 AIR 1934 Nag 253 (254, 255). (Finding based on wrong view of burden of proof or on one sided examination of evidence.)
('38) 25 AIR 1938 Lah 182 (183) (DB). (Appellate Court erring in law in arriving at conclusion upon facts.)
('38) 25 AIR 1938 Cal 763 (765). (Failure to attach presumption under S. 90, Evidence Act.)
('38) 25 AIR 1938 Cal 541 (542) (DB). (Failure to appreciate legal effect of recitals of necessity in ancient documents and omission to consider other documents.)
('38) 25 AIR 1938 Lah 760 (762). (Misapplication of rule as to burden of proof.)
('36) 19 Nag L Jour 301 (304). (Onus wrongly laid.)
('36) 23 AIR 1936 Nag 130 (132) : I L R (1936) Nag 142. (Wrong basis regarding onus of proof.)
('36) 23 AIR 1936 Lah 1005 (1006). (Wrong assumptions.)
† ('36) 23 AIR 1936 Pat 185 (187) (DB). (Ignoring presumption of correctness attaching to the record of rights.)
('36) 23 AIR 1936 Lah 788 (789). (Finding of fact based on presumption which cannot be made under S. 90, Evidence Act.)
('38) 25 AIR 1938 Lah 303 (304). (Finding as to relationship vitiated by misapprehension of pedigree table.)
('38) 25 AIR 1938 Nag 385 (388) : I L R (1939) Nag 324. (Misapplication of law of evidence.)
('38) 25 AIR 1938 Mad 253 (254) (DB). (Wrong view as to presumption — Evidence approached from a wrong standpoint.)
('34) 21 AIR 1934 Lah 309 (311, 312). (Presumption under S. 44, Punjab Land Revenue Act, ignored.)
[*See also* ('35) 22 AIR 1935 Pat 415 (416) (DB). (Court has only to see whether decision on facts by lower Court is vitiated by error of law.)]

2. ('43) 30 AIR 1943 All 241 (242, 243). (Finding based on extraneous considerations.)
('43) 30 AIR 1943 Cal 211 (213). (Finding based on assumption.)
('41) 28 AIR 1941 Rang 76 (76) : 1940 Rang L R 777 (DB).
('40) 27 AIR 1940 Lah 245 (246). (Inadmissible evidence.)
('40) 42 Pun L R 136 (137). (Finding based on assumption not borne out by record.)
('40) 1940 Oudh W N 550 (553). (Finding perverse and not based on any evidence.)
('39) 26 AIR 1939 Lah 510 (511). (Finding based on conjectures.)
✠ ('90) 17 Cal 875 (882) : 17 Ind App 65 (PC).
† ('32) 142 Ind Cas 673 (673) (Lah). (Overlooking material evidence and basing decision on wrong assumptions.)
✠ ('19) 6 AIR 1919 P C 29 (30, 31) : 47 Cal 107 : 46 Ind App 140 : 15 Nag L R 97 (PC).
('25) 12 AIR 1925 Pat 552 (552) (DB). (But where the allegation in plaint was not specifically denied in the written statement — *Held*, that a finding in support of such allegation cannot be said to be based on no evidence.)
† ('27) 14 AIR 1927 Pat 209 (212): 6 Pat 698(FB). (No evidence.)
('31) 18 AIR 1931 Oudh 136 (137). (Do.)
('31) 18 AIR 1931 Oudh 382 (388). (Do.)
('32) 19 AIR 1932 Lah 293 (294) : 13 Lah 399 (DB). (Do.)
('32) 19 AIR 1932 Lah 322 (323, 324).

consideration of the evidence adduced.[3]

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†('04) 29 Bom 1 (12) : 31 Ind App 154 : 1 All L Jour 637 (640) (PC). (No evidence and point not raised in pleadings.)
('26) 13 AIR 1926 Bom 33 (39)(DB). (Lower Courts went outside the foundation for determination of fraud — High Court interfered.)
('21) 8 AIR 1921 Lah 256 (257) (DB). (A finding on a question of fact not put in issue can be challenged in second appeal.)
('69) 3 Beng L R A C 258 (260)(DB). (Inadmissible evidence.)
('11) 11 Ind Cas 536 (537) (Oudh). (Do.)
('12) 15 Ind Cas 459 (459, 460) (DB) (Cal). (Do.)
('12) 16 Ind Cas 887 (888, 889) (Oudh). (Insufficient evidence.)
('16) 3 AIR 1916 Lah 333 (334). (Inadmissible evidence.)
('36) 23 AIR 1936 Lah 978 (981). (Findings based on mere conjecture.)
('36) 23 AIR 1936 Oudh 192 (192). (Inadmissible evidence.)
('36) 23 AIR 1936 Oudh 211 (212) : 12 Luck 94.
('37) 24 AIR 1937 Pat 289 (290).
† ('37) 24 AIR 1937 Rang 225 (226) (DB).
('35) 18 Nag L Jour 333 (334). (Decision based on inadmissible and unproved document.)
('35) 18 Nag L Jour 104 (105).
('38) 1938 Oudh W N 171 (173).
('39) 26 AIR 1939 Cal 366 (367).
('36) 23 AIR 1936 Rang 488 (490) (DB).
('36) 23 AIR 1936 Lah 788 (789). (Inadmissible evidence.)
('36) 23 AIR 1936 Sind 7 (8) (DB).
('38) 25 AIR 1938 Pat 622 (624) (DB).
† ('37) 39 Pun L R 361 (363). (Finding based purely upon unwarranted assumptions and unjustified conjectures.)
('37) 1937 All L Jour 1385 (1386).
('35) 22 AIR 1935 Cal 648 (649).
('35) 22 AIR 1935 Lah 108 (109) (DB).
('35) 22 AIR 1935 Mad 26 (26).
('35) 22 AIR 1935 Mad 190 (191) (DB). (Finding based on surmises.)
('35) 22 AIR 1935 Oudh 41 (43):10 Luck 423 (DB). (Finding based on inadmissible evidence i. e., on a document rejected by the trial Court.)
('36) 23 AIR 1936 Oudh 189 (190). (Inadmissible evidence.)
Also see Section 107, Note 14.

3. ('41) 28 A I R 1941 Lah 10 (13) : I L R (1941) Lah 568 (DB).
('39) 26 AIR 1939 Lah 504 (505, 506).
('12) 15 Ind Cas 190 (191) (Mad).
('29) 16 A I R 1929 Lah 145 (145, 146). (Finding based only on part of evidence legally on record.)
('19) 6 AIR 1919 Oudh 44 (46) : 22 Oudh Cas 312 (DB). (But the mere failure of a Court to mention a document in the judgment is no sufficient proof that the Court failed to consider it.)
('22) 9 AIR 1922 Lah 140 (141) (DB). (Do.)
('24) 11 AIR 1924 All 270 (271) (DB). (Mistake or error of fact.)
('94) 18 Bom 250 (255 (DB). (Do.)
('17) 4 AIR 1917 Lah 60 (63) (DB). (Do.)
('23) 10 A I R 1923 Lah 585 (587). (Misreading of evidence.)
('01) 25 Bom 574 (581) (DB). (Do.)
('12) 16 Ind Cas 618 (619, 620) (DB) (Cal). (Do.)
† ('21) 8 AIR 1921 All 212 (213) (DB). (Do.)
('24) 11 AIR 1924 Mad 770 (771). (Do.)
† ('96) 20 Bom 753 (754) (DB). (Misconception of what the evidence is.)
† ('17) 4 AIR 1917 Lah 225 (226). (Do.)
('24) 11 AIR 1924 All 848 (849):46 All 773(DB). (Do.)
('25) 12 AIR 1925 Cal 408 (410) (DB). (Do.)
† ('12) 15 Ind Cas 515 (517) (DB) (Cal). (Misconception as to the existence of evidence.)
('21) 8 AIR 1921 Cal 71 (72) (DB). (Do.)
† ('85) 11 Cal 499 (501) (DB). (Disregard of material evidence.)
('06) 33 Cal 200 (202) (DB). (Do.)
('14) 1 AIR 1914 Lah 404 (405). (Do.)
('17) 4 AIR 1917 Lah 196 (197) (DB). (Do.)
('20) 7 AIR 1920 All 344 (345) (DB). (Do.)
('21) 8 AIR 1921 Pat 18 (20) : 6 Pat L Jour 72 (DB). (Do.)
† ('22) 9 AIR 1922 Lah 149 (153) (DB). (Do.)
('22) 9 AIR 1922 Nag 226 (227). (Do.)
('22) 9 AIR 1922 Pat 503 (504) (DB). (Do.)
('23) 10 AIR 1923 All 401 (401). (Do.)
('25) 12 AIR 1925 Mad 447 (448) (DB). (Do.)
('28) 15 AIR 1928 Mad 826 (827). (Do.)
('27) 8 L R All (Rev) 313 (313).
† ('31) 18 AIR 1931 Sind 128 (134) : 25 Sind L R 511 (DB). (Disregard of reliable evidence.)
('32) 19 A I R 1932 Lah 54 (55) (DB). (Important document not considered.)
('75) 24 Suth W R 431 (431, 432) (DB). (Rejection of material evidence.)
† ('69) 11 Suth W R 482 (484) (DB). (Do.)
('98) 20 All 42 (45) (DB). (Do.)
('07) 11 Cal W N 380 (389) (DB). (Do.)
('07) 11 Cal W N 1028 (1030) (DB). (Do.)
('14) 1 AIR 1914 Oudh 123 (124): 17 Oudh Cas 1 : 20 Ind Cas 894 (895). (Do.)
('21) 8 AIR 1921 Oudh 137 (137): 5 Luck 514. (Do.)
('23) 10 AIR 1923 Lah 208 (208). (Do.)
('26 13 AIR 1926 Cal 603 (604) (DB). (Do.)
('28) 108 Ind Cas 191 (192) (Lah). (Do.)
('38) 25 AIR 1938 Cal 763 (765). (Lower Court misdirecting itself with regard to history of documents.)
('38) 25 AIR 1938 Cal 31 (32) : 1 L R (1938) 1 Cal 413. (Evidence not taken into consideration nor party given benefit of statutory presumption.)
('38) 40 Pun L R 705 (706). (Lower Court omitting to consider circumstances erroneously holding them to be inadmissible.)
('36) 19 Nag L Jour 301 (304). (Omission to consider all facts and circumstances.)
('36) 23 AIR 1936 Pat 243 (244) (DB). (But mere omission to consider a piece of evidence will not alter the character of a finding of fact.)
('36) 23 AIR 1936 Lah 864 (865). (Effect of mutation proceedings not considered.)
('36) 23 AIR 1936 All 124 (127) (DB). (Evidence not weighed fairly and properly.)
† ('38) 25 AIR 1938 Sind 198 (200) : I L R (1939) Kar 111 (DB).

(2) Where it is based on a misconception of the real point in controversy in the case.[4]

(3) Where the conclusion of fact is not warranted by the facts on which it is based,[5] or is inconsistent with the other findings in the case;[6] or is opposed to the case set up by the party in whose favour it is drawn.[7]

(4) Where it is contrary to the facts found,[8] or is inconsistent with the statement of reasons therefor in the judgment,[9] or is based on quaint reasoning,[10]

('35) 22 AIR 1935 Oudh 394 (399) : 11 Luck 209 (DB). (Finding based solely on legal presumption without considering oral evidence.)
('35) 22 AIR 1935 Oudh 86 (87) (DB). (Important evidence not considered.)
('35) 22 AIR 1935 Mad 701 (703). (Important evidence not considered—Assuming wrong legal principles.)
† ('35) 22 AIR 1935 Mad 58 (59) (DB). (Misdirection in the appreciation of evidence.)
('35) 22 AIR 1935 Lah 912 (913). (Disregard of entries in revenue records.)
('39) 26 AIR 1939 Lah 88 (89). (Disregard of oral and documentary evidence.)
('38) 25 AIR 1938 Pat 10 (11). (No categorical reference by appellate Court to statements of witnesses whom it disbelieved — High Court can go into evidence to see whether finding is correct.)
('38) 25 AIR 1938 Mad 568 (569, 570) (DB). (Appellate Court, while reversing considered judgment of trial Judge, failing to refer to material piece of evidence militating against its own view.)
('36) 23 AIR 1936 Nag 177 (178) (DB). (Misconception of pleadings, burden of proof and relevancy of evidence in arriving at conclusion.)
✠('34) 21 AIR 1934 Cal 633 (634) : 61 Cal 365. (Misconception of or error in consideration of evidence.)
Also see Note 13.

4. ('39) 26 AIR 1939 Lah 455 (456). (Misconception of nature of contract.)
('15) 2 AIR 1915 Lah 477 (478).
† ('20) 7 AIR 1920 Mad 252 (255) (DB).
('19) 6 AIR 1919 P C 29 (31) : 47 Cal 107 : 46 Ind App 140 (PC).
('23) 10 AIR 1923 Lah 206 (207).
('26) 13 AIR 1926 Nag 416 (420). (Misconception of pleadings.)
('26) 13 AIR 1926 Oudh 353 (354). (Do.)
('32) 19 AIR 1932 Lah 128 (128). (Misconception that witnesses are interested.)
('30) 17 AIR 1930 Pat 405 (405). (Misdirection.)
('31) 18 AIR 1931 All 547 (548) (DB). (Do.)
('29) 16 AIR 1929 Lah 516 (518) (DB). (Misapprehension of law.)
('39) 26 AIR 1939 Lah 301 (302).
† ('38) 25 AIR 1938 Nag 470 (472) : I L R (1938) Nag 535.
('38) 25 AIR 1938 Sind 198 (200) : I L R (1939) Kar 111 (DB). (Important aspect of the case not considered.)
('38) 25 AIR 1938 Mad 133 (134). (Finding of fact based on erroneous approach to a case.)

5. See also Note 28.
('27) 14 AIR 1927 P C 257 (260) (PC).
† ('68) 4 Mad H C R 63 (68).
('78) 3 Cal 198 (204) : 4 Ind App 247 (PC).
('16) 3 AIR 1916 Cal 647 (649) (DB).
('22) 9 AIR 1922 All 312 (313) : 44 All 169 (DB).
('24) 11 AIR 1924 Pat 591 (592) (DB).
('25) 12 AIR 1925 Cal 469 (470) (DB).
('30) 17 AIR 1930 Oudh 101 (101) : 4 Luck 396.
('23) 10 AIR 1923 Lah 695 (696) (DB). (Comparison of signature is one of the modes of proving handwriting and although, where there is no other evidence such proof would be regarded as hazardous and inconclusive, it cannot be regarded as an error in law.)
('25) 12 AIR 1925 Lah 87 (88).
('28) 15 AIR 1928 All 39 (41) : 50 All 180 (DB).
('29) 16 AIR 1929 All 767 (768). (Legal conclusions erroneously deduced from ascertained facts.)
('31) 18 AIR 1931 All 219 (220) (DB). (Conclusion based on nobody's pleadings.)
('86) 12 Cal 93 (95) (DB).
('02) 6 Cal W N 185 (188) (DB).
('25) 12 AIR 1925 Nag 179 (179).
† ('03) 5 Bom L R 174 (176) (DB). (Incorrect inferences of law as to the legal consequences regarded as following from facts found.)
('99) 3 Cal W N 255 (260) (DB).
('23) 10 AIR 1923 Lah 497 (498) (DB). (Wrong conclusions from proved facts.)
('21) 8 AIR 1921 Oudh 104 (105) : 24 Oudh Cas 1.
('17) 4 AIR 1917 Lah 350 (351).
('05) 9 Cal W N 663 (665) (DB).
('04) 6 Bom L R 312 (313) (DB).
('23) 10 AIR 1923 Nag 124 (125).
('35) 22 AIR 1935 Pat 342 (344) : 14 Pat 785 (SB).
✠('38) 25 AIR 1938 Pat 413 (415) : 17 Pat 507 (DB).
('38) 25 AIR 1938 Pat 147 (148). (High Court can see whether inference is justified by the facts found.)
† ('35) 22 AIR 1935 Bom 47 (50). (Finding based on wrong inference from proved facts.)
Also see Note 21.

6. ('25) 12 AIR 1925 Nag 211 (214). (Inconsistent findings.)
('20) 7 AIR 1920 Pat 285 (286) (DB).
('28) 15 AIR 1928 Lah 690 (691).
[*See* ('35) 22 AIR 1935 Bom 326 (330) : 59 Bom 502.]

7. ('26) 13 AIR 1926 Lah 535 (536).
('37) 39 Pun L R 361 (363).
[*See* ('38) 25 AIR 1938 Pat 181 (182). (Lower Appellate Court on slenderest evidence making out case which is not in pleadings—Its finding is not binding in second appeal.)]

8. † ('13) 18 Ind Cas 814 (815) (DB) (Cal).

9. ('90) 1890 Unrep Print Judgt. 358.

10. ('25) 12 AIR 1925 Oudh 386 (387).
('34) 21 AIR 1934 All 902 (903). (Manifestly wrong reasoning.)

or is vague[11] or indefinite.[12]

(5) Where the finding has been given in reversal of the decision of the first Court either without properly appreciating or discussing the reasons given by the latter Court,[13] or on unsatisfactory grounds.[14]

(6) Where it is arbitrary,[15] or vitiated by prejudice,[16] or is based on a distorted view of the evidence,[17] or where no reasons have been given for the finding.[18]

(7) Where material facts have been ignored in arriving at the conclusion of fact.[19]

It has been held by the Allahabad High Court that a finding based on the opinions of experts is not necessarily a finding based on facts proved or directly demonstrated, and that the sufficiency of the facts observed or of the inferences or opinions formed, can be examined in second appeal.[20] Even an error of law on one point is not, however, sufficient justification for re-opening a finding of fact which has been mainly decided by applying correct principles of law.[21] Where a finding of fact has become irrelevant by reason of a change in the law at the time of the second appeal, the High Court can consider the evidence in the light of the altered aspect of the finding.[22]

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11. † ('43) 30 AIR 1943 P C 24 (25) (PC).
('17) 4 AIR 1917 Oudh 194 (195).
('34) 21 AIR 1934 All 529 (529) (DB).
('17) 4 AIR 1917 Lah 254 (255) (DB).

12. ('42) 29 AIR 1942 Pat 188 (189) (DB). (Court being obsessed with the idea that point did not arise giving a perfunctory finding on it.)
('29) 16 AIR 1929 Lah 654 (656) (DB).
† ('25) 12 AIR 1925 Cal 993 (994). (Where it is not clear whether the finding was one of fact or of law, the High Court cannot be confined to the one or to the other and will interfere.)

13. ✣('02) 4 Bom L R 822 (822) (DB).
('23) 10 AIR 1923 Lah 502 (503) (DB).
('92) 16 Bom 540 (545) (DB).
('36) 40 Cal W N 769 (772) (DB).
('36) 23 AIR 1936 Cal 178 (180) : 63 Cal 846 (DB).
('39) 26 AIR 1939 Lah 188 (189). (Appellate Court failing to consider a document pointedly relied on by trial Court for its finding.)

14. ('40) 27 AIR 1940 Lah 329 (331).
('88) 1888 Unrep Print Judgt. 59.
† ('23) 10 AIR 1923 P C 62 (64) (PC).
('90) 17 Cal 256 (257) (DB).
('25) 12 AIR 1925 Rang 71 (78) : 2 Rang 495 (DB).

15. ('23) 10 AIR 1923 All 199 (201). (Amount of damages.)
✣('31) 1931 Mad W N 102 (103) (DB). (Perverse finding.)
('37) 1937 All L Jour 1385 (1386).

16. ('40) 1940 Oudh W N 550 (553).
('12) 13 Ind Cas 131 (132) (DB) (All).
('38) 25 AIR 1938 Sind 198 (200) : I L R (1939) Kar 111 (DB). (Finding of fact coloured and influenced by aspect of case which the Judge was not entitled to consider.)

17. ('22) 9 AIR 1922 Bom 296 (299) (DB).
† ('30) 17 AIR 1930 All 510 (511) (DB). (Lower Court trying to fit facts with law—Finding of fact of lower Court can be set aside in second appeal.)
('03) 30 Cal 207 (210).

18. (1864) 1 Suth W R 244 (244) (DB).
('85) 9 Bom 452 (454) (DB).
('84) 8 Bom 368 (371) (DB).
('85) 9 Bom 527 (529) (DB).
('90) 14 Bom 452 (454) (DB).
('93) 1893 Unrep Print Judgt. 237.
('95) 19 Bom 323 (326) (DB).
('20) 56 Ind Cas 529 (530) (DB) (All).
('20) 7 AIR 1920 Pat 829 (830).
† ('21) 8 AIR 1921 Pat 18 (20) : 6 Pat L Jour 72 (DB).
('26) 13 AIR 1926 Lah 158 (159) (DB).
('72) 18 Suth W R 110 (110, 111) (DB). (But not for giving a bad reason for believing the witnesses of one party where all the evidence has been dealt with and weighed.)
('37) 24 AIR 1937 Mad 282 (283). (Appellate Court upsetting reasoned and elaborate judgment of trial Court without giving reasons except on general ground that evidence was not satisfactory—No discussion of evidence whatever — Finding can be set aside.)
Also see O. 41 R. 31, Note 11.

19. ('42) 29 AIR 1942 Pat 140 (141) : 20 Pat 870 (DB). (Record of rights and village note ignored while arriving at finding of custom — Case remanded.)
('41) 28 AIR 1941 Pat 118 (127) (DB). (Finding without considering all the evidence.)
('32) 19 AIR 1932 All 603 (606) (DB).
('37) 24 AIR 1937 Pat 78 (79) (DB). (Omission to consider materials having obvious bearing on case.)
† ('38) 25 AIR 1938 Nag 470 (472): ILR (1938) Nag 535. (Material part of admissible evidence which vitally bears on the point at issue disregarded.)

20. ('24) 11 AIR 1924 All 116 (118).
('25) 12 AIR 1925 All 24 (25) : 47 All 243 (DB). [But see ('35) 22 AIR 1935 All 501 (501).]

21. ('27) 14 AIR 1927 Mad 331 (335).

22. † ('26) 13 AIR 1926 All 725 (727) (DB). (Overruled on another point in AIR 1927 All 1 : 49 All 25 (FB).)
('26) 13 AIR 1926 Nag 49 (50).

54. Concurrent findings of fact. — It has been observed in Notes 52 and 53 that a finding of fact is conclusive in second appeal unless it is arrived at by committing an error of law or of procedure. The same principles apply with greater force in the case of *concurrent* findings of fact by two Courts.[1] Such findings will therefore be conclusive in second appeal[2] unless an error of law or of procedure is committed in arriving at the findings.[3] Thus, if it is based on no evidence,[4] or on an improper rejection of material evidence[5] or on a misconstruction of documents,[6] or on inferences not warranted by the facts,[7] it can be set aside in second appeal, but it is for the appellant to show the existence of one or other of the circumstances mentioned above.[8] In *H. A. Morine* v. *London Loan Assets, Ltd.*,[9] their Lordships of the Privy Council observed as follows: "A litigant who seeks before a second appellate tribunal to reverse findings of fact which have been arrived at by the trial Judge and have, after consideration, been confirmed on appeal, comes always with a very heavy burden upon his shoulders."

Note 54

1. *See* ('40) 27 AIR 1940 Rang 126 (127, 128) : 1940 Rang L R 180 (DB). (On second appeal it is not the concurrent finding of fact which cannot be interfered with; it is the finding of fact of the first Appellate Court.)

2. ('43) 30 AIR 1943 Pat 111 (115) : 21 Pat 764 (DB). (Suit against Railway—Finding as to negligence against Railway.)
('42) 29 AIR 1942 All 221 (222) : ILR (1942) All 667 (FB). (Finding as to title by adverse possession.)
('42) 29 AIR 1942 All 233 (234) : ILR (1942) All 832 (FB).
('42) 29 AIR 1942 Mad 730 (730). (Finding as to consideration.)
('42) 29 AIR 1942 Pat 392 (393). (Finding as to fraud.)
('41) 28 AIR 1941 Oudh 412 (414). (Finding as to title.)
('41) 28 AIR 1941 Oudh 429 (431) (DB). (Do.)
('41) 28 AIR 1941 Oudh 479 (484) : 16 Luck 789. (Finding as to adequacy of consideration.)
('12) 17 Ind Cas 733 (733) (PC).
†('33) 20 AIR 1933 Mad 353 (355) (DB).
('33) 20 AIR 1933 Bom 114 (115) : 57 Bom 134 (DB).
('34) 21 AIR 1934 Cal 707 (708) (DB). (When a Judge in second appeal interferes with the concurrent findings of fact of the Courts below he exceeds his jurisdiction.)
('13) 40 Cal 288 (296) : 1913 Pun Re No. 26 (PC).
('14) 1 AIR 1914 P C 87 (89) : 37 Mad 443 : 41 Ind App 258 (PC).
('17) 4 AIR 1917 P C 33 (39) : 40 Mad 709 : 44 Ind App 147 (PC).
('18) 5 AIR 1918 P C 182 (183) : 42 Mad 400 : 46 Ind App 44 (PC).
('22) 9 AIR 1922 P C 159 (160) : 48 Cal 856 : 48 Ind App 144 (P C).
✠('28) 15 AIR 1928 P C 243 (245) : 55 Ind App 380 (PC).
('29) 16 AIR 1929 P C 63 (65) (PC).
('30) 17 AIR 1930 P C 232 (234) (PC).
('90) 17 Cal 726 (742) (FB).
('26) 13 AIR 1926 All 215 (215). (Finding as to custom.)
('31) 18 AIR 1931 Oudh 400 (401) (DB). (Finding as to consideration.)
('31) 18 AIR 1931 P C 48 (50) : 27 Nag L R 113 : 58 Ind App 106 (PC). (Finding as to separation in family business.)
('35) 22 AIR 1935 Pat 175 (176) (DB). (Finding as to legal necessity for alienation by Hindu widow.)
('34) 21 AIR 1934 All 941 (942). (The mere fact that the lower appellate Court has not referred to certain documentary evidence in its judgment does not vitiate such finding of fact.)
('34) 21 AIR 1934 Nag 219 (220). (Finding as to whether transaction was a loan or deposit.)
[*See also* ('32) 19 AIR 1932 P C 89 (90) : 7 Luck 64 : 59 Ind App 147 (PC). (Privy Council — Practice.)
('32) 19 AIR 1932 P C 231 (234) (PC). (Do.)]

3. ('29) 16 AIR 1929 P C 38 (38, 39, 40) (PC).
✠('29) 16 AIR 1929 P C 205 (209) (PC).
('25) 12 AIR 1925 Oudh 729 (731).
('36) 23 AIR 1936 Mad 506 (508).
('33) 20 AIR 1933 Mad 353 (357) (DB).
[*See* ('39) 26 AIR 1939 Rang 139 (141) : 1939 Rang L R 622. (In the case, however it was remarked that under S. 11, Burma Courts Act, XI of 1922, the High Court could interfere on a finding of fact concurrent or otherwise.)]

4. ('14) 1 AIR 1914 P C 67 (71) : 41 Cal 972 : 41 Ind App 110 (PC).
('16) 3 AIR 1916 Mad 692 (693): 39 Mad 597 (DB).
('23) 10 AIR 1923 Rang 196 (196) : 1 Rang 135. (Perverse finding.)
†('18) 5 AIR 1918 Bom 161 (161) : 42 Bom 352 (DB). (Surmises—No evidence.)
('14) 1 AIR 1914 Lah 207 (208) (DB). (No evidence.)

5. ('41) 28 AIR 1941 Oudh 468 (472) : 16 Luck 626.

6. ('22) 9 AIR 1922 Nag 52 (55): 18 Nag L R 163.
('72) 18 Suth W R 447 (449) (DB).
('35) 22 AIR 1935 Oudh 304 (305) (DB). (Concurrent finding of fact based on interpretation of title deed can be challenged.)

7. See Notes 28, 52 and 53.

8. ('93) 20 Cal 847 (852) : 20 Ind App 95 (PC).

9. ('34) 21 AIR 1934 P C 127 (129) (PC).

The circumstance that the lower Appellate Court and the trial Court, in arriving at the same conclusion, have not been influenced by the same considerations, will not detract from the binding nature of the concurrent finding.[10] But if the lower Appellate Court does not deal with the question and fails to give independent opinion thereon, then the finding is not "concurrent."[11]

55. New case—General.—Parties are bound by the case which arises on their pleadings and which has been enquired into by the trial Court.[1] They should not be allowed to depart from the facts and grounds of relief originally pleaded by them,[2] or to change their case and present it in an entirely new shape.[3] If there is any defect in their case it is not the function of the High Court to remedy it.[4] Consequently, a new plea not being one of pure law, which is inconsistent with,[5] or different from,[6] the one set up in the Courts below, will not be allowed in second appeal.

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10. ('93) 20 Cal 847 (852) : 20 Ind App 95 (PC). Also see S. 112 Note 6.

11. ('10) 5 Ind Cas 592 (593) (DB) (Lah).
[*See* ('16) 3 AIR 1916 P C 126 (128): 43 Ind App 172 (PC).]

Note 55

1. ('15) 2 AIR 1915 Lah 399 (400).

2. ('40) 27 AIR 1940 Pat 161 (162) : 18 Pat 854 (DB).
('66) 6 Suth W R 57 (58) (PC).
('33) 10 Oudh W N 1186 (1187). (New line of defence.)
('23) 10 AIR 1923 Lah 56 (57) (DB).
† ('32) 19 AIR 1932 Cal 77 (79) (DB).
('27) 14 AIR 1927 Mad 1197 (1198, 1199).
[*See also* ('36) 23 AIR 1936 Pat 49 (50) : 15 Pat 219 (DB). (New facts cannot be investigated in second appeal.)]

3. ('42) 29 AIR 1942 Oudh 205 (206) (DB). (Plaintiff obtaining a personal decree against the defendant in his capacity as a owner—Plaintiff cannot contend in appeal that the decree was obtained against defendant as a muttawalli.)
('40) 27 AIR 1940 Pat 161 (162) : 18 Pat 854 (DB).
('35) 22 AIR 1935 Cal 817 (820) (DB). (Plaintiff cannot alter frame of suit in appellate stage.)
('69) 11 Suth W R (Cr) 10 (11) (DB).
('34) 21 AIR 1934 Mad 639 (640) (DB).
('66) 5 Suth W R 197 (197) (DB).
('80) 5 Cal 246 (250) (DB).
('81) 6 Cal 55 (58) (DB).
('84) 6 All 428 (430) (DB).
† ('88) 10 All 495 (497) (DB).
('04) 26 All 331 (334) (DB).
('13) 19 Ind Cas 661 (662) (DB) (All). (Suit for sale on mortgage cannot be changed as one for money charged on immovable property.)
('15) 2 AIR 1915 Cal 438 (440) : 19 Cal W N 768 (772) (DB).
('16) 3 AIR 1916 Cal 236 (237) (DB).
('16) 3 A I R 1916 Oudh 313 (314) : 19 Oudh Cas 166.
('21) 8 AIR 1921 All 154 (155) (DB).
('27) 14 AIR 1927 Lah 426 (427).
† ('36) 23 AIR 1936 Pat 275 (282) (DB). (Plea of forfeiture of tenancy not raised in plaint not allowed to be raised.)
Also see O. 6 R. 2, Note 9.

4. ('22) 9 AIR 1922 Bom 150 (152) : 46 Bom 213 (DB).

5. ('67) 7 Suth W R 413 (414) (DB).
('74) 22 Suth W R 552 (553) (DB).
('14) 1 AIR 1914 Lah 11 (13): 1914 Pun Re No. 77 (DB).
('23) 10 AIR 1923 All 358 (360) : 45 All 53 (DB).
('23) 10 AIR 1923 Cal 177 (178) (DB).
('23) 10 AIR 1923 Cal 345 (350) (DB).
('09) 1 Ind Cas 112 (114) (DB) (Cal). (Permanent tenancy contrary to the plea in written statement.)
('13) 18 Ind Cas 87 (88) (DB) (Cal). (Plea of eviction by title paramount contrary to the pleas already taken.)
('16) 3 AIR 1916 Cal 236 (237) (DB).
('17) 4 AIR 1917 Cal 467 (469), (DB).
† ('29) 16 AIR 1929 Mad 349 (350) (DB).
('36) 23 AIR 1936 Rang 260 (262) : 14 Rang 738. (Plea that property descended to the stridhana heirs of the deceased inconsistent with the plea already taken.)

6. (41) 28 AIR 1941 Nag 70 (71).
('40) 27 AIR 1940 Lah 291 (292).
('40) 27 AIR 1940 Pat 88 (90) (DB). (Suit based on contract to pay Government revenue changed into suit on contract to indemnify against loss if property should be sold for arrears.)
('40) 27 AIR 1940 Rang 91 (95) : 1940 Rang L R 237.
(1864) 1 Suth W R 136 (136) (DB). (Discharge of interest into non-liability for interest.)
('33) 20 AIR 1933 Lah 845 (847) (DB).
('33) 20 AIR 1933 Oudh 462 (464). (Adverse possession pleaded in lower Court—New plea of easement in second appeal.)
(1864) 1 Suth W R 282 (283) (DB). (Heirship to last full owner, into heirship to one of his widows not allowed.)
('68) 10 Suth W R 424 (424, 425) (DB). (Genuineness of pattah set up in suit for enhancement of rent into misconstruction of the terms of a lease.)
('69) 11 Suth W R 133 (133) (DB). (Claim for dower into claim of heirship.)
('69) 11 Suth WR 10 (11) (DB). (The plea originally being that the debts for which the properties were sold had been incurred for purposes not sanctioned by Hindu law, its attempted change in second appeal into the following, viz., that the father being in Hindu law only a sharer with his sons the rights and interests sold did not comprise the sons' shares was not allowed.)

Even in the case of new pleas which are in the nature of *additional pleas*, the general rule is that the parties are not entitled to relief on facts or grounds not stated or referred to in their pleadings;[7] and unless upon very strong grounds, or under very special circumstances,[8] a party will not be allowed to urge them in second appeal.[9] The same principle will apply even if the new plea is in the nature of an *alternative case* arising out of the lower Appellate Court's decision.[10] However, it has been held that an alternative title not urged before, can nevertheless be allowed if the facts are so plain that it will be doing an injustice to the party to deny him a right to which he is entitled on that basis.[11] A new prayer may be allowed if it naturally arises from the findings of the lower

† ('69) 12 Moo Ind App 470 (475): 11 Suth W R P C 27 (28) (PC). (A plea as to whether suit land was comprised in resumption proceedings into one of improper resumption.)
('69) 11 Suth W R 164 (164, 165) (DB). (Defence on ground of non-liability for enhanced rent into asking for the dismissal of suit on the strength of a Full Bench decision.)
('69) 12 Suth W R 80 (81) (DB).(Right under miras patta into occupancy right.)
('75) 23 Suth W R 230 (231) (DB). (Gift into nuncupative bequest.)
('77) 2 Cal 418 (423, 424) (DB). (Lawful title into title by adverse possession.)
('81) 7 Cal 560 (563) (DB). (Do.)
('82) 5 Mad 163 (164) (DB). (Tenancy by putta into tenancy from year to year.)
('99) 12 Mad 292 (293) (DB). (Right by purchase from a divided member into right to partition.)
('91) 15 Bom 407 (412) (DB).
† ('92) 19 Cal 507 (512) : 19 Ind App 90 (PC). (Personal liability of defendant into liability of the estate inherited by defendant.)
('92) 15 Mad 50 (52) (DB). (Fraud—Misrepresentation or concealment by vendor into implied covenant for title.)
✠('92) 15 Mad 503 (511) : 19 Ind App 179 (PC). (Right of inheritance by sapindaship into right of succession of one illegitimate brother to another.)
('10) 6 Ind Cas 423 (423) (DB) (Mad). (Partition into injunction.)
('14) 1 AIR 1914 Lah 425 (426) (DB). (New plea about being governed by Mahomedan law.)
('14) 1 AIR 1914 Lah 398 (399) (DB). (Tracing title from a person different from the person alleged originally.)
('15) 2 AIR 1915 Lah 115 (116) : 1915 Pun Re No. 67 (DB). (Custom into Mahomedan law.)
('17) 4 AIR 1917 Cal 661 (661) (DB). (Where the plaintiff's case in the Court was not that a new tenancy has been created or that the parties had intended to create a new tenancy by the amalgamation of the old tenancy, he cannot be allowed to contend in second appeal that a new tenancy was created by the amalgamation.)
('20) 7 AIR 1920 Cal 177 (178) (DB). (Permanent tenancy into pecuniary compensation.)
('20) 7 AIR 1920 Lah 489 (491). (Suit for arrears of maintenance into one for contribution.)
('23) 10 AIR 1923 Lah 53 (54) (DB). (Ordinary law into custom.)
('23) 10 AIR 1923 Pat 309 (313) (DB). (Existence of custom into its validity.)
('25) 12 AIR 1925 Cal 1184 (1184, 1185) (DB). (From the sale of tenancy being colourable and without consideration to non-transferability of tenancy.)
('25) 12 AIR 1925 Mad 384 (384). (Absolute sale into sale of life interest.)
('27) 14 AIR 1927 Nag 378 (378). (Where claim to easement on ground of prescription fails, party cannot be allowed in second appeal to set up a claim based on custom or grant.)
('14) 1 AIR 1914 Oudh 248 (250).
('32) 19 AIR 1932 Lah 256 (256) (DB). (Easement into customary right or implied dedication.)
('33) 20 AIR 1933 All 73 (73) (DB). (Suit on basis of liability for actual collections — Liability on basis of failure to collect cannot be raised.)
('39) 26 AIR 1939 Nag 210 (210, 211): ILR (1939) Nag 636.

7. ('42) 29 AIR 1942 Cal 133 (136).
('67) 11 Moo Ind App 468 (473, 474) (PC).
('32) 19 AIR 1932 Bom 255 (255).
(68) 12 Moo Ind App 470 (475) (PC).
('13) 20 Ind Cas 22 (23) (DB) (Lah).
('22) 9 AIR 1922 Pat 398 (399) : 1 Pat 23 (DB).
('25) 12 AIR 1925 Lah 192 (193).
('31) 18 AIR 1931 Nag 25 (26).

8. † ('82) 6 Bom 107 (110) (DB).
('83) 7 Bom 146 (150).

9. ('15) 2 AIR 1915 Lah 169 (170) (DB).
('20) 7 AIR 1920 Cal 499 (500) (DB).
('20) 7 AIR 1920 Cal 932 (934).
('21) 8 AIR 1921 All 405 (406).
('22) 9 AIR 1922 Bom 329 (331):46 Bom 966 (DB).
('22) 9 AIR 1922 Pat 68 (70).
('23) 10 AIR 1923 Cal 285 (285).
('26) 98 Ind Cas 268 (268) (Lah).
('26) 96 Ind Cas 304 (305) (DB) (All).
('27) 14 AIR 1927 Nag 104 (107): 22 Nag L R 175.
('37) 24 AIR 1937 Nag 205 (208) : I L R (1937 Nag 367.
('37) 24 AIR 1937 Pesh 97 (99).
('39) 26 AIR 1939 Bom 117 (118).
('39) 26 AIR 1939 Lah 141 (142). (Plea not raised in plaint and not put in issue.)
[*See also* ('36) 23 AIR 1936 P C 139 (141) (PC). (Plea of undue influence.)]

10. ('26) 13 AIR 1926 Pat 156 (158) (DB).
('33) 20 AIR 1933 Pat 269 (270).

11. † ('23) 10 AIR 1923 All 176 (179) : 45 All 59 (DB).
[*See also* ('38) 25 AIR 1938 All 188 (191): I L R (1938) All 218 (DB). (New alternative case—No conceivable defence nor any ground of fact or law to meet it—Plea can be allowed for first time in second appeal.)]

Appellate Court,[12] but not if it would change the frame or nature of the suit.[13] A prayer for consequential relief may also be allowed if its omission in the first instance was through a *bona fide* mistake.[14]

See also the cases cited below.[15]

In the case of new points or objections, the following propositions may be laid down:

(1) A point or objection not raised in the Courts below or in the grounds of appeal—that is, as to which the respondent has had no notice that it is going to be urged—will not be allowed to be argued in second appeal.[16] (In this connexion, see Note 56 and O. 41 R. 2, Notes 3 and 4.)

(2) A point or objection which, if it had been taken in the first instance, could have been cured or met by the other side adopting a course of action which is not open to him at the stage of second appeal, will not be allowed.[17]

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12. ('72) 18 Suth W R 424 (432, 433) (DB).

13. ('42) 29 AIR 1942 Sind 81 (82) : I L R (1942) Kar 32 (DB). (Suit by vendee for return of consideration for sale on ground of vendor's defective title sought to be changed as one for rescission of conveyance.)
('13) 19 Ind Cas 661 (662) (DB) (All). (Suit for sale of property on the basis of a mortgage into a suit for recovery of money charged on property.)
('35) 22 AIR 1935 Pesh 126 (128) (DB).

14. † ('24) 11 AIR 1924 Pat 310 (311): 2 Pat 919 (DB).

15. ('42) 29 AIR 1942 Mad 748 (750). (Point that decree was not for payment of money and was not executable raised throughout—Contention that there is no reference to defendant in decree and therefore decree is not money decree is not new and can be raised in second appeal.)
('41) 28 AIR 1941 Pat 247 (248) (DB). (Suit for possession—Claim for damages made for first time in second appeal cannot be decreed.)
('36) 23 AIR 1936 Nag 70 (71) (DB). (Plaintiff not asking for punitive damages in trial Court, cannot ask for them in second appeal.)

16. ('43) 30 AIR 1943 Bom 191 (194) (DB). (Plea of plaint in previous suit being acknowledgment can not be raised in second appeal for first time.)
('43) 30 AIR 1943 Mad 322 (324). (Plea of waiver and limitation for first time.)
('42) 29 AIR 1942 Mad 716 (717).
('42) 29 AIR 1942 Pat 392 (393).
('40) 27 AIR 1940 Nag 70 (71): I L R (1941) Nag 669.
('09) 4 Ind Cas 1123 (1124) (DB) (Mad).
('33) 20 AIR 1933 All 911 (913) (DB).
('34) 21 AIR 1934 All 941 (942).
('34) 21 AIR 1934 Rang 289 (290).
('33) 20 AIR 1933 Pat 270 (271).
('34) 21 AIR 1934 Cal 414 (420) (DB).
('32) 19 AIR 1932 Oudh 244 (246): 8 Luck 87 (DB).
('34) 21 AIR 1934 Mad 579 (580).
('09) 4 Ind Cas 1118 (1118) (DB) (Mad).
('13) 21 Ind Cas 554 (555) (Oudh).
('14) 1 AIR 1914 Lah 39 (41): 1913 Pun Re No. 34 (DB).
('14) 1 AIR 1914 Lah 67 (68) (DB).
('15) 2 AIR 1915 Lah 312 (312).
('22) 4 Lah L Jour 437 (438) (DB).
('22) 9 AIR 1922 Mad 519 (520) (DB).
('35) 22 AIR 1935 Mad 988 (995).
('34) 21 AIR 1934 All 802 (803).
('36) 23 AIR 1936 Lah 612 (616).
('36) 23 AIR 1936 Lah 192 (193) (DB). (Mixed question of fact and law—Question not raised in the Courts below nor in the grounds of appeal — Question not allowed.)
('36) 23 AIR 1936 Cal 176 (177).
('37) 24 AIR 1937 Mad 228 (229). (This case is reversed on another point in AIR 1938 Mad 501.)
('37) 24 AIR 1937 Pat 532 (534): 16 Pat 196 (DB).
('37) 24 AIR 1937 Oudh 127 (129) (DB).
[*See* ('36) 23 AIR 1936 P C 258 (259) (PC).
('36) 23 AIR 1936 Pat 62 (63) (DB).
('35) 22 AIR 1935 All 1008 (1010) (DB).]
[*See also* ('34) 21 AIR 1934 Lah 460 (463) : 15 Lah 849 (DB).]
[See however ('42) 29 AIR 1942 Mad 317 (318). (Point not raised in lower Courts nor in memorandum of second appeal allowed to be raised as case was one of trust.)]

17. ('41) 28 AIR 1941 Lah 345 (346).
('41) 28 AIR 1941 Mad 727 (731).
('73) 20 Suth W R 174 (176) (DB).
('33) 20 AIR 1933 Lah 951 (951) (DB).
† ('74) 22 Suth W R 352 (354) (FB).
('94) 18 Bom 144 (146) (DB)
('36) 23 AIR 1936 Cal 646 (649) : I L R (1937) 1 Cal 359. (A point as to the authority of an agent to do a particular act under a power of attorney which has not been raised in the Courts below and which if raised in the first Court could have been met by the plea of ratification by the principal cannot be allowed to be urged for the first time in second appeal.)
('38) 25 AIR 1938 Sind 198 (199): ILR (1939) Kar 111 (DB).
('34) 21 AIR 1934 All 941 (942).
('38) 25 AIR 1938 All 188 (191): I L R (1938) All 218 (DB).
('36) 23 AIR 1936 Pat 260 (262): 15 Pat 272 (DB).
('37) 24 AIR 1937 Bom 456 (457) : I L R (1937) Bom 801 (DB).
('37) 24 AIR 1937 Lah 193 (194). (Plea that suit is not maintainable for want of succession certificate.)
[*See* ('32) 19 AIR 1932 Mad 739 (742) : 55 Mad 994 (DB).]

(3) A new point or objection involving fresh investigation on facts will not be allowed.[18] (In this connexion, see Notes 58, 59 and 60.)

In *Ram Kinker Rai* v. *Tufani Ahir*,[19] a Full Bench of the Allahabad High Court has held—

(*i*) that a point not taken in the Court below, whether the omission is by the appellant in that Court, or whether the respondent failed to support his decree by taking the point, will not be permitted to be raised, except possibly where the point may be described as involving a question of *public policy*, e. g.,
  (1) involving jurisdiction,
  (2) involving the principle of *res judicata*,
  (3) when the decision of the point would prevent future litigation;

(*ii*) where the plaint discloses no cause of action, or the written statement no ground of defence, it is not a ground for permitting a new point to be argued merely because —
  (1) it was omitted by oversight in the Court below, or
  (2) the materials are all on record and the answer to the point is plain.

The Full Bench decision does not however preclude the *Court itself* from deciding the case on such new point.[20]

The following are some of the objections which under the principles stated above, were not allowed to be raised for the first time in second appeal:

(1) Objections to the admission of evidence[21] or to the reception of secondary evidence[22] unless such objection is one which could not have been cured

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18. ('43) 30 AIR 1943 Lah 113 (116) (DB).
('43) 30 AIR 1943 Pat 10 (12, 13) : 21 Pat 322 (DB). (New point of law requiring fresh investigation of facts.)
('42) 29 AIR 1942 Mad 97 (98) (DB).
('42) 29 AIR 1942 Pat 152 (154) (DB). (Whether sale of portion of property should be ordered involves further investigation of fact.)
('42) 29 AIR 1942 Pat 264 (265) (DB). (Point raised that no valuation of property was made under Ss. 13 and 14, Bihar Money-lenders Act before execution sale took place.)
('41) 28 AIR 1941 Pat 600 (601).
('41) 28 AIR 1941 Pesh 6 (7) (DB). (Point as to undue influence.)
('40) 27 AIR 1940 Oudh 318 (319) (DB).
('40) 27 AIR 1940 Rang 136 (138). (Question of adverse possession.)
('15) 2 AIR 1915 Cal 438 (440) (DB).
('34) 21 AIR 1934 Mad 551 (552) (DB).
('34) 21 AIR 1934 Cal 467 (469) (DB).
('34) 21 AIR 1934 Oudh 189 (190):8 Luck 665 (DB).
('33) 20 AIR 1933 Bom 26 (33) (DB). (Plea of adverse possession — Specially when facts on record are insufficient.)
('31) 18 AIR 1931 Mad 284 (295) : 54 Mad 793 (DB).
('68) 9 Suth W R 503 (504, 505) (DB).
† ('87) 14 Cal 586 (590, 592) (DB).
('81) 6 Cal 127 (134) : 5 Ind App 157 (PC).
('33) 20 AIR 1933 Lah 615 (618).
[*See also* ('41) 28 AIR 1941 Oudh 198 (203). (Question as to possession in lieu of dower raising questions of fact.)]

19. † ('31) 18 AIR 1931 All 35 (38):53 All 65 (FB).

20. ('31) 18 AIR 1931 All 490 (494) : 54 All 25 (FB).
[*See* ('38) 25 AIR 1938 Rang 468 (470) (DB). (If there is sufficient material.)]
[*See also* ('34) 21 AIR 1934 Bom 313 (317) : 58 Bom 544 (DB). (High Court can base its decision upon ground different from that given by trial Court, provided there was sufficient evidence on record from which finding could be arrived at.)]

21. ('74) 22 Suth W R 216 (218) (DB).
('90) 14 Bom 372 (377) (DB).
('14) 1 AIR 1914 Cal 534 (534) (DB).
('22) 9 AIR 1922 All 493 (494) : 45 All 21 (DB).
† ('24) 11 AIR 1924 All 709 (710) (DB).
('24) 11 AIR 1924 All 845 (846) : 46 All 815 (DB).
('27) 14 AIR 1927 Cal 1 (2) (DB).
('27) 14 AIR 1927 Mad 1107 (1108).
[But see ('36) 23 AIR 1936 Lah 1005 (1006). (Question of admissibility not raised in lower Courts can be raised in second appeal — A I R 1927 Lah 448 : 8 Lah 651 followed — But the view of Agha Haider, J., personally was contrary to that which he had to follow.)]

22. † ('69) 12 Suth W R 13 (14) (DB).
('72) 18 Suth W R 105 (105) (DB).
('75) 24 Suth W R 232 (232).
('35) 22 AIR 1935 Lah 628 (629).
Also see Note 61.

even in the first instance.[23] Further, an erroneous omission to object to evidence in the trial Court will not make an irrelevant evidence relevant in second appeal.[24]

(2) Objections to reception,[25] proof[26] and admissibility[27] of documents. But an objection to the admissibility of a document on the ground of want of registration has been held to be allowable.[28] On the other hand, objections on the ground of invalidity of registration[29] or on the ground of want of sufficient stamps[30] will not be allowed. An instrument not duly stamped will not be admitted in second appeal on payment of stamp duty and penalty, when there is no evidence that such stamp duty and penalty were tendered in the lower Courts.[31]

(3) Objections as to the sufficiency of evidence,[32] or as to the construction of evidentiary documents,[33] or an objection that a document has been materially altered.[34]

(4) Objections relating to the burden of proof.[35]

(5) An objection that a witness who ought to have been examined by the trial Court has not been examined.[36]

(6) An objection that the decision has been given by the District Court on evidence recorded by the Munsif before the transfer of the suit to the District Court.[37]

(7) An objection that the plaintiff should have, but has not, asked for another or consequential relief.[38]

(8) Objections on the ground of misjoinder or non-joinder[39] of parties. But the question whether a particular defendant is necessary party and could contest the suit can be allowed if no further evidence is thereby rendered necessary.[40]

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23. ('25) 12 AIR 1925 Cal 1034 (1036) (DB).
24. ('16) 3 AIR 1916 Cal 278 (278) (DB).
25. ('82) 1882 Pun Re No. 74, p. 213 (213) (DB).
26. ('22) 9 AIR 1922 Pat 122 (143) (DB).
('32) 19 AIR 1932 Lah 130 (131).
27. ('40) 27 AIR 1940 Bom 63 (64) (DB). (The point was, however, dealt with on merits as it had been argued.)
('69) 12 Suth W R 315 (316) (DB).
† ('97) 1 Cal W N 530 (532, 534) (DB).
('16) 3 AIR 1916 Mad 147 (150).
† ('16) 3 AIR 1916 All 11 (12) (FB).
('18) 5 AIR 1918 Cal 394 (395) (DB).
('20) 7 AIR 1920 Cal 538 (539) (DB).
('19) 6 AIR 1919 Cal 499 (500).
('26) 97 Ind Cas 414 (414) (DB) (Cal).
('28) 112 Ind Cas 461 (462) (Lah).
Also see O. 13 R. 3, Note 2.
28. † ('73) 19 Suth W R 22 (23) (DB).
('77) 2 Bom 489 (490) (DB).
('25) 12 AIR 1925 Cal 370 (372).
[See however ('32) 19 AIR 1932 PC 118 (120, 121): 10 Rang 242 : 59 Ind App 161 (PC). (Point raised first time before the Privy Council — Disallowed as the unregistered document had been admitted by parties and the proceedings did not affect any immovable property in the suit.)]
[But see ('69) 3 Beng L R App 125 (127) (DB).]
('69) 11 Suth W R 381 (381) (DB). (The learned Judges held that they were not able to say if there was any error in the judgment of the lower Court.)
('15) 2 AIR 1915 Lah 217 (217, 218).]
29. ('27) 14 AIR 1927 Mad 92 (93).
30. ('09) 37 Cal 63 (65) : 2 Ind Cas 414 (415) (DB).
('35) 22 AIR 1935 Lah 172 (173).
('35) 22 AIR 1935 Rang 160 (160) : 13 Rang 322.
31. ('96) 20 Bom 791 (792, 794) (DB).
32. ('22) 9 AIR 1922 Pat 167 (169) : 1 Pat 350 (DB).
('69) 12 Suth W R 244 (245) (DB).
('72) 18 Suth W R 105 (105) (DB). (Objection to evidence as being not the best evidence.)
('29) 16 AIR 1929 Rang 213 (214).
33. ('24) 11 AIR 1924 Cal 353 (354) (DB).
('27) 14 AIR 1927 Mad 791 (791).
34. ('29) 16 AIR 1929 Mad 622 (624).
35. ('75) 23 Suth W R 324 (325) (DB).
36. ('82) 6 Bom 524 (527) (DB).
('71) 15 Suth W R 87 (88) (DB). (Refusal by trying Court to examine witnesses.)
37. ('74) 6 N W P H C R 80 (83) (DB).
38. ('90) 14 Mad 46 (48) (DB).
('78) 2 All 134 (135) (DB).
39. ('41) 28 AIR 1941 Mad 506 (507).
See O. 1 R. 13, Note 2.
40. ('25) 12 AIR 1925 Lah 65 (65).

(9) Objections on the ground of misdescription of parties.[41]

(10) Objections on the ground of the misjoinder of causes of action.[42]

(11) Objections to the frame of issues.[43]

(12) An objection that the suit is not maintainable[44] or that it is premature[45] if it depends on facts.

(13) Objections based on the ground of illegality and insufficiency of notice to quit.[46]

(14) Objections to court-fee and to the valuation of the suit for purposes of court-fees.[47]

For other cases of objections, see the undermentioned cases.[48] As to new points of pure law, *vide* Note 56.

A point which, though mentioned in the pleadings, was not put forward or agitated in the Courts below, will not be allowed to be raised in second appeal.[49] Similarly, a

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41. ('93) 16 Mad 317 (319) (DB).
[*See* ('69) 12 Suth W R 117 (118) (DB).]

42. See O. 2 R. 7, Note 1.

43. ('17) 4 AIR 1917 Lah 68 (69) (DB).

44. ('17) 4 AIR 1917 Mad 177 (177) (DB).
('34) 21 AIR 1934 Oudh 55 (56): 9 Luck 365 (DB).
('22) 9 AIR 1922 Lah 363 (363) : 5 Lah 239 (DB).
('30) 17 AIR 1930 Cal 267 (269) (DB).
('69) 11 Suth W R 134 (135) (DB). (Suit not properly framed.)
('78) 2 All 134 (135) (DB).
('75) 24 Suth W R 413 (413, 414). (Objection as to right of suit owing to want of damage to plaintiff.)
('32) 19 AIR 1932 All 661 (662) (DB.)
('35) 22 AIR 1935 Bom 254 (255).

45. ('24) 11 AIR 1924 Lah 328 (328, 329) (DB).

46. ('18) 5 AIR 1918 Mad 980 (982) (DB).
('17) 4 AIR 1917 Pat 469 (470) : 2 Pat L Jour 595 (DB).
('20) 7 A I R 1920 Mad 990 (991) : 62 Ind Cas 390 (391, 392) (DB).
† ('29) 16 AIR 1929 Mad 617 (620) (DB).
('20) 7 AIR 1920 Mad 965 (967) : 60 Ind Cas 766 (769) (DB). (Notice to quit—Not denied in written statement — Want of notice cannot be raised in second appeal.)
[*See also* ('78) 1 Cal L Rep 421 (423, 424) (DB). (Non-service of notice to quit.)]
[But see ('80) 2 Mad 346 (351) (DB). (Where notice to quit was part of plaintiff's title to eject, defendant was allowed to raise the point in second appeal.)
('94) 18 Bom 110 (113) (DB). (Objection to non-service of notice allowed and decree modified accordingly.)]

47. (1862) 1 Bom H C R 62 (63) (DB).
('91) 13 All 580 (581) (DB).
('25) 12 AIR 1925 Lah 241 (241) (DB).
('27) 14 AIR 1927 Nag 321 (322).

48. ('43) 30 AIR 1943 Mad 288 (290) (DB). (Objection as to absence of notice to certain persons before cancellation of security bond.)
('42) 29 AIR 1942 Cal 133 (136). (Plea that party was purchaser at rent sale without notice of unusual covenant governing holding.)
('41) 28 AIR 1941 Mad 727 (730, 731). (Plea as to deed being invalid as opposed to public policy.)
('41) 28 AIR 1941 Nag 152 (155). (Plea that application for execution is fraudulent.)
('35) 22 AIR 1935 Lah 10 (11). (Question of fraud, misrepresentation or gross negligence.)
('35) 22 AIR 1935 Cal 726 (728) (DB). (Plea as to legality of certain tax by Municipality.)
('35) 22 AIR 1935 Cal 89 (90) (DB). (Question whether S. 173, Bengal Tenancy Act, was applicable to a particular application.)
('35) 18 Nag L Jour 110 (115) (DB). (A plea that a suit is barred by reason of S. 47, C. P. Code.)
('36) 23 AIR 1936 Pat 62 (63) (DB). (Objection that decree was satisfied as against the objector-judgment-debtor.)
('38) 40 Pun L R 630 (631). (Plea that suit should be treated as representative one.)
('36) 23 AIR 1936 Oudh 235 (235, 236) : 12 Luck 59 (DB). (Finding as to existence of custom—Plea that it is qualified cannot be raised for the first time in second appeal.)
('32) 19 AIR 1932 Bom 255 (255). (Plea of purchase in good faith and for consideration from ostensible owner.)
('34) 21 AIR 1934 Nag 226 (227) : 18 Nag L R 27. (Plea of fraud not set up in pleadings — Appellate Court has no jurisdiction to entertain the plea.)
('37) 24 AIR 1937 Cal 8 (9) (DB). (Whether rate of rent mentioned in lease contravenes S. 29, Bengal Tenancy Act, and so not enforceable.)
('38) 25 AIR 1938 Nag 163 (164) : I L R (1938) Nag 469 (DB). (Allegation as to caste or community cannot be challenged for first time in second appeal at the stage of argument.)
('36) 23 AIR 1936 Pat 275 (282) (DB). (New point as to forfeiture of tenancy by denial of title.)
('39) 26 A I R 1939 All 163 (164) : I L R (1939) All 167 (DB). (Plea that lower Appellate Court should not entertain plea of want of jurisdiction in view of S. 21, C. P. Code, not raised in lower Court nor in grounds of second appeal.)
('36) 23 AIR 1936 Rang 260 (262) : 14 Rang 738. (New plea that property descended to stridhana heir of the deceased.)
('37) 24 A I R 1937 Nag 237 (239) : I L R (1938) Nag 221 (DB). (Plea of invalidity of deed of assignment of decree for want of registration.)

49. ('42) 29 AIR 1942 Cal 586 (587) (DB). (Point relating to estoppel.)

point put forward in the trial Court but not urged in first appeal will not be allowed in second appeal.[50] Conversely, where one party sets up a new case in first appeal, the other side should ask the lower Appellate Court for an opportunity to meet it; if he fails to do so, he cannot raise the objection in second appeal.[51] Where the trial Court refused to permit the setting up of an alternative case, but the question was not raised in first appeal, it was not allowed to be raised in second appeal.[52] Where an unsuccessful defendant was content to rest his case in first appeal on a question of law without challenging the trial Court's findings on other points, it was held that, when the point of law was decided against him in second appeal, he could not be allowed to meet the case on the other points.[53]

As to the effect of subsequent Full Bench decisions on pending second appeals, see the undermentioned cases.[54]

See also Notes on O. 41 R. 33.

56. New point involving pure question of law. — A point of pure law apparent on the face of the record and *involving no further development by evidence* may be taken in second appeal, even though it may not have been raised in the Courts below.[1] In other words, a point of law not depending upon an examination of the

('41) 28 AIR 1941 Mad 612 (614). (Objection as to competency of plaintiff to maintain suit.)
('25) 12 AIR 1925 Cal 1184 (1184) (DB).
† ('17) 4 AIR 1917 P C 23 (25) (PC). (Such point disallowed before Privy Council.)
('37) 24 AIR 1937 Oudh 243(244):13 Luck 167(DB). (Plea of *res judicata* withdrawn in trial Court.)
[But see ('23) 18 Ind Cas 367 (368) (Oudh). (Raised in written statement but no issue framed — Allowed in second appeal and remanded.)]

50. ('43) 30 AIR 1943 Pesh 47 (48).
('21) 8 AIR 1921 All 232 (233) : 43 All 555 (DB).
('27) 14 AIR 1927 All 791 (793).
('16) 3 AIR 1916 P C 166 (168). (Point not pressed before Appellate Court —Disallowed before the Privy Council.)
† ('36) 23 AIR 1936 Oudh 52 (53, 54) : 11 Luck 575 (DB). (Although one of law.)
✣ ('37) 24 AIR 1937 Oudh 243 (244) : 13 Luck 167 (DB). (Plea of *res judicata* raised in trial Court, but not raised in grounds of first or second appeal.)
('34) 21 AIR 1934 Lah 517 (519).
('39) 26 AIR 1939 Cal 593 (594) (DB).
('35) 1935 R D 124 (124). (Point not raised in first appeal by way of cross-objection.)
('35) 22 AIR 1935 Lah 590 (591): 17 Lah 84 (DB).
[*See* ('35) 18 Nag L Jour 220 (224). (It is not open to an appellant who has acquiesced in the decree of the trial Court, and who has omitted to file an appeal or cross-objection against it to the lower Appellate Court, to impeach the trial Court's decree for the first time in second appeal.)]

51. ('20) 7 AIR 1920 Cal 325 (326) (DB).

52. ('25) 12 AIR 1925 Oudh 329 (330).

53. ('09) 32 Mad 76 (82):1 Ind Cas 384 (387) (DB).

54. ('69) 3 Beng L R 271 (272) (DB). (That judgment is erroneous under a Full Bench ruling of the High Court will not be allowed.)
('69) 11 Suth W R 430 (431) (DB). (Suit having been originally contested on different grounds (non-liability for enhancement of rent), it is not open for first time in second appeal to ask for the dismissal of a suit on the strength of a Full Bench decision.)
('75) 24 Suth W R 6 (7) (DB). (Involving a modification of law.)
('75) 24 Suth W R 72 (72). (Do.)

Note 56

1. ('42) 29 AIR 1942 Oudh 499 (501)(DB). (Applicability of S. 76 (h), or S. 77 of T. P. Act.)
('41) 28 AIR 1941 Cal 58 (59) : I L R (1940) 2 Cal 334.
('40) 27 AIR 1940 All 353 (363) (DB). (Construction of document.)
('40) 27 AIR 1940 Nag 236 (237). (Record must include all relevant documents.)
('40) 27 AIR 1940 Pesh 52 (53). (Point whether parties are governed by Mahomedan law or custom.)
('39) 26 AIR 1939 Oudh 233(237):14 Luch 678(DB).
(1865) 3 Suth W R 40 (41) (DB).
('34) 21 AIR 1934 All 722 (722).
('34) 21 AIR 1934 All 868 (870) (DB).
('33) 20 AIR 1933 Sind 176 (178): 27 Sind L R 41 (DB).
('33) 20 AIR 1933 Lah 738 (739).
† ('09) 3 Sind L R 106 (107) : 4 Ind Cas 599 (600) (DB).
('09) 2 Ind Cas 202 (202) (DB) (Cal).
('21) 8 AIR 1921 Pat 298 (299) (DB).
('23) 10 AIR 1923 Lah 491 (492).
('25) 12 AIR 1925 All 361 (362) : 47 All 324 (DB).
('27) 14 AIR 1927 Mad 273 (274).
('31) 18 AIR 1931 Mad 632 (633). (Question of law not pressed, yet not abandoned in the lower Court.)
('30) 17 AIR 1930 Cal 616 (618).
('87) 14 Cal 586 (590) (DB).
('37) 24 AIR 1937 Oudh 505 (506).
('36) 23 AIR 1936 Pat 572 (577) (DB).
('37) 24 AIR 1937 Sind 230 (231) : 31 Sind L R 510 (DB).
[*See* ('37) 24 AIR 1937 All 535 (543) (DB).
('35) 22 AIR 1935 Mad 721 (722) : 58 Mad 804 (DB).]

evidence[2] and not requiring fresh investigation of facts,[3] may be taken for the first time in the second appeal. The reason is that it is the duty of the Court to take judicial notice of and apply the law correctly and a failure to do this will be an error of law.

Thus, a new point of law will be allowed —

(1) where it arises on the findings of the lower Court;[4]

(2) where it arises on the facts found by the said Court;[5] or

(3) where it arises on admitted facts or facts not in dispute.[6]

For specific instances of points thus allowed, see the undermentioned cases.[7]

[*See also* ('32) 19 AIR 1932 All 510 (511) : 54 All 65 (DB). (First appeal.)]

Also see O. 41 R. 1, Note 12.

2. ('89) 16 Cal 33 (36) (DB).
('36) 23 AIR 1936 Lah 612 (616). (Question of consideration of sale deed.)
† ('38) 25 AIR 1938 Bom 291 (293).
('36) 23 AIR 1936 Lah 448 (448).
('36) 23 AIR 1936 Sind 99 (104) : 29 Sind L R 455 (DB). (Court can *suo motu* deal with point of law.)
('35) 22 AIR 1935 Bom 326 (328, 330) : 59 Bom 502.

3. ('40) 21 Pat L Tim 894 (896) (DB). (Question of *res judicata* requiring further investigation of facts not allowed in second appeal.)
† ('22) 9 AIR 1922 All 124 (125). (Question of limitation.)
('23) 10 AIR 1923 Bom 82 (83): 47 Bom 128 (DB.)
('23) 10 AIR 1923 Cal 247 (248, 249) (DB).
('25) 12 AIR 1925 Nag 104 (106).
† ('27) 14 AIR 1927 Cal 393 (393) : 54 Cal 424 (DB).
✠ ('95) 19 Bom 331 (335) (DB).
('22) 9 AIR 1922 Bom 148 (148) (DB). (Where fresh evidence is to be taken, point will be disallowed.)
('22) 9 AIR 1922 Bom 147 (148) (DB). (Do.)
('22) 9 AIR 1922 Bom 233 (233, 234) (DB). (Do.)
('23) 10 AIR 1923 Bom 37 (39) (DB). (Do.)
('24) 11 AIR 1924 Bom 457 (458) (DB). (Do.)
('24) 11 AIR 1924 Bom 469 (469) (DB). (Do.)
('25) 12 AIR 1925 Lah 65 (65). (Do.)
('29) 16 AIR 1929 All 456 (457). (Do.)
('39) 26 AIR 1939 Rang 42 (44) (DB). (Question of law raised for the first time in a Court of last resort will receive consideration only if it is based on facts either admitted or proved beyond controversy.)
('36) 23 AIR 1936 All 557 (559).
('36) 23 AIR 1936 Pat 104 (105): 15 Pat 356 (DB).
('37) 1937 All L Jour 1252 (1253). (Point of law depending upon fresh trial of issue will not be allowed.)
† ('37) 24 AIR 1937 All 99 (100). (New question of law if requires new evidence, will not be allowed in second appeal.)
('38) 25 AIR 1938 Lah 128 (128). (Question of law requiring retrial for its decision cannot be allowed.)
('35) 22 AIR 1935 Cal 179 (180).

4. ('93) 17 Bom 303 (305) (DB).
('19) 6 AIR 1919 Low Bur 58 (58).
('20) 7 AIR 1920 Lah 489 (491).

5. ('10) 6 Ind Cas 75 (75) (Cal).
('17) 4 AIR 1917 Nag 7 (12) : 14 Nag L R 82.
('17) 4 AIR 1917 Nag 213 (213) : 13 Nag L R 98.
('18) 5 AIR 1918 Lah 88 (88): 1918 Pun Re No. 31.
('21) 8 AIR 1921 Pat 326 (328) (DB).
('32) 19 AIR 1932 All 289 (290, 291) (DB). (Alternative argument on facts established.)
† ('38) 25 AIR 1938 Lah 558 (559). (Plea of estoppel.)
('34) 21 AIR 1934 All 868 (870) (DB).
† ('38) 25 AIR 1938 All 396 (397): I L R (1938) All 563 (FB). (A I R 1932 P C 118 : 10 Rang 242 : 59 Ind App 161 (PC) followed.)

6. ('43) 30 AIR 1943 Pat 96 (101) : 21 Pat 799 (DB).
('41) 28 AIR 1941 Cal 333 (334) : I L R (1941) 1 Cal 339.
('40) 27 AIR 1940 Rang 27 (28).
('40) 185 Ind Cas 10 (11) (Oudh).
('69) 11 Suth W R 183 (183) (DB).
('32) 19 AIR 1932 All 108 (109) : 53 All 738 (DB). (Question of limitation.)
('93) 17 Bom 100 (105, 106) (DB).
('24) 11 AIR 1924 Lah 543 (544) (DB).
† ('38) 25 AIR 1938 Mad 405 (410).
('38) 25 AIR 1938 Rang 376 (377): 1938 Rang L R 83.
✠ ('38) 25 AIR 1938 Rang 236 (238) : 1938 Rang L R 256 (DB). (Question of law raised for the first time in a Court of last resort should receive consideration only if it is based on facts whether admitted or proved beyond controversy.)

7. ('42) 29 AIR 1942 Bom 95 (96) (DB). (New point — Point of law (e. g.) applicability of S. 82, T. P. Act, can be allowed to be argued.)
('41) 28 AIR 1941 Bom 197 (198). (Point of limitation.)
('41) 28 AIR 1941 Cal 333 (334) : I L R (1941) 1 Cal 339. (Whether sale for amount for which no certificate was issued under Bengal Public Demands Recovery Act is illegal.)
('39) 26 AIR 1939 Oudh 233 (237) : 14 Luck 678 (DB). (Question as to right of pre-emption.)
('74) 21 Suth W R 326 (326) (DB). (The omission of a party to prefer an appeal against an order of remand does not preclude him from questioning its legality when it comes up in special appeal from the subsequent decision passed after remand.)
('30) 2 All 884 (887) (SB). (The question whether the plaintiff has any cause of action or not.)
('10) 6 Nag L R 78 (80) : 6 Ind Cas 824 (825). (The legal effect of a transaction.)
('15) 2 AIR 1915 Lah 251 (251) (DB). (Question of adverse possession.)
('17) 4 AIR 1917 Cal 681 (684) (DB). (Easement by grant—If evidence is legally sufficient to prove a grant.)

In respect of such points it is not necessary that they should have been mentioned in the appeal grounds if there can be no legitimate objection on the ground of surprise to the other side.[8] It has been held that the power of allowing new points of pure law to be raised for the first time in second appeal is *discretionary*[9] though as a general rule, the discretion will be exercised in favour of allowing them to be raised.[10]

Where the new point sets up a right different in *kind* and not merely in *degree* from that originally set up, it cannot be entertained.[11]

57. New case of mixed questions of law and fact. — It has already been mentioned in Note 55 that a question involving questions of fact cannot be taken for the first time in second appeal. Therefore, a plea involving a mixed question of law and fact and depending on fresh investigation of facts will not be allowed to be taken for the first time in second appeal.[1]

('16) 3 AIR 1916 Oudh 199 (201). (Where a party set up separation of a joint Hindu family but the lower Court finds that the family had been joint, the party is entitled in second appeal to argue his case by setting up the existence of the joint Hindu family.)

('18) 5 AIR 1918 Lah 88 (88): 1918 Pun Re No. 31. (The question whether the Punjab Alienation of Land Act, S. 10 applied to a transaction.)

('21) 8 AIR 1921 Lah 229 (231). (Effect of abandonment on facts found.)

('22) 9 AIR 1922 Pat 252 (253): 6 Pat L Jour 650 (DB). (Liability of sons to pay an antecedent debt of their father apart from any proof of legal necessity or benefit to the family.)

('22) 9 AIR 1922 Pat 281 (284): 6 Pat L Jour 625 (DB). (If a respondent first comes to know of the erroneous order restoring the appeal without any notice upon him, he can raise objection to its validity in second appeal.)

('23) 10 AIR 1923 All 173 (174). (Doctrine of marz-ul-mout allowed to be taken in the appeal as a special grace.)

('25) 12 AIR 1925 All 783 (784): 47 All 932 (DB). (That S. 19A of Contract Act overlooked.)

('25) 12 AIR 1925 Cal 370 (372). (The question whether the Amaldhari lease is inadmissible in evidence for want of registration.)

('25) 12 AIR 1925 Cal 1034 (1036) (DB). (Objection to admissibility of evidence.)

('25) 12 AIR 1925 Lah 65 (65). (Question whether a particular defendant was a necessary party and could contest the suit.)

('27) 14 AIR 1927 Rang 83 (84): 4 Rang 500. (Whether the plaintiff was entitled to maintain the suit instituted by him.)

('37) 24 AIR 1937 Cal 632 (634). (Landlord contending in lower Courts that the area mentioned in kabuliyat was actual area—Finding of both Courts against landlord—In second appeal landlord contending that area mentioned must be assumed to be the area with reference to which rent was assessed.)

('38) 25 AIR 1938 Mad 405 (410) (DB). (Question whether stipulation in a mortgage amounts to a clog or not can be raised for the first time.)

('38) 25 AIR 1938 Rang 376 (377): 1938 Rang L R 83 (DB). (Plea that on admitted facts plaintiff was entitled to one-fourth and not half share according to Buddhist law of succession.)

('36) 23 AIR 1936 Nag 29 (30). (Question whether ancestors of a party were inferior holders or tenants.)

('36) 23 AIR 1936 Lah 612(616). (Question of consideration.)

('39) 26 AIR 1939 Rang 42 (44) (DB). (Plea of interest.)

('37) 24 AIR 1937 Sind 230 (231): 31 Sind L R 510 (DB). (Material facts on record—Whether such facts show the trust to be within provisions of S. 92, C. P. Code, is a question of law.)

('37) 24 AIR 1937 Nag 330 (334): ILR (1937) Nag 111. (Plea of subrogation.)

('37) 24 AIR 1937 Lah 387 (389). (Objection to certification on the ground that the payment made to the next friend of the minor without leave of the Court is not binding on the minor can be taken for first time.)

8. ('10) 8 Ind Cas 990 (991) (Low Bur).
[*See* ('40) 27 AIR 1940 Mad 577 (579). (Point raised at the close of hearing of appeal—Point allowed to be argued after giving notice to opposite side.)]
[*See also* ('42) 29 AIR 1942 Bom 95 (96) (DB). (Point of law not mentioned in memorandum of appeal but implicit from frame of suit.)]
Also see O. 41 R. 2, Note 4.

9. ('72) 17 Suth W R 214 (214, 215) (DB).
† ('87) 14 Cal 586 (590) (DB).
('71) 15 Suth W R 315 (317) (DB).
('31) 18 AIR 1931 Cal 565 (567) (DB).
('30) 17 AIR 1930 All 726 (726).
('30) 17 AIR 1930 All 885 (886) (DB). (Good ground to be shown for not raising point before.)
('21) 8 AIR 1921 All 337 (339): 43 All 193 (SB).
[*See* ('35) 22 AIR 1935 All 143 (146).]

10. † ('18) 5 AIR 1918 Cal 13 (17, 18) (SB).
('71) 15 Suth W R 180 (181) (DB).
✣ ('17) 4 AIR 1917 Cal 716 (718): 44 Cal 47.
('25) 12 AIR 1925 Oudh 506 (507).

11. ('94) 18 Bom 679 (683) (DB).
† ('36) 23 AIR 1936 Rang 260 (262): 14 Rang 738.
('37) 24 AIR 1937 All 99 (100). (New point of law turning plaint into an entirely different case will not be entertained.)

Note 57

1. ('41) 28 AIR 1941 Bom 197 (198).

For specific questions not allowed on this ground, see the undermentioned cases[2] and Notes 59 and 60.

('24) 11 A I R 1924 All 877 (878). (Whether the arrears of rent were due to any default of the mortgagee.)
† ('33) 20 A I R 1933 Nag 299 (301) : 30 Nag L R 101. (Plea of vicarious liability.)
('34) 21 A I R 1934 All 692 (693). (Adverse possession.)
('85) 9 Bom 285 (287, 288) (DB).
† (1900) 27 Cal 205 (207) (DB).
('05) 1 C P L R 1 (2).
('10) 6 Nag L R 3 (6) : 5 Ind Cas 426 (428).
('11) 14 Oudh Cas 332 (334) : 12 Ind Cas 321 (322).
('13) 7 Sind L R 11(15): 20 Ind Cas 523 (525) (DB).
('15) 2 AIR 1915 Cal 438 (440) (DB).
('18) 5 AIR 1918 Cal 526 (526) (DB).
('19) 6 AIR 1919 Oudh 283 (285) : 22 Oudh Cas 3.
('19) 6 AIR 1919 Pat 329 (330) (DB).
('20) 7 AIR 1920 Cal 530 (530, 531) (DB).
('21) 62 Ind Cas 761 (762) (DB) (Cal).
('21) 63 Ind Cas 497 (497, 498) (DB) (Cal).
('22) 9 AIR 1922 Bom 233 (233) (DB).
('22) 4 Lah L Jour 432 (434) (DB).
('23) 10 AIR 1923 Bom 37 (39) (DB).
† ('23) 10 AIR 1923 Cal 247 (248) (DB).
('23) 10 AIR 1923 Cal 292 (293) (DB).
('24) 11 AIR 1924 Bom 469 (469) (DB).
('24) 11 AIR 1924 Cal 372 (372) (DB).
('24) 11 AIR 1924 Pat 446 (447) : 3 Pat 236 (DB).
('25) 12 AIR 1925 Cal 225 (230) (DB).
('25) 12 AIR 1925 Nag 104 (106).
('26) 13 AIR 1926 All 707 (707, 708) (DB).
('26) 13 AIR 1926 Pat 401 (402) : 5 Pat 759 (DB).
('27) 14 AIR 1927 All 59 (59).
('27) 14 AIR 1927 All 763 (764).
('27) 14 AIR 1927 Mad 411 (411).
('27) 14 AIR 1927 Mad 455 (455).
('27) 14 AIR 1927 Nag 351 (352).
† ('39) 26 A I R 1939 Rang 42 (44) (DB). (Plea of limitation.)
('36) 23 AIR 1936 Lah 192 (193) (DB).
('35) 22 A I R 1935 Oudh 387 (392) : 11 Luck 82. (Plea as to adverse possession.)
('35) 22 AIR 1935 Rang 129 (130).
[*See also* ('36) 23 A I R 1936 Lah 629 (634) : 17 Lah 737 (DB). (Doubtful whether a mixed question of law and fact can be raised for the first time in second appeal.)]

2. ('43) 30 AIR 1943 Bom 191 (194) (DB). (Plea of plaint in previous suit being acknowledgment.)
('41) 28 AIR 1941 Mad 727 (731). (Plea as to deed being invalid as opposed to public policy.)
('17) 4 AIR 1917 P C 197 (200) (PC). (Question of abatement involving evidence.)
('32) 19 AIR 1932 Cal 405 (408) (DB). (Question of abandonment of a holding.)
('34) 21 AIR 1934 Nag 51 (52). (Plea of estoppel is a mixed question of fact and law — Cannot be pleaded in second appeal.)
('33) 20 AIR 1933 All 493 (495) : 55 All 554 (DB). (Question of family settlement not allowed to be raised at the hearing of second appeal.)
('17) 4 AIR 1917 Cal 817 (817, 818) (DB). (Question whether possession adverse or not.)
('24) 11 AIR 1924 Cal 245 (248) (DB). (Do.)
('27) 14 AIR 1927 Lah 522 (524). (Do.)
('14) 1 AIR 1914 P C 33 (33) (PC). (Award—Binding nature of.)
('29) 16 AIR 1929 Cal 452 (453) (DB). (Bengal Municipal Act—Imposition of personal tax under.)
('26) 13 AIR 1926 Nag 164 (166). (Omission to certify adjustment—If valid.)
('22) 9 AIR 1922 Bom 148 (148) (DB). (Gift—Validity of.)
('28) 15 AIR 1928 Cal 49 (49) (DB). (Gift — If offends against doctrine of musha.)
('29) 16 AIR 1929 Lah 875 (876). (Gift unregistered if admissible.)
('19) 6 AIR 1919 Cal 1077 (1078) (DB). (Interest—Liability to.)
('20) 2 Lah L Jour 230 (232). (*Lis pendens* — Plea of.)
('26) 97 Ind Cas 611 (612) (Mad). (Question whether a mortgage is properly executed.)
('21) 8 AIR 1921 Cal 781 (782) (DB). (Mortgage — Subrogation—Plea as to.)
('24) 11 AIR 1924 Nag 360 (361). (Necessaries — What are.)
('16) 3 AIR 1916 Sind 53 (54) : 10 Sind L R 38 (DB). (Legal Necessity—Existence of.)
('19) 6 AIR 1919 Cal 161 (162). (Occupancy right—Acquisition of.)
('21) 8 AIR 1921 Lah 226 (227) : 2 Lah 167 (DB). (*Onus probandi* in a case of custom.)
('27) 14 AIR 1927 Mad 528 (529). (Partial partition —Maintainability of suit for.)
('29) 16 AIR 1929 Lah 266 (267). (Partner's authority to bind partnership in winding up.)
('27) 14 AIR 1927 All 344 (345) (DB). (Part performance — Plea of.)
('29) 16 AIR 1929 Pat 717 (720, 721) : 9 Pat 487. (Whether a certain provision is penal.)
('26) 94 Ind Cas 417 (418) (Cal). (Question of procedure dependent on facts.)
('19) 6 AIR 1919 Cal 407 (408) (DB). (Registration —Validity of—Plea as to.)
† ('27) 14 AIR 1927 Mad 311 (316) (DB). (Sale certificate—What passes under — Question as to.)
('14) 1 AIR 1914 Low Bur 166 (168). (Question of contest between verbal sale and registered sale.)
('21) 3 Lah L Jour 470 (472). (Shamilat land — Right to, as natural accretion.)
('24) 11 AIR 1924 Cal 353 (354) (DB). (Tenure — Nature of.)
('22) 9 AIR 1922 Pat 390 (392) : 1 Pat 15 (DB). (Ware-house rent—Claim for.)
('22) 4 Lah L Jour 432 (434) (DB). (Widow's power under custom to make a gift.)
('69) 11 Suth W R 485 (487, 488) (DB). (Plea of merger.)
('21) 8 AIR 1921 Cal 816 (817, 818) (DB). (New defence of adverse possession.)
† ('38) 25 AIR 1938 Rang 236 (239) : 1938 Rang L R 256 (DB). (Validity of security bond executed by guardian *ad litem*.)
('36) 23 AIR 1936 Cal 127 (128). (Suit for recovery of money — Plea that claim for interest should be limited to 25 per cent., by reason of S. 3, Bengal Money-lenders Act.)

58. Plea going to the root of the case. — It follows from what has been said in Note 56 that a plea of law which goes to the root of a case can be taken up even for the first time in second appeal,[1] if it arises from the evidence on record[2] and does not depend on other facts or further enquiry on facts.[3] But such a plea will not necessarily be allowed in all cases. Where the objection if one which, if it had been taken in the lower Courts, might have been cured, it will not be allowed to be taken for the first time in second appeal.[4] Thus, a plea of want of cause of action which is merely technical and capable of being cured if the objection had been taken in the lower Courts cannot be allowed to be raised in second appeal.[5] But where the plea is one which is *fundamental* and *incurable*, it can be allowed to be raised for the first time in second appeal.[6] Thus, an objection that the appellant in the lower appellate Court was not competent to file the appeal goes to the very root of the appeal and can be raised for the first time in second appeal;[7] where such a plea is allowed, the opposite party may be given an opportunity to meet it.[8]

('36) 23 AIR 1936 Lah 192 (193) (DB). (Question of validity of gift.)

Note 58

1. ('42) 29 AIR 1942 Bom 273 (274) : ILR (1942) Bom 649. (Plea as to maintainability of suit or application.)
('40) 27 AIR 1940 Oudh 92 (93): 15 Luck 92. (Plea of want of notice before suit for ejectment.)
('68) 10 Suth W R 213 (213) (DB).
('10) 6 Ind Cas 464 (465) (All).
('23) 10 AIR 1923 All 343 (344). (Though it is ordinarily a sound rule of law not to permit a point to be taken in second appeal, which has not been taken before.)
('36) 23 AIR 1936 Lah 448 (448). (Point relating to jurisdiction.)
('39) 26 AIR 1939 Pat 140 (140).

2. † ('87) 14 Cal 586 (590) (DB).
† ('17) 4 AIR 1917 Cal 716 (718) : 44 Cal 47 (DB).
('23) 10 AIR 1923 Lah 491 (492).

3. ('42) 29 AIR 1942 Pat 79 (80) (DB).
('17) 4 AIR 1917 Nag 213 (213).
('27) 14 AIR 1927 Bom 157 (158) : 51 Bom 231 (DB).

4. ('42) 29 AIR 1942 Pesh 81 (82). (Plea as to jurisdiction of Civil Court in view of S. 21, Punjab Alienation of Land Act.)
('39) 26 AIR 1939 Mad 918 (919). (Plea as to jurisdiction of Revenue Court.)
† (1843) 3 Moo Ind App 229 (242) (PC).
('34) 21 AIR 1934 Rang 308 (308). (Maintainability of suit under S. 53 of the T. P. Act.)

5. (1864) 1 Suth W R 23 (23) (DB).
('69) 11 Suth W R 248 (248) (DB).
† ('69) 11 Suth W R 350 (351) (DB).
('11) 9 Ind Cas 385 (387) (Lah).
('78) 1 Cal L Rep 421 (424) (SB).
('90) 13 Mad 277 (281) (DB). (Plea of want of notice not allowed for the first time in second appeal as, though plaint alleged demand of relinquishment of possession, yet no issue was taken on it and in view of the allegations on both sides the point could not have arisen.)
('12) 15 Ind Cas 584 (586) (Mad). (Notice to quit—Want of.)
† ('20) 7 AIR 1920 Mad 965 (967) (DB). (Do.)
('75) 1 All 269 (271) (DB). (Plea as to notice not affecting decision.)
('95) 19 Bom 43 (45, 46) (DB). (Suit for declaration of plaintiff's right to be registered in the revenue register — Plaintiff had not previously asked the Collector to place him on the register—Plea cannot be raised for first time in second appeal.)

6. ('69) 12 Suth W R 24 (26) (DB). (Want of cause of action appearing on the plaint.)
('70) 14 Suth W R 420 (422) (DB). (Want of cause of action going to the root of the case.)
('71) 6 Beng L R App 73 (74) (DB). (Plea affecting jurisdiction.)
† ('99) 21 All 341 (345) (FB). (Want of cause of action appearing on the plaint.)
('11) 12 Ind Cas 111 (112) (SB) (All.) (Do.)
(93) 18 Bom 110 (113) (DB). (Want of notice in ejectment suit.)
('10) 5 Ind Cas 336 (337) (All). (Plea of want of notice which goes to the root of the case.)
('01) 26 Bom 360 (362) (DB).
('66) 1 Agra 1 (2) (DB). (Incompetency to bring a suit.)
('78) 1 All 535 (537) (DB). (Objection affecting arbitrator's procedure.)
('79) 3 Bom 437 (438) (DB). (Plaintiffs having been adjudicated insolvent.)
('83) 6 Mad 76 (78) (DB). (Point that sale of religious office is void.)
('93) 20 Cal 86 (92) : 10 Ind App 191 (PC). (Impropriety of notice of sale under regulation.)
† ('01) 28 Cal 324 (328) (DB). (Irregular remand under O. 41 R. 23.)
('07) 11 Cal W N 1127 (1128) (DB). (A point as to jurisdiction under Chota Nagpur Encumbered Estates Act.)
('17) 4 AIR 1917 Cal 661 (684) (DB). (The point whether in the absence of a written and registered document creating a right of way the plaintiff's suit for declaration of such a right must fail for want of legally sufficient evidence to prove the grant.)

7. ('34) 21 AIR 1934 All 677 (679).

8. † ('79) 2 Mad 346 (350, 351) (DB).
('25) 12 AIR 1925 Mad 67 (68) (DB).

59. Plea of jurisdiction. — A plea of jurisdiction is a point of law[1] and except in cases covered by S. 21 of the Code[2] and S. 11 of the Suits Valuation Act, 1887,[3] can even as a new plea be raised in second appeal,[4] unless such plea cannot be determined on the facts found by or admitted in the lower Court,[5] or on the facts already in evidence.[6]

See also the undermentioned decision.[7]

60. Plea of limitation, estoppel or res judicata. — Pleas of limitation or of estoppel or of *res judicata* are all pleas raising questions of law and, on the principles mentioned in Notes 56 to 59, can be raised for the first time in second appeal[1] unless —

Note 59

1. † ('31) 18 AIR 1931 All 556 (557) (DB).
('34) 21 AIR 1934 Sind 123 (125) : 28 Sind L R 54 (DB). (The plea was allowed to be raised, as it depended on public documents which required no proof.)
2. See Notes on Section 21.
('27) 14 AIR 1927 Nag 164 (165). (Small cause tried as original suit.)
† ('94) 21 Cal 249 (252) (DB). (Do.)
('27) 14 AIR 1927 Nag 120 (120). (Do.)
† ('33) 20 AIR 1933 Nag 318 (321, 322) : 29 Nag L R 342.
('05) 2 All L Jour 156 (159). (Wrong Court.)
('17) 4 AIR 1917 Pat 598 (599). (Place of suing.)
3. See Notes on Sections 15 and 21.
('76) 25 Suth W R 260 (261) (DB).
† ('95) 18 Mad 418 (420) (DB).
('01) 24 Mad 43 (45) (DB).
('36) 23 AIR 1936 Lah 442 (442).
4. ('23) 10 AIR 1923 Lah 551 (553) (DB).
('34) 21 AIR 1934 Oudh 55 (55): 9 Luck 365 (DB).
('90) 13 Mad 25 (27) (DB).
✠ ('88) 12 Bom 155 (157) (DB).
('89) 13 Bom 424 (427) (DB).
('21) 8 AIR 1921 All 290 (291) : 42 All 18 (DB).
✠ ('24) 11 AIR 1924 P C 95 (101): 20 Nag L R 33: 51 Ind App 72 : 51 Cal 361 (PC).
('14) 1 AIR 1914 P C 140 (143) : 42 Cal 116 : 41 Ind App 197 (PC).
('85) 7 All 230 (243) (FB).
('24) 11 AIR 1924 Nag 372 (373).
('72) 18 Suth W R 345 (345)(DB). (Jurisdiction to transfer execution proceedings.)
('89) 13 Mad 273 (274) (DB).
('96) 20 Bom 86 (96) (DB).
('99) 23 Bom 22 (26) (DB).
('10) 5 Ind Cas 525 (526) (DB) (Cal.)
('08) 35 Cal 470 (474) (DB).
('23) 10 AIR 1923 Bom 321 (349) : 47 Bom 843 (FB).
('25) 12 AIR 1925 Bom 162 (162) : 49 Bom 152 (DB).
('26) 13 AIR 1926 All 401 (402).
('89) 13 Bom 489 (491) (DB). (Want of appellate jurisdiction in the lower Appellate Court.)
('12) 15 Ind Cas 669 (670) (DB) (Cal). (Do.)
('18) 5 AIR 1918 Lah 369 (370) : 1918 Pun Re No. 21. (Do.)
('08) 8 Cal L Jour 116 (117) (DB).
('32) 19 AIR 1932 All 701 (702) : 54 All 998 (DB). (Objection that suit must have been brought in Revenue Court.)
('35) 22 AIR 1935 All 422 (423).
('36) 23 AIR 1936 Lah 448 (448).
('36) 23 AIR 1936 Pat 177 (178) (DB). (Want of jurisdiction cannot be cured by waiver.)
('39) 26 AIR 1939 All 49 (51). (Objection that there is no proper reference to arbitration and that it could not enable arbitrator to make an award, relates to question of jurisdiction and can be raised at any stage.)
† ('39) 26 AIR 1939 All 22 (23).
('37) 24 AIR 1937 Nag 170 (171) : 19 Nag L Jour 308 (311) : I L R (1938) Nag 276.
† ('35) 22 AIR 1935 Oudh 325 (326):11 Luck 106.
[*See also* ('32) 19 AIR 1932 All 273 (276) : 54 All 573 (FB). (Plea entertained in Letters Patent appeal.)
('35) 22 AIR 1935 Mad 89 (89). (Plea that suit should have been instituted on original side instead of small cause side taken in revision.)]
Also see S. 21 Note 3 and O. 41 R. 1, Note 12.
[See however ('12) 14 Ind Cas 34 (35) (DB) (Cal.)]
5. † (1862) 1862 Suth W R Sup No. 31 (32, 33) (FB).
('35) 22 AIR 1935 All 746 (748) : 57 All 891 (DB).
('35) 39 Cal W N 876 (880) (DB). (A question of jurisdiction is a question of law but it cannot always be allowed to be raised for the first time in appeal ; and an Appellate Court should always be chary of entertaining points which are not sifted in the Court below.)
6. ('95) 22 Cal 483 (486) (DB).
7. ('35) 22 AIR 1935 Bom 254 (255). (When a small cause suit is tried by a Court without small cause powers as a regular suit, without any objection on the part of the defendant, who does not raise any objection either in the trial Court or in appeal, he cannot be allowed to raise that point in second appeal.)

Note 60

1. ('43) 30 AIR 1943 Pesh 43 (45) (DB). (Plea of limitation.)
('41) 28 AIR 1941 Bom 197 (198). (Do).
('40) 27 AIR 1940 Rang 136 (136). (Plea of *res judicata*.)
('39) 26 AIR 1939 Lah 556 (557). (Do.)
('14) 1 AIR 1914 All 80 (83) : 36 All 370 (DB). (Plea of limitation.)
† ('22) 9 AIR 1922 Lah 240 (241) (DB). (Do.)
('68) 10 Suth W R 59 (60) (DB). (Do.)
('22) 9 AIR 1922 All 124 (125). (Do.)
✠ ('07) 34 Cal 941 (946) (SB). (Do.)
('21) 63 Ind Cas 785 (786) (DB) (Cal.) (Do.)

(1) they depend on facts which are not admitted or undisputed,[2] or

(2) they involve questions of fact requiring further evidence,[3] or

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('06) 33 Cal 257 (259) (DB). (Do.)
† ('15) 2 AIR 1915 Mad 150 (156) (DB). (Do.)
('19) 6 AIR 1919 Cal 671 (671) : 46 Cal 455 (457) (DB). (Do.)
('28) 15 AIR 1928 Cal 870 (871) (DB). (Do.)
('27) 14 AIR 1927 All 177 (179). (Do.)
('76) 2 Cal 114 (116, 117) (DB). (Do.)
('18) 5 AIR 1918 Pat 526 (528). (Do).
('85) 1885 Bom P J 34 (35) (DB). (Do.)
('88) 1888 Pun Re No. 139 p. 374 (375). (Do.)
† ('29) 16 AIR 1929 Pat 173(175):8 Pat 107 (DB). (Do.)
('10) 5 Ind Cas 294 (294) (All). (Do.)
('36) 23 AIR 1936 Cal 497 (503) : I L R (1937) 1 Cal 1 (FB). (Limitation, plea as to.)
('39) 26 AIR 1939 Lah 556 (557) : 41 Pun L R 521 (525). (Plea of *res judicata* patent on record — Whole execution record is to be taken as one record.)
† ('38) 25 AIR 1938 Lah 558 (559). (Plea of estoppel.)
('37) 24 AIR 1937 Mad 228 (229) (Plea of *res judicata*—Court is bound to entertain it in second appeal, even though parties had abandoned it — Note : This case is reversed on another point in AIR 1938 Mad 501.)
('35) 22 AIR 1935 Oudh 387 (392) : 11 Luck 82. (*Res judicata.*)
[*See* (35) 22 AIR 1935 Mad 947 (953). (Plea of limitation.)]
[*See also* ('98) 1898 All W N 104 (104).]
[See however ('42) 29 AIR 1942 Lah 217 (219): I L R (1943) Lah 191 (FB). (A new plea of *res judicata* was not allowed to be raised before the Full Bench to which that case had been referred by the Letters Patent Bench.)]

2. ('40) 27 AIR 1940 Pat 480 (482) (DB).
('40) 27 AIR 1940 Rang 172 (174). (Estoppel.)
† (14) 1 A I R 1914 Sind 27 (28) : 8 Sind L R 272 (DB). (Do.)
('18) 5 AIR 1918 Lah 388 (389) (DB). (Plea of *res judicata.*)
('37) 24 A I R 1937 Nag 184 (185) : I L R (1938) Nag 167.
[*See* ('39) 26 AIR 1939 Pat 19 (20) (DB).]
[*See also* ('43) 30 AIR 1943 Lah 129 (137). (Plea of limitation—Not allowed in Letters Patent appeal as a mixed question of law and fact).
('36) 165 Ind Cas 208 (209) (Cal). (Plea of *res judicata*—Pleadings of suit in which decree relied on as *res judicata* not on record.)]

3. ('42) 29 AIR 1942 Pat 71 (72) (DB). (Estoppel.)
('40) 27 AIR 1940 Nag 7 (8). (Do.)
('40) 27 AIR 1940 Nag 163 (173) : I L R (1941) Nag 513 (DB). (*Res judicata.*)
('40) 21 Pat L Tim 894 (896) (DB). (Do.)
('34) 21 AIR 1934 Mad 551 (552)(DB). (Do.)
† ('14) 1 AIR 1914 Sind 27 (28) : 8 Sind L R 272 (DB). (Limitation or estoppel.)
('25) 12 AIR 1925 Nag 77 (77) : 22 Nag L R 118.
('34) 21 AIR 1934 All 770 (772).
('14) 1 AIR 1914 Bom 47 (51) : 38 Bom 227 (DB).
('17) 4 AIR 1917 All 359 (362) (DB).
('18) 5 AIR 1918 Pat 504 (504) (DB).
('22) 9 AIR 1922 Pat 398 (399) : 1 Pat 23 (DB).
† ('23) 10 AIR 1923 Rom 254 (255) (DB).
('25) 12 AIR 1925 Mad 986 (988).
('28) 15 AIR 1928 Cal 870 (871) (DB). (Case cannot be remanded to find out facts)
('29) 16 AIR 1929 Lah 432 (432).
('30) 17 AIR 1930 Cal 385 (387) : 57 Cal 114 (DB).
('25) 12 AIR 1925 Nag 178 (179).
('87) 11 Bom 114 (119) (DB).
('09) 5 Low Bur Rul 82 (83) : 3 Ind Cas 711 (712). (Limitation and adverse possession.)
('29) 115 Ind Cas 680 (681) (DB) (Pat). (Do).
('28) 15 AIR 1928 Nag 203 (204). (Plea of prescription cannot be raised for the first time in second appeal—Limitation and prescription distinguished).
('16) 3 AIR 1916 Mad 535 (535) (DB). (Bar of plaintiff's suit under S. 7 of the Limitation Act because his undivided elder brother would be barred.)
('23) 10 AIR 1923 Mad 306 (308).
† ('16) 3 AIR 1916 P C 182 (185) : 44 Cal 759: 41 Ind App 65 (PC). (Depending upon construction of a kabuliyat in a respect not submitted to the Court below.)
('29) 16 AIR 1929 Mad 775 (776). (Plea of *res judicata* not raised or discussed before the lower Court.)
('99) 21 All 446 (448, 449). (*Res judicata* — The observations to the contrary in 4 All 69 (FB) that the plea could be entertained even if it involves inquiry into facts was held in this case to be merely *obiter.*)
('34) 21 AIR 1934 All 692 (693). (Plea of limitation.)
('34) 21 AIR 1934 All 941 (942). (Plea of estoppel not entertained.)
('35) 22 AIR 1935 Bom 326 (327) : 59 Bom 502. (New plea as to estoppel.)
('35) 22 AIR 1935 Cal 713 (715).
('35) 22 AIR 1935 Mad 725 (726). (Plea of estoppel.)
† ('37) 24 AIR 1937 All 696(699). (Plea of limitation.)
('37) 24 AIR 1937 Lah 312 (312). (Do.)
† ('37) 24 AIR 1937 Nag 314 (316) : I L R (1937) Nag 28. (Do.)
('37) 24 AIR 1937 Pat 642 (643). (Plea of estoppel not raised in the trial Court.)
† ('39) 26 AIR 1939 All 194(196). (Plea of estoppel.)
('38) 25 AIR 1938 Bom 291 (293). (Plea of estoppel cannot be allowed to be raised for the first time in second appeal, when it would necessitate the taking of further evidence of facts.)
[*See* ('36) 23 AIR 1936 P C 258 (259) (PC).]
[*See also* ('42) 29 AIR 1942 Cal 586 (587) (DB). (Point relating to estoppel raised in written statement not pressed in trial Court — It cannot be raised in appeal.)
('35) 22 AIR 1935 Cal 713 (715) (DB). (Question of estoppel is not a pure question of law; when the plea of estoppel, therefore, has not been raised in the Courts below it cannot be raised for the first time in second appeal.)
('36) 23 AIR 1936 Cal 181 (183).
('84) 8 Bom 535 (537) (BB).]
Also see O. 41 R. 1, Note 12.

(3) they depend on a possible question regarding which the party adversely affected might have adduced evidence.[4]

But even a plea which could be raised for the first time in second appeal cannot be heard at the hearing of the appeal unless it has been set out in the memorandum of appeal or unless the Court grants leave under O. 41 R. 2.[5]

Where an objection on the ground of limitation was taken in the trial Court but the issue was found against, and the High Court remanded the case without passing any judgment on that issue, it was held that where the case came upon second appeal again, the question of limitation could be gone into.[6]

An objection that the second appeal is barred by limitation can be raised at the hearing, if the appeal had been admitted *ex parte*. See O. 41 R. 9, Note 2.

61. Plea abandoned or waived is barred. — It has been seen in sections 9 and 21 that no amount of consent by parties can give jurisdiction and that there can be no waiver or abandonment of such a plea.[1] Where, however, a plea whether of fact or of law is one which could be waived or abandoned and is so abandoned, it cannot be raised again in second appeal.[2] Whether a plea has been abandoned or waived has to be gathered from the conduct of the party in the Courts below.[3] Thus, where points taken in the pleadings or in the memorandum of first appeal are not pressed in the trial Court or in the lower Appellate Court, as the case may be,[4] or where parties conduct the

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4. ('16) 3 AIR 1916 Mad 535 (535) (DB).
[*See also* ('34) 21 AIR 1934 Oudh 55 (55) : 9 Luck 365 (DB). (Plea of bar of S. 47, C. P. Code.)]
5. ✠('93) 15 All 123 (128) (SB).
('91) 13 All 580 (581) (DB).
✠('82) 4 All 69 (70, 71, 72) (FB). (Section 542 of the old Code (O. 41 R. 2) applied.)
('23) 10 AIR 1923 Lah 560 (563). (4 All 69 followed.)
('14) 1 AIR 1914 All 2 (3). (Do.)
[*See also* ('31) 18 AIR 1931 All 556 (557) (DB). (Objection on the ground of jurisdiction was allowed to be raised under the provisions of O. 41 R. 2.)]
Also see O. 41 R. 2, Note 5.
6. ('67) 7 Suth W R 67 (69) (DB).

Note 61

1. ('36) 23 AIR 1936 Pat 177 (178) (DB).
[*See also* ('27) 14 AIR 1927 Mad 273 (274). (Plea of *res judicata* is akin to plea of jurisdiction and can be raised though abandoned.)
2. ('10) 6 Ind Cas 795 (795) (DB) (All).
('32) 19 AIR 1932 Lah 343 (343) : 13 Lah 185 (DB). (Abandoning mixed issues of law, custom and fact.)
('33) 20 AIR 1933 Cal 865 (870) (DB).
('78) 2 Cal L Rep 208 (208) (DB).
('96) 23 Cal 374 (392) (DB).
('20) 7 AIR 1920 Nag 45 (45) : 16 Nag L R 89. (This case is overruled on another point in A I R 1938 Nag 366 : ILR (1938) Nag 461.)
('21) 8 AIR 1921 Lah 294 (295) (DB).
('21) 63 Ind Cas 490 (492) (All).
('09) 2 Ind Cas 848 (849) (All). (Parties impleaded without objection.)
('22) 9 AIR 1922 Oudh 102 (105).
('23) 10 AIR 1923 Lah 252 (252) (DB).
('24) 11 AIR 1924 Cal 541 (541) (DB).
('25) 12 AIR 1925 Oudh 510 (511).
('26) 13 AIR 1926 Nag 160 (161).
('27) 14 AIR 1927 Mad 75 (76).
('29) 16 AIR 1929 Pat 717 (720, 721) : 9 Pat 487 (DB). (Mixed question of law and fact.)
('31) 18 AIR 1931 Sind 170 (176) : 25 Sind L R 403 (DB). (Do.)
('30) 17 AIR 1930 Oudh 268 (269, 270) (DB). (Point of pure law.)
†('27) 14 AIR 1927 Oudh 37 (37) (DB). (Do.)
('30) 17 AIR 1930 Lah 148 (149) (DB). (Future interest denied by trial Court—No cross-objections in first appeal — Cannot be claimed in second appeal.)
('72) 18 Suth W R 37*n* (DB). (Objection to jurisdiction not pressed before lower Appellate Court.)
('11) 11 Ind Cas 408 (409) (DB) (Lah).
('37) 24 AIR 1937 Lah 174 (176). (Decree transferred for execution without following procedure under O. 21 R. 5—Objection as to irregularity in procedure can be waived.)
('36) 23 AIR 1936 Bom 10 (11) : 60 Bom 34 (DB). (Objection as to maintainability of a suit, if not brought in the lower Court, will be deemed to have been waived and cannot be raised in second appeal.)
[*See* ('37) 24 AIR 1937 Mad 228 (229). (Court is bound to entertain plea of *res judicata* even though abandoned by parties. NOTE. — This case is reversed on another point in AIR 1938 Mad 501.)]
Also see O. 41 R. 1, Note 12.
3. ('02) 26 Bom 410 (413) (DB).
4. ('41) 28 AIR 1941 Mad 612 (614). (Plea as to *locus standi* of plaintiff to sue.)
('41) 28 AIR 1941 Peah 69 (72) (DB). (Absence of cause of action—Plea, as to.)
('18) 5 AIR 1918 P C 53 (55) : 40 All 497 (PC).
('34) 21 AIR 1934 Pat 55 (57).
('71) 15 Suth W R 392 (392) (DB).
('70) 14 Suth W R 423 (424) (DB).

case in the lower Courts as if certain facts are admitted,[5] or where the findings of the trial Court are not challenged in the first Appellate Court,[6] such points will be taken to be abandoned or waived and cannot be raised in second appeal. Similarly, objections as to the admissibility or exclusion of evidence if not raised in the trial Court or in the lower Appellate Court cannot be raised in second appeal.[7] But the mere fact that the lower Appellate Court has not referred to a certain point does not necessarily mean that the point was abandoned.[8]

62. Who may appeal and who may not. — The matter has been fully discussed in Notes 6, 7 and 8 of S. 96. The questions as to who may and who may not prefer a second appeal will be governed by the same principles.

63. Remand. — Where, in appeal from an order of remand the High Court determines a question of law, the decision of the question will be final for all purposes and in any appeal that may be subsequently made to the High Court.[1] See also O. 41, Rules 23 and 25.

64. Ex parte appellate decree is subject to second appeal. — Under the Code of 1859 there was a conflict of views on the question whether a second appeal lay against *ex parte* decrees passed in first appeals. Some decisions held that the only remedy was to proceed under S. 119 of the said Code (corresponding to O. 9 R. 13 of the present Code).[1] Others held that a second appeal was also competent.[2]

This conflict has been set at rest by the last paragraph of S. 584 of the Code of 1882 re-embodied as sub-s. (2) to S. 100 and there is now no doubt that a second appeal from an *ex parte* appellate decree is competent.[3]

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† ('19) 6 AIR 1919 Oudh 30 (30).
('35) 22 AIR 1935 All 1004 (1008) (DB).
('35) 22 AIR 1935 Pat 351 (352).
5. ('70) 13 Suth W R 91 (94) (DB).
('75) 23 Suth W R 174 (175) (DB).
[*See* ('35) 22 AIR 1935 Oudh 163 (164). (Admission of a mixed question of law and fact made in lower Appellate Court cannot be withdrawn in second appeal.)]
6. ('43) 30 AIR 1943 All 196 (197) (DB).
('43) 30 AIR 1943 Pesh 66 (67) (DB).
('10) 6 Ind Cas 331 (332) (DB) (All).
7. ('40) 27 AIR 1940 Bom 63 (64) (DB). (Objection as to inadmissibility under S. 63A, Dekkhan Agriculturists' Relief Act.)
('68) 10 Suth W R 50 (50) (DB). (Admission).
('72) 18 Suth W R 105 (105) (DB). (Do).
('23) 10 AIR 1923 Cal 378 (379) (DB). (Do.)
† ('27) 14 AIR 1927 Mad 1107 (1108). (Do.)
† ('12) 16 Ind Cas 213 (214)(DB)(Cal). (Exclusion.)
('69) 11 Suth W R 418 (419)(DB). (Refusal to summon witnesses — Objection not taken in Court below.)
('70) 2 N W P H C R 206 (206, 207) (DB). (Exclusion of evidence.)
('69) 12 Suth W R 470 (471)(DB). (Refusal to summon — Objection taken but not pressed in first appeal.)
('11) 12 Ind Cas 691 (691) (DB) (Bom). (Evidence dispensed with in trial Court and not offered in first Appellate Court.)
('69) 12 Suth W R 363 (364) (DB). (Refusal to take evidence — Party content to rest his case in the lower Appellate Court on the evidence let in.)
('88) 13 Bom 336 (337) (DB). (Do.)
[*See also* (1900) 24 Bom 591 (594, 596) (DB). (Admission.)]
Also see Note 55.
8. ('43) 30 AIR 1943 Mad 455 (457).
† ('29) 16 AIR 1929 Lah 81 (82).
('09) 4 Ind Cas 30 (30, 31) (Mad) (DB).
[*See* ('37) 39 Pun L R 312 (312). (Lower Appellate Court not noticing in judgment point taken in grounds — Presumption is that it is abandoned in absence of affidavit to contrary.)]
[*See also* ('13) 18 Ind Cas 367 (368) (Oudh). (Plea raised in written statement of the defendant not made subject of issue and not brought by the plaintiff-appellant to the notice of the lower Appellate Court — Defendant can raise it in second appeal.)]

Note 63

1. ('93) 15 All 413 (414) (DB).

Note 64

1. See for instance ('66) 3 Mad H C R 109 (110) (DB).
2. ('69) 10 Suth W R 450 (451).
('73) 20 Suth W R 402 (403).
('77) 3 Cal 228 (229) (DB).
('78) 2 Mad 75 (76) (DB).
3. ('86) 8 All 354 (357, 358) (FB).
('92) 16 Bom 117 (118) (DB).
('96) 19 Mad 414 (416) (DB).
† ('22) 9 AIR 1922 Lah 439 (440): 3 Lah 357 (DB).
('25) 12 AIR 1925 Cal 497 (498) (DB).
('29) 117 Ind Cas 229 (229) (DB) (Lah).

102. [S. 586.] No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes,[2] when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

No second appeal in certain suits.

[1877, S. 586; 1861, S. 27.]

Synopsis

1. Scope and object of the section.
2. Suits of the nature cognizable by Courts of Small Causes.
3. Effect of trying small cause suits as ordinary suits.
4. Suit includes execution proceedings.
5. Suits for accounts.
6. Suits for contribution.
7. Suits for damages.
8. Suits for maintenance.
9. Suits relating to marriage.
10. Suits for mesne profits.
11. Suits for money.
12. Suits relating to immovable property.
13. Suits for rent.
14. Suits for title.
15. Suits for declaration.
16. Suits for specific performance of contract.
17. Suits relating to trusts.
18. Appeal from order of remand in suits of small cause nature.
19. Appeal from order of review in suits of small cause nature.
20. Other cases.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Appeal from order refusing to re-admit an appeal. See Note. 1.

Effect of decision when question of title is raised. See Note 2.

It is the character of the suit as originally framed that determines whether second appeal lies or not. See Note 2.

Pecuniary value of the suit is determined from plaint allegations. See Note 2.

Prayer for declaration does not alter the nature of the suit. See Note 15.

Return of plaint involving question of title. See Note 2.

Suits for money had and received. See Note 11.

Suits for taxes and cesses. See Note 13.

Suits for grazing fee. See Note 13.

Suit for rent or alternatively for damages. See Note 13.

Suit for value of paddy cut and misappropriated. See Note 7.

Suit for money advanced for partnership business. See Note 5.

Suits on mortgage. See Note 12.

1. Scope and object of the section. — Section 27 of the Provincial Small Cause Courts Act (IX of 1887) enacts that where a suit of a small cause nature is tried by a Court of Small Causes, its decree or order is *final*, i. e., no appeal lies therefrom. Section 37 of the Presidency Small Cause Courts Act (XV of 1882), enacts a similar provision. This section provides that where a suit of a small cause nature is tried not by a Small Cause Court, but by a Court *in its ordinary jurisdiction*, the decree or order is not open to a *second appeal*.[1] "The object of this section," said White, C. J., in *Sundaram Aiyar* v. *Sennia Naicken*,[2] "is to take away the right of second or special appeal where the value of the subject-matter of the original suit does not exceed Rs. 500 in the case of all suits which as regards their subject-matter would lie within the jurisdiction of Courts of Small Causes but which are outside that jurisdiction by reason of the amount claimed being beyond the pecuniary limit of the Small Cause jurisdiction."

Section 102 — Note 1

1. ('41) 28 AIR 1941 Mad 665 (665).
('24) 11 AIR 1924 Lah 619 (619).
('35) 22 AIR 1935 Bom 254 (255). (Nature of suit and not Court in which it is tried, determines right of appeal.)
('37) 24 AIR 1937 Oudh 244 (245) : 13 Luck 204. (Do.)
('36) 23 AIR 1936 Oudh 129 (129). (Case can be treated as application for revision under S. 115 — It is not revisable under S. 25, Provincial Small Cause Courts Act.)
('35) 22 AIR 1935 All 574 (575). (Suit transferred from Small Cause Court to ordinary Court by District Judge under S. 24—Decree of latter Court is open to appeal but not subject to second appeal if the value of suit does not exceed Rs. 500.)
2. (1900) 23 Mad 547 (554) (FB).

Similarly, if an order is passed by the executing Court in execution of a decree in a suit of a small cause nature, the order is not open to second appeal though it may be within section 47.[3] The reason is that when no second appeal will lie in the suit itself no such appeal will lie from an order in execution of the decree in such suit.[4]

This section will apply even where the suit has been referred to arbitration.[5] But it does not apply to an order refusing to re-admit a first appeal dismissed for default as an appeal lies from such order under O. 43 R. 1 (t).[6]

An objection that a second appeal to the High Court was barred under this section can be raised in the Letters Patent appeal for the first time as it is an objection affecting the jurisdiction of the Court.[7]

2. Suits of the nature cognizable by Courts of Small Causes. — Every suit is of a small cause nature except those that are excepted from the cognizance of a Court of Small Causes, by the second schedule of the Provincial Small Cause Courts Act, 1887.[1] The test therefore for finding out whether a particular suit is or is not of the nature cognizable by Courts of Small Causes is to see whether it is excepted under that schedule.[2] Where it is not so excepted *and* the value of the suit is less than Rs. 500, no second appeal will lie from the decree.[3] It is the character of the suit as originally *framed and presented* to the Court that will determine the nature of the suit,[4] and not the defence which may be set up,[5] or the character which it may assume in the course of, and after the trial by operation of findings by the Court.[6] As to whether the value of the suit

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3. ('39) 26 AIR 1939 Sind 360 (360) : ILR (1939) Kar 342 (343) (DB). (Bar of appeal under the section also applies to surety against whom an order is passed in execution.)

4. ('21) 8 AIR 1921 All 55 (55) : 43 All 403 (DB).
[See however ('22) 9 AIR 1922 Lah 290 (291) : 3 Lah 141 (DB). (While determining whether second appeal lies against order passed in execution proceedings, the amount of the subject-matter of the suit and not the amount to be recovered is to be considered.)]

5. ('68) 10 Suth W R 205 (205) (DB).
('70) 13 Suth W R 233 (233) (DB).

6. ('83) 1883 Pun Re No. 100, p. 311 (312) (DB).

7. ('40) 27 AIR 1940 Cal 528 (528) (DB).

Note 2

1. See S. 15 of the Provincial Small Cause Courts Act, 1887.

2. (1900) 23 Mad 547 (558, 559).
See the speech of the Honourable Mr. Ilbert, "Gazette of India" January 2, 1886, Sup., p. 8.
('37) 24 AIR 1937 Oudh 244 (245) : 13 Luck 204.
('35) 22 AIR 1935 Rang 386 (386) : 13 Rang 633 (FB).

3. ('31) 18 AIR 1931 Oudh 49 (49).
('85) 11 Cal 169 (171, 172) (DB).
('36) 23 AIR 1936 Nag 276 (277).
† ('39) 26 AIR 1939 Sind 35 (35): ILR (1939) Kar 134 (DB). (Suit for recovery of terminal tax on moveable property valued at less than Rs. 500 — No second appeal lies.)

4. ('01) 24 Mad 508 (511) (DB).
(1900) 23 Mad 547 (556) (FB).
('24) 11 AIR 1924 Cal 405 (406) : 51 Cal 62.
('16) 3 AIR 1916 Bom 106 (106): 41 Bom 367 (DB). (Nature of the suit and not the forum is to be considered.)
('31) 18 AIR 1931 Oudh 411 (411) (DB). (Plaint allegations coming under Art. 35 (ii) of Act IX of 1887—Suit tried on regular side without objection by defendant — Second appeal lies, though plaint allegations subsequently appear to have been designedly made.)
('16) 3 AIR 1916 All 343 (343).
[See however ('40) 27 AIR 1940 Mad 507 (508, 509). (Suit for rent against tenants—As originally filed it was one of small cause nature—Plaintiff's cosharers added afterwards as defendants — Suit involving question of title as shares of cosharers came up for determination — *Held* that suit ceased to be of small cause nature and second appeal lay.)]

5. ('15) 2 AIR 1915 Nag 124 (125): 12 Nag L R 47.
† ('91) 15 Bom 400 (405) (DB).
('76) 1876 Pun Re No. 109, p. 230 (231) (DB). (A plea of title raised by defendant does not oust Court's jurisdiction.)
('09) 5 Bom L R 398 (403) (DB).
('85) 1885 Pun Re No. 8, page 16 (16) (DB).
('35) 22 AIR 1935 Oudh 413 (414). (Accordingly in a suit for damages in regard to the cutting of certain trees and appropriation of fruits which is of a nature cognizable by a Court of Small Causes, a second appeal is barred under S. 102, even though the defendant raises a question of title to the land under the trees.)

6. ('24) 11 AIR 1924 Mad 844 (844).
('19) 50 Ind Cas 629 (630) (Nag).
('28) 15 AIR 1928 Lah 764 (765). (Where plaintiff brought a suit for ejectment and recovery of rent below Rs. 500 but abandons case of ejectment, second appeal is not barred.)
† ('08) 32 Bom 356 (360) (DB). (Suit for specific performance and in the alternative for damages—First Court awarding damages and the appellate Court dismissing the suit—Second appeal lies.)

is less than Rs. 500 or not is to be determined on the allegations in the plaint[7] and not upon the nature of the defence pleaded or of the relief granted.[8] The mere fact that a Small Cause Court returns a plaint under S. 23 of the Provincial Small Cause Courts Act, 1887, to be presented to another Court on the ground that it involves a question of title will not alter the nature of the suit for the purposes of this section.[9] Nor would the nature of the suit be affected by the fact that the Small Cause Court decides a question of title incidentally raised.[10]

If a claim is partly within the jurisdiction of Small Cause Courts and partly within the jurisdiction of the regular Courts, the plaintiff is entitled to file a suit in the regular Courts,[11] but a collateral claim to which the plaintiff is not entitled, but put forward in the plaint will not deprive the suit of the character of a small cause.[12]

See also Notes 5 to 17.

3. Effect of trying small cause suits as ordinary suits. — If instead of trying a small cause suit in a summary way it is tried in the ordinary manner as a regular

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('10) 35 Bom 29 (32) : 7 Ind Cas 955 (956) (DB).
('28) 108 Ind Cas 898 (898) (Oudh).
('12) 13 Ind Cas 493 (494) (Oudh). (In an ejectment suit the awarding of damages only by the Court will not bar a second appeal.)
('25) 12 A I R 1925 Bom 440 (441) : 49 Bom 596. (Plaintiff omitting a portion of claim subsequently —Suit does not change its character.)
('12) 13 Ind Cas 174 (175) (Mad).
('01) 25 Bom 417 (417) (DB).
('13) 40 Cal 537 (540) : 21 Ind Cas 120 (120, 121) (DB). (Suit having small cause character tried in ordinary manner — Character of the suit is not altered thereby.)
('89) 11 All 13 (14) (DB). (To determine whether second appeal lies or not under this section, the shape in which the suit is originally brought must be looked to, and not the shape in which the case comes up in appeal.)
('18) 5 AIR 1918 Mad 162 (162) (DB). (Character of suit is not altered by a subsequent amending Act passed at the time of the second appeal.)
('31) 18 AIR 1931 All 595 (595) (DB).
('12) 13 Ind Cas 907 (908) (DB) (Cal).
('38) 25 AIR 1938 Cal 336 (337) : ILR (1938) 2 Cal 81. (A suit *bona fide* framed as a mortgage suit, although the only claim which could be established by the plaintiff is a money claim is still a mortgage suit.)

7. ('24) 11 AIR 1924 Cal 405 (406) : 51 Cal 62.
('04) 27 All 200 (202) (DB).

8. ('10) 7 Ind Cas 778 (780) (DB) (Cal). (Commissioner's finding increasing the valuation does not alter the nature of the suit as originally brought.)
('86) 6 Suth W R 152 (153) (DB).
† ('06) 30 Mad 212 (213) (DB). (Appealability determined by subject-matter of the suit, and not by the amount claimed in execution.)

9. ('43) 47 Cal W N 664 (666) (DB). (Though in such a case a first appeal will lie.)
('40) 27 AIR 1940 Cal 399 (400). (First appeal is competent in such a case.)
('98) 20 All 480 (481) (DB).
('11) 12 Ind Cas 957 (957) (DB) (Mad).
† ('97) 24 Cal 557 (560, 561) (DB).
('02) 6 Cal W N 687 (688) (DB).
('92) 15 Mad 98 (99) (DB).
('28) 15 AIR 1928 Nag 136 (136).
('21) 8 AIR 1921 Oudh 144 (144). (Suit for damages for value of trees cut on plaintiff's land.)
('26) 13 AIR 1926 Mad 622 (622) (DB).
† ('29) 16 A I R 1929 Mad 389 (390). (Suit for damages for use and occupation.)
('29) 16 AIR 1929 Mad 525 (526). (Suit for rent or in the alternative for damages for use and occupation.)
('29) 16 AIR 1929 Mad 781 (781). (Suit for use and occupation on the ground of permissive possession.)
('37) 24 AIR 1937 Oudh 244 (245) : 13 Luck 204.

10. ('25) 12 AIR 1925 All 821 (822).
('87) 9 All 591 (601) (SB).
('14) 1 AIR 1914 All 516 (517).
('85) 9 Bom 259 (265) (DB).
† ('91) 15 Bom 400 (405) (DB).
('97) 21 Bom 248 (249) (DB).
† ('01) 25 Bom 625 (628, 629) (DB).
('08) 32 Bom 560 (562) (DB).
('13) 37 Bom 675 (680): 20 Ind Cas 974 (975)(FB).
('14) 1 AIR 1914 Bom 302(302):38 Bom 190 (DB).
(1864) 1 Suth W R 35 (35) (DB).
('67) 7 Suth W R 73 (73) (DB).
('68) 10 Suth W R 272 (272) (DB).
('72) 18 Suth W R 104 (105) (DB).
('77) 2 Cal 470 (471) (FB).
('97) 24 Cal 557 (560, 561) (DB).
('02) 6 Cal W N 687 (688) (DB).
('10) 6 Ind Cas 415 (415) (DB) (Cal).
('18) 5 AIR 1918 Cal 528 (528) (DB).
('23) 10 AIR 1923 Cal 321 (321) (DB).
('12) 16 Ind Cas 201 (201, 202) (DB) (Mad).
('81) 3 Mad 127 (129) (FB).
† ('81) 3 Mad 192 (195, 199) (FB).
('91) 1 Mad L Jour 166 (167).
('26) 13 AIR 1926 Mad 656 (656) (DB).
('29) 16 AIR 1929 Mad 389 (390).
('15) 2 AIR 1915 Nag 43 (44) : 11 Nag L R 160.
('77) 1877 Pun Re No. 75, page 191 (191) (DB).
('82) 1882 Pun Re No. 38, page 111 (112) (DB).
(1864) 2 Mad H C R 184 (186) (DB).
('35) 22 AIR 1935 Oudh 413 (414).
Also see Notes 12 and 15.

11. ('17) 4 AIR 1917 Mad 128 (129) (DB).

12. ('01) 24 Mad 508 (511) (DB).
† ('06) 28 All 293 (294) (DB).

suit, the mistake will not alter the character of the suit which will nevertheless be subject to all the incidents of a small cause suit.[1] Therefore no decree or order in such a suit will admit of a second appeal.[2]

4. Suit includes execution proceedings. — The term *suit* in this section *includes execution proceedings also*,[1] so that an order passed in execution of a decree in a suit cognizable by a Small Cause Court is not subject to second appeal when the amount or value of the subject-matter of the original suit does not exceed Rs. 500.[2] Where a Small Cause Court decree is transferred from the small cause side to the regular side for execution and an order is passed in execution, it may be open to a first appeal under the provisions of S. 42 of the Code but a *second* appeal will be barred under this section.[3] The test in all cases is what was the nature or value of the *suit*, the decree in which is

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Note 3

1. ('13) 40 Cal 537 (540) : 21 Ind Cas 120 (121) (DB).
('01) 25 Bom 417 (417).
('04) 26 All 358 (360) (DB).
('17) 4 AIR 1917 All 159 (160) : 39 All 101.
('03) 5 Bom L R 398 (403) (DB).
† ('88) 12 Bom 486 (489) (DB).
('92) 15 Mad 298 (300) (DB).
[*See* ('36) 40 Cal W N 698 (702). (Suit of small cause nature tried by Judge as an ordinary suit and not as a Small Cause Court Judge — Judge having the powers of a Small Cause Court Judge to try suits of that value — His decision must be taken to be a decision of a Small Cause Court.)]
[*See also* ('41) 28 AIR 1941 Mad 867 (867).(Small cause suit tried by Judge having small cause powers but suit numbered as original suit — No appeal lies.)]

2. ('41) 28 AIR 1941 All 144 (145) : I L R (1941) All 216. (Suit of small cause nature tried as original suit because there was a prayer for declaration — *Held*, suit was of small cause nature, declaratory relief being merely incidental.)
('26) 13 AIR 1926 Mad 622 (622) (DB).
('28) 15 AIR 1928 Nag 136 (136).
('20) 7 AIR 1920 Oudh 231 (231):23 Oudh Cas 117.
('31) 18 AIR 1931 Oudh 49 (49).
(1900) 23 Mad 547 (563) (FB).
('83) 7 Bom 100 (101) (DB).
('85) 9 Bom 259 (265) (DB).
('04) 26 All 358 (360) (DB).
('13) 19 Ind Cas 362 (363) (All.)
('25) 12 AIR 1925 All 821 (822).
('74) 11 Bom H C R 194 (196) (DB).
('94) 21 Cal 249 (250,252) (DB).
('98) 25 Cal 872 (873) (DB).
('11) 12 Ind Cas 957 (957) (Mad) (DB).
('17) 4 AIR 1917 Mad 897 (898) (DB).
('22) 9 AIR 1922 Mad 352 (353) (DB).
[*See* ('09) 33 Mad 323 (326): 1 Ind Cas 543(544) (FB). (Decision given by the lower Appellate Court in such a suit was set aside by the High Court in revision.)
('09) 33 Bom 664 (666): 3 Ind Cas 816 (817) (DB).]

Note 4

1. ('74) 20 Suth W R 421 (421) (FB).
† ('18) 5 AIR 1918 Cal 925 (926): 45 Cal 519 (DB).
('26) 13 AIR 1926 All 345 (345).
† ('67) 8 Suth W R 112 (113) (DB).
('96) 18 All 481 (482) (FB).
('89) 12 Mad 116 (117) (DB).
('24) 11 AIR 1924 Mad 32 (32) (DB).
[*See* (1900) 27 Cal 484 (486, 487).]

2. ('41) 28 AIR 1941 Oudh 101 (102, 103).
('77) 2 All 112 (115) (DB).
('99) 12 C P L R 12 (12).
('96) 18 All 481 (481) (FB).
('06) 30 Bom 113 (115) (DB).
('85) 11 Cal 169 (172) (DB). (*Quære.*)
('98) 25 Cal 872 (874) (DB).
† ('1900) 27 Cal 484 (488).
† ('12) 16 Ind Cas 975 (977) (DB) (Cal).
('88) 11 Mad 130 (132) (DB).
('89) 12 Mad 116 (117) (DB).
('24) 11 AIR 1924 Mad 32 (32).
('15) 2 AIR 1915 Nag 91 (91) : 11 Nag L R 99.
('13) 18 Ind Cas 245 (245, 246) (Oudh).
('18) 5 AIR 1918 Oudh 269 (269).
('86) 1886 All W N 181 (182) (DB).
('21) 8 AIR 1921 All 55 (55) : 43 All 403 (DB).
('24) 11 AIR 1924 All 263 (264) : 46 All 73.
('26) 13 AIR 1926 All 345 (345).
('67) 8 Suth W R 112 (113) (DB).
('67) 8 Suth W R 321 (321) (DB).
('20) 7 AIR 1920 Cal 174 (174) (DB).
('18) 5 AIR 1918 Mad 1368 (1368) (DB).
('24) 11 AIR 1924 Mad 367 (367) (DB).
('25) 12 AIR 1925 Mad 742 (742) (DB).
('18) 5 AIR 1918 Pat 624 (624) (DB).
('76) 1876 Pun Re No. 65, page 124 (124).
('90) 12 All 579 (580) (DB).
('27) 14 AIR 1927 All 740 (740).
('12) 12 Ind Cas 959 (960) (DB) (Mad).
('17) 4 A I R 1917 Mad 188 (189) (DB). (Order refusing to *set aside* a sale in execution of a small cause decree.)
('19) 6 AIR 1919 Mad 264 (265) (DB).
('05) 8 Oudh Cas 405 (407) (DB).
('39) 26 AIR 1939 Sind 360 (360): ILR (1939) Kar 342 (343) (DB). (Even though the order is under Section 47.)
Also see Section 42 Note 5 and Section 47 Note 84.

3. ('27) 14 AIR 1927 All 740 (740).
† ('28) 15 A I R 1928 Bom 534 (537) : 53 Bom 46 (DB).
('21) 8 AIR 1921 Cal 242 (243) (DB).
('07) 11 Cal W N 861 (862) (DB).
('09) 31 All 1 (2) (DB).
Also see Section 42 Note 5 and Section 47 Note 84.

sought to be executed and not the nature of the proceedings in execution[4] or the actual amount affected by the order sought to be appealed against.[5] So where execution was applied for in a Munsif's Court for Rs. 422-14-0 the value of the suit being above Rs. 500, it was held that a second appeal lay.[6]

5. Suits for accounts. — See Arts. 29, 30 and 31 of the Second Schedule of the Provincial Small Cause Courts Act, 1887. A suit for accounts is not one cognizable by a Court of Small Causes.[1] A suit is one for accounts which seeks for a decree *ordering the defendant to render accounts* or which *involves investigation* of accounts between the parties.[2] A suit for a definite sum of money due on an account is not excepted from the cognizance of a Court of Small Causes.[3] But if it is necessary to take accounts in order to grant relief to the plaintiff, it will be a suit for account.[4]

As to suits for mesne profits, see Note 10.

6. Suits for contribution. — Two classes of suits for contribution have been excepted from the cognizance of Courts of Small Causes by Arts. 41 and 42 of the Second Schedule of the Provincial Small Cause Courts Act, 1887 —

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4. *See* ('06) 30 Bom 113 (114).

5. † ('85) 11 Cal 169 (172) (DB).
('07) 30 Mad 212 (213) (DB).
('22) 9 AIR 1922 Lah 290 (291) : 3 Lah 141 (DB).
[*See also* ('15) 2 AIR 1915 Cal 268 (271).
('21) 8 AIR 1921 Bom 229 (230) : 45 Bom 223. (Petition under O. 21 R. 71 to recover deficiency of price from a defaulting purchaser on re-sale.)]

6. ('90) 12 All 581 (586).

Note 5

1. ('13) 21 Ind Cas 537 (538) (DB) (Cal).
('11) 10 Ind Cas 883 (884) (DB) (Cal).

2. † ('96) 23 Cal 884 (890) (FB).
('17) 4 AIR 1917 Mad 476 (477).
('01) 1901 Pun Re No. 13, p. 47 (49) (DB).
('02) 5 Oudh Cas 130 (131). (The word 'account' in the suit means a suit where account is expressly asked for — It also includes suits in which there must be an account.)
('89) 1889 Pun Re No. 92, p. 329 (330). (Suit for profits out of a partnership business.)
('70) 1870 Pun Re No. 71 p. 191 (193). (Suit for profits in virtue of an agreement to share equally the profit and loss of a certain contract.)
('81) 6 Cal 551 (553) (DB). (Suit involving questions of partnership account.)
('68) 10 Suth W R 214 (214). (Do.)
('15) 2 AIR 1915 All 60 (61). (Suit for partnership account with an alternative prayer for the dissolution of the partnership.)

3. ('40) 27 AIR 1940 Cal 528 (528) (DB).
('97) 19 All 513 (514) (DB). (Suit by a retired partner for money alleged to have been agreed to be paid to him.)
('10) 6 Ind Cas 336 (338) (DB) (Cal). (Suit for damages between date of payment of mortgage money and date of possession—See however 19 Ind Cas 427.)
†('96) 23 Cal 884 (890) (FB). (Suit for mesne profits is cognizable by a Small Cause Court.)
('05) 27 All 200 (202) (DB). (Suit by widow of a priest for recovery of books and money received by defendant as agent of plaintiff's husband is not one for accounts.)
† ('05) 28 Mad 394 (396) (DB).
('12) 13 Ind Cas 159 (160) (DB) (Mad).
('12) 8 Nag L R 36 (38) : 14 Ind Cas 786 (787).
('12) 14 Ind Cas 573 (573) (Mad).
('20) 7 AIR 1920 Mad 783 (783) (DB). (Suit for specific sum as half share of the profits of land.)
('21) 8 AIR 1921 Lah 173 (173). (Suit on agreement to share proceeds of a tenancy is small cause.)
('09) 4 Ind Cas 618 (619) (Mad). (Suit against an agent for some specific items of money.)
('13) 20 Ind Cas 518 (519) (DB) (Mad). (Do.)
('78) 2 Cal L Rep 17 (18) (DB). (Suit for account papers and documents and for an account of agency and in default for damages.)
('04) 26 All 358 (360, 361) (DB).
('73) 20 Suth W R 4 (5) (DB). (Suit for an unaccounted balance by an agent to conduct law suits.)
('14) 1 AIR 1914 Mad 100 (100). (Suit for value of goods received.)
('71) 15 Suth W R 89 (89). (Suit by agent for wages.)
('98) 21 Mad 366 (367) (DB). (A suit for balance struck between partners is a simple money suit.)
('11) 11 Ind Cas 15 (16) (Lah).
('01) 28 All 293 (294) (DB). (Suit for recovery of balance struck with prayer for declaration that the partnership is dissolved does not oust the Small Cause Court of its jurisdiction.)
('19) 6 AIR 1919 Cal 328 (328). (Money advanced for partnership business.)
('30) 17 AIR 1930 Lah 613 (613). (Article 31 does not apply to suit by cosharers for recovery of value of their share of produce realized by other co-sharers.)
('81) 6 Cal 284 (289) (DB).
('14) 1 AIR 1914 All 108 (108) (DB). (Though precise amount could be ascertained only by examining accounts.)

4. † ('12) 13 Ind Cas 159 (160) (Mad).
('17) 4 AIR 1917 Mad 476 (477).

(1) suit by a cosharer in joint property or by a member of an undivided family for contribution in respect of money paid by him on *account of the property or family*,[1] and

(2) suit by a co-mortgagor who has redeemed the property, for contribution from his co-mortgagors.[2]

All other suits for contribution are small causes. For such suits, see the undermentioned cases.[3] It should be remembered that contribution implies the existence of a *joint liability* of the parties and arises when one or some of them alone has or have discharged such liability.[4] Where there is no *joint liability*, there can be no contribution.[5] Thus, where B and C, agents of A, mortgage A's property on their own account, and in order to save the property A pays off the mortgage and sues B and C for the amount, the suit is not one for contribution.[6] Again, a suit in respect of a liability created *by the payment itself* is not a suit for contribution excepted from the cognizance of a Court of Small Causes.[7] Thus, a suit for recovery of a share of the cost of repairing common property is not a suit for contribution within the meaning of Art. 41 of Act IX of 1887.[8]

7. Suits for damages. — See Article 35 of the Provincial Small Cause Courts Act and the undermentioned cases.[1]

Note 6

1. ('09) 4 Ind Cas 59 (60) (All).
('15) 2 AIR 1915 All 118 (118). (Property does not cease to be joint because enjoyed by the sharers separately.)
('15) 2 AIR 1915 Cal 310 (311) (DB).
('96) 23 Cal 189 (191) (DB).
('16) 3 AIR 1916 Cal 954 (955) (DB).
('12) 14 Ind Cas 735 (735) (Cal). (But a suit for rent of certain lands of which plaintiff was a registered tenant but not for any interest in the land is small cause.)
('12) 17 Ind Cas 90 (91) (DB) (Cal). (The fact that the recorded tenant transferred his share before the whole amount sued for fell due does not put the suit outside the scope of Art. 41.)

2. *See* ('28) 15 AIR 1928 Cal 593 (596) : 55 Cal 1193. (Per Cuming, J.—Suit by purchaser from a joint owner mortgagor—Mukherji, J., dissenting.)

3. ('20) 7 AIR 1920 Cal 995 (996) : 62 Ind Cas 504 (505) (DB). (Joint decree for mesne profits.)
('25) 12 AIR 1925 Mad 970 (970). (Joint pro-note —Suit for contribution.)
('89) 12 Mad 349 (351) (DB).
('24) 11 AIR 1924 Mad 790 (790).
('12) 15 Ind Cas 218 (219) (Mad).
('26) 13 AIR 1926 All 456 (456). (Suit between co-judgment-debtors.)
('14) 1 AIR 1914 Oudh 385 (385). (Do.)
('04) 14 Mad L Jour 480 (481) (DB). (Do.)
('06) 28 All 292 (293) (DB). (Do.)
('21) 62 Ind Cas 651 (652) (DB) (Cal). (Do.)
('88) 15 Cal 713 (714) (DB). (Do.)
('07) 4 All L Jour 543 (544). (Do.)

4. † ('15) 2 AIR 1915 Cal 278 (279) (DB).
✠ ('28) 15 AIR 1928 Cal 593 (596) : 55 Cal 1193 (DB).
Also see S. 9 Note 31.

5. ('18) 5 AIR 1918 All 167 (168) : 40 All 135 (DB). (Decree against *A* and *B*—*A* to be primarily liable—*B* to be liable on *A*'s default.)
('15) 2 AIR 1915 Cal 278 (279) (DB). (So is a suit by the plaintiffs for recovery of money paid by them for the benefit of the defendants.)
† ('81) 3 All 66 (72) (DB).
('88) 15 Cal 652 (656) (FB).
('14) 1 AIR 1914 All 406 (407). (Suit to recover the amount paid by a purchaser for incumbrance on property represented to be free from incumbrance.)

6. ('15) 2 AIR 1915 All 317 (317).
('24) 11 AIR 1924 All 787 (788) (DB). (*A* and *B* mortgaging only the property of *A*, *B* having no interest in it—Suit for contribution is small cause.)

7. ('07) 30 Mad 212 (213) (DB).

8. ('92) 15 Mad 155 (156) (DB).

Note 7

1. ***Malicious prosecution.***
('68) 10 Suth W R 115 (115) (DB).
('89) 1889 Pun Re No. 30, p. 111 (112).
('90) 14 Bom 100 (101) (DB).
('70) 4 Beng L R App 59 (60) (DB).
('84) 1884 Pun Re No. 143, p. 375 (375) (DB).
('88) 1888 Pun Re No. 98, p. 262 (263) (DB).
('15) 2 AIR 1915 Nag 67 (68) : 12 Nag L R 7. (Damages for causing pollution.)

Obstruction or diversion of water course.
('96) 1896 Pun Re No. 71, p. 207 (208) (DB). (An encroachment on the bank of a channel is not obstruction to water course.)
('13) 21 Ind Cas 393 (394) (DB) (Cal).
('95) 18 Mad 28 (29). (Obstruction diverting flow of water from plaintiff's land is obstruction within cl. 35 (1) of Sch. II of Act IX of 1887.)
('86) 6 Suth W R 7 (7) (DB).
('06) 1906 Pun Re No. 134, p. 498 (499) (DB).
('96) 20 Bom 283 (285) (DB).
('15) 2 AIR 1915 Mad 35 (35).

Inducing person to break contract.
('23) 10 AIR 1923 Lah 244 (244).

Compensation for offences against property.
('40) 27 AIR 1940 Rang 100 (102) : 1940 Rang L R 1. (Plaint alleging that defendants without per-

8. Suits for maintenance. — See Article 38 of the Second Schedule of the Provincial Small Cause Courts Act, IX of 1887. Before the date of that Act, suits for maintenance based on a contract, bond, family arrangement or agreement, could be brought as a small cause.[1] Such a suit will now be barred under Art. 38 of the Provincial Small Cause Courts Act, 1887, whether the maintenance is claimed under a will or by agreement or on a personal obligation.[2] But if the right to maintenance has been recognized and does not arise for determination, a *claim for arrears* will be a suit for money and hence a small cause.[3] A suit must, if it is to be excepted under Art. 38 of the Small Cause Courts Act from the cognizance of a Court of Small Causes, be in *substance*

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mission and consent occupied and used plaintiff's land and cut and removed Dhani leaves — No mention of theft or trespass—Suit is of small cause nature—No second appeal lies.)

('39) 26 AIR 1939 Pat 216 (216). (Suit for recovery of price of trees cut and misappropriated not amounting to offence under Ch. 17, I. P. C., is small cause.)

('36) 23 AIR 1936 Nag 276 (277). (Suit for damages for cutting and removal of trees — No allegation of criminal act or intent — Suit is of small cause nature.)

('35) 22 AIR 1935 Oudh 413 (414). (Suit for damages for cutting trees and appropriation of fruits is of a small cause nature.)

('94) 1894 Pun Re No. 119, p. 456 (459).

('33) 20 AIR 1933 Mad 636 (637). (Suit for value of timber removed by defendant from custody of Court by its order—Value of timber less than Rs. 500—Suit is of small cause nature.)

('96) 1896 Pun Re No. 80, p. 255 (256) (DB).
(1900) 1900 Pun Re No. 94, p. 384 (384) (DB).
('15) 2 AIR 1915 Nag 43 (44) : 11 Nag L R 160.
('67) 7 Suth W R 73 (73) (DB).
('69) 11 Suth W R 369 (370) (DB).
('11) 35 Mad 726 (727) : 11 Ind Cas 31 (31).
('92) 15 Mad 298 (300) (DB).
('03) 26 Mad 176 (178).
('17) 4 AIR 1917 Mad 897 (898) (DB).
('68) 3 Agra 290 (291) (FB).
('90) 17 Cal 707 (710) (DB).
('10) 6 Ind Cas 415 (415) (DB) (Cal).
('19) 50 Ind Cas 629 (630) (Nag).
('27) 14 A I R 1927 All 288 (288) : 49 All 440 (DB).
('30) 130 Ind Cas 481 (482) (DB) (All).
('23) 10 AIR 1923 Lah 39 (39).
('28) 15 AIR 1928 Lah 887 (887).
('24) 11 AIR 1924 All 430 (431).
('26) 13 AIR 1926 Lah 228 (228). (Suit for misappropriation of offerings at a shrine.)
('23) 10 AIR 1923 Cal 568 (568) (DB).
('26) 13 AIR 1926 Cal 1230 (1231). (Suit for price of paddy cut and misappropriated not amounting to a crime is small cause.)
('27) 14 AIR 1927 Rang 262 (263) : 5 Rang 338.
('21) 8 AIR 1921 Oudh 144 (144).
('31) 18 AIR 1931 All 595 (595) (DB).

Damages for wrongful distraint.

('02) 25 Mad 540 (542) (DB).
('89) 21 Mad 239 (240) (DB).
('97) 24 Cal 163 (165) (DB).
('02) 24 All 517 (518).
('06) 16 Mad L Jour 353 (353) (DB).

Wrongful distraint and wrongful attachment.

('36) 23 AIR 1936 Nag 257 (257) : I L R (1937) Nag 19. (Suit for damages for wrongful attachment and negligence—Not of small cause nature.)
('09) 3 Ind Cas 429 (429) (DB) (Cal). (Where the warrant was merely issued and money paid, suit for money paid is only a small cause.)
('89) 22 Mad 457 (459) (DB).
('97) 24 Cal 163 (165) (DB).
('11) 9 Ind Cas 537 (538) (All).
('13) 18 Ind Cas 695 (695) (All).
('11) 33 All 306 (308) : 9 Ind Cas 317 (318) (DB).
[*See also* ('12) 36 Bom 443 (445) : 15 Ind Cas 505 (506) (DB).
('72) 18 Suth W R 283 (283) (DB). (Suit for money paid by an unsuccessful claimant to prevent sale of his property attached.)
('02) 12 Mad L Jour 349 (350) (DB). (Suit for damages for trespass is a small cause.)
('09) 1 Ind Cas 592 (593) (DB) (Cal). (Do.)
('33) 20 AIR 1933 Lah 363 (363). (Suit to recover compensation for loss suffered on account of percolation of drain water is suit of small cause nature.)]

Damages for breach of contract.

('36) 23 AIR 1936 Lah 293 (294). (Suit for damages for breach of contract and for refund of earnest money—Suit of small cause nature.)
('36) 23 AIR 1936 Oudh 129 (129).

Note 8

1. ('87) 1887 All W N 94 (95). (Based on a contract.)
('78) 2 Bom 624 (632) (FB).
[*See* ('83) 7 Bom 537 (538).]

2. ('89) 1889 Pun Re No. 123, p. 417 (418).
('01) 23 All 495 (496) (DB).
('03) 1903 All W N 226 (227). (Following 23 All 495.)
† ('92) 16 Bom 267 (268) (DB). (Maintenance payable under a written agreement does not lie in a Court of Small Causes.)
('97) 20 Mad 29 (30) (DB). (Maintenance payable under a written agreement.)
('04) 26 All 321 (325) (DB). (Suit by a widow against her husband's brother for recovery of income of the property assigned to her by way of annuity.)
('31) 18 AIR 1931 Bom 286 (286).
('18) 5 AIR 1918 All 398 (399) : 40 All 52.
('12) 16 Ind Cas 13 (14) (All).

3. † ('90) 1890 All W N 201 (203).

a suit for maintenance.[4] Thus, a suit by a guardian of a minor's person against the guardian of his property to recover the amount payable to the minor for his maintenance can be brought in a Small Cause Court, as the payment is from his own property.[5]

9. Suits relating to marriage. — Suits for compensation for breach of contract of betrothal or promise of marriage are not cognizable by Small Cause Courts and are excluded expressly by Article 35 of Act IX of 1887. The word "compensation" includes compensation for loss sustained by the plaintiff in consequence of the articles got ready for the marriage, being wasted or damaged, and also the cost of presents or ornaments.[1] It has the same meaning as in S. 73, Contract Act, 1872.[2]

10. Suits for mesne profits. — In order that a person in wrongful possession may be liable for mesne profits, it is not necessary that he should have actually *received* any profits at all. Even if he *might* have received with due diligence any profits, he would be liable.[1] The High Courts of Calcutta[2] and Lahore[3] have held that a suit for mesne profits is not, therefore, a suit "for the profits of immovable property belonging to the plaintiff which have been wrongfully *received* by the defendant" within the meaning of Art. 31 of Act IX of 1887, and is, therefore, a small cause. The Madras High Court has, on the other hand, held[4] that since an account has, in some sense to be taken in ascertaining the amount of mesne profits, the suit will fall under the said article and is, therefore, not a small cause. The Bombay,[5] Rangoon[6] and Nagpur[7] High Courts have also taken a similar view. Where, however, the claim is for a *definite sum* of money as mesne profits, it will not, as has been seen in Note 5, be a *suit for an account* and will not be covered by Art. 31, and will, therefore, be cognizable by a Court of Small Causes.[8] The Allahabad High Court has taken a contrary view.[9]

The words *wrongfully received* in Art. 31 mean received under a claim of title that cannot lawfully be substantiated. Thus, a suit by a cosharer for his share of the profits recovered by another cosharer does not fall under the article.[10]

11. Suits for money. — All suits for money whether had and received,[1] or

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4. ('05) 2 All L Jour 697 (698).
('14) 1 AIR 1914 Mad 16 (17) : 38 Mad 553.
('03) 13 Mad L Jour 471 (471).
5. ('17) 4 AIR 1917 Mad 870 (870) (DB).

Note 9

1. † ('88) 15 Cal 833 (834) (DB).
('01) 24 Mad 652 (653) (DB).
('16) 3 AIR 1916 Mad 1138 (1138) : 38 Mad 274 : 19 Ind Cas 700 (700).
('12) 14 Ind Cas 837 (838) (Upp Bur).
('07) 1907 Pun Re No. 125, p. 611 (612).
('89) 1889 Pun Re No. 132, p. 460 (461) (DB).
2. ('12) 14 Ind Cas 837 (838) (Upp Bur).

Note 10

1. See S. 2 (12) of the Code.
2. † ('96) 23 Cal 884 (889) (FB). (Overruling 18 Cal 316, Ghose and Bannerjee JJ., dissenting.)
('10) 6 Ind Cas 336 (338) (DB) (Cal).
('10) 7 Ind Cas 778 (779) (DB) (Cal).
('68) 10 Suth W R 375 (375) (DB).
3. ('02) 1902 Pun Re No. 35, p. 132 (134) (FB).
[*See also* (1900) 1900 Pun Re No. 94, p. 384 (386) (DB). (Suit for value of crops cut and carried by person in wrongful possession being an action for damages and not for an account is not excluded from cognizance of Small Cause Court.)]
4. † ('02) 25 Mad 103 (107) (FB). (22 Mad 196 and 24 Mad 118 overruled.)
('03) 13 Mad L Jour 136 (137) (DB).
('95) 5 Mad L Jour 232 (233).
('08) 18 Mad L Jour 88 (89).
('10) 34 Mad 502 (503) : 8 Ind Cas 162 (162) (DB).
5. ('01) 25 Bom 85 (89) (DB).
6. ('28) 15 AIR 1928 Rang 102 (106) : 6 Rang 60 (FB).
7. ('03) 16 C P L R 1 (2).
('35) 158 Ind Cas 1119 (1120) (Nag).
8. ('01) 25 Bom 625 (630) (DB).
† ('06) 30 Bom 147 (151, 152) (DB).
9. ('10) 8 Ind Cas 270 (272) (All).
('01) 23 All 437 (438) (DB).
10. ('04) 6 Bom L R 370 (373) (DB).
('09) 34 Bom 171 (173) : 4 Ind Cas 830 (831) (DB).
('10) 7 Ind Cas 390 (390) (Mad).
('04) 26 All 358 (360) (DB).
† ('31) 18 AIR 1931 All 551 (552).
[*See also* ('10) 7 Ind Cas 487 (489) (Cal). (Suit for recovery of money due to the plaintiff under the terms of conveyance of immovable property.)]

Note 11

1. ('82) 4 All 19 (20) (DB).
('83) 5 All 531 (532) (DB).
('93) 17 Bom 42 (45) (DB). (Share in the profits of inam villages.)

payable under an award,[2] or on contracts generally,[3] or wrongfully collected and retained by the defendant,[4] could be brought in a Small Cause Court if they are within the specified pecuniary limits. See also the undermentioned cases.[5]

12. Suits relating to immovable property. — The policy of the Provincial Small Cause Courts Act, 1887, is to exclude suits relating to immovable property from the cognizance of Courts of Small Causes. See Arts 4 to 7 and 9 to 13 of the Second Schedule of that Act. A suit for possession[1] or for partition[2] or for sale or foreclosure or redemption of a mortgage of immovable property[3] or for the determination of any other right to or

('13) 37 Bom 700 (701): 21 Ind Cas 181 (182) (DB). (Suit for recovery of a share in the profits of a Kulkarni vatan.)
('82) 4 All 6 (8) (DB).
† ('01) 4 Oudh Cas 89 (92) (DB). (Wrongfully retained.)
('89) 1889 Pun Re No. 81, p. 303 (304) (DB).
('88) 1888 Pun Re No. 188, p. 485 (486) (DB).
('92) 1892 Pun Re No. 84, p. 291 (292) (DB).
('11) 1911 Pun Re No. 20 : 9 Ind Cas 579 (580).
('11) 11 Ind Cas 410 (410) (DB) (Lah.).
('13) 1912 Pun Re No. 120 : 18 Ind Cas 532 (532).
('89) 1889 Pun Re No. 204, p. 718 (720).
[But see ('26) 13 AIR 1926 Lah 228 (228). (Suit for recovery of offerings to a shrine from their wrongful appropriators is not a small cause suit.)]

2. ('90) 13 Mad 344 (346) (DB).
† ('24) 11 AIR 1924 Mad 485 (485) (DB). (A suit to enforce an award is not the same as one to enforce a contract.)
('12) 6 Sind L R 85 (85): 16 Ind Cas 868 (869) (DB).
[But see ('75) 7 N W P H C R 157 (161).]

3. ('02) 24 All 208 (209) (DB). (For money paid to a vakil for filing suits.)
('81) 3 All 37 (40) (DB). (Value of produce of mango trees held by tenant agreed to be given.)
('08) 1908 Pun Re No. 9, p. 68 (69). (On bailment.)
('14) 7 Low Bur Rul 138 (139) : 25 Ind Cas 933 (934).
('66) 1 Agra 275 (276) (DB).
('20) 7 AIR 1920 Cal 781 (781) : 59 Ind Cas 188 (189) (DB). (Value for coal supplied.)
('71) 15 Suth W R 65 (66) (DB). (Suit on bond.)
('30) 17 AIR 1930 All 702 (703) (DB). (Do.)
† ('85) 7 All 896 (897, 898) (DB).
('68) 10 Suth W R 79 (80) (DB).
('21) 8 AIR 1921 Lah 173 (173). (Suit on an agreement to pay.)
('22) 66 Ind Cas 285 (286) (Lah). (Suit for interest on a mortgage bond is simply for money.)
[*See also* ('12) 15 Ind Cas 352 (352) (Mad).]
[See however ('87) 1887 Pun Re No. 74, p. 154 (155). (Suit not cognizable by a Court of Small Causes as the liability of the defendant did not arise under any arrangement between the parties.)]
[But see ('87) 9 All 591 (600, 601) (SB). (Not cognizable by a Small Cause Court as question of title relating to immovable property was directly involved.)]

4. ('71) 15 Suth W R 397 (397) (DB).
('87) 1887 Pun Re No. 2, p. 6 (6) (DB).
('83) 7 Bom 100 (101).
('15) 2 AIR 1915 All 396 (396).
('32) 19 AIR 1932 Mad 226 (226).
[*See also* ('69) 12 Suth W R 29 (30).]
[But see (1900) 1900 Pun Re No. 2, p. 5 (7) (DB). (Suit for recovery of jagir income wrongfully retained does not come under the cognizance of a Small Cause Court.)]

5. ('99) 26 Cal 842 (844). (Claim in respect of excess payments made by a tenant in respect of rent against the landlord under the Bengal Tenancy Act.)
('69) 4 Beng L R App 46 (47). (Suit against Government for recovery of money from nazir who stole it from Court.)
('10) 5 Ind Cas 438 (438) (DB) (Mad). (Suit to recover moiety of cess paid.)
('24) 11 AIR 1924 Lah 619 (619). (Suit for tax illegally levied.)
('69) 11 Suth W R 30 (31) (DB). (Money paid in excess of rent due.)
(1864) 1864 Suth W R (Gap) 297 (297) (DB). (Suit for refund of revenue paid by lessee.)
('79) 4 Cal 595 (597) (DB). (Suit for money paid by an unsuccessful claimant to an attached property to save it from being sold.)
('14) 1 AIR 1914 All 322 (323). (Suit by a landlord against his tenant to recover costs of sweepers employed under municipal orders to keep the premises clean.)
('73) 5 N W P H C R 24 (25) (DB). (Suit for value of trees and fish.)
('37) 24 A I R 1937 Oudh 244 (245) : 13 Luck 204. (Money wrongfully recovered in execution by defendant from plaintiff — Suit for such money is small cause.)
('35) 22 AIR 1935 All 574 (575). (Suit for recovery of money.)
('36) 23 AIR 1936 Pat 102 (102). (Suit for recovery of money value of bhaoli produce of mahua trees is suit for money and not suit for rent.)
('39) 26 AIR 1939 Sind 35 (35) : I L R (1939) Kar 134. (Suit for recovery of terminal tax on moveable property is small cause.)
('36) 40 Cal W N 698 (701). (Suit for rent against certain defendants with alternative claim for money against certain other defendants — Bar of second appeal in regard to latter claim by virtue of this section — Bar cannot be avoided by reason of the composite nature of the suit.)

Note 12

1. ('11) 9 Ind Cas 133 (134) (Cal). (Standing trees.)
('29) 16 A I R 1929 Rang 200 (203) : 7 Rang 706 (DB). (Do.)
(1900) 1900 Pun Re No. 60, p. 233 (234).
('10) 35 Bom 29 (32) : 7 Ind Cas 955 (956) (DB).
2. See Article 5 Schedule II of the Provincial Small Cause Courts Act.
3. ('90) 1890 Pun Re No. 24, p. 65 (66).

interest in immovable property[4] is not a small cause. A suit for title relating to immovable property cannot be tried by a Small Cause Court.[5] But a suit which is a small cause does not cease to be so merely because a question of title is *incidentally* involved in the suit.[6]

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† ('66) 2 Bom H C R 1 (3).
('71) 15 Suth W R 265 (266) (DB).
('25) 12 AIR 1925 All 205 (205).
('38) 25 AIR 1938 Cal 336 (337) : I L R (1938) 2 Cal 81. (Suit framed *bona fide* as mortgage suit though alternative prayer for money is claimed—Section 102 does not apply.)

4. ('40) 27 AIR 1940 Mad 507 (508, 509). (Suit mainly involving question of title in respect of allocation of shares of cosbarers in land.)
('97) 20 Mad 155 (156) (DB). (Interpleader suit by the Secretary of State against persons claiming compensation under the Land Acquisition Act.)
('01) 28 Cal 235 (237) (DB). (Suit to set aside sale of immovable property.)
('03) 13 Mad L Jour 499 (499) (DB). (Suit by member of tarwad for maintenance out of tarwad property.)
† ('87) 9 All 591 (601) (SB). (Arrears of Malikana.)
('07) 6 Cal L Jour 218 (220).
('21) 8 AIR 1921 All 68 (69) : 43 All 681 (DB). (A suit for *zar chaharum* or one-fourth share of the sale proceeds of a house.)
† ('82) 6 Bom 512 (515) (FB). (To recover baluta or aya leviable on crops of village land.)
('94) 1894 All W N 113 (113) (DB). (Suit for nankar allowance.)
('14) 1 AIR 1914 Bom 238 (238) : 39 Bom 131 (DB). (Suit by an inamdar for the recovery of sums payable by a khatedar in respect of certain immovable property held by him under the inamdar as his superior holder.)
('18) 5 AIR 1918 Mad 1 (2) : 41 Mad 374 (FB). (Mirashi right is an interest in the village lands and the thunduwaram payable to the mirasdar is not of the nature of "rent" but comes under the general expression "dues" in Art. 13.)
('95) 1895 Pun Re No. 13, page 48 (49) (DB).
('11) 9 Ind Cas 1 (1) (Cal).
('98) 1898 Pun Re No. 80, page 278 (278) (DB). (Suit for the recovery of tolls.)
('97) 1897 Pun Re No. 48, page 215 (216). (Do.)
('13) 35 All 156 (157) : 18 Ind Cas 282 (283). (Do.)
[*See* ('16) 3 AIR 1916 Mad 445 (445) (DB). (A suit for the recovery of dues according to plaintiff by reason of his hereditary office as purveyor of ghee to a temple for a fixed annual allowance.)
('92) 8 Mad L Jour 228 (230).
('18) 5 AIR 1918 Mad 366 (367) : 41 Mad 528 (DB). (Suit by an hereditary archaka of temple to recover from the defendant, the trustee, the amount which was due to him in respect of his office.)]

The following suits are not suits for the determination of a right to or interest in immovable property:
('13) 19 Ind Cas 628 (629) (DB) (All). (Suit for participation in income of religious endowment.)
('15) 2 AIR 1915 Nag 106 (107) : 11 Nag L R 100. (A suit by malguzar to recover the value of manure under a wajib-ul-arz.)
('11) 36 Mad 126 (127); 12 Ind Cas 171 (172). (Suit for rent and cesses.)
('28) 15 AIR 1928 Mad 21 (22) (DB).
('97) 21 Bom 387 (391) (DB).
('20) 7 A I R 1920 All 123 (124) (DB). (Suit for money forcibly taken away.)
('23) 10 AIR 1923 All 420 (420). (Suit for money.)
('26) 13 AIR 1926 Lah 276 (277). (Suit for cesses improperly collected.)
('69) 12 Suth W R 29 (30) (DB). (Suit for share of malikana realised by the collector.)
('15) 2 AIR 1915 Nag 124 (125) : 12 Nag L R 47.
('11) 10 Ind Cas 267 (267) (DB) (Mad). (Suit for the recovery of unpaid purchase money.)
('97) 1 Cal W N 140 (141) (DB). (Suit by an auction-purchaser against the decree-holder for refund of the purchase money.)
('98) 20 All 80 (81). (Do.)
('26) 13 A1R 1926 Nag 65 (65). (Suit for recovery of purchase money by a vendee after the sale falls through.)
('06) 8 Bom L R 369 (370) (DB). (Suit by auction-purchaser against decree-holder when the sale is set aside.)
(1900) 4 Cal W N 63 (65) (DB). (Suit by a vendee to recover from the vendor the purchase money.)
('27) 14 AIR 1927 Rang 90 (91).
('10) 5 Ind Cas 322 (323) (DB) (All).
('02) 26 Bom 437 (441) (DB). (Suit by a joint khata holder against other joint holders for their share of land revenue paid.)
('12) 17 Ind Cas 522 (523) (All). (Suit for money.)
('99) 22 Mad 351 (353) (DB). (Suit for money due as emoluments of hereditary office.)
('68) 10 Suth W R 29 (29) (DB). (Suit for the materials of a hut.)
('78) 1878 Pun Re No. 64, page 221 (221) (DB).
('25) 12 AIR 1925 Lah 335 (335) : 6 Lah 33 (DB). (Suit for recovery of document.)
('72) 4 N W P H C R 15 (16). (Suit for sugar mill.)
[*See also* ('40) 27 AIR 1940 Bom 12 (12). (Suit to recover sums payable by khatedar to inamdar as superior holder is not cognizable by Small Cause Court under Art. 13 of Sch. II of Provincial Small Cause Courts Act—A I R 1914 Bom 238 : 39 Bom 131 (DB) followed.)]
[But see ('12) 16 Ind Cas 107 (107) (DB) (Mad). (Suit for baluta allowance.)
('11) 36 Mad 18 (18) : 11 Ind Cas 760 (761) (DB). (Suit by zamindar for the recovery of land cess from the inamdar.)]

5. ('26) 13 AIR 1926 Mad 656 (656) (DB).
6. ('01) 25 Bom 625 (628, 629) (DB).
('08) 32 Bom 560 (562) (DB).
('26) 13 AIR 1926 Mad 656 (656) (DB).
† ('35) 22 AIR 1935 Oudh 413 (414).
Also see Note 2.
[See however ('40) 27 AIR 1940 Mad 507 (508, 509). (New parties impleaded on objection by defendant—Question of title arising between such persons and plaintiff — Suit not small cause as regards such persons.)]

13. Suits for rent. — See Art. 8 of Sch. II of Act IX of 1887. Under that article a suit for *house rent* is a small cause[1] but a suit for rent other than house rent is not a small cause unless the Judge of the Court of Small Causes has been expressly invested by the Provincial Government with authority to exercise jurisdiction with respect thereto. In Madras[2] and Bombay,[3] Judges have been specially authorised as mentioned above. Independent, however, of this, the Madras[4] and Bombay[5] High Courts and the Nagpur Judicial Commissioner's Court[6] have held that a suit for rent is of a small cause *nature* for the purposes of this section. The High Courts of Calcutta,[7] Patna[8] and Rangoon[9] have held a different view. As to what are and what are not suits for rent, see the undermentioned cases.[10]

Note 13

1. ('13) 9 Nag L R 72 (73) : 19 Ind Cas 858 (859).
('88) 15 Cal 174 (177) (DB).
('25) 12 A I R 1925 Cal 423 (423) (DB). (Suit for homestead land not a small cause.)
('94) 1894 Pun Re No. 1, page 1 (2) (DB). (Ground rent is not same as house rent.)
('16) 3 AIR 1916 Mad 891 (891). (Suit for recovery of a certain sum of money for occupation of land let for the purposes of building houses is not a suit for 'rent' under S. 3 of the Madras Estates Land Act.)
2. (1900) 23 Mad 547 (557) (FB).
('01) 24 Mad 356 (357) (DB).
('10) 6 Ind Cas 702 (702) (Mad).
3. ('16) 3 AIR 1916 Bom 106 (106) : 41 Bom 367 (DB).
4. (1900) 23 Mad 547 (556, 559) (FB).
[*See* ('40) 27 AIR 1940 Mad 507 (508).]
5. ('35) 22 AIR 1935 Bom 254 (255). (Suit to recover rent including galli-patti and local cess — Amount below Rs. 500 — Suit is of small cause nature.)
6. *See* ('22) 9 AIR 1922 Nag 15 (16). ('House rent' includes shop rent.)
7. ('43) 30 AIR 1943 Cal 252 (253).
('15) 2 AIR 1915 Cal 302 (303) : 42 Cal 638 (DB).
8. ('22) 9 AIR 1922 Pat 184 (185) (DB).
9. (39) 26 AIR 1939 Rang 350 (350) : 1939 Rang L R 472.
† ('35) 22 AIR 1935 Rang 386 (386, 388):13 Rang 633 (FB). (Suit for rent of agricultural land is not of nature cognizable by Court of Small Causes— AIR 1926 Rang 19 : 3 Rang 390 overruled.)
10. ***Suits held to be for rent.***
('43) 30 A I R 1943 Cal 252 (253). (Cosharer purchasing occupancy holding in execution of a decree for his share of rent—Suit by landlord against him is for rent and not for compensation for use and occupation.)
('12) 15 Ind Cas 32 (33) (All).
('33) 20 AIR 1933 Cal 527 (528) : 60 Cal 587. (Suit for recovery of excess cess under the Bengal Tenancy Act is a suit for rent.)
('97) 1 Cal W N 55 (56) (DB). (Suit for rent in kind or its money value under the Bengal Tenancy Act.)
('12) 13 Ind Cas 29 (32) (DB) (Cal). (Suit for value of the crops on account of the use and occupation of the land.)
('13) 20 Ind Cas 536 (536) (DB) (Cal).
('95) 22 Cal 680 (684, 685) (DB). (Suit to recover arrears of choukidari tax payable by putnidar under putni settlement.)
('10) 8 Ind Cas 96 (97) (DB) (Cal). (Suit for damages for non-performance of the service by a tenant as the consideration of his tenancy.)
('15) 2 AIR 1915 Cal 135 (137) (DB). (Suit for arrears of rent in respect of forest lands leased out.)
('14) 1 AIR 1914 All 5 (6).
('16) 3 AIR 1916 Nag 21 (21) : 12 Nag L R 83. (Claim to grazing rights under a village custom.)
('17) 4 AIR 1917 Nag 37 (38) : 14 Nag L R 35. (Suit to recover the consideration agreed upon for the right of fishing in a certain tank.)
('13) 9 Nag L R 94 (96) : 20 Ind Cas 261 (262). (Suit for nazarana.)
('88) 1888 Pun Re No. 164, page 431 (433) (DB). (Suit for rent of masonry outlet.)
('27) 14 AIR 1927 Mad 670 (671). ("Choutarji" dues payable by sub-inamdar to inamdar — Suit for.)
('98) 21 Mad 243 (244) (DB). (Suit for arrears of jodi.)
('12) 17 Ind Cas 39 (39) (DB) (Mad). (Do.)
('22) 9 AIR 1922 Mad 352 (353) (DB). (Suit for kattabadi.)
('10) 6 Nag L R 117 (122) : 8 Ind Cas 276 (279). (Suit for arrears of bigar due from a tenant.)
('94) 21 Cal 132 (133) (DB). (Dak cess payable under the Bengal Tenancy Act for use and occupation is rent.)
(1900) 4 Cal W N 10 (13) (DB). (For rent against a tenant by landlord's assignee.)
(1900) 27 Cal 827 (835) (FB). (Do.)
(1900) 4 Cal W N 605 (606) (DB). (Do.)
('14) 1 AIR 1914 All 164 (164). (Do.)
(1900) 27 Cal 67 (73, 77) (FB). (Do.)
('98) 2 Cal W N 455 (458) (DB).
('22) 9 AIR 1922 Mad 119 (120) : 44 Mad 697 (DB). (Suits by a land-holder for rent under the Madras Estates Land Act — Case specially made triable by Revenue Court and not by Court of Small Causes.)
('69) 6 Bom H C R A C 12 (16) (DB). (For arrears of rent at increased rate.)

Suits held not to be for rent.

('42) 29 AIR 1942 Pat 391 (391, 392). (Cosharer landlord in possession having purchased occupancy holding in execution of decree for rent against tenant is not tenant of other cosharers — Suit against him by other cosharers for what is payable by him under S. 22 (2), Bihar Tenancy Act is not suit for rent.)
('28) 15 AIR 1928 Cal 709 (710, 712) (DB). (Suits for recovery of cesses and damages.)

14. Suits for title. — In the undermentioned case,[1] it has been held by the Patna High Court that a suit for setting aside, on the ground of fraud, an *ex parte* decree obtained against the plaintiff for damages for removal of a tree is in the nature of a title suit and is not cognizable by a Court of Small Causes.

See also Note 12.

15. Suits for declaration. — Suits for declarations are outside the jurisdiction of Small Cause Courts.[1] The jurisdiction of the Small Cause Court will not, however, be ousted if the prayer for declaration asked for *was unnecessary*[2] or *incidental*.[3] A suit for declaration of ownership of a share in crop by virtue of purchase is one to recover moveable property or its value and is a small cause.[4] As to suits for injunction, see the undermentioned cases.[5]

16. Suits for specific performance of contract. — Such a suit is not one cognizable by a Court of Small Causes under Article 15 of Act IX of 1887, Schedule II.

('20) 7 AIR 1920 Cal 733 (734) (DB). (Suit for grazing fee is small cause.)
('83) 5 All 518 (519) (DB). (Suit by land-holder against purchaser of tenant's produce.)
('03) 1903 Pun L R No. 3, p. 4 (5). (Suit against trespasser for rent wrongfully received by him.)
('97) 24 Cal 557 (560, 561) (DB). (Suit for compensation for money got by the defendants from plaintiff's tenants.)
('10) 6 Ind Cas 594 (595) (DB) (Cal).
('10) 7 Ind Cas 553 (554) (DB) (Cal). (Suit for money due under contract to ply boats.)
('96) 23 Cal 835 (837) (DB). (Suit for the recovery of municipal taxes from the owner of a hut in the basti.)
('90) 17 Cal 541 (543) (DB). (Suit for recovery of damages for use and occupation of land.)
('89) 22 Mad 149 (150) (DB) (Do).
('25) 12 AIR 1925 Mad 890 (891) (DB). (Do).
('26) 13 AIR 1926 Mad 622 (622) (DB). (Do.)
('06) 4 Cal L Jour 402 (404). (Suit for recovery of the sum due under an instalment bond.)
('36) 23 AIR 1936 Pat 102 (102). (A suit for recovery of money value of bhaoli produce of mahua trees is not a suit for rent but is a suit for money.)
('11) 12 Ind Cas 855 (856) (Low Bur).
[*See* ('16) 3 AIR 1916 Cal 907 (908). (Suit for recovery of damages for use and occupation of land.)
('29) 16 AIR 1929 Mad 525 (526). (Do.)
('72) 4 N W P H C R 56 (57) (DB). (Do.)]

Note 14

1. ('35) 22 AIR 1935 Pat 482 (482).

Note 15

1. ('82) 8 Cal 399 (400, 401) (DB).
('92) 1892 All W N 10 (10). (Declaration of his right to half the produce and wood of a certain grove claiming the same as due by custom.)
('28) 15 AIR 1928 Rang 173 (174) : 6 Rang 238. (Suit for declaring award void and for recovery of money.)
('75) 24 Suth W R 190 (192) (DB). (Declaration that a bond has been satisfied and is inoperative.)
† ('68) 10 Suth W R 352 (353) (DB). (Suit to alter or set aside a decision, decree or order of a Court.)
('17) 4 AIR 1917 Cal 562 (563) (DB).
† ('81) 7 Cal 608 (612) (DB). (Goods illegally seized and sold in execution — If owner brings a suit against purchaser only for the recovery or value thereof such suit will lie in a Small Cause Court.)
('94) 21 Cal 430 (432, 433) (DB). (Suit to establish plaintiff's right to a standing crop.)
† ('85) 7 All 152 (159) (FB). (Suit to establish plaintiff's right to moveable property.)
[*See also* ('40) 27 AIR 1940 Mad 507 (508, 509). (Suit of small cause nature at inception — On objection of defendant persons added as defendants—Question of declaration of title becoming substantial question between plaintiff and such persons—Suit ceases to be of small cause nature and second appeal lies.)]

2. ('07) 30 Mad 101 (103) (FB).
† ('18) 5 AIR 1918 Cal 528 (528) (DB).
(1864) 1 Suth W R 35 (35) (DB).
[*See also* ('02) 6 Cal W N 687 (688).]

3. ('41) 28 AIR 1941 All 144 (145) : ILR (1941) All 216. (Suit for refund of amount recovered as tax—Prayer for declaration of non-liability only incidental—Suit is of small cause nature.)
('12) 17 Ind Cas 704 (704) (DB) (Mad).
('98) 8 Mad L Jour 149 (150) (DB).
('23) 10 AIR 1923 Mad 689 (689) : 46 Mad 808 (DB). (Suit against President, District Board, for damages is one of small cause nature.)
† ('23) 10 AIR 1923 Cal 321 (321) (DB). (Suit for recovery of the price of fish removed from a tank after declaration of title.)
('06) 16 Mad L Jour 432 (432) (DB).
[*See also* ('32) 19 AIR 1932 Mad 226 (226, 227). (Suit for refund of profession tax not taken out of the small cause nature merely because judgment is prefaced by some sort of declaration.)]
Also see Note 2.

4. ('13) 21 Ind Cas 638 (638) (DB) (All).

5. ('33) 20 AIR 1933 Mad 22 (23). (Suit for return of money less than Rs. 500 recovered as tax and injunction to prevent defendant from levying it again—Reliefs independent and necessary—Suit is not of small cause nature.)
('38) 25 AIR 1938 Mad 941 (942). (Suit to recover tax illegally levied under Madras Local Boards Act and for injunction restraining defendant from levying it again—Suit is not of small cause nature.)

See also the undermentioned cases.[1]

17. Suits relating to trusts. — Suits relating to trusts are not small causes. But where the question of trust arises only *collaterally* or *incidentally*, the suit will not thereby be taken out of the category of small causes.[1] The mere fact that money claimed by the plaintiff is as trustee does not make it a suit *relating* to trust.[2] The undermentioned cases[3] are illustrations of cases of trust excluded from the cognizance of Small Cause Courts.

18. Appeal from order of remand in suits of small cause nature. — No appeal lies against an order of remand made in a suit of a small cause nature.[1] This is also indicated by O. 43 R, 1 (u) which enacts that an appeal will lie from an order of remand only when an appeal will lie from the *decree* of the Appellate Court.

19. Appeal from order of review in suits of small cause nature. — Where an Appellate Court passes a decree on *review* in a suit of a small cause nature, no second appeal lies against that decree on the merits though an appeal will lie against the *order granting* the review under O. 43 R. 1 (w) and O. 47 R. 7.[1]

20 Other cases. — For other cases, see the several Articles in Schedule II of Act IX of 1887.

Note 16

1. ***Suits held to be for specific performance.***
('24) 11 AIR 1924 Rang 192 (192) : 1 Rang 700. (Suit to enforce an award.)
('66) 6 Suth W R 322 (322) (DB).
('04) 32 Bom 356 (360) (DB). (Prayer for alternative claim of damages does not change character of suit.)
('16) 3 AIR 1916 Cal 530 (531) : 43 Cal 59 (DB). (Suit by a mortgagor for the recovery of the balance of the mortgage money not paid to him.)
('32) 19 AIR 1932 Cal 481 (481) : 59 Cal 388. (Suit for certain papers of a mahal on the basis of a registered contract or for damages in the alternative—Not of small cause nature.)

Suits not for specific performance.
('03) 13 Mad L Jour 299 (299) (DB). (Suit for damages for breach of contract.)
('24) 11 AIR 1924 Mad 485 (485) (DB).
('17) 4 AIR 1917 All 340 (341) (DB). (Suit for damages for breach of contract.)
('08) 1908 Pun Re No. 114, p. 520 (521). (Suit by an auction-purchaser against the decree-holder for refund of the purchase money.)
('10) 6 Ind Cas 704 (704) (All). (Suit for money not one for specific performance.)
('05) 27 All 200 (202) (DB). (Suit by a widow of a deceased Brahmin priest to recover from the defendant certain books containing lists of the clients of her husband.)
('04) 1904 Pun Re No. 49, p. 149 (150). (Suit for avoiding a sale on the ground of fraud and for recovery of damages.)

Note 17

1. †('10) 33 Mad 494 (496, 497) : 5 Ind Cas 912 (913) (DB).
('03) 26 Mad 200 (201).
2. ('12) 15 Ind Cas 273 (275) (Mad).
3. ('98) 21 Mad 245 (246). (Suit by the manager of a temple against his predecessor-in-office for damages sustained by the temple owing to the negligence of the defendant.)
('92) 14 All 413 (416).
('03) 26 Mad 368 (369). (Suit by a trustee for his salary.)
('98) 22 Bom 729 (730) (DB). (For collections of subscriptions for building a temple.)
('03) 1903 Pun Re No. 58, p. 267 (268) (DB). (By the guardian of a minor against the latter to recover money spent in connexion with guardianship.)
('12) 13 Ind Cas 183 (184) (DB) (Mad). (Suit for emoluments and nivedhanam by a hereditary pujari secured under a trust deed.)
('14) 1 AIR 1914 Mad 95 (96) : 38 Mad 788. (Suit to enforce a provision made in favour of a daughter for the performance of her marriage.)
('95) 18 Mad 252 (253). (Suit by the grandson of a donee to recover his share of rents and profits to which he is entitled under the will of the donor.)
('15) 2 AIR 1915 Mad 404 (405) : 25 Ind Cas 41 (41). (Suit by a schoolmaster who had been a regular subscriber to the Schoolmaster Pension Fund for his pension after his removal.)

Note 18

1. ('13) 21 Ind Cas 638 (638) (DB) (All).
† ('16) 3 AIR 1916 All 125 (125).
('19) 6 AIR 1919 All 6 (6) : 42 All 200 (DB). (Execution proceedings.)
('21) 8 AIR 1921 All 55 (55) : 43 All 403. (Do.)
('16) 3 AIR 1916 Cal 581 (581) (DB).
('14) 1 AIR 1914 Lah 328 (331) : 1914 Pun Re No. 85 (DB).
[*See* ('11) 1911 Pun Re No. 50 : 11 Ind Cas 315 (315).]
Also see O. 41 R. 23, Note 21.

Note 19

1. ('12) 16 Ind Cas 203 (204) (DB) (Cal).
('10) 5 Ind Cas 483 (484) (DB) (Cal).
('21) 8 AIR 1921 Lah 124 (125).
† ('95) 22 Cal 734 (737) (DB).
('16) 3 AIR 1916 Pat 370 (370) : 1 Pat L Jour 193.
('02) 1902 Pun Re No. 33, p. 128 (128) (DB).

103. [New.] In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal [a][which has not been determined by the lower Appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of section 100.]

Power of High Court to determine issues of fact.

a. Substituted by the Code of Civil Procedure (Amendment) Act, 1926 (VI of 1926), Section 2, for "but not determined by the lower Appellate Court."

1. Amendments subsequent to 1908. — The words "which has not been determined . . . . . section 100" were substituted by Act VI of 1926 for the words "but not determined by the lower Appellate Court." See Note 2.

2. Scope and object of the section. — This section enables the High Court in second appeal to determine a question of fact, if there is sufficient evidence on the, record, in two cases —

(1) where the lower Appellate Court has failed to determine an issue of fact and

(2) where it has determined an issue of fact *wrongly* by reason of any illegality, omission, error or defect referred to in sub-section (1) of section 100.

There was no such provision in the old Code. It was therefore held that though the lower Appellate Court had not determined an issue of fact and though there was sufficient evidence on the record, the High Court could not itself determine it but could only remand the case for such determination.[1] The present section negatives this view and enables the High Court to determine the issue itself in such cases.[2] This power applies also to cases where a case is remanded under O. 41 R. 25 and the lower Appellate Court fails to give the findings or its findings are incomplete.[3] But where the necessary finding

Section 103 — Note 2

1. ('92) 16 Bom 545 (547) (DB).
('87) 9 All 147 (153) (FB). (Overruling 7 All 765 and 8 All 172.)
('83) 5 All 14 (16, 17) (DB).
('81) 7 Cal 293 (296) (DB).
('96) 23 Cal 179 (185, 186) (DB).
('21) 8 AIR 1921 Pat 61 (63) (DB).

2. ('42) 29 AIR 1942 Pat 188 (189) (DB).
('15) 2 AIR 1915 Mad 774 (775) (DB).
('33) 20 AIR 1933 All 341 (343) (DB).
('32) 19 AIR 1932 Mad 545 (552) (DB).
('24) 11 AIR 1924 Oudh 266 (268) : 27 Oudh Cas 77.
('25) 12 AIR 1925 Mad 763 (764).
('28) 15 AIR 1928 Pat 318 (321) : 7 Pat 260 (DB).
† ('20) 7 AIR 1920 P C 67 (69, 70) : 43 Mad 567 : 47 Ind App 76 (PC).
('28) 15 AIR 1928 All 220 (221) : 50 All 640 (DB).
('19) 6 AIR 1919 P C 29 (31) : 47 Cal 107 : 15 Nag L R 97 : 46 Ind App 140 (PC).
('23) 10 AIR 1923 All 134 (135) : 45 All 191 (DB).
('15) 2 AIR 1915 Cal 284 (287) (DB).
('23) 10 AIR 1923 All 71 (73) (DB). (Documentary evidence not considered by lower Court — High Court can give finding iteelf.)
('18) 5 AIR 1918 All 428 (428) (DB).
✻('27) 14 AIR 1927 Bom 228 (229, 230) : 51 Bom 258 (DB).
('13) 18 Ind Cas 878 (879) (DB) (All).
('09) 4 Ind Cas 1143 (1143) (DB) (Mad).
('28) 15 AIR 1928 Pat 410 (419) : 7 Pat 690 (DB).
('29) 16 AIR 1929 Pat 728 (729) (DB).
('31) 18 AIR 1931 Rang 29 (30) : 8 Rang 425. (No definite finding on question of fact in the judgment of the lower Appellate Court—Clear finding necessary for dealing with law in the case—High Court will go into question of fact.)
('31) 18 AIR 1931 Cal 129 (130, 131). (Small question of fact relating to damages—High Court can determine to avoid remand.)
('18) 5 AIR 1918 Mad 543 (544) (DB).

3. † ('20) 7 AIR 1920 P C 67 (69) : 43 Mad 567:47 Ind App 76 (PC).
('30) 17 AIR 1930 Mad 489 (490) (DB).
✻('22) 9 AIR 1922 P C 292 (297) : 45 Mad 586 : 49 Ind App 286 (PC).
✻('36) 23 AIR 1936 Nag 140 (142) : I L R (1936) Nag 188. (Court of second appeal cannot examine finding of fact after remand under R. 25 except as provided by S. 103.)
† ('39) 26 AIR 1939 Nag 173 (174) : I L R (1940) Nag 652 (DB). (High Court in second appeal remanding case to trial Court for determination of issue—Case returned to High Court after finding—High Court can determine the issue itself as the issue cannot be said to have been determined by the lower Appellate Court.)
Also see O. 41 R. 25, Note 11.

has actually been given it cannot be said that it was not given merely because a *correct issue* was not framed.[4]

As the section stood before its amendment by Act VI of 1926, the High Court could determine any issue of fact necessary which *had not been determined* by the lower Appellate Court.

Where the lower Appellate Code *did determine* an issue of fact but it was vitiated by an illegality such as an improper admission or exclusion of evidence, etc., there was a conflict of decisions as to whether the High Court could itself determine the issue of fact.[5] The amendment of 1926 now makes it clear that the High Court can itself determine the issue of fact, under the said circumstances.[6] The Calcutta High Court, however, has held in the undermentioned decisions[7] that where the lower Appellate Court has relied on inadmissible evidence as also other evidence in arriving at its finding, the High Court has, generally, no power to decide whether the evidence other than that which has been improperly admitted warrants the finding of the lower Court and that the proper course for the High Court in such cases is to remand the case to the lower Court. No reference is made in the above decisions to the amendment of this section in 1926 and it is submitted that they cannot be accepted as correct.

APPEALS FROM ORDERS

104. [S. 588, para. 2.] (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force,[5] from no other orders :—

Orders from which appeal lies.

a* * * * * *

[b](*ff*) an order under section 35A;[16]

(*g*) an order under section 95;[17]

(*h*) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;[18]

(*i*) any order made under rules from which an appeal is expressly allowed by rules:[19]

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4. (97) 21 Bom 325 (327) (DB).
5. ('26) 13 AIR 1926 Nag 339 (339). (No.)
('26) 13 AIR 1926 Mad 1003 (1005) (DB). (No.)
('24) 11 AIR 1924 Cal 1042 (1044) (DB). (No.)
('27) 14 AIR 1927 Cal 140 (143) (DB). (No.)
('22) 9 AIR 1922 Pat 417 (417, 419) (DB). (No).
('26) 13 AIR 1926 Nag 489 (490). (Yes.)
('16) 3 AIR 1916 Lah 205 (206). (Yes.)
('18) 5 AIR 1918 Oudh 221 (222). (Yes.)
('19) 6 AIR 1919 Oudh 44 (47) : 22 Oudh Cas 312 (DB). (Yes.)
6. ('41) 28 AIR 1941 Pat 118 (128) (DB).
('27) 14 AIR 1927 Pat 167 (169) (DB).
*('27) 14 AIR 1927 Cal 1 (8-10) (SB). (Finding based partly on inadmissible evidence.)
('30) 17 AIR 1930 Mad 65 (67) (DB). (Finding based on wrong presumption.)
('29) 16 AIR 1929 Cal 636 (639) (DB).
†('30) 17 AIR 1930 Cal 235 (238) (DB).
('31) 18 AIR 1931 Cal 129 (131) (DB).
('36) 23 AIR 1936 Lah 788 (789). (Lower Court deciding question of title on inadmissible and other evidence — High Court can remand case or itself determine the issue.)
[*See* ('18) 5 AIR 1918 Mad 1166 (1167) : 40 Mad 1108 (DB).) (Where, however, the judgment of a Court of appeal is reversed on a question of custom or usage on a preliminary point the High Court should not take on itself to examine the evidence as to usage as if it were hearing the first appeal.)]
7. ('35) 39 Cal W N 277 (280).
('37) 24 AIR 1937 Cal 537 (540) : ILR (1937) 2 Cal 661 (DB).

[b][Provided that no appeal shall lie against any order specified in clause (*ff*) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.]

(2) No appeal shall lie from any order passed in appeal under this section.[21]

[1877, S. 588; 1859, Ss. 363 to 365. See O. 16 Rr. 10 and 12; O. 38, R. 1; O. 39 R. 2; O. 43 R. 1.]

a. Clauses (a) to (f) (both inclusive) of sub-s. (1) were repealed by the Arbitration Act, 1940 (X of 1940), Sch. III. For corresponding provisions in the above Act, see Section 39 thereof.

b. Inserted by the Civil Procedure (Amendment) Act, 1922 (IX of 1922), Section 3. See also foot-note to the text of Section 35A.

Synopsis

1. Legislative changes.
2. Scope and applicability of the section.
3. Retrospective effect.
4. Non-appealable orders.
5. "Save as otherwise expressly provided in the body of this Code or by any law for the time being in force."
6. Letters Patent appeals.
7. Execution proceedings.
8. Appeals to Privy Council.
9. Revision or review.
10. Order superseding arbitration—Clause (a). *(Omitted.)*
11. Order on award stated as special case—Clause (b). *(Omitted.)*
12. Order modifying or correcting an award—Clause (c). *(Omitted.)*
13. Order filing or refusing to file agreement to refer to arbitration — Clause (d). *(Omitted.)*
14. Order staying or refusing to stay suit—Clause (e). *(Omitted.)*
15. Order filing or refusing to file private award — Clause (f). *(Omitted.)*
16. Order under Section 35A—Clause (ff).
17. Order under Section 95—Clause (g).
18. Order imposing fine, etc.—Clause (h).
19. Order appealable under rules—Clause (i). See Order 43 Rule 1.
20. Proviso to sub-section (1).
21. Bar of appeal from appellate order—Sub-section (2).

1. Legislative changes. — This section introduces some material changes in the law as laid down in S. 588 of the old Code.[1]

(1) The words "save as otherwise . . . . in force" are new (See Notes 2, 5 and 6).

(2) Clause (1) of S. 588 of the old Code providing for an appeal against an order under S. 20 of the old Code is omitted as that section itself has been omitted.

(3) Clause (17) of the old Code dealing with orders in insolvency proceedings has been omitted, as provisions have been made therefor in the Provincial Insolvency Act.

(4) Sub-section (2) replacing the last paragraph of the old section makes it clear that what is prohibited is only a right of *further appeal* and not a right of *revision* or *review*.

(5) Clause (ff) and the proviso to sub-s. (1) have been newly added to the section by Act IX of 1922.

(6) Clauses (a) to (f) (both inclusive) of sub-s. (1) were repealed by the Arbitration Act, X of 1940, Sch. III.

Section 104 — Note 1

1. ('21) 8 AIR 1921 P C 80 (82, 83) : 48 Cal 481 (489) : 46 Ind App 76 (PC). (*Vide* cls. 2 to 5, 7, 11, 12, 13, 18, 19 and 22 of S. 588, which are omitted in the present section and notes to the new sections corresponding to the old sections referred to in those clauses—*Vide* S. 104 (1) cl. (ff) and O. 43 R. 1 cls. (f), (m), (n), (o), (v) and (w) and notes thereon.)

These clauses were as follows :

(a) an order superseding an arbitration where the award has not been completed within the period allowed by the Court ;

(b) an order on an award stated in the form of a special case ;

(c) an order modifying or correcting an award ;

(d) an order filing or refusing to file an agreement to refer to arbitration ;

(e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration ;

(f) an order filing or refusing to file an award in an arbitration without the intervention of the Court.

Corresponding provisions, with some changes, have been enacted in S. 39 of the above Act. Where an arbitration was held and award passed before the coming into force of the Arbitration Act, the appealability of an order filing or refusing to file the award would depend on the provisions of the Civil Procedure Code though the appeal is preferred afterwards.[2]

2. Scope and applicability of the section. — The section is restrictive in character. By sub-s. (1) it limits a party's right of appeal against an order to the cases specified in cls. (ff) to (i) and by sub-s. (2) that right is further restricted to only *one appeal.*[1]

Where an order is one *not specified* in the section but is a "decree" within the meaning of S. 2, cl. (2) of the Code,[2] or a right of appeal therefrom is *expressly provided* for elsewhere in the body of the Code or by any other law for the time being in force,[3] this section will have no application. Where, however, an order is one *specified* in this section, and is *also* appealable as a "decree" or under other express provision of law, it has been held that the right of appeal is governed only by the provisions of this section, and that consequently no second appeal will lie in such cases.

Illustration.

A applied under the Code of 1882 for setting aside an execution sale on the ground of *fraud.* His application was dismissed. An appeal against that order was also dismissed; it was held that a second appeal lay. The reason is that under the old Code an order refusing to set aside an execution sale on the ground of fraud was *not appealable* under S. 588, cl. (16) (now O. 43 R. 1) but was a "decree" under S. 244 (now S. 47), and therefore a second appeal lay.[4]

Suppose, a similar application is made under the new Code which *provides* for an appeal against an order refusing to set aside a sale on the ground of fraud also. Such an order is appealable *under* S. 104 and O. 43 R. 1 *as an order* and therefore no second appeal

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2. ('43) 30 AIR 1943 Pat 285 (286) : 22 Pat 108 (DB).

Note 2

1. ('11) 33 All 479 (480) (DB). (Order returning a plaint for presentation to proper Court—Appeal —Case remanded to Court of first instance—Appeal from order of remand inadmissible.)
('94) 21 Cal 789 (791) (DB). (Order made by the lower Appellate Court on appeal, setting aside a sale under S. 294 (old Code).)

2. ('42) 29 AIR 1942 Lah 95 (99) : I L R (1942) Lah 491 (FB).
('41) 28 AIR 1941 Cal 618 (621) (DB). (Order interpreting a scheme framed in a suit under S. 92, C.P.Code and deciding general questions concerning rights of parties is not one within this section but is a decree and is appealable.)
('26) 13 AIR 1926 Lah 547 (547).

3. *See for instance S. 154 which expressly saves a right of appeal accrued to a party before the passing of this Code.*

4. ('99) 26 Cal 539 (541) (DB).
('09) 32 All 3 (6) : 3 Ind Cas 46 (47) (DB). (Order specifically excluded — Hence second appeal lay— Observation at page 47 (of 3 I. C.) though general must be deemed to apply to the facts of the case.)
('09) 2 Ind Cas 983 (984) (All.)
Also see O. 21 R. 90, Note 50.

will lie, though the order may be one within S. 47.[5] It may here be noted that a decree as defined by S. 2 excludes an order appealable *as an order* even though it is within S. 47.[6]

The section being a disabling one must, under general principles of interpretation be construed strictly.

As to whether an interlocutory order which is appealable under this section can be appealed against after the decree in the case, see section 105, Note 2.

3. Retrospective effect. — A disabling provision of law such as this section cannot be so interpreted as to have a retrospective effect.[1] This is also expressly made clear by S. 154 of the Code which saves rights of appeal accrued before the commencement of this Code.

4. Non-appealable orders. — No appeal lies from any *order* except as provided for by this section. In other words, orders—not being "decrees" within S. 2 (2)—not falling within clauses (ff) to (i) of this section nor within O. 43 R. 1 are not appealable.[1]

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5. † ('12) 8 Nag L R 177 (179):17 Ind Cas 884 (885). (26 Cal 539 was not properly understood and seems to be wrongly dissented from.)
('11) 9 Ind Cas 135 (136) (DB) (Cal).
('11) 38 Cal 339 (340) : 10 Ind Cas 345 (345) (DB).
('12) 15 Ind Cas 679 (681) (DB) (Cal).
('12) 16 Ind Cas 436 (436) (DB) (Cal).
† ('18) 5 AIR 1918 All 209 (210): 40 All 122 (DB).
('20) 7 AIR 1920 Bom 60 (60) : 44 Bom 472 (DB). (Decree-holder being the auction-purchaser is immaterial.)
('23) 10 AIR 1923 Lah 592 (593):4 Lah 243 (DB).
('17) 4 AIR 1917 Cal 443 (444) (DB).
[*See also* ('38) 25 AIR 1938 Nag 107 (107) : ILR (1938) Nag 436 (DB).
('35) 22 AIR 1935 Rang 521 (521). (Application to set aside sale on ground of material irregularity in publication and conduct of sale.)
('35) 22 AIR 1935 Lah 962 (962).]
Also see O. 21 R. 90, Note 50.
6. ('11) 38 Cal 339 (340) : 10 Ind Cas 345 (345) (DB).
('26) 13 AIR 1926 Cal 400 (400) (DB).
Also see O. 21 R. 89, Note 29.

Note 3

1. ('10) 5 Ind Cas 102 (105) (SB) (Mad). (Following 1905 App Cas 369, *Colonial Sugar Refining Co., Ltd.* v. *Irving*; *vide* also Maxwell's "Interpretation of Statutes" Chap. VIII, S. 4 and Craies' "Statute Law," pages 327 and 328.)
Also see S. 154 Note 1.

Note 4

1. ('41) 28 AIR 1941 Pat 1 (3) : 19 Pat 862 (DB). (An order determining instalments under S. 11 of the Bihar Money-Lenders Act.)
('40) 27 AIR 1940 Oudh 387 (390) : 16 Luck 27 (DB). (Order under S. 151 refusing to restore an execution to file—No appeal lies.)
('09) 36 Cal 130 (132, 133) (DB). (Order between stranger and party to suit under S. 295, 1882 Code.)
('34) 21 AIR 1934 Pat 41 (42). (Order under Section 151 setting aside a compromise decree is not appealable.)
('32) 19 AIR 1932 Mad 714 (715). (Where no appeal lies from an order on the merits, no appeal lies from the portion of the order relating to costs.)
('32) 19 AIR 1932 All 415 (415) (DB). (No appeal lies from a mere finding in a suit on the question of jurisdiction.)
('34) 21 AIR 1934 Pesh 43 (44). (Decree removing a mahant from office — Order in miscellaneous application appointing a committee which was to appoint a new mahant—Order not appealable.)
('33) 20 AIR 1933 All 10 (11) (DB). (Two applications for sale in execution of different decrees of different decree-holders—Order directing one sale to be prior is not appealable.)
('83) 1883 All W N 255 (256) (DB). (Insolvent judgment-debtor — Distribution of assets—Order deciding priority of claim as between two decree-holders is not appealable.)
('14) 1 AIR 1914 Mad 437 (437) (DB). (Order under S. 73 of the Code.)
† ('13) 35 All 582 (586) (DB). (Order under Section 148.)
('30) 17 AIR 1930 Pat 280 (282) : 9 Pat 685 (DB). (Order of restitution under Section 151.)
('30) 17 AIR 1930 Lah 789 (790). (Order setting aside sale under Section 151.)
('94) 21 Cal 539 (541) (DB). (Order refusing to make person party defendant to an application for probate.)
('86) 13 Cal 100 (101) (DB). (Order rejecting an application under S. 32 (old Code) to be made a party to suit.)
('80) 2 All 904 (904) (DB). (Order under O. 1 R. 10 refusing to make a person a party to a suit or proceeding.)
('14) 1 AIR 1914 Cal 795 (795) (DB). (Order dismissing suit for misjoinder of parties and causes of action.)
('86) 8 All 191 (193) (DB). (Order under S. 44 of the Code (now O. 2 R. 4) rejecting application for leave to join another cause of action with that for the recovery of immovable property.)
('09) 4 Ind Cas 492 (492)(DB)(All). (Order under O. 6 R. 18 admitting amended plaint after time fixed.)
('11) 9 Ind Cas 484 (485) (DB) (All).
('83) 9 Cal 627 (628) (DB). (Order under S. 97 of the old Code (O. 9 R. 2) dismissing the suit for failure to pay process fees.)
('11) 9 Ind Cas 238 (238) (DB) (Lah). (Order under O. 9 R. 4 refusing to restore suit dismissed for default.)

('99) 22 Mad 221 (222) (DB). (Dismissal of suit for default.)
('02) 29 Cal 60 (62, 63) (DB). (Do.)
† ('96) 23 Cal 115 (117) (DB). (Order dismissing appeal for default under O. 41 R. 17.)
('96) 23 Cal 827 (829) (DB). (Do.)
('12) 39 Cal 341 (343) (DB). (Do.)
('14) 1 AIR 1914 Oudh 303 (304). (Do.)
('25) 12 AIR 1925 Rang 96 (98): 4 Upp Bur Rul 164. (Do.)
('79) 1879 Pun Re No. 113, p. 319 (319) (DB). (Do.)
('17) 4 AIR 1917 All 300 (300) : 39 All 450 (452) (DB). (Order under O. 10 R. 4 (2), striking off defence of one party but proceeding with suit.)
('05) 1905 Pun Re No. 103, page 308 (308). (Order setting aside *ex parte* decree.)
† ('04) 28 Bom 378 (382) (DB). (Order under S. 225 of the old Code (now O. 21 R. 7) by the Court to which case is transferred for execution declining to become the executing Court.)
('07) 10 Oudh Cas 171 (172) (DB). (Order dismissing for default application to set aside sale under Section 311, C. P. Code, 1882.)
('10) 6 Ind Cas 148 (148) (DB) (Cal). (Do.)
('04) 31 Cal 207 (209) (DB). (Do.)
(1900) 27 Cal 414 (415) (DB). (Do.)
('07) 29 All 596 (598). (Order refusing to restore to file an application under S. 310 (O. 21 R. 88), which had been dismissed for default.)
('09) 31 All 82 (101, 102) (FB). (Section 318, C. P. Code, 1882. Cases discussed.)
('18) 5 AIR 1918 All 405 (405) : 40 All 216 (218) (DB). (Order delivering possession under O. 21 R. 95.)
('97) 1 Cal W N 658 (658) (DB). (Order under O. 21 R. 95; see Section 318 of the old Code.)
† ('95) 17 All 172 (173) (DB). (Dissenting from 10 Bom 220.)
('14) 1 AIR 1914 All 402 (402). (Order under O. 22 R. 3 directing abatement—Following 17 All 172.)
('22) 9 AIR 1922 All 113 (114) (DB). (Order that pending appeal has abated.)
('19) 6 AIR 1919 Mad 971 (971) (DB). (Order under O. 22 R. 5.)
('13) 19 Ind Cas 904 (905) (DB) (Cal). (Order allowing decree-holder to withdraw the execution proceedings.)
† ('02) 24 All 532 (537) (FB). (Order on application to be brought on record as legal representative.)
('22) 9 AIR 1922 Pat 525 (526) : 1 Pat 232 (DB). (Order refusing withdrawal of execution case.)
('91) 18 Cal 322 (323) (DB). (Order by Appellate Court under S. 373 (O. 23 R. 1) giving permission to withdraw a suit with liberty to bring a fresh suit.)
('26) 13 AIR 1926 Oudh 185 (185). (Order granting permission to withdraw suit with liberty under O. 23 R. 1 (S. 373 of the old Code).)
('19) 6 AIR 1919 Lah 313 (314) (DB). (Withdrawal under O. 23 R. 1.)
('16) 3 AIR 1916 Cal 80 (81) (DB). (Order dismissing suit for want of prosecution.)
† ('78) 1 All 745 (747) (FB). (Order under O. 33 R. 5 refusing permission to sue as pauper.)
('07) 17 Mad L Jour 144 (145) (DB). (Order on application for appointment of Commissioner.)
('21) 8 AIR 1921 Bom 427 (428) : 45 Bom 99 (DB). (Order granting permission to sue receiver for damages.)
('03) 1903 All W N 67 (68) (DB). (Order on application for removal of receiver and rendition of accounts.)
('08) 30 All 143 (146) (DB). (Refusing to restore appeal dismissed under S. 549 of 1882 Code.)
('16) 3 AIR 1916 Cal 227 (228) (DB). (Order refusing to re-admit appeal rejected under O. 41 R. 10 for not furnishing security for costs.)
('22) 9 AIR 1922 Cal 246 (246) : 49 Cal 355 (DB). (Order rejecting appeal under O. 41 R. 10.)
('10) 8 Ind Cas 436 (437) (DB) (Mad). (Do.)
† ('07) 30 Mad 54 (60) (FB).
('98) 1898 Pun Re No. 15, page 31. (Order of Appellate Court — Court returning plaint for presentation to proper Court (S. 588 (6) of the old Code).)
('12) 14 Ind Cas 39 (39) (DB) (Cal). (Order granting review of appellate judgment on grounds other than those under O. 47 R. 7.)
('26) 13 AIR 1926 Lah 513 (513). (Order removing name of person who died before suit.)
('01) 23 All 476 (477). (Order refusing amendment of sale certificate.)
('69) 11 Suth W R 505 (505) (DB). (Order to proceed with case notwithstanding representation of compromise by parties.)
('29) 16 AIR 1929 All 375 (376). (Order keeping a review application, pending disposal of appeal.)
('12) 16 Ind Cas 794 (795) (DB) (Mad). (Order framing issues.)
('21) 8 AIR 1921 Oudh 224 (224) : 24 Oudh Cas 366 (DB). (Order of directions to Commissioner in partition case.)
('21) 8 AIR 1921 Lah 265 (266). (Interlocutory order.)
('08) 35 Cal 568 (570) (DB). (Order giving directions by Court in passing receiver's accounts.)
('06) 2 Nag L R 179 (189). (Order imposing terms on defendant on setting aside *ex parte* decree.)
('29) 16 AIR 1929 Rang 127 (127) (DB). (Order granting interest on the mortgage money during period of sale proceeds of mortgaged property lying in Court.)
('98) 21 Mad 152 (153) (DB). (Order dismissing petition to receive appeal represented with excess court-fee after time.)
('80) 5 Cal 711 (712) (DB). (Order directing a suit to be restored to file.)
('93) 3 Mad L Jour 223 (224) (DB). (Order dismissing the suit as against one of the defendants.)
('93) 3 Mad L Jour 253 (253). (Order allowing amendment of plaint.)
('07) 6 Cal L Jour 214 (216) (DB). (Appellate order admitting plaint.)
2 Hay 286. (Adverse order under O. 41 R. 27.)
('74) 6 N W P H C R 124 (125) (DB). (Order of Sub-Judge granting sanction to prosecute. This was under the Code of 1861.)
('34) 21 AIR 1934 Lah 301 (303). (Order rejecting review application at second stage.)
† ('29) 16 AIR 1929 Cal 676 (678): 57 Cal 549 (DB). (Order granting amendment of decree.)
† ('37) 24 AIR 1937 All 694 (695, 696) (DB). (Partition suit — Preliminary decree—Any order passed before final decree is interlocutory—No appeal lies from such order.)

5. "Save as otherwise expressly provided in the body of this Code or by any law for the time being in force." — These words are new. The former Code did not provide any exception as to orders under other laws, such as the Letters Patent, the Guardians and Wards Act, etc., which contain provisions as to rights of appeal against orders passed thereunder. And there was consequently a conflict of opinion as to which provision was to prevail.[1] This defect has now been remedied by the introduction of the saving clause.[2]

6. Letters Patent Appeals. — The conflict referred to in Note 5 arose chiefly in connexion with Letters Patent Appeals. Under the Letters Patent certain orders are appealable when they come within the definition of the word "judgment."[1] The High Courts of Calcutta, Madras and Bombay held that such appeals were not barred by S. 588, cl. 16[2] following the decision of the Privy Council in *Hurish Chunder* v. *Kali Sundari*.[3] The Allahabad High Court took a contrary view distinguishing the said Privy Council case.[4]

The introduction of the saving clause as already mentioned sets at rest the conflict of views and it is now clear that an appeal may lie from an order under the Letters Patent, although such order may be unappealable under this section.[5] The Allahabad High Court has, however, held even in a case under the new Code that S. 104 would bar an appeal under the Letters Patent if the order appealed against is unappealable under S. 104.[6] The decision simply purports to follow the Full Bench case of *Mohamed* v.

('35) 22 AIR 1935 All 1016 (1017): 58 All 360 (DB). (Order of sale under O. 21 R. 64, C. P. Code, is not appealable.)
('35) 22 AIR 1935 Mad 609 (610): 58 Mad 814 (DB). (Application to set aside *ex parte* decree dismissed for default—Application to set aside such order dismissed—No appeal lies.)
[*See* ('01) 6 Cal W N 614 (615) (DB). (Decree in terms of award.)]

Note 5

1. ('06) 28 All 88 (89) (DB). (Case under the Agra Tenancy Act.)
✠('90) 12 All 129 (157) (FB). (Order under S. 5, Court-fees Act — Order not specified in S. 588 though coming under S. 2 is not appealable.)
('21) 8 AIR 1921 PC 80 (82, 83) : 48 Cal 481 (488): 48 Ind App 76 (PC).
2. *See* ('41) 28 AIR 1941 All 55 (56) (DB). (Section 6A inserted by the U.P. Court-fees Amendment Act provides that any person called upon to make good a deficiency in court-fee may appeal against such order as if it were an order appealable under S. 104 of the C. P. Code.)

Note 6

1. ('81) 7 Cal 339 (342) (DB). (Order passed by a single Judge of High Court under R. 2 of the Privy Council Orders refusing leave to appeal is not "judgment.")
('91) 18 Cal 182 (186) (DB). (Order of Judge in Privy Council Department refusing to extend time for furnishing security for costs is not "judgment.")
('89) 16 Cal 788 (793) (DB).
† ('90) 17 Cal 455 (457, 458) (DB). (Order of Judge granting a certificate that a case is a fit and proper one for appeal to the Privy Council.)
[*See* ('37) 24 AIR 1937 Rang 522 (523) (DB). (In this case the order in question was held not to come within the meaning of "judgment".)]

[*See also* ('35) 22 AIR 1935 Rang 267 (273) : 13 Rang 457 (FB).]
2. ✠('99) 22 Mad 68 (80, 84) (FB). (9 Mad 253 ; 9 Mad 447; 20 Mad 152 and 20 Mad 407 overruled.)
('01) 25 Mad 555 (557) (DB). (Following 22 Mad 68 (FB).)
('02) 4 Bom L R 342 (348).
('09) 2 Ind Cas 150 (151) (DB) (Bom).
† ('99) 26 Cal 361 (367, 368) (FB). (Order made by a single Judge in the exercise of original civil jurisdiction refusing to set aside an award — Order appealable.)
('03) 13 Mad L Jour 497 (498) (DB).
('81) 6 Cal 594 (599) (SB).
3. ('83) 9 Cal 482 (494) : 10 Ind App 4 (PC).
4. ('92) 14 All 226 (232, 236, 238) (FB).
('09) 1 Ind Cas 137 (137) (DB) (All).
('89) 11 All 375 (377).
5. ('40) 27 AIR 1940 Bom 216 (224) : ILR (1940) Bom 426 (DB).
('24) 11 AIR 1924 Cal 1025 (1026) : 51 Cal 905 (DB).
† ('22) 9 AIR 1922 Lah 380 (383) : 3 Lah 188 (DB).
('16) 3 AIR 1916 Cal 361 (362, 365) : 43 Cal 857 (872) (SB). (Effect of S. 104 is not to take away a right of appeal but to create one even in cases where the Letters Patent is not applicable.)
('21) 8 AIR 1921 P C 80 (82) : 48 Cal 481 : 48 Ind App 76 (PC).
[*See* ('40) 27 AIR 1940 Nag 39 (39) : ILR (1940) Nag 141 (FB). (*Obiter* — The right of appeal from a decree of a single Judge to the High Court is not governed by S. 96 or S. 100 or S. 104 of the C. P. Code but by cl. 10 of the Letters Patent.)]
6. ('23) 10 AIR 1923 All 356 (357) : 45 All 535 (536) (DB). (The Privy Council decision in AIR 1921 P C 80 : 48 Cal 481 : 48 Ind App 76 (PC) is not cited in this case.)

Ishanullah[7] which was a case under the old Code and makes no reference to the change of the law in the Code. The decision is not correct.

Suppose, now, that A prefers an appeal *under this section* to the High Court from an order appealable under this section, and the High Court passes a judgment therein. Does a further or second appeal lie against that judgment on the ground that it is also a "judgment" within the meaning of the Letters Patent? In an earlier decision of the Allahabad High Court it was held that in such a case no further appeal will lie.[8] The decision was based on the ground that sub-s. (2) of S. 104 expressly bars such an appeal and there is no saving clause such as has been inserted in sub-s. (1). But this view has been dissented from in a subsequent decision of the same High Court[9] which proceeds on the ground that by virtue of the provisions of S. 4 the right of appeal under the Letters Patent is unaffected by S. 104, sub-s. (2). The Bombay High Court has held a similar view.[10]

7. Execution proceedings. — Orders passed in execution proceedings, though in many cases fall within S. 47 of the Code, may in some cases fall outside its scope, e. g., orders passed on objections by third parties to attachment or delivery of possession in execution of decrees.[1] Where an order in execution is *specified* as appealable under this section, then, as has been seen already,[2] there will be only *one* appeal notwithstanding the fact that otherwise the order falls also within the scope of S. 2 (2) of the Code. Where an order in execution neither falls under S. 47 *nor is specified* in this section, then there will be no appeal at all.[3] An appeal against an order in execution which is appealable under this section is not barred by the mere fact that the order is only a preliminary one, and that a final order has been passed at the time of appeal.[4]

8. Appeals to Privy Council. — Sub-section (1) saves rights of appeal "expressly provided in the body of this Code." Section 109 which gives a right of appeal to the Privy Council from certain decrees and final orders is one of such provisions, and consequently this section does not govern appeals to the Privy Council.[1]

9. Revision or review. — As has already been seen in Note 1, the restriction in sub-section (2) is to prevent only a further appeal and not to bar a right of revision or review. The word "final" which had been used in the last paragraph of S. 588 of the old Code was held not to bar a right of review or revision.[1] The possibility of any doubt in this matter has now been removed by the present sub-section (2).

10. Order superseding arbitration — Clause (a). *(Omitted.)*

11. Order on award stated as special case — Clause (b). *(Omitted.)*

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7. ('92) 14 All 226 (232, 237, 238) (FB).
8. ('17) 4 AIR 1917 All 325 (326) : 39 All 191 (192) (DB).
9. ('37) 24 AIR 1937 All 165 (167) : ILR (1937) All 386 (DB).
10. ('40) 27 AIR 1940 Bom 216 (218, 224) : I L R (1940) Bom 426 (DB).

Note 7

1. See O. 21 Rr. 58 to 63 and 99 to 103.
2. See Note 2.
('11) 38 Cal 717 (720) : 11 Ind Cas 545 (545) : 38 Ind App 126 (PC). (Order refusing permission to a decree-holder to bid.)
3. See Note 2.
4. ('15) 2 AIR 1915 Mad 197 (199) : 37 Mad 29 (37) (DB).

Note 8

1. ✢('24) 11 AIR 1924 P C 95 (100, 101) : 51 Cal 361 : 20 Nag L R 33 : 51 Ind App 72 (PC).
('34) 21 AIR 1934 Oudh 291 (292) (DB). (Section refers to appeals to High Courts in British India.)
('98) 20 All 412 (418) : 25 Ind App 146 (PC). (The Privy Council judgment is not directly in point since the appeal was dismissed on the merits, the implication however being that an appeal lay to the Privy Council.)
†('13) 40 Cal 635 (647, 648) : 40 Ind App 140 (PC).
('03) 13 Mad L Jour 497 (498) (DB).
Also see S. 109 Note 5a.

Note 9

1. ('97) 1 Cal W N 626 (631) (DB).
('14) 1 AIR 1914 Lah 187 (187) (DB). (Doubted.)
('96) 19 Mad 167 (168).
†('09) 1909 Pun Re No. 77, p. 299 (300) : 3 Ind Cas 607 (608) (DB).
('03) 13 Mad L Jour 497 (498) (DB).

12. Order modifying or correcting an award—Clause (c). *(Omitted.)*

13. Order filing or refusing to file agreement to refer to arbitration — Clause (d). *(Omitted.)*

14. Order staying or refusing to stay suit — Clause (e). *(Omitted.)*

15. Order filing or refusing to file private award — Clause (f). *(Omitted.)*

16. Order under section 35A — Clause (ff). — This clause, the proviso to S. 104, sub-s. (1) and S. 35A were newly introduced by Act IX of 1922.

17. Order under section 95 — Clause (g). — Section 588 of the old Code provided for an appeal against an order for compensation under S. 497 for obtaining an injunction on insufficient grounds, and not from an order for compensation for obtaining an improper *arrest* or *attachment*, and there was a conflict of opinion as to whether an appeal lay from such an order.[1] The present section read with S. 95 now shows that an order for compensation for obtaining an improper arrest or attachment is also appealable.[2] An "order under S. 95" will include an order either granting or refusing compensation[3] and, in either case, will not be open to second appeal.[4] Where an order under S. 95 is passed by a Court of Small Causes, no appeal will lie against the order. The reason is that on general principles, no appeal will lie from an order passed in a suit, in which the decree itself is unappealable.[5]

18. Order imposing fine, etc. — Clause (h). — This clause applies only to orders made *under the provisions of the Code*[1] and only where they are *positive* orders *imposing* a fine or *directing* an arrest. The following are some of the orders contemplated by this clause :

(1) Order under O. 16 Rr. 10 and 12 against a refractory witness.[2]

(2) Order under O. 38 R. 1 for arrest before judgment.

(3) Order under O. 39 R. 2, sub-rule (3) against a party for disobedience of an injunction.

Vide Order 16 Rules 10, 12, 17 and 21; Order 38 Rules 1 and 4 and Order 39 Rule 2 (3).

(*Note.*—This clause and O. 43 R. 1 (r) overlap each other to the extent that both allow an appeal against an order directing detention of any person in civil prison.)

A *negaitve* order of refusal is not appealable under this clause. Nor is an order for arrest or detention appealable under this clause if it is *in execution of a decree*.[3] But such an order may be appealable as a decree under section 47.[4]

Note 17

1. ('06) 28 All 81 (84) (DB). (No appeal. 24 Mad 62 followed.)
('11) 21 Mad L Jour 460 (461) (DB). (Appeal lies against order awarding compensation for improper attachment. 28 All 81 not followed; 24 Mad 62 distinguished.)
('67) 8 Suth W R 332 (332). (Case under S. 8 of the Code of 1859—No appeal.)
2. ('11) 11 Ind Cas 349 (349) (DB) (Mad). (The decision in this case is thus approved by the Legislature.)
3. ('19) 6 A I R 1919 Mad 20 (20) (DB). (Order refusing compensation.)
4. ('42) 29 AIR 1942 All 261 (262) : ILR (1942) All 360. (Order allowing compensation.)
('11) 11 Ind Cas 917 (918) (DB) (Low Bur).
('13) 21 Ind Cas 758 (757) (DB) (Mad).
5. ('19) 6 AIR 1919 Mad 23 (23) : 50 Ind Cas 886 (886) (DB). (Dissenting from the *obiter dictum* to the contrary expressed in AIR 1915 Mad 1072.)
('37) 24 AIR 1937 Nag 126 (127) : ILR (1938) Nag 361.
[*See also* ('30) 17 AIR 1930 Sind 173 (174).]

Note 18

1. ('80) 5 Cal 311 (313, 314) (DB). (Order imposing fine under the Stamp Act is not appealable.)
[*See* ('32) 19 AIR 1932 All 524 (524).]
2. ('68) 10 Suth W R 233 (233) (DB). (Fine for keeping out of the way to avoid summons as a witness.)
3. ('43) 30 AIR 1943 Peah 58 (58). (Order directing imprisonment of a person obstructing execution of a decree is not appealable.)
('17) 4 AIR 1917 Lah 24 (24).
('32) 19 AIR 1932 All 524 (524) (DB).
4. ('15) 2 AIR 1915 Cal 688 (688) (DB).
('09) 32 All 3 (6) : 3 Ind Cas 46 (47) (DB).

An order for *attachment* for contempt[5] is not within this clause. An order refusing arrest or attachment under O. 39 R. 2 is appealable under O. 43 R. 1 though not under S. 104;[6] while a conditional order of arrest, though not appealable under O. 43 R. 1 is appealable under section 104.[7]

19. Order appealable under rules — Clause (i). — See Order 43 Rule 1.[1]

20. Proviso to sub-section (1). — The effect of this proviso is that an appeal against an order under S. 35A lies only when the order is one *awarding* compensatory costs. The reason is that it is only in such cases that an appeal will be possible on the limited grounds specified in the proviso. When the order is one *refusing* to award compensatory costs, no appeal will lie.[1]

21. Bar of appeal from appellate order—Sub-section (2).—An order passed on appeal under sub-s. (1) is not open to any further appeal.[1] As seen already, this does

('24) 11 AIR 1924 Lah 360 (360). (Order issuing warrant for arrest.)
('19) 6 AIR 1919 Lah 15 (16) : 1 Lah 77 (DB).
Also see O. 21 R. 40, N. 9.
5. ('83) 7 Bom 5 (12) (DB).
6. ('17) 4 AIR 1917 Mad 448 (449, 450) : 39 Mad 907 (914) (DB).
Also see O. 39 R. 2, N. 2.
7. ('24) 11 AIR 1924 Rang 361 (361) : 2 Rang 362 (DB).

Note 19

1. ('17) 4 AIR 1917 Mad 448 (449, 450) : 39 Mad 907 (914) (SB).
('14) 1 AIR 1914 Cal 632 (632) (DB). (Appeal from order granting review.)
('36) 23 AIR 1936 Mad 347 (349). (Order recording compromise is appealable under O. 43 R. 1, cl. (m) even if factum of compromise is not disputed.)

Note 20

1. ('35) 162 Ind Cas 860 (860) (Nag). (Order refusing compensatory costs under S. 35A, Civil Procedure Code.)

Note 21

1. ('42) 29 AIR 1942 All 261 (262) : I L R (1942) All 360. (No second appeal lies where an appeal against an order awarding compensation under S. 95, C. P. Code, is dismissed.)
('42) 29 AIR 1942 Bom 82 (84) : ILR (1941) Bom 629 (DB). (Order rejecting an application in execution proceedings to add a party to darkhast under O. 22 R. 10—No second appeal lies.)
('42) 29 AIR 1942 Oudh 370 (371) (DB). (Order returning plaint for presentation to proper Court—Appellate Order setting aside order and directing suit to be decided according to law — No second appeal lies.)
('42) 29 AIR 1942 Oudh 480 (481). (Order dismissing appeal against an order under O. 7 R. 10 — No second appeal.)
('41) 28 AIR 1941 All 338 (339). (Appeal under O. 43, R. 1 (d) abating — Application to set aside abatement — Order passed on application is not open to appeal.)
('39) 26 AIR 1939 Lah 65 (66). (Order of remand passed in appeal under O. 43, R. 1 (m)—No appeal lies.)
('11) 33 All 479 (480) (DB). (Appeal from order of remand.)
('34) 21 AIR 1934 Lah 326 (326). (Order under O. 21 R. 92.)
('33) 20 AIR 1933 Nag 72 (73) : 29 Nag L R 92. (Do.)
('33) 20 AIR 1933 Lah 139 (140). (Appeal against appellate order modifying and filing an award.)
('12) 1912 Pun Re No. 119 p. 406. (Order returning plaint.)
('20) 2 Lah L Jour 587 (589) (DB). (Do.)
('25) 12 AIR 1925 Bom 431 (431) (DB). (Do.)
('11) 10 Ind Cas 36 (37) (Lah). (Do.)
('21) 8 AIR 1921 All 226 (227) : 43 All 334 (DB). (Do.)
('30) 17 AIR 1930 All 122 (123) (DB). (Do.—The Court cannot by framing its order under O. 41 R. 23 permit an appeal which would not otherwise lie.)
('30) 125 Ind Cas 581 (581) (DB) (All). (Do.)
('20) 7 AIR 1920 Lah 290 (290, 291). (Order under O. 7 R. 10.)
('26) 13 AIR 1926 Lah 141 (141). (Do.)
('15) 2 AIR 1915 All 54 (55) (DB). (Order under O. 21 R. 72 (3).)
('10) 6 Ind Cas 573 (573) (DB) (Cal). (Order under O. 21 R. 92 read with O. 21 R. 89.)
('15) 2 AIR 1915 Lah 293 (295). (Under O. 21 R. 92.)
('26) 13 AIR 1926 Lah 204 (204). (Do.)
('28) 15 AIR 1928 Lah 444 (444). (Do.)
('12) 13 Ind Cas 147 (147) (DB) (All). (Do.)
('29) 16 AIR 1929 All 553 (553). (Do.)
('66) 6 Suth W R Misc 119 (119) (DB). (Do.)
('70) 14 Suth W R 385 (385) (DB). (Do.)
('94) 21 Cal 799 (802) (DB). (Do.)
('95) 22 Cal 802 (804) (DB). (Do.)
('99) 3 Cal W N 333 (335) (DB). (Do.)
† ('27) 14 AIR 1927 Cal 657 (658) (DB). (Do.)
('19) 6 A I R 1919 Lah 422 (422). (Do.)
('21) 8 AIR 1921 Lah 156 (157). (Do.)
('28) 15 AIR 1928 Lah 414 (416). (Do.)
('91) 18 Cal 422 (426) (FB). (Do.)
('30) 17 AIR 1930 Lah 208 (209). (Do.)
('70) 5 Mad H C R 213 (214). (Do.)
('96) 19 Mad 29 (30) (DB). (Do.)
('10) 8 Ind Cas 883 (883) (DB) (Mad). (Do.)
('18) 5 AIR 1918 Mad 262 (262) (DB). (Under O. 21 R. 91.)
('17) 4 AIR 1917 Oudh 45 (45). (Under O. 21 R. 90.)
('22) 9 AIR 1922 Oudh 146 (147) : 25 Oudh Cas 78. (O. 21 R. 89.)

not take away the right of appeal under the Letters Patent (see Note 6) or to His Majesty in Council (see Note 8) nor does it interfere with a right of revision or review (see Note 9). The sub-section is general and bars a second appeal against *any* order passed in an appeal under this section and not merely against an order deciding an appeal on the *merits*.[2]

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105. [S. 591.] (1) Save as otherwise expressly provided,[3] no appeal
Other orders. shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from,[4] any error, defect or irregularity[5] in any order,[3] affecting the decision of the case,[6] may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

[1877, Ss. 580, 591; 1861, S. 26; 1859, S. 360 last para.]

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. Order must be one under the Code.
4. "Where a decree is appealed from."
5. Error, defect or irregularity.
6. "Affecting the decision of the case."
7. Compliance with order is no bar to questioning it in appeal.
8. Effect of not appealing against order of remand.
9. Privy Council appeals.
10. Letters Patent appeals.
11. Order granting review.
12. Revision of orders that can be challenged under the section.

('30) 17 AIR 1930 Oudh 9 (9). (O. 21 R. 90.)
('20) 7 AIR 1920 Lah 377 (377) : 1919 Pun Re No. 168. (O. 21 R. 90)
('29) 16 AIR 1929 Rang 148 (148) : 7 Rang 37. (Do.—Section 11, Burma Courts Act, does not affect this section.)
('22) 9 AIR 1922 Lah 309 (311) : 3 Lah 175 (DB). (Order under O. 23 R. 3)
('85) 11 Cal 296 (298) (DB). (Order granting review.)
('89) 11 All 383 (385) (DB). (Do.)
('89) 12 Mad 125 (126) (DB). (Do.)
('97) 24 Cal 319 (320) (DB). (Do.)
('74) 22 Suth W R 288 (289) (DB). (Do.)
('01) 24 Mad 447 (449) (DB). (Order for arrest under O. 39 R. 2 (3).)
('11) 9 Ind Cas 55 (55) (DB) (Mad). (Order refusing to set aside an *ex parte* decree.)
('82) 8 Cal 832 (833) (DB). (Do.)
('04) 1904 Pun Re No. 14, p. 55 (57).
('13) 13 Ind Cas 421 (423) (DB) (Mad). (Order substituting new plaintiff in place of original plaintiff.)
('02) 4 Bom L R 138 (139) (DB). (Order under O.39 R. 1.)
('38) 25 AIR 1938 All 511 (512) : I L R (1938) All 754 (DB). (Order in appeal from order returning plaint under O. 7 R. 10.)
('35) 22 AIR 1935 All 738 (739). (Appeal against appellate order under O. 43 R. 1 (m).)
('34) 21 AIR 1934 Lah 326 (326). (No second appeal lies from an order confirming sale.)
('35) 22 AIR 1935 Cal 239 (240) : 62 Cal 229. (Order recording disputed compromise.)
('39) 26 AIR 1939 Sind 62 (63) : I L R (1939) Kar 417 (DB). (Order under O. 21 R. 92.)
('37) 24 AIR 1937 Rang 537 (538). (Order of Appellate Court on dismissal of application under O. 21 R. 89—S. 11, Burma Courts Act, does not modify S. 104 (2)—No second appeal therefore lies.)
('35) 22 AIR 1935 Rang 521 (521). (Material irregularity in conducting and publishing sale — O. 21 R. 90 applies — Second appeal does not lie.)
('38) 25 A I R 1938 Oudh 224 (224) : 14 Luck 218 (DB). (Order returning plaint reversed in first appeal.)
('36) 23 AIR 1936 Oudh 172 (172) (DB). (Order rejecting application for setting aside sale which has been confirmed.)
('38) 25 AIR 1938 Nag 107 (107) : I L R (1938) Nag 436 (DB). (Order refusing to set aside sale.)
('36) 23 AIR 1936 Lah 969 (971). (Order under O. 21 R. 90.)
('35) 22 AIR 1935 Lah 962 (962). (Order passed on appeal against order dismissing objection under O. 21 R. 90, C. P. Code.)

2. ('41) 28 AIR 1941 All 338 (339).
Also see Ss. 100 & 101, Note 3.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Appeal apparently against the decree, but not really directed against interlocutory order. See Note 4.

Appealable and non-appealable orders. See Note 2.

Preliminary decree. See Section 97.

Save as expressly provided. See Note 3.

Section does not control O. 47 Rr. 7 and 9. See Note 11.

1. Legislative changes.

(1) Section 591 of the old Code contained the words "any *such* order" after the word "irregularity." This gave rise to a contention that the section was applicable to non-appealable orders only. That contention was negatived by the Privy Council.[1] The word "such" has now been omitted in order to make this view clear.

(2) Sub-section (2) is new. See Note 8.

The above alterations do not effect any material changes in the law as it stood before.[2]

2. Scope and object of the section. — Under section 96, every decree is appealable save where otherwise expressly provided in the body of the Code or by any other law for the time being in force. No order is, however, appealable except those specified in section 104.[1] Section 105 enacts that every order whether appealable or not,[2] except an order of remand, can be attacked *in an appeal from the final decree* on the ground —

(1) that there is an error, defect or irregularity in the order; *and*

(2) that such error, defect or irregularity affects the decision of the case.

In *Moheshur Singh* v. *The Bengal Government*,[3] the Privy Council observed as follows :

> "We are not aware of any law or Regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting for ever the benefit of the consideration of the Appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities."

This is the principle on which the section is based.[4]

Section 105 — Note 1

1. ('69) 11 Suth W R 19 (21) : 12 Moo Ind App 157 (PC).
('66) 5 Suth W R 47 (52) : 10 Moo Ind App 340 (PC).
(1865) 5 Suth W R 21 (24) : 10 Moo Ind App 413 (PC).
(1859) 3 Suth W R 45 (47) : 7 Moo Ind App 283 (PC).
2. ('12) 1912 Pun Re No. 97 : 15 Ind Cas 62 (63) (DB).

Note 2

1. See also S. 104 (1), first sentence, and the following cases :
('78) 2 Cal L Rep 589 (591) (DB).
('25) 12 AIR 1925 Lah 338 (339). (Order refusing leave under S. 20 (b) of the Code is not appealable.)
('11) 1911 Pun Re No. 50 : 11 Ind Cas 815 (316) (DB). (Where it was impossible to say whether or not an order was appealable, it was held that appeal from such an order would not lie.)
† ('12) 39 Cal 563 (565) : 13 Ind Cas 690 (690) (DB). (Order assigning administration bond is not appealable.)
2. ('43) 30 AIR 1943 Oudh 288 (290) (DB).
3. (1859) 7 Moo Ind App 283 (302) (PC).
4. ('43) 30 AIR 1943 Oudh 288 (290) (DB).
('14) 1 A I R 1914 Nag 58 (59, 60) : 10 Nag L R 28.
[*See also* (1865) 10 Moo Ind App 413 (423) (PC).
('68) 12 Moo Ind App 157 (185) (PC).
(1865) 10 Moo Ind App 340 (359, 360) (PC).]

As has been mentioned already, this section applies to appealable[5] as well as to non-appealable[6] orders.

This section and S. 99 are not mutually destructive as the latter section deals only with an error, defect or irregularity *not affecting the merits of the case* while this section deals with any error, etc., *affecting the decision of the case.*[7]

There is a conflict of decisions as to whether an interlocutory order which is otherwise appealable can be appealed against after the decree in the suit has been passed. In the cases noted below[8] the Calcutta High Court held that the right of appeal from an interlocutory order ceased with the disposal of the suit. But the Nagpur High Court has held a contrary view.[9]

3. Order must be one under the Code. — The word "order" in the section refers to orders passed *under the Code.*[1] The words "save as otherwise expressly provided" contemplate appeals from orders of a character provided for elsewhere than in the Civil Procedure Code and include appeals allowed under *other laws.*[2]

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5. ('96) 18 All 19 (21, 22) (FB).
(1900) 23 Mad 494 (495,496) (DB). (Order declaring the joint and several liability of defendants for mesne profits.)
✠('36) 23 AIR 1936 Nag 8 (10) : 31 Nag L R (Sup) 72. (This case is overruled on another point in A I R 1940 Nag 349 : ILR (1940) Nag 538 (DB).)
† ('36) 163 Ind Cas 700 (700) (Cal).
('96) 23 Cal 406 (409) (DB). (Order declaring one of the defendants to be a partner and requiring accounts to be taken.)
('89) 11 All 35 (37, 41) (DB).
('96) 23 Cal 335 (338) (DB).
('04) 1904 Pun Re No. 14, page 55 (57).
('01) 28 Cal 324 (328) (DB).
('02) 29 Cal 758 (769) (FB).
('87) 9 All 447 (451) (DB).
('89) 14 Bom 232 (234) (DB).
('09) 36 Cal 422 (430) : 2 Ind Cas 338 (341) (DB).
('88) 10 All 97 (105) (DB).

6. ('43) 30 AIR 1943 Pesh 37 (39) (DB). (Interlocutory order not amounting to decree — Appeal against, filed and withdrawn — No bar to party challenging same in appeal against final decree.)
(1900) 24 Bom 302 (304,305) (DB). (An order varying a commissioner's report.)
('97) 24 Cal 725 (736, 738) (FB). (Order appointing a commissioner to make the partition.)
('38) 25 AIR 1938 All 511 (512) : I L R (1938) All 754 (DB). (Order in appeal under O. 43 R. 1 (a) though not appealable under S. 104 (2) can be challenged in second appeal from the appellate decree.)
† ('35) 22 AIR 1935 Rang 245 (246) : 13 Rang 239 (DB).
('21) 8 AIR 1921 Oudh 23 (23) : 24 Oudh Cas 215. (An order of adjournment on payment of costs.)
('17) 4 AIR 1917 Mad 404 (405). (Interlocutory order leading up to final order appealed from.)
('23) 10 AIR 1923 Mad 147 (149) : 46 Mad 47 (DB). (Right to share in mesne profits in a partition suit.)
('25) 12 AIR 1925 All 768 (769) : 47 All 853 (DB). (Order impleading a person in appeal.)
('09) 2 Ind Cas 677 (680) (DB) (All).
('97) 21 Bom 392 (393) (DB).
('94) 1894 Pun Re No. 83, page 284 (290) (DB). (Section applies to all orders.)
('83) 1883 Pun Re No. 156, p. 477 (478) (DB) (Do.)
('28) 15 AIR 1928 Sind 100 (101) : 23 Sind L R 87 (DB). (Directions given to commissioner to give credit to one of the parties in respect of partnership goods in a partnership suit.)
('13) 37 Bom 480 (482, 483) : 19 Ind Cas 894 (895, 896) (DB). (Preliminary finding.)
('78) 2 Bom 644 (648, 649) (DB). (Whether made before or after the decree.)
('14) 1 AIR 1914 Sind 70 (74, 75) : 8 Sind L R 69 (DB). (Order permitting an amendment of the plaint.)
[*See also* ('30) 17 AIR 1930 Mad 988 (991) (DB). (Where it was held that an order embodied in the final decree can be attacked only in an appeal against such decree.)]

7. ('27) 14 AIR 1927 Rang 150 (154) : 5 Rang 80 (DB). (Section 105 should be looked at as being supplementary to Section 99—Overruled on another point in AIR 1937 Rang 334 : 1937 Rang L R 207 (FB).)

8. ('05) 32 Cal 1023 (1029) (DB). (Case relating to order of remand.)
('09) 36 Cal 762 (763) (DB). (Actual decision was that a preliminary decree could not be appealed against after the final decree had been passed.)

9. ('40) 27 AIR 1940 Nag 104 (105, 106) (DB). (Right of appeal given by S. 104 is not taken away by the right to question an interlocutory order in the appeal against the decree, conferred by S. 105 (1).)

Note 3

1. ('95) 17 All 475 (477) (DB).
† ('95) 17 All 438 (440) (DB).
('83) 7 Bom 5 (12) (DB). (An order for attachment for contempt cannot come under this section.)
('90) 12 All 129 (158) (FB). (A decision under S. 5, Court-fees Act, cannot be questioned under this section.)

2. ('24) 11 AIR 1924 Rang 237 (238) : 2 Rang 117 (DB). (Probate and Administration Act.)
('95) 17 All 438 (440) (DB). (Right of appeal created by the Indian Companies Act (VI of 1882) in a matter entirely outside the Code is not forbidden by this section.)
See also S. 192 (a) of the Madras Estates Land Act, I of 1908.

4. "Where a decree is appealed from." — It is only where the erroneous or defective order has been passed by the very Court by which the decree appealed from has been passed that the order can be attacked in the appeal. Thus, an erroneous order of remand passed by an *Appellate* Court cannot be attacked in an appeal from a decree of the *trial* Court passed on such remand.[1] There is a conflict of opinion as to whether an appeal will lie from a decree where the *only* ground of appeal is the defect, error or irregularity of an order made in the suit. The High Courts of Bombay,[2] Calcutta[3] and Madras[4] have held that such an appeal will lie. The High Court of Allahabad held in the undermentioned cases[5] a contrary view. In a later case, however, that High Court expressed the same view as the other High Courts.[6]

The ground of objection must be set out in the memorandum of appeal; otherwise it will not be entertained at the hearing of the appeal.[7]

The principle of this section would apply not only to decrees and interlocutory orders but also to orders and interlocutory orders which lead up to the final order.[8] In the undermentioned case,[9] however, the Allahabad High Court took a contrary view and held that it is only when a *decree* is appealed from that prior orders passed by the Court from whose decree the appeal has been filed can be questioned. It is submitted that in view of the express provisions of S. 108, clause (b), the above decision does not seem to be correct.

5. Error, defect or irregularity. — The error, defect or irregularity referred to in the section must be one in *law or procedure* and not in matters of *fact*.[1]

6. "Affecting the decision of the case." — An error, defect or irregularity in any order may be raised as a ground of objection in an appeal from the decree if such error, etc., should have *affected the decision of the case*.[1] The words "affecting the decision of the case" mean according to all the Courts, affecting the decision of the case *on the merits*.[2] The following are examples of orders which have been held to affect the decision of the case on the merits :

Note 4

1. ('09) 32 Mad 318 (320) : 2 Ind Cas 525(526) (DB). [But see ('40) 27 AIR 1940 Mad 756 (757): ILR (1940) Mad 901 (DB). (Order of remand by High Court on revision — Appeal to High Court from decree after remand — Correctness of order on revision application can be gone into.)]
2. ('90) 14 Bom 232 (235) (DB).
3. ('81) 7 Cal 148 (149) (DB).
4. ✢('10) 34 Mad 228 (230) : 6 Ind Cas 239(239)(DB).
5. ('96) 18 All 19 (22) (FB).
('00) 22 All 366 (367) (DB).
('99) 1899 All W N 136 (137).
6. ('28) 15 AIR 1928 All 194 (196) (DB).
7. See O. 41 R. 2, Note 3.
8. † ('17) 4 AIR 1917 Mad 404 (405).
('36) 23 AIR 1936 Mad 936 (937). (Plaintiff asked to amend plaint and pay court-fees for added relief — Plaint amended but Court returning it for presentation to proper Court — Appeal — Order directing amendment can be challenged.)
[*See also* ('32) 19 AIR 1932 All 392 (393) (DB).)]
9. ('36) 164 Ind Cas 730 (731) (DB) (All). (In an appeal against an order of remand, no objection could be taken on the ground that the lower Appellate Court had no jurisdiction to entertain the appeal which had abated and to order substitution of names.)

Note 5

1. ✢('90) 12 All 200 (202) (DB).
('30) 17 AIR 1930 Pat 266 (269) : 9 Pat 102 (DB).
('29) 16 AIR 1929 Cal 26 (27) (DB).
† ('36) 23 AIR 1936 Nag 8 (11) : 31 Nag L R (Sup) 72. (This case is overruled on another point in AIR 1940 Nag 349 : ILR (1940) Nag 538 (DB).)
[*See also* ('03) 27 Bom 162 (187) (SB).]

Note 6

1. ('43) 30 AIR 1943 Oudh 288 (290) (DB).
('90) 12 All 200 (202) (DB).
('34) 21 AIR 1934 Lah 312 (312). (Order under S. 151 cancelling the previous order for amendment of plaint held did not affect the decision of the case on merits.)
('29) 16 AIR 1929 Pat 609 (612) : 9 Pat 408 (DB).
('72) 17 Suth W R 370*n* (371*n*) (DB). (Order making another person party to the suit does not affect the merits of the case.)
('16) 3 AIR 1916 Nag 89 (90) : 13 Nag L R 32. (Order under O. 22 R. 5.)
2. ('43) 30 AIR 1943 Oudh 288 (290) (DB). (Whether claim is barred by time or not is decision of case on merits.)
† ('25) 12 AIR 1925 Lah 466 (467) : 6 Lah 94 (DB).
('95) 22 Cal 981 (984).

(1) Order setting aside an award and directing the case to be tried by the Court.[3]

(2) Order extending the time for payment of money under a preliminary mortgage decree.[4]

(3) Order in a suit for the dissolution of partnership that a particular party was a partner.[5]

(4) Order admitting or excluding a document.[6]

(5) Order refusing amendment of plaint.[7]

(6) Order giving directions for the preparation of a final decree.[8]

(7) Order deciding that the mortgagor was liable to pay interest only at a particular rate.[9]

(8) Order making a person respondent in appeal.[10]

(9) Order refusing to set aside abatement.[11]

(10) Order entertaining a claim after the period of limitation.[12]

('39) 26 AIR 1939 Rang 164 (165).
('37) 24 AIR 1937 All 582 (584).
† ('37) 24 AIR 1937 Rang 334 (335) : 1937 Rang L R 207 (FB). (Overruling AIR 1927 Rang 150 : 5 Rang 80.)
✠('36) 23 AIR 1936 Nag 8 (11): 31 Nag L R (Sup) 72. (Order refusing to record an adjustment is not an order affecting the decision of a case, but is merely an order ensuring that the merits of the case should be determined. NOTE.— This case is overruled on another point in A I R 1940 Nag 349 : I L R (1940) Nag 538 (DB).)
† ('25) 12 AIR 1925 Cal 766 (767) : 52 Cal 472 (DB).
('29) 16 AIR 1929 Cal 26 (27) (DB).
('03) 25 All 280 (282) (DB).
('17) 4 AIR 1917 All 434 (435) (DB).
('02) 24 All 464 (465) (DB).
('25) 12 AIR 1925 All 610 (612, 613) : 48 All 175 (FB).
('25) 12 A I R 1925 All 426 (427) : 47 All 555 (DB).
✠('31) 18 AIR 1931 All 294 (297, 298, 299) : 53 All 612 (FB).
('31) 18 AIR 1931 All 329 (330).
('06) 2 Nag L R 179 (189).
[*See also* ('30) 17 AIR 1930 All 168 (168) (DB).]

3. † ('15) 2 AIR 1915 All 247 (248) : 37 All 456 (DB). (28 All 408, Not approved. 4 All L Jour 256, Not followed.)
('33) 20 AIR 1933 Oudh 563 (564) (DB). (A I R 1929 Cal 322 followed.)
('39) 26 AIR 1939 Rang 164 (164).
('39) 26 AIR 1939 Sind 241 (245) : I L R (1940) Kar 22 (FB). (Validity of an order setting aside an award can be attacked in appeal under the prosions of S. 105.)
('37) 24 AIR 1937 All 582 (584).
('16) 3 AIR 1916 Pat 21 (22). (The acceptance or supersession of an award affects the decision on the merits of the case.)
('81) 1881 Pun Re No. 72, page 163 (164) (DB).
('88) 1888 Pun Re No. 134, page 362 (366) (DB). (Order directing the filing of award can be questioned in an appeal against the final decree on ground of absence of agreement to refer.)
('12) 1912 Pun Re No. 97 : 15 Ind Cas 62 (63) (DB).
✠('29) 16 AIR 1929 Cal 322 (323, 324) : 56 Cal 21 (DB).
('70) 14 Suth W R 327 (327) (DB).
('78) 2 All 181 (187) (FB).
('28) 15 AIR 1928 Lah 753 (754). (A I R 1921 Lah 145, Not followed.)
('29) 16 AIR 1929 Lah 174 (175). (Distinguishing A I R 1921 Lah 145 as in that case the order of supersession of the reference was before the award itself was passed.)
('08) 31 Mad 345 (346) (DB).
('13) 16 Oudh Cas 233 (235) : 20 Ind Cas 773 (775) (DB).
('08) 5 All L Jour 644 (646, 647).
('97-01) 2 Upp Bur Rul 310.
('25) 12 AIR 1925 All 566 (567) : 47 All 916 (DB).
('21) 8 AIR 1921 All 16 (18) : 43 All 305.
[*See also* ('02) 26 Bom 551 (552) (DB).]
[But see ('33) 20 AIR 1933 Lah 530 (531). (The same principle as is applicable to order setting aside an *ex parte* decree.)

4. ('11) 7 Nag L R 162 (164) : 12 Ind Cas 795 (796). (No analogy between an order setting aside an *ex parte* decree and an order extending time.)

5. ('96) 23 Cal 406 (409) (DB).

6. ('13) 18 Ind Cas 309 (310) (Lah).
('25) 12 AIR 1925 Cal 711 (713) (DB).

7. ('14) 1 AIR 1914 Mad 17 (17) (DB).

8. ('13) 35 All 159 (162) : 18 Ind Cas 701 (701) (DB).

9. ('69) 12 Moo Ind App 157 : 2 Beng L R 44 (48) (PC).

10. ('87) 9 All 447 (451) (DB).

11. † ('33) 20 AIR 1933 All 294 (295) (DB).
('36) 163 Ind Cas 700 (701) : 39 Cal W N 1173 (1175).

12. ('43) 30 AIR 1943 Oudh 288 (290) (DB).

The following are examples of orders which have been held not to affect the decision of the case on the merits :

(1) Order allowing plaintiff to sue *in forma pauperis*.[13]

(2) Order setting aside the dismissal of an appeal for default.[14]

(3) Order of remand passed in an appeal from an order returning a plaint for presentation to the proper Court.[15]

(4) Order refusing to record adjustment of suit.[16]

Is an order setting aside an *ex parte* decree one that affects the merits of the case? On this point there has been a conflict of opinion. It has been held by the High Courts of Allahabad,[17] Bombay,[18] Calcutta,[19] Lahore[20] and Rangoon[21] and the Judicial Commissioner's Court of Oudh[22] that such an order does not affect the decision of the case on the merits, but only ensures the *re-hearing* of the case on the merits. According to the High Court of Madras,[23] where a decree against two defendants *ex parte* was set aside *in toto* on an application by *one* of them only, the order can be attacked in an appeal from the final decree. The same High Court has also held[24] that when the result of setting aside the *ex parte* decree is not the hearing of the suit *de novo* on the merits but to burke such a decision altogether as where the *ex parte final* decree alone is set aside retaining the *ex parte* preliminary decree, the order is one which will affect the decision of the case, and can be attacked in an appeal from the decree. It has been held that an order improperly refusing an adjournment and placing a defendant *ex parte*,[25] or an order setting aside an *ex parte* decree only against some of the defendants,[26] is one affecting the decision of the case within the meaning of the section. The Chief Court of Oudh has held in the undermentioned case[27] that an order under O. 9 R. 9 restoring a suit to file cannot be challenged in the appeal against the decree under this section.

There is also a conflict of opinion on the question whether an order setting aside an abatement under O. 22 R. 9 affects the decision on the merits. The decisions of the High Court of Lahore are conflicting.[28] According to the Allahabad High Court it affects

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13. ('01) 23 All 364 (365) (DB).
14. ('02) 24 All 464 (465) (DB).
('97) 1897 Upp Bur Rul 237.
15. ('26) 13 AIR 1926 Mad 900 (902) (DB).
16. ('36) 23 AIR 1936 Nag 8 (11): 31 Nag L R (Sup) 72. (This case is overruled on another point in AIR 1940 Nag 349 : ILR (1940) Nag 538 (DB).)
17. ✣('31) 18 AIR 1931 All 294 (297) : 53 All 612 (FB).
✣('24) 11 AIR 1924 All 929 (930) (DB).
('03) 25 All 280 (282) (DB).
('15) 2 AIR 1915 All 483 (484) (DB).
('06) 3 All L Jour 30 (34) (DB).
† ('25) 12 AIR 1925 All 610 (612) : 48 All 175 (FB).
[But see † ('12) 34 All 592 (595) : 16 Ind Cas 1 (2) (DB).]
18. ('27) 14 AIR 1927 Bom 455 (455): 51 Bom 495 (DB).
[Compare however ('02) 26 Bom 201 (203) (DB). (Order affected decision as it obliged Judge to pass wrong order as to costs.)]
19. ('08) 8 Cal L Jour 308 (310) (DB).
† ('95) 22 Cal 981 (984) (DB).
('05) 9 Cal W N 584 (587).
20. ('15) 2 AIR 1915 Lah 353 (353): 1916 Pun Re No. 40. (Any error, etc., made by a Court in setting aside an *ex parte* decree is not an error etc., affecting the decision of the case.)
('23) 10 AIR 1923 Lah 425 (425).
† ('25) 12 AIR 1925 Lah 466 (467): 6 Lah 94 (DB).
21. ✣('37) 24 AIR 1937 Rang 334 (334, 335): 1937 Rang L R 207 (FB).
22. ('16) 34 Ind Cas 713 (713) (Oudh).
23. ('03) 26 Mad 604 (605) (DB).
24. ('24) 11 AIR 1924 Mad 890 (892) (DB). (The defendant refrained from opening the whole suit.)
25. ('25) 12 AIR 1925 Pat 534 (534, 535) (DB).
[*See also* ('40) 27 AIR 1940 All 305 (306, 308) : I L R (1940) All 192 (DB). (Order refusing to give an adjournment is an order which affects the decision of the case within the meaning of this section and can be referred to in an appeal against the *ex parte* decree.)]
26. ('30) 17 AIR 1930 Pat 266 (269) : 9 Pat 102 (DB).
27. ('41) 28 AIR 1941 Oudh 367 (368) (DB). (Order of restoration being case decided within S. 115, C. P. Code, is open to revision—AIR 1933 Oudh 331 overruled.)
28. ('23) 10 AIR 1923 Lah 230 (232) (DB). (Yes — Following 34 All 592 and AIR 1915 All 247 : 37 All 456 held that it does affect the decision on the merits.)

the decision of the case if the order is made *simultaneously* with the decree in the suit,[29] but otherwise does not.[30] The Calcutta High Court has held that an order setting aside an abatement does not affect the decision of the case whether it was made simultaneously or not.[31]

It has been held by the High Courts of Bombay and Calcutta that an order under O. 22 R. 5 impleading a person as the legal representative of the deceased plaintiff does not affect the decision of the case and cannot be challenged in an appeal from the final decree.[32] The High Court of Madras took a contrary view in the undermentioned case,[33] but in a later case[34] has taken the same view as the Bombay High Court.

7. Compliance with order is no bar to questioning it in appeal. — A compliance with the directions contained in an interlocutory order does not preclude a party from objecting to it in an appeal against the final decree.[1] Nor does the dismissal of an appeal against an order which is non-appealable take away that right.[2]

8. Effect of not appealing against order of remand. — Orders of remand can be divided into two classes —

(1) appealable orders of remand, for which see Order 41 Rule 23 and Order 43 Rule 1 (u) ; and

(2) orders of remand which are not appealable, for which see O. 41 R. 25.

As regards the latter they stand on the same footing as any other order and can be challenged in the appeal from the final decree.[1] As regards the former, it was held under the old Code that the order could be challenged in an appeal from the final decree though no appeal had been preferred against the order itself.[2] Under the present Code this has been expressly negatived by the addition of sub-section (2), the policy of the Legislature being to treat an order of remand as a special case[3] and to give a finality to it.[4] Where, therefore, an appealable order of remand has not been appealed against,

('33) 20 AIR 1933 Lah 152 (153) : 14 Lah 361 (DB). (No—Whether such order is passed before or simultaneously with the decree.)

29. (1900) 22 All 430 (432).
[*See* ('33) 20 AIR 1933 All 294 (295) (DB). (Order refusing to set aside abatement of appeal may be questioned in second appeal.)

30. [*See* ('17) 4 AIR 1917 All 434 (435) (DB).
('25) 12 AIR 1935 All 426 (427): 47 All 555 (DB).]

31. † ('25) 12 AIR 1925 Cal 766 (768): 52 Cal 472 (DB).
('33) 20 AIR 1933 Cal 498 (500).
('25) 12 AIR 1925 Cal 473 (474) (DB).
('36) 163 Ind Cas 700 (701) : 39 Cal W N 1173 (1175).

32. ('02) 27 Bom 162 (187, 188) (SB).
('33) 20 AIR 1933 Cal 498 (500).

33. ('18) 5 AIR 1918 Mad 1055 (1055) (DB). (Order under O. 22 R. 5 bringing on record legal representative affects decision of case.)

34. ('19) 6 AIR 1919 Mad 971 (971) (DB).

Note 7

1. ('19) 6 AIR 1919 Lah 38 (39) : 1 Lah 54.
('91) 1891 Pun Re No. 89, page 431 (433) (FB). (Submitting to the proceedings resulting from the order of remand.)
('27) 14 AIR 1927 Cal 733 (735) (DB).

2. ('22) 9 AIR 1922 All 118 (119): 44 All 534 (DB).

Note 8

1. ('26) 13 AIR 1926 Mad 900 (901) (DB).
('38) 25 AIR 1938 All 37 (38) : ILR (1938) All 79 (DB). (Order of remand under the Agra Tenancy Act, not appealable—Such order can be questioned in appeal from final decree.)
('35) 22 AIR 1935 All 553 (554). (The prohibition contained in sub-section (2) of this section exists only when the order of remand is appealable.)
('26) 13 AIR 1926 Mad 695 (697).
('18) 5 AIR 1918 Pat 680 (682): 2 Pat L Jour 663 (SB.)
('25) 12 AIR 1925 Oudh 527 (528) (DB). (A remand judgment is not conclusive on points not specifically decided therein beyond possibility of revision.)
('22) 9 AIR 1922 Cal 255 (257) (DB).

2. ('93) 15 All 119 (120) (DB).
('96) 18 All 19 (21, 22) (FB).
('90) 14 Bom 232 (235) (DB).
('01) 28 Cal 324 (328) (DB).
('07) 6 Cal L Jour 547 (556) (DB).
('95) 18 Mad 421 (422) (DB).
('06) 1906 Pun L R No. 32, p. 109 (110) (DB).
('89) 11 All 35 (41) (DB).
('90) 12 All 510 (513, 514) (FB).
('74) 21 Suth W R 326 (326) (DB).
[But see ('05) 32 Cal 1023 (1029) (DB).]

3. See Report of the Special Committee.

4. ✢('23) 10 AIR 1923 Cal 385 (386) (DB).

the propriety or correctness thereof[5] or of any of the incidental findings and decisions which are a material part of the basis of that order[6] cannot be challenged in an appeal from the final decree, or by the lower Court.[7] To prevent obvious injustice, however, the High Court can refuse to be bound by a remand order of a subordinate Court though neither party can question it by reason of their not having been appealed therefrom.[8] As to whether an order of remand can be appealed from after it has been carried out and the lower Court has decided the suit on the merits in accordance with the order of remand, see Order 41 Rule 23, Note 21.

It has been held by the High Court of Allahabad[9] that this section deals with orders which the Court had *jurisdiction* to make, but in the making of which it had committed an error or irregularity and that, therefore, an order of remand passed without jurisdiction is outside sub-section (2) and open to question in an appeal from the final decree.

A failure to appeal from the order of remand does not affect the right of appeal from the final decision on remand.[10]

9. Privy Council appeals. — Sub-section (2) of this section does not apply to appeals to the Privy Council.[1] But the principle of sub-s. (1) will apply to appeals to the Privy Council also.[2]

10. Letters Patent appeals. — Clause 15 of the Letters Patent is not controlled by S. 105 of the Code and an order of remand, though not appealed against, can be challenged in a Letters Patent appeal against the final judgment.[1] For a full discussion, see Note 6 on section 104.

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† ('28) 15 AIR 1928 Cal 325 (326, 327) : 55 Cal 506 (DB).
('11) 10 Ind Cas 514 (515) (DB) (Cal).
5. ('21) 8 AIR 1921 Lah 154 (155):2 Lah 252 (DB).
† ('28) 15 AIR 1928 Rang 297 (298) : 6 Rang 506.
('23) 10 AIR 1923 Pat 45 (47) : 2 Pat 207 (DB).
('16) 3 AIR 1916 Mad 127 (128) (DB).
('21) 8 AIR 1921 All 276 (277) : 43 All 377 (DB).
† ('36) 23 AIR 1936 Cal 590 (592).
('18) 5 AIR 1918 Cal 182 (182) (DB).
('19) 6 AIR 1919 Cal 946 (946) (DB).
('21) 63 Ind Cas 845 (846) (DB) (Cal).
('10) 5 Ind Cas 667 (668) (All).
✠('17) 4 AIR 1917 All 144 (145) (DB).
('19) 6 AIR 1919 Cal 65 (65) : 46 Cal 738 (DB).
('17) 4 AIR 1917 Lah 392 (393).
('13) 20 Ind Cas 761 (762) (DB) (Lah).
('10) 8 Ind Cas 246 (246) (Lah).
('26) 13 AIR 1926 Cal 509 (509) (DB).
('22) 9 AIR 1922 Cal 255 (257) (DB). (But not precluded from showing that they have been prejudiced by the further amendment made in the course of retrial.)
('25) 12 AIR 1925 Mad 916 (917).
† ('25) 12 AIR 1925 Mad 1046 (1047).
('25) 12 AIR 1925 Nag 185 (186).
('26) 13 AIR 1926 Nag 164 (167).
('23) 10 AIR 1923 Rang 29 (30):4 Upp Bur Rul 93.
('20) 7 AIR 1920 Pat 735 (737) : 4 Pat L Jour 645 (DB).
('26) 13 AIR 1926 Nag 147 (148). (This does not take away the power vested in the Court of appeal under O. 41 R. 2.)
('07) 32 Mad 318 (320) : 2 Ind Cas 525 (526) (DB).
('22) 65 Ind Cas 745 (746) (Lah).
('20) 7 AIR 1920 Lah 193 (193, 194).
('23) 10 AIR 1923 Nag 283 (283).
[But see ('10) 5 Ind Cas 764 (764) (DB) (Mad). (*Quære.*)]
6. † ('14) 1 AIR 1914 Nag 58 (59, 60) : 10 Nag L R 28. (He is also precluded from disputing the correctness of any of the incidental findings and decisions which are an essential or material part of the basis of that order.)
('23) 10 AIR 1923 Pat 226 (228) (DB).
('09) 32 Mad 318 (320) : 2 Ind Cas 525 (526) (DB).
('25) 12 AIR 1925 Mad 1019 (1020).
('21) 62 Ind Cas 703 (704) (DB) (Mad).
('23) 10 AIR 1923 Mad 67 (70) (DB).
† ('28) 15 AIR 1928 Rang 297 (298) : 6 Rang 506.
('25) 12 AIR 1925 Pat 530 (533) (DB).
Also see O. 41 R. 23, Note 29.
7. ('21) 8 AIR 1921 Nag 129 (130).
('18) 5 AIR 1918 Nag 264 (267).
('30) 17 AIR 1930 Lah 719 (721) (DB).
8. ('29) 16AIR 1929 All 421 (428): 51 All 780(DB).
9. ('10) 6 Ind Cas 464 (465) (DB) (All).
[*See also* ('10) 6 Ind Cas 205 (206) (DB) (All).]
10. ('10)37 Cal 552(558):5 Ind Cas 577 (578)(DB).

Note 9

1. ✠('15) 2 AIR 1915 Mad 423 (423, 424) : 38 Mad 509 (DB).
('33) 20 AIR 1933 Bom 251 (252) (DB).
† ('33) 20 AIR 1933 Bom 260 (262) (DB).
('11) 33 All 391 (393) : 9 Ind Cas 932 (932) (DB).
('25) 12 AIR 1925 Nag 349 (349):22NagLR132(DB).
('28) 15 AIR 1928 Rang 132(133):6 Rang 169(DB).
2. ('33) 20 AIR 1933 Bom 251 (252) (DB).

Note 10

1. ('29) 16 AIR 1929 Mad 349 (351) (DB).

11. Order granting review. — An order granting review is appealable under O. 43 R. 1 (w). But it is appealable only on the grounds mentioned in O. 47 R. 7. It follows that under this section, read with O. 47 R. 7, the order can be challenged in an appeal from the final decree only on the grounds specified in O. 47 R. 7.[1] Where an application for review is rejected the matters raised in such application can be pressed again in an appeal from the final decree passed.[2]

12. Revision of orders that can be challenged under the section. — Where an interlocutory order can be challenged in an appeal from the final decree under this section, the High Court will not, as a rule, interfere in revision[1] but in the exercise of its powers of superintendence the High Court may interfere in proper cases in order to avoid irreparable injury being caused.[2]

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106. [S. 589.] Where an appeal from any order is allowed it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

What Courts to hear appeals.

[1877, S. 589.]

1. Scope of the section. — This section provides that appeals from orders in cases in which they are appealable, shall lie to the Court to which an appeal would lie from the decree in the suit in which the order was made. The appellate jurisdiction of the District Judge, for instance, extends under the various Civil Courts Acts to decrees in suits of the value of Rs. 5000 and less. Hence, where the value of the subject-matter of the suit does not exceed Rs. 5000, the appeal from the order lies to the District Judge and where the value of the suit exceeds Rs. 5000 the appeal lies to the High Court, because the *forum* of appeal in regard to the *decree passed in the suit* is determinable in like manner.[1] But where the order appealed from is passed by a Court in the exercise of *appellate jurisdiction*, the appeal lies to the High Court.[2]

Note 11

1. ('41) 28 AIR 1941 Nag 308 (309, 310) : I L R (1942) Nag 487.
† ('08) 31 Mad 49 (50, 51) (DB).
('05) 27 All 695 (696) (DB).
('95) 22 Cal 984 (989) (DB).
('13) 1913 Pun Re No. 109 : 19 Ind Cas 481 (485) (DB).
('77) 1 All 363 (365, 366) (DB).
('97) 24 Cal 878 (880) (DB).
('13) 20 Ind Cas 670 (671) (DB) (Cal).
[*See also* ('95) 22 Cal 734 (737, 738) (DB).
2. ('41) 28 AIR 1941 Nag 308 (310) : ILR (1942) Nag 487.
Also see S. 115 N. 11 and O. 47 R. 7 N. 11.

Note 12

1. ('82) 4 All 91 (92) (DB).
('83) 5 All 293 (294) (DB).
('17) 4 AIR 1917 All 321 (321).
('94) 18 Bom 35 (37) (DB).
('02) 26 Bom 551 (552) (DB).
('83) 12 Cal L Rep 148 (151) (DB).
('86) 9 Mad 256 (257).
✢('14) 1 AIR 1914 Mad 17 (17) (DB).
† ('17) 4 AIR 1917 Low Bur 35 (36).
('08) 2 Sind L R 22 (23) (DB).
† ('12) 34 All 592 (594) : 16 Ind Cas 1 (2) (DB).
2. ('20) 7 AIR 1920 Pat 131 (136) : 5 Pat L Jour 550 (DB).
Also see S. 115 Note 5.

Section 106 — Note 1

1. ('08) 6 Cal L Jour 38 (39) (DB).
† ('90) 17 Cal 680 (682, 683) (DB).
('01) 14 C P L R 62 (63). (Order passed by civil Judge in a suit in which the subject-matter was over Rs. 1000 in value—*Held*, appeal lay to the Judicial Commissioner's Court.)
Also see S. 96 N. 18.
2. ('03) 25 All 174 (177) (FB).
('14) 1 AIR 1914 All 128 (128) : 36 All 58 (DB).
('84) 10 Cal 523 (524).
† ('99) 26 Cal 275 (279) (DB).
('99) 1899 Pun Re No. 59, page 265 (267) (DB).
('91) 14 Mad 462 (464) (DB).
Also see O. 7 R. 10 N. 11.

GENERAL PROVISIONS RELATING TO APPEALS

107. [S. 582, First part.] (1) Subject to such conditions and limitations as may be prescribed,[3] an Appellate Court shall have power[10]—

Powers of appellate Court.

(*a*) to determine a case finally;[4]

(*b*) to remand a case;[5]

(*c*) to frame issues and refer them for trial;[6]

(*d*) to take additional evidence[7] or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties[30] as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

[See O. 41 Rr. 23-25, 27, 28, 33.]

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. "Prescribed." See S. 2, clause (16).
4. Power to determine case finally — Clause (a). See O. 41 Rr. 4, 24 and 33.
5. Power to remand case — Clause (b). See O. 41 R. 23.
6. Power to frame issues and refer them for trial — Clause (c). See O. 41 R. 25.
7. Power to take additional evidence — Clause (d). See O. 41 Rr. 27, 28.
8. Power to summon witnesses. See O. 41 Rr. 27 and 28.
9. Appellate Court to exercise the same powers and perform the same duties as original Court — Sub-section (2).
10. "Powers," meaning of.
11. Inherent powers.
12. Competence of the Appellate Court to interfere with the discretion of the Court below.
13. Powers of the Appellate Court in matters of evidence.
14. Appreciation of evidence by the Appellate Court.
15. Failure to consider weight of evidence.
16. Power to add, transpose or substitute parties.
17. Powers regarding court-fee.
18. Power to direct stay of proceedings, grant interim injunctions and pass interlocutory orders.
19. Power to entertain application to set aside ex parte decree. See Section 96 Note 12; O. 41 R. 21.
20. Power to permit withdrawal of proceedings. See O. 23 R. 1.
21. Power to reject plaint or memorandum of appeal.
22. Power to return memorandum of appeal for presentation to the proper Court.
23. Power to allow amendment. See S. 153, O. 1 R. 10, Note 39; O. 6 R. 17 and O. 41 R. 3.
24. Power to decide new point suo motu. See O. 41 R. 2, Note 7.
25. Power to make new case in appeal. See O. 41 R. 1, Note 12 and R. 25.
26. Power to interfere with the appointment of a receiver. See O. 40 R. 1, Note 51.
27. Power to refer to arbitration. *(Omitted.)*
28. Power to examine ameen.
29. Power to expunge remarks from the judgment. See O. 6 R. 16, Note 6.
30. Duties of the Appellate Court.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Appellate Court, powers of — Admission and rejection of documents. See Note 13.

Appellate Court, powers of—Return of plaint. See Note 9.

Appellate Court, powers to raise objection to court-fee on plaint *suo motu*. See Note 17.

Power of Appellate Court to direct local investigation. See Note 9.

Power of Appellate Court to pass a decree for an amount larger than that claimed. See Note 17.

Power of Appellate Court to decide on points not raised or covered by issues. See Note 11.

Power of Appellate Court in cases of assignment, creation or devolution of any interest, pending appeal. See Notes 16 and 9.

1. Legislative changes. — Sub-section (1) is new. Sub-section (2) corresponds to the first clause of the first part of section 582 of the Code of 1882.

2. Scope and object of the section. — Sub-section (1) specifies the powers conferred on an Appellate Court in order to enable it to dispose of a case completely and effectively. The powers themselves are mentioned in cls. (a) to (d) and the conditions and limitations subject to which such powers are to be exercised are prescribed in the First Schedule.

Sub-section (2) provides that an Appellate Court shall have the same powers as the original Court under this Code and thereby comprehensively makes the relevant provisions of the Code applicable to appeals[1] except such as are specifically excluded.[2] A second Appellate Court has the same powers and duties as the first Appellate Court.[3] See section 108.

The powers and duties contemplated in this section are such as are provided for in the Civil Procedure Code, and not in any other enactment, such as the Limitation Act.[4]

3. "Prescribed." — See Section 2, clause (16).

4. Power to determine case finally — Clause (a). — See O. 41 Rr. 4, 24 and 33.

5. Power to remand case — Clause (b).—See Order 41 Rule 23.

6. Power to frame issues and refer them for trial — Clause (c). — See O. 41 R. 25.

7. Power to take additional evidence — Clause (d). — See O. 41 Rr. 27 and 28.

8. Power to summon witnesses. — See O. 41 Rr. 27 and 28.

9. Appellate Court to exercise the same powers and perform the same duties as original Court — Sub-section (2). — Sub-section (2) is based on the general principle that an Appellate Court has the same powers as the original Court, and can do, while the appeal is pending, what the original Court could have done, while the suit was pending.[1] The provisions of the Code relating to incidental proceedings in original Courts are thus equally applicable to an Appellate Court.[2] But they do not apply

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Section 107 — Note 2

1. ('94) 18 Mad 94 (98) (DB).
('06) 3 Cal L Jour 29 (36) (DB).
('85) 7 All 693 (698, 699) (FB). (Per Mahmood J., dissenting.)
2. ('90) 12 All 129 (151, 152) (FB). (Certain provisions not applicable to the original side of the High Court are equally inapplicable to the appellate side of that Court.)
3. ('07) 29 All 535 (536) (DB).
4. ('86) 12 Cal 590 (593) (FB).

Note 9

1. ('42) 29 AIR 1942 Mad 464 (465). (High Court can help party to get refund of excess court-fee erroneously paid.)
† ('10) 1910 Pun Re No. 82 : 7 Ind Cas 1017 (1017).
('12) 22 Mad L Jour 225 (227, 228) (DB).
('11) 21 Mad L Jour 824 (827).
2. † ('31) 18 AIR 1931 Lah 610 (611) : 13 Lah 195 (DB). (O. 1 R. 8.)
(1865) 4 Suth W R 109 (110) (DB). (O. 2 R. 6.)
('69) 12 Suth W R 11 (12) (DB). (O. 2 R. 6.)
('23) 10 AIR 1923 Nag 310 (311). (O. 7 R. 10.)
('32) 1932 Mad W N 104 (104). (O. 7 R. 11.)
('32) 19 AIR 1932 Cal 482 (484, 486) : 59 Cal 388 (DB). (O. 7 Rr. 11 and 13.)
('02) 1902 Pun L R No. 46, p. 173 (174). (O. 9 R. 5.)
† ('16) 3 AIR 1916 Mad 641 (641) (DB). (O. 9 R. 13 — Application under — Competent in second appeal.)
('19) 6 AIR 1919 All 49 (49) : 42 All 48 (DB). (Power to examine parties in appeal—O. 10 R. 2.)
('96) 1896 Bom P J 541 (541) (DB). (O. 20 R. 2.)
('10) 1910 Pun Re No. 82 : 7 Ind Cas 1017 (1017, 1018). (O. 21 R. 29.)
('88) 10 All 223 (234) (FB). (O. 22 R. 4.)
('81) 8 Cal 440 (441, 442) (DB). (O. 22 Rr. 3 and 11.)
† ('80) 4 Bom 654 (655) (DB). (O. 22 R. 4.)
('96) 18 All 86 (88) (DB). (O. 22 R. 10.)
('96) 18 All 285 (287). (O. 22 R. 10.)
('31) 132 Ind Cas 194 (195) (All). (O. 23 R. 1.)
('02) 5 Oudh Cas 49 (53) (DB). (O. 23 R. 3.)
('28) 15 AIR 1928 Mad 964 (965, 968) (DB). (O. 25 R. 2.)
('72) 17 Suth W R 300 (301) (DB). (O. 26 R. 9.)
('32) 19 AIR 1932 All 270 (271). (O. 26 R. 9.)
('84) 8 Bom 577 (581) (FB). (O. 33 R. 11.)
† ('04) 14 Mad L Jour 471 (472, 474) (FB).
('17) 4 AIR 1917 Mad 448 (449, 451) : 39 Mad 907 (912) (DB). (O. 39 R. 2 (3).)
('17) 4 AIR 1917 All 443 (446) : 38 All 398 (407) (DB). (Amendment.)
('17) 4 AIR 1917 All 153 (154) (DB). (Do.)
('10) 7 Ind Cas 797 (797) (DB) (Mad). (Do.)

to cases where the subject which is being dealt with by the Appellate Court is not the actual appeal itself.[3] The words "as nearly as may be" mean, so far as may be necessary, to carry into effect the requisite reliefs.[4] See also Notes 10 to 30.

10. "Powers," meaning of. — The word "powers" is not synonymous with "jurisdiction"[1] but comprehends the authority to carry out such of the functions as are indicated in Notes 12 to 30. The decisions of the English and American Courts on the functions of an Appellate Court are to be followed with great caution in India as they are based on practice and procedure of a highly technical character.[2]

11. Inherent powers.—Every Court trying civil causes has inherent jurisdiction to take cognizance of questions cutting at the root of the subject-matter in controversy,[1] and, in fact, such powers should be exercised in order to meet the ends of justice[2] although there may be no direct statutory provision therefor.[3] Thus, an Appellate Court has inherent powers to add, as a party respondent[4] or allow to figure as an appellant[5] a person who was not a party to the suit. See also section 151.

12. Competence of the Appellate Court to interfere with the discretion of the Court below. — Ordinarily a Court of appeal will not interfere with the exercise of discretion by the lower Court and substitute for it its own discretion.[1] Nor can the Appellate Court lay down any rules with a view to indicate the particular groove in which the discretion of the lower Court should run.[2]

('26) 13 AIR 1926 Oudh 98 (99) : 1 Luck 33. (Do.)
† ('30) 17 AIR 1930 All 131 (131, 132). (Amendment to correct bona fide error in preferring appeal against dead person and to implead legal representatives.)
† ('06) 3 Cal L Jour 29 (36) (DB). (Appointment of a guardian *ad litem*.)
('28) 15 AIR 1928 All 458 (459) (DB). (Power to correct errors and mistakes apparent on the face of the record.)
('37) 24 AIR 1937 All 243 (245). (Amendment of a memorandum of appeal can be made by an appellate Court by virtue of the powers conferred by Section 107 (2), C. P. Code.)
3. ('68) 10 Suth W R 160 (163, 164) (DB).
4. ('85) 7 All 693 (697) (FB).

Note 10

1. ('68) 10 Suth W R 160 (164) (DB).
2. ('17) 4 AIR 1917 Mad 597 (599) (DB). (31 Mad 268 followed.)

Note 11

1. ('12) 35 Mad 607 (612) : 39 Ind App 218 (PC).
2. † ('20) 7 AIR 1920 Cal 434 (435) (SB).
('26) 13 AIR 1926 Mad 631 (633).
3. ('06) 3 Cal L Jour 29 (35) (DB). (To hold otherwise would render infructuous the exercise of appellate jurisdiction in many instances.)
4. ('10) 12 Cal L Jour 91 (101) (DB).
5. ('18) 5 AIR 1918 Mad 409 (410, 411) (DB).

Note 12

1. ('41) 28 AIR 1941 Sind 178 (183) : ILR (1941) Kar 362 (DB).
† ('17) 4 AIR 1917 P C 116 (118): 42 Bom 380 : 45 Ind App 61 (PC).
('10) 14 Cal W N 532 (534) (DB).
† ('16) 3 AIR 1916 Cal 564 (566) (SB).
('14) 1 AIR 1914 Cal 314 (318) (DB). (Appointment of a guardian to a minor.)
('04) 29 Bom 71 (73) (DB). (Order refusing stay of execution.)
('21) 8 AIR 1921 Pat 341 (341) (DB). (Amount of damages.)
† ('22) 9 AIR 1922 P C 71 (72) : 48 Ind App 280 : 44 Mad 656 (PC). (Rate of interest.)
('21) 8 AIR 1921 Pat 430 (432) (DB). (Rate of interest on mesne profits.)
(1864) 1864 Suth W R Gap 146 (147) (DB). (Costs.)
('71) 8 Bom H C R A C 100 (102). (Do.)
('27) 14 AIR 1927 Lah 65 (65). (Appointment of a receiver.)
('19) 6 AIR 1919 Cal 946 (947) (DB). (Acceptance of report of a commissioner.)
† ('19) 6 AIR 1919 Cal 800 (801) (DB). (Late production of documents.)
('33) 20 AIR 1933 All 443 (447) (DB). (The raising of the presumption of genuineness of a document.)
† ('34) 21 AIR 1934 Cal 438 (440) : 61 Cal 22 (DB).
('35) 22 AIR 1935 Rang 389 (390) (DB).
('36) 165 Ind Cas 513 (514) (Lah).
('35) 22 AIR 1935 Lah 169 (170). (But there is no provision of law that bars jurisdiction of Appellate Court to consider matters of discretion.)
('35) 22 AIR 1935 Mad 1072 (1073) (DB). (Order as to costs — Appellate Court will not interfere unless question of principle is involved.)
('39) 26 AIR 1939 Oudh 61 (61) (DB).
('35) 22 AIR 1935 Pat 256 (260) (DB). (Granting declaration under S. 42, Specific Relief Act.)
† ('37) 24 AIR 1937 Pat 584 (585) : 16 Pat 371 (DB).
('15) 2 AIR 1915 Cal 435 (437) (DB). (Appointment of guardian to a minor — Principle accepted — However High Court interfered with order of lower Court.)
[*See* ('34) 21 AIR 1934 Lah 438 (441) : 15 Lah 772 (DB). (Court using its discretion vested in it one way—Presumption by Appellate Court.)]
2. ('28) 15 AIR 1928 Pat 630 (633) : 8 Pat 235 (DB).

An interference, however, will be justified in the following cases :

(1) where the lower Court acts arbitrarily or perversely or capriciously[3] or in disregard of sound legal principles;[4]

(2) where the discretion has been exercised where it ought not to have been exercised;[5]

(3) where the Judge misdirects himself by wrongly assuming that there is no general rule to guide him in the exercise of his discretion;[6] or

(4) where the discretion which is vested in the Judge and which he ought in law to exercise has not been exercised at all.[7]

The mere possibility of the Appellate Court coming to a different conclusion on the same facts and evidence will not justify interference.[8] See also Note 14.

13. Powers of the appellate Court in matters of evidence. — An Appellate Court will not interfere with the decision of the lower Court as to *admissibility of* evidence[1] except to prevent a clear miscarriage of justice.[2] But the question of the relevancy of evidence is always open to reconsideration in appeal.[3] See also Note 14.

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3. ('42) 29 AIR 1942 Mad 487 (493): I L R (1942) Mad 562 (DB). (Court in its discretion allowing certain per cent. for collection expenses in computing mesne profits — Appellate Court will not interfere with discretion unless it is arbitrary and unreasonable — Discretion in allowing 10 per cent. held properly exercised.)

✠('17) 4 AIR 1917 P C 116 (118) : 42 Bom 380 (389) : 45 Ind App 61 (PC).

† ('66) 3 Bom H C R App 94 (101). (A bond insufficiently stamped—Refusal to grant relief arbitrarily.)

('25) 12 AIR 1925 Cal 711 (713) (DB). (Discretion used properly and not arbitrarily.)

('18) 5 AIR 1918 Cal 467 (470) : 45 Cal 138 (148) (DB). (A judgment on admission of the defendant.)

4. ✠('17) 4 AIR 1917 P C 116 (118) : 42 Bom 380 (389) : 45 Ind App 61 (PC). (So to allow would cause great inconvenience.)

('25) 12 AIR 1925 Cal 1027 (1029) (DB). (The order as to costs.)

('35) 22 AIR 1935 Mad 280 (282) (DB).

[*See* ('19) 6 AIR 1919 All 453 (454) : 40 All 558 (562) (DB).]

5. ('11) 21 Mad L Jour 1018 (1019) (DB). (Appellate Court giving specific directions — Trial Court not to exercise discretion.)

6. ✠('17) 4 A I R 1917 P C 156 (159) : 45 Cal 94 (107) : 44 Ind App 218 (PC).

[*See* ('38) 25 A I R 1938 Pat 413 (417) : 17 Pat 507 (DB). (Lower Court misdirecting itself on a point of law.)]

7. ('22) 9 A I R 1922 Pat 47 (48) : 6 Pat L Jour 444 (DB). (Else useless expenditure of money and unprofitable waste of time would be incurred and great embarrassment caused.)

('26) 13 AIR 1926 Lah 223 (224).

† ('24) 11 AIR 1924 Lah 629 (630).

8. ('24) 11 AIR 1924 Oudh 326 (328).

('18) 46 Ind Cas 794 (795) (Nag).

('26) 13 AIR 1926 Lah 672 (672) (DB).

('26) 13 AIR 1926 Oudh 522 (525).

('27) 14 AIR 1927 Oudh 66 (67).

('25) 12 AIR 1925 Cal 224 (225) (DB).

† ('27) 14 AIR 1927 Cal 830 (831) (DB).

('28) 15 AIR 1928 Mad 489 (491) (DB).

† ('16) 3 AIR 1916 All 181 (182) (DB).

('03) 5 Bom L R 584 (586) (DB). (Judgment of the lower Court should not be reversed.)

✠('03) 5 Bom L R 956 (969) (DB).

('10) 12 Bom L R 801 (805) (DB). (Reversal of the decree of lower Court.)

('69) 11 Suth W R 465 (466) (DB).

('18) 5 A I R 1918 Cal 618 (622, 625) : 45 Cal 60 (DB).

† (1837) 1 Moo Ind App 431 (442, 444) (PC). (Validity of a document.)

✠('20) 7 AIR 1920 P C 132 (136) (P C).

[See however ('74) 1874 Pun Re No. 7, p. 10. (Not good law.)]

Note 13

1. See Section 167 of the evidence Act.

✠('92) 19 Cal 438 (442) : 19 Ind App 79 (PC).

('04) 26 All 581 (587) : 30 Ind App 217 (PC). (Presumption as to genuineness of a document — Discretion of lower Court cannot be lightly overruled.)

('15) 2 AIR 1915 Mad 839 (839) (DB).

('19) 6 AIR 1919 Lah 69 (70). (Presumption as to genuineness of document.)

† ('68) 3 Agra 148 (148) (DB). (Admission of documents produced late.)

('13) 36 Mad 418 (422) (DB). (Admission of secondary evidence on grounds satisfactory to the lower Court.)

('24) 11 AIR 1924 Lah 265 (269) (DB). (Evidence admitted without objection in the lower Court.)

('24) 11 AIR 1924 Lah 303 (304) (DB).

('17) 4 AIR 1917 Mad 483 (483) (DB). (Document whether properly attested.)

Also see O. 13 R. 2 N. 3.

[But see ('26) 13 AIR 1926 All 537(537). (A suspicious document.)

('14) 1 A I R 1914 Mad 473 (474) : 37 Mad 455 (457) (DB). (Where there is no evidence at all.)]

2. ✠('92) 19 Cal 438 (442) : 19 Ind App 79 (PC).

('26) 13 AIR 1926 Mad 1003 (1004) (DB).

('13) 11 All L Jour 537 (538, 539). (Plaintiff's late production of documents—Surprise to defendant.)

3. ('28) 15 AIR 1928 Cal 512 (512).

14. Appreciation of evidence by the Appellate Court. — Where the appreciation of oral testimony is concerned, the Appellate Court has to reconcile two conflicting view-points, namely, on the one hand, the undoubted duty of the Court of appeal to review the recorded evidence and to draw its own inferences and conclusions, and, on the other hand, the unquestionable weight which must be attached to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noticing their look and manner.[1] On questions of fact, therefore, largely depending on oral testimony, the conclusions of the trial Judge will not be lightly interfered with.[2]

('27) 14 AIR 1927 Mad 60 (60).

[*See also* ('35) 22 A I R 1935 Lah 251 (259) : 16 Lah 782 (DB). (Relevancy and admissibility — Relevant document — Objections to admissibility not raised—Document is admissible—Irrelevant document though admitted can be discarded by Appellate Court.)]

Note 14

1. ('42) 29 AIR 1942 Bom 161 (170): I L R (1942) Bom 357 (DB). (But appreciation of oral evidence by trial Court must be tested by other proved facts.)
('42) 197 Ind Cas 356 (358) (Nag).
('41) 28 AIR 1941 Bom 129 (137):ILR (1941) Bom 211 (DB).
('41) 28 AIR 1941 Cal 20 (24) : I L R (1941) 1 Cal 457 (DB).
('40) 27 AIR 1940 Cal 115 (128) (DB). (Appellate Court is not relieved from examining probabilities and circumstances of whole case — Story told by witness highly improbable — Appellate Court can reject his testimony.)
('39) 26 AIR 1939 Cal 595 (596) (DB).
† ('21) 8 AIR 1921 Cal 677 (684) : 47 Cal 1043 (DB).
✠('16) 3 AIR 1916 Cal 964 (971): 43 Cal 833 (837, 838, 840, 843, 849, 853) (SB).
† ('36) 23 AIR 1936 P C 154 (155) (PC).
[*See* ('38) 25 AIR 1938 P C 91 (95) (PC). (Trial Judge is in superior position than Appeal Court to judge the credibility of witnesses on question of fact.)
('35) 22 AIR 1935 Cal 80 (81) : 61 Cal 937.
('38) 25 AIR 1938 Bom 304 (308) (DB). (When the trial Judge does not approach the examination of the evidence from the correct standpoint, the opinion of the trial Judge is not entitled to much weight.)]
2. ('42) 29 AIR 1942 Cal 412 (415) : ILR (1942) 1 Cal 100 (DB).
('41) 28 AIR 1941 Bom 129 (139) : I L R (1941) Bom 211 (DB).
('41) 28 AIR 1941 Cal 20 (24) : I L R (1941) 1 Cal 457 (DB). (Question as to which set of witnesses is to be believed—Appellate Court should not lightly regard findings of trial Court on mere calculation of probabilities.)
('41) 28 AIR 1941 Mad 393 (393). (Interference without good reasons is erroneous in law.)
('41) 28 AIR 1941 Mad 539 (545) : I L R (1941) Mad 785 (FB). (Trial Court after detailed examination of evidence holding it to be true—Appellate Court should not reverse finding without stating reasons.)
('40) 27 AIR 1940 Nag 70 (70) : I L R (1941) Nag 669.
('40) 27 AIR 1940 Sind 68 (72) (DB).
('09) 13 Cal W N 782 (784, 787) (PC).
('33) 20 AIR 1930 Cal 449 (452) (DB).
('33) 20 AIR 1933 Oudh 295 (297) (DB).
('33) 20 AIR 1933 Oudh 242 (245) (DB).
† ('33) 20 AIR 1933 Oudh 170 (175) : 8 Luck 538 (DB).
('33) 20 AIR 1933 Oudh 142 (146) (DB).
('26) 13 AIR 1926 P C 29 (30) : 4 Rang 513 (P C). (Especially where testimony of a witness is rejected on demeanour.)
('11) 15 Cal W N 717 (721, 722) (PC).
✠('15) 2 AIR 1915 P C 1 (2) : 39 Bom 386 : 42 Ind App 110 (PC). (Decision as to the credibility of a witness.)
† ('16) 3 AIR 1916 P C 256 (261): 43 Cal 707 (722): 43 Ind App 73 (PC).
('16) 3 AIR 1916 PC 73 (73) (PC). (Case of collision of two steamers.)
† ('16) 3 AIR 1916 P C 166 (169) (PC). (Authority to adopt given by an oral will.)
✠('19) 6 AIR 1919 P C 188 (189) (PC).
('22) 9 AIR 1922 P C 371 (372): 46 Bom 857 (PC).
† ('23) 10 AIR 1923 P C 156 (158): 1 Rang 451 (PC). (Credibility of a witness.)
('28) 15 AIR 1928 P C 277 (280) (PC).
('16) 3 AIR 1916 All 181 (182) (DB). (If the credibility of a witness can be inferred otherwise than by his manners and demeanour, the Appellate Court can differ from the trial Court.)
† ('14) 1 AIR 1914 Cal 301 (302) (DB).
('26) 13 AIR 1926 Cal 116 (119) (DB).
('27) 14 AIR 1927 Oudh 485 (487) (DB).
('16) 3 AIR 1916 Pat 284 (288) : 1 Pat L Jour 48 (DB).
('16) 3 AIR 1916 Cal 400 (401) (SB).
† ('18) 5 AIR 1918 Cal 363 (368) (SB).
('20) 7 AIR 1920 Cal 249 (250) : 47 Cal 337 (347) (DB).
('25) 13 AIR 1925 Sind 35 (36): 18 Sind L R 55 (DB).
('26) 13 AIR 1926 Sind 216 (219) : 20 Sind L R 295 (DB). (Trial Judge acquainted with customs of community of the parties before him.)
('09) 32 Mad 400 (409) : 36 Ind App 185 (PC).
('11) 10 Mad L Tim 304 (306) (DB).
('19) 6 AIR 1919 Mad 447 (452, 457) (DB). (Oral authority to adopt.)
('21) 8 AIR 1921 Oudh 42 (44).
† ('21) 8 AIR 1921 Cal 543 (546) (DB). (Damages.)
('32) 19 AIR 1932 Mad 167 (168) : 55 Mad 385 (DB).
('36) 164 Ind Cas 815 (816) (DB) (Cal).
† ('35) 1935 All W R 1197 (1198) (DB).
✠('37) 31 Sind L R 213 (216) : 167 Ind Cas 8 (10) (PC).

But this rule should not be treated as having a too general application.[3] An Appellate Court is entitled to interfere with questions of fact in the following cases :

(1) Where the conclusions of the trial Judge depend on *inferences from facts* and not on the *credibility* of oral evidence of such facts.[4]

(2) Where an important fact of which the Appellate Court is in possession was not known to the trial Judge.[5]

(3) Where the Judge giving the judgment did not examine the witnesses himself or the bulk of the evidence was taken on commission.[6]

(4) Where the finding of the lower Court is manifestly erroneous[7] or is based on no evidence[8] or the Judge has misdirected himself by applying wrong standards of probability or has committed an error in procedure[9] or there is a deliberate suppression of evidence by one party.[10]

(5) Where the finding is opposed to experience of life and course of business.[11]

('37) 172 Ind Cas 527 (528) (PC).
('35) 22 AIR 1935 All 329 (333): 57 All 85 (DB).
† ('37) 24 AIR 1937 P C 288 (292) (PC). (Finding cannot be reversed unless the Appellate Court comes to an affirmative conclusion that the finding is wrong.)
('38) 25 AIR 1938 All 504 (505): I L R (1938) All 741 (DB).
('34) 21 AIR 1934 Cal 520 (523) (DB).
('35) 22 AIR 1935 Cal 80 (81): 61 Cal 937. (Finding of fact depending upon the credibility of witnesses can be interfered with under exceptional circumstances.)
('35) 22 AIR 1935 Pat 256 (260) (DB).
('35) 22 AIR 1935 Pat 74 (78) (DB).
('37) 24 AIR 1937 Lah 324 (326) (DB).
('36) 23 AIR 1936 Cal 87 (93) (DB).
('35) 22 AIR 1935 Rang 30 (31) (DB).
('35) 22 AIR 1935 Rang 39(42). (It is dangerous for an Appellate Court to differ from an original Court on the question of the credibility of witnesses.)
[*See* ('40) 42 Pun L R 374 (377). (Respectable witnesses deposing on behalf of both parties — Appellate Court should endorse trial Court's conclusion.)
('36) 165 Ind Cas 49 (52) (DB) (Oudh).
('35) 22 AIR 1935 All 293 (294). (Appraisement of witnesses is final and binding in second appeal.)
('11) 12 Ind Cas 208 (208) (Mad). (Court can decide that the truth is something different from what is stated by either party.)]
[*See also* ('21) 8 AIR 1921 Cal 852 (855) (DB).]
Also see Ss. 100 and 101, Note 52.
[See however ('18) 5 AIR 1918 P C 10 (11) : 21 Oudh Cas 104 (PC). (Where decision of trial Court is speculative and that of Appellate Court well reasoned, the latter decision shall prevail.)]

3. ('39) 26 AIR 1939 Rang 350 (351) : 1939 Rang L R 472.
† ('25) 12 AIR 1925 Rang 308 (309) : 3 Rang 177.
✠('15) 2 AIR 1915 Cal 225 (231) (DB).
('22) 9 AIR 1922 Cal 260 (267) : 49 Cal 132 (DB).
('25) 12 AIR 1925 Rang 117 (117). (Rule applies strictly only to a trial Judge of very great experience.)
('36) 23 AIR 1936 All 537 (544) (DB). (No indication in the judgment of the trial Court that the evidence was carefully weighed and considered — Appellate Court can interfere.)
('36) 23 AIR 1936 Rang 399 (400) (DB). (Lower Court's failure to give due weight to evidence — Wrong conclusion — Appellate Court may interfere.)

4. ('21) 8 AIR 1921 P C 221 (223) (PC).
† ('22) 9 AIR 1922 P C 315 (316) (PC).
✠('15) 2 AIR 1915 Cal 225 (231) (DB).
('26) 13 AIR 1926 Cal 643 (644) (DB).
† ('18) 5 AIR 1918 P C 233 (235) (PC).
† ('17) 4 AIR 1917 P C 214 (216) (PC).
('26) 13 AIR 1926 Oudh 120 (123) (SB).
('36) 23 AIR 1936 Rang 518 (520) (DB).

5. ('21) 8 AIR 1921 P C 93 (97) : 42 All 487 (PC).

6. ('28) 15 AIR 1928 Sind 179 (185) : 23 Sind L R 97 (DB).
('32) 19 AIR 1932 P C 13 (19) : 6 Luck 556 : 59 Ind App 1 (PC). (Credibility of witness whose evidence was taken on commission — Opinion of first Appellate Court is entitled to greater weight than that of trial Court.)
('20) 7 AIR 1920 Cal 26 (31) (DB).
[*See also* ('35) 22 AIR 1935 Cal 28 (29) : 61 Cal 886 (DB). (Trial Court accepting commissioner's report and decreeing suit — Appellate Court accepting facts of commissioner but disagreeing with his conclusion and setting aside decree — It is entitled to do so.)]

7. † ('28) 15 AIR 1928 P C 122 (126) (PC).
('12) 11 Mad L Tim 38 (40) (DB).
✠('18) 5 AIR 1918 Pat 1 (35) : 3 Pat L Jour 633 (FB).
('73) 1873 Pun Re No. 28, p. 47.
('16) 3 AIR 1916 Cal 1 (9) (FB).
† ('36) 23 AIR 1936 P C 60 (61) (PC).
[*See also* ('41) 28 AIR 1941 Rang 344 (346) (DB). (Finding based on inadmissible evidence is vitiated.)]

8. ('35) 22 AIR 1935 Cal 648 (649).
Also see Ss. 100 and 101, Note 53.

9. † ('20) 7 AIR 1920 Cal 255 (258) : 48 Cal 1079 (1090, 1091) (DB).
('22) 9 AIR 1922 Pat 111 (112) (DB).
† ('26) 13 AIR 1926 P C 29 (30, 31) : 4 Rang 513 (PC).

10. ('29) 16 AIR 1929 P C 95 (98, 99) (PC).

11. ('15) 2 AIR 1915 P C 50 (51) (PC).

(6) Where the case is one of conflicting evidence and the conduct of parties, effect of documents or the weight of probabilities, reduce the value of the opinion of the Judge.[12]

In appreciating evidence generally, discrepancies on *material* points should not be disregarded[13] but a too minute attention to immaterial discrepancies may lead to serious failure to justice.[14] It must also be remembered that a case is not necessarily false if some evidence in support of it is doubtful or untrue[15] and an Appellate Court reversing a finding of fact must do so on a consideration of the whole evidence on record.[16] As to the appreciation of evidence in cases where the genuineness or otherwise of a signature is in question, see the undermentioned cases.[17]

See also Order 41 Rule 1, Note 13.

15. Failure to consider weight of evidence.—The failure of the Appellate Court to tackle the crucial question between the parties and consider the evidence in the case amounts to a substantial error of procedure.[1] See section 101, Notes 23 and 24.

16. Power to add, transpose or substitute parties. — An Appellate Court has, under sub-s. (2) of this section, the same power to add, transpose and substitute parties under the provisions of the Code as a Court of original jurisdiction. See S. 151, O. 1 R. 10, Notes 11 and 34 ; O. 22 Rr. 3, 4 and 11 and O. 41 R. 20, Note 2.

As to whether a person not party to the first appeal can be added in second appeal, see O. 1 R. 10, Note 11 and O. 41 R. 20, Note 2. Under the old Code, it was doubted in the undermentioned case[1] whether S. 27 of that Code corresponding to the present O. 1 R. 10, sub-r. (1) applied to appeals. The doubt was expressed in view of the wording of the old S. 582. In view however of the changes made in the wording of the section, it is submitted that there can be no doubt about it now.

17. Powers regarding court-fee. — An Appellate Court cannot deal with the appeal until the court-fee payable on the memorandum of appeal is paid.[1] Nor can it, in the generality of cases, award an amount in excess of that in respect of which the appeal is brought and court-fee paid.[2] As to the power of the Appellate Court to entertain

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12. ('23) 10 AIR 1923 Mad 103 (104) (DB).
('18) 5 AIR 1918 P C 10 (11) : 21 Oudh Cas 104 (PC).
('09) 31 All 116 (127, 135) : 36 Ind App 9 (PC).
[*See* ('36) 23 AIR 1936 Cal 87 (93) (DB.) (Trial Court not properly considering effect of documentary evidence of great weight — Appellate Court may draw conclusions of its own.)]
13. ('14) 1 AIR 1914 PC 38 (40): 36 All 187 (194) (PC).
14. ('09) 1909 Pun Re No. 15 Cr. p. 51 (54): 4 Ind Cas 864 (866) (DB).
† ('27) 14 AIR 1927 Rang 200 (200). (Supposed discrepancies.)
('13) 15 Bom L R 297 (301) (DB). (Discrepancies in reference to time.)
15. † ('19) 6 AIR 1919 P C 157 (158) (PC). (For there is a tendency amongst litigants to back a a good case by false or exaggerated evidence.)
16. ('20) 7 AIR 1920 Cal 419 (420) (DB).
('17) 4 AIR 1917 Mad 689 (690) (DB).
('36) 23 AIR 1936 Cal 256 (258).
Also see Note 30.
17. ('11) 38 Cal 805 (817) : 38 Ind App 155 : 11 Ind Cas 801 (804) (PC). (Where parties are at issue on vital facts principle to consider is which story fits in with admitted circumstances.)
('28) 15 AIR 1928 P C 277 (281) (PC). (Determination of the genuineness of a signature by mere comparison with admitted signatures.)
('15) 2 AIR 1915 All 112 (113).
† ('19) 6 AIR 1919 Oudh 136 (144) (DB).
('18) 5 AIR 1918 Cal 618 (626) : 45 Cal 60 (81) (DB).

Note 15

1. ('20) 7 AIR 1920 Pat 359 (362).

Note 16

1. ('99) 4 Cal W N 58 (61, 62) (DB).

Note 17

1. ('12) 16 Ind Cas 46 (47) (DB) (Cal). (*Held* also that appellate Court is not entitled to raise objection to court-fee on plaint *suo motu* under S. 11 of Act VII of 1887).
2. ('03) 30 Cal 516 (519, 520).
See for fuller discussion Notes on Section 6.
('11) 1911 Pun L R No. 213, p. 821 (DB). (Memo of cross-objections.)

an objection as to the valuation of the suit in the original Court, see S. 11 of the Suits Valuation Act of 1887.

18. Power to direct stay of proceedings, grant interim injunctions and pass interlocutory orders. — An Appellate Court having seisin of an appeal has power to pass all such interlocutory orders as are necessary in the interests of justice, such as an order granting an *interim* injunction,[1] appointing a temporary guardian in a pending appeal from an order of appointment under the Guardians and Wards Act,[2] or staying further proceedings or execution.[3]

See also section 94, Order 41 Rules 5, 6 and 33 and section 151.

19. Power to entertain application to set aside ex parte decree. — See Section 96, Note 12 and Order 41 Rule 21.

20. Power to permit withdrawal of proceedings. — See Order 23 Rule 1.

21. Power to reject plaint or memorandum of appeal. — This section makes the provisions relating to the rejection of plaints applicable to the memorandum of appeal.[1]

22. Power to return memorandum of appeal for presentation to the proper Court. — Section 107 (2) read with O. 7 R. 10 makes it clear that the Appellate Court has the power to return the memorandum of appeal for presentation to the proper Court.[1]

23. Power to allow amendment. — See Section 153, O. 1 R. 10, Note 39; O. 6 R. 17 and O. 41 R. 3.

24. Power to decide new point suo motu. — See O. 41 R. 2, Note 7.

25. Power to make new case in appeal. — See O. 41 R. 1, Note 12 and R. 25.

26. Power to interfere with the appointment of a receiver. — See O. 40 R. 1, Note 51.

27. Power to refer to arbitration. *(Omitted.)*

28. Power to examine ameen. — An Appellate Court has power to send for the ameen and examine him on his report.[1]

29. Power to expunge remarks from the judgment. — See O. 6 R. 16, Note 6.

30. Duties of the Appellate Court. — Before an Appellate Court reverses the finding of the lower Court it should apply its mind to a consideration of the *whole* of the evidence in the case.[1] It should bring on the record all the necessary parties to the appeal.[2]

Note 18

1. †('04) 14 Mad L Jour 471 (473, 474) (FB).
2. ('06) 3 Cal L Jour 29 (36) (DB).
3. †('07) 34 Cal 1037 (1049) : 11 Cal W N 1030 (1040) (FB).

Note 21

1. ('37) 24 AIR 1937 All 280 (281): ILR (1937) All 484. (Rejection for non-payment of court-fee.)
('42) 29 AIR 1942 Cal 539 (541) : ILR (1942) 2 Cal 253. (Do).
('41) 28 AIR 1941 Bom 242 (244) : ILR (1941) Bom 477 (DB). (Do).
('36) 23 AIR 1936 Cal 804 (805) : ILR (1937) 1 Cal 103 (DB). (Do).
Also see O. 7 R. 11, Note 11.

Note 22

1. ('33) 20 AIR 1933 All 108 (109) (DB).
('23) 10 AIR 1923 Nag 310 (311).
('25) 12 AIR 1925 Oudh 499 (499).
[*See* ('42) 29 AIR 1942 Mad 657 (658). (Civil revision petition in High Court—Return under O. 7, R. 10 for presentation as appeal in District Court—Not permissible.)]

Note 28

1. ('75) 24 Suth W R 342 (342) (DB).

Note 30

1. ('42) 29 AIR 1942 Cal 498 (504) (SB). (Appellate Court to come to its own conclusion.)
('17) 4 AIR 1917 Mad 689 (690) (DB).
('18) 5 AIR 1918 Low Bur 62 (62) : 9 Low Bur Rul 159 (DB). (To take cognizance of a defect in attestation not noticed in the lower Court.)
Also see Note 14.
2. ('16) 3 AIR 1916 Mad 828 (829) (DB).
[*See also* ('41) 28 AIR 1941 Oudh 593 (598) (DB). (Decree against debtor and surety — Appeal by surety alone—Decree cannot be set aside against non-appealing debtor.)]
Also see O. 1 R. 10 Note 11.

It should apply correct principles of law[3] and give clear findings of fact[4] and directions free from doubt[5] and rectify the errors of the lower Court.[6] It is the duty of the Appellate Court to decide an appeal according to law, giving findings on all the issues decided by the lower Court against the appellant, however small the subject-matter of the appeal may be[7] unless the appellant waives his objection to the findings against him.[8] An Appellate Court is not entitled to call for a private report from the trial Court for its own information. The Appellate Court can only act in the manner provided by the Code.[9]

Procedure in appeals from appellate decrees and orders.

108. [Ss. 587, 590.] The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals —

(a) from appellate decrees, and

(b) from orders made under this Code or under any special or local law in which a different procedure is not provided.

[1877, Ss. 587 and 590; 1859, S. 366; *Cf*. O. 42 R. 1 and O. 43 R. 2.]

1. Scope and applicability of the section. — This section corresponds to O. 42 R. 1 and O. 43 R. 2 and the combined effect of these provisions is to make the provisions of the Civil Procedure Code in regard to appeals from original decrees applicable *mutatis mutandis* to appeals from appellate decrees and two appeals from orders where such appeal is open. But the section does not apply to Privy Council appeals.[1]

2. Appeals from appellate decrees.—By virtue of this section and O. 42 R. 1, a Court of second appeal has indirectly all the powers of a Court of first appeal (so far as may be).[1] Thus, a Court of second appeal can remand a case for retrial[2] or for finding on an issue[3] or for other sufficient reason to prevent the ends of justice from being defeated.[4] Similarly, with regard to the power to entertain a ground of objection not taken in the grounds of appeal[5] (O. 41 R. 2), the addition of respondents[6] (O. 41 R. 20), the dismissal of an appeal for default[7] (Order 41 Rule 17), the documents to accompany a memorandum of appeal[8] (O. 41 R. 1), the power to entertain objections as to misjoinder

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3. † ('16) 3 AIR 1916 Pat 363 (363, 364) (DB).
('15) 2 AIR 1915 Low Bur 36 (37).
('15) 2 AIR 1915 Cal 618 (619) : 42 Cal 451 (454) (DB).
4. ('19) 6 AIR 1919 Cal 360 (360) (DB). (Because the High Court in second appeal cannot go behind them.)
5. ('07) 31 Mad 28 (32) (DB). (Appellate decree must state clearly extension of time for performance beyond that fixed by the lower Court.)
6. ('26) 13 AIR 1926 Pat 159 (160). (Appoint another commissioner where previous commissioner's report is unsatisfactory.)
('12) 1912 Pun L R No. 240, p. 758 (759). (Appellate Court should set aside orders of lower Court passed without hearing.)
7. ('17) 4 AIR 1917 Lah 210 (210).
8. † ('16) 3 AIR 1916 P C 14 (15, 16) : 38 All 440: 43 Ind App 179 (P C).
('87) 1887 All W N 214 (214).
9. ('40) 27 AIR 1940 Pat 54 (54, 55) : 18 Pat 649 (DB).

Section 108 — Note 1

1. ('11) 33 All 391 (393):9 Ind Cas 932 (932) (DB). (Section 105 not applicable to Privy Council appeals.)

Note 2

1. ('69) 11 Suth W R 228 (229) (DB). (Court of special appeal.)
('04) 14 Mad L Jour 471 (473) (FB). (Second appeal—Court has no higher powers.)
2. See O. 41 R. 23 Note 20.
3. ('74) 21 Suth W R 52 (53) (DB). (In special appeal Court was debarred from entering upon merits of the case.)
('13) 20 Ind Cas 35 (36) (DB) (Cal).
('17) 4 AIR 1917 Cal 233 (234) (DB). (Lower Courts ought to deal with material facts specifically and decisively.)
('20) 7 AIR 1920 Pat 642 (643).
('06) 4 Cal L Jour 86 (87) (DB). (Case remanded for decision on issue of limitation.)
4. See O. 41 R. 23 Note 20.
5. † ('90) 12 All 461 (464) (FB). (Plea of limitation entertained.)
('66) 5 Suth W R 147 (147) (DB). (New ground arose out of the proceedings.)
6. See O. 1 R. 10 Note 11.
7. ('93) 15 All 359 (361, 362) (DB). (Order of dismissal for default is not decree — No appeal lies.)
8. ('08)32 Bom 14 (24) (FB). (Presentation valid even if decree and judgment of first Court not filed.)

of causes of action,[9] the power to entertain cross-objections,[10] and the bringing on the record of legal representatives of deceased parties,[11] a Court of second appeal has been held to be governed by the same rules as a Court of first appeal.

But the expression "so far as may be" makes it clear that the provisions relating to first appeals cannot be applied to second appeals indiscriminately, but can be applied only subject to the principles governing the entertainment and disposal of second appeals.[12] Thus, it has been held that a Court of second appeal cannot grant a review on the ground of a discovery of fresh evidence[13] nor remand a case for a fresh hearing in order that a record of rights published after the decision of the first Court might be taken into consideration.[14] Similarly, a party will not be ordinarily allowed to raise a new plea for the first time in second appeal.[15] But an objection as to absence of cause of action can be entertained though raised for the first time in second appeal.[16] Order 41 R. 32, read with the present section and O. 42 R. 1, does not enable the High Court in second appeal to vary an order for execution in such a way as to grant the decree-holder a relief for which he had not asked.[17]

3. Appeals from orders. — As to whether an appeal lies from an order recording a compromise under O. 23 R. 3 with the consent of the parties, see O. 43 R. 1, Note 7.

As the provisions relating to appeals from original decrees applyto appeals from orders only "so far as may be," it is not open to the Appellate Court in an appeal from an order of remand under O. 41 R. 23 to enter into the merits of the whole case as in a

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† ('82) 4 Mad 419 (420) (FB). (Judgment and decree of original Court need not be filed.)
('21) 8 AIR 1921 Lah 73 (73) : 2 Lah 227.
('21) 67 Ind Cas 670 (671) (Lah).
('19) 6 AIR 1919 Lah 42 (43) : 1 Lah 83. (Time was extended under S. 5, Limitation Act. NOTE.—This case is overruled on another point in A I R 1927 Lah 289 : 8 Lah 384 (FB).)
('93) 15 All 123 (126, 127) (SB). (Grounds should be set forth in memorandum of appeal.)
('21) 8 AIR 1921 All 23 (23) : 43 All 660 (DB). (Under the rules of the High Court, Court in second appeal cannot dispense with copy of judgment of first Court.)
('22) 9 AIR 1922 Lah 93 (93). (The omission to annex copy of an interlocutory order incorporated by reference in the judgment may be excused. NOTE.—The above decisions will reveal a conflict of opinions as to whether a second appeal is properly filed when the memorandum of appeal is not accompanied by a copy of the judgment and decree of the trial Court and as to whether the appellant is entitled to exclude the time taken for obtaining copies of these, in computing the period of limitation for second appeal—The question is more fully dealt with under O. 41 R. 1.)

9. † ('73) 20 Suth W R 240 (241) (DB).
('05) 2 Cal L Jour 602 (607, 609) (DB).

10. ('99) 21 All 297 (300). (Section 561, C. P. Code of 1882, not applicable to Letters Patent appeals.)

11. † ('07) 29 All 535 (536) (DB).
('05) 28 Mad 498 (499). (NOTE.—The controversy under the old Code and the old Limitation Act as to the period of limitation applicable to an application for bringing on the record of a second appeal the legal representatives of a deceased party can have only an academic interest now.)
See the following cases :
('79) 3 Cal L Rep 440 (442) (DB). (Application made after 60 days granted—Art. 171, Limitation Act, 1877, did not apply.)
('07) 34 Cal 1020 (1023) (DB). (Article 175 (c), Limitation Act (1877), applied.)
('06) 29 Mad 529 (530). (Limitation Act, 1877 — Article 178—3 years limitation—Applied.)
('11) 34 Mad 292 (293) (DB). (Prior to Limitation Act of 1908, application was governed by Art. 178 of Limitation Act (1877), which provided 3 years period of limitation.)

12. † ('85) 7 All 765 (768, 769) (FB). (Finding upon issues remanded by High Court in second appeal cannot be challenged as in first appeal.)

† ('84) 7 Mad 52 (54) (DB).
('86) 9 All 26 (30, 31) (DB).

13. ('10) 32 All 71 (72) (DB).

14. ('17) 4 AIR 1917 Pat 139 (140) : 2 Pat L Jour 564 (DB).

15. *See the following cases* :
('20) 7 AIR 1920 Cal 325 (326) (DB).
('10) 12 Bom L R 795 (800) (DB). (Waiver of plea.)
('74) 20 Suth W R 240 (241) (DB). (No defect in original trial in consequence of misjoinder of causes of action — Plea of misjoinder not entertained.)

16. ('10) 5 Ind Cas 336 (337) (All). (Plea went to the root of the case.)

17. ('82) 8 Cal 174 (177) (DB).

regular appeal.[1] An Appellate Court has inherent jurisdiction to grant an interim injunction pending an appeal from an order refusing temporary injunction.[2]

It is only *where a different procedure is not provided* by the Code or by any special or local law, that the procedure in an appeal from an order is to be governed by the provisions relating to appeals from original decrees. Thus, the procedure as to appeals from original decrees is not applicable to appeals from orders under the Provincial Insolvency Act, as a special procedure is provided for such matters.[3] Likewise, this section is not applicable to proceedings under the Madras Estates Land Act (I of 1908).[4]

APPEALS TO THE KING IN COUNCIL

109. [S. 595.] Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council —

When appeals lie to King in Council.

(*a*) from any decree[3] or final order[4] passed on appeal[5] by a High Court or by any other Court of final appellate jurisdiction;[6]

(*b*) from any decree or final order passed by a High Court[7] in the exercise of original civil jurisdiction; and

(*c*) from any decree or order, when the case, as hereinafter provided, is certified to be a fit[10] one for appeal to His Majesty in Council.

[1877, S. 595; See O. 45 and Cl. 39 of the Letters Patent.]

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. "Decree," meaning of.
4. "Final order," meaning of.
5. "Order passed on appeal."
5a. Whether appeal to Privy Council lies against appellate order from which no second appeal lies.
6. "Any other Court of final appellate jurisdiction."
7. Orders passed by the High Court in the exercise of original civil jurisdiction.
8. Limitation. See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 179.
9. Prerogative of the Crown. See Section 112.
10. Certificate of fitness—Clause (c).
11. Form of certificate. See O. 45 R. 3.
11a. Rules of the Judicial Committee. See Appendix IV.
12. Appeal to the Privy Council in criminal cases. See S. 112. See also the Authors' Commentaries on the Code of Criminal Procedure, 2nd (1941) Edn., S. 404 Note 2.

NOTE to the Synopsis. See the Notes indicated for the following topics:

Bar of appeal under the Code not applicable to the Privy Council appeals. See Notes 3 and 6.
Cases where no appeal lies. See Note 2.
Extra-judicial decisions. See Note 2.
Insolvency Acts—Appeal under. See Note 2.
Interlocutory orders. See Note 10.
Leave to appeal in *forma pauperis*. See Note 2.
Preliminary decree — Appeal against. See Notes 1 and 3.
Remand order. See Note 4.

1. Legislative changes.

The following amendments have been introduced in the section:

(1) In clauses (a) and (b) the words "decree or final order" have been substituted for the words "final decree."

(2) In clause (c) the words "or order" have been added after the word "decree."

Note 3

1. ('85) 7 All 136 (138) (DB).
2. ('04) 14 Mad L Jour 471 (473) (FB).
3. ('86) 12 Cal 629 (634) (DB). (By S. 73 of Provincial Insolvency Act.)
('93) 17 Bom 334 (340) (DB).
4. See Section 192 of the Act.

It was enacted by S. 594 of the old Code that the word "decree" for the purposes of this section meant "judgment or order" so that a "final decree" meant a "final decree or final order." It was also held in cases arising under the corresponding section of the old Code (i. e., section 595) that "final decree" included also decisions in the nature of preliminary decrees.[1]

2. Scope and object of the section. — The right of appeal to the Privy Council is governed by Ss. 109, 110, 111 and 112 and O. 45 of the Code, and clause 39 of the Letters Patent granted to the High Courts of Bombay, Calcutta and Madras and the corresponding clauses of the Letters Patents granted to the other High Courts.[1] Sections 109 and 110 enact provisions very similar to the said clause of the Letters Patent but are wider in their applicability than the Letters Patent. Whereas the LettersP atent only applies to *Chartered* High Courts, Ss. 109 and 110 apply to *all* "High Courts" as defined by S. 3 (24) of the General Clauses Act[2] and to other Courts of final appellate jurisdiction. Clause 39 of the Letters Patent must also be read subject to sections 109 and 110 of the Code.[3]

Sections 109 to 112 and clause 39 of the Letters Patent should be read together, and, when so read, the law enacted therein can be briefly summarized as follows :

(1) An appeal will lie to the Privy Council from *any* decree or order when, either the case is *certified to be a fit one* for such appeal [see S. 109 cl. (c)] or when *special leave* is given by the King in Council. (Section 112.)

(2) In the absence of a certificate or special leave as aforesaid, an appeal will lie to the Privy Council from any decree or *final* order of the High Court in the exercise of *original civil jurisdiction*, provided the value of the subject-matter involved in the case is Rs. 10,000 or upwards. [Section 109 cl. (b) and S. 110.]

(3) An appeal will lie from any decree or *final* order *passed on appeal* by a High Court or by any other Court of final appellate jurisdiction, but not affirming the decree or order of the Court below, provided the value of the subject-matter involved is Rs. 10,000 or upwards. [Section 109 cl. (a) and section 110.]

(4) An appeal will lie from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction, but *affirming the decision of the Court below*, provided, *firstly*, the value of the subject-matter is as aforesaid, *and* secondly the appeal involves a substantial question of law. (Sections 109 and 110.)

(5) Notwithstanding the above, and, save on a special leave granted by the King in Council, no appeal will lie from any decree from which, under S. 102, no second appeal lies, or from any decree or order of a *single* Judge of a Chartered High Court or of a Division Court, or of two or more Judges of such High Court or Division Court where the Judges constituting it are equally divided in opinion. (Section 111.)

Section 109 — Note 1

1. ('91) 15 Bom 155 (159) : 18 Ind App 6 (PC).

Note 2

1. ('42) 29 A I R 1942 Oudh 362 (365) (DB). (Section 109 is subject to the provisions of S. 110.)
Clause 30, Letters Patent, Allahabad.
Clause 31, Letters Patent, Patna.
Clause 29, Letters Patent, Lahore.
Clause 37, Letters Patent, Rangoon.
Clause 29, Letters Patent, Nagpur.

2. ('32) 19 AIR 1932 Oudh 163 (163, 164) (DB) (Oudh Chief Court is a High Court for purposes of Section 109.)

3. See Clause 44 of Letters Patent, Calcutta, and the corresponding Clauses in other Letters Patents.
('25) 12 AIR 1925 Mad 243 (243, 244) (DB). (Appeal may lie under Clause 39 of Letters Patent, though not under Section 109.)
[*See also* ('24) 11 AIR 1924 Mad 399 (399) : 46 Mad 958 (DB). (Section 111 overrides Clause 39 of Letters Patent.)]

Sections 109 and 110 do not apply in the following cases :

(1) *Where the decision is not that of a "Court"* — The jurisdiction exercised by the Political Agent in Kathiawar and by the Governor of Bombay in Council in the administration of justice is *political* and not that of a Court.[4] Similarly, an order of the Governor-General in Council deposing the Ruler of a Native State or appointing a Commission to inquire into a charge against him is an act of State and not the act of a "Court."[5]

(2) *Where the decision of the Court is an extra judicial one*[6] — An order of the High Court in its *administrative* and *disciplinary* jurisdiction, as for instance, against legal practitioners, is an extra-judicial act and not within section 109.[7]

(3) *Where in the nature of the decision itself, no appeal can lie* — No appeal will lie to the Privy Council from a *consent* decree passed by the High Court[8] or where the suit itself has become non-existent.[9]

(4) *Where a right of appeal is barred by the other provisions of the Code or by any special law* — An order granting a review is not appealable except in the cases mentioned in O. 47 R. 7. Section 109 must be read subject to O. 47 R. 7, as is indicated by the words "subject to . . . . the provisions hereinafter contained" in the section, and therefore no appeal will lie from an order by the High Court on review if it is not appealable under O. 47 R. 7.[10] Again, S. 109 will not affect any special law or any special jurisdiction conferred by any other law for the time being in force.[11] Thus, in the undermentioned case[12] it was held that a provision in the Rangoon City Municipal Act that a decree of the High Court under S. 91 (3) of the Act is "final" would preclude an

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4. ('06) 33 Cal 219 (254, 255) : 33 Ind App 1 (PC).
5. ('05) 32 Cal 1 (4, 5) : 31 Ind App 239 (PC).
6. ('19) 6 AIR 1919 Pat 279 (280) : 4 Pat L Jour 423 (DB). (Suspension of pleader under Legal Practitioners Act.)

† (1846) 4 Moo Ind App 220 (221) (PC).
[*See also* ('34) 21 AIR 1934 All 974 (976): 57 All 306 (DB). (Under S. 66A of Income Tax Act of 1922 appeal to Privy Council lies from judgment on reference by Income Tax Commissioner but not from order of High Court declining to call upon the Commissioner to make a reference.)

7. ('14) 1 AIR 1914 Cal 557 (559) : 41 Cal 734 (DB). (Application for leave under Cl. 39, Letters Patent.)
('08) 32 Bom 106 (107) (DB). (Application for leave under Cl. 39, Letters Patent.)

† ('22) 9 A I R 1922 Mad 440 (441) (FB). (Suspending vakil from practice.)
('30) 17 AIR 1930 Rang 150 (150, 151): 8 Rang 40 (DB). (Do.)
('84) 6 All 163 (164) (FB). (Cancellation of notification enrolling pleader.)
('16) 3 AIR 1916 Mad 1225 (1225) : 39 Mad 128 (FB).
('22) 9 AIR 1922 Pat 603 (604) : 1 Pat 590 (DB). (Refusal to enrol a person as legal practitioner.)

NOTE. — It was held in AIR 1923 P C 148 : 47 Bom 724 : 50 Ind App 212 (PC) that the judgment of the High Court on a reference under the Income-Tax Act was advisory and not appealable —It is now provided by S. 66A (2) of the Income-Tax Act inserted by Act XXIV of 1926, that an appeal will lie to the Privy Council in such cases. *Cf.* AIR 1923 P C 138: 50 Ind App 227 : 47 Bom 742 (PC) wherein appeal was allowed but the question was not raised — Section 66A does not, however, provide for an appeal from an order of High Court under S. 66 (3) refusing to require the Commissioner to state a case — Such an appeal, therefore, does not lie: AIR 1930 Rang 274 (276): 8 Rang 435.)

8. ('20) 7 AIR 1920 Pat 721 (722) : 5 Pat L Jour 383 (DB).

† ('32) 19 AIR 1932 P C 251 (251, 252) (PC).
('22) 9 AIR 1922 Pat 256 (257) : 6 Pat L Jour 171 (DB). (So assumed.)

9. ('25) 12 AIR 1925 P C 174 (175) (PC). (Order of the High Court on review set aside by the Privy Council and suit dismissed—No more appeal to the Privy Council.)

10. ('26) 13 AIR 1926 Oudh 17 (18) (DB).
Also see O. 47 R. 7, Note 4.

11. See Section 4.
('32) 19 AIR 1932 Oudh 163 (164) (DB). (Special provision in S. 12 of the Oudh Courts Act, IV of 1925.)

12. ('27) 14 AIR 1927 Rang 88 (89, 90) : 4 Rang 508 (DB).

appeal to the Privy Council also, though a similar provision has been differently construed by the Chief Court of Oudh.[13] See also the undermentioned case.[14]

In *Bhaya Mohammad Azim Khan* v. *Raja Saadat Ali Khan*,[15] a question arose as to whether an appeal to the Privy Council was competent from a decree of a single Judge of the Oudh Chief Court in the exercise of original civil jurisdiction notwithstanding that under the Oudh Courts Act such decree was appealable to a Bench of the Chief Court itself. Their Lordships of the Privy Council held that in such a case the appeal to the Privy Council should be rejected in exercise of the prerogative of His Majesty under S. 112. Their Lordships also expressed the view that Ss. 109 and 110 did not prohibit an appeal being brought within the Chief Court in like manner as a Letters Patent Appeal was brought within a Chartered High Court and that the two sections taken together seemed rather to be intended to provide an appeal to His Majesty on the footing that no further appeal in India was provided.

It was held in the undermentioned cases[16] that an award by a Court under the Land Acquisition Act was not open to an appeal to the Privy Council on the ground that only a *special and limited right* of appeal was given by that Act from the award of the Court to the High Court. These cases are no longer law since the amendment of S. 54 of that Act by Act XIX of 1921, by which an appeal to the Privy Council is expressly provided for.[17]

The right of appeal to the Privy Council is not confined to the King's subject.[18]

Subject to the limitations set forth above, an appeal will lie to the Privy Council from any judicial order or decree of a Court, by any person injured or aggrieved by it. Where the petitioner *prima facie* satisfies the conditions prescribed by this section, leave to appeal must be granted. The chance of success of the appellant in the proposed appeal is immaterial.[19] See also the undermentioned cases.[20]

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13. ('40) 27 AIR 1940 Oudh 312 (313) : 16 Luck 91 (DB). (In this case, a provision in S. 45 of the U. P. Encumbered Estates Act making the decree of the Chief Court final was held to bar only further appeals and revisions in India but not an appeal to the Privy Council.)
('43) 30 AIR 1943 Oudh 262 (263). (Do.)

14. ('41) 28 AIR 1941 Pat 225 (226) : 20 Pat 561 (SB). (Appeals from orders passed under S. 66 of the Income-tax Act cannot be regulated by Ss. 109 and 110, C. P. Code—AIR 1927 P C 242 : 54 Ind App 421 : 9 Lah 284 (PC) followed.)

15. ('39) 26 AIR 1939 P C 122 (127) : 66 Ind App 160 : 14 Luck 252 : I L R (1939) Kar 234 (PC).

16. ('12) 40 Cal 21 (27) : 39 Ind App 197 : 16 Ind Cas 188 (189) (PC).
('12) 37 Bom 506 (509) : 17 Ind Cas 952 (952, 953) (DB).
('13) 21 Ind Cas 427 (427) (DB) (Cal). (40 Cal 21 : 39 Ind App 197 (PC) followed.)
('13) 20 Ind Cas 763 (764, 765) (PC).
('15) 2 AIR 1915 Low Bur 94 (94): 8 Low Bur Rul 163. (Award is neither decree nor order.)

17. ('25) 12 AIR 1925 P C 91 (92) : 6 Lah 69: 52 Ind App 133 (PC).

18. ('06) 33 Cal 219 (253) : 33 Ind App 1 (PC).

19. ('32) 19 AIR 1932 Mad 46 (52) (DB).

20. ('24) 11 AIR 1924 Mad 63 (65, 66) (DB). (Decision of High Court on reference under S. 51 of the Income-tax Act — Appeal lies to Privy Council.)
('34) 21 AIR 1934 Rang 65 (65, 66) : 12 Rang 164 (DB). (Leave to appeal to Privy Council by defendant—Considerations where plaintiff is applicant need not be considered.)
('21) 8 AIR 1921 Bom 378 (378) (DB). (Refusal of application for an order under Section 45 of the Specific Relief Act to compel a reference under S. 51 of the Income-tax Act — Appeal lies.)
('25) 12 AIR 1925 Mad 243 (243, 244) (DB). (Order under the Presidency Towns Insolvency Act — Appeal lies under Clause 39 of Letters Patent.)
('13) 40 Cal 685 (690) : 19 Ind Cas 435 (436) (DB). (Order under Provincial Insolvency Act—*Held* to be a fit one for appeal under Section 109 (c).)
('97) 24 Cal 30 (33) (DB). (Order by the Recorder of Rangoon refusing probate—Appeal lies.)
('27) 14 AIR 1927 Rang 56 (56): 5 Rang 119 (DB). (Order granting probate—Appeal lies—AIR 1919 Low Bur 104 : 10 Low Bur Rul 22 dissented from.)
('26) 13 AIR 1926 Mad 986 (988) : 49 Mad 954 (DB). (Decree in testamentary matter is appealable to Privy Council.)
('25) 12 AIR 1925 Pat 712 (712) (DB).
('29) 115 Ind Cas 832 (832) (DB) (Mad). (Leave to appeal in *forma pauperis* on behalf of community not available : AIR 1918 Mad 18 : 42 Mad 32 followed.)
('13) 18 Ind Cas 129 (129) (DB) (Cal). (Do.)
('18) 5 AIR 1918 Pat 303 (304) : 3 Pat L Jour 179 (DB). (Do.)

3. "Decree," meaning of. — See S. 2 (2). The word "decree" will include a preliminary decree[1] and a decree passed under Sch. II para. 21 of the Code[2] (now repealed) but not an act of State.[3] An execution sale was impeached on the following grounds: (a) that the execution proceedings were without jurisdiction; (b) that they were barred by limitation; (c) that the proclamation and conduct of sale were materially defective. When the matter came up in a Letters Patent Appeal, the High Court negatived the first two objections but allowing the third objection set aside the sale and remanded the case for issuing a fresh proclamation of sale and taking further proceedings in accordance with the law. The judgment-debtor applied for leave to appeal to the Privy Council and contended that the decision of the High Court on the first two objections amounted to a decree within the meaning of this section. It was held that the judgment could not be split up like this and that it could not be held that the findings on some of the points amounted to decrees and those on other points amounted only to orders. It was held further that even otherwise, there was no final determination of the application for execution, the order being only for setting aside the former sale and the holding of a re-sale, and so there was no "decree."[4]

Under S. 594 of the old Code "decree" included "judgment or order." An order passed by the High Court under the Companies Act, 1882, was held to be a "decree" for the purposes of S. 595. Such an order will still be within S. 109 of this Code but as an "order."[5]

4. "Final order," meaning of. — The words "final order" in the section are used in contra-distinction to the words "interlocutory order."[1] The Privy Council does not, as a rule, interfere with interlocutory orders[2] and it is only on this ground that the section enacts that it is only a *final order* that is appealable to the Privy Council *as of right* and that *other* orders are so appealable only if the case is *certified to be fit* for appeal.[3]

In *Rahimbhoy* v. *Turner*[4] and *Muzhar Hossein* v. *Bodha Bibi*,[5] both cases under the old Code, their Lordships of the Privy Council held that an order was a "final" one if it decided the *cardinal* point in the case *notwithstanding that there might be subordinate enquiries to make.* This view was followed in the High Courts in India in a number of cases.[6]

('21) 8 AIR 1921 Pat 134 (135) (DB). (Defendant not filing any written statement, nor taking any part in lower Courts — Allowing co-defendant to do all — Co-defendant's appeal pending before Privy Council — No leave to former.)

('29) 16 AIR 1929 Mad 672 (672) (DB). (Person in contempt cannot be heard unless and until he purges his contempt — Leave refused.)

Note 3

1. ('42) 29 AIR 1942 Cal 537 (538) (DB). (Order of High Court decreeing plaintiff's claim for possession of property upon payment of money to be ascertained by trial Court — Order is preliminary decree and appeal to Privy Council lies.)
('22) 9 AIR 1922 P C 237 (238): 49 Ind App 108: 49 Cal 560 (PC).
2. ('12) 15 Oudh Cas 55 (57) : 15 Ind Cas 2 (3) (DB). (The bar to appeal in Para. 21 (2) inapplicable to Privy Council appeals.)
3. ('05) 32 Cal 1 (4, 5) : 31 Ind App 239 (PC).
4. ('43) 30 AIR 1943 Lah 140 (143) (FB). (Per Tek Chand and Bhide, JJ.)
5. ('03) 27 Bom 415 (417) (DB). (Case decided under Ss. 9 and 10 of the Companies Memorandum of Association Act (XII of 1895).)

Note 4

1. ('39) 26 AIR 1939 F C 43 (48): I L R (1940) Lah 400 : I L R (1939) Kar F C 132 (FC).
†('01) 23 All 220 (227) : 28 Ind App 28 (PC).
('77) 1 Cal L Rep 354 (357, 358). (Such construction reasonable when dealing with orders made prior to decree.)
2. ('34) 21 AIR 1934 Lah 26 (26) (DB).
See Note 10.
[*See* ('66) 10 Moo Ind App 341 (359, 360) (PC).]
[*See also* ('14) 23 Ind Cas 396 (396, 397) (PC). (But an interlocutory order can be impeached when an appeal is preferred against the final order in the cause.)]
3. See Note 10.
[*See also* ('19) 6 A I R 1919 All 34 (34) : 42 All 176 (DB).
('35) 22 AIR 1935 Lah 458 (459) (DB).]
4. ('90) 15 Bom 155 (159) : 18 Ind App 6 (PC).
5. ('94) 17 All 112 (116) : 22 Ind App 1 (PC).
6. † ('24) 11 AIR 1924 Lah 571 (579, 580) : 5 Lah 329 (FB). (Matter of procedure cannot be treated as cardinal point — Case law discussed.)

But in *Ramchand Manjimal* v. *Goverdhandas*,[7] a case arising under the present Code, in which the question was whether an order refusing stay of a suit under S. 19 of the Arbitration Act, 1899, (now repealed by the Arbitration Act, X of 1940) was final or not, Viscount Cave observed :

> "The question as to what is a final order was considered by the Court of Appeal in the case of *Salaman* v. *Warner*,[8] and that decision was followed by the same Court in the case of *Bozson* v. *Altrincham Urban District Council*.[9] The effect of those and other judgments is that an order is final if it finally *disposes of the rights of the parties*. The orders now under appeal do not finally dispose of those rights but leave them to be determined by the Courts in the ordinary way."

In *Abdul Rahman* v. *D. K. Cassim and Sons*,[10] after stating that the decisions in *Rahimbhoy* v. *Turner*[11] and *Muzhar Hossein* v. *Bodha Bibi*[12] were not applicable to cases arising under the present section, Sir George Lowndes observed :

> "The finality *must be a finality in relation to the suit*. If after the order the suit is still a live suit in which the rights of the parties have still to be determined no appeal lies against it under Section 109 (a) of the Code . . . . . In their Lordships' opinion it is impossible to distinguish the present case from that upon which Lord Cave pronounced. The effect of the order from which it is here sought to appeal was not to dispose *finally of the rights of the parties*. It no doubt decided an important and *even a vital issue* in the case but it *left the suit alive* and provided for its trial in the ordinary way . . . . . For these reasons their Lordships think that the appeal is incompetent."

The decision of a *cardinal* point may in many cases finally dispose of the rights of the parties in the suit; but the *test* to find out whether an order is a final one is not whether the point decided thereby is a *cardinal* one, but whether the *rights of the parties in the suit are finally disposed of by it*.[13]

('32) 19 A I R 1932 Rang 137 (137, 138): 10 Rang 335.

Order of remand deciding cardinal point held final. See the following cases :

('25) 12 AIR 1925 Rang 147 (148) (DB).
('10) 7 Ind Cas 622 (622) (DB) (Cal).
('21) 8 AIR 1921 Lah 203 (204) : 2 Lah 106.
('22) 9 AIR 1922 Mad 510 (511, 512) (DB).
('28) 15 A I R 1928 Rang 132 (133) : 6 Rang 169 (DB). (Plaintiff was held entitled to pre-emption and case was remanded.)
('07) 5 All L Jour 57 (58).
('21) 8 AIR 1921 Cal 177 (178) (DB).
('08) 35 Cal 618 (619, 620) (DB).
('04) 1 All L Jour 26 (27, 28) (DB).
('03) 25 All 629 (630) (DB). (High Court remanding the case on reversal of lower Court's decree on the point of limitation — The order of remand was interlocutory.)
('31) 18 A I R 1931 Nag 24 (25) : 27 Nag L R 172 (DB).
(1900) 22 All 405 (407) (DB).
('09) 4 Ind Cas 459 (460, 462) (DB) (Cal). (Order confirming an order of remand.)
('22) 9 AIR 1922 Bom 383 (383): 47 Bom 106 (DB). (The word "final" in its ordinary sense explained.)
('11) 9 Ind Cas 183 (187) (DB) (Cal).
('11) 10 Ind Cas 439 (440) (DB) (Cal). (Order appointing a receiver not "final.")
('15) 2 A IR 1915 Cal 624 (625) (DB). (Order refusing temporary injunction not final.)
('11) 11 Ind Cas 65 (66) (DB) (Cal). (Leave to sue in *forma pauperis* refused on the ground of non-disclosure of cause of action — Order of refusal final.)
('96) 1896 Pun Re No. 12, p. 31 (32) (DB).
('17) 4 AIR 1917 Pat 126 (127, 128): 3 Pat L Jour 339 (DB).
('21) 8 A I R 1921 Pat 37 (38) : 6 Pat L Jour 116 (DB). (Partition suit dismissed after preliminary decree — Order of High Court reversing the dismissal is in effect a restoration of the preliminary decree and is a final order.)

7. ('20) 7 AIR 1920 P C 86 (87) : 47 Cal 918 : 14 Sind L R 191 : 47 Ind App 124 (PC).
8. (1891) 1 Q B 734.
9. (1903) 1 K B 547.
10. ('33) 20 A I R 1933 P C 58 (60) : 11 Rang 58 : 60 Ind App 76 (PC).
11. ('90) 15 Bom 155 (159) : 18 Ind App 6 (PC).
12. ('94) 17 All 112 (116) : 22 Ind App 1 (PC).
13. ('43) 30 A I R 1943 Lah 140 (145, 146) (FB). (Order holding that execution proceedings are not without jurisdiction or are not barred by limitation is not final order.)

('42) 29 AIR 1942 Cal 537 (539)(DB). (*Obiter*—Order determining rights of parties to suit final though certain subordinate matters of detail not disposed of—Order for possession in favour of plaintiff on payment of certain amount to be decided by trial Court—Order is final order.)
('42) 29 AIR 1942 Oudh 283 (284) (DB). (An order which merely decided that a particular person was entitled to be substituted in place of a deceased party is not 'final order.')
('39) 26 A I R 1939 F C 43 (49) : ILR (1940) Lah 400 : ILR (1939) Kar FC 132 (FC). (If the effect of the order from which it is sought to appeal is not to dispose finally of the rights of the parties, then even though it decides an important and even

The mere fact that an order decides one issue on the rights of the parties does not make it a final order if there are other issues left to be decided later on.[14] Where an order merely gives a *direction as to procedure* or where it does not dispose of the suit or proceeding but reserves some further question for further determination, it is only an *interlocutory* and not a *final* order.[15]

Thus, an order of remand under O. 41 R. 23, which decides an important issue but leaves the suit alive to be tried in the ordinary way, is not a final order.[16] In the under-

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a vital issue in the case, it leaves the suit alive and provides for its trial in the ordinary way.)

('16) 3 AIR 1916 All 243 (244) : 38 All 150 (FB). (A contract was challenged on various grounds, the most important of them being that it should have been under a particular seal — High Court held that it did not require to be under seal—*Held* that the decision was not a final order.)

✠('33) 20 A I R 1933 P C 58 (60) : 11 Rang 58 ; 60 Ind App 76 (PC).

('26) 13 AIR 1926 All 311 (312) : 48 All 329 (DB). (Order setting aside compromise is interlocutory.)

('39) 26 AIR 1939 Oudh 224 (224) : 14 Luck 675 : 182 Ind Cas 1007 (1007) (DB).

('36) 23 AIR 1936 Oudh 205 (205) (DB).

† ('39) 26 A I R 1939 Mad 697 (699) (DB). (Order deciding rate of interest to be allowed and remanding case, not a final order.)

14. ('16) 3 AIR 1916 All 243 (243, 244) : 38 All 150 (FB).

† ('19) 6 AIR 1919 Mad 893 (894) (DB). (Two sets of properties—Order of remand deciding as to one set of properties and directing trial as to the other set—Order not final.)

✠('90) 13 Mad 349 (350) (DB). (Several issues including that as to adoption—Order holding adoption proved and remanding case on other issues — Order not final.)

('19) 6 AIR 1919 All 31 (32) : 42 All 174 (DB).

('82) 4 All 238 (240) (DB).

† ('01) 23 All 220 (227) : 28 Ind App 28 (PC).

15. ('11) 9 Ind Cas 183 (188) (Cal).

('77) 1 Cal L Rep 354 (358). (Order directing execution to proceed not final.)

('25) 12 A I R 1925 All 263 (263, 264) : 47 All 335 (DB). (Refusal by lower Court to set aside an abatement — High Court reversing the order and directing the lower Court to rehear the application for permission to implead the heirs — Order is not final.)

† ('26) 13 AIR 1926 Mad 748 (749) (DB). (Order holding the suit not to abate as regards settling of scheme is not final order.)

('24) 11 AIR 1924 Mad 701 (702) (DB). (Order refusing to interfere in revision with order of lower Court restoring suit to file.)

† ('25) 12 AIR 1925 Cal 857 (859, 860) (DB). (Compromise not recorded and suit ordered to be proceeded with as usual.)

('81) 6 Bom 260 (265) (DB). (Order in a partnership suit for account, refusing to allow the plaintiffs to have their accounts taken in particular manner suggested by themselves.)

('02) 6 Cal W N 41 (41) (SB). (Order of Court under Rr. 615 and 617 of Belchamber's Rules and Orders (2nd Edn.) merely refusing to reopen a Registrar's Report.)

('15) 2 AIR 1915 Cal 624 (624) (DB). (Order by High Court reversing an order refusing to issue a temporary injunction against execution of mortgage decree.)

('11) 10 Ind Cas 439 (440) (DB) (Cal). (Order refusing the appointment of a receiver in a suit.)

('25) 12 AIR 1925 Pat 173 (175) (DB). (Refusal to appoint a receiver.)

† ('95) 22 Cal 929 (930) (DB). (Order refusing to appoint a receiver in a suit.)

16. ('41) 28 AIR 1941 All 333 (335) : ILR (1941) All 573 (DB). (Order remanding case for trial in accordance with U. P. Encumbered Estates Act.)

✠('33) 20 AIR 1933 P C 58 (60) : 11 Rang 58 : 60 Ind App 76 (PC). (And no appeal lies against it —Enforcement of this principle involves no practical hardship by virtue of Section 109 (c).)

† ('31) 18 AIR 1931 Lah 556 (558, 559) (DB).

('23) 10 AIR 1923 Bom 39 (40) (DB).

('18) 5 AIR 1918 Nag 193 (194) (DB).

('34) 21 AIR 1934 All 58 (59, 60) : 56 All 277 (DB).

('33) 20 AIR 1933 Lah 82 (83) (DB).

† ('33) 20 AIR 1933 Bom 260 (261, 262) (DB). (Remand of decision on merits setting aside plea of limitation.)

('11) 33 All 391 (392) : 9 Ind Cas 932 (932) (DB). (Order of remand merely interlocutory.)

† ('08) 11 Oudh Cas 169 (172) (DB). (17 All 112 : 22 Ind App 1 (PC) and 15 Bom 155 distinguished.)

('20) 7 AIR 1920 Oudh 268 (268, 269) : 23 Oudh Cas 324 (DB). (Order that applicant was competent to apply for probate and remanding case for disposal on merits.)

† ('15) 2 AIR 1915 Mad 423 (423) : 38 Mad 509 (DB). (Remand on the ground that lower Court took erroneous view of pleadings.)

✠('01) 23 All 220 (227) : 28 Ind App 28 (PC). (Refusal to set aside *ex part* decree — Order set aside by High Court and case remanded.)

('18) 5 AIR 1918 Cal 878 (878) (DB). (Suit dismissed by lower Court — High Court setting aside dismissal and remanding case.)

('88) 1888 Pun Re No. 56, p. 136 (137) (DB). (Order of remand after finding that plaintiff had a cause of action and asking lower Court to try the case on the merits.)

('04) 1 All L Jour 26 (28) (DB). (Order holding that lower Court was competent to try the case and remanding the case.)

† ('17) 4 AIR 1917 Pat 77 (78, 79) (DB). (Do.)

('25) 12 AIR 1925 Cal 574 (574) (DB). (Suit dismissed due to plaintiff's want of *locus standi* — Appeal—*Prima facie* case made out—Case remanded for further hearing — Order is not final.)

† ('24) 11 AIR 1924 Lah 571 (579, 580) : 5 Lah 329 (FB). (Remand of case on the ground that plaintiff had *locus standi* — Matter of procedure can never be treated as the cardinal point of the suit.)

mentioned decision,[17] the Rangoon High Court has, however, proceeded on the view that a "final order" within the meaning of this section need not completely dispose of the suit and an appellate order of remand may also under certain circumstances be a "final order." In that case, the Appellate Court held that a certain award was not binding on the persons against whom it had been set up and remanded the case to the lower Court for the investigation of their claims. It was held that this was a "final order" as it finally disposed of the rights of such persons to prosecute their claims in the suit. Reliance was placed upon the decisions of the Privy Council in *Rahimbhoy* v. *Turner*[18] and *Muzhar Hossein* v. *Bodha Bibi*.[19] The decisions of the Privy Council in *Ramchand Manjimal* v. *Goverdhandas*[20] and *Abdul Rahman* v. *D. K. Cassim and Sons*[21] were distinguished on the ground that in neither case did the order dispose of any question affecting the substantive rights or liabilities of the parties in any way. An order granting leave to sue in *forma pauperis*[22] or refusing leave to appeal in *forma pauperis*[23] is a mere matter of *procedure* not finally deciding any rights of the parties and is not a "final order." An order extending the time for presenting an appeal under S. 5 of the Limitation Act[24] or an order granting a review for re-hearing an appeal[25] or an order rejecting an application made by the legal representatives of a deceased party to the brought on record[26] or an order refusing to interfere in revision with an order of the lower Court allowing a

('13) 21 Ind Cas 430 (431) (Cal). (Order deciding that suit as framed was not barred under Section 91 of the Chota Nagpur Tenancy Act and remanding the case for trial.)
('29) 16 AIR 1929 Mad 308 (308, 309) (DB). (Scheme suit under S. 92 — Trial Court finding temple to be private and dismissing suit — High Court on appeal finding temple to be public and remanding suit.)
('09) 31 All 545 (549, 550) (DB). (17 All 112 : 22 Ind App 1 (P C) distinguished.)
('30) 17 AIR 1930 Sind 254 (255) (DB). (Do.)
('07) 1907 Pun Re No. 52, p. 225 (226) (DB).
('78) 2 All 65 (67) (DB). (District Judge recalling execution application to his own file from that of the Sub-Judge and dismissing it — High Court remanding case for trial by the Sub-Judge.)
('24) 11 AIR 1924 Oudh 81 (81, 82) (DB). (Order merely disposing of a subsidiary issue and remanding case.)
('19) 6 AIR 1919 All 34 (34) : 42 All 176. (Order holding that there was no fraud on the part of the mortgagee in the registration so as to render the suit on the mortgage liable to dismissal.)
('78) 1 All 726 (727). (Order holding that execution was not barred and remanding it for disposal.)
† ('27) 14 AIR 1927 Pat 363 (368) : 6 Pat 282 (DB). (Order directing that a compromise decree passed under O. 23 R. 3 be set aside and the suit proceeded with from the stage at which the compromise was filed.)
('21) 8 AIR 1921 Lah 203 (204) : 2 Lah 106 (DB). (Dismissal of suit as wrongly framed — Order setting aside dismissal and remanding case.)
('16) 3 AIR 1916 Oudh 242 (243) : 19 Oudh Cas 36 (DB). (Question of limitation and estoppel decided without evidence — Decision reversed and case remanded for taking evidence — Order is not final.)
('98) 2 Cal W N ccci.
('25) 12 AIR 1925 Nag 349 (349, 350) : 22 Nag L R 132 (DB).
('39) 26 AIR 1939 Oudh 224 (224) : 14 Luck 675 : 182 Ind Cas 1007 (1007) (DB).
† ('36) 23 AIR 1936 Mad 311 (311) (DB).
('39) 26 AIR 1939 Mad 697 (699) (DB).
('39) 26 AIR 1939 Mad 95 (95) (DB). (But question of jurisdiction being of general importance case *held* fit to be certified under clause (c).)
[*See also* ('36) 23 AIR 1936 Oudh 205 (205) (DB). (Order under O. 41 R. 25.)
('35) 158 Ind Cas 1117 (1118) (DB) (Lah).
('36) 38 Pun L R 112 (112) (DB). (Order remanding execution proceeding.)]
[But see ('33) 20 AIR 1933 Bom 251 (251, 252) (DB). (Order under O. 41 R. 25 is not "final" order.)]

17. ('38) 25 AIR 1938 Rang 333 (334, 335) : 1938 Rang L R 330 (DB).
18. ('90) 15 Bom 155 (159) : 18 Ind App 6 (PC).
19. ('94) 17 All 112 (116) : 22 Ind App 1 (PC).
20. ('20) 7 AIR 1920 P C 86 (87) : 47 Cal 918 : 14 Sind L R 191 : 47 Ind App 124 (PC).
21. ('33) 20 AIR 1933 P C 58 (60) : 11 Rang 58 : 60 Ind App 76 (PC).
22. ('03) 8 Cal W N 296 (297) (SB).
23. ('42) 29 AIR 1942 Oudh 422 (423) (DB).
('27) 14 AIR 1927 Pat 175 (176) : 6 Pat 67 (DB).
('32) 19 AIR 1932 Rang 192 (192) : 10 Rang 504 (DB).
('25) 12 AIR 1925 Oudh 548 (549) (DB).
24. ('26) 13 AIR 1926 Pat 102 (102) (DB). (Order refusing extension and dismissing appeal is appealable to Privy Council as a "decree passed on appeal.")
[*See also* ('36) 23 AIR 1936 Oudh 110 (112) : 11 Luck 599 (DB). (Order refusing to excuse delay under S. 5, Limitation Act, and rejecting appeal as time-barred is not final order.)]
25. ('23) 10 AIR 1923 Mad 57 (57) (DB).
('32) 19 AIR 1932 All 318 (318) : 54 All 401 (DB).
26. ('14) 1 AIR 1914 Bom 6 (8) : 38 Bom 421 (DB).

co-decree-holder to join in executing the decree[27] or an order directing the lower Court to proceed with the execution and determine the questions in dispute in execution[28] are all interlocutory orders and are not appealable under this section. See also the under-mentioned cases.[29]

It has been held by the High Court of Allahabad[30] that where an application to set aside an *ex parte* decree is rejected and on appeal the order is set aside, the appellate order is a "final order" within this section inasmuch as such order finally terminates the proceeding for setting aside the *ex parte* decree.

It has been seen in Note 6 on S. 2 (2) that a decision that a suit is not barred by *res judicata* or by limitation or in other like manner, is not a decision on any *substantive rights* of the parties. Such an order will, however, be a "final order" where the question as to bar by *res judicata* or limitation disposes of the rights of the parties in the suit.[31]

5. "Order passed on appeal." — An order cannot be deemed to have been passed "on appeal" unless it is an order by a superior Court reversing, modifying or confirming the order of an inferior Court.[1] Two essentials must exist—*(a)* the relationship of superior and inferior Court and, *(b)* the power in the superior Court to reverse, affirm or modify, the decision of the inferior Court.[2] Again, the words "final order passed on appeal" are not equivalent to "final order passed in the exercise of final appellate jurisdiction" but imply orders disposing of an appeal at the hearing.[3]

Illustrations.

(1) *A* applies to the High Court to review its decision in an appeal before it. The High Court passes an order refusing the application for review. The order is not one "passed on appeal."[4] The

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27. ('22) 9 AIR 1922 Pat 611 (613) (DB). (It is a mere matter of procedure.)

28. ('43) 30 AIR 1943 Lah 140 (145, 146) (FB). (Order setting aside execution sale and remanding case for fresh proclamation and fresh proceedings is not final order.)
('19) 6 AIR 1919 Pat 383 (383) : 4 Pat L Jour 461 (DB).

29. ('37) 24 AIR 1937 All 566 (567) (DB). (Second appeal rejected and dismissed for want of prosecution—Application for restoration also dismissed—Application for leave to appeal from order dismissing application — No cardinal point decided, nor rights of parties adjudicated upon in that order—*Held* order was not final.)
('35) 22 AIR 1935 Lah 458 (459) (DB). (Order holding document excluded by lower Court admissible and remanding suit—Order not final.)
('38) 25 AIR 1938 Oudh 107 (110) : 14 Luck 13 (DB). (Order dismissing an appeal as premature cannot be said to be a final order within the meaning of Section 109.)

30. † ('33) 20 AIR 1933 All 15 (17) : 54 All 941 (DB). (Final order need not be in suit, it may be made in a proceeding arising out of a suit.)

31. ('19) 6 AIR 1919 Oudh 256 (257) : 21 Oudh Cas 336 (DB). (Limitation.)
('21) 8 AIR 1921 Cal 177 (178) (DB). (*Res judicata.*)
† ('09) 4 Ind Cas 459 (460, 462) (DB) (Cal).
('15) 2 AIR 1915 Cal 610 (610) (DB). (Setting aside dismissal of suit for default.)
('24) 11 AIR 1924 All 119 (121) : 45 All 741 (DB). (Order holding that application under O. 34 R. 6 is not statute barred.)
('27) 14 AIR 1927 Rang 20 (27) : 4 Rang 265 (DB). (Appeal to High Court dismissed as barred by limitation—Leave granted. NOTE. — This case is overruled on another point in AIR 1940 Rang 12: 1939 Rang L R 668 (FB).)

Note 5

1. ('11) 10 Ind Cas 444 (445) (DB) (Cal).
('25) 12 AIR 1925 Mad 243 (243, 244) (DB). (Order of the High Court on the insolvency side on appeal is order on appeal under Cl. 39, Letters Patent.)
2. † ('11) 11 Ind Cas 65 (65) (DB) (Cal).
('11) 9 Ind Cas 183 (185 to 187) (DB) (Cal).
3. ('42) 29 AIR 1942 Oudh 362 (365) (DB).
('14) 1 A I R 1914 Oudh 41 (42) : 16 Oudh Cas 264 (DB). (Order passed on application for review by Appellate Court is not "a final order passed on appeal.")
('33) 20 AIR 1933 Lah 690 (691) : 14 Lah 609 (DB). (Dismissal of appeal as having abated is final order on appeal.)
('32) 19 AIR 1932 All 318 (318) : 54 All 401 (DB).
✣ ('36) 23 AIR 1936 Pat 465 (467) : 15 Pat 659 (DB). (There is vast difference between an order made or a judgment passed on the appellate side of a Court and the final order passed on appeal — The latter may be included in the former but the former is necessarily not the same as the latter.)
4. (14) 1 AIR 1914 Oudh 41 (42) : 16 Oudh Cas 264 (DB).
('68) 10 Sutn W R 1 (3) (FB).
('66) 6 Suth W R Misc 102 (103) (FB).

reason is that the High Court is not asked to deal with any order of an *inferior* Court.[5] Nor does it dispose of the appeal at the hearing. Similarly, an order of the High Court refusing stay of execution of a decree[6] or an order refusing to restore an appeal dismissed for default[7] to set aside an *ex parte* appellate decree[8] or an order rejecting an application for amendment of an appellate decree[9] is not an order passed on appeal. Similarly, an order dismissing an appeal for non-prosecution is not a final order passed on appeal.[10]

(2) *A* applies to the High Court to pass a final decree according to the preliminary decree of the Privy Council. The order of the High Court on such application is not one "passed on appeal."[11]

(3) *A* applies to the High Court for leave to appeal in *forma pauperis* and the application is dismissed. He subsequently files another application to be allowed to deposit the court-fees and that is also dismissed. The last order of dismissal is not an order "passed on appeal."[12] The reason is that the appeal not having been admitted at all, the order in question could not be one passed "on appeal."

On the same principle as that mentioned in the last illustration, it has been held that an order rejecting an appeal for failure to furnish security for costs under O. 41 R. 10 is not an order passed 'on appeal.'[13] There is however a conflict of opinion whether an order refusing to admit an appeal after the period of limitation under S. 5 of the Limitation Act is an order passed 'on appeal.' According to the Bombay and Madras High Courts and the Chief Court of Oudh such an order is not one passed on appeal.[14] The Calcutta[15] and Patna[16] High Courts and the Punjab Chief Court[17] have held that the order is one passed on appeal within the meaning of cl. (a) of S. 109.

There is also a conflict of decisions as to whether an order passed by the High Court in the exercise of its powers of *revision* under S. 115 of the Code or in the exercise of its powers of *superintendence* under S. 15 of the High Courts Act, 1861 (24 & 25 Vict., C. 104) is one passed on appeal. The High Courts of Allahabad, Madras and Patna and the Judicial Commissioner's Court of Peshawar have held that it is not,[18] while the Calcutta High Court has held that it is.[19]

5a. Whether appeal to Privy Council lies against appellate order from which no second appeal lies. — The provisions of the Code which preclude a further appeal from various appellate orders deal with internal appeals in British India and do not affect the maintainability of an appeal to the *Privy Council* against such

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5. † ('11) 9 Ind Cas 183 (186) (DB) (Cal).
6. ('11) 10 Ind Cas 444 (445) (DB) (Cal).
7. ('17) 4 AIR 1917 All 313 (313) (DB).
('33) 20 AIR 1933 All 453 (453) (DB).
('24) 11 AIR 1924 Rang 209 (209) (DB).
('37) 24 AIR 1937 All 566 (566, 567) (DB). (Though it would be an order passed in the exercise of appellate jurisdiction.)
8. ('42) 29 AIR 1942 Mad 357 (357) (DB).
9. ('03) 30 Cal 679 (681) (DB).
10. ('42) 29 AIR 1942 Oudh 362 (365) (DB). (Such order is not one disposing of an appeal at the hearing.)
11. ('25) 12 AIR 1925 Mad 187 (187) (DB).
† ('32) 19 AIR 1932 Bom 90 (91 to 93) : 55 Bom 785 (DB). (In pursuance of Privy Council decree High Court takes accounts and passes a decree — High Court decree not one made on appeal.)
12. ('19) 6 AIR 1919 All 331 (331) (DB).
13. ('14) 1 A I R 1914 All 54 (54) : 36 All 325 (DB).
('10) 13 Oudh Cas 59 (61):5 Ind Cas 940(941) (DB). [But see ('32) 19 AIR 1932 All 312 (314): 54 All 390 (DB). (13 Oudh Cas 59 disapproved.)]
14. ('42) 29 AIR 1942 Mad 357 (357) (DB).
('08) 32 Bom 108 (109) (DB).
('36) 23 AIR 1936 Oudh 110 (112) : 11 Luck 599 (DB).
15. ('21) 8 AIR 1921 Cal 415 (416) (DB). (32 Bom 108 distinguished.)
16. ('26) 13 AIR 1926 Pat 102 (102) (DB). (*Obiter.*)
17. ('17) 4 AIR 1917 Lah 448 (448).
[*See also* ('27) 14 AIR 1927 Rang 20 (27) : 4 Rang 265 (DB). (NOTE —This case is overruled on another point in AIR 1940 Rang 12:1939 Rang L R 668 (FB).]
18. ('43) 56 Mad L W 385 (386).
('26) 13 AIR 1926 All 202 (202, 203) : 48 All 226 (DB).
('34) 21 AIR 1934 All 193 (201) (DB).
('36) 23 AIR 1936 Pat 465 (468):15 Pat 659 (DB).
('39) 26 AIR 1939 Pesh 26 (27) (SB).
19. ✣('11) 9 Ind Cas 183 (186, 187) (DB) (Cal).
('74) 21 Suth W R 263 (264) (SB). (Order made under S. 15 of High Courts Act.)
('11) 11 Ind Cas 65 (65) (DB) (Cal).

orders.[1] Thus, an order passed by the High Court in appeal from one of the appealable orders specified in S. 104 sub-s. (1) will be open to appeal to the Privy Council (notwithstanding the provisions of S. 104, sub-s. (2)) if the requirements of this section and S. 110 as to valuation etc., are satisfied.[2]

The decision of the High Court on appeal from an order of the District Court which under S. 4 sub-s. (2) of the Provincial Insolvency Act is 'final' subject to the right of appeal to the High Court under S. 75 of the Act, can be appealed against to the Privy Council. The reason is that when a right of appeal to one of the ordinary Courts of the country is given, the procedure, orders and decrees of that Court will be governed by the ordinary rules of the Civil Procedure Code.[3] (See also Note 2.)

6. "Any other Court of final appellate jurisdiction." —Suppose a "final order" is passed by a District Court on appeal and that no second appeal lies from such order. Is the order to be treated as an order of a Court of final appellate jurisdiction within the meaning of cl. (a)? In *Official Receiver, Madura* v. *Kuppuswami Chettiar*[1] it was held by the Madras High Court that an order passed by the District Court on appeal under S. 75 of the Provincial Insolvency Act was not the order of a Court of final appellate jurisdiction within the meaning of cl. (a) of this section. The decision proceeds on the ground that the expression "appellate jurisdiction" includes revisional jurisdiction and inasmuch as the order of the District Court was subject to the revisional jurisdiction of the High Court, the District Court cannot be considered to be a Court of final appellate jurisdiction. In *Saadatmand Khan* v. *Phul Kuar*,[2] however, a direct appeal from an appellate order of a District Court was entertained and disposed of by the Privy Council. But this decision was distinguished by the Madras High Court in the above case on the ground that the mere fact that an appeal is heard by the Privy Council does not amount to a ruling that such appeal is maintainable.

7. Orders passed by the High Court in the exercise of original civil jurisdiction. — In the undermentioned case,[1] where the High Court refused to issue a *writ of certiorari* to the Board of Revenue against enhancement of rent under the Madras Estates Land Act, it was held that the order was one passed under the original jurisdiction of the High Court and came under cl. (b) of this section. See also commentary on Cls. 15 and 40 of the Letters Patent.

8. Limitation. — See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Article 179.

9. Prerogative of the Crown. — See Section 112.

10. Certificate of fitness — Clause (c). — This section must be read with O. 45 Rr. 2 and 3. There are two kinds of certificates —

(1) In a case coming under cls. (a) and (b) of S. 109, a certificate that, as regards amount or value and nature, the case fulfils the requirements of section 110.

(2) In a case coming under cl. (c), that it is *otherwise* a fit one for appeal to His Majesty in Council.

Note 5a

1. ('12) 15 Oudh Cas 55 (57) : 15 Ind Cas 2 (3) (DB).
('34) 21 AIR 1934 Oudh 291 (292) (DB).
('24) 11 AIR 1924 P C 95 (100) : 51 Ind App 72 : 51 Cal 361 : 20 Nag L R 33 (PC).
2. ('13) 40 Cal 635 (648) : 40 Ind App 140 : 19 Ind Cas 296 (300) (PC).
('24) 11 AIR 1924 P C 95 (100) : 51 Ind App 72 : 51 Cal 361 : 20 Nag L R 33 (PC).
('34) 21 AIR 1934 Oudh 291 (292) (DB).
Also see S. 104, Note 8.
3. ('34) 21 AIR 1934 P C 81 (82) : 61 Ind App 158 : 12 Rang 194 (PC). (A I R 1916 P C 21 : 39 Mad 617 : 43 Ind App 192 (PC) followed.)
[*See also* ('37) 24 AIR 1937 Mad 930 (931) (DB).]

Note 6

1. ('37) 24 AIR 1937 Mad 930 (932, 934).
2. ('98) 20 All 412 (418) : 25 Ind App 146 (PC).

Note 7

1. ('38) 25 AIR 1938 Mad 722 (722, 723) : I L R (1938) Mad 816 (DB).

It is not necessary that an order, in order to be appealable under this clause, should be a *final* one. *Any* decree or order, whether coming under clauses (a) and (b) or not, is appealable under this clause if it is certified to be a fit one for appeal.[1] Thus, even an *interlocutory* order may be appealable if there are questions fit for a certificate,[2] though Courts will hesitate to grant leave if it should involve needless expense at that stage.[3]

This clause is intended to meet special cases such as those in which the point in dispute is not measurable in money though it may be of great public or private importance[4] and the grant of a certificate is in the *discretion* of the Court; but it must be *judicially* exercised[5] and sparingly used.[6] It is, however, not final and is open to review by the Privy Council, if necessary.[7] Nor does the mere assent of the respondent to an appeal justify the grant of an erroneous certificate.[8]

The *test* to determine whether a case is a fit one to be certified under this clause is to see whether the point involved is of *great public* or *private importance*[9] or is of

Note 10

1. ('19) 6 AIR 1919 Oudh 7 (8) (DB). (Leave should be sparingly granted.)
('02) 24 All 174 (178) : 29 Ind App 40 (PC).
('06) 10 Cal W N 7 (8) (PC). (Omission to certify—Appeal incompetent.)
[*See* ('39) 181 Ind Cas 947 (948) (FB). (Appeal from Federal Court.)]
2. ('40) 27 AIR 1940 All 38 (39, 40): I L R (1940) All 11 (DB). (Order superseding the arbitration.)
† ('22) 9 AIR 1922 Cal 130 (133) (DB).
('11) 10 Ind Cas 444 (446) (DB) (Cal). (Order refusing to stay execution.)
('15) 2 AIR 1915 Cal 624 (625) (DB). (Order granting temporary injunction against execution of mortgage decree.)
† ('27) 14 AIR 1927 Cal 481 (483, 488) (DB). (Order removing a receiver appointed in suit under S. 92, C. P. Code.)
('37) 24 AIR 1937 Sind 217 (217) (DB).
3. ('10) 8 Ind Cas 1189 (1190) (DB) (Low Bur).
[*See also* ('32) 19 AIR 1932 Rang 137 (138, 139): 10 Rang 335 (DB). (Remand for findings — Premature at that stage for certificate.)]
4. ('42) 29 AIR 1942 Oudh 283 (285) (DB). (When the question involved is not of public importance leave to appeal can be granted under S. 109 (c) only in special cases in which the matter in dispute is incapable of being valued in money — Question of mesne profits is not such a question.)
('41) 28 AIR 1941 All 211 (212) : I L R (1941) All 364 (DB). (Matter must be of great general importance or of great private importance and must not be measurable in terms of money.)
('34) 21 AIR 1934 Lah 515 (516) (DB). (A I R 1921 P C 25 : 44 Mad 293 : 48 Ind App 31 (PC) followed.)
('37) 24 AIR 1937 All 167 (168) (DB).
5. ✣('11) 10 Ind Cas 444 (445) (DB) (Cal).
('11) 10 Ind Cas 439 (440) (DB) (Cal).
('15) 2 AIR 1915 Cal 624 (625) (DB).
('37) 24 AIR 1937 All 167 (168) (DB).
6. ('40) 27 AIR 1940 All 38 (40): I L R (1940) All 11 (DB).
('11) 10 Ind Cas 444 (445) (DB) (Cal).
('33) 20 AIR 1933 All 4 (6) : 54 All 459 (DB). (23 All 227 followed.)
('27) 14 AIR 1927 Pat 363 (369) : 6 Pat 282 (DB).
('33) 20 AIR 1933 Oudh 394 (395) (DB). (Appeal *prima facie* falling under S. 109 (a) will not ordinarily be converted into one under S. 109 (c) merely because it fails to reach money value required by Section 110.)
7. ✣('01) 23 All 415 (420) : 28 Ind App 182 (PC).
('01) 23 All 227 (231, 232) : 28 Ind App 11 (PC).
8. ('01) 23 All 227 (232) : 28 Ind App 11 (PC).
('32) 19 AIR 1932 Rang 189 (190) : 10 Rang 499 (DB). (Non-opposition immaterial—Duty of Court to be satisfied as to right of appeal.)
('01) 23 All 220 (227) : 28 Ind App 28 (PC).
9. ('43) 30 AIR 1943 Oudh 266 (268) (DB).
('42) 29 AIR 1942 All 258 (259) : I L R (1942) All 753 (DB). (Question whether the amount awarded to a person by the U. P. Improvement Trust in the land acquisition proceedings was awarded by way of interest or damages is not a question of general importance.)
('42) 29 AIR 1942 Cal 498 (505) (SB). (Where there is no question of great public importance and the suit is one for property only and so definable in money value, the case does not come within the principles of S. 109 (c).)
('42) 29 AIR 1942 Oudh 174 (176) (DB). (Revision at applicant's request treated as second appeal — Second appeal found not maintainable—Applicant held could not canvass maintainability of revision before Privy Council — Case held did not come within Section 109 (c).)
('41) 28 AIR 1941 All 211 (212) : I L R (1941) All 364 (DB). (Refusal to stay a criminal complaint not matter of great private importance — Certificate not granted.)
✣('01) 23 All 227 (231) : 28 Ind App 11 (PC).
('33) 20 AIR 1933 Bom 260 (262) (DB).
† ('33) 20 AIR 1933 All 4 (6, 7): 54 All 459 (DB). (The case involved matters of principle and of importance to Hindu community—Case certified.)
('33) 20 AIR 1933 All 8 (10) : 54 All 431 (DB). (Appeal to Privy Council in cases of questions of law of importance may be justified—Case certified.)
('34) 21 AIR 1934 All 58 (60) : 56 All 277 (DB). (Not certified.)
('34) 21 AIR 1934 Pat 564 (565) (DB). (Substantial question of law not sufficient — Litigation should not be made oppressively expensive.)
('32) 19 AIR 1932 Bom 218 (221). *(Obiter.)*

such a nature that a decision thereon might result in a *precedent governing numerous cases*[10] or whether there are any other *exceptional circumstances* justifying the grant of a certificate,[11] as for example where there are several suits in which the same question

('23) 10 AIR 1923 Rang 71 (73) : 11 Low Bur Rul 335 (DB). (The decision as to doctrine of '*lis pendens*' is not of general interest.)
('23) 10 AIR 1923 Mad 602 (603) (DB). (Question of no general interest — Leave granted in another case on same question — No ground for leave — 5 Ind Cas 583 not followed.)
('16) 3 AIR 1916 Mad 686 (687) (DB).
('14) 1 AIR 1914 Mad 140 (140) (DB).
('17) 4 AIR 1917 All 93 (93) (DB). (Construction of a will—Not of general public importance — 28 All 488 : 33 Ind App 97 (PC) distinguished.)
('27) 14 AIR 1927 Rang 20 (27): 4 Rang 265 (DB). (Question affecting period of limitation for appeals to a Bench from the judgment of the original side of Rangoon High Court — Certificate granted — NOTE.—This case is overruled on another point in AIR 1940 Rang 12 : 1939 Rang L R 668 (FB).)
('27) 14 AIR 1927 Lah 181 (182): 8 Lah 269 (DB). (Case under S. 66A (2) of Income-tax Act of 1922—Case not certified.)
('30) 17 AIR 1930 Lah 109 (110) (DB). (Do —Not of general or of public importance.)
('29) 16 AIR 1929 Nag 265 (266) (DB). (Question when debt becomes bad debt under the Income-tax Act is one of great importance to commercial public.)
('29) 16 AIR 1929 Nag 336 (337) (DB). (In this case question under Income-tax Act was not of public importance.)
('21) 8 AIR 1921 P C 25 (26): 44 Mad 293: 48 Ind App 31 (PC). (Clause (c) contemplates cases such as those relating to religious rights and ceremonies, to caste and family rights or such matters as the reduction of the capital of companies, as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money.)
† ('11) 10 Ind Cas 444 (446) (DB) (Cal).
('35) 22 AIR 1935 All 424 (424) (DB).
('35) 22 AIR 1935 All 464 (466) (DB). (Case under S. 66-A, Income-tax Act of 1922—Question whether income received as maintenance allowance is taxable — Case held to be fit one for appeal to Privy Council.)
('35) 22 AIR 1935 Rang 113 (115) : 13 Rang 123 (DB). (Case involving determination of rights of large body of persons with regard to management of mosque—Question of construction of trust deed also involved — Leave granted.)
('33) 20 AIR 1933 Lah 637 (638) (DB). (Income-tax Act (XI of 1922), S. 66A—All questions referred to High Court answered in favour of assessee — Commissioner not allowed to support assessment on other grounds — Case is not one fit for appeal.)
('36) 23 AIR 1936 Pat 465 (468) : 15 Pat 659 (DB). (Application under O. 21 R. 100 in anticipation of delivery of possession — Court deciding it under Rr. 99 and 101 of O. 21 — *Held*, case did not raise any question of great public or private importance.)
('36) 23 AIR 1936 Rang 65 (65, 66) : 14 Rang 86. (Question whether accession to mortgaged property within meaning of S. 70, T. P. Act, means accession by mortgagor or his representative or accession by any one whatsoever, held to be question of great public importance.)
('36) 23 AIR 1936 Sind 68 (69) (DB). (Reference by Income-tax Officer as to whether interest paid to partner on capital borrowed is allowable as deduction from profits earned is not of great public or private importance.)
('37) 24 AIR 1937 Sind 217 (218) (DB). (Question whether certain tribal Chief residing within British territory is Ruling Chief under Ss. 84 and 87, C. P. Code, is not of importance.)
('39) 26 A I R 1939 Pat 564 (565) : 1939 Pat W N 341 (343) (DB). (Refusal by trial Court to dispose of certain issues before going into merits —Dismissal of revision petition—Order refusing to interfere in revision does not raise any point of importance or difficulty.)
('39) 26 AIR 1939 Oudh 224 (225) : 14 Luck 675 : 182 Ind Cas 1007 (1007) (DB).

10. ('43) 30 AIR 1943 Nag 76 (77) (DB). (Question whether power of adoption of a Hindu widow governed by Bombay School (in Berar) is extinguished the moment the son died leaving a widow and whether subsequent remarriage of the son's widow does not revive the power.)
('42) 29 AIR 1942 All 258 (259) : I L R (1942) All 753 (DB). (Question whether amount awarded by U. P. Improvement Trust was by way of interest or damages held not likely to arise in numerous cases.)
('23) 10 AIR 1923 Mad 232 (233, 234) (DB). (Private importance means private importance to "both" parties to litigation.)
('13) 21 Ind Cas 783 (789) (DB) (Bom). (Suit for money— Result of suit of no importance to others —No certificate granted.)
† ('23) 10 AIR 1923 Mad 125 (126) (DB).
('72) 9 Beng L R 423 (425). (Suit for less than Rs. 10,000 — Decision likely to govern other suits contemplated.)
('22) 9 AIR 1922 Mad 34 (35) (DB). (Interpretation of Section 12 of the Madras Estates Land Act.)
('23) 10 AIR 1923 Cal 451 (453) (DB).
('24) 11 AIR 1924 Oudh 81 (83) (DB).
('39) 26 A I R 1939 Mad 95 (96) (DB). (Question whether jurisdiction of Civil Court barred under Sea Customs Act — Question awaiting decision in other suits pending in the province.)
('36) 23 A I R 1936 Rang 65 (65, 66) : 14 Rang 86 (DB).
[*See also* ('32) 19 A I R 1932 Bom 218 (221). (Application under Cl. 15, Letters Patent (Bombay.)]

11. ('39) 181 Ind Cas 947 (948) (F C). (Leave to appeal from decision of Federal Court — Special circumstances must be shown — Special circumstances, what are, depend on merits of each case.)
[*See* ('29) 16 A I R 1929 Oudh 243 (244) (DB). (Under O. 45 R. 3, C. P. Code.)]

is involved and the grant of a certificate in some only of those cases would result in contradictory decrees.[12] Even the fact that a point is of general importance is not enough to support the grant of a certificate under this clause if it has been settled by the Privy Council,[13] or by a Full Bench of the High Court concerned.[14] Another consideration which the Court must keep in view in granting the certificate is that litigation is not made oppressively expensive and the elucidation of the real issues in the case by a trial of the suit is not unduly postponed or delayed.[15]

A question will be one of *public importance* if it affects not merely the parties to the case[16] but also large bodies of persons or communities.[17] The mere existence of a substantial question of law is not sufficient.[18] A question of *private importance* means private importance to *both* parties to the litigation and not merely to one of them.[19] But the fact that the question raised affects third parties is no ground of fitness.[20]

The following questions have been held to be of public importance :

(1) Right of procession claimed by Mahomedans against Hindus.[21]

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12. ('19) 6 AIR 1919 Cal 118 (119, 120) (DB).
('10) 5 Ind Cas 583 (584) (All).
('15) 2 A I R 1915 All 129 (130) : 37 All 124 (DB). (Two appeals arising out of the same suit.)
('85) 11 Cal 740 (745).
For other cases of exceptional circumstances in which leave can be granted see also the following cases :
('19) 6 A I R 1919 Oudh 7 (8) (DB). (Where two Judges of the High Court have arrived at diametrically opposite conclusions on the vital question on which the suit should be decided.)
('24) 11 AIR 1924 Pat 468 (470,471) (DB). (Reversal based on evidence not before lower Court—Procedure unusual—Value involved very large.)
13. ('42) 29 A I R 1942 Oudh 174 (177) (DB). (Question whether certain provision is retrospective.)
('40) 27 AIR 1940 All 38(40): ILR(1940) All 11 (DB).
† ('29) 16 A I R 1929 All 339 (340, 341) (DB). (Question of cow sacrifice.)
('29) 16 AIR 1929 Mad 780 (781) (DB).
('26) 92 Ind Cas 1013 (1015) (DB) (All).
See also Section 110 Note 17.
14. ('28) 15 AIR 1928 Mad 448 (450) (DB).
('13) 18 Ind Cas 305 (306) (DB) (All). (Certificate granted—The judgment of the Full Bench was not unanimous.)
('37) 24 AIR 1937 Sind 217 (218) (DB). (The fact that a Full Bench decision of one High Court differs from a decision of a Full Bench of another High Court is not in itself sufficient ground to make a case a fit one for appeal to the Privy Council under the provisions of S. 109 (c), C. P. Code.)
See also Section 110 Note 17.
[*See also* ('36) 23 AIR 1936 Pesh 194 (195) (DB). (No inconsistency in rulings of Court — Different High Courts holding divergent views regarding similar matters is no ground for certifying case as fit one for appeal to Privy Council.)]
15. ('40) 27 AIR 1940 All 38 (40) : ILR (1940) All 11 (DB). (One of the matters to be taken into consideration must be whether the permission to appeal is or is not calculated to unduly delay the disposal of the substantive dispute between the parties on its merits.)
† ('36) 23 AIR 1936 Mad 311 (313) (DB).
('34) 21 AIR 1934 Pat 564 (565) (DB).
16. ('21) 8 AIR 1921 Oudh 30 (31) (DB). (Exercise of discretion under S. 90; Evidence Act—No substantial question of law involved.)
17. ('43) 30 AIR 1943 Oudh 266 (268) (DB).
('42) 29 AIR 1942 Oudh 422 (423) (DB).
('42) 29 AIR 1942 Oudh 362 (366) (DB).
('42) 29 AIR 1942 Oudh 283 (284)(DB). (Question whether construction put by the High Court on an agreement settling dispute between claimants of deceased mahant is correct or not is not of any benefit to the public.)
('41) 28 AIR 1941 Oudh 245 (246) (DB).
('40) 27 A I R 1940 Oudh 378 (380) : 15 Luck 716 (DB). (Question whether adverse possession of a mosque has been established does not come under S. 109 (c).)
('23) 10 AIR 1923 Nag 272 (272) (DB).
('30) 17 A I R 1930 Nag 91 (92) : 12 Nag L R 170 (DB). (A I R 1921 P C 25 : 44 Mad 293 : 48 Ind App 31 (PC) followed.)
('13) 7 Sind L R 92 (93) : 23 Ind Cas 793 (793) (DB). (Or threatens the religious or civil rights of any class of community.)
('27) 14 AIR 1927 Nag 63(64) (DB). (Inheritance of "Lawajama" in Berar — Whether governed by Inam Rules or by Law of Pensions is a question of public importance.)
('28) 15 AIR 1928 All 220 (221) : 50 All 640 (DB).
('28) 15 AIR 1928 Rang 187 (187): 6 Rang 43 (DB).
18. ('43) 30 AIR 1943 Oudh 266 (268) (DB).
('40) 27 AIR 1940 All 38 (40) : ILR (1940) All 11 (DB).
† ('31) 18 AIR 1931 Mad 642 (643, 644) (DB). (Substantial question of law of some difficulty — Not sufficient in absence of general and public importance)
('21) 8 AIR 1921 Pat 33 (34) : 6 Pat L Jour 125 (DB).
('34) 21 AIR 1934 Pat 564 (565) (DB).
19. ('43) 30 AIR 1943 Oudh 266 (268) (DB).
† ('23) 10 AIR 1923 Mad 232 (234) (DB).
('21) 11 AIR 1924 Mad 231 (231, 232) (DB). (Disputes about temples—Certificate was granted.)
('22) 9 AIR 1922 Mad 34 (35) (DB).
20. ('29) 16 AIR 1929 Mad 696 (698) (DB).
21. ('30) 17 AIR 1930 All 121 (122): 52 All 329 (DB).

(2) Construction of an agreement between two rival temples affecting rights of great importance.[22]

(3) The nature of the constitution of a community and whether the constitution amounts to a trust.[23]

(4) The nature of the resolution to be passed by a company for the alteration of its memorandum of association.[24]

(5) Whether certain kinds of permanent tenures in Malabar carry with them the incident of forfeiture on alienation.[25]

(6) The extent of control acquired by one who has built a Parsi Fire Temple.[26]

(7) The status and legal position of one who has collected the debts of a deceased person in relation to the beneficiaries and others by virtue of his holding a succession certificate.[27]

(8) The necessity or otherwise for registration of documents containing an option of re-purchase.[28]

(9) The burden of proof of family necessity for a debt contracted by the manager of joint Hindu family and the liability of the mortgagor's share alone for such debts.[29]

(10) Whether the fraud of the mortgagor alone in registration proceedings would affect the mortgagee's right of suit.[30]

(11) Whether a suit by a Hindu widow is one of a representative character.[31]

(12) The form of ritual in an important public temple.[32]

(13) The question of jurisdiction of a Civil Court.[33]

(14) The question whether in a suit for partition, the value for purposes of appeal to the Privy Council is the value of the entire property or the value of the share claimed.[34]

The questions raised in the following cases were held not sufficient to justify the grant of a certificate under this clause :

(1) Where it would not be right to call upon a party whose financial interest in the matter is too small to incur the risk of the costs of the appeal.[35]

(2) Where the question is merely a matter of practice, such as an order for the inspection of documents.[36]

(3) Where the question is merely the sufficiency of evidence in proof of a particular fact[37] or where the case merely rests upon evidence and there are concurrent findings of fact.[38]

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22. ('24) 11 AIR 1924 Mad 231 (232) (DB).
23. ('28) 15 AIR 1928 Nag 202 (203) (DB).
24. ('03) 27 Bom 415 (418) (DB).
25. ('23) 10 AIR 1923 Mad 443 (444) (DB).
26. ('05) 6 Bom L R 286 (287) (DB)
27. ('16) 3 AIR 1916 All 253 (253):38 All 188 (DB).
28. ('27) 14 AIR 1927 Bom 19 (20, 21) : 50 Bom 753 (DB).
29. ('13) 18 Ind Cas 305 (305, 306) (DB). (All).
30. ('19) 6 AIR 1919 All 34 (35):42 All 176 (DB).
31 ('34) 21 AIR 1934 All 198 (201) (DB).
32. ('39) 26 AIR 1939 Mad 847 (848):ILR (1939) Mad 967 : 1939 Mad W N 816 (817) (DB).
33. ('39) 26 AIR 1939 Mad 95 (95) (DB).
34 ('35) 22 AIR 1935 Pat 266 (267) (DB).
35. † ('23) 10 AIR 1923 Mad 232 (233, 234) (DB). ('09) 3 Ind Cas 786 (787) (DB) (Cal).
36. † ('72) 9 Bom H C R 398 (401, 402) (SB).
37. ('42) 29 AIR 1942 Mad 368 (369) (DB). (Value to be put upon statement is a question of fact—No leave.) ('19) 6 AIR 1919 All 97 (98) (DB). ('29) 16 AIR 1929 Nag 85 (87). (Pure questions of fact alone—No leave.)
38. ('41) 28 AIR 1941 P C 106 (109) (PC). ('16) 3 AIR 1916 Lah 87 (88,:1916 Pun Re No. 64 (DB). ('01) 28 Cal 190 (194). ('96) 20 Bom 699 (702, 703) (DB). ('89) 16 Cal 753 (755) : 16 Ind App 125 (PC). ('91) 18 Cal 23 (30) : 17 Ind App 122 (PC). ('02) 25 Mad 215 (219, 220) : 29 Ind App 38 (PC). ('01) 24 All 174 (177, 178) : 29 Ind App 40 (PC). (Special leave to appeal, when granted.) ('05) 1905 Pun Re No. 59 p. 210 (211) (DB). (1900) 1900 Pun Re No. 61 p. 284 (237) (DB). (Applicant contended there was no bid, no sale, no deposit under S. 306, C. P. Code (1882).)

(4) Whether the non-joinder of certain parties is fatal to the suit or appeal.[39]
(5) Whether a valid acknowledgment was given for the purpose of Art. 1 of Sch. 1 of the Stamp Act.[40]
(6) Where the discretion of the High Court was properly exercised in refusing to excuse the delay of the appellant.[41]
(7) The right of a party to open windows in a loft.[42]
(8) Whether a suit to set aside a fraudulent decree could be brought by a person not a party to the decree.[43]
(9) Whether a suit is maintainable to set aside a decree on the ground that it was obtained by perjured evidence.[44]
(10) Whether a certain interpretation of a decree by a Court operates as *res judicata* between the parties.[45]
(11) Whether a receiver should be appointed in a particular case.[46]
(12) Failure to record reasons for granting a review.[47]
(13) The construction of a section of an Act (the Tenancy Act) not directly affecting persons other than the parties.[48]
(14) An order reversing the decision of the lower Court refusing to set aside a dismissal for default.[49]
(15) The dismissal of an appeal in a suit for defamation.[50]
(16) The interpretation of a document which is not of general or public importance.[51]

See also the undermentioned cases[52] where it was held that the case was not a fit one for appeal to the Privy Council.

In the case of orders suspending advocates from practice, the practice of the Allahabad High Court has been to grant leave to appeal under clause (c).[53]

[*See* ('90) 17 Cal 246 (249) (PC).]
Also see S. 110 Notes 2 & 16.

39. ('19) 6 AIR 1919 All 104 (104) (DB).
40. ('24) 11 AIR 1924 Mad 616 (617) (DB).
41. ('21) 8 AIR 1921 Cal 94 (95) (DB).
42. ('29) 16 AIR 1929 Bom 341 (343):53 Bom 552.
43. ('12) 14 Ind Cas 626 (626) (Low Bur).
44. ('20) 7 AIR 1920 Pat 119 (121) (DB).
45. ('11) 8 Ind Cas 485 (485) (DB) (All).
46. ('11) 10 Ind Cas 439 (441) (DB) (Cal).
† ('33) 20 AIR 1933 Pat 293 (295):12 Pat 723 (DB).
47. (1900) 27 Cal 333 (335) : 27 Ind App 79 (PC).
48. ('21) 8 AIR 1921 Pat 33 (34) : 6 Pat L Jour 125 (DB).
49. ('14) 1 AIR 1914 Oudh 223 (225) (DB).
50. ('28) 15 AIR 1928 Rang 187 (188):6 Rang 43 (DB). (Suit was against District Council.)
51. ('34) 21 AIR 1934 All 58 (60):56 All 277 (DB). (Interpretation was held not to be of general or public importance.)
52. ('42) 29 AIR 1942 Mad 368 (369) (DB). (The fact that large stakes are involved in an appeal would not in itself be a ground for granting leave).
('42) 29 AIR 1942 Oudh 174 (177) (DB). (Revision, at applicant's request, treated as second appeal — Second appeal found not maintainable—Case held could not come within S. 109 (c), the applicant being estopped from asserting maintainability of revision, before the Privy Council).
('41) 28 AIR 1941 All 333 (335) : I L R (1941) All 573 (DB). (Case held not fit one for appeal to Privy Council in view of the change in the law that had been recently made and under which the question raised by the applicant became of academic interest only.)
('40) 27 AIR 1940 Mad 810 (811) (DB). (Leave asked for purpose of raising new point for first time in appeal to His Majesty in Council cannot be granted.)
('39) 26 AIR 1939 Pesh 26 (27). (An order setting aside an execution sale on consideration of facts.)
('36) 23 AIR 1936 Mad 311 (312) (DB). (Whether O. 1 R. 3, C. P Code, can be so interpreted as to permit of joinder of causes of action when such joinder is not permissible under O. 2 R. 3, C.P.C., and whether on a proper construction of O 1 R. 3 the allegations in a plaint allege the same cause of action or series of acts or tran-actions.)
('36) 23 AIR 1936 Oudh 110 (112, 113) : 11 Luck 599 (DB). (An order rejecting the memorandum of appeal as being time-barred.)
('35) 22 AIR 1935 All 424 (424, 425) (DB). (An order rejecting an application for review of judgment for failure of the applicant to plead that he has discovered new and important matter.)
53. ('34) 21 AIR 1934 All 898 (901) : 56 All 702 (DB). (Applicant filed fee certificate on the strength of promissory note.)
('33) 20 AIR 1933 All 18 (18) (DB).

11. Form of certificate. — See Order 45 Rule 3.

11a. Rules of the Judicial Committee. — See Appendix IV.

12. Appeal to the Privy Council in criminal cases. — See Section 112. See also the Authors' Commentaries on the Code of Criminal Procedure, 2nd (1941) Edn., Section 404 Note 2.

Value of subject-matter.

110. [S. 596.] In each of the cases mentioned in clauses (a) and (b) of section 109, the amount[6] or value[3] of the subject-matter of the suit in the Court of first instance[3] must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal[8] to His Majesty in Council must[2] be the same sum or upwards,

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,[11]

and where the decree or final order appealed from affirms[13] the decision of the Court immediately below[15] the Court passing such decree or final order, the appeal must involve[16] some substantial question of law.[17]

[1877, S. 596; See O. 45 Rr. 3, 4 and 5.]

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Valuation of the subject-matter in the Court of first instance.
4. Date of valuation.
5. Mesne profits, interest and costs after date of suit.
6. Sum actually at stake may not represent the true value.
7. Value as laid in the plaint. See Note 3.
8. Valuation of subject-matter in dispute on appeal.
9. Several appeals from a single decree.
10. Effect of abandonment of portion of claim after grant of certificate.
11. "Or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value."
12. Appeal from decree of affirmance must involve a substantial question of law.
13. Affirmance — Meaning of.
14. Cross-appeals.
15. "Immediately below."
16. "Involve."
17. Substantial question of law.
18. Privy Council practice when there are concurrent findings of fact. See Section 112.
19. Review. See Order 45 Rule 3.
20. Appeal. See Order 45 Rule 3.

NOTE to the Synopsis. See the Notes indicated for the following topics:

"Claim or question" *in futuro*. See Note 11.

Consolidation of appeals for valuation. See O. 45, R. 4 Notes.

Costs — Privy Council practice as to. See S. 112, Note 8.

Execution matters. See Note 2.

Form of application for leave. See O. 45 Rr. 2 and 3.

Powers of High Court subsequent to granting of leave. See O. 45 and S. 112, Note 11.

Section 110, how far governs S. 109, cl. (c). See Note 2 and S. 109, Notes 2 and 10.

Subject-matter being not capable of valuation. See Note 2.

Subject-matter being under appealable value. See Note 2.

Valuation—Alteration and estoppel. See Note 3.

Valuation — Mortgage suits — Amount claimed or property involved. See Note 8.

Valuation—Variation pendente lite. See Note 8.

Value—Costs, if part of. See Note 5.

Value—Meaning of. See Notes 3 and 6.

Word "and" in first paragraph—Meaning of. See Note 2.

('33) 20 AIR 1933 All 225 (226) : 55 All 246 (DB).
('37) 24 AIR 1937 All 167 (168) (DB). (But leave cannot be granted as a matter of course and the applicant has to satisfy the High Court that the case is otherwise a fit one for appeal to His Majesty in Council—Where some points of law are raised in the case a certificate can be granted under Section 109 (c).)

1. Legislative changes. — Under Orders in Council dated 10th April 1838 the only condition enforced with respect to Privy Council appeals was that the value of the subject-matter *in dispute in appeal* to His Majesty shall amount to Rs. 10,000 at least. The additional conditions about the same value being necessary in the Court of first instance and the existence of a substantial question of law were first introduced by S. 5 of the Privy Council Appeals Act (VI of 1874).[1] This was later incorporated in S. 596 of the Code of Civil Procedure, 1877, corresponding to the present section.

The words "final order" have been newly added after the word "decree." See Note 4 on section 109.

2. Scope of the section. — It is the object of the section not to encourage appeals to the Privy Council where the value of the subject-matter in dispute is small[1] or where, though the value is high, the dispute is only about a question of *fact* about which there have been *concurrent* findings in the Courts below.[2] The section accordingly enacts that every appeal under S. 109, clauses (a) and (b) must be of a certain value and, in cases of decrees of affirmance, must *also* involve a *substantial question of law*.[3] The mere fact that large stakes are involved in the appeal is not sufficient for the grant of leave.[4] No leave to appeal can be granted under this section when the subject-matter in dispute is incapable of valuation in terms of money.[5] The subject-matter in dispute must be of the appealable value *both* in the Court of first instance *and* on appeal to His Majesty in Council. The word "and" in the first paragraph of the section cannot be construed as "or."[6]

The terms of this section must be strictly construed.[7] No real mischief can arise from doing so, inasmuch as cases not coming within this section, if worthy of being tried by a higher tribunal, can always be dealt with under S. 109, clause (c) and under S. 112.[8]

Though the first paragraph speaks of the "subject-matter of the *suit*" it must be

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Section 110 — Note 1

1. † ('92) 15 Mad 237 (239) (FB).

Note 2

1. (1900) 23 All 227 (232) : 28 Ind App 11 (PC).
2. ('01) 28 Cal 190 (194) (SB).
('32) 19 AIR 1932 Lah 121 (122): 13 Lah 338 (DB).
Also see Notes 10 and 16.
3. ('41) 28 AIR 1941 Pat 269 (271) : 20 Pat 459 (SB).
('01) 23 All 227 (231): 28 Ind App 11 (PC).
✣('01) 23 All 415 (418, 419): 28 Ind App 182 (PC).
('25) 12 AIR 1925 P C 159 (160) : 52 Cal 650 : 52 Ind App 207 (PC). (Petitioner praying leave in respect of decision involving a claim of Rs. 3,000 — Petition cannot be granted.)
('22) 9 AIR 1922 Pat 555 (556) (DB).
† ('33) 20 AIR 1933 All 4 (6, 7): 54 All 459 (DB).
[*See* ('42) 29 A I R 1942 Cal 537 (537) (DB). (Judgment of reversal—Appealability depends on its being decree or final order and the value being Rs. 10,000 or upwards.)]
4. ('42) 29 AIR 1942 Mad 368 (369) (DB).
5. ('91) 18 Cal 378 (381) (DB). (Suit for restitution of conjugal rights though the suit was valued about Rs. 10,000.)
('33) 20 AIR 1933 All 4 (6, 7) : 54 All 459 (DB).
('22) 9 AIR 1922 Lah 131 (132): 2 Lah 297 (DB). (Suit for declaration that plaintiff belongs to Rajput caste.)
('70) 14 Suth W R 299 (299). (Order of appointment as guardian of person and property — Value of minor's estate does not represent value of guardianship.)
('35) 22 AIR 1935 Rang 113 (114): 13 Rang 123 (DB).
6. ('01) 24 All 174 (177) : 29 Ind App 40 (PC).
† ('31) 18 AIR 1931 P C 125 (126, 127) (PC).
('29) 16 AIR 1929 Nag 75 (76) (DB).
('01) 1901 All W N 19 (19) (DB).
7. ('25) 12 AIR 1925 P C 159 (160) : 52 Cal 650 : 52 Ind App 207 (PC).
✣('32) 19 AIR 1932 Mad 46 (47, 52) (DB).
('32) 19 AIR 1932 Rang 189 (190) : 10 Rang 499 (DB). (Court should be satisfied that the conditions are fulfilled though petition is not opposed. See Note 10 on Section 109.)
('01) 23 All 415 (419) : 28 Ind App 182 (PC).
8. ('25) 12 AIR 1925 P C 159 (160) : 52 Cal 650 : 52 Ind App 207 (PC).
('03) 27 Bom 415 (418) (DB).
('03) 31 Cal 57 (74) : 30 Ind App 238 (PC). (S. 110 does not control S. 109 (c).)
('03) 31 Cal 305 (310) : 31 Ind App 24 (PC). (Do.)
('38) 25 AIR 1938 Rang 415 (416) (DB).
[*See* ('07) 30 Mad 185 (188, 190) : 34 Ind App 93 (PC).]

deemed to include proceedings other than suits which may result in an appealable decree or order.[9]

As to *consolidation* of suits, see Order 45 Rule 4.

3. Valuation of the subject-matter in the Court of first instance. — In order that an appeal may lie to the Privy Council under the first paragraph of this section, it is one of the essential conditions that the value of the subject-matter of the suit in the Court of first instance should be Rs. 10,000 or upwards.[1] Such value must be the value at the *date of the suit* and not a *future* increase or decrease thereof.[2] Thus, it will not include interest or mesne profits or costs *after* the date of the suit.[3] Nor will it include a subsequent accretion to the property in suit by alluvion, increase in value, etc.[4]

The value, again, must be the *market value* as ascertained by ordinary commercial standards, of the property or of the detriment to the applicant's interests if the right claimed is negatived.[5]

Illustrations.

(1) *A* sues for possession of land from *B*. *B* denies *A*'s title thereto. The value of subject-matter of the suit is the *market value* of the land and not the value as calculated for fiscal purposes under S. 7 of the Court-fees Act.[6]

(2) *A* sues for *partition* and possession of his one-third share of certain joint property worth Rs. 15,000. The value of the subject-matter of the suit is the market value of the *plaintiff's share*

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9. † ('81) 3 All 633 (635) (FB). (Execution proceedings for mesne profits valued at Rs. 16,000 though value of suit less than Rs. 10,000—Order appealable.)
('70) 13 Moo Ind App 490 (496) (PC).

Note 3

1. ('42) 29 AIR 1942 Oudh 174 (176) (DB).
2. † ('16) 3 AIR 1916 Mad 985 (987) : 39 Mad 843 (DB).
('31) 18 AIR 1931 P C 125 (127) (PC).
('36) 23 AIR 1936 Lah 31 (32).
3. See Note 5.
4. ('28) 15 AIR 1928 Mad 448 (449) (DB). (Land under cultivation subject-matter of valuation — Value of house sites in its vicinity should not be considered.)
*('29) 16 AIR 1929 Nag 75 (79) (DB). (New machinery brought on property during pendency of suit for specific performance—Its value cannot be taken into account.)
('19) 6 AIR 1919 Pat 486 (486) (DB). (Increase in value *pendente lite*.)
('10) 5 Ind Cas 645 (646) (DB) (Cal). (Subsequent accretion.)
5. ('18) 5 AIR 1918 Mad 1099 (1100) (DB).
('05) 1905 Pun Re No. 60, p. 211 (212) : 1905 Pun L R No. 150, p. 514 (DB).
('24) 11 AIR 1924 Lah 82 (82, 83) : 4 Lah 185 (DB).
('92) 15 Mad 237 (239) (FB). (Legislature's intention as to the meaning of the words "value of the subject-matter in the Court of first instance.")
('80) 4 Bom 515 (527) (FB). (Value for court-fees, not value for purposes of appeal to Privy Council.)
('77) 2 Bom 219 (229) (DB). (Do.)
(1857) 8 Moo Ind App 193 (196, 197) (PC).
(1860) 7 Moo Ind App 428 (429, 430) (PC).
('01) 6 Bom L R 403 (406) (DB).
† ('19) 6 AIR 1919 Pat 305 (307) : 4 Pat L Jour 415 (DB). (Sale in execution of a mortgage decree for over Rs. 10,000—Application by puisne mortgagee of certain items worth Rs. 4000 to set aside sale—Value of subject-matter is Rs. 4000.)
('03) 31 Cal 301 (304) (SB). (Suit for injunction in respect of buildings worth Rs. 10,000 — Value of suit is the value of buildings.)
('72) 18 Suth W R 21 (22). (Conflicting claims to the waters of a flowing stream — The value was held to be the extent to which plaintiff's interest would be deteriorated if the right could not be established.)
*('18) 5 AIR 1918 Mad 632 (633, 634) (DB). (Value of irrigation rights — Detriment or injury to the party if the rights are negatived.)
('01) 26 Bom 319 (325) (DB). (Question as to the destination of the income of the residue until the residuary attained the age of twenty-five years—The value of subject-matter is value of income and not that of residue.)
('39) 26 AIR 1939 Oudh 1 (1) (DB). (Market value usually determined with reference to instances of sale. Multiples prescribed by the U. P. Encumbered Estates Act not applicable as they were fixed for purposes of that particular Act.)
† ('39) 43 Cal W N 432 (434) (DB).
('37) 24 AIR 1937 Bom 181 (182) : I L R (1937) Bom 705 (DB).
('35) 22 AIR 1935 Rang 113 (114) (DB). (Loss or detriment suffered by passing of decree not capable of being estimated in money — Section does not apply.)
6. ('27) 14 AIR 1927 Rang 304 (306) : 5 Rang 499 (DB). (Suit for redemption and possession.)
('1859) 8 Moo Ind App 268 (269) (PC).
[*See also* ('18) 5 AIR 1918 Mad 1099 (1100) (DB). (Suit for cancellation of sale deed.)]

of the properties, i. e., Rs. 5,000.[7] But the decree may *involve* a question relating to the *whole property*. The second paragraph of the section will apply in such a case.[8]

(3) *A* sues *B* for foreclosure of a mortgage for Rs. 7,000 executed by *B* to *A*. The amount due on the date of suit is Rs. 14,000 but the market value of the property is Rs. 9,000. The value of the subject-matter of the suit will be Rs. 9,000. The reason is that, in a foreclosure suit, the value cannot *exceed* the value of the property to be foreclosed. But if the amount sued for is *less* than the value of the property, only the value of the subject-matter will be the *amount sued for*.[9]

(4) *A* sues *B*, the mortgagor and *C*, the puisne mortgagee of certain items, on a mortgage for Rs. 12,000. *C* contends that the items mortgaged to him, the market value of which is Rs. 2,000, are not liable to satisfy *A's* mortgage. The value of the subject-matter of the dispute between *A* and *C* is the *whole mortgage amount* of Rs. 12,000. The reason is that the entire liability under the mortgage can be enforced against *any* of the items mortgaged and that if *C* wants to redeem the mortgage he will have to pay the whole amount due under the mortgage and not merely the amount *proportionate* to the value of the items mortgaged to him.[10] Where, however, *C does not claim through B* but does so adversely to him under a paramount title, he is not concerned with the mortgage at all and is not bound, like a subsequent mortgagee, to redeem it. The value of the dispute in such a case can be only the value of the property claimed by *C* under the paramount title.[11]

(5) *A* sues *B* for enforcement of an annuity of Rs. 125 *per annum* charged upon certain properties. The value of the subject-matter of the suit is the value of the annuity and not the value of the property upon which the annuity is charged. The value of an annuity of Rs. 125 *per annum* can by no reasonable method of valuation be worth Rs. 10,000.[12] But a claim for a rent of Rs 275 *per month*[13] or a rent of Rs. 1,500 per year[14] will be worth more than Rs. 10,000. See also the undermentioned case.[15]

(6) *A* is a maintenance holder with a right to reside in a certain house on condition that if she is asked to vacate it she should be paid Rs. 400 a month in lieu of the right of residence. *A* is sued in ejectment. The subject-matter of the suit is the value of the house and not the difference between the value of the house and Rs. 400 a month which she will get.[16]

It follows from what has been said above that the applicant for leave to appeal is not bound by the *fiscal standards* under the Court-fees and Suits Valuation Acts, by which he has valued the suit, but is entitled to show the actual or market value of the claim made.[17] Where, however, he has once *valued the claim at its market*

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7. ('90) 12 All 506 (509) (DB).
('16) 3 AIR 1916 Pat 157 (158) (DB).
('96) 20 Mad 289 (292) (DB).
('96) 22 Bom 315 (316) (DB).
('25) 12 AIR 1925 Bom 137 (138) : 49 Bom 149 (DB). (Same law applies to partnership suits.)
† ('20) 7 AIR 1920 Bom 418 (419) : 44 Bom 101 (DB).
('04) 6 Bom L R 403 (406) (DB). (Suit seeking declaration of title to property valued at R. 12,000 —Relief sought by establishment of title to undivided third share (value Rs. 4000) and a partition on that basis with mesne profits.)
† ('31) 18 AIR 1931 Rang 138 (139) : 9 Rang 52 (DB).
Also see Section 15 Note 13.

8. See Note 11.

9. † ('11) 13 Cal L Jour 505 (506) (DB).

10. ('27) 14 AIR 1927 Pat 391 (391) (DB). (The dispute involves a right on the one hand and a liability on the other in respect of a sum exceeding Rs. 10,000.)
✣ ('23) 10 AIR 1923 Cal 387 (388, 389) (DB).

11. ('16) 3 AIR 1916 P C 18 (20):38 All 488 (493): 43 Ind App 187 (PC).

12. ('23) 10 AIR 1923 P C 102 (102) : 26 Oudh Cas 216 (PC).
[*See also* ('25) 12 AIR 1925 Cal 414 (415) (DB). (Suit for rent under Ss. 30 and 52 of the Bengal Tenancy Act—Amount at twenty years purchase was taken as the valuation.)]

13. ('23) 10 AIR 1923 Bom 23 (23) (DB). (Twenty years purchase.)

14. † ('22) 9 AIR 1922 P C 257 (258) : 45 Mad 475 : 49 Ind App 211 (PC).

15. ('36) 62 Cal 992 (995) : 163 Ind Cas 731 (731) (DB). (Royalty of Rs. 3200 payable per annum being a liability of recurring nature is worth more than Rs. 10,000.)

16. ('32) 19 AIR 1932 Bom 543 (544) : 56 Bom 526 (DB).

17. ('74) 1 Ind App 317 (320) (PC).
✣ ('33) 20 AIR 1933 All 15 (16) : 54 All 941 (DB).
('33) 20 AIR 1933 All 177 (177) : 54 All 858 (DB). ("Property" in para. 2 of S. 110 need not necessarily be the subject-matter in dispute in the suit.)
('17) 4 AIR 1917 Cal 496 (497) : 44 Cal 119 (DB).
('27) 14 AIR 1927 Cal 225 (226) (DB).
('31) 18 AIR 1931 Cal 417 (419) : 58 Cal 66 (DB).

value,[18] or where he, having a discretion to value his claim in alternative ways, chooses to value his claim in a particular way,[19] he cannot, thereafter, be allowed to show that such value did not represent the real value. It has, however, been held in the undermentioned case[20] that the plaintiff is not absolutely precluded even in such a case from contending that his valuation in the plaint is wrong but that the Court will treat his admission as a strong piece of evidence against him. Where a plaintiff sued for accounts and valued the suit at Rs. 101 for the purpose of court-fees and filed the same in the Court of the Second Class Subordinate Judge whose pecuniary jurisdiction extended only up to Rs. 5000, it was held by the Bombay High Court[21] that the value of the subject-matter could not be shown to be anything beyond Rs. 5,000. The basis of the decision was that the plaintiff having deliberately instituted the suit in the Court of the Second Class Subordinate Judge must be taken to have conceded the subject-matter to be a maximum of Rs. 5,000 and could not be allowed to turn round and say that it was over Rs. 10,000.[22]

A valuation of the property by the plaintiff which is admitted or is not objected to by the defendant, cannot be questioned by him (defendant) subsequently for the purpose of securing admission of an appeal to the Privy Council,[23] or of opposing an application for leave to appeal to the Privy Council.[24] In considering the value of the subject-matter of the suit, the value of the several reliefs should *all* be taken into consideration[25] but not *ancillary reliefs*.[26] Thus, in a suit for declaration and damages the value of the subject-matter is the value of the damages claimed as well as of the declaration asked for.[27] In a suit for specific performance of a contract to sell and for possession, the relief of possession is only ancillary to the specific performance and its value cannot therefore be taken into consideration.[28]

4. Date of valuation. — The valuation of the subject-matter of the suit in the Court of first instance is the value at the *date of suit*.[1] As to the valuation of the subject-matter in dispute on appeal, see Note 8.

† ('32) 19 AIR 1932 Mad 125 (127) : 55 Mad 106 (DB). (Court-fee value represents minimum market value.)
('18) 5 AIR 1918 Mad 1099 (1100) (DB).
('72) 18 Suth W R 494 (497).
('16) 3 AIR 1916 Bom 66 (68) : 40 Bom 477 (481, 482) (DB).
('04) 31 Cal 301 (303) (SB).
[*See also* ('37) 24 AIR 1937 Bom 326 (329): ILR (1937) Bom 402 (DB).
('37) 24 AIR 1937 Cal 292 (296) (DB). (A mere mistake in stating the value in the plaint where the other side has not been prejudiced by having to resort to a different forum does not amount to estoppel in law so as to prevent the plaintiff from showing that the real value of the subject-matter of the suit in the Court of first instance was Rs. 10,000 or upwards.)]

18. ('39) 26 AIR 1939 All 695 (695, 696) (DB).
† ('23) 10 AIR 1923 Mad 125 (126, 128) (DB).
('26) 13 A I R 1926 Rang 138 (139) : 4 Rang 92 (DB).
(1865) 10 Moo Ind App 313 (320, 321) (PC).
(73) 19 Suth W R 191 (191).
('31) 133 Ind Cas 415 (416) (DB) (All).
('30) 17 AIR 1930 Cal 737 (738) (DB). (Plaintiff knowingly undervaluing claim cannot raise it for Privy Council appeal.)
19. ('34) 21 AIR 1934 Cal 809 (810) (DB).
20. ('27) 14 AIR 1927 Mad 862 (862) (DB).
21. † ('13) 15 Bom L R 1021 (1032, 1033) (DB).
22. ('27) 14 AIR 1927 Bom 83 (83, 84) : 50 Bom 839 (DB).
('31) 18 AIR 1931 Cal 417 (419) : 58 Cal 66 (DB).
23. † ('27) 14 AIR 1927 Mad 862 (862) (DB). (Party taking advantage of other party's valuation cannot object to it.)
('27) 14 AIR 1927 Cal 418 (419) (DB). (Do.)
('10) 14 Cal W N 872 (873) (DB). (Do.)
('15) 2 AIR 1915 Oudh 166 (167, 168) (DB).
('70) 14 Suth W R 62 (63).
('17) 4 AIR 1917 P C 66 (68) (PC).
✣ ('23) 10 AIR 1923 Oudh 93 (96): 26 Oudh Cas 24 (DB).
('25) 12 AIR 1925 Mad 1223 (1224) (DB).
('01) 23 All 227 (232) : 28 Ind App 11 (PC).
24. ('41) 28 AIR 1941 Pat 269 (270) : 20 Pat 459 (SB).
25. *See* ('19) 6 A I R 1919 Cal 118 (119, 120) (DB).
16. *See* ('29) 16 AIR 1929 Nag 75 (79) (DB).
27. ('19) 6 AIR 1919 Cal 118 (119, 120) (DB).
28. ('29) 16 AIR 1929 Nag 75 (79) (DB).

Note 4

1. See Note 3.
('34) 21 A I R 1934 Rang 65 (65) : 12 Rang 164 (DB).
('37) 24 AIR 1937 Pesh 61 (62) (DB).

5. Mesne profits, interest and costs after date of suit. — Till recently, there was a divergence of opinion among the High Courts in India on the following questions :

(1) whether in a suit for money the "value of the subject-matter, in the Court of first instance" included *interest* from the date of suit to the date of the decree or any later date[1] and

(2) whether in a suit for land or other immovable property and *mesne profits* the "value of the subject-matter in the Court of first instance" included *future mesne profits* after the date of suit; and if so, up to what period?[2]

The conflict has now been set at rest by the decision of the Privy Council in *Mangamma* v. *Mahalakshmamma*[3] in which it has been held that neither interest nor mesne profits after the date of suit could be included for the purpose of ascertaining the value of the subject-matter of the suit under S. 110. Their Lordships entirely approved of the reasoning and decision of the Madras High Court in *Subramania Aiyar* v. *Sellammal.*[4] See also the undermentioned cases.[5]

The *costs* of the suit are in no sense the subject-matter of the suit and ought not to be added to the subject-matter in order to bring the valuation up to the appealable amount.[6]

Note 5

1. ('12) 39 Cal 1037 (1040) (DB). (Interest after decree not included.)
('75) 24 Suth W R 442 (442) (DB). (Do.)
('26) 13 AIR 1926 Rang 45 (46): 3 Rang 405 (DB). (Interest up to date of decree included.)
('23) 10 AIR 1923 Mad 135 (136) (DB). (Do.)
('18) 5 AIR 1918 Pat 566 (567, 568): 3 Pat L Jour 317 (DB). (Interest after decree not included.)
('29) 16 AIR 1929 Nag 75 (78). (Interest after suit is in the discretion of the Court and cannot be included.)
('21) 60 Ind Cas 523 (524) (DB) (Pat). (Valuation must be as at the date of decree.)
('21) 8 AIR 1921 Pat 229 (230, 232): 6 Pat L Jour 596 (DB). (Mortgage suit—Interest could be added up to the days of grace but not afterwards.)
('23) 10 AIR 1923 All 78 (79) : 45 All 133 (DB). (Suit amount plus interest up to end of period fixed for payments is the value of the subject-matter.)
('23) 10 AIR 1923 Nag 239 (240) (DB). (Do.)
('02) 24 All 174 (177) : 29 Ind App 40 (PC). (Interest after decree cannot be considered.)
(1859) 8 Moo Ind App 262 (264) (PC). (Subsequent interest cannot be added.)
('16) 3 AIR 1916 Mad 985 (987) : 39 Mad 843. (Interest after suit cannot be added.)

2. ('29) 16 AIR 1929 Pat 547 (547) (DB). (Includes up to date of decree.)
('06) 33 Cal 1286 (1288) (DB). (Mesne profits subsequent to suit are to be taken into consideration.)
('10) 14 Cal W N 872 (874) (DB). (Mesne profits subsequent to suit are to be allowed for valuation.)
('21) 8 AIR 1921 Pat 115 (116, 117) : 6 Pat L Jour 246 (DB). (Mesne profits from date of suit to delivery of possession or for three years after decree whichever is less are to be included.)
('28) 107 Ind Cas 828 (829) (DB) (Pat). (Also future mesne profits up to the date of the decree of the trial Court.)
('18) 5 AIR 1918 Pat 377 (377) : 3 Pat L Jour 377 (DB). (Mesne profits up to date of appellate decree to be included.)
('16) 3 AIR 1916 Mad 985 (989): 39 Mad 843 (DB). (Mesne profits after suit cannot be added.)

3. ('30) 17 AIR 1930 P C 44 (44, 45) : 53 Mad 167 : 57 Ind App 56 (PC).
[*See* ('31) 18 AIR 1931 P C 22 (22) : 57 Ind App 279: 10 Pat 86 (PC). (Following AIR 1930 P C 44: 53 Mad 167 : 57 Ind App 56 (PC).)]

4. ('16) 3 AIR 1916 Mad 985 (989) : 39 Mad 843.

5. ('33) 20 AIR 1933 Mad 401 (402) : 56 Mad 886 (DB).
('37) 24 AIR 1937 All 169 (170) : I L R (1937) All 405 (DB). (Value of subject-matter in trial Court less than Rs. 10,000 — Mesne profits accruing till date of certificate for leave to appeal cannot be added to original value for purpose of obtaining certificate.)
('36) 23 AIR 1936 Lah 31 (32) (DB). (Suit property worth less than Rs. 10,000 — Decree for mesne profits of suit property obtained in separate suit—Decretal amount cannot be added.)
('37) 24 AIR 1937 Bom 326 (329) : I L R (1937) Bom 402. (Construction of words, "some claim or question to or respecting property of like amount or value"—Increase in value of property between date of trial and date of appeal is not to be taken into account.)
('33) 20 AIR 1933 Nag 22 (23) : 28 Nag L R 345. (Interest from date of suit "*die datus*" (date fixed for payment) in mortgage suits has to be taken into account — AIR 1930 P C 44 : 53 Mad 167 : 57 Ind App 56 (PC) and AIR 1931 P C 22 : 10 Pat 86 : 57 Ind App 279 not considered.)

6. ('42) 29 AIR 1942 Pesh 6 (7) (DB).
('41) 28 AIR 1941 Pat 255 (258): 20 Pat 481 (FB).
('27) 14 AIR 1927 Pat 328 (329) : 6 Pat 444.
('33) 20 AIR 1933 Nag 22 (23) : 28 Nag L R 345.
('69) 13 Moo Ind App 85 (103) (PC).
(1860) 8 Moo Ind App 262 (264) (PC).
('92) 15 Mad 237 (240) (FB).

6. Sum actually at stake may not represent the true value.—In *Radhakrishna Ayyar* v. *Sundaraswamier*,[1] their Lordships of the Privy Council said as follows:

> "In the first place, the sum of money actually at stake may not represent the true value. The proceeding may in many cases, such as a suit for an instalment of rent or under a contract, raise the entire question of the contract relations between the parties and that question may, settled one way or the other, affect a much greater value, and its determination may govern rights and liabilities of a value beyond the limit."

See also Note 11.

7. Value as laid in the plaint. — See Note 3.

8. Valuation of subject-matter in dispute on appeal.—Another essential condition for the applicability of the first paragraph of the section is that the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must also be Rs. 10,000 or upwards. Such amount or value is the amount or value of the subject-matter in dispute *at the date of the decree of the High Court* under appeal.[1] It follows that where an appeal is sought to be filed against a decree allowing a claim for money or mesne profits against the appellant, interest or mesne profits up to the date of the decree should be taken into account in calculating the value of the appeal.[2] But interest or mesne profits *after* the date of the decree cannot be taken into account.[3] Suppose, the proposed appeal is against the *dismissal* of a claim by the High Court, either wholly or partially. It is clear that the value of the appeal would be the value of the dismissed claim. The main decisions relating to the valuation of such claim may be summarised as follows:

(1) Where a suit is decreed by the trial Court but dismissed by the High Court in appeal and the plaintiff seeks to appeal to the Privy Council, interest after the decree of the trial Court cannot be taken into account in valuing the appeal to the Privy Council.[4] In such a case, the plaintiff seeks a restoration of the trial Court's decree. The grant of subsequent interest is within the *discretion* of the Court and cannot form part of plaintiff appellant's *claim*.

(2) A suit for money is decreed partially by the trial Court and the defendant appeals to the High Court. The plaintiff files cross objections. The High Court allows the defendant's appeal and dismisses the plaintiff's cross-objections, with the result that the plaintiff's whole claim stands dismissed. The plaintiff wants to appeal to ths Privy Council. In calculating the value of such appeal, interest after the institution of the suit cannot be taken into account, such interest being within the *discretion* of the Court and not capable of being part of the plaintiff's *claim*.[5]

Note 6

1. ('22) 9 AIR 1922 P C 257 (258) : 45 Mad 475 : 49 Ind App 211 (PC).
[*See also* ('33) 20 AIR 1933 All 4 (6, 7) : 54 All 459 (DB). (Subject-matter in dispute is not necessarily the same as subject-matter of suit or appeal — Former may not be estimable in value though latter are.)]

Note 8

1. ('32) 19 AIR 1932 Lah 526 (527) (DB).
2. ('41) 28 AIR 1941 Pat 255 (256):20 Pat 481 (FB).
('34) 21 AIR 1934 Rang 65 (66) : 12 Rang 164 (DB).
('61) 8 Moo Ind App 165 (168).
3. ('26) 13AIR1926Bom265(265):50 Bom 160(DB).
('18) 5 AIR 1918 Mad 1178 (1178) (DB). (Interest after decree cannot be allowed to be included.)
4. ('42) 29 AIR 1942 Mad 535 (538) : ILR (1942) Mad 618 (DB). (Interest subsequent to date fixed for payment under mortgage decree not to be taken into account)
('41) 28 AIR 1941 Pat 255 (259): 20 Pat 481 (FB). (Observation of Dawson-Miller C. J. in AIR 1921 Pat 229 : 6 Pat L Jour 596, not approved.)
(1861) 8 Moo Ind App 262 (264).
[*See* ('20) 7 AIR 1920 All 202 (203) : 42 All 445. (*Obiter* — (1879) 4 App Cas 270 distinguished.)]
5. ('33) 20 AIR 1933 Mad 401 (402, 403) : 56Mad 886 (DB).

(3) Where a suit is decreed by the trial Court and dismissed by the High Court on appeal, in valuing a proposed appeal by the plaintiff to the Privy Council, the costs awarded by the trial Court cannot be taken into consideration. Such costs are not part of the subject-matter in dispute.[6]

(4) Where a suit in the original Court for Rs. 22,000 is decreed by the High Court on appeal, for Rs. 13,000 and the plaintiff wishes to appeal to the Privy Council, the value of the subject-matter of the proposed appeal would be Rs. 9000. The plaintiff will not be entitled to add to this amount interest after the institution of the suit and costs of the proceedings.[7]

(5) Where a plaintiff's claim for mesne profits was decreed by the trial Court but dismissed by the High Court on appeal and the plaintiff wished to appeal to the Privy Council, it was held that in calculating the value of the appeal to the Privy Council, the plaintiff was entitled to include mesne profits up to the date of the High Court's decree.[8]

The meaning of the words "in dispute" is illustrated by the following example :

Illustration.

A sues *B* on breach of contract for recovery of Rs. 8,000 paid as advance, and of Rs. 7,000 as damages. The Court of first instance passes a decree in *A*'s favour for the recovery of Rs. 5,000 paid as advance and of Rs. 2,000 as damages. On appeal to the High Court, the decree for Rs. 5,000 is upheld but the claim for damages is dismissed. Is *A* entitled to apply for a certificate for leave to appeal to the Privy Council? No; the decree for Rs. 5,000 having been *upheld* it can no longer be *in dispute in A's appeal*. The subject-matter of the dispute can therefore be only the disallowed claim for damages, namely, for Rs. 7,000, which is less than the appealable value.[9]

See also the undermentioned cases.[10]

9. Several appeals from a single decree. — Where, in a suit to set aside different alienations by a Hindu widow, the plaintiff reversioner obtained a decree in his favour in the first Court and on separate appeals being filed by the alienees, the High Court drew up one decree under R. 93 of the Madras Civil Rules of Practice (old R. 105) and the plaintiff applied for leave to appeal to His Majesty in Council, it was held that the application must be considered as if a separate decree had been passed in each appeal, and that, accordingly, leave could be granted only in those appeals in which the subject-matter was over Rs. 10,000 in value.[1]

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6. ('42) 29 AIR 1942 Pesh 6 (7) (DB).
('61) 8 Moo Ind App 262 (264).
7. ('42) 29 AIR 1942 Pesh 6 (7) (DB).
8. ('18) 5 AIR 1918 Pat 377 (377) (DB). (Calcutta practice followed—Madras practice not followed.)
9. † (20) 7 AIR 1920 All 22 (22) (DB).
[*See also* ('19) 6 A I R 1919 All 104 (104) (DB). (One defendant alone appeals to High Court — Value of contest becoming reduced.)]
10. ('35) 157 Ind Cas 605 (606) (DB) (Cal). (Suit for possession of garden on basis of lease and in alternative for refund of premium — Suit valued at Rs. 10,000—Decree for one-third of the garden — Defendant applying for leave to appeal to Privy Council — Plaintiff objecting that value of appeal would be only one-third of Rs. 10,000—*Held* that as the original claim in the alternative was for refund of Rs. 10,000, the question whether that amount should or should not be refunded to the plaintiffs would also be a question in the contemplated appeal in case the Privy Council should think fit and proper to dismiss the claim for possession and hence the matter involved was of the requisite valuation.)
('38) 25 AIR 1938 Mad 352 (353) (SB). (Application for leave to appeal to Privy Council from decision of High Court on effect of proviso 2 to S. 4 (2), Income tax Act — Assessee as planter carrying on large business in Mysore State—Actual amount of tax involved in appeal Rs. 3500—Still, leave held should be granted as the question will arise year after year.)
('36) 23 A I R 1936 P C 212 (218) (PC). (In this appeal from Ontario, the Privy Council interpreted the words "where the matter in controversy in any case exceeds the sum or value of 4000 dollars" which occurred in S. 1 of the Privy Council Appeals Act of Ontario and held that the true test was what was at stake on the appeal.)

Note 9

1. ('19) 6 AIR 1919 Mad 275 (275) : 42 Mad 228 (DB).

10. Effect of abandonment of portion of claim after grant of certificate. — Where a would-be appellant, *bona fide* intending to appeal in respect of the whole amount decreed against him, obtains leave to appeal to His Majesty in Council, the appeal will not be rendered incompetent by the mere fact that at the hearing of the appeal he withdraws a part of his appeal thereby reducing the amount in dispute to one below the appealable value.[1]

11. "Or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value." — Where the value of the subject-matter of the suit in the Court of first instance or the value of the subject-matter in dispute on appeal to the Privy Council is less than Rs. 10,000, no certificate can be granted, as has been seen already, under the first paragraph of the section. But a certificate can be granted even in such a case under the second paragraph of the section if the decree or final order involves some claim or question to or respecting property of the amount or value of Rs. 10,000 or upwards.[1]

The words "some claim or question to or respecting property" must be interpreted to mean "some claim or question to, or respecting, property *additional to, or other than the actual subject-matter in dispute in the appeal.*"[2] The leading case on the point is *Subramania Aiyar* v. *Sellammal.*[3]

The distinction in the applicability of the first and second paragraphs of the section has been thus expressed by Srinivasa Aiyangar, J., in the said case :

> "We have to take both the clauses together so as to give a meaning to both. In my judgment the first clause applies to cases where the decree awards a particular sum, or property of a particular value, or refuses that relief, i. e., to cases where the *object matter* in dispute is of a particular value. In fact the words "objects in dispute," are used in the provisions relating to appeals from Guernsey. If the *operation of the decision is confined to the particular object matter clause (2) does not apply*, and unless the case satisfies the conditions of clause (1) there is no right of appeal. If the decision, beyond awarding relief in respect of the particular object-matter of the suit *affects rights in other properties* clause (2) would apply."[4]

The decision in *Subramania Aiyar* v. *Sellammal*[4] has been approved by their Lordships of the Privy Council in *Mangamma* v. *Mahalakshmamma.*[5] The contrary

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† ('02) 6 Cal W N 41 (41, 42) (DB). (Three separate suits involving same question—Not consolidated—Value of each to be Rs. 10,000.)

('16) 3 A I R 1916 Mad 943 (944) (DB). (Batch of suits—Value of each to be Rs. 10,000, though common judgment.)

[But see ('36) 23 AIR 1936 All 832 (833) : I L R (1937) All 105 (DB). (Two separate appeals filed in High Court from same suit by different sets of defendants—Appeals disposed by practically one judgment and on ground common to all defendants—One appeal valued above Rs. 10,000 and other below Rs. 10,000—High Court can certify that latter case is fit one for appeal to Privy Council under S. 109 (c).)]

Also see O. 45 R. 4 Note 1.

Note 10

1. ('95) 22 Cal 434 (442, 443) : 22 Ind App 68 (PC).

Note 11

1. ('37) 24 AIR 1937 All 169 (170) : I L R (1937) All 405 (DB). (The condition laid down in the second paragraph is independent and self-sufficient and is not in any way dependent on the fulfilment of both or either of the conditions in the first paragraph.)

† ('39) 26 AIR 1939 Mad 742 (743) : ILR (1939) Mad 838 : 1939 Mad W N 607 (608) (DB). (Construction of agreement embodied in compromise decree—Dispute as to — Decision affecting party's interest in property worth over Rs. 10,000—Right to grant of certificate.)

2. †('16) 3 AIR 1916 Mad 985 (988) : 39 Mad 843 (DB).

('21) 8 AIR 1921 Low Bur 48 (48, 49) : 11 Low Bur Rul 152 (153, 154, 155). (Property other than that forming part of the actual subject-matter in dispute and which would be affected by the final decree or order.)

('29) 16 AIR 1929 Nag 75 (77) (DB).

('13) 35 All 445 (447) : 21 Ind Cas 617 (617, 618) (DB).

('37) 24 AIR 1937 Bom 326 (329) : I L R (1937) Bom 402 (DB).

[*See also* ('23) 10 AIR 1923 Rang 71 (72, 73) : 11 Low Bur Rul 335 (DB).]

3. †('16) 3 AIR 1916 Mad 985 (988) : 39 Mad 843 (DB).

4. ('16) 3 AIR 1916 Mad 985 (989) : 39 Mad 843.

5. ('30) 17 AIR 1930 P C 44 (45) : 53 Mad 167 : 57 Ind App 56 (P C).

view which was apparently taken by Maclean, C. J., in *Dalgleish* v. *Damodar*,[6] was an *obiter dictum* and, in view of the Madras decision above referred to as approved by the Privy Council, is no longer law.

A claim or question to or respecting other property cannot be said to be *involved* under this paragraph unless the decree or order has the effect of *estopping*, either by the rule of *res judicata* or otherwise, a party from claiming rights in, or agitating the same question in respect of such other property.[7] It follows that the claim or question must be one arising between the *parties* to the suit in which the appeal is taken.[8] It also follows that a claim or question which is *not essential or relevant* for the decision[9] or is too remote[10] or is in *gremio futuri* and may never materialise[11] cannot be said to be *involved* directly or indirectly in the decree or order.

Illustrations.

(1) *A* sues *B* for recovery of Rs. 230 as rent due to him, in respect of holding *X* basing his claim on the ground that *A* is the zamindar and *B*, the tenant, of holdings *X*, *Y* and *Z* in the zamindari. *B* denies that he is a tenant. A decree is passed by the High Court dismissing *A*'s suit on the ground that there is no relationship of landlord and tenant between the parties. Here the effect of the decree is to bar the plaintiff from recovering any rent from the defendants not only in respect of holding *X* but also in respect of holdings *Y* and *Z*. The decree, therefore, *involves* a claim or question to or respecting the holdings *Y* and *Z*.[12]

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6. ('06) 33 Cal 1286 (1288) (DB).

7. ('18) 5 AIR 1918 Mad 1178 (1179) (DB).
('29) 16 AIR 1929 Mad 780 (780).
('32) 19 AIR 1932 Mad 125 (128) : 55 Mad 106 (DB).
('22) 9 AIR 1922 Pat 611 (613) (DB). (Question relating to portion of decree which is time-barred.)
('23) 10 AIR 1923 Cal 451 (452) (DB). (It should govern the decision in other matters—In this case it was held that it was not possible to hold that the decree involved a question respecting such other property.)
('23) 10 AIR 1923 Rang 71 (72, 73) : 11 Low Bur Rul 335 (DB). (A decision regarding validity of alienation by co-heir does not affect a different alienation by other co-heirs to others—Paragraph 2 has no application.)
† ('07) 34 Cal 466 (469) (DB). (Question affecting claimant's property other than that under reference under the Land Acquisition Act.)
('15) 2 AIR 1915 All 446 (446) (DB). (Suit relating to land valued at Rs. 1,000 — Other lands were likely to be affected by the decision—*Held* litigation did not involve a claim to property exceeding Rs. 10,000.)
[*See* ('35) 22 AIR 1935 Pat 266 (267). (The decision on the question of impartibility of the estate raised as a bar to the suit for partition is a decision which possibly affects the whole estate notwithstanding that the judgment can only take effect as *res judicata* between the parties to the litigation. Hence leave to appeal to the Privy Council should be granted in such a case.)]
[*See also* ('66) 6 Suth W R Misc 4 (5).
('37) 24 AIR 1937 Lah 95 (96).]
[But see ('04) 1904 Pun Re No. 75, p. 255 (257): 1904 Pun L R No. 137, p. 483. (A simple money decree.)]

8. ('13) 1913 Pun Re No. 90 : 21 Ind Cas 624 (624, 625) (DB).
('22) 9 AIR 1922 Mad 34 (34) (DB).
† ('02) 24 All 236 (238).

9. ('29) 16 AIR 1929 Nag 85 (86).
('26) 13 AIR 1926 Rang 128 (128).

10. ('23) 10 AIR 1923 Mad 125 (126, 127) (DB).
† ('25) 12 AIR 1925 P C 159 (160) : 52 Cal 650 (654) : 52 Ind App 207 (PC).
('38) 42 Cal W N 298 (300) (DB). (Question whether a decree involves indirectly a claim or question respecting property the value of which is Rs. 10,000 or upwards, must be decided with reference to actual circumstances at the time and not to circumstances, which are remote, and not in particular to a mere possibility that future suits as to all or part of the larger extent of the property alleged to be concerned may be instituted at some time in the future—A I R 1923 Mad 125 followed.)
('36) 23 AIR 1936 Lah 31 (33) (DB).

11. ('43) 30 AIR 1943 Oudh 266 (268) (DB).
('15) 2 AIR 1915 Lah 150 (151).
✠ ('02) 24 All 236 (238) (DB).
('26) 13 AIR 1926 Rang 128 (128) (DB).
('33) 20 AIR 1933 All 8 (10) : 54 All 431 (DB). (A I R 1922 Mad 34 followed.)
('36) 23 AIR 1936 Lah 31 (33) (DB). (The phrase 'directly or indirectly' in S. 110 refers to suits in existence and cannot be stretched to cover suits not yet brought. The indirect relation must be decided with reference to actual circumstances at the time and not to circumstances which are remote. On the other had, the possibility of future suits may be taken into consideration if such suits will be affected by the doctrine of *res judicata*.)
('36) 23 AIR 1936 Oudh 181 (182) : 12 Luck 27 (DB).

12. ('10) 14 Cal W N 651 (653) (DB).
[*See also* (1857) 7 Moo Ind App 261 (262, 263) (PC).

(2) *A* sues *B* for the recovery of a property valued at less than Rs. 10,000 basing his claim on a deed of gift. Other claimants who are donees of other properties under the same deed of gift are also made parties to the suit and the total value of the subject-matter of the deed far exceeds Rs. 10,000. *A*'s suit is dismissed on the ground that the *deed of gift is void*. Here the decree involves a claim or question to or respecting property other than the property actually claimed in the suit.[13] But, in the undermentioned case,[14] it was held by the Calcutta High Court that the word "property" in the second paragraph of this section must be taken to be the property of the applicant for leave and that it is the extent to which the decree has operated to the prejudice of the *applicant* that determines the value of the property for the purposes of the section. Hence, it was held in that case that in a suit by some of the heirs of a certain person for maintenance allowances, the plaintiffs were entitled to rely only upon the value of their own share and not upon the value of the entire monthly allowances payable to all the heirs when the other heirs, though made parties, had not made any claim. In such circumstances, it was held that it could not be said that the decision in the suit would involve directly or indirectly the interests of the others who had made no claim.

(3) *A* is the owner of a *ganj* consisting of several grounds occupied by several tenants. *A* sues *B*, one of such tenants, for ejectment and for enhancement of rent. The other tenants of the other grounds are not parties to this suit. Here, the decision in the suit, though it may seriously prejudice *A* in similar suit, which *he may have to file* against the other tenants of the other sites, cannot be said to involve a question in respect of *all* the sites.[15]

(4) *A* sues for partition and possession of his share in family property. Does the decision in the suit involve a claim or question to or respecting the *other* shares ? No, according to the Bombay and Madras High Courts.[16] Yes, according to the High Courts of Calcutta[17] and Allahabad,[18] the reason being that the share of the plaintiff could not be ascertained without determining the value of *all* the other shares in the estate. The Patna High Court has held that the question depends upon the particular circumstances of each case; where the only question for determination is whether the plaintiff is entitled to a specific share leaving the rest of the property undivided in the hands of the defendants, the decree may not involve any question relating to the other shares; but where the suit is one for *general partition* in which some of the defendants are themselves claimants of shares, and the decree in appeal deprives them equally with the plaintiff of the benefit of the first Court's decree, the decree in appeal will be considered to involve a claim or question to, or respecting the other shares also.[19] The Bombay High Court also has held that where the decree of the High Court prejudicially affects the interests of both the plaintiff and one of the defendants in the case, the total value of the shares of the plaintiff and such defendant can be taken into consideration in determining the value of the property involved in the decree.[20]

Another important point to remember in applying this paragraph is that it is not sufficient that the decree affects property whose value is Rs. 10,000 or upwards. It is necessary that it should involve rights and claims to property which *rights and claims*

('17) 4 AIR 1917 Cal 496 (496) : 44 Cal 119 (124, 125) (DB). (Suit in ejectment from one property on basis of defendant being tenant-at-will—Defendant setting up permanent tenancy in suit lands as well as other lands)]

13. ('12) 16 Ind Cas 431 (431) (DB) (All).
('33) 20 AIR 1933 Oudh 397 (398) (DB). (Maintenance amount less than Rs. 10,000—But charge on property worth more than Rs. 10,000—Adoption and will in respect of such property also disputed—Leave to be granted.)
('23) 10 AIR 1923 Bom 59 (59, 60) (DB).
[*See also* ('13) 35 All 445 (448). (Case of award.)
('97) 1 Cal W N xciii.]

14. ('39) 43 Cal W N 432 (434).

15. ('43) 30 AIR 1943 Oudh 266 (267, 268) (DB). (Suit for possession of shops valued at Rs. 5000, in Lalganj which was a part of plaintiff's talugdari village, on ground that shopkeepers in Lalganj had no right to sell shops without his permission — Plaintiff on dismissal of his suit applying for leave to appeal to Privy Council contending that Lalganj was a big bazar and similar cases may arise in future and his title may be affected — Leave not granted.)
('13) 1913 Pun Re No. 90 : 21 Ind Cas 624 (624) (DB).

16. † ('20) 7 AIR 1920 Bom 418 (419): 44 Bom 104 (107) (DB).
('38) 25 AIR 1938 Mad 666 (666, 667) : I L R (1938) Mad 923 (DB).

17. ('06, 3 Cal L Jour 257 (259) (DB).
[But see ('73) 19 Suth W R 191 (192).]

18. † ('33) 20 AIR 1933 All 177 (177) : 54 All 858 (DB).

19. ('21) 8 AIR 1921 Pat 502 (504) (DB).

20. ('37) 24 AIR 1937 Bom 181 (182) : I L R (1937) Bom 705 (DB).

are themselves worth Rs. 10,000 or upwards.[21] In other words, where some subsidiary interest such as an easement of small value attached to property of great value is in dispute, it is the value of such *interest in dispute* and not the value of the *property* affected that determines the right of appeal.[22]

Illustrations.

(1) *A* files a suit on a prior mortgage against *B*, the mortgagor, and *C*, the puisne mortgagee of a 4 annas share in the property mortgaged to *A*. A decree is passed for sale, in the first instance of a 12 annas share of the property and for sale of the 4 annas share also if the proceeds of the sale of the 12 annas share are insufficient to satisfy the decree amount. The 12 annas share is sold and the proceeds being found insufficient, the 4 annas share is also sold. *C* applies thereafter to set aside the sale on the ground of irregularity in conducting and publishing the sale, but the petition is dismissed by the High Court. *C* applies for leave to appeal to the Privy Council. Here there is, no doubt, a dispute as to the whole property but so far as *C* is concerned *its value to him* cannot be anything more than the market value of his 4 annas share, and if that is under Rs. 10,000, no leave can be granted.[23]

(2) *A* claims a right of way over a piece of land valued at Rs. 1500, and forming part of a survey number valued at Rs. 10,000, *A* having a right to fence the way from the remaining land. Here the claim of *A* cannot be of more value to him than the value of the piece of land over which he claims the right of way, i. e., Rs. 1500. No leave can therefore be granted.[24]

(3) *A* sues *B* for ejectment from a site valued at Rs. 300 on the ground that *B* is a tenant-at-will. *B* contends that he is a permanent tenant of the land and that he has put up buildings thereon valued at Rs. 23,000. *A* is willing that *B* should remove the buildings. In such a case the claim of *A* cannot (in view of his laying no claim to the buildings) be worth to him more than the value of the site viz., Rs. 300. No leave can therefore be granted.[25]

The Allahabad High Court has, however, in the undermentioned decision[26] dissented from the view that the *right claimed* must itself be worth Rs. 10,000 or upwards. In that case it was held that the second paragraph of this section gave a right of appeal to the Privy Council from a mortgage decree for the sale of property worth more than Rs. 10,000 although the decree itself was for a sum less than Rs. 10,000. The view of the Allahabad High Court has recently been followed by the Patna High Court.[27]

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21. ('42) 29 AIR 1942 Oudh 174 (176) (DB).
('41) 28 AIR 1941 Oudh 407 (408) : 16 Luck 737 (DB). (Where a suit is to declare the non-liability of certain property valued at over Rs. 10,000 to attachment and sale in execution of a decree for an amount less than Rs. 10,000 leave to appeal to Privy Council cannot be granted.)
('18) 5 A I R 1918 Mad 632 (633, 634) (DB). (Rights of irrigation to lands worth more than a lakh of rupees—Subsidiary interest of small value in question— *Held*, not of adequate value.)
('38) 25 AIR 1938 Mad 666 (667) : I L R (1938) Mad 923 (DB).
[*See also* ('28) 15 AIR 1928 Pat 191 (192) (DB).]

22. ('21) 8 AIR 1921 Bom 266 (267) (DB). (Easement.)
('18) 5 AIR 1918 Mad 632 (633) (DB).
† ('34) 21 AIR 1934 Rang 292 (294) : 12 Rang 355 (DB).
('26) 13 AIR 1926 Rang 138 (139) : 4 Rang 92. (Right to float logs in stream.)
('28) 15 AIR 1928 Pat 191 (192) (DB). (Right of irrigation of small value in the case of village of considerable value.)
('29) 16 AIR 1929 Bom 341 (342) : 53 Bom 552. (Easement — The case in A I R 1923 Bom 176 was dissented from.)
('15) 2 AIR 1915 All 486 (488) (DB). (Question regarding improvements with which applicant is not concerned.)

23. ('19) 6 AIR 1919 Pat 305 (307) : 4 Pat L Jour 415 (DB).

24. ('28) 15 AIR 1928 Mad 785 (785) (DB).

25. ('23) 10 AIR 1923 Lah 286 (287) (DB).
('30) 17 AIR 1930 Bom 509 (511) (DB). (Suit by tenant for renewal of lease — Value of improvements not to be added.)

26. † ('37) 24 AIR 1937 All 169 (171) : I L R (1937) All 405 (DB).

27. ('41) 28 AIR 1941 Pat 288 (288) (DB). (Suit for declaration that certain property could not be attached and sold in execution of certificate as same belonged to plaintiff—Suit valued at Rs. 7699 for which certificate was issued—Suit decreed by trial Court but dismissed on appeal by High Court —Appeal also valued at Rs. 7699 — Property in respect of which certificate was issued worth more than Rs. 10,000 — Case held fully covered by Section 110 (2).)

Where an applicant for leave files an affidavit that the decree or order involves a claim respecting property exceeding Rs. 10,000 in value and there is no counter affidavit by the respondents, the High Court may assume that the petitioner's affidavit is correct.[28]

12. Appeal from decree of affirmance must involve a substantial question of law. — Where the decree or final order appealed from is one of affirmance, there must exist a substantial question of law *in addition* to the requirements as to value mentioned in the first and second paragraphs of the section.[1] The affirmance of a "decision" means the affirmance of the *decree* and not necessarily of the judgment.[2] It follows that where the *decree* of the Court below is affirmed by the decree or final order appealed from, the latter will be a decree of affirmance even though it is based on *grounds different* from those adopted by the lower Court[3] or even where the appeal has been dismissed without any hearing, as for example, for default, non-prosecution, etc.[4] The question whether the judgment of the High Court is one of affirmance or not does not depend upon whether appellant is the plaintiff or the defendant; it depends upon whether the judgment is one affirming the decree of the lower Court. Where the lower Court gives a mortgage decree for a certain sum and the Appellate Court modifies it into a money decree for the same amount, there is no affirmance of the lower Court's decision.[5]

13. Affirmance — Meaning of. — The affirmance must be as regards the *subject-matter of the suit* dealt with by the Court below.[1] Where there is such

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28. ('26) 13 AIR 1926 Lah 416 (416) (DB).

Note 12

1. ('16) 3 AIR 1916 Mad 1222 (1223) (DB).
('11) 13 Cal Jour 501 (503) (DB).
† ('12) 34 All 455 (463): 39 Ind App 156: 15 Oudh Cas 271: 16 Ind Cas 197 (200) (PC).
('15) 2 AIR 1915 Oudh 158 (159) (DB).
('01) 23 All 227 (231): 28 Ind App 11 (PC).
† ('01) 23 All 415 (418, 419): 28 Ind App 182 (PC).
('16) 3 AIR 1916 Lah 87 (88): 1916 Pun Re No. 64 (DB).
† ('14) 1 AIR 1914 Oudh 41 (42): 16 Oudh Cas 264 (DB). (Leave to appeal from an order on an unsuccessful review of an affirming decree of the High Court—Substantial question of law must nevertheless exist.)
('96) 20 Bom 699 (703) (DB).
('02) 25 Mad 215 (219): 29 Ind App 38 (PC).
('36) 23 AIR 1936 Rang 125 (126) : 13 Rang 744 (DB).
† ('38) 25 AIR 1938 P C 165 (166) : 65 Ind App 182 : ILR (1938) All 601: 32 Sind LR 531 (PC).
2. ('24) 11 AIR 1924 Pat 468 (470) (DB).
† ('33) 20 AIR 1933 Lah 690 (691) : 14 Lah 609 (DB).
('03) 25 All 109 (114) : 30 Ind App 35 (PC).
('27) 14 AIR 1927 Oudh 535 (535) (DB).
† ('35) 22 AIR 1935 All 374 (377): 57 All 873 (FB). ('Decision' does not mean the reasoning in the judgment, but the operative portion of the judgment which is ultimately incorporated in the decree.)
See Section 2 (2) and Section 2 (9).
3. ('03) 25 All 109 (114) : 30 Ind App 35 (PC).
('33) 20 AIR 1933 Pat 703 (704) (SB).
('94) 21 Cal 523 (526).
('11) 13 Cal L Jour 501 (503) (DB).
('24) 11 AIR 1924 Pat 468 (470) (DB).
('23) 10 AIR 1923 Rang 55 (56) : 11 Low Bur Rul 410 (DB).
('21) 8 AIR 1921 Oudh 111 (112) : 24 Oudh Cas 164 (DB).
('23) 10 AIR 1923 Oudh 49 (49): 25 Oudh Cas 277 (DB). (Two Judges of a Bench confirming on different grounds.)
('25) 12 AIR 1925 Oudh 219 (220) (DB).
('26) 92 Ind Cas 479 (479) (Lah). (Even though there be difference in findings on other issues—25 All 109 (PC) followed.)
[But see ('89) 16 Cal 287 (299). (In which case decree was held to include "judgment" on application of S. 594 of the old Code.)]
4. ('42) 29 AIR 1942 Oudh 362 (365) (DB).
('40) 27 AIR 1940 Oudh 397 (399) (DB). (Rejection of appeal on account of insufficiency of court-fee.)
† ('98) 20 All 367 (368, 369) (DB). (Dismissal for appellants' default in supplying counsel material for argument.)
('26) 13 AIR 1926 Rang 111 (112) : 3 Rang 658 (DB). (Dismissal for want of prosecution.)
('12) 23 Mad L Jour 219 (220) (DB).
('15) 2 AIR 1915 All 327 (327) (DB). (Dismissal for default.)
('19) 6 AIR 1919 Lah 65 (65) : 1 Lah 220 (DB). (Dismissal for deficient court-fee.)
But an order rejecting an appeal under O. 41 R. 10 is not one affirming the decision of the Court below :
('32) 19 AIR 1932 All 312 (314): 54 All 390 (DB).
[*See* ('10) 13 Oudh Cas 59 (60) (DB).
('14) 1 AIR 1914 All 54 (54) : 36 All 325 (DB). (Order dismissing appeal for non-furnishing of security under O. 41 R. 10.)]
5. ('33) 20 AIR 1933 Pat 262 (262, 263) (DB).

Note 13

1. ('27) 14 AIR 1927 Pat 379 (381) (DB.)

affirmance, a reversal or variation merely on a matter which is not the subject-matter of the suit will not take the appellate decree out of the class of decrees of affirmance.[2] Thus, a variation of the lower Court's decree in the matter of *costs*[3] or the grant or extension of time for payment of the amount decreed[4] or the correction of an error, in the lower Court's decree due to oversight[5] is not a variation in respect of the subject-matter of the suit and does not prevent the appellate decree from being a decree of affirmance.

Where the decree of the Court below comprises different matters and the decree of the High Court affirms the lower Court's decree in respect of some of these matters and varies or reverses such decree in respect of other matters, then, if the proposed appeal to the Privy Council is in respect of a matter in regard to which the lower Court's decree has been affirmed, the case would come within the third paragraph of this section and no leave for appeal to the Privy Council can be granted unless such appeal involves a substantial question of law.[6] But where the appeal to the Privy Council involves also

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('15) 2 AIR 1915 All 327 (327) (DB). (Dismissal of appeal for default of prosecution is affirmance.)
('36) 23 AIR 1936 Mad 881 (883) : I L R (1937) Mad 121 (DB). (What is to be regarded is not the decision as a whole but the decision as it affects the subject-matter in dispute.)

2. *See* ('27) 14 AIR 1927 Pat 379 (381) (DB).
See also the cases in foot-notes 3 and 4.

3. ('42) 29 AIR 1942 Mad 368 (369) (DB).
('22) 9 AIR 1922 Cal 316 (316, 317) (DB).
('33) 20 AIR 1933 Pat 703 (704) (SB).
('34) 21 AIR 1934 Oudh 433 (434) (DB).
('23) 10 AIR 1923 Mad 30 (30) (DB).
('29) 16 AIR 1929 Oudh 43 (44).
('07) 10 Oudh Cas 65 (68, 69) (DB).

4. ('28) 15 AIR 1928 Pat 190 (191) (DB). (Date of redemption extended.)
('27) 14 AIR 1927 Pat 379 (381) (DB). (Variation of period of grace.)

5. ('42) 29 AIR 1942 Oudh 478 (479) (DB). (Trial Court awarding interest contrary to S. 27, U. P. Encumbered Estates Act, at 4½ per cent. instead of 4¼ per cent. — Mistake resulting from sheer oversight and no more than accidental slip or omission — High Court in appeal altering rate of interest to 4¼ per cent. and affirming decree of trial Court in all other respects — Decree held was one of affirmance.)
[*See also* ('43) 30 AIR 1943 Oudh 262 (262) (DB). (*Quære*—Variation of lower Court's decree rectifying an obvious error which is not disputed — Decision whether of affirmation.)]

6. ('43) 30 AIR 1943 Mad 67 (68, 69) (DB).
('38) 25 AIR 1938 Mad 631 (633) (DB). (The term 'decree' used in connection with the High Court and the expression 'the decision' used in regard to the lower Court do not mean exactly the same thing. A single decree may comprise several decisions and each decision may relate to a distinct matter.)
† ('36) 23 AIR 1936 Mad 881 (883): ILR (1937) Mad 121 (DB). (Trial Court dismissing suit against two defendants—High Court on appeal reversing decree as to one but affirming the decree as to the other —Plaintiff seeking to appeal to Privy Council in respect of the latter portion of the decree — Decree is one of affirmance and no leave can be granted in absence of substantial question of law.)
† ('37) 24 AIR 1937 Lah 761 (764) (DB). (It would be anomalous to grant leave to appeal to His Majesty in Council to an applicant on matters in which a High Court has concurred with the trial Court on the mere ground that on other matters High Court has modified the decree of the trial Court but in favour of the applicant.)
('37) 24 AIR 1937 Lah 712 (714): ILR (1937) Lah 268 (DB).
† ('35) 22 AIR 1935 Cal 146 (146) : 62 Cal 257 (DB). (Appellate Court modifying original decree upon single point in appellant's favour — He has no right to appeal on other points simply on such modification without showing that substantial question of law is involved.)
('39) 26 AIR 1939 All 322 (323) : I L R (1939) All 443 (DB). (Suit on mortgage decreed by trial Court — Main question argued in appeal was whether mortgage was valid—High Court holding mortgage to be valid but reducing rate of interest — Amount by which decree was varied less than Rs. 10,000— Question of validity of mortgage sought to be raised in appeal to Privy Council — *Held* that leave to appeal could not be granted unless substantial question of law was involved.)
('27) 14 AIR 1927 Cal 543 (546) (DB).
('32) 19 AIR 1932 Nag 118 (120): 28 Nag L R 142 (DB).
('29) 16 AIR 1929 Mad 827 (827) (DB).
('29) 16 AIR 1929 Bom 359 (360) (DB).
('22) 9 AIR 1922 All 89 (90) : 44 All 200 (DB).
('22) 9 AIR 1922 All 243 (244) (DB).
('15) 2 AIR 1915 Lah 113 (114, 115) : 1915 Pun Re No. 22 (DB).
[*See* ('37) 24 AIR 1937 Mad 964 (965) (DB). (*Held*, on the facts of the case that the judgment of the High Court was a reversing judgment in respect of the whole case.)
[*See also* ('21) 8 AIR 1921 Cal 81 (82) (DB).
('30) 17 A I R 1930 Lah 102 (103) : 10 Lah 688 (DB).
('26) 13 AIR 1926 Nag 245 (245) (DB).
('29) 16 AIR 1929 Nag 85 (87).
('27) 14 AIR 1927 Pat 379 (381) (DB).]
[But see ('43) 30 AIR 1943 Pesh 45 (46).

the matters in regard to which the lower Court's decree has been reversed or varied, the third paragraph of this section will not apply and no substantial question of law need be shown to be involved in the appeal.[7]

Suppose, the plaintiff sues the defendant for Rs. 20,000 on a promissory note. The lower Court passes a decree in favour of the plaintiff for Rs. 8000 disallowing his claim for the balance, viz., Rs. 12,000. The High Court on appeal varies the decree by enhancing the amount decreed to Rs. 9000. The plaintiff wants to appeal to the Privy Council on the ground that he is entitled to the balance of the amount also, viz., Rs. 11,000. Can it be said that inasmuch as the decree of the High Court concurs with that of the lower Court in disallowing the plaintiff's claim for this sum, that the decree of the High Court is one of *affirmance* of the lower Court's decree? It has been held by the Privy Council that in such cases the High Court's decree *cannot* be said to be one of affirmance of the lower Court's decree[8] and this view has been followed in the undermentioned decisions.[9] The contrary view taken by the Calcutta High Court in *Raja Sree Nath Roy* v. *Secretary of State*[10] must be treated as overruled by the above decision of the Privy Council.[11]

It will be seen that such cases are clearly distinguishable from the cases above referred to in which the lower Court's decree covers *different* matters and the High Court affirms such decree in regard to some of them and varies or reverses the decree in regard to others.[12]

See also Note 12.

('41) 28 AIR 1941 Pat 269 (276):20 Pat 459 (SB). (AIR 1936 Pat 553 : 15 Pat 637 overruled.)

('35) 22 A I R 1935 Oudh 489 (490) : 11 Luck 320 (DB). (Decision of trial Court relating to question of adoption and also value of moveables —On appeal decision relating to adoption against defendant upheld but value regarding moveables modified in his favour — Defendant wishing to appeal on the question of validity of adoption— Decree of Appellate Court is not one of affirmance.)]

7. ('23) 10 AIR 1923 Cal 215 (216) (DB).
('28) 15 AIR 1928 Pat 609 (611, 612) (DB).
('29) 16 AIR 1929 Pat 561 (564) : 9 Pat 558 (DB). (Part of decree affirmed and part varied — Appeal is not limited to part varied.)
('19) 6 AIR 1919 Cal 118 (119, 120) (DB). (Lower Court granting declaration but refusing damages. The High Court granting damages also.)
('11) 9 Ind Cas 1040 (1040) (DB) (Oudh).
('21) 8 A I R 1921 All 270 (271, 272) : 43 All 220 (DB).
('32) 19 AIR 1932 All 65 (67, 68):54 All 146 (SB).
('37) 41 Cal W N 494 (494) (DB). (Suit on mortgage — Trial Court decreeing suit in respect of certain items of properties and dismissing it with regard to others — High Court on appeal by both parties dismissing entire suit—High Court's decree is not one of affirmance with regard to the part of the claim dismissed by the trial Court.)

8. ('25) 12 A I R 1925 P C 60 (60) : 51 Ind App 319 : 51 Cal 969 (PC). (Suit for maintenance claiming Rs.3000 per year—Trial Court awarding Rs. 800 a year — High Court on appeal increasing the amount to Rs. 1200 a year — High Court's decree is not one of affirmance in regard to the Rs. 1800 a year disallowed by both the Courts.)

9. ('41) 28 AIR 1941 All 66 (68):ILR(1941) All 180 (FB). (High Court, in appeal by defendant, reduced the amount of interest awarded to plaintiff by lower Court from Rs. 18,700 to Rs. 12,380—*Held*, defendant denying his liability for interest is entitled to certificate under S. 110—Overruling AIR 1939 All 723, which held that High Court's increasing amount granted by lower Court under the Land Acquisition Act amounts to affirmation.)
('32) 19 AIR 1932 Nag 118(120):28 Nag LR 142 (DB).
('16) 3 AIR 1916 Mad 670 (670). (Claim for rupees 15,000 wholly dismissed by lower Court — High Court decreeing Rs. 5000.)
('38) 25 AIR 1938 Lah 836 (837) (DB).
('35) 22 AIR 1935 Cal 250 (251) : 62 Cal 175 (DB). (Where the High Court, on appeal, modifies the decree of the lower Court, in favour of the applicant for leave to appeal, the decree is not one affirming the decree of the Court below; and the applicant for leave to appeal to the Privy Council who is not satisfied with the modification, is entitled to a certificate without showing that some substantial question of law is involved.)
('32) 19 A I R 1932 Mad 46 (48) (DB). (Decree for payment of certain amount after taking accounts is one decree and not series of decrees merely because it is the result of decisions in respect of a number of items — If the High Court's decree in such a case does not entirely affirm the decision of the Court immediately below it then it is not an affirming decree within the meaning of S. 110.)
('37) 41 Cal W N 494 (494) (DB).

10. ('04) 8 Cal W N 294 (295, 296) (SB).

11. *See* ('30) 17 AIR 1930 Lah 554 (555) : 11 Lah 465 (DB).
('32) 19 AIR 1932 Mad 46 (51) (DB).

12. ('38) 25 AIR 1938 Lah 836 (837) (DB).

14. Cross-appeals. — A obtains a decree against B for a portion of the amount claimed. A and B both prefer separate appeals against the decree in respect of the portion which is against them. A's appeal is dismissed but B's appeal is allowed in part. Can A obtain leave to appeal to the Privy Council on the ground that the decree has been modified in the cross-appeal of B? The Patna High Court has held that the appeal and the cross-appeal must be considered together and both the decrees must be regarded as one for the purpose of determining the question of affirmance.[1] The Calcutta High Court also seems to be of the same view.[2] The Allahabad and Lahore High Courts have held a contrary view, namely, that it is only the decree in A's *appeal* that must be considered.[3] The Madras High Court has held that where the cross-appeal or the memorandum of cross-objections relates to a matter *distinct* from the subject-matter of the appeal, the Allahabad view is to be followed[4] but that, where it is not possible to say whether the decree in the appeal and the memorandum of objections really consists of separate decrees in respect of separate subject-matter, they should be considered together for the purpose of determining whether the decree is one of affirmance.[5]

15. "Immediately below." — Where an appeal is preferred under the Letters Patent to the High Court from the judgment of a single Judge of the High Court, the latter is a Court "immediately below" the High Court Bench which disposes of the appeal.[1]

16. "Involve." — Where there are concurrent findings of fact and no question of law would arise unless the findings of fact are also re-opened, no question of law can be said to be *involved* in the appeal.[1] In *Banki Lal* v. *Jagat Narain*,[2] Strachey, C. J., said:

Note 14

1. ('29) 16 A I R 1929 Pat 561 (563) : 9 Pat 558 (DB).
2. ('37) 41 Cal W N 494 (494) (DB).
3. ('18) 5 AIR 1918 All 245 (246) (DB).
† ('35) 22 A I R 1935 All 374 (377) : 57 All 873 (FB).
('37) 24 AIR 1937 Lah 916 (917) (DB). (Fact that a composite decree is prepared in both appeals does not make any difference.)
[*See* ('32) 19 AIR 1932 All 65 (67, 68): 54 All 146 (SB). (Case of appeal and cross-objections.)]
[*See also* ('30) 17 A I R 1930 Lah 554 (555) : 11 Lah 465. (High Court followed AIR 1918 All 245 and A I R 1926 Mad 1024 and distinguished AIR 1929 Mad 429 : 52 Mad 521.)]
4. ('41) 28 AIR 1941 Mad 227 (228) (DB). (A I R 1926 Mad 1024 followed.)
† ('26) 13 AIR 1926 Mad 1024 (1025) (DB). (See the explanation of this decision in AIR 1929 Mad 429 : 52 Mad 521.)
('38) 25 AIR 1938 Mad 631 (633) (DB).
('38) 25 AIR 1938 Mad 598 (599) (DB).
5. ('29) 16 AIR 1929 Mad 429 (431) : 52 Mad 521 (DB).
† ('32) 19 AIR 1932 Mad 46 (49) (DB). (Suit on accounts—Partly decreed—Appeal and cross-appeal taken together for leave to appeal.)

Note 15

1. ('41) 45 Cal W N 1002 (1004) (DB).

Note 16

1. † ('01) 23 All 94 (98) (DB).
('16) 3 AIR 1916 Oudh 286 (286, 287) : 19 Oudh Cas 131 (DB).
('94) 16 All 274 (275, 276) (PC).
('91) 18 Cal 23 (30) : 17 Ind App 122 (PC).
('04) 1904 Pun Re No. 48, p. 146 (148) (DB).
('05) 1905 Pun Re No. 59, p. 210 (211) (DB).
('14) 7 Low Bur Rul 103 (105) : 25 Ind Cas 922 (DB).
('01) 28 Cal 190 (194) (SB). (The case in 16 Cal 292*n*, 2 Cal 228 and the view of Ranade, J., in 20 Bom 699, expressing a contrary opinion were held to be overruled by the Privy Council decision in 23 Cal 918 : 23 Ind App 102 (PC).)
[*See also* ('41) 28 AIR 1941 Mad 227 (228) (DB). (Decision on question of fact sufficient for disposal of case — Question of law, however, dealt with—Leave not granted.)
('21) 8 AIR 1921 Pat 83 (85) : 5 Pat L Jour 719 (DB).
('36) 23 AIR 1936 Rang 125 (127) : 13 Rang 744 (DB). (Where the High Court in affirming a decision holds that under a clause in the memorandum of association, the directors of a company had power to do a certain thing, and that such power was clear and manifest, and the whole case turns on the merits and is decided on the facts, it cannot be said that there is any substantial question of law involved on the appeal, so as to justify the High Court to grant leave to appeal to His Majesty in Council.)]
Also see Note 2 and S. 109 Note 10.
2. ('01) 23 All 94 (98).

"The word 'involve' implies a considerable degree of necessity. It does not mean that in certain contingencies a question of law might possibly arise. The practice of the Privy Council is not to interfere with concurrent findings of fact of the Courts below....I think it is impossible to say that a question which only arises if the concurrent findings of fact of the Courts in India are disregarded, a question which can never arise so long as the Privy Council maintains those concurrent findings of fact, is substantial question of law which the appeal to the Privy Council 'involves'."

The mere fact that a question of law *seems* to arise in the appeal is not sufficient for granting leave under the section. It must definitely and clearly arise.[3] In the undermentioned case[4] the Madras High Court held that leave to appeal should not be granted if the point raised is an entirely new point raised for the first time after the whole case has been disposed of by the Courts in India. Where the order sought to be appealed against is an order dismissing an appeal for non-prosecution, the appeal to the Privy Council will only involve questions as to the propriety of the order of dismissal for non-prosecution and a question relating to the merits of the case and which arose before the Court of first instance would not be involved in the appeal to the Privy Council.[5]

17. Substantial question of law. — It is not enough if a mere question of law is involved. It must be a *substantial* one.[1] Whether a particular question is substantial or not must depend on the circumstances of each case and reported decisions are mostly of illustrative value.[2] The following guiding principles have, however, been recognized and applied in determining whether a question of law is substantial or not:

(1) The function of the Privy Council being one to *declare* the law and not to alter it,[3] a question of law which has been definitely settled by the Privy Council or the High Courts[4] or on which there is or may be no difference of opinion[5] is not a substantial question of law. In fact, it is not a *question*

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3. ('43) 30 AIR 1943 Mad 67 (69) (DB). (An issue of law into which it would be unnecessary to go cannot be said to be "involved" in an appeal.)
('40) 27 AIR 1940 Oudh 397 (399) (DB).
('02) 25 Mad 215 (219, 220) : 29 Ind App 38 (PC).
4. ('40) 27 AIR 1940 Mad 810 (811) (DB). (To grant leave merely for the purpose of enabling such a new point to be raised would be an abuse of the provisions of the Code.)
5. ('42) 29 AIR 1942 Oudh 362 (366) (DB). (A I R 1921 Pat 83 : 5 Pat L Jour 719 followed.)

Note 17

1. ('23) 10 AIR 1923 Mad 30 (31) (DB).
('96) 20 Bom 699 (703) (DB).
('29) 16 AIR 1929 Bom 341 (343) : 53 Bom 552 (DB).
('28) 106 Ind Cas 362 (363) (DB) (Pat).
('27) 14 AIR 1927 Oudh 535 (535) (DB).
('32) 19 AIR 1932 Oudh 134 (135) (DB). (Use of certain Urdu words—Whether amounts to divorce —Not a substantial question of law.)
2. ('97) 1 Cal W N xciii (DB).
3. ('17) 4 AIR 1917 P C 71 (76) : 40 Mad 793 : 44 Ind App 261 (PC).
4. ('29) 16 AIR 1929 Lah 55 (56):9 Lah 581 (DB).
('31) 18 AIR 1931 Rang 283 (285) : 9 Rang 360 (DB).
('15) 2 AIR 1915 Oudh 158 (159) (DB).
('18) 5 AIR 1918 Mad 632 (633, 634) (DB).
† ('26) 13 AIR 1926 Oudh 381 (386): 29 Oudh Cas 215 : 1 Luck 265 (FB).
('96) 20 Bom 699 (703) (DB). (Settled in India.)
('28) 15 AIR 1928 Mad 448 (449) (DB).
('27) 14 AIR 1927 Oudh 43 (44) (DB). (Full Bench of a High Court specific on the point—Point is not substantial point of law.)
('23) 10 AIR 1923 Rang 71 (73) : 11 Low Bur Rul 335 (DB).
('26) 13 AIR 1926 Rang 111 (112) : 3 Rang 658 (DB).
('28) 15 AIR 1928 Mad 233 (233) (DB).
('17) 4 AIR 1917 Pat 493 (495) (DB).
('24) 11 AIR 1924 Pat 271 (271) (DB).
('39) 43 Cal W N 432 (435) (DB).
('37) 24 AIR 1937 Lah 758 (758, 759) (DB).
('38) 25 AIR 1938 Nag 482 (484, 485): ILR (1940) Nag 59. (Legal principle well-defined—Misapplication of it does not raise substantial question of law.)
('36) 23 AIR 1936 Mad 881 (882) : I L R (1937) Mad 121 (DB).
('36) 165 Ind Cas 735 (735, 736) (DB) (Lah). (Legal principles settled by Privy Council—Real question only as to applicability of principles to facts—No substantial question of law.)
See also Section 109 Note 10,
† [But see('29) 16 AIR 1929 Rang 280 (281, 282) : 7 Rang 271 (DB). (Whether High Courts in India have rightly decided an important legal point held to be substantial question of law.)]
5. ('43) 30 AIR 1943 Mad 67 (69) (DB).
('43) 30 AIR 1943 Mad 591 (583) (DB). (Whether family business is ancestral or not — Whether entry of stranger partner makes ancestral business otherwise.)
('26) 13 AIR 1926 Nag 5 (6) (DB).

of law at all but only a *proposition* of law.[6] In order that a point may be a substantial question of law it should be such as to impress the High Court that it is debatable[7] in view of the authorities or that the authorities themselves may require reconsideration. A question of law does not become substantial simply because the Judges have stated and examined it in detail in order to show that it has no substance.[8] A question of law will not be substantial merely because much is at stake on the answer to it.[9]

(2) Although a point has not been directly decided by Courts, if the principles clearly applicable to the case are well established, the question is not a substantial question of law, and the difficulty in the *application* of such principles to the case cannot render it *substantial*.[10]

(3) The words 'substantial question of law' mean a substantial question of law *as between the parties in the case involved*, and not merely a question of *general importance*.[11]

(4) Orders passed in the exercise of the *discretion* of the Court do not involve substantial questions of law[12] but a question whether a Court could, in law,

('21) 8 AIR 1921 All 214 (214) : 43 All 513 (DB).
('32) 19 AIR 1932 Lah 56 (56) (DB).
('26) 92 Ind Cas 479 (479) (DB) (Lah).
('30) 121 Ind Cas 506 (507) (DB) (Lah). (Point of limitation — No serious divergence of judicial opinion — No leave.)
('26) 13 AIR 1926 Nag 215 (216) (DB). (Question of law involving differences of opinion is a substantial question of law.)
('13) 18 Ind Cas 327 (328) DB) (Oudh).
('36) 23 AIR 1936 Pesh 200 (202) (DB).
('38) 25 AIR 1938 Mad 631 (632) (DB). (Decision based on clear language of statute and in accordance with prior Bench decisions—No leave to appeal.)

6. ('26) 13 AIR 1926 Oudh 381 (383) : 29 Oudh Cas 215 : 1 Luck 265 (FB).

7. ('42) 29 AIR 1942 Cal 498 (505) (SB). (Question of limitation or of adverse possession on which all the three Judges agreed held not to be a substantial question of law.)
('37) 24 AIR 1937 Lah 758 (759) (DB).
('36) 23 AIR 1936 Mad 311 (313) (DB). (Substantial question of law must be a question of some difficulty in which the pros and cons are about evenly balanced.)
[*See* ('36) 23 AIR 1936 Rang 125 (126): 13 Rang 744 (DB). (The Court rejected the contention that the words 'substantial question of law' did not mean a question of law which the Court thought was reasonably debatable but any alleged question of law which if decided against a party would substantially affect his rights.)

8. ('33) 20 AIR 1933 Pat 703 (705, 706) (SB).

9. ('36) 23 AIR 1936 Mad 311 (313) (DB).

10. ('28) 15 AIR 1928 Pat 581 (582).
('24) 11 AIR 1924 All 559 (560) : 46 All 227 (DB).
('28) 15 AIR 1928 All 61 (62) : 50 All 208 (DB).
('27) 14 AIR 1927 Rang 288 (288): 5 Rang 585 (DB).
('31) 18 AIR 1931 Lah 753 (754) : 13 Lah 251 (DB). (Misapplication of established law to facts, not substantial question of law.)
('32) 19 AIR 1932 Lah 56 (56) (DB). (Do.)
('36) 165 Ind Cas 735 (735, 736) (Lah).
[*See also* ('33) 20 AIR 1933 Lah 1044 (1045) (DB). (Yeoman tenancy—Widow's rights thereunder — Question if absolute or limited and settled by decisions—Not substantial question of law.)]

11. ('42) 29 AIR 1942 Mad 368 (369) (DB). (Words "substantial question" must be understood in their being of substance to the parties—Decision holding that certain documents, which are of great importance, are inadmissible in evidence, is a substantial question of law.)
('28) 15 AIR 1928 Nag 114 (115).
('33) 147 Ind Cas 121 (122) (Oudh).
('33) 20 AIR 1933 Mad 221 (223, 224) (DB).
† ('27) 14 AIR 1927 P C 110 (110) : 2 Luck 93 : 54 Ind App 126 (PC). (NOTE.—The following cases must be deemed to be overruled by this decision:— 11 Cal W N ccxviii ; 10 Oudh Cas 318 ; AIR 1922 Oudh 214; 3 Oudh W N 841; AIR 1926 Oudh 381 : 1 Luck 265 : 29 Oudh Cas 215 (FB) ; A I R 1924 All 559 and AIR 1920 All 161.)
('28) 15 AIR 1928 P C 172 (173) : 55 Cal 944 : 55 Ind App 235 (PC).
('29) 16 AIR 1929 Nag 85 (87). (Finding on questions of law quite immaterial to decision of suit — No point of law for decision of suit itself — No appeal lies.)
('28) 15 AIR 1928 Lah 560 (561) (DB).
† ('28) 15 AIR 1928 Nag 76 (76, 77): 23 Nag L R 156 (DB). (A question of general importance would also be a substantial question of law when it is also a question between the parties.)
[*See* ('28) 15 AIR 1928 Rang 132 (133, 134) : 6 Rang 169 (DB).
('28) 15 AIR 1928 All 19 (20) (DB). (*Quære*).]
[*See also* ('25) 12 AIR 1925 Oudh 545 (545) (DB).
('38) 178 Ind Cas 203 (204) (DB) (Pat). (Where both the Judges of the High Court agree on the merits with the judgment of the Court below, but differ as between themselves on a question of mere academic interest, leave should not on that ground be granted to appeal to His Majesty in Council.)]

12. ('42) 29 AIR 1942 Cal 498 (503) (SB). (Court in the exercise of discretion not accepting certain document in evidence.)

exercise any discretion at all in a given case is a substantial question of law.[13]

(5) Objections on the ground of defects in form[14] or procedure[15] are not substantial questions of law, though a question as to limitation[16] or jurisdiction may be one.[17]

(6) A question of law taken up for the first time at the hearing of the application for leave to appeal cannot be a substantial question of law.[18]

(7) Whether the construction of documents is or is not a substantial question of law, depends upon the facts of each case.[19] But the mere appreciation of the *effect* of documentary evidence[20] or the meaning of entries and terms

('42) 29 AIR 1942 Oudh 362 (366) (DB).
('42) 29 AIR 1942 Oudh 478 (480) (DB). (Whether interest under S. 27, U. P. Encumbered Estates Act, should be awarded at maximum rate of 4½ per cent.)
('22) 9 A I R 1922 Bom 11 (12) (DB). (Refusal of leave under Cl. 12 of the Letters Patent to file additional statement.)
('66) 5 Suth W R 59 (60) : 1 Moo Ind App 470 (PC). (Order as to costs.)
('94) 21 Cal 484 (487). (Rejection of additional evidence under O. 41 R. 27.)
('21) 8 AIR 1921 Cal 94 (95) (DB). (Dismissal for laches in filing paper-book.)
('21) 8 AIR 1921 Oudh 30 (31) (DB).
('21) 8 AIR 1921 Pat 83 (85) : 5 Pat L Jour 719 (DB). (Dismissal for default in filing paper-book in time.)
('12) 23 Mad L Jour 219 (221) (DB).
('14) 1 AIR 1914 All 54 (54) : 36 All 325 (DB).
('19) 6 AIR 1919 Lah 65 (65) : 1 Lah 220 (DB).
('21) 63 Ind Cas 222 (222) (DB) (Lah). (Discretion exercised in refusing time under S. 148 for furnishing deficient court-fee.)
[*See* ('39) 26 AIR 1939 Cal 35 (38) : ILR (1938) 1 Cal 13 (DB). (Rejection of affidavit filed by debtor under R. 79, Calcutta Insolvency Rules—No substantial question of law.)]
13. ('28) 15 AIR 1928 Nag 292 (293) (DB).
14. ('87) 9 All 93 (96, 97) (FB). (High Court judgment not complying with terms of O. 41 R. 31.)
15. ('98) 20 All 118 (119, 120) (DB). (Objection to High Court allowing production in appeal of succession certificate without which lower Court had ordered execution.)
† ('72) 9 Bom H C R 398 (401) (DB). (Inspection of documents.)
('08) 1908 Pun W R No. 62, p. 234.
('23) 10 AIR 1923 All 463 (464) (DB). (Refusal by High Court to allow point to be raised at a late stage.)
('26) 13 AIR 1926 Cal 711 (712) (DB). (The question as to whether a Hindu widow qua executrix can compromise is not a substantial question.)
† ('24) 11 AIR 1924 Pat 468 (470) (DB). (Re-opening an issue given up in trial Court.)
('35) 22 AIR 1935 Lah 91 (91) (DB). (Appellate Court allowing amendment and converting suit for declaration into one for possession — No substantial question of law.)
('37) 24 AIR 1937 Lah 761 (763) (DB). (Administration suit — Non-joinder of all creditors is not substantial question of law.)
16. ('43) 30 AIR 1943 Mad 67 (69). (Transfer of trust property by manager—Suit to avoid—Starting point of limitation.)
('27) 14 AIR 1927 Rang 20 (27) : 4 Rang 263 (DB). (This case is overruled on another point in AIR 1940 Rang 12 : 1939 Rang L R 668 (FB).)
17. ('25) 12 AIR 1925 Oudh 728 (729) (DB). (Decree transferred for execution—Application for substitution made to second Court — Whether application is according to law is a substantial question of law.)
('34) 21 AIR 1934 Oudh 291 (292, 293) (DB). (Jurisdiction in executing Court to go behind the orders of sale officer accepting pre-emption price.)
('31) 18 AIR 1931 Cal 174 (175) (DB). (Jurisdiction of High Court to appoint receiver in execution giving directions to him—No substantial question of law.)
18. ('40) 27 AIR 1940 Mad 810 (811) (DB).
('20) 7 AIR 1920 All 241 (241) (DB).
[*See* ('31) 135 Ind Cas 510 (510, 511) (DB) (Lah).]
19. ('25) 12 AIR 1925 Oudh 219 (220) (DB).
('34) 21 AIR 1934 Oudh 433 (434) (DB).
† ('33) 20 AIR 1933 Mad 221 (223, 224) (DB). (Construction of documents, *held* substantial question of law.)
('33) 20 AIR 1933 All 561 (561) (DB).
('33) 20 AIR 1933 All 177 (177) : 54 All 858 (DB).
('33) 20 AIR 1933 All 8 (10) : 54 All 431 (DB). (Construction of reference and award.)
('27) 14 AIR 1927 Mad 443 (444) (DB). (Construction of difficult document — Yes.)
('12) 14 Ind Cas 269 (269) (DB) (All). (Whether transaction evidenced by the document is a mortgage — Yes.)
('17) 4 AIR 1917 Lah 381 (382) (DB). (Construction of documents incidentally arising — No.)
('36) 23 AIR 1936 Rang 125 (126) : 13 Rang 744 (DB). (Question depending upon construction of memorandum and articles of association of a company which are plain — *Held*, no substantial question of law.)
('38) 25 AIR 1938 Mad 631 (632) (DB). (Question whether property belongs to God or archaka service inam turning upon construction of inam papers—No substantial question of law.)
('30) 17 AIR 1930 Lah 554 (556) : 11 Lah 465 (DB).
20. † ('95) 22 Cal 609 (617, 618) : 22 Ind App 59 (PC).
('16) 3 AIR 1916 Mad 1222 (1223) (DB).

in a document[21] do not raise substantial questions of law.

(8) The existence of a *custom*[22] or the nature of a *tenure*[23] may under proper conditions involve substantial questions of law.

(9) Questions as to the *status* of parties[24] or of the applicability of any point of law or provision of a statute[25] may raise substantial questions of law.

(10) Questions regarding the validity of presentation of a document for registration[26] orfraud in procuring registration[27] are substantial questions of law.

(11) Cases between riparian owners as to rights of water in a channel give rise to questions of law or, at all events, to mixed questions of law and fact.[28]

See also the undermentioned cases.[29] As to what are questions of law, see S. 100 and the commentary thereon.

18. Privy Council practice when there are concurrent findings of fact. — See Section 112.

19. Review. — See Order 45 Rule 3.

20. Appeal. — See Order 45 Rule 3.

('17) 4 AIR 1917 Lah 381 (382) (DB).
Also see Ss. 100 & 101 Notes 29 and 30.

21.✢('28) 15 AIR 1928 P C 243 (245) : 55 Ind App 380 (PC).
('26) 13 AIR 1926 Nag 245 (245) (DB).
† ('26) 98 Ind Cas 164 (165) (DB) (Oudh). (Construction of a document—Parties alone interested —Not substantial question of law.)
('25) 12 AIR 1925 Oudh 219 (220) (DB). (Do.)
('22) 9 AIR 1922 Oudh 214 (216) (DB). (Mere construction of document of private importance.)
('31) 18 AIR 1931 Lah 753 (754) : 13 Lah 251 (DB). (Finding as to intention from the language of a document not being a document of title.)
('28) 15 AIR 1928 All 19 (20) (DB). (Question whether certain document executed by Hindu widow is binding on the estate is not a substantial question of law.)

22. † ('17) 4 AIR 1917 P C 33 (39) : 40 Mad 709 (721) : 44 Ind App 147 (PC).
('24) 11 AIR 1924 Lah 473 (473, 474) : 5 Lah 260 (DB).
('26) 13 AIR 1926 Nag 215 (215, 216) (DB).
[*See* ('39) 26 AIR 1939 Oudh 60 (60) (DB). (Question whether a party has succeeded in proving a family custom set up by him is not a substantial question of law.)]

23.✢('09) 36 Cal 1 (18) : 35 Ind App 195 (PC).
† ('23) 10 AIR 1923 Mad 443 (444) (DB).
† ('17) 4 AIR 1917 Cal 496 (496) : 44 Cal 119 (125, 129).

24. † ('13) 40 Cal 685 (692). (Refusal of adjudication as insolvent.)
('16) 3 AIR 1916 All 253 (253) : 38 All 188 (190) (DB). (Status of holder of a succession certificate.)

25. † ('28) 15 AIR 1928 Rang 132 (134) : 6 Rang 169 (DB). (Requisites for right of pre-emption under Mahomedan law.)
† ('33) 20 AIR 1933 All 4 (6) : 54 All 459 (DB). (Legal necessity for sale by Hindu widow is substantial question of law.)
('33) 20 AIR 1933 Mad 221 (223, 224) (DB). (Compromise not beneficial to minors and enhancing rent — If illegal — If Madras Estates Land Act applies — Substantial questions of law.)
('18) 5 AIR 1918 Pat 666 (667) (DB). (Limitation Act.)
('25) 12 AIR 1925 Oudh 541 (541) (DB). (Section 54 of the Indian Succession Act—Whether legatees who signed a will intended to attest — Not a substantial question of law.)
('26) 13 AIR 1926 Oudh 17 (17) (DB). (Section 72, Transfer of Property Act.)
('30) 17 AIR 1930 Mad 159 (159, 160) (DB). (Divorce Act, S. 37—Whether entitles High Court to increase alimony once fixed is a substantial question of law.)
('29) 16 AIR 1929 Mad 827 (827, 828) (DB). (Finding on a question of alienation without advertence to rule laid down by the Privy Council regarding recitals in ancient documents.)
('23) 10 AIR 1923 Cal 387 (389) (DB).
('89) 16 Cal 287 (299).
('27) 14 AIR 1927 Pat 311 (311) (DB). (Sufficiency of mistakes to re-open account settled.)
('23) 10 AIR 1923 Mad 602 (603) (DB). (Whether suit barred by S. 47 — Not substantial question of law.)
† ('38) 25 AIR 1938 Mad 352 (352) (SB). (Interpretation of proviso 2 to S. 4 (2), Income-tax Act, is substantial question of law.)

26.✢('14) 1 AIR 1914 PC 16 (18) : 37 All 49 (53): 42 Ind App 22 (PC).
('13) 18 Ind Cas 126 (127) (DB) (All).

27. ('19) 6 AIR 1919 All 34 (35): 42 All 176 (180) (DB).

28. ('28) 15 AIR 1928 Pat 191 (192) (DB).

29. ('42) 29 AIR 1942 P C 61 (62) : I L R (1942) Kar P C 157 (PC). (Question whether certain items should be allowed on one side or other in taking accounts of partnership is pure question of fact where no principle is involved.)
('42) 29 AIR 1942 Cal 498 (501) (SB). (Judges differing — Discussions and exchange of views are necessary for validity of judgment—What amounts to sufficient deliberations is question of fact and not of law much less a substantial question of law.)

111. [S. 597.] Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council —

Bar of certain appeals.

(a) from the decree or order of one Judge of a High Court [a][constituted by His Majesty by Letters Patent], or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being; or

(b) from any decree from which under section 102 no second appeal lies.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915."

1. **Legislative changes.** — The words "decree or order" have been substituted for the word "judgment." See section 109, Note 1.

2. **Amendments after 1908.** — See foot-note (a) to the text of the section.

3. **Scope and object of the section.** — This section definitely prohibits an appeal to the Privy Council from a decree made by a single Judge of a High Court and to this extent overrides Cl. 39 of the Letters Patent by virtue of Cl. 44 thereof.[1] See Note 2 on S. 109. The object is to allow an appeal to the Privy Council only after all the remedies are exhausted in the Indian Courts.[2]

('42) 29 AIR 1942 Mad 368 (369) (DB). (Whether a document of great importance is admissible or not is a substantial question of law.)

('40) 27 AIR 1940 Oudh 397 (399, 400). (Determination of question of Court-fee depended on simple question of fact — *Held*, no substantial question of law arose.)

('39) 26 AIR 1939 All 723 (724) (DB). (Question relating to the method of arriving at the value of bungalows for land acquisition is substantial question of law—Overruled on another point in A I R 1941 All 66 : I L R (1941) All 180 (FB).)

('35) 22 AIR 1935 Pat 266 (267) (DB). (In appeals to the Privy Council in partition suits, the question of valuation itself is one of sufficient importance for allowing leave to appeal to His Majesty in Council under S. 110, C. P. Code.)

('39) 26 AIR 1939 Cal 35(37): ILR (1938) 1 Cal 13 (DB). (Petition for insolvency—At date of hearing petitioning creditor making sworn statement as regards existence of debt — Court relying on presumptions under S. 114, Evidence Act, holding debt as existing and adjudging debtor as insolvent — Decision *held* one upon question of fact and no question of law arose.)

('35) 22 AIR 1935 Lah 91 (91) (DB). (Plaintiff changing allegations — High Court finding them true and decreeing suit — No substantial question of law.)

('37) 24 AIR 1937 Oudh 132 (13[illegible]) : 12 Luck 15 (DB). (Where the whole object of the appeal which is sought to be argued before the Privy Council is to challenge the act of the Executive Government in taking the estate of the applicant under the management and superintendence of the Court of Wards, a matter which is settled by statute law contained in the U. P, Court of Wards Act, the appeal does not involve a substantial question of law such as would justify the High Court in granting leave to the applicant to appeal to His Majesty in Council.)

('35) 157 Ind Cas 605 (607) (DB) (Cal). (Where the law as to constructive *res judicata* has been applied (and correctly applied) to a set of facts concurrently found by two Courts in India, there is no such "substantial question of law" involved in the case.)

Section 111 — Note 3

1. ('43) 30 AIR 1943 Bom 196 (196, 197) (DB). (Appeal from single Judge acting on original side.)
('24) 11 AIR 1924 Mad 399 (399): 46 Mad 958 (DB). (Appeal from single Judge acting in revision.)
†('28) 15 AIR 1928 Cal 640 (642) : 56 Cal 512 (FB).
('31) 18 AIR 1931 Bom 503 (504, 505) (DB).
('36) 23 AIR 1936 Pat 106 (107) (DB). (Decision of single Judge of High Court—Application for leave to appeal to Division Bench rejected—Decision remains that of a single Judge and appeal to Privy Council is prohibited.)
[*See* ('42) 29 AIR 1942 Lah 169 (170): ILR (1942) Lah 592 (FB). (No appeal lies to His Majesty in Council either under C. P. Code, or Letters Patent from the decree of a single Judge of Lahore High Court — There is no conflict between Cl. 29 of Lahore Letters Patent and this section.)]

2. ('42) 29 AIR 1942 Lah 169 (169) : I L R (1942) Lah 592 (FB).

The prohibition, however, only applies to the decree or order of a Judge or Judges of a *Chartered High Court* and not to other High Courts.[3] But the section applies to chartered High Courts whether established before or after the passing of the Code of 1908.[4]

4. "Decree or order," meaning of. — See Notes 3, 4 and 10 on Section 109.

Appeals to Federal Court.

111A. [*Omitted by the Federal Court Act, XXI of 1941, Section 2.*]

NOTE. — The above Act XXI of 1941 came into force on 1-9-1942. See Gazette of India dated 25-7-1942, Part I, page 1226.

The omitted section 111A ran as follows :

"Where a certificate has been given under section 205 (1) of the Government of India Act, 1935, the three last preceding sections shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council, and accordingly references to His Majesty shall be construed as references to the Federal Court :

Provided that —

(a) so much of the said sections as delimits the cases in which an appeal will lie shall be construed as delimiting the cases in which an appeal will lie without the leave of the Federal Court otherwise than on the ground that a substantial question of law as to the interpretation of the said Act, or any Order in Council made thereunder, has been wrongly decided ;

(b) in determining under clause (c) of section 109 whether the case is a fit one for appeal, and, under section 110, whether the appeal involves a substantial question of law, any question of law as to the interpretation of the said Act, or any Order in Council made thereunder, shall be left out of account."

The object of repealing the section was to empower the Federal Court itself to make rules for regulating the presentation of appeals lying to that Court. Such rules have been made and are given in Appendix IV.

('02) 25 Mad 555 (558) (DB). (Appeal from single Judge acting in revision.)

('84) 10 Cal 814 (817) (FB). (Clause 15 of Letters Patent.)

[*See* ('39) 26 AIR 1939 PC 122 (127): ILR (1939) Kar 234 : 14 Luck 252 : 66 Ind App 160 (P C). (Sections 109 and 110 seem to be intended to provide for an appeal to His Majesty on the footing that no further appeal in India is provided.)]

3. ('42) 29 AIR 1942 Lah 169 (169) : I L R (1942) Lah 592 (FB).

('39) 26 AIR 1939 P C 122 (126) : ILR (1939) Kar 234 : 14 Luck 252 : 66 Ind App 160 (P C). (Decree by a single Judge of Oudh Chief Court in exercise of original civil jurisdiction—Privy Council refused special leave to appeal in view of the fact that such decree was appealable under the Oudh Courts Act to a Bench of the Chief Court.)

† ('17) 4 AIR 1917 Lah 448 (448). (Appeal from the decision of a single Judge of the Chief Court of Punjab—See the definition of "High Court" in the General Clauses Act, 1897.)

('32) 19 AIR 1932 Oudh 163 (163, 164) (DB). (Oudh Chief Court—Not a High Court for this section.)

[*See* (1856) 6 Moo Ind App 448 (455) (PC). (Decision of single Judge of the Bombay Sudder Court as to admissibility of special appeal.)]

4. ('42) 29 AIR 1942 Lah 169 (170) : I L R (1942) Lah 592 (FB).

Savings.

112. [S. 616.] (1) Nothing contained in this Code shall be deemed —

(a) to bar the full and unqualified exercise[2] of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

(b) to interfere with any rules[5] made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct[5] before the said Judicial Committee.

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

[1877, S. 616; See Order 45.]

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. Prerogative of the Crown — Clause (a). See Note 2.
4. Grounds for the exercise of the prerogative.
5. Practice of the Privy Council.
6. Findings of fact.
7. New point before the Privy Council.
8. Order as to costs.
9. Rehearing of appeals.
10. Remand, reception of additional evidence, etc.
11. Powers of the High Courts after special leave is granted.
12. Contents of the application for special leave.
13. Proceedings for contempt of Court — Whether appeal to Privy Council lies.

1. Legislative changes. — The words "herein contained" have been substituted for the words "in this chapter" occurring in the old section.

2. Scope and object of the section. — This section does not confer a right upon the subject to prefer an appeal to His Majesty in Council. It merely declares that nothing in the Code will affect the exercise of the appellate jurisdiction which the Sovereign in Council undoubtedly possesses by virtue of the Royal Prerogative.[1] His Majesty in Council can therefore receive or reject an appeal notwithstanding anything contained in Ss. 109 and 110 and notwithstanding the High Courts in India have refused leave to appeal on the ground that the requirements of the Code have not been satisfied.[2]

3. Prerogative of the Crown — Clause (a). — See Note 2.

Section 112 — Note 2

1. ('09) 10 Cal L Jour 326 (328) (DB).
[*See also* (1862) 8 Moo Ind App 270 (274) (PC).
† ('35) 22 AIR 1935 P C 158 (163) (PC). (King's Prerogative cannot be restricted or qualified save by express words or necessary intendment — If such limitation is by Dominion or Colonial Act, Act must deal with it expressly and such Act must have been passed by Legislature endowed with requisite power.)
('39) 26 AIR 1939 PC 122 (127) : 66 Ind App 160: 1LR (1939) Kar (PC) 234: 14 Luck 252(PC). (Privy Council cannot be asked at appellant's option to function as concurrent Court of first appeal.)]
2. (1843) 3 Moo Ind App 220 (224) (PC).
† (1841) 2 Moo Ind App 428 (434) (PC).
(1847) 4 Moo Ind App 220 (222) (PC).
† (1850) 4 Moo Ind App 353 (361) (PC).
(1852) 5 Moo Ind App 196 (198, 199) (PC).
(1859) 7 Moo Ind App 555 (570) (PC).
(1860) 8 Moo Ind App 265 (267) (PC).
(1862) 8 Moo Ind App 270 (274) (PC).
(1862) 9 Moo Ind App 168 (194) (PC). (In this case the Judicial Committee declined to determine the question of the Royal Prerogative to admit an appeal in a criminal matter.)
('68) 12 Moo Ind App 107 (111, 112) (PC).
('70) 13 Moo Ind App 532 (541) (PC).
('73) 1 Ind App 72 (75) (PC).
('90) 15 Bom 155 (158) : 18 Ind App 6 (PC).
('99) 21 All 496 (496, 497) : 26 Ind App 58 (PC).
('94) 17 All 112 (116) : 22 App Ind 1 (PC).
('11) 13 Cal L Jour 507 (509) (DB).
('18) 5 AIR 1918 PC 312 (312) (PC).

4. Grounds for the exercise of the prerogative. — Special leave under this section will not be granted as a matter of course.[1] It will be refused where the question involved is merely one of practice or of form or of costs[2] or where the refusal of the High Court to grant leave is not shown to be wrong.[3] Again, the Judicial Committee will not entertain an application for leave to appeal against an act of State.[4] But leave will be granted where the question involved is an *important or substantial question of law of general interest*, even though the value of the subject-matter of the appeal is below Rs. 10,000 or the application to the High Court is time-barred.[5]

5. Practice of the Privy Council.—The provisions of the Code do not apply to the procedure of the Privy Council in hearing appeals from India but the Privy Council may follow the rules contained in such provisions where it considers them to be based on sound principles.[1] See also Notes 6 to 10 and 12 and the undermentioned cases.[2]

(1865) 10 Moo Ind App 313 (321) (PC). (Special leave to appeal granted notwithstanding that no application had been made for such leave to the Court below.)
('39) 26 AIR 1939 P C 122 (127): I L R (1939) Kar (PC) 234:14 Luck 252:66 Ind App 160 (PC). (The discretion which S. 112 affirms and maintains applies to the rejecting as well as to the receiving of appeals and the prerogative is not wholly or finally concluded by the provisions of S. 109.)
[*See* ('27) 14 AIR 1927 P C 264 (265) (PC). (The first consideration of the Privy Council is to secure if possible substantial justice.)]

Note 4

1. ('70) 13 Moo Ind App 433 (437) (PC). (Subject-matter of the suit under the appealable value — Grounds of appeal peculiar to the particular case —Leave to appeal refused.)
('10) 1910 Pun Re No. 97 : 1911 Pun L R No. 11, p. 31 (105, 108) (DB).
('75) 2 Ind App 205 (206, 209) (PC). (Preliminary objection before Privy Council — Leave of High Court *ultra vires* — Other proceedings in India more satisfactory — Special leave refused.)
2. ('72) 9 Bom H C R 398 (401). (Practice.)
('32) 19 AIR 1932 P C 13 (21) : 59 Ind App 1 : 6 Luck 556 (PC). (Costs.)
('99) 27 Cal 333 (335): 27 Ind App 79 (PC). (Form.)
† (1837) 1 Moo Ind App 470 (479) (PC). (Costs.)
3. ('02) 30 Cal 309 (315, 316): 30 Ind App 20 (PC).
('90) 15 Bom 155 (158) : 18 Ind App 6 (PC).
4. † ('04) 32 Cal 1 (4, 5) : 31 Ind App 239 (PC). (Order of the Viceroy deposing a Maharaja.)
(1854) 5 Moo Ind App 499 (509, 510) (PC). (Order against non-judicial acts, such as an act of Governor of Bombay in Council in administration of estate of a Nawab.)
('70) 13 Moo Ind App 343 (346) (PC). (Dismissal of Munsif for corruption.)
5. ('01) 24 All 174 (177, 178): 29 Ind App 46 (PC). (Before applying for special leave an application under Section 109 (c) of the Code should ordinarily be made to the High Court.)
('68) 5 Moo P C (N S) 67 (72) (PC).
† (1859) 8 Moo Ind App 1 (17) (PC). (Question affecting *tora giras huq* in Bombay Presidency.)
(1860) 8 Moo Ind App 103 (120) (PC).
('99) 3 Cal W N ccxxxviii.
(1900) 23 All 227 (231) : 28 Ind App 11 (PC).
('11) 13 Cal L Jour 681 (685) (DB).
('06) 33 Cal 893 (894) : 33 Ind App 106 (PC).
✠('07) 30 Mad 185 (188) : 34 Ind App 93 (PC). (Question touching the rights of religious bodies in regard to public processions.)
('03) 27 Bom 415 (418) (DB). (Important question affecting companies.)
† (1860) 8 Moo Ind App 265 (267) (PC). (A question of tenure service affecting other suits.)
(1860) 8 Moo Ind App 339 (351, 352) (PC). (Construction of an Act of Parliament.)
('73) 1 Ind App 268 (275, 276) (PC). (Special appeal on the ground of conflict of decisions.)
(1862) 8 Moo Ind App 270 (274) (PC). (Where the Judicial Commissioner of Oudh had no power under Statute or Charter to grant leave.)
('68) 12 Moo Ind App 107 (111, 112) (PC). (Where, owing to change of rule, period for leave to appeal had expired pending review proceedings and there was no default of petitioner, the Privy Council gave special leave.)
('97) 19 All 95 (97) : 23 Ind App 167 (PC). (Where the High Court had granted leave in only one of two cross-appeals.)
('15) 19 Cal W N xii. (Where the High Court had granted leave in only one of the two connected suits.)
('70) 13 Moo Ind App 532 (540, 541) (PC). (Special circumstances of the case.)
('15) 19 Cal W N cxxv. (Question of jurisdiction to try suit or appeal.)
[*See also* ('13) 36 Mad 501 (521) : 21 Ind Cas 369 (371, 372) : 40 Ind App 193 (PC). (Wholly inadmissible evidence used to the grave prejudice of accused.)
('33) 57 Cal L Jour 335 (371) (PC). (Important question of law sufficient—Construction of R. 36, Chapter 10 of Calcutta High Court Original Side Rules.)]

Note 5

1. ('40) 27 A I R 1940 Oudh 164 (170) : 15 Luck 619 (DB). (Their Lordships of the Privy Council are not bound by the provisions of the Code of Civil Procedure.)
('37) 24 A I R 1937 P C 233 (234) : 64 Ind App 250 : 31 Sind L R 590 : I L R (1937) All 655 (PC). (Rule in Section 99 applied.)
[*See also* ('42) 29 AIR 1942 Lah 279 (279) : I L R (1942) Lah 548. (The provisions of the Code are subject to rules made by the Judicial Committee.)]
2. ('16) 3 AIR 1916 P C 227 (229) : 44 Cal 573 : 44 Ind App 39 (PC). (Where an appeal is heard

6. Findings of fact. — It is a long established rule of practice of the Board that it will not, as a general rule, disturb *concurrent findings of fact* by two Courts in India,[1] though such findings do not always or necessarily *prevent* their Lordships from

ex parte it is the duty of the counsel to place before the Board adverse as well as favourable authorities.)

('32) 19 AIR 1932 P C 36 (38, 39, 40) (PC). (It is not Board's duty to act as draftsman of foreign Acts.)

('32) 19 AIR 1932 P C 251 (251, 252) (PC). (Judicial Commissioner of Central Provinces reporting that decree is a consent decree—Appeal is incompetent and other statements as to sufficiency of consent need not be considered.)

('34) 21 AIR 1934 P C 29 (30) : 61 Cal 221 : 61 Ind App 29 (PC). (High Court not proceeding on inadmissible evidence or inapplicable principles—No interference.)

('14) 1 AIR 1914 P C 65 (66) : 36 All 284 : 41 Ind App 104 (PC). (Appellant guilty of non-prosecution of appeal before the Privy Council—Appeal automatically stands dismissed—No need for order of dismissal.)

('89) 17 Cal 693 (694) (PC). (Appellant after transmission of appeal to England obtained leave of High Court to withdraw it. Interests of a minor party affected by withdrawal. The Privy Council ordered substitution of minor's guardian as appellant for costs.)

(1856) 6 Moo Ind App 346 (347) (PC). (Admission of appeal to Privy Council—No further steps taken by the appellant. Judicial Committee on a petition by respondent and upon a certificate of non-prosecution by the Registrar of the High Court dismissed the appeal.)

('24) 11 AIR 1924 P C 208 (208, 209) (PC). (In a case where the lower Appellate Court reversed a finding of fact such as adoption, the Privy Council simply expressed its agreement with the lower Appellate Court without giving any reasons.)

('25) 12 AIR 1925 P C 111 (112) : 52 Ind App 110 : 49 Bom 241 (PC). (No application to the Privy Council lies to interpret a previous order in Council unless on regular appeal except for special reasons.)

('30) 17 AIR 1930 P C 196 (197) : 57 Ind App 186 : 52 All 277 (PC). (Special leave granted on incorrect valuation of subject-matter — Leave can be rescinded without an application by respondent.)

('31) 18 AIR 1931 PC 22 (22): 57 Ind App 279: 10 Pat 86 (PC). (Special leave to appeal granted on *ex parte* application—Board is not precluded from going into question of competency of appeal on facts being known.)

('85) 11 Cal 379 (385) : 12 Ind App 47 (PC). (Mere want of particularity in pleadings in the absence of consequent injustice will not be a ground for setting aside decree.)

('27) 14 AIR 1927 Mad 1088 (1089). (Death of respondent pending Privy Council appeal — Order in appeal valid and executable.)

('35) 22 AIR 1935 P C 197 (198) (PC). (Special leave granted only as to area open to compensation —Question of quantum not allowed — Question of area not determinable without opening question of quantum—*Held*, appeal must fail.)

('35) 22 AIR 1935 P C 36 (39) : 62 Ind App 40 : 14 Pat 327 (PC). (In the absence of sufficient reason Privy Council will not interfere with discretion of the Courts in India.)

('37) 24 AIR 1937 Bom 433 (445) (DB). (Provisions of Code do not apply to Privy Council appeals—Death of respondent pending Privy Council appeal —Privy Council decree is not nullity though legal representative not substituted.)

Note 6

1. ('43) 30 A I R 1943 P C 121 (124) (PC). (Will executed by Indian in English—Construction of, by Courts in India—Interference with—Hesitation of Privy Council.)

('42) 29 AIR 1942 P C 54 (57) : I L R (1943) Mad 1 : 69 Ind App 110 : I L R (1942) Kar (P C) 111 (PC).

('42) 29 AIR 1942 P C 19 (21) (PC).

('41) I L R (1941) Kar (PC) 123 (126): 195 Ind Cas 624 (625) (PC).

('40) 27 A I R 1940 P C 24 (26) : 67 Ind App 32 : ILR (1940) 1 Cal 266 : I L R (1940) Kar (PC) 47 (PC).

('39) 26 AIR 1939 P C 249 (252) : ILR (1940) Kar (PC) 1 (PC).

('39) 183 Ind Cas 194 (195) (PC).

(1854) 6 Moo Ind App 27 (49) (PC). (Credibility of witnesses.)

('32) 19 AIR 1932 P C 50 (51) (PC).

✠('32) 19 AIR 1932 P C 89 (90) : 59 Ind App 147 : 7 Luck 64 (PC). (Unless there has been a miscarriage of justice or violation of some principle of law.)

('32) 19 AIR 1932 P C 231 (234) (PC). (Importance of the rule is to discourage consideration of facts found by two Courts concurrently.)

† ('33) 20 AIR 1933 P C 120 (121) (PC).

(1861) 8 Moo Ind App 477 (489) (PC).

('67) 7 Suth W R 27 (27) : 11 Moo Ind App 213 (PC).

('68) 10 Suth W R 10 (10): 11 Moo Ind App 19 (PC).

('69) 11 Suth W R 1 (1): 12 Moo Ind App 145 (PC).

('69) 11 Suth W R 35 (38) (PC).

('71) 16 Suth W R 16 (17, 18) (PC).

† ('72) 14 Moo Ind App 401 (410, 411) (PC).

('73) 19 Suth W R 275 (276) (PC).

('74) 1 Ind App 144 (156) : 21 Suth W R 21 (21) (PC).

('89) 12 Mad 512 (515) (PC).

('92) 19 Cal 452 (461) : 19 Ind App 101 (PC). (Question of adoption.)

('96) 23 Cal 918 (921, 922) : 23 Ind App 102 (PC). (Question whether the defendant had attained full age at the time he executed mortgages.)

('98) 25 Cal 189 (194) : 24 Ind App 183 (PC).

('99) 3 Cal W N 249 (249) (PC). (Question whether defendants held upon one kind of tenure or another.)

✠('01) 28 Cal 1 (4) : 27 Ind App 166 (PC).

('01) 28 Cal 190 (193, 194) (SB).

examining the whole evidence and acting upon their own independent judgment.[2] The rule is based upon the special advantages which the Judges in India possess for appreciation of evidence, viz., familiarity with the habits and practices of the country, its manners and customs and local conditions and also the opportunity of judging the parol evidence by seeing the witnesses under examination and by inspecting the original documents.[3] The

('01) 25 Bom 332 (336) (PC). (Question of malice and reasonable and probable cause in a suit for damages for malicious prosecution.)
('02) 25 Mad 215 (219) : 29 Ind App 38 (PC).
('08) 35 Cal 271 (274) : 35 Ind App 67 (PC).
('09) 31 All 557 (570) : 36 Ind App 210 : 13 Oudh Cas 183 (PC). (Existence of custom.)
('12) 17 Ind Cas 733 (733) (PC).
('13) 15 Bom L R 463 (466) (PC).
('13) 41 Ind App 51 (62) (PC).
('13) 17 Cal W N 389 (393) (PC).
('13) 40 Cal 879 (889, 890) : 40 Ind App 156 : 18 Cal L Jour 70 (73) (PC).
('13) 18 Ind Cas 91 (92) (PC).
('13) 40 Cal 288 (296) : 1913 Pun Re No. 26 (PC).
('71) 15 Suth W R 37 (37) (PC).
† ('14) 1 AIR 1914 PC 82 (84) (PC).
('18) 5 AIR 1918 P C 225 (226) (PC).
† ('20) 7 AIR 1920 PC 4 (6) : 43 Mad 650: 47 Ind App 99 (PC). (Concurrent finding of fact — Reasons for finding not consistent — Evidence was examined.)
('20) 7 AIR 1920 P C 87 (87) (PC).
('20) 7 AIR 1920 P C 88 (90) (PC).
('22) 9 AIR 1922 P C 105 (105) : 45 Mad 207 : 49 Ind App 67 (PC).
('23) 10 AIR 1923 P C 21 (22) : 2 Pat 230 : 50 Ind App 58 (PC).
('24) 11 AIR 1924 P C 232 (232) (PC).
('25) 12 AIR 1925 P C 31 (32) (PC).
('26) 97 Ind Cas 287 (288) (PC).
('26) 99 Ind Cas 427 (428) (PC).
('25) 12 AIR 1925 P C 174 (174) (PC).
('27) 14 AIR 1927 P C 27 (30) (PC).
† ('29) 16 AIR 1929 P C 38 (39) (PC).
('31) 18 AIR 1931 P C 68 (69) (PC).
('37) 168 Ind Cas 737 (738) (PC).
('36) 161 Ind Cas 589 (589) (PC).
('35) 156 Ind Cas 843 (843) (PC).
✠('39) 26 AIR 1939 PC 152 (156): ILR (1939) Kar (PC) 258 (PC). (No proof that findings were arrived at by error of method or neglect of any aspect of evidence—Findings would not be disturbed.)
('35) 22 AIR 1935 P C 71 (72) (PC). (Question whether by custom women are excluded from inheritance is one of fact, and the Privy Council will not interfere with the concurrent findings of the Courts in India negativing such a custom.)
('35) 22 AIR 1935 P C 92 (93) (PC).
('35) 22 AIR 1935 P C 146 (149) (PC). (Appellant cannot go beind concurrent findings of fact of lower Courts.)
('36) 23 AIR 1936 P C 198 (198): 63 Ind App 295: 58 All 397 (PC).
('36) 23 AIR 1936 P C 332 (333): 63 Ind App 441: 16 Pat 1 (PC).
('37) 24 AIR 1937 P C 157 (160) (PC). (Concurrent findings of fact of the lower Courts on the question of navigability of a certain river based on documentary or historical writing cannot be interfered with as it does not involve a question of law as to the construction of the documents or the writings produced in evidence but only a question as to the effect to be given as evidence to the historical writings which referred to the state and the use of the river in the past.)
('37) 24 AIR 1937 P C 310 (311): 31 Sind L R 702 (PC).
✠('38) 25 AIR 1938 P C 183 (183) : 32 Sind L R 545 (PC).
† ('39) 182 Ind Cas 416 (416) (PC). (No interference unless finding is shown to be erroneous beyond shadow of doubt.)

2. ('41) 28 AIR 1941 P C 55 (56) (PC). (No doubt the rule as to concurrent findings of fact is not so rigid that it might not be departed from if such a state of things existed as facts appearing from some undisputed document which are completely distructive of the findings of fact.)

(1849) 4 Moo Ind App 431 (433) (PC).
✠(1865) 10 Moo Ind App 429 (436) (PC).
† ('09) 31 All 457 (474) : 36 Ind App 15 : 12 Oudh Cas 304 (PC). (Concurrent finding though not binding is entitled to greatest weight.)

3. ('43) 30 AIR 1943 P C 108 (109) (PC). (Evidence as to cause and origin of fire.)

('42) 202 Ind Cas 373 (376) (PC).
('40) 27 AIR 1940 P C 93 (97) : I L R (1940) Kar (PC) 235 (PC). (Witness examined on commission by trial Court — Judges of High Court having advantage of seeing demeanour of witness in witness box—Their appreciation of evidence should not be rejected.)
✠('94) 21 Cal 997 (1002) : 21 Ind App 163 (PC).
('32) 19 AIR 1932 P C 152 (153) : 10 Rang 261:59 Ind App 216 (PC).
† ('32) 19 AIR 1932 P C 69 (73) (PC).
† ('32) 19 AIR 1932 P C 13 (19) : 59 Ind App 1: 6 Luck 556 (PC). (Evidence on commission—Witness not seen by any Court—Opinion of Appellate Court preferred.)
† ('33) 20 AIR 1933 P C 46 (47) (PC).
('93) 20 Cal 560 (572) : 20 Ind App 38 (PC).
† ('18) 5 AIR 1918 P C 10 (11) : 21 Oudh Cas 104 (PC). (Trial Court's judgment based not on appreciation of witnesses but on probabilities—Appellate Court's judgment though contrary to that of the trial Court will not be disturbed.)
('06) 28 All 215 (218, 219) : 33 Ind App 53 (PC).
('99) 22 Mad 515 (518) : 26 Ind App 55 (PC).
('67) 11 Moo Ind App 194 (208) (PC).
(1854) 6 Moo Ind App 27 (49, 50) (PC).
✠('1861) 9 Moo Ind App 66 (87) (PC).
† (1863) 9 Moo Ind App 456 (478) (PC).
(1865) 2 Suth W R 1 (4) (PC).
('80) 5 Cal L Rep 430 (434, 435, 436) (PC).
('66) 5 Suth W R 3 (3, 7) : 7 Moo Ind App 207 (PC).
('21) 8 AIR 1921 P C 231 (233) (PC).
('72) 17 Suth W R 185 (187) (PC).

weight to be attached to concurrent findings of the Courts in India is not detracted in any way by any of the following circumstances :

(1) that the two Courts differ in their *reasons* in arriving at the finding;[4]

(2) that the Courts differ in their view of the weight to be given to any *particular* piece of evidence;[5]

(3) that the Judges composing the Bench which concurred in the finding of the lower Court are not unanimous in their finding;[6]

(4) that the materials before the two Courts were not entirely the same, owing to the admission of additional evidence by the Appellate Court;[7]

(5) that the lower Court had not considered part of the evidence though coming to the same conclusion;[8]

(6) that the judgments of the Courts are not exhaustive enough to show that every minute and elementary consideration was present to the minds of the Judges;[9]

(7) that the nature of the question discussed and the character of evidence on record justify equally either view of the matter.[10]

In exceptional circumstances and for very strong reasons, the Privy Council will interfere even with the concurrent findings of fact in order to avoid injustice being done.[11] The following circumstances have been held to justify interference by the Privy Council with concurrent findings of fact —

(1) plain *miscarriage of justice* in the conduct of the trial or the decision of the Court;[12]

(2) *violation* or improper application of *any principle of law*, evidence, or procedure or the fact of the Court having clearly *fallen into an error* apparent on the documents;[13]

(3) inadmissible evidence forming the basis of the finding;[14]

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† (1849) 4 Moo Ind App 431 (433) (PC).
('04) 26 All 581 (586) : 31 Ind App 217 : 7 Oudh Cas 290 (PC).
† ('39) 182 Ind Cas 416 (417) (PC).
[*See* ('67) 11 Moo Ind App 177 (187, 188) (PC).]

4. † ('93) 20 Cal 847 (852) : 20 Ind App 95 (PC).
('27) 14 AIR 1927 Mad 443 (444) (DB).
('24) 11 AIR 1924 P C 113 (115) : 5 Lah 200 : 51 Ind App 182 (PC).
('03) 25 All 1 (17) : 29 Ind App 203 (PC).
† ('38) 25 AIR 1938 P C 67 (69) : 65 Ind App 66 : 32 Sind L R 374 : I L R (1938) 2 Cal 72 (PC).
Also see Ss. 100 & 101, Note 54.

5. ('03) 30 Cal 303 (308) : 30 Ind App 41 (PC).

6. ('22) 9 AIR 1922 P C 159 (160) : 48 Cal 856 : 48 Ind App 114 (PC).

7. ('97) 24 Cal 1 (6) : 23 Ind App 97 (PC).
[*See also* ('72) 9 Beng L R 364 (369, 371) (PC). (Some evidence wrongly admitted — Rest will be considered.)
('71) 15 Suth W R 8 (9) (PC) (Do.)
† ('09) 36 Cal 833 (839, 840) : 36 Ind App 221 (PC). (Finding by the trial Court—Separate finding given by the High Court on additional evidence — Privy Council refused to disturb the finding of the High Court.)]

8. † ('90) 17 Cal 882 (884) : 17 Ind App 70 (PC).
('81) 3 Mad 384 (392) : 8 Ind App 149 (PC).
('35) 22 AIR 1935 P C 146 (149) (PC).

9. ('12) 34 All 455 (463) : 39 Ind App 156 : 15 Oudh Cas 271 (PC).

10. ('08) 35 Cal 271 (274) : 35 Ind App 67 (PC).
† ('66) 5 Suth W R 79 (80) (PC).
('71) 16 Suth W R 9 (11) (PC).

11. † ('14) 1 AIR 1914 P C 184 (188) (PC).
† ('33) 20 AIR 1933 P C 26 (27) (PC).
('29) 16 AIR 1929 P C 24 (24) : 52 Mad 175 : 56 Ind App 21 (PC).
('22) 9 AIR 1922 P C 356 (357) : 1 Pat 741 : 49 Ind App 342 (PC).
('89) 16 Cal 753 (755) : 16 Ind App 125 (PC).
('69) 11 Suth W R 35 (38) (PC).
('06) 28 All 219 (222,223) (PC). (Mere fact that the Courts below do not agree on all the steps which lead to one and the same conclusion is no reason for disturbing concurrent finding of fact.)
See also cases in foot-notes 12 to 23.

12. ('72) 14 Moo Ind App 453 (460) (PC).
('38) 25 AIR 1938 P C 183 (183): 32 Sind L R 545 (PC).

13. ('71) 15 Suth W R 5 (5) PC).
✠ ('04) 31 Cal 871 (884) : 31 Ind App 127 (PC).
† ('87) 14 Cal 296 (306, 307) : 14 Ind App 7 (PC).
(1849) 4 Moo Ind App 414 (430) (PC).

14. ('72) 10 Beng L R 301 (311) (PC).
✠ ('39) 26 AIR 1939 PC 146 (149) (PC).

(4) the judge *misdirecting* himself by omitting to deal with the real questions raised in issue and drawing wrong inferences from the evidence ;[15]

(5) finding of fact being based on an error of law or a *misconstruction of documents* ;[16]

(6) that important *questions of law underlie the findings* or that law is mixed up largely with facts ;[17]

(7) that the lower Court had *not seen the witnesses* under examination;[18]

(8) that the High Court has clearly misunderstood or failed to appreciate material evidence in the case thereby necessarily coming to a *wrong* conclusion ;[19]

(9) that there is *no evidence* to support a finding ;[20]

(10) that questions of fact undecided by the lower Courts require to be decided by the Privy Council in order to enable the respondent to meet the appellant's points of law ;[21]

(11) that the case involves a question of *jurisdiction of an important and delicate character*, new to the Courts in India ;[22]

(12) that the dispute is one as to *custom* which is a mixed question of law and fact;[23]

Even in the case of findings of fact which are not concurrent the Privy Council will not interfere unless it is satisfied that the conclusions of the High Court are clearly erroneous.[24]

It may also be remembered that in appeals from decrees on second appeals a finding of fact is as binding on their Lordships of the Judicial Committee as on the Court of second appeal in India.[25]

7. New point before the Privy Council. — Though in exceptional cases a new point may be allowed to be raised for the first time before the Privy Council,[1] yet

† ('35) 22 AIR 1935 P C 175 (179) (PC). (Fact that trial Court has seen witnesses is not important if decision is based on inadmissible evidence.)

15. †('25) 12 AIR 1925 P C 122 (123) (PC).
('69) 12 Moo Ind App 507 (520, 521) (PC).
† ('29) 16 AIR 1929 P C 38 (40) (PC).
('69) 13 Moo Ind App 232 (244, 246) (PC).

16. † ('29) 16 AIR 1929 P C 38 (39, 40) (PC).
† ('14) 22 Ind Cas 51 (52) (PC).
('19) 6 AIR 1919 P C 60 (61) : 42 All 152 (156, 157): 46 Ind App 197 (PC).
('81) 3 Mad 384 (392) : 8 Ind App 149 (PC).

17. † ('25) 12 AIR 1925 P C 122 (123) (PC).
('77) 1 Mad 252 (258) : 4 Ind App 109 (PC).

18. ('28) 15 AIR 1928 PC 39(40):24 NagLR 40 (PC).
('14) 1 AIR 1914 P C 184 (188) (PC).

19. † ('25) 12 AIR 1925 P C 280 (288) : 52 Ind App 418 : 5 pat 135 (PC).
('35) 22 AIR 1935 P C 73 (78) (PC). (Failure to consider material evidence.)

20. ('14) 1 AIR 1914 P C 67 (71):41 Cal 972 (987, 989) : 41 Ind App 110 (PC).
('18) 5 AIR 1918 P C 339 (343) (PC).

21. ('20) 7 AIR 1920 P C 181 (190) (PC).

22. ('72) Ind App Supp Vol 106 (118).

23. ('17) 4 AIR 1917 P C 33 (39) : 40 Mad 709 : 44 Ind App 147 (PC).
('99) 22 Mad 515 (518):26 Ind App 55 (PC). (Question of custom treated as one of law by both parties and no error of law shown.)
Also see Ss. 100 and 101, Note 21.

24. ('42) 29 AIR 1942 P C 61 (62) : I L R (1942) Kar P C 157 (PC). (Question whether certain items should be allowed on one side or the other in taking accounts of partnership is purely one of fact.)
('34) 21 A I R 1934 P C 81 (83) : 61 Ind App 158 : 12 Rang 194 (PC). (Burden of so satisfying the Privy Council is on the appellant.)
[*See also* ('36) 23 AIR 1936 P C 147 (150) (PC). (Privy Council would be slow to differ from the view of the trial Judge who has seen the witnesses when they were being examined as to the effect of such evidence, especially in a case where the language used often has a local significance by no means identical with the English words into which the native words are translated).]

25. ('89) 16 Cal 753 (755) : 16 Ind App 125 (PC).
('91) 19 Cal 253 (259, 260) : 19 Ind App 48 (PC).
('90) 17 Cal 246 (249) (PC).
† ('28) 15 AIR 1928 P C 219 (221) (PC).
('87) 14 Cal 740 (748) : 14 Ind App 101 (PC).
('72) 12 Beng L R 107 (108) (PC). (Special leave in appeals from decrees on second appeal on questions of fact granted only under special circumstances.)
† ('27) 14 AIR 1927 P C 117 (119) : 54 Ind App 196 : 54 Cal 586 (PC).

Note 7

1. † ('15) 2 AIR 1915 P C 172 (173) (PC). (A new defence.)

as a *general rule* such a point is disallowed where it ought to have been raised in and considered by the Courts in India.[2] Mere technical objections taken for the first time

('32) 19 AIR 1932 P C 28 (31) : 59 Ind App 29 : 59 Cal 1012 (PC). (New claim for abated rent under a kabuliyat allowed on payment of costs.)
('32) 19 AIR 1932 P C 51 (52) : 59 Ind App 121 : 53 All 990 (PC). (New point as to non-maintainability of the suit owing to want of previous sanction of Local Government under S. 93, C. P. Code, allowed to be raised.)
('11) 33 All 344 (355, 356) : 38 Ind App 104 : 14 Oudh Cas 133 (PC). (A new interpretation of a document.)
('68) 9 Suth W R 9 (10) (PC).
('34) 21 AIR 1934 P C 213 (216): 61 Ind App 378: 56 All 634 (PC). (One of the grounds in appeal before High Court not argued—It can be considered by Privy Council, where the point was one of law and required no fresh evidence.)
('35) 22 AIR 1935 P C 108 (114) : 57 All 314 : 62 Ind App 115 (PC). (Where a party has not raised certain defence in the High Court or has abandoned it, the Privy Council grants leave to raise such defence before it only in exceptional cases, and there is no distinction in principle between the position of an appellant who abandons in the High Court a ground of appeal of which he had given notice and the position of a respondent in the High Court who does not raise a point in his favour which was open to him without notice. It is quite true that it would be open to the Board on proper terms to refer to the High Court this question for their consideration. But even that the Board would not do except under special circumstances.)

2. ('41) 28 AIR 1941 P C 120 (123) : I L R (1941) Kar P C 155 : I L R (1942) Lah 1 : 68 Ind App 155 (PC).
('40) 27 A I R 1940 P C 147 (149) : I L R (1940) Kar P C 341 : 67 Ind App 377 (PC). (Question whether a party was pardanashin lady, not raised at the trial not allowed by the Privy Council.)
('40) 27 AIR 1940 P C 145 (146) : ILR (1940) Kar P C 282 (PC). (Mortgage by members of joint Hindu family on behalf of themselves and their minor sons—Suit by mortgagee—Relief that judgment should be given against minor sons of each of mortgagors as well held could not be sought for for first time in Privy Council appeal.)
('40) 27 AIR 1940 P C 30 (32) : 67 Ind App 102 : I L R (1940) Kar P C 76 (PC). (A plea raised for the first time in appeal to the Privy Council cannot be entertained at that stage if the Board is not satisfied that the evidence already taken establishes beyond doubt that the facts, if fully investigated, would have supported the plea.)
('39) 26 AIR 1939 P C 249 (252) : I L R (1940) Kar P C 1 (PC). (Objection regarding admissibility of evidence not raised in petition under Ss. 109 and 110 cannot be allowed to be raised in Privy Council appeal.)
('12) 34 All 57 (62) (PC).
('32) 19 AIR 1932 P C 118 (121): 59 Ind App 161 : 10 Rang 242 (PC). (Invalidity of document owing to non-registration—Not raised in Court below — Circumstances and facts not admitted — Not allowed to be raised.)
('33) 20 AIR 1933 P C 117 (117) (PC).
('33) 20 AIR 1933 PC 164 (166, 167) (PC). (Plea of genuine sale sought to be converted for the first time in Privy Council to one of gift.)
('34) 21 AIR 1934 P C 108 (111): 58 Bom 306 : 61 Ind App 190 (PC). (New defence — Not raised in written statement nor considered by Courts below —Disallowed.)
† (1843) 3 Moo Ind App 229 (242) (PC). (Objection which if taken might have been cured but not taken below, shall not be taken in appellate Court.)
('13) 35 All 227 (238) : 40 Ind App 74 (PC).
('28) 15 AIR 1928 PC 106 (107) (PC). (Question of wakf being public or private not raised in the lower Courts—Privy Council refused to entertain.)
('69) 11 Suth W R 27 (28) : 12 Moo Ind App 470 (PC). (A new ground of defence not in issues.)
('28) 15 AIR 1928 PC 39 (43): 24 Nag L R 40 (PC). (New defence.)
('28) 15 AIR 1928 PC 47 (48) (PC). (New plea of limitation based on new facts.)
('16) 3 AIR 1916 P C 166 (168) (PC). (A question abandoned in the appeal Court in India.)
('07) 34 Cal 709 (710) : 34 Ind App 164 (PC). (Question of fact decided against appellant, and not raised in High Court.)
('18) 5 AIR 1918 P C 53 (55): 40 All 497 (PC).
('18) 5 AIR 1918 P C 173 (177) : 43 Mad 174 : 45 Ind App 195 (PC).
('86) 12 Cal 239 (246): 12 Ind App 166 (PC). (Point not in issue or before the lower Court.)
('71) 14 Moo Ind App 176 (196) (PC). (Do.)
('98) 25 Cal 187 (189): 24 Ind App 191 (PC). (Point not raised in plaint or Courts below.)
('14) 1 AIR 1914 P C 137 (140): 37 Mad 227 (PC). (Point not raised in Courts below.)
('17) 4 AIR 1917 P C 197 (200) (PC). (New plea not raised in lower Courts.)
('24) 11 AIR 1924 P C 123 (123) (PC). (Subsidiary points not raised or canvassed in Courts below.)
('25) 12 AIR 1925 P C 118 (122): 52 Cal 482: 21 Nag L R 50: 52 Ind App 231 (PC). (Objections to frame of decree.)
('26) 13 AIR 1926 P C 41 (43, 46): 53 Cal 533: 53 Ind App 100 (PC). (Argument which has not been sifted in the Courts below cannot be entertained.)
('99) 22 Mad 515 (518) : 26 Ind App 55 (PC). (Objection taken for the first time before the Privy Council.)
('94) 21 Cal 997 (1004, 1005) : 21 Ind App 163 (PC).
('39) 26 AIR 1939 P C 114 (116) : ILR (1939) Kar 160 (PC). (Contention not put forward before the trial Court or High Court.)
('39) 26 AIR 1939 P C 143 (145) (PC). (Parties not taking objection to reception of certain evidence in Court of Appeal when professionally represented — Such objection cannot prevail for first time in Privy Council appeal.)
('39) 26 AIR 1939 PC 159 (161): ILR (1939) Kar 249 (PC). (Plea as to validity of lease not raised in written statement—Plea not allowed.)

before the Privy Council are always disallowed.[3]

8. Order as to costs. — The sound general rule is that the party who is defeated in the controversy that is raised shall pay the costs.[1] But if the successful party is guilty of laches[2] or if grounds of appeal which are absolutely untenable are joined with grounds which are tenable in order to bring the case within the rule authorising an appeal as of right,[3] he will disentitle himself to the application of the general rule. Where a decree is affirmed upon grounds wholly different from those relied upon in the Court below,[4] costs would be disallowed to the respondent. Where the Privy Council remanded a case to the lower Court and the remand was occasioned by the manner in which the issue was framed by the Judge, the costs of the appeal were directed to be costs in the cause.[5] In the undermentioned case[6] where the suit arose out of the ambiguity of a will which was construed differently by two Courts in India, their Lordships of the Privy Council ordered that the costs should come out of the estate. When granting leave to appeal it is open to the Privy Council to impose such terms upon the party applying as the special circumstances of the case require.[7]

The High Courts have no jurisdiction regarding costs or security for costs where special leave has been granted by the Privy Council, except so far as directed by the Privy Council in that behalf.[8]

9. Re-hearing of appeals. — A re-hearing will, as a general rule, be refused in accordance with the salutary maxim *interest reipublicæ ut sit finis litium* —it concerns

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('35) 22 AIR 1935 P C 212 (214) (PC). (Case based on specific alleged negligence — Case not made out — New plea that negligence is presumed in circumstances of case—Plea not taken in pleadings nor at trial—Plea held not allowable.)

† ('36) 23 AIR 1936 P C 89 (90) (PC). (Appellant cannot be allowed to maintain contention abandoned by him in lower Court.)

('36) 23 AIR 1936 P C 139 (141) (PC). (Plea not pressed in lower Courts and no issue framed.)

('36) 23 AIR 1936 P C 179 (183) (PC). (Issue abandoned or not raised in lower Courts—Privy Council will be reluctant to consider such issue.)

('37) 24 AIR 1937 PC 260 (261) : 31 Sind L R 652 (PC). (Question of fact not raised in India—Cannot be raised for first time before Privy Council.)

('38) 25 AIR 1938 P C 4 (6, 7) : 32 Sind L R 235 (PC). (Plea not raised in pleading nor in issue.)

('38) 25 AIR 1938 P C 20 (22) : 65 Ind App 45 : 17 Pat 69 : 32 Sind L R 276 (PC). (New plea not raised in High Court or in application for leave or in grounds of appeal to Board—Plea depending on proof of facts not allowed.)

3. (1849) 5 Moo Ind App 1 (26) (PC).
(1859) 7 Moo Ind App 441 (474, 475) (PC).

† ('78) 1 All 688 (708): 5 Ind App 87 (PC). (Special leave granted on question of law of importance to the Jain sect, in argument — Technical objections disallowed.)

Note 8

1. ('83) 9 Cal 797 (802) : 10 Ind App 113 (P C). (On this principle the appellant was awarded costs of appeal although the appellant only partly succeeded in his appeal, because the whole of his claim was opposed in the Courts beolw on an untenable ground.)
(1861) 8 Moo Ind App 477 (489) (PC).

† ('83) 7 Bom 19 (33) : 9 Ind App 86 (PC).

('66) 10 Moo Ind App 454 (476) (PC). (Slight modification as to rate of interest in appeal is not sufficient to deprive the respondent of the costs of appeal.)

('98) 25 Cal 187 (189) : 24 Ind App 191 (PC).
[*See also* (1865) 10 Moo Ind App 229 (251) (PC). (Rate of interest reduced — Parties to bear their own costs.)
('25) 12 AIR 1925 PC 169 (170): 47 All 459 (PC). (Respondent lodging his printed case but absent at hearing—Appeal dismissed—Respondent entitled to costs up to lodging.)
(1900) 27 Cal 951 (970) : 27 Ind App 110 (P C). (The Indian practice of apportionment of costs does not prevail in the Privy Council.)]

2. † ('16) 3 AIR 1916 P C 110 (113) : 44 Cal 186 (200) : 43 Ind App 249 (P C).
(1861) 8 Moo Ind App 193 (198) (P C).

3. † ('82) 8 Cal 332 (337) : 9 Ind App 1 (P C).

4. (1860) 8 Moo Ind App 170 (192) (P C).
Also see O. 41 R. 35, Note 3.

5. ('69) 12 Moo Ind App 289 (332) (P C).
('69) 12 Moo Ind App 343 (349) (P C).
[*See also* (1865) 6 Moo Ind App 53 (87) (P C). (Question of costs was left to the discretion of Courts below.)]

6. ('32) 19 AIR 1932 P C 269 (275) : 59 Ind App 419 : 60 Cal 454 (P C).

7. (1853) 5 Moo Ind App 322 (326, 327) (P C).
(1859) 8 Moo Ind App 1 (17) (P C).
(1850) 4 Moo Ind App 353 (361) (P C).

8. ('25) 12 AIR 1925 Oudh 99 (100). (Hence High Court cannot demand security.)
('84) 10 Cal 106 (107). (Costs of printing and translation of appeal papers to be assessed by the High Court, and costs in England are assessed by the Privy Council.)
Also see O. 45 R. 7, Note 2.

the state that there should be an end to law suits. There may, however, be exceptional circumstances which will warrant the Board in allowing a case to be re-heard at the instance of one of the parties. But this is an indulgence which will be exercised for the purpose of preventing irremediable injustice, where, by some accident without any blame, the party has not been heard and an order has been made inadvertently as if he had been heard.[1] For examples of cases in which such indulgence was exercised, see the undermentioned cases.[2] In any view the restoration will only be ordered on terms as to costs, security, etc.[3]

10. Remand, reception of additional evidence, etc. — For the practice of the Privy Council in regard to remand, reception of additional evidence and matters within the discretion of the Courts in India, see the cases noted below.[1]

11. Powers of the High Courts after special leave is granted. — See the undermentioned cases.[1]

12. Contents of the application for special leave.—The application must contain a full statement of all the material facts and legal grounds showing that there is a good case for appeal on facts and law. A petition which is too vague and is not in conformity with the above requirement is liable to be dismissed, if liberty to amend is not

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Note 9

1. ('87) 10 Mad 73 (77, 78) : 13 Ind App 155 (PC). ("*Res noviter*" not itself a ground for re-hearing.)
✠(1839) 2 Moo Ind App 181 (215, 216, 220) (P C). (But Court always possesses common law power to rectify mistakes or errors in judgment.)
✝ ('29) 16 AIR 1929 P C 84 (87, 89) (P C).
('25) 12 AIR 1925 P C 111 (112): 52 Ind App 118: 49 Bom 241 (PC). (Petition for interpretation of Orders in Council allowed only in rare cases.)
('97) 19 All 209 (211): 24 Ind App 49 (PC). (Alleged want of notice to respondent — Appeal heard *ex parte*—No re-hearing allowed.)
('69) 2 Beng L R 60 (64) (PC). (Omission and neglect of petitioner himself no ground.)
('91) 14 Mad 439 (441) (PC). (No re-hearing on ground that new evidence is forthcoming.)
('21) 59 Ind Cas 7 (8) (PC). (Omission to notify respondents of the admission of an appeal is not a sufficient ground.)
('69) 12 Moo Ind App 254 (260, 261) (PC). (*Ex parte*—Default due to agents—No ground.)
Also see S. 151 Note 4.
2. (1854) 6 Moo Ind App 204 (205) (PC). (Non-prosecution due to ignorance of new rules.)
(1860) 8 Moo Ind App 160 (162) (PC). (Dismissal for non-prosecution seriously affecting infant.)
('97) 21 Bom 723 (724) : 24 Ind App 128 (PC). (Delay in non-prosecution duly explained.)
(1839) 2 Moo Ind App 181 (223) (PC). (*Ex parte*—Infant under the Court of Wards — Default due to guardian *ad litem* absenting and abandoning appeal.)
('16) 3 AIR 1916 P C 119 (119) : 44 Cal 388 : 44 Ind App 87 (PC). (Default and non-prosecution due to fraud of another.)
('16) 3 AIR 1916 P C 121 (122) : 40 Mad 112 : 44 Ind App 6 (PC). (Arguments closed by junior — Important questions involved — Leader allowed to re-argue.)
3. ('97) 21 Bom 723 (724) : 24 Ind App 128 (PC).
(1857) 7 Moo Ind App 16 (17, 18) (PC). (Extension of time for performance of terms also granted.)

Note 10

1. ('43) 30 AIR 1943 P C 106 (108) (PC). (Strong grounds are necessary for interference with lower Courts' discretion.)
(1865) 2 Suth W R 13 (13) : 10 Moo Ind App 492 (PC). (Remand.)
(1865) 3 Suth W R 19 (30) : 10 Moo Ind App 81 (PC). (Do.)
('19) 6 AIR 1919 P C 85 (88) (PC). (Do.)
('66) 2 Knapp 259 (263) : 5 Suth W R 79 (PC). (Do.)
('23) 10 AIR 1923 P C 128 (136) : 2 Pat 676 : 50 Ind App 183 (PC). (Reception of additional evidence.)
('69) 13 Moo Ind App 15 (34) (PC). (Discretionary matter—Board is reluctant to interfere.)
(1900) 27 Cal 1 (4) : 26 Ind App 281 (PC). (Do.)
('36) 23 AIR 1936 P C 139 (141) (PC). (Regard being had to sum at stake and protracted character of litigation case was not remitted for inquiry.) [*See* ('18) 5 AIR 1918 P C 3 (4) : 45 Cal 748 : 45 Ind App 94 (PC).]

Note 11

1. ('09) 4 Ind Cas 452 (454) (DB) (Cal). (High Court bas no jurirdiction to appoint receiver under O. 45 Rule 13.)
('25) 12 AIR 1925 Oudh 99 (100) (DB). (High Court cannot demand security.)
('33) 20 AIR 1933 Bom 244 (245) (DB). (Compromise after grant of leave to appeal to Privy Council —High Court cannot substitute a new decree.)
('89) 16 Cal 184 (185) : 15 Ind App 200 (PC). (Party dying pending appeal to the Privy Council —Practice relating to substitution of parties on revivor—Representative character to be ascertained by High Court.)
('27) 14 AIR 1927 Bom 217 (220) : 51 Bom 430 (FB). (High Court can extend time prescribed for security by O. 45 R. 7.)
('31) 18 AIR 1931 Bom 278 (279, 280) (DB). (High Court can also change form of security.)
(1900) 27 Cal 1 (4) : 26 Ind App 281 (PC).

granted.[1] It is the duty of the petitioner to send to his agents or legal advisers in England material papers with instructions to make an application in due form.[2] As special leave is invariably granted *ex parte*, the Privy Council on finding any material mis-statement or concealment in the application so granted will ordinarily discharge the appeal with costs.[3] If, however, the mis-statements were not made in bad faith, it is within the discretion of their Lordships of the Privy Council to allow the appeal to be heard.[4]

13. Proceedings for contempt of Court — Whether appeal to Privy Council lies. — In *Kapildev Malaviya* v. *Chief Justice and Judges of the High Court, Allahabad*[1] certain persons were fined by the High Court for contempt of the High Court in having published an article in a newspaper which contained an "unwarranted and defamatory aspersion on the character and ability of a number of Judges of the High Court." On an application by such persons for leave to appeal to the Privy Council it was held by the Allahabad High Court that no leave could be granted. The decision was based on two grounds : 1. The proceedings were of a *criminal* nature and as such not within the provisions of the Code relating to appeals to the Privy Council. 2. The matter was of an *exclusive* jurisdiction and the order of the High Court was 'final.' The above decision has been followed in a later decision of the same High Court in which it was held that S. 109 does not apply to orders in contempt proceedings and that an order refusing to punish a person for contempt of Court could not be appealed against to the Privy Council.[2]

But in *S. N. Banerjee* v. *Kuchwar Lime and Stone Co. Ltd.*,[3] it was held by the Privy Council that a committal for a finding of contempt for *breach of an injunction* is not criminal in its nature and is properly dealt with under the Civil Procedure Code and hence, there could be an appeal to the Privy Council in such cases under the Civil Procedure Code.

Note 12

1. (1861) 8 Moo Ind App 193 (195, 197) (PC).
('66) 11 Moo Ind App 1 (2, 3-6) (PC).
2. ('20) 7 AIR 1920 P C 169 (169, 170) (PC).
3. † (1855) 6 Moo Ind App 207 (207, 209) (PC). (Mis-statement of fact.)
(1859) 7 Moo Ind App 261 (263) (PC).
(1861) 8 Moo Ind App 193 (197) (PC).
(1861) 8 Moo Ind App 492 (496, 497) (PC).
('82) 4 All 500 (507, 508) : 9 Ind App 70 (PC).
('30) 17 AIR 1930 P C 196 (197) : 57 Ind App 186 : 52 All 277 (P C). (Application from respondent to rescind special leave not necessary.)
('31) 18 AIR 1931 P C 22 (22) : 57 Ind App 279 : 10 Pat 86 (PC).
Also see O. 45 R. 3, Note 5.
4. ('82) 4 All 500 (508, 509) : 9 Ind App 70 (PC).
† ('74) 2 Ind App 71 (81, 82) (PC).

Note 13

1. ('35) 22 AIR 1935 All 811 (813) : 57 All 910 (DB).
2. ('41) 28 AIR 1941 All 211 (212) : I L R (1941) All 364 (DB).
3. ('38) 25 AIR 1938 P C 295 (298) : 17 Pat 770 : I L R (1939) Kar 42 (PC). (1913 App Cas 417, Scott v. Scott, followed.)

PART VIII.

REFERENCE, REVIEW AND REVISION

Reference to High Court.

113. [S. 617.] Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit.

[1877, S. 617; 1861, S. 28; See Order 46.]

1. **"Court," meaning of.**—The Deputy Commissioner of Oudh[1] or a Collector hearing an application under the Bombay Mamlatdars' Courts Act[2] is not a "Court" within the meaning of this section and cannot state a case for the opinion of the High Court. Applications which had been submitted to the Maharajah of Benares in civil cases from the Benares State Court cannot be referred under this section to the Allahabad High Court for its opinion.[3]

A Debt Relief Court under the C. P. and Berar Relief of Indebtedness Act (XIV of 1939) is not a "Civil Court." It is a special tribunal created *ad hoc* for the purpose of the Act and cannot make a reference to the High Court under the section.[4]

2. **"Subject to such conditions .... prescribed."**—The power under this section can only be exercised subject to the conditions and limitations prescribed by the rules in the First Schedule. For such conditions and limitations, see Order 46.

This part of the Code does not apply to suits and proceedings under the U. P. Tenancy Act (XVII of 1939), Second Schedule, List I.

Review.

114. [S. 623.] Subject as aforesaid, any person considering himself aggrieved —

(*a*) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,

(*b*) by a decree or order from which no appeal is allowed by this Code, or

(*c*) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

[1877, S. 623; 1859, S. 376. See O. 47.]

Section 113 — Note 1

1. ('28) 15 AIR 1928 Oudh 485 (485) (DB).
2. ('12) 14 Ind Cas 782 (783) (DB) (Bom).
('96) 1896 Bom P J 217 (217). (Or the Registrar acting under Indian Registration Act.)
3. ('25) 12 AIR 1925 All 293 (293) : 47 All 322 (DB).
4. ('42) 29 AIR 1942 Nag 8 (11): I L R (1941) Nag 588 (DB). (Proceedings under the Relief of Indebtedness Act are not 'suits' and as they are neither 'suits' nor 'appeals' nor proceedings in execution of a 'decree,' the provisions of O. 46 R. 1 are not attracted.)

1. Scope and applicability of the section. — This section contains a brief statement of the Court's general power of review. The details and procedure are provided for in O. 47. See O. 47 R. 1. On the question of the applicability of this section to decrees in appeals under the Letters Patent, the High Courts of Bombay[1] and Madras[2] have held that the section applies, while the High Courts of Allahabad[3] and Patna[4] have held that it does not. See also the undermentioned case.[5]

2. "Subject as aforesaid." — See Order 47.

3. Appealable order from which no appeal has been preferred. — See Section 104.

4. Non-appealable orders. — See Section 104.

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115. [S. 622.] The High Court may call for the record[3] of any case which has been decided[4] by any Court subordinate to such High Court[6] and in which no appeal lies thereto,[7] and if such Subordinate Court appears —

Revision.

(a) to have exercised a jurisdiction not vested in it by law,[9] or

(b) to have failed to exercise a jurisdiction so vested,[11] or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,[12]

the High Court may make such order in the case as it thinks fit.[16]

[1877, S. 622; 1861, S. 35. See also S. 224 of the Government of India Act of 1935.]

Synopsis

1. History of the section.
2. Scope and object of the section.
3. "May call for the record."
4. "Any case which has been decided."
5. Interlocutory orders.
6. "Subordinate Court."
7. "And in which no appeal lies thereto."
8. Other remedy open.
9. Jurisdiction.
10. "Exercised a jurisdiction not vested in it by law."
11. "Failed to exercise a jurisdiction so vested."
12. Exercise of jurisdiction illegally or with material irregularity.
13. Error of law or fact.
14. Error of procedure.
15. Wrong decision of lower Appellate Court as to the jurisdiction of the trial Court.
16. "May make such order in the case as it thinks fit."
16a. Nature of order made in revision against a decree.
17. Laches in making the application.
18. Application in revision treated as appeal.
19. Appeal treated as an application in revision.
20. Revision in cases of discretionary and final orders.
21. Orders under Sections 152 and 153.
22. Orders under Section 73.
23. Orders in claim cases.
24. Orders setting aside or refusing to set aside sales.
25. Order permitting withdrawal of suit. See O. 23 R. 1, Note 41.
26. Orders under Order 33.
27. Orders under Order 47. See O. 47, R. 7, Note 16.
27a. Orders under Order 45.
27b. Decision as to court-fee, whether revisable.
28. High Court's power of superintendence.
29. High Court's revisional powers under other Acts.
30. Sanction to prosecute.
31. Orders under the Provincial Small Cause Courts Act. See Note 29.
32. Appeal and review.

Section 114 — Note 1

1. ('27) 14 AIR 1927 Bom 232 (233).
2. ('17) 4 AIR 1917 Mad 670(670):40Mad 651(DB).
3. ('04) 1 All L Jour 509 (511).
('31) 18 AIR 1931 All 244 (249) : 53 All 535 (FB).
4. † ('31) 18 AIR 1931 Pat 409 (410).
5. ('37) 24 AIR 1937 Lah 82 (83). (The company law does not affect the power of review which is otherwise vested in a Court especially when by S. 141, C. P. Code, the provisions of the Code are to be followed in all proceedings in any Court of civil jurisdiction.)

NOTE to the Synopsis. See the Notes indicated for the following topics :

Appeal against an order of a single Judge of the High Court on revision. See Note 32.
Distinction between revisional and appellate powers. See Note 2.
Evidence—Insufficiency, inadmissibility or absence of—As a ground of revision. See Note 12.
High Court can interfere *suo motu*. See Note 3.
High Court's revisional powers :
Bengal Rent Recovery Act, X of 1859. See Note 6.
The Chota Nagpur Tenancy Act. See Note 6.
The Land Acquisition Act. See Notes 6 and 10.
The Madras Rent Recovery Act. See Note 6.
The North-West Provinces Rent Act. See Note 6.
The Religious Endowments Act. See Note 6.
No interference on merely technical grounds. See Notes 3 and 16.
Objections to jurisdiction depending on disputed facts and not raised in trial Court will not be entertained in revision. See Note 2.
Orders granting or refusing addition of parties. See Note 5.
Powers of revision under the Bombay Mamlatdars' Courts Act. See Notes 6, 8 and 10.
Powers of the High Courts in the matter of issuing writs of certiorari. See Note 2.
Questions of limitation. See Note 13.
The Bombay High Court's powers of revision under Regulation II of 1827. See Note 2.

1. History of the section. — The Code of 1859 did not contain any provision for the exercise of revisional powers by the High Court. When the Charter Act of 1861 was passed establishing the High Courts in the several Presidencies (Bengal, Bombay and Madras), a power of superintendence was conferred on them over subordinate Courts subject to their appellate jurisdiction by section 15 of that Act. But before the actual constitution of the High Courts, the Sudder Courts were empowered by S. 35 of Act XXIII of 1861 to call for the records of any case decided in appeal by the Subordinate Court and in which no further appeal lay when the subordinate Court appeared to have exercised a jurisdiction not vested in it. That section is the foundation of the present section.[1]

The section, as it originally stood, contained only the first two clauses. The third clause was added in 1879.

No material changes have been made in the present section.

2. Scope and object of the section. — This section provides for the exercise of revisional powers of the High Courts. But it is necessary that the following conditions are satisfied before such powers can be exercised —

(1) There must have been a *case decided* by the subordinate Court. See Note 4.
(2) The Court deciding the case must be one *subordinate* to the High Court. See Note 6.
(3) The decision must be one in which *no appeal lies*. See Note 7.
(4) The subordinate Court must have in the decision of the case, *exercised a jurisdiction not vested in it by law* (see Note 9), or *failed to exercise* a jurisdiction vested in it (see Note 11), or must have acted in the exercise of its jurisdiction *illegally or with material irregularity*.[1] See Note 12.

Where the above conditions are not satisfied the High Court cannot interfere on the ground of expediency.[2] The powers under this section are intended to be exercised

Section 115 — Note 1

1. ('98) 22 Mad 68 (98) (FB).
('18) 5 AIR 1918 Sind 65 (66) : 11 Sind L R 93 (DB).
('83) 7 Bom 341 (352) (FB).

Note 2

1. ('42) 29 AIR 1942 Oudh 395 (397). (Distinction between appellate jurisdiction and revisional jurisdiction pointed out — Revisional jurisdiction can only be exercised in the three cases enumerated.)
('42) 29 AIR 1942 Pat 312 (313). (No question of jurisdiction involved—No revision.)
[*See* ('42) I L R (1942) Kar 160 (162) (DB). (The maintainability of a revision application is not a matter to be judged by the merits of such application.)]
2. ('42) 29 AIR 1942 Oudh 432 (433) (DB).
('40) 27 AIR 1940 Pat 87 (88) : 18 Pat 210 (DB). (The fact that a case is a very hard one does not permit the High Court to interfere where it has no power so to do.)

with a view to subserve and not to defeat the ends of justice.[3] Where, therefore, substantial justice has been rendered by the order of the lower Court, the High Court will not interfere in revision notwithstanding the fact that the reasons for the order are not correct.[4]

The High Court cannot, in the exercise of its revisional powers under this section, attack *findings of fact* of the subordinate Court or substitute its own appreciation of evidence for that of the primary Court.[5] These are functions of a Court exercising

('40) 27 AIR 1940 Pat 102 (106) : 19 Pat 321 (SB). (No revision merely because no other remedy is open.)
('12) 34 All 393 (395) : 14 Ind Cas 766 (766).
('31) 18 AIR 1931 Cal 604 (606) : 59 Cal 68 (DB).
('19) 6 AIR 1919 All 328 (329) (DB). (Party relying on want of jurisdiction must prove it.)
('38) 25 AIR 1938 Lah 434 (435) (DB). (This principle is all the more applicable in cases of revision from an order making an award a rule of Court.)
† ('36) 23 AIR 1936 Oudh 22 (24) : 11 Luck 529 (FB). (Requirements of S. 115 not fulfilled—High Court cannot interfere merely on ground that hardship would be caused to applicant and that he would have no other remedy.)
[*See* ('34) 21 AIR 1934 Pat 55 (55) (Complaint under S.476, Criminal P.C., withdrawn—Revision lies under this section.)
('35) 22 AIR 1935 All 353 (358) : 57 All 459 (DB). (In doubtful cases, Court should err on side of entertaining revision rather than refusing to do so.)]
[*See also* ('41) 28 AIR 1941 Mad 285 (286). (Mere question whether Court's order is wise or unwise cannot be gone into in revision.)
('38) 25 AIR 1938 Pat 106 (107). (Powers of High Court to interfere under S.115 are very limited.)]

3. ('35) 22 AIR 1935 Mad 89 (89, 90).

4. † ('33) 20 AIR 1933 All 154 (155) (DB).
('37) 24 AIR 1937 Mad 644 (645). (Trial Court having no jurisdiction to try suit — High Court is not bound to interfere in revision if decree of trial Court is correct.)
('35) 22 AIR 1935 Lah 190 (191).
('35) 22 AIR 1935 Mad 574 (575).
[*See* ('36) 63 Cal L Jour 103 (104) (DB). (No injustice caused by technical error in entertaining petition instead of demanding *ad valorem* court-fee—Essential justice done between parties — No interference in revision.)
('39) 26 AIR 1939 All 452 (454). (If liability is established and decree is passed to enforce the same High Court should not interfere on technical ground.)]
[*See also* ('36) 23 AIR 1936 All 514 (515). (Both Courts having jurisdiction—Parties agreeing that their suit be tried by one Court—Trial of suit by other Court having jurisdiction—Revisional Court should not interfere and entail fresh hardship on both parties.)]
Also see Note 16.

5. ('43) 30 AIR 1943 Nag 155 (156) : I L R (1943) Nag 456. (High Court cannot interfere in revision with a decision on merits.)
('43) 30 AIR 1943 Oudh 192 (196).
('43) 30 AIR 1943 Oudh 300 (302). (Finding of fact not less so because it is based on circumstantial evidence.)
('43) 30 AIR 1943 Pat 318 (319) (DB).
('42) 29 AIR 1942 Mad 502 (503).
('42) 29 AIR 1942 Nag 47 (48) : ILR (1942) Nag 625.
('42) 29 AIR 1942 Oudh 480 (481).
('42) 29 AIR 1942 Pesh 81 (82).
('41) 28 AIR 1941 Pat 385 (388) : 20 Pat 417 (DB). (In revision under S. 115 the High Court will not go behind the finding of the lower Court that the giving of evidence by a public servant was done in execution of his duty.)
('41) 28 AIR 1941 Pat 517 (526) : 20 Pat 394 (DB). (Finding that accident resulting in loss to plaintiff was due to misconduct of railway employees is of fact.)
('29) 16 AIR 1929 Mad 259 (260).
('34) 21 AIR 1934 Cal 104 (104, 105) (DB).
† ('33) 20 AIR 1933 Pat 575 (576) : 12 Pat 862 (FB). (It is exceptional for the Court of revision to investigate facts.)
† ('34) 21 AIR 1934 Rang 306 (307).
('96) 20 Bom 630 (632) (DB).
✠ ('83) 7 Bom 341 (372) (FB).
('15) 2 AIR 1915 Mad 1122 (1123).
('19) 6 AIR 1919 Cal 312 (314) (SB).
('29) 16 AIR 1929 Mad 416 (416).
('12) 17 Ind Cas 508 (508) (Lah).
('88) 10 All 467 (471).
('36) 23 AIR 1936 Lah 725 (727). (Finding that a certain document is not genuine.)
('37) 24 AIR 1937 Bom 25 (26) : I L R (1937) Bom 136.
('37) 24 AIR 1937 All 691 (692) (DB). (Question, whether party is prevented from sufficient cause from appearing being one of fact.)
('36) 23 AIR 1936 Pat 558 (559). (Concurrent finding of fact cannot be interfered with.)
('36) 23 AIR 1936 Oudh 264 (265) : 12 Luck 128. (A finding of the lower Court about the bailee having taken necessary care of the goods such as is required by S. 151 of the Contract Act is a finding of fact.)
('36) 23 AIR 1936 Oudh 176 (176) (DB).
('38) 25 AIR 1938 Nag 454 (455) : I L R (1939) Nag 377. (Finding of lower Courts that certain transfer was made with a view of giving preference to transferee, is question of fact.)
('38) 25 AIR 1938 Nag 370 (373). (Whether there is sufficient cause for non-appearance is a question of fact.)
('35) 22 AIR 1935 Mad 574 (576).
('36) 23 AIR 1936 Mad 541 (542). (Factum of agreement.)
† ('35) 22 AIR 1935 Mad 246 (247). (Concurrent findings of fact.)

appellate jurisdiction. The High Court, in the exercise of revisional jurisdiction can, however, look into the evidence with a view to determine whether a subordinate Court has assumed a jurisdiction which it had not, or declined to exercise a jurisdiction which it had, or acted illegally or with material irregularity in the exercise of its jurisdiction.[6] A party cannot be allowed to obtain in revision what he will not be able to obtain in appeal.[7] Nor will he be allowed to take in revision a point which he could have taken but did not take in the subordinate Court.[8] The High Court is not bound to allow even a point

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† ('36) 23 AIR 1936 Nag 140 (143) : I L R (1936) Nag 188. (Remand as Court of revision for further evidence and return of finding on issue sent down —Evidence cannot be scrutinized.)
[*See* ('42) 29 AIR 1942 All 85 (90) : I L R (1941) All 807 (DB).
('33) 20 AIR 1933 Lah 139 (140).]
Also see O. 9 R. 13, Note 30.
[But see ('43) 30 AIR 1943 Bom 42 (43) (DB). (Courts exercising revisional powers can differ from the lower Court on questions of fact unless precluded from so doing by the statute conferring the jurisdiction : AIR 1930 Cal 806 : 57 Cal 612 dissented from.)]

6. † ('15) 2 AIR 1915 Cal 49 (53) (DB).
('19) 6 AIR 1919 All 295 (296) : 41 All 602 (DB). (NOTE.—This case is overruled on another point in AIR 1921 All 1 : 43 All 564 (FB).)
('20) 7 AIR 1920 All 359 (359) (DB).
('99) 1899 Pun Re No. 44, p. 210 (211) (DB).
('02) 1902 Pun Re No. 79, p. 320 (321).
('07) 1907 Pun Re No. 12, p. 59 (60).
('01) 1901 Pun L R No. 132, p. 340 (341).
('96) 1896 Pun Re No. 54, p. 154 (158) (DB).
('96) 1 Cal W N 67 (70) (DB).
('16) 3 AIR 1916 Nag 123 (126) : 13 Nag L R 203. (Section which gives plenary powers of interference by the High Court which are to be exercised in harmony with the spirit of the provisions of S. 99 of the Code.)
('87) 9 All 398 (404, 409) (DB).

7. † ('27) 14 AIR 1927 Mad 859 (860) (DB).
('29) 16 AIR 1929 Mad 259 (260).
('27) 14 AIR 1927 Bom 599 (600) (DB).
('18) 5 AIR 1918 All 176 (177) (DB).
[*See* ('87) 12 Bom 617 (620) (DB).
('08) 35 Cal 909 (913) (DB).

8. ('42) 29 AIR 1942 All 45 (46): I L R (1941) All 793. (Plea as to exemption of court-fee under S. 19 (17), Court-fees Act, cannot be raised for the first time in revision as it involves a question of fact.)
('42) 29 AIR 1942 Mad 449 (450) (DB). (No materials on record to support argument—It cannot be raised for first time in revision.)
('42) 29 AIR 1942 Mad 733 (733). (Plea of limitation.)
('42) 29 AIR 1942 Nag 47 (49) : I L R (1942) Nag 625. (New plea depending on facts.)
('41) 28 A I R 1941 All 355 (357). (New point depending on facts.)
('40) 27 A I R 1940 Nag 302 (303) : I L R (1942) Nag 139.
('39) 26 AIR 1939 Rang 413 (416). (New point requiring fresh evidence.)
('24) 11 AIR 1924 Pat 785 (785).(Application under O. 21 R. 90—New point that the applicant has no *locus standi* to apply.)
('29) 16 AIR 1929 Cal 831 (832).
('34) 21 AIR 1934 Lah 230 (231).
('34) 21 AIR 1934 Pesh 50 (51). (Question of registration of a document not allowed to be urged in revision even though it was apparent.)
('15) 2 AIR 1915 All 80 (80).
† ('22) 9 AIR 1922 Bom 149 (150):46 Bom 56 (DB). (Point of law not taken in trial Court.)
† ('25) 12 AIR 1925 Pat 461 (461). (Petition under O. 21 R. 90 — New plea that property was non-transferable.)
('25) 12 AIR 1925 Nag 77 (77) : 22 Nag L R 118. (Plea of estoppel.)
('21) 8 AIR 1921 Sind 159 (164, 165, 166) : 16 Sind L R 207 (FB). (New case of fraud and estoppel.)
('21) 8 AIR 1921 Mad 532 (532). (Point of *res judicata*.)
('19) 6 AIR 1919 Cal 919 (920, 921) (DB). (Objection as to non-joinder.)
('14) 1 AIR 1914 Cal 786 (787) (DB). (Want of jurisdiction dependent on investigation of facts.)
('10) 7 Ind Cas 404 (404) (Mad).
('86) 1886 All W N 188 (188) (DB).
('27) 14 AIR 1927 Lah 555 (555). (New plea of limitation.)
('24) 11 AIR 1924 Cal 1036 (1036). (Point involving questions of fact though relating to jurisdiction.)
('27) 14 AIR 1927 Cal 381 (382). (Do.)
('27) 14 AIR 1927 Cal 388 (389). (Objection — Jurisdiction after submission to it.)
('37) 24 AIR 1937 Cal 201 (203) (DB). (Objection to filing of unregistered award.)
† ('38) 42 Cal W N 437 (439) (DB).
('39) 26 AIR 1939 Sind 125 (126) : I L R (1939) Kar 422 (DB).
('39) 26 AIR 1939 Lah 260 (261).
('39) 26 AIR 1939 Bom 296 (299) : 41 Bom L R 485 (490).
[*See also* ('26) 13 AIR 1926 P C 18 (20) : 53 Ind App 64 : 49 Mad 249 (P C). (Litigant who has all along maintained a position in support of one branch of his suit cannot be permitted when he fails upon this branch to withdraw from the position and assert the contrary more especially when he thereby places his opponent at a great disadvantage.)]
[See however † ('28) 15 AIR 1928 Mad 528 (531) : 51 Mad 672 (DB).
('27) 14 AIR 1927 Rang 134 (134).]

of *jurisdiction* to be raised for the first time in revision[9] although it *can* allow such point to be raised.[10]

The section is not exhaustive and the jurisdiction which the High Courts have inherited from the Supreme Courts in the matter of issuing *writs* of *certiorari* cannot be said to have been taken away by this section.[11] High Courts have also, in addition to the power given under this section, powers of superintendence over subordinate Courts under S. 224 of the Government of India Act of 1935. See Note under S. 224 of the Government of India Act of 1935 in Appendix II.[12]

Apart from the power under this section, there is an extraordinary jurisdiction vested in the Bombay High Court, derived from Regulation II of 1827, to exercise general superintendence over subordinate Courts. Though this Regulation has been repealed the jurisdiction created by it has been expressly saved from the effect of the repeal.[13]

As to the High Court's power under S. 151 to interfere with orders of lower Courts see Notes under that section.

3. "May call for the record." — The exercise of the *revisional powers* of the High Court *is* entirely *discretionary*. The High Court will not take a technical view and necessarily interfere in every case where an order has been made irregularly or even improperly[1] unless grave injustice or hardship would result from a failure to do so.[2] As to

9. ('37) 24 AIR 1937 Mad 644 (645).
('35) 22 AIR 1935 Mad 699 (700).
('36) 23 AIR 1936 Pat 428 (429). (New point as to jurisdiction — Case under S. 25, Small Cause Courts Act.)
('35) 22 AIR 1935 Mad 56 (56).
[*See also* ('36) 23 AIR 1936 Lah 442 (442).]

10. ('42) 29 AIR 1942 Oudh 289 (289) : 17 Luck 725 (DB).
('40) 27 AIR 1940 Sind 178 (180): ILR (1940) Kar 327 (DB).
[*See* ('36) 23 AIR 1936 Pesh 97 (100). (A question of jurisdiction can be raised even on revision.)
('35) 22 AIR 1935 Mad 89 (89).]

11. ✱ ('19) 6 AIR 1919 P C 31 (35) : 46 Ind App 176 : 43 Mad 146 (PC).
('27) 14 AIR 1927 Mad 130(130): 50 Mad 130(DB).
[*See also* ('40) 27 AIR 1940 Rang 84 (89) : 1940 Rang L R 325(SB). (Fact that the Letters Patent do not expressly confer the power to issue writ of *certiorari* does not mean that such power does not exist.)

12. See also Section 85 of the Government of Burma Act of 1935 which corresponds to S. 224 of the Government of India Act of 1935.

13. ('15) 2 AIR 1915 Bom 269 (270, 271): 40 Bom 86 (94) (DB). (See the third paragraph of S. 1 of the General Repealing Act XII of 1873, which expressly provides that it shall not affect any established jurisdiction, etc.)
('28) 15 AIR 1928 Bom 5 (7, 8) : 52 Bom 37 (DB). (Exercised only in exceptional cases. NOTE.—In this case history of S. 5 of Bombay Regulation II of 1927 is traced.)
('34) 21 AIR 1934 Bom 299(300):58 Bom 597(DB).
[But see ('41) 28 AIR 1941 Bom 271 (272) (DB). (Doubted whether the High Court has now revisional jurisdiction under the above Regulation.)]

Note 3

1. ('42) 29 AIR 1942 Cal 230 (232) : ILR (1941) 2 Cal 366. (Petitioner himself party to arbitration and on its going against him, trying to back out —High Court would not interfere in his favour.)
('41) 1941 Oudh W N 835 (838).
('40) 27 AIR 1940 Sind 178(180) : ILR (1940) Kar 327 (DB).
('40) 42 Pun L R 227 (228). (The High Court will not be justified in interfering in revision with an order granting permission to the plaintiff to sue in *forma pauperis* on the ground that the power of attorney granted by the plaintiff to the Mukhtar who filed the application was technically defective, when the plaintiff has been in fact found to be a pauper.)
('31) 18 AIR 1931 Cal 607 (613) : 59 Cal 275 (DB).
('32) 19 AIR 1932 Oudh 156 (158) : 7 Luck 642 (DB). (Exercise of revisional jurisdiction is matter of discretion—High Court will not therefore interfere where the order is just.)
('33) 20 AIR 1933 All 118 (120) (DB).
('33) 20 AIR 1933 All 924 (924) (DB). (If substantial justice is done, High Court is not bound to interfere with an award even though reference to arbitration is not proper.)
('33) 20 AIR 1933 Oudh 327 (327).
† ('92) 14 All 226 (232) (FB).
('99) 21 All 152 (154) (DB).
('26) 13 AIR 1926 Lah 637 (637).
† ('25) 12 AIR 1925 Bom 341 (342) : 49 Bom 535 (DB).
('69) 1 N W P H C R 271 (272) (DB).
('17) 4 AIR 1917 Mad 726 (726) (DB).
[*See* ('36) 23 AIR 1936 All 659 (661).]
[*See also* ('31) 18 AIR 1931 Lah 647 (648). (Discretion of Court—Party not appearing before High Court—Interference on his behalf.)
('32) 19 AIR 1932 All 154 (155) (DB).]

2. ('43) 30 AIR 1943 Lah 65 (70, 71) : ILR (1943) Lah 257 (FB).

whether the High Court would exercise its discretion in favour of interference where *another remedy* is open to the party, see Note 8. On the other hand, where the conditions of the section are satisfied and interference in any particular case is found necessary, the High Court may *of its own motion* call for the record and pass the necessary orders. It is not necessary that *an application by a party* should be filed.[3] It is the practice of the Bombay High Court, however, not to exercise its powers of interference, under Regulation II of 1827, unless a party applies.[4] Where a party applies for a revision, the mere fact that a non-party has also joined in the application is no bar to the High Court entertaining and disposing of the application.[5] It has also been held that a person who is not aggrieved by an order cannot apply for revision against the order.[6]

4. "Any case which has been decided." — The word 'case' has nowhere been defined.[1] It has, however, been held to have a wider meaning than the words 'suit' or 'appeal.'[2] In *Chattarpal Singh* v. *Rajaram*,[3] Mr. Justice Mahmood observed as follows :

> "The word 'case,' as used in S. 622 of the Code, is nowhere defined ; but adopting the general rule of construing statutes, I hold that the word should be understood in its broadest and most ordinary sense, unless there were specific reasons for narrowing its meaning."

And in *Balakrishna Udayar* v. *Vasudeva Ayyar*[4] where the question was whether an *ex parte* proceeding under the Religious Endowments Act, 1863, constituted a 'case'

✣('31) 18 AIR 1931 Rang 136 (137, 138): 9 Rang 71.
('33) 20 AIR 1933 Mad 5 (6).
('35) 22 AIR 1935 Lah 190 (191).
('36) 23 AIR 1936 Pat 250 (252). (Court summarily rejecting prayer for trying preliminary issue on point of law—No opinion expressed as to whether question of law would be sufficient to dispose of case—High Court would interfere in revision as non-interference might give rise to gravest hardship.)
[*See* ('95) 22 Cal 729 (734): 22 Ind App 90 (PC).]
[*See also* ('35) 22 AIR 1935 Pesh 33 (37) (DB). (Decision as to powers of revision under S. 84, N. W. F. P. Law and Justice Regulation—Same principles held to apply.)]

3. ('83) 5 All 42 (43) (DB).
('34) 21 AIR 1934 All 4 (6) : 55 All 825 (DB).
('34) 21 AIR 1934 All 368 (369) : 56 All 721 (DB). (High Court can interfere of its own accord when the fact of material irregularity is brought to its notice.)
('06) 28 All 72 (74).
('33) 20 AIR 1933 Lah 327 (327).
✣('32) 19 AIR 1932 Mad 714 (716).
('33) 20 AIR 1933 Sind 200 (202): 28 Sind L R 167 (DB).
(1900) 4 Cal W N 695 (697, 698) (DB).
† ('01) 28 Cal 680 (684) (DB).
✣('06) 33 Cal 757 (769, 770): 10 Cal W N 609 (621, 623) (FB).
('11) 38 Cal 421 (424) : 9 Ind Cas 296 (297) (DB).
† ('11) 9 Ind Cas 806 (808) (DB) (Cal). (Case of admission of improper evidence.)
('16) 3 AIR 1916 Cal 653 (654) (DB).
('82) 4 Mad 217 (218) (DB).
('14) 1 AIR 1914 Mad 675 (676): 38 Mad 256 (DB).
('28) 15 AIR 1928 Mad 528 (529) : 51 Mad 672 (DB).
('24) 11 AIR 1924 Nag 154 (155). (Decree in favour of plaintiff against one of two defendants — High Court can vary decree by passing decree against others.)
('09) 12 Oudh Cas 78 (80) : 2 Ind Cas 237 (238).
('22) 9 AIR 1922 Pat 525 (526) : 1 Pat 232 (DB).
('14) 1 AIR 1914 Bom 123 (124) : 38 Bom 638 (DB). (On a reference by a District Judge.)
('36) 23 AIR 1936 Pat 591 (593): 15 Pat 738 (DB).
('36) 23 AIR 1936 Sind 1 (1) (DB).
('38) 25 AIR 1938 All 456 (458) : I L R (1938) All 702 (FB).
('38) 25 AIR 1938 Pesh 81 (82).
('36) 23 AIR 1936 Pat 402 (402) : 15 Pat 626.
Also see S. 96 Note 3.
[But see ('81) 7 Cal L Rep 191 (192).]

4. † ('94) 1894 Bom P J 52 (52) (DB).
('96) 21 Bom 806 (807) (DB). (Reference by a Collector—No interference with a Mamlatdar's decision in a possessory suit.)
('89) 14 Bom 371 (371) (DB). (Do.)

5. ('03) 27 Bom 140 (143) (DB). (Directing refund of court-fees paid for getting letters of administration.)
('01) 28 Cal 574 (579).

6. ('38) 177 Ind Cas 138 (139) (DB) (Pat). (Where one of many decree-holders applies for stay of execution proceedings against the judgment-debtor, and it is not granted, the person aggrieved by such an order is that decree-holder and if he does not choose to agitate it further the judgment-debtor has no *locus standi* to prefer a revision under S. 115 against that order.)

Note 4

1. ('17) 4 AIR 1917 P C 71 (74) : 40 Mad 793 : 44 Ind App 261 (PC).
2.✣('21) 8 AIR 1921 All 1 (2) : 43 All 564 (FB).
('15) 2 AIR 1915 Bom 269 (271): 40 Bom 86 (DB).
('36) 23 AIR 1936 Sind 205 (205) (DB).
3. ('85) 7 All 661 (665) (FB).
4. ('17) 4 AIR 1917 P C 71 (74) : 40 Mad 793 : 44 Ind App 261 (PC).

within the meaning of this section, their Lordships of the Privy Council observed as follows :

> "It cannot, in their Lordships' view, be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court. It must, they think, include an *ex parte* application, such as that made in this case, praying that persons in the position of trustees or officials should perform their trust or discharge their official duties."

So also where a scheme had been framed for the management of a public temple and under such scheme the Devasthan Committee of the taluka was given power to audit the accounts of the managing committee of the temple and where on the report of the Devasthan Committee pointing out irregularities in the management the District Judge passed orders interfering in the management and threatening action in case of disobedience, it was held by the Bombay High Court that the proceeding was a 'case' within the meaning of this section.[5]

So also it has been held that the proceedings of a District Judge under the Charitable and Religious Trusts Act (XIV of 1920) are open to revision by the High Court under this section.[6] Where the whole case was over and the only thing that remained to be done was the preparation of the decree, it was held to be a 'case decided' within this section.[7]

It has been held that where the *decision* of the Court is in favour of the party concerned an application by him against a *finding* is not competent.[8]

As to whether an *interlocutory order* is a 'case decided,' see Note 5.

See also the undermentioned case.[9]

5. Interlocutory orders. — There is a conflict of views among the various High Courts as to whether an interlocutory application is a 'case' and an interlocutory order 'a case decided,' within the meaning of this section. It has been held by the High Court of Allahabad[1] that it is not. Its view is based on the ground that though the word 'case' is more comprehensive than the word 'suit' no instance can

5. ('39) 26 AIR 1939 Bom 279 (283) : 41 Bom L R 490 (495).

6. ('29) 16 AIR 1929 All 581 (583, 584) : 51 All 957 (DB).
('36) 23 AIR 1936 All 411 (411).

7. ('15) 2 AIR 1915 All 171 (171).

8. ('36) 23 AIR 1939 Pesh 97 (99).

9. ('43) 30 AIR 1943 Oudh 307 (307):206 Ind Cas 358 (358) (DB). ("Dismissal of a suit on the ground that the Court has no jurisdiction amounts to 'a case decided' within the meaning of this section.")

Note 5

1. ('41) 28 AIR 1941 All 50 (51) : ILR (1941) All 132. (Order in partition suit appointing amin to prepare quras and to report in detail all points involved in the case is not "case decided" within the meaning of S. 115 — Remedy against order is by way of appeal from decree.)

†('21) 8 AIR 1921 All 1 (4, 5) : 43 All 564 (FB).
('36) 23 AIR 1936 All 80 (82) : 58 All 639 (DB). (Court ordering legal representatives of judgment-debtor to be impleaded in appeal—Not a decision.)

('34) 21 AIR 1934 All 986 (987) (DB). (Refusal to decide question of law in first instance—Revision does not lie.)

('35) 22 AIR 1935 All 599 (599) : 57 All 977 (FB). (Section 115 is inapplicable to a case where the Court below has in the course of a suit merely disallowed certain questions that had been put to a witness, as no case can be said to have been decided thereby.)

('36) 23 AIR 1936 All 179 (184) : 58 All 721 (DB). (Case under Guardians and Wards Act — Judge holding he has jurisdiction to go into accounts— *Held*, order was interlocutory and no revision lay.)

('34) 21 AIR 1934 All 620 (622) : 57 All 17 (F B). (A mere decision as to amount of court-fees payable does not amount to a case decided.)

('33) 20 AIR 1933 All 749 (750). (Order refusing to decide a particular issue first is not 'case decided.')

('34) 21 AIR 1934 All 785 (787) (DB). (Order allowing amendment of plaint.)

('33) 20 AIR 1933 All 189 (190, 191) : 55 All 169. (Do.)

('32) 19 AIR 1932 All 415 (415) (DB). (No revision lies from a mere finding on the question of juridiction.)

('33) 20 AIR 1933 All 959 (959) (DB). (Interlocutory order in execution proceedings.)

('34) 21 AIR 1934 All 37 (39) (DB). (Order refusing to issue a commission to examine witnesses is not a 'case decided.')

be quoted of its use in the Code where it would not at least include a 'suit' and that where the 'case' in which the revisional jurisdiction of the High Court is invoked happens to be also a 'suit,' then the *suit itself* is the case which requires to be decided before the record is called for. It was therefore held that an interlocutory order in a suit which did not decide the *suit itself* is not a 'case decided' and cannot be interfered with under S. 115. Order 14 R. 2 was relied upon as showing that the word 'case' was synonymous with 'suit.' The High Court of Bombay in the undermentioned cases[2] has accepted the same view as that of the Allahabad High Court on the ground that 'case' does not include a *branch of a case* such as an interlocutory order though it has taken a contrary view in the cases noted below.[3] The Chief Courts of Sind[4] and Oudh[5] and the Peshawar

('22) 9 AIR 1922 All 334 (335) (DB). (Order holding a defendant to be major.)
('23) 10 AIR 1923 All 118 (119) : 45 All 218 (DB). (Refusing time to enable applicant to pay requisite court-fee.)
('29) 16 AIR 1929 All 581 (583) : 51 All 957 (DB).
('22) 9 AIR 1922 All 441 (442) (DB). (Order setting aside a decree *ex parte*, and though without jurisdiction as neither of the conditions contained in O. 9 R. 13 was present.)

In the following cases of the Allahabad High Court, the power to interfere was assumed to exist, but interference was refused as another remedy was open under S. 105 of the Code :
('83) 1883 All W N 35 (36).
('83) 5 All 293 (294) (DB).
('84) 6 All 233 (234) (DB). (An order transferring a suit from one file to another.)
('89) 11 All 383 (385) (DB).
('98) 1898 All W N 73 (74) (DB). (An order under old S. 108 (O. 9 R. 13) restoring a suit to the file of pending suits.)
('99) 1899 All W N 210 (211) (DB).
('12) 34 All 592 (595) : 16 Ind Cas 1 (2) (DB).
('12) 16 Ind Cas 404 (405) (DB) (All). (Order rejecting an application for amendment substituting a new geneology.)
('14) 1 AIR 1914 All 176 (176). (An order to adjourn a case on condition of payment of costs.)
('17) 4 AIR 1917 All 321 (321). (Order allowing a petition under O. 9 R. 9.)
('17) 4 AIR 1917 All 140 (141, 142) : 39 All 254 (DB). (An order under S. 202 of the Agra Tenancy Act adjourning a suit pending decision by the Revenue Court—Per Walsh, J., *contra*.)
('19) 6 AIR 1919 All 349 (349) (DB). (Order refusing to frame an issue.)
('20) 7 AIR 1920 All 170 (171) (DB). (An order deciding preliminary issues.)
[But see ('41) 28 AIR 1941 All 298 (300) : ILR (1941) All 558 (DB). (Order regarding court-fees is case decided—*Obiter*.)
('33) 20 AIR 1933 All 753 (754). (Refusal to decide question of jurisdiction first is revisable—This case has been held to be not good law in AIR 1934 All 986 in view of the Full Bench decision in AIR 1934 All 620 : 57 All 17.)
('33) 20 AIR 1933 All 350 (352): 55 All 274 (DB). (No longer good law in view of the Full Bench ruling in A I R 1934 All 620 : 57 All 17.)]

2. † ('32) 19 AIR 1932 Bom 81 (82) (DB). (Finding on an issue of *res judicata*.)
('27) 14 AIR 1927 Bom 664 (665) (DB). (Interlocutory order rejecting certain evidence as inadmissible.)
('32) 19 AIR 1932 Bom 232 (233) (DB). (Order setting aside award and directing suit to proceed.)
('02) 26 Bom 551 (552) (DB). (Do.)
('94) 18 Bom 35 (37) (DB).

3. ('41) 28 AIR 1941 Bom 361 (363) : ILR (1941) Bom 658 (DB). (The observations in this case suggest that interlocutory orders can be revised under this section.)
('35) 22 AIR 1935 Bom 222 (225) : 59 Bom 430. (7 Bom 341 followed.)
† ('37) 24 AIR 1937 Bom 167 (168) : ILR (1937) Bom 623. (The High Court, while it should be very slow to interfere in its revisional jurisdiction with orders which are merely interlocutory, has certainly jurisdiction to do so, and the jurisdiction can be exercised in a proper case. A revision application is therefore competent in respect of a preliminary order passed by a subordinate Court, where that preliminary order goes to the jurisdiction of the Court.)

4. †('30) 17 AIR 1930 Sind 265 (269) : 24 Sind L R 277 (FB).
('33) 20 AIR 1933 Sind 82 (83, 84) : 26 Sind L R 491 (DB). (Order refusing leave to sue in *forma pauperis*.)

In the following cases the right to interfere was assumed :
('08) 2 Sind L R 22 (23) (DB).
('25) 12 AIR 1925 Sind 260 (261) (DB). (Where the Court refused an amendment of a suit for injunction into one for possession.)
('20) 7 AIR 1920 Sind 1 (2, 5) : 14 Sind L R 28 (DB). (Order refusing to issue a commission to examine certain witnesses.)
('29) 16 AIR 1929 Sind 92 (93) : 23 Sind L R 403 (DB).
('36) 23 AIR 1936 Sind 205 (205) (DB). (Application under S. 19 of Arbitration Act is not an interlocutory proceeding; AIR 1931 Lah 644 : 13 Lah 59 followed.)
('39) 26 AIR 1939 Sind 241 (245) (FB). (An order of the Court setting aside an award under Para. 15 of Sch. 2, C. P. Code, and fixing the suit for final hearing does not decide a case within the meaning of Section 115.)
[*See* ('36) 23 AIR 1936 Sind 160 (162) : 30 Sind L R 226 (DB). (Order held not interlocutory and hence revision competent.)]

5. ('43) 30 AIR 1943 Oudh 147 (148) (DB). (Order refusing to try issue of jurisdiction as preliminary issue—No revision.)

Judicial Commissioner's Court have also held that the expression 'case decided' will not include an interlocutory order.[6] In the Lahore High Court also, before the recent decision of a Full Bench of that High Court in *Bibi Gurdevi* v. *Chaudhri Mohammad Baksh*[7] the view adopted was that interlocutory orders could not be revised and there was no "case decided" in such cases. This was the view taken in a previous Full Bench decision of that High Court.[8] This view has been overruled by the later Full Bench decision in

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('42) 29 AIR 1942 Oudh 79 (80). (Objection as to maintainability of application dismissed — No revision.)
('42) 29 A I R 1942 Oudh 334 (334). (Order of remand by appellate Court.)
('42) 29 AIR 1942 Oudh 340 (342) (DB). (Order rejecting an application made under O. 1 R. 8 (2) is not a case decided—No revision lies.)
('42) 29 AIR 1942 Oudh 344 (345) (DB). (An order refusing to issue commission.)
('42) 29 AIR 1942 Oudh 370 (371) (DB). (Appellate order setting aside order for return of plaint for presentation to proper Court.)
('42) 29 AIR 1942 Oudh 431 (432) (DB). (Refusal to recast issue—Not revisable.)
('42) 29 AIR 1942 Oudh 432 (434) (DB). (Conditions mentioned in section must be strictly complied with before there can be interference in revision — Considerations of possible irreparable injury or injustice are out of place — Order remodelling issue is interlocutory and no revision lies.)
('41) 28 AIR 1941 Oudh 87 (88) (DB). (Refusal to amend the plaint.)
('41) 28 AIR 1941 Oudh 598 (599): 17 Luck 17 (DB).
('41) 28 AIR 1941 Oudh 623 (624). (Order allowing amendment of plaint—No revision.)
('40) 27 AIR 1940 Oudh 405 (406) : 16 Luck 79 (DB). (Order setting aside final decree in terms of award and restoring case is interlocutory order.)
('39) 183 Ind Cas 837 (838) (DB) (Oudh). (Order setting aside award filed by arbitrator in pending suit—No revision.)
('32) 19 AIR 1932 Oudh 271 (272) (DB). (Decision as to maintainability of claim for mesne profits is not a 'case decided' but an interlocutory order.)
('99) 2 Oudh Cas 67 (71).
† ('33) 20 AIR 1933 Oudh 345 (345) (DB). (Order of refusal to receive documentary evidence is not open to revision.)
✠ ('09) 12 Oudh Cas 405 (413): 4 Ind Cas 878 (882) (DB).
('17) 4 AIR 1917 Oudh 87 (87) (DB). (An order issuing a warrant of attachment against the properties of witness.)
('18) 5 AIR 1918 Oudh 430 (431) (DB). (Refusal to amend plaint.)
('21) 8 AIR 1921 Oudh 176 (176) : 24 Oudh Cas 231 (DB). (A decision on an issue as to jurisdiction is not a case.)
('24) 11 AIR 1924 Oudh 348 (349) (DB). (Order fixing the fee of a Commissioner.)
('25) 12 AIR 1925 Oudh 179 (180). (The refusal to try a preliminary issue of *res judicata* is not a case.)
('25) 12 AIR 1925 Oudh 189 (189) : 28 Oudh Cas 78. (Framing an issue and sending the case to the lower Court.)
('25) 12 AIR 1925 Oudh 254 (254). (Refusal to amend plaint.)
('26) 13 AIR 1926 Oudh 185 (186). (An order in supersession of a previous order directing certain issues to be tried and decided preliminarily, not a case.)
('21) 8 AIR 1921 Oudh 23 (23) : 24 Oudh Cas 215. (Order granting adjournment on condition of paying the costs of the other side.)
('18) 5 AIR 1918 Oudh 430 (431) (DB). (Order rejecting an amendment of pleading from contesting the validity of a will to a denial of execution.)
† ('36) 23 AIR 1936 Oudh 22 (28) : 11 Luck 529 (FB). (No revision lies to High Court from order of lower Court calling upon plaintiff to make good deficiency of court-fee as no case is decided and no question of jurisdiction arises—A I R 1934 Oudh 212 overruled.)
('39) 26 AIR 1939 Oudh 238 (238, 239) : 1939 Oudh W N 716 (718) (DB). (Order in pending suit setting aside award and superseding the arbitration is not open to revision.)
('35) 22 AIR 1935 Oudh 333 (334) (DB). (An order remitting issues for decision under O. 41 R. 25, C. P. Code, is not "a case decided" within the meaning of S. 115.)
[*See* ('42) 29 AIR 1942 Oudh 208 (208) (DB). (In this case it is remarked that it would be difficult to reconcile with the wording of the section the view that interlocutory orders can be revised but at the same time it is stated that Courts have interfered even in case of interlocutory orders in order to avoid irreparable injury. In this particular case it was held that the order of the lower Court overruling an objection as to jurisdiction was not likely to cause irreparable harm.)]
[But see ('17) 4 AIR 1917 Oudh 389 (390) (DB). (Order directing plaintiff to elect one of two allegations in the plaint—Interfered with in revision to secure unhampered trial.)]

6. ('43) 30 AIR 1943 Pesh 8 (9) (DB).
('42) 29 AIR 1942 Pesh 23 (24). (Order requiring additional court-fee.)
(41) 28 AIR 1941 Pesh 34 (36). (Order refusing to stay suit.)
('34) 21 AIR 1934 Pesh 37 (38).
('35) 22 AIR 1935 Pesh 33 (36) (DB). (Case under S. 84 of N. W. F. P. Law and Justice Regulation.)
('37) 24 AIR 1937 Pesh 21 (22). (Case under S. 34 of the N. W. F. P. Courts Regulation.)
† ('33) 20 AIR 1933 Pesh 48 (49) (DB). (Suit dismissed on the ground of *res judicata*—On appeal suit remanded for trial on merits—Order of remand is not case decided.)

7. ✠ ('43) 30 AIR 1943 Lah 65 (79) : I L R (1943) Lah 257 (FB). (Case law fully discussed with illustrations—Overruling AIR 1924 Lah 425 : 5 Lah 288 (FB).)

8. ✠ ('24) 11 AIR 1924 Lah 425 (426) : 5 Lah 288 (FB).

Bibi Gurdevi's case referred to above in which it has been held that the word "case" is wide enough to include the decision on any substantial question in controversy between the parties affecting their rights even though such order is passed in the course of the trial of the suit.

All these Courts (including the Lahore High Court before the recent Full Bench decision in *Bibi Gurdevi's case*) have, however, held that proceedings before a suit is *commenced*, or after a suit has *ended* and proceedings for which the Legislature

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The following cases have followed the Full Bench view :

('37) I L R (1937) Lah 430 (432, 433) : 172 Ind Cas 497 (498). (Order to pay additional court-fee is an interlocutory order—Revision does not lie as no case is decided.)

('39) 41 Pun L R 146 (147). (No revision lies against an order allowing an amendment of the plaint.)

('38) 25 AIR 1938 Lah 548 (549) : I L R (1938) Lah 289 (DB). (Order giving leave to defend conditionally under O. 37 R. 3 is not case decided.)

('38) 25 AIR 1938 Lah 80 (81) : I L R (1938) Lah 377. (Order calling upon plaintiff to make good deficiency in court-fee is an interlocutory order.)

('36) 23 AIR 1936 Lah 466 (468). (Arbitration proceedings referred by a Court during the pendency of a suit are merely a ramification of the main suit which is still pending and which would be disposed of on the termination of these proceedings.)

('36) 23 AIR 1936 Lah 538 (540). (Order superseding arbitration is an interlocutory order and not open to revision.)

('33) 20 AIR 1933 Lah 191 (192).

('33) 20 AIR 1933 Lah 692 (693, 694) : 14 Lah 715 (DB). (No revision lies against order refusing objection to an award as it is interlocutory.)

('34) 21 AIR 1934 Lah 165 (166). (Order refusing amendment is interlocutory order and no revision lies.)

('34) 21 AIR 1934 Lah 231 (231). (Order allowing amendment of application to sue in *forma pauperis* is interlocutory.)

('34) 21 AIR 1934 Lah 401 (402). (A mere admission of a pauper petition is not a case decided.)

('34) 147 Ind Cas 347 (347) (Lah). (Demanding additional court-fee—Remedy is to appeal when the plaint is rejected on refusal to pay.)

('30) 17 AIR 1930 Lah 559 (560). (Order granting leave to amend plaint.)

('30) 17 AIR 1930 Lah 589 (589). (Order refusing amendment of plaint or permission to withdraw suit.)

('30) 17 AIR 1930 Lah 448 (448). (Order overruling contention that oral will is not valid and directing further evidence.)

In the following cases before the Full Bench the right to interfere was assumed to exist but interference was refused for various reasons :

('05) 1905 Pun Re No. 64, p. 217 (217).

('11) 11 Ind Cas 840 (842) (DB) (Lah). (Order directing fresh court-fee—Stamps to be applied for those spoilt.)

('11) 1911 Pun Re No. 82, p. 303.

('16) 3 AIR 1916 Lah 346 (347).

('18) 5 AIR 1918 Lah 334 (335). (As to *res judicata*.)

('02) 1902 Pun Re No. 31, p. 118 (120).

('11) 11 Ind Cas 831 (832) (Lah).

('11) 11 Ind Cas 880 (880) (Lah). (Order as to valuation of plaint and court-fee.)

('15) 2 AIR 1915 Lah 306 (307). (Order relating to issues.)

('16) 3 AIR 1916 Lah 128 (129). (Order rejecting an application to confirm the evidence on one issue only.)

('17) 4 AIR 1917 Lah 59 (59, 60) : 1917 Pun Re No. 26. (Order refusing leave to amend plaint.)

('17) 4 AIR 1917 Lah 57 (59). (Court's refusal to remove an unfit commissioner appointed to take accounts.)

('19) 6 AIR 1919 Lah 249 (250).

('19) 6 AIR 1919 Lah 308 (309).

('19) 6 AIR 1919 Lah 381 (382) : 1919 Pun Re No. 77.

('20) 7 AIR 1920 Lah 85 (86). (Erroneous decision as to jurisdiction to try a suit.)

('21) 59 Ind Cas 450 (451) (Lah). (Order allowing a party to produce fresh evidence on an issue after closing the case.)

('20) 7 AIR 1920 Lah 412 (413).

('21) 8 AIR 1921 Lah 213 (213). (On a question of jurisdiction as to whether the suit lay for breach of contract.)

('21) 8 AIR 1921 Lah 265 (266).

('21) 8 AIR 1921 Lah 367 (368). (Refusing to allow amendment of pleadings and raise additional issues.)

('21) 8 AIR 1921 Lah 370 (371). (Where the order of remand remitting the case back for framing proper issues was wholly unnecessary — High Court interfered.)

('22) 9 AIR 1922 Lah 394 (394). (When lower Court refused leave to amend plaint originally brought on insufficiently stamped hundi as an original consideration without giving reasons.)

('23) 10 AIR 1923 Lah 301 (301). (When the lower Court in supersession of its previous orders to examine a person on commission issued summons to attend Court.)

('23) 10 AIR 1923 Lah 565 (566).

('21) 8 AIR 1921 Lah 184 (184).

In the following cases revision on the decision as to jurisdiction held not to lie :

('23) 10 AIR 1923 Lah 414 (414).

('10) 1910 Pun Re No. 70 : 7 Ind Cas 710 (710).

[But see ('25) 12 AIR 1925 Lah 72 (73). (Interlocutory order as to place of trial is a "case." The Full Bench case was not referred to.)

('32) 19 AIR 1932 Lah 51 (52). (If the order is manifestly illegal, it could be revised.)]

has provided an *independent* remedy or a different procedure, are not interlocutory proceedings and will therefore be open to interference in revision.[9] Thus, the disposal of an application for leave to sue as a pauper[10] or to set aside an *ex parte* decree[11] or to restore a suit dismissed for default[12] has been held to be 'a case decided' the decision in which is revisable by the High Court under this section. In the undermentioned case[13]

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9. ('40) 27 AIR 1940 Sind 190 (190) : ILR (1940) Kar 34 (DB). (Order awarding arbitrator's fees under Sch. 2, para. 13 is "case decided.")
('26) 13 AIR 1926 Lah 642 (643).
('33) 20 AIR 1933 All 106 (107): 54 All 1048. (Order returning plaint under S. 23 of the Provincial Small Cause Courts Act terminates the proceedings in that Court and is therefore a "case decided.")
✠('34) 21 AIR 1934 All 620 (622, 623) : 57 All 17 (FB). (Test as to whether a proceeding is a case or not laid down.)
('34) 21 AIR 1934 Bom 252 (253): 58 Bom 485. (DB). (Decision dismissing applications under O. 41 R. 6 (2) is 'case decided.')
('33) 20 AIR 1933 Lah 1046 (1047) (DB). (Proceedings for a temporary injunction are a case as they do not directly affect the decision of the suit one way or other.)
✠('04) 12 Oudh Cas 405 (413): 4 Ind Cas 878 (882) (DB).
('24) 11 AIR 1924 Lah 408 (409). (Order directing the defendant to deposit money under S. 10 of the Charitable and Religious Trusts Act.)
('25) 12 AIR 1925 Lah 189 (189). (Application for transfer without notice is illegal.)
('30) 17 AIR 1930 All 701 (702): 52 All 951. (In a suit against a firm an order refusing permission to a partner to file a written statement to resist the claim.)
('30) 17 AIR 1930 Lah 195 (197). (Original Court having no jurisdiction sending suit to District Judge who transfers the same — There is a case decided — Proceedings terminate when original Court decided that it had no jurisdiction.)
('31) 18 AIR 1931 Lah 644 (647): 13 Lah 59 (DB). (Order refusing stay under S. 19, Arbitration Act.)
('31) 18 AIR 1931 Lah 66 (67). (Suits for injunction to restrain opposite party from proceeding to arbitration under arbitration clause — Order staying suit and asking parties to proceed with arbitration terminates the case so far as the Court is concerned and is therefore a "case.")
('25) 12 AIR 1925 Oudh 604 (604). (Order deciding finally one point in a suit terminates case and is therefore a "case.")
† ('31) 18 AIR 1931 Lah 503 (503). (Order regarding security for stay of further proceedings on appeal from preliminary decree — *Held*, to be a "case.")
† ('36) 23 AIR 1936 Sind 205 (205) (DB). (An application made under S. 19, Arbitration Act, is not an interlocutory proceeding or a mere branch of a suit within the meaning of S. 115 of the Code. It is a case in itself and decides finally between the parties whether the matter shall or shall not be decided by arbitration; therefore an application in revision will lie and is not excluded by S. 115.)
('35) 22 AIR 1935 All 455 (456). (Application for refund of court-fee — Decision of, after suit has terminated is "case decided.")
[*See also* ('27) 14 AIR 1927 Lah 394 (394) : 8 Lah 362 (DB). (Order holding that a suit is triable under Sikh Gurdwaras Act (VIII of 1925) is revisable.)
† ('37) 24 AIR 1937 All 658 (659) (DB). (Where in the course of execution of a decree, an outsider to the suit and to the execution proceedings, makes an independent application for stay of execution, the proceedings which begin with such an application for stay by a person not a party to the suit and not originally a party to the execution proceedings and which terminate with an order of refusal have the character of a 'case' complete in itself; and an order passed on such an application, refusing to stay the execution is a "case decided" within the meaning of S. 115, C. P. Code, and is subject to revision by the High Court.)]
10. ('42) 29 AIR 1942 Pesh 29 (29).
('27) 14 AIR 1927 Lah 56 (56).
('26) 13 AIR 1926 Lah 642 (643).
('34) 21 AIR 1934 Lah 231 (231).
† ('37) 24 AIR 1937 Oudh 481 (481): 13 Luck 560 (DB). (Rejection of application for leave to sue as pauper amounts to 'case decided.')
[*See* ('34) 21 AIR 1934 Lah 401 (402). (But the mere admission of a petition is not a case decided.)]
See also Note 26.
11. ('25) 12 AIR 1925 All 610 (611): 48 All 175 (FB).
✠('31) 18 AIR 1931 All 294 (301): 53 All 612 (FB).
('26) 13 AIR 1926 Lah 344 (344).
('26) 13 AIR 1926 Lah 379 (380) : 7 Lah 161.
('20) 7 AIR 1920 Lah 452 (452).
('21) 8 AIR 1921 Oudh 141 (142) : 24 Oudh Cas 282.
† ('23) 10 AIR 1923 Oudh 177 (180) : 26 Oudh Cas 10. (Order of remand setting aside an *ex parte* decree and directing a rehearing of the same.)
('38) 25 AIR 1938 Sind 76 (78) : 32 Sind L R 703 (DB). (The fact that an appeal lies against an order made under O. 9 R. 13 refusing to grant an application to set aside an *ex parte* decree and that no appeal lies against an order granting an application to set aside a decree does not exclude the remedy by revision in the latter case, much more restricted though the remedy by revision is.)
[*See also* ('33) 20 AIR 1933 Rang 156 (156).]
12. ('41) 28 AIR 1941 Oudh 367 (368) (DB).
('29) 16 AIR 1929 All 599 (599) : 51 All 908 (DB).
† ('33) 20 AIR 1933 All 41 (41) (DB).
('33) 20 AIR 1933 Lah 169 (171). (Order is not of an interlocutory nature.)
('28) 107 Ind Cas 395 (396) (Lah).
[*See* ('32) 19 AIR 1932 Lah 176 (177).
('36) 23 AIR 1936 Lah 618 (619). (Orders relating to an application for restoration of proceedings dismissed in default constitute a 'case' within the meaning of S. 115.)]
13. † ('29) 16 AIR 1929 Lah 257 (259). (Case finally decided *qua* that particular proceeding.)

it was held that an application raising the question whether a certain person should or should not act as the next friend of a minor, was held to be a 'case.' As regards an application for stay under S. 10 of the Code, the Allahabad High Court, the Chief Court of Sind and before the recent Full Bench decision in *Bibi Gurudevi's* case, the Lahore High Court, have held that it is only an interlocutory application and not a 'case'[14] while the Oudh Chief Court is of a contrary opinion.[15] As to an application under O. 1 R. 10 the Allahabad High Court holds that it is an interlocutory order and not a case[16] while the Oudh Chief Court holds that it is a *separate and independent* proceeding.[17] The Lahore High Court[18] has held that where the plaintiff dies during the pendency of a suit and two parties, each claiming to be his legal representative, apply to be brought on the record, and the Court decides in favour of one party, the proceedings, so far as the other party is concerned, do not arise in the suit itself but are rather collateral proceedings and final *qua* that party, and hence the order amounts to a 'case decided.'

A suit was instituted against A, B, C and D on the basis of a promissory note executed by them. The Court ordered that the suit could not proceed against A as the promissory note was signed by him at a place which was beyond the jurisdiction of the Court. It was held by the Lahore High Court that a revision would be competent as the proceedings terminated so far as A was concerned and therefore there was a 'case decided.'[19]

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14. ('39) 41 Pun L R 883 (883). (No revision against order refusing stay.)
('39) 26 AIR 1939 Sind 291 (292) (DB).
('29) 16 AIR 1929 All 957 (959) (DB).
('34) 21 AIR 1934 All 520 (521) (DB). (Decision by lower Court on an issue that the trial of the suit was not barred under S. 10, C. P. Code, is not a case decided.)
('33) 20 AIR 1933 Lah 191 (192).
('20) 7 AIR 1920 All 197 (198) : 42 All 409.
('24) 11 AIR 1924 Lah 567 (567).
('29) 16 AIR 1929 Lah 662 (663).
('30) 17 AIR 1930 Lah 525 (525). (Court can however interfere either under S. 151, C. P. Code, or under S. 107 of the Government of India Act.)
('22) 9 AIR 1922 Lah 54 (55).
('23) 10 AIR 1923 Lah 69 (69, 70).
('23) 10 AIR 1923 Lah 615 (617).
('36) 23 AIR 1936 Lah 569 (569). (Order refusing to stay proceedings under S. 10.)
('39) 41 Pun L R 55 (55).
[*See* ('33) 20 AIR 1933 Lah 605 (606). (In this case the High Court interfered under S. 107 of the Government of India Act.)]
[But see ('33) 20 AIR 1933 Lah 34 (34).
('33) 20 AIR 1933 Lah 50 (51). (Distinguishing the cases holding a contrary view on the ground that in this case the application for stay was under inherent powers and not under S. 10.)
('21) 61 Ind Cas 830 (831) (Lah).]

15. ('40) 27 AIR 1940 Oudh 441 (442):16 Luck 184 (DB). (Assumed.)
('28) 15 AIR 1928 Oudh 355 (358) : 3 Luck 650 (FB).
('19) 6 AIR 1919 Oudh 178 (179) (DB).
[*See also* ('40) 27 AIR 1940 Oudh 342 (343) : 15 Luck 641 (DB). (Civil Court proceeding with trial of suit in spite of its finding that its jurisdiction to proceed with it is temporarily ousted by U. P. Encumbered Estates Act—Revision lies.)]

16. ('28) 15 AIR 1928 All 97 (97): 50 All 276 (DB).
('12) 14 Ind Cas 263 (264) (DB) (All).
[But see ('34) 21 AIR 1934 All 25 (27) (DB).]

17. ('43) 30 AIR 1943 Oudh 315 (315, 316).
('42) 29 AIR 1942 Oudh 338 (339) : 18 Luck 56. (Order rejecting application for being made a party to the suit.)
† ('10) 13 Oudh Cas 109 (112): 6 Ind Cas 977 (978) (DB).
('12) 15 Oudh Cas 304 (309) : 16 Ind Cas 592 (594) (DB).
('14) 1 AIR 1914 Oudh 184 (185). (Stranger to a mortgage ordered to be impleaded.)
('29) 16 AIR 1929 Oudh 148 (148) (Where *A* sued *B* for arrears of rent in respect of a house, and *C*, who had obtained a decree against *A* and *B* declaring that he is the owner of the house, applied for being impleaded as a party to the suit, held refusal, to be bad.)
('38) 25 AIR 1938 Oudh 10 (10):13 Luck 625 (DB). (The order of a Court dismissing the application of a party to be made a party to a suit under O. 34 R. 1, though interlocutory, has decided the case and a revision petition lies against such an order.)
[*See also* ('42) 29 AIR 1942 Oudh 340 (340) (DB). (A distinction ought to be drawn between a case where a person applies to a Court to be made a party and his application is refused and a case where the application is granted—When the application is refused, a case is decided so far as that party is concerned, but not so when he is made a party and the former order is revisable while the latter is not.)
('42) 29 AIR 1942 Oudh 366 (368) (DB). (Application of vendor to be allowed to continue as defendant wrongly rejected — Chief Court can interfere in revision.)]
[But see ('39) 26 AIR 1939 Oudh 102 (103) : 14 Luck 447 (DB). (Order adding person as party to suit is not appealable nor one open to revision —It is merely an interlocutory order.)]

18. ('35) 22 AIR 1935 Lah 934 (934).

19. ('37) 24 AIR 1937 Lah 800 (801).

In view of the Full Bench decision of the Lahore High Court in *Bibi Gurudevi's* case holding that interlocutory orders can be revised, the above discussion in so far as it is based on prior decisions of the Lahore High Court is only of academic interest now.

The proceeding started by the filing of an application under S. 7 (1) (a) of the U. P. Encumbered Estates Act, XXV of 1934, is a fresh proceeding and therefore a 'case.'[20]

According to the High Court of Allahabad an order allowing or refusing an amendment of the plaint, being of an interlocutory nature is not open to revision.[21] The Oudh Chief Court also holds likewise.[22]

An order refusing to file an award and directing the suit to proceed is interlocutory in its nature and as such not open to revision.[23] Similarly, an order setting aside an award in a pending suit and directing the suit to proceed in the ordinary way is interlocutory in its nature and as such not revisable.[24]

An order of the appellate Court holding that there is a valid reference to arbitration and directing the lower Court to deal with the case under the Arbitration Act has been held not to be of an interlocutory nature.[25]

In a case decided by the Lahore High Court before the decision in *Bibi Gurudevi's* case it was held that an order impounding a document and forwarding it to the Collector for necessary action under the Stamp Act is a case decided and is therefore open to revision.[26]

On the other hand, the general trend of the decisions of the High Courts of —

(a) Calcutta,[27]

[*See also* ('38) 25 AIR 1938 Lah 507 (508). (An order by Court holding the suit of a plaintiff time-barred in respect of certain reliefs claimed by him is a 'case decided' to that extent.)

† ('39) 26 AIR 1939 Sind 137 (140): ILR (1939) Kar 330 (DB). (Order dismissing suit as against one of the defendants is not an (interlocutory order and order by successor of Judge setting aside such order is also not an interlocutory order.)]

20. ('40) 27 AIR 1940 All 387 (388) : ILR (1940) All 499 (DB). (Dismissal of application is case decided.)
('38) 25 AIR 1938 All 6 (7): ILR (1938) All 22 (DB).

21. ✣('36) 23 AIR 1936 All 686 (688, 689) : I L R (1937) All 17 (FB).
('34) 21 AIR 1934 All 785 (785) (DB).
[See however ('40) 27 AIR 1940 All 448 (449) : I L R (1940) All 564 (DB). (Application that certain additions by way of explanatory notes be made after description of certain defendants in the plaint is not an application for amendment of a pleading—Rejection of application constitutes the decision of a case and revision lies—AIR 1936 All 686 : ILR (1937) All 17 (FB) explained.)]
The following cases should be deemed as overruled by the Full Bench :
('35) 22 AIR 1935 All 353 (356) : 57 All 459 (DB).
('35) 22 AIR 1935 All 651 (652).
('33) 20 AIR 1933 All 374 (375) : 55 All 256.

22. ('41) 28 AIR 1941 Oudh 87 (88) (DB).
('41) 28 AIR 1941 Oudh 623 (624).

23. ('36) 58 All 946 (947) : 164 Ind Cas 722 (724) (DB).
('35) 22 AIR 1935 All 519 (519 520).
† ('38) 25 AIR 1938 All 557 (559, 560) : I L R (1938) All 805 (FB). (AIR 1931 All 721 and AIR 1929 All 743 : 51 All 1010 overruled.)
[*See also* ('43) 30 AIR 1943 Pesh 8 (9) (DB). (Order holding that there was no valid reference to arbitration and directing suit to be tried regularly—No revision.)
('32) 19 AIR 1932 All 452 (453): 53 All 1006(DB).]

24. ('39) 183 Ind Cas 837 (838) (DB) (Oudh).
[*See also* ('40) 27 AIR 1940 Oudh 405 (406) : 16 Luck 79 (DB). (Order setting aside final decree in terms of award and restoring case—No revision.)]

25. ('43) 30 AIR 1943 Pesh 8 (9) (DB).
[*See also* ('42) 29 AIR 1942 Sind 7 (7) (DB). (Judge deciding that particular issue should be referred to arbitration—That is a case decided.)]

26. ('42) 29 AIR 1942 Lah 265 (266).

27. ('40) 27 AIR 1940 Cal 92 (92) : I L R (1939) 2 Cal 378 (DB). (After remand lower Court ordering restoration of possession by auction purchaser to the judgment-debtor—The order is interlocutory —No appeal but revision lies.)
('17) 4 AIR 1917 Cal 248 (249). (Revision from an order on a stay application under S. 10, C. P. C.)
† ('87) 14 Cal 768 (780) (DB).
('29) 16 AIR 1929 Cal 159 (159). (Interlocutory order deciding question of jurisdiction—Wrong assumption of jurisdiction.)
('10) 6 Ind Cas 570 (572) (DB) (Cal).
('12) 15 Ind Cas 46 (48) (DB) (Cal).
In the following cases the right to interfere was assumed :
('29) 16 AIR 1929 Cal 831 (831).
('13) 21 Ind Cas 943 (944) (DB) (Cal).
('83) 8 Cal 837 (841) : 12 Cal L Rep 421 (423) (DB).
('10) 6 Ind Cas 549 (552) (DB) (Cal).

(b) Madras,[28]
(c) Nagpur,[29]

('10) 6 Ind Cas 546 (549) (DB) (Cal).
('94) 21 Cal 539 (541) (DB).
('18) 5 AIR 1918 Cal 909 (909) (DB).
('10) 8 Ind Cas 87 (90) (DB) (Cal).
('12) 17 Ind Cas 361 (362) (DB) (Cal).
('22) 9 AIR 1922 Cal 42 (44) (DB).
('13) 21 Ind Cas 771 (772) (DB) (Cal).
('10) 7 Ind Cas 92 (93) (DB) (Cal). (Court-fee.)
('25) 12 AIR 1925 Cal 204 (206) (DB).
('10) 7 Ind Cas 436 (442) (DB) (Cal).
('10) 6 Ind Cas 574 (576) (DB) (Cal).
('10) 38 Cal 230 (241) : 8 Ind Cas 107 (114) (DB).
('35) 22 AIR 1935 Cal 102 (106) (DB). (High Court will not interfere with interlocutory orders unless irreparable injury and inevitable miscarriage of justice will result.)
('35) 22 AIR 1935 Cal 279 (280) : 62 Cal 417 (DB).
('38) 25 AIR 1938 Cal 161 (162). (Lower Court accepting valuation in plaint and acting wrongly in not exercising its powers under S. 8 (c), Court-fee (Bengal Amendment) Act—High Court can interfere under S. 115 as lower Court will be exercising its jurisdiction wrongly if its decision is wrong.)
Also see Government of India Act, 1915, S. 107 Note 2.

28. ('42) 29 AIR 1942 Mad 247 (249) : ILR (1942) Mad 455. (Before interference question of inconvenience and delay in trial of suit should be considered.)
('42) 29 AIR 1942 Mad 362 (363) : I L R (1942) Mad 647 (DB). (Ordinarily the High Court will not entertain a revision against a preliminary finding such as one holding certain rules framed under an Act to be *ultra vires* unless there are special circumstances rendering it desirable—Revision entertained, as an authoritative ruling on the question where certain rules framed in the exercise of the powers under S. 28 (1) and S. 28 (2) (b) and (c) of Madras Agriculturists' Relief Act was necessary for guidance of lower Courts in similar cases.)
✠('29) 16 AIR 1929 Mad 121 (124) (DB). (See observations of Odgers, J.)
('22) 9 AIR 1922 Mad 332(334) : 45 Mad 194(DB).
('31) 18 AIR 1931 Mad 542 (549) (DB).
† ('31) 18 AIR 1931 Mad 1 (2, 5) (DB).
('27) 14 AIR 1927 Mad 212 (213).
('30) 17 AIR 1930 Mad 216 (216).
('23) 10 AIR 1923 Mad 270 (270). (Court-fee.)
('25) 12 AIR 1925 Mad 722 (723). (Do.)
('25) 12 AIR 1925 Mad 713 (714). (Do.)
('26) 13 AIR 1926 Mad 678 (679). (Do.)
('29) 16 AIR 1929 Mad 396 (397) (DB). (Do.)
('23) 10 AIR 1923 Mad 321 (322) : 46 Mad 574. (Order refusing to issue commission to examine witness.)
('08) 31 Mad 60 (61) (DB). (Order issuing commission.)

In the following cases the right to interfere was assumed to exist :
('22) 9 AIR 1922 Mad 321 (323). (An amendment of the plaint.)
('17) 4 AIR 1917 Mad 134 (135). (Court-fee.)
('18) 5 AIR 1918 Mad 1060 (1061) (DB). (Setting aside review order.)
('18) 5 AIR 1918 Mad 1137 (1139).
('23) 10 AIR 1923 144 (147) : 47 Mad 47.
('26) 13 AIR 1926 Mad 135 (136).
('29) 16 AIR 1929 Mad 403 (403).
('13) 19 Ind Cas 672 (672) (Mad).
('11) 12 Ind Cas 104 (105) (Mad).
('11) 12 Ind Cas 173 (174) (Mad).
('14) 1 AIR 1914 Mad 298 (298).
('30) 17 AIR 1930 Mad 72 (74).
('25) 12 AIR 1925 Mad 188 (189).
('30) 17 AIR 1930 Mad 322 (325).
('08) 18 Mad L Jour 302 (304).
('26) 13 AIR 1926 Mad 166 (168).
('24) 11 AIR 1924 Mad 541 (541).
('31) 18 AIR 1931 Mad 8 (10).
('14) 1 AIR 1914 Mad 17 (17) (DB). (Erroneous order refusing to allow the amendment.)
('14) 1 AIR 1914 Mad 271 (272). (Amendment of pleading.)
('26) 13 AIR 1926 Mad 1047 (1048) (FB).
('28) 15 AIR 1928 Mad 416 (418) : 51 Mad 664 (DB). (Though appeal lies against order rejecting plaint for non-payment of court-fee.)
('31) 18 AIR 1931 Mad 716 (717). (Do.)
('23) 10 AIR 1923 Mad 690 (692).
('26) 13 AIR 1926 Mad 1124 (1125).
('24) 11 AIR 1924 Mad 846 (847) : 47 Mad 934.
('12) 13 Ind Cas 903 (904) (DB) (Mad).
('23) 10 AIR 1923 Mad 88 (88). (Order under S. 10.)
('27) 14 AIR 1927 Mad 524 (525).
('37) 24 AIR 1937 Mad 338 (339). (Order under O. 1 R. 10 can be revised under Section 115, C. P. Code, when the Court fails to exercise a discretion vested in it and when its failure is due to error.)
('38) 25 AIR 1938 Mad 646 (648). (Order refusing issue of commission is revisable.)
('36) 23 AIR 1936 Mad 526 (526). (A Court in framing issues or refusing to frame issues is, in the language of S. 115, deciding a case, if the onus of proof is involved in the form of the issues.)
('35) 22 AIR 1935 Mad 282 (283) : 58 Mad 771 (DB). (Decision on preliminary issue as to maintainability of suit—High Court has power to, but will not interfere unless the point can be shortly and conveniently disposed of by way of a civil revision petition.)
[*See* ('32) 19 AIR 1932 Mad 603 (604). (Order refusing to amend plaint can be set aside in revision.)
('33) 20 AIR 1933 Mad 506 (507, 508) : 56 Mad 744 (DB). (But High Court will not interfere if order as to court-fee is favourable to plaintiff.)]
[*See also* ('34) 21 AIR 1924 Mad 669 (669). (Revision lies against order passed on petition under O. 9 R. 9 for restoration of dismissed petition.)]

29. ('43) 30 AIR 1943 Nag 97 (98) : I L R (1943) Nag 520. (Order impounding documents, in possession of a witness, which the Court had no authority to impound.)
('41) 28 A I R 1941 Nag 289 (290) : I L R (1942) Nag 478. (Order refusing to allow an amendment of the plaint and thereby shutting out a part of the plaintiff's claim being a case decided within the meaning of S. 115, is open to revision.)

(d) Patna[30] and
(e) Rangoon,[31]

with few exceptions,[32] is to hold that the High Court is not powerless to interfere under

† ('31) 18 AIR 1931 Nag 17 (19): 27 Nag L R 251. (Erroneously allowing a time-barred suit to continue.)
('25) 12 AIR 1925 Nag 195 (196). (Refusal to allow amendment.)
('11) 7 Nag L R 130 (133) : 12 Ind Cas 357 (359).
('24) 11 AIR 1924 Nag 292 (293) (DB).
('28) 15 AIR 1928 Nag 131 (131).
('27) 14 AIR 1927 Nag 256 (258).

In the following cases the right to interfere was assumed to exist :

('26) 13 AIR 1926 Nag 409 (409).
('25) 12 A I R 1925 Nag 62 (63). (Amendment of plaint claiming alternative reliefs.)
('25) 12 AIR 1925 Nag 108 (109). (An order allowing amendment of plaint *ex parte* without notice.)
('30) 17 AIR 1930 Nag 51 (51).
('19) 6 AIR 1919 Nag 150 (152) : 15 Nag L R 21.
('30) 17 AIR 1930 Nag 10 (11).
('28) 15 AIR 1928 Nag 222 (222).
('25) 12 AIR 1925 Nag 373 (374).
('38) 25 AIR 1938 Nag 210 (210): I L R (1940) Nag 463. (Order allowing a person to sue as pauper.)
('38) 25 AIR 1938 Nag 358 (359) : I L R (1940) Nag 280. (The High Court would not ordinarily exercise its revisional jurisdiction in a purely interlocutory matter, namely, about the admission of a certain piece of evidence — It may however do so when the question is one of general importance and no objecton is taken by the opposite party as to the competency of the Court to entertain the petition — But such case must not be regarded as a precedent for interference in purely interlocutory matters of procedure which do not affect jurisdiction, and do not inflict irreparable injury.)

30. ('18) 5 AIR 1918 Pat 100 (103) : 4 Pat L Jour 20 (DB). (Order dismissing application for leave to sue a receiver without enquiring into the allegations.)
† ('37) 24 AIR 1937 Pat 550 (552) : 16 Pat 600 (SB). (Interlocutory order allowing deficit court-fee to be made up.)
('24) 11 AIR 1924 Pat 176 (179) (DB).

See also the following cases :

('30) 17 AIR 1930 Pat 592 (592).
('23) 10 AIR 1923 Pat 411 (412).
('20) 7 AIR 1920 Pat 789 (789, 790). (Court-fee.)
('21) 8 AIR 1921 Pat 180 (180): 5 Pat L Jour 400. (Do.)
('21) 8 AIR 1921 Pat 323 (323).
('30) 17 AIR 1930 Pat 277 (278). (Court-fee.)
('24) 11 AIR 1924 Pat 673 (675) : 3 Pat 980.
('22) 9 AIR 1922 Pat 359 (360): 4 Pat L Jour 195.
('18) 5 AIR 1918 Pat 131 (131): 4 Pat L Jour 191.
('25) 12 AIR 1925 Pat 488 (489).
('25) 12 AIR 1925 Pat 703 (704).
('26) 13 AIR 1926 Pat 334 (335).
('35) 22 AIR 1935 Pat 90 (91).
('36) 23 AIR 1936 Pat 85 (86) : 15 Pat 340. (Decision as to court-fee.)
('38) 25 AIR 1938 Pat 22 (25, 26): 16 Pat 766 (FB). (Do.)
('38) 25 AIR 1938 Pat 209 (209). (Order under O. 33 R. 8, C. P. C.)
('36) 23 AIR 1936 Pat 190 (190). (Court-fee.)
('35) 22 AIR 1935 Pat 186 (187). (Interlocutory order raising question of jurisdiction—Revision lies.)

31. ('17) 4 AIR 1917 Low Bur 35 (36). (Order permitting three separate suits to be brought in respect of different parts of the estate of a deceased by the administrator.)
('33) 20 AIR 1933 Rang 49 (50): 11 Rang 36 (DB). (Though High Court has got such power, it should not interfere unless there would be miscarriage of justice.)
('21) 8 AIR 1921 Low Bur 6 (8) : 11 Low Bur Rul 65 (DB). (Order refusing permission to examine witness on commission.)
† ('24) 11 AIR 1924 Rang 2 (3): 1 Rang 231 (DB).
('18) 5 AIR 1918 Low Bur 25 (26).
('31) 18 AIR 1931 Rang 136 (137) : 9 Rang 71.
('39) 26 AIR 1939 Rang 92 (93). (The Court will not however interfere unless it seems that there has been a gross and culpable error likely to inflict grave injustice and cause irreparable injury.)
('35) 22 AIR 1935 Rang 122 (122). (Interlocutory order of Court refusing to admit oral admissible evidence—Revision is competent.)
('35) 22 AIR 1935 Rang 466 (466): 13 Rang 595 (DB).
('35) 22 AIR 1935 Rang 225 (226). (The Rangoon High Court has always entertained applications in revision with a certain amount of freedom, even when the cases are not complete, if to allow a case to proceed would result in waste of time, trouble and money.)
[*See* ('39) 26 AIR 1939 Rang 448 (448) : 1939 Rang L R 591 (DB). (An interlocutory order may decide a case and may be subject to revision if it does irreparable damage to a party but that cannot be said in case of rejection of evidence as party can question that decision under S. 105 in appeal.)]
[*See also* ('33) 20 AIR 1933 Rang 263 (264). (Interlocutory orders—Revision lies more under S. 107 Government of India Act, 1915, than under Section 115 of the Code.)]

32. ('41) 28 AIR 1941 Nag 263 (268) : I L R (1942) Nag 414. (Order superseding award of arbitrator on the ground that arbitrator exceeded his authority — No revision lies.)
('34) 21 AIR 1934 Pat 550 (551). (Order setting aside an award in an arbitration.)
('26) 13 AIR 1926 Cal 1149 (1150) : 53 Cal 767. (Per Cuming, J.)
('28) 15 AIR 1928 Cal 114 (114): 54 Cal 1038 (DB). (Order in a divorce suit.)
('82) 12 Cal L Rep 148 (151).
('19) 6 AIR 1919 Cal 840 (841) (DB).
('12) 16 Ind Cas 3 (5) (DB) (Cal). (Doubted.)
('86) 9 Mad 256 (257).
('95) 5 Mad L Jour 75 (76) (DB).
('11) 9 Ind Cas 672 (672) (DB) (Mad). (Doubted.)
('14) 1 AIR 1914 Mad 116 (116). (Order setting aside an abatement.)
('14) 1 AIR 1914 Mad 685 (685). (*Ex parte* decree, setting aside.)
('23) 10 AIR 1923 Mad 43 (43). (Order directing a commissioner to ascertain mesne profits.)

S. 115, with interlocutory orders. As already seen above, the Lahore High Court has also recently come to adopt this view. The Calcutta, Madras and Patna High Courts have also interfered with such orders in the exercise of their powers of superintendence under S. 107 of the Government of India Act, 1915 (corresponding to S. 15 of the Charter Act, 1861).[33] It must, however, be noted in this connexion that under sub-s. (2) to S. 224 of the Government of India Act of 1935 the High Court has no power of revision in respect of the judicial proceedings in lower Courts except in so far as such power may be otherwise conferred. See Note on S. 224 of the Government of India Act of 1935 given in Appendix II. The High Court of Bombay has also acted under Regulation II of 1827, S. 5, and interfered with such orders.[34] See also the cases noted below.[35]

It is submitted with respect that the view that an interlocutory order cannot be revised at all is not correct. A judgment, under O. 20 R. 4, must contain a concise statement of the 'case' and under S. 2, cl. (9), a 'judgment' means the statement given by the Judge of the grounds of a decree or *order*. A judgment in support of an *order* which will, of course, include an interlocutory order must, therefore, contain a concise statement of the 'case' which can only mean the matter in dispute in the *particular proceeding*. This view is also supported by S. 113 of the Code which enacts that any Court may state a 'case' and refer the same for the opinion of the High Court. A reference to the Report of Select Committee in 1879 for amending S. 622 of the Code of 1877 by introducing words

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('25) 12 AIR 1925 Mad 985 (986). (Wrong order under Order 1 Rule 8.)
('28) 110 Ind Cas 78 (78) (Nag.)
('29) 16 AIR 1929 Rang 270 (271). (An erroneous decision on an issue.)
('14) 1 AIR 1914 Low Bur 207 (208) : 8 Low Bur Rul 77. (An order declining to frame an issue.)
('35) 160 Ind Cas 519 (519) : 18 Nag L Jour 132 (134). (A decision in a pending suit that certain evidence is inadmissible does not amount to a "case" decided.)
('35) 22 AIR 1935 Rang 158 (158). (Interlocutory order on question of *res judicata* — No revision lies.)

33. ('22) 9 AIR 1922 Pat 598 (599) (DB). (Suit for accounts of income of property — Interlocutory order — Ultimate decision appealable—Order not to be revised unless directions given for taking account are improper resulting in irrparable loss to the parties.)
('10) 6 Ind Cas 574 (576) (DB) (Cal).
('11) 10 Ind Cas 308 (309) (DB) (Cal). (Order refusing permission to amend pleadings.)
('33) 20 AIR 1933 Pat 161 (164) : 12 Pat 77 (DB). (It is the privilege and prerogative of High Court to exercise power of superintendence to revise order which is so erroneous as manifestly to amount to injustice.)
† ('09) 4 Ind Cas 364 (367) (DB) (Cal). (Delegation to a Commissioner by a Court of the power to call for production of documents under O. 11 R. 14.)
('16) 3 AIR 1916 Cal 318 (319) : 42 Cal 926 (DB).
('15) 2 AIR 1915 Cal 87 (91) (DB).
('25) 12 AIR 1925 Cal 1118 (1119) (DB).
† ('12) 16 Ind Cas 963 (965) (Cal).
('12) 15 Ind Cas 621 (622) (DB). (Cal).
('20) 7 AIR 1920 Cal 204 (205) (DB).
('19) 6 AIR 1919 Pat 270 (275, 276): 4 Pat L Jour 57 (DB).
† ('16) 3 AIR 1916 Mad 903 (906).
('11) 12 Ind Cal 719 (719) (Mad).
('11) 9 Ind Cas 672 (672) (DB) (Mad).
('25) 12 AIR 1925 Mad 585 (586).
('08) 31 Mad 60 (61) (DB).
('16) 3 AIR 1916 Mad 740 (742).
† ('24) 11 AIR 1924 Pat 673 (675) : 3 Pat 930 (DB). (Order demanding additional court-fee.)
('20) 7 AIR 1920 Pat 131 (137) : 5 Pat L Jour 550 (DB).
('29) 16 AIR 1929 Pat 427 (428).
('35) 22 AIR 1935 Cal 102 (107).
('34) 21 AIR 1934 Pat 641 (642) : 14 Pat 220 (DB).
('36) 23 AIR 1936 Mad 187 (187) : 59 Mad 356 (FB). (Agency District Munsif's Court at Rayagada is a civil Court subject to powers of superintendence of the Madras High Court under S. 107, Government of India Act.)
('24) 11 AIR 1924 Pat 761 (764). (Where local investigation ordered by lower Court would be a calamitous waste of time and money, interference should be made.)
Also see S. 105, Note 12.

34. ('86) 10 Bom 610 (616) (FB).
† ('15) 2 AIR 1915 Bom 269 (270, 271) : 40 Bom 86 (DB).
('24) 11 A I R 1924 Bom 65 (68) : 48 Bom 43 (DB).
('31) 18 AIR 1931 Bom 234 (235) (DB).
[*See also* ('37) 24 AIR 1937 Bom 167 (168) : ILR (1937) Bom 623. (High Court has jurisdiction to interfere in revision in respect of interlocutory orders in proper cases, though High Court should be slow to interfere.)]

35. ('43) 30 AIR 1943 Lah 65 (78) : I L R (1943) Lah 257 (FB).
('39) 26 AIR 1939 Rang 448 (448): 1939 Rang L R 591 (DB). (Improper rejection of evidence can be questioned in appeal from decision—No revision.)

therein corresponding to clause (c) of this section makes the matter still more clear. It was there stated that the object of the amendment was to extend S. 622 (now S. 115) to cases in which the High Court of Bombay was then acting in the exercise of its powers under Regulation II of 1827, S. 5. This power extended under the said regulation, to call *for the proceedings* of any subordinate Court and to pass such order thereon as the case may require.

As has been seen already in Note 3, the *exercise* of revisional powers, even in cases where S. 115 is held to apply, is a matter of *discretion*, and in the case of interlocutory orders, assuming such orders are revisable, the High Court will not interfere except where the non-interference will cause a denial of justice or irremediable harm.[36] The following are some of the circumstances in which the High Courts have interfered under S. 115 with interlocutory orders :

(1) Where the effect of the order was to cause a multiplicity of litigation or to prolong the trial.[37]

(2) Where there is a patent irregularity in procedure.[38]

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36. ('38) 25 AIR 1938 Nag 358 (359): ILR (1940) Nag 280.
† ('36) 23 AIR 1936 Pat 85 (86): 15 Pat 340 (DB).
('35) 22 AIR 1935 Pat 186 (187).
('39) 26 AIR 1939 Pat 157 (158) (DB). (Party defendants to action claiming cause of action against principal defendants — Court allowing them to be joined as co-plaintiffs — High Court will not interfere under S. 115 especially as it is an interlocutory order.)
('35) 22 AIR 1935 Cal 102 (106) (DB).
See also cases in foot-note 40.

37. ('41) 28 AIR 1941 Mad 84 (85). (Where a decision relates to the question of the jurisdiction of the Court to entertain the suit and it relates to a matter which, if decided wrongly, would result in an elaborate trial which would otherwise be unnecessary, the High Court will interfere in revision.)
('10) 6 Ind Cas 549 (552) (DB) (Cal). (Improper refusal to add party.)
('10) 6 Ind Cas 546 (549) (DB) (Cal). (Do.)
('10) 8 Ind Cas 87 (90) (DB) (Cal). (Do.)
('18) 5 AIR 1918 Cal 909 (909) (DB). (Neither S. 115, C. P. Code, nor S. 107, Government of India Act, 1915, prevents the interference of the High Court in the matter of addition or substitution of parties.)
('94) 21 Cal 539 (541) (DB). (Refusal to allow a party interested in a probate case to appear and oppose the grant of probate.)
('18) 5 AIR 1918 Mad 1137 (1139). (Erroneously adding parties.)
('23) 10 AIR 1923 Mad 144 (147) : 47 Mad 47. (Failure to add receiver as party to suit or execution proceedings.)
('26) 13 AIR 1926 Mad 135 (136). (Addition of party causing multifariousness — 5 Mad L W 207 doubted.)
('30) 17 AIR 1930 Pat 592 (592). (Order refusing to add purchaser of holding in a rent suit is improper.)
('29) 16 AIR 1929 Mad 403 (403). (Trial Court refusing to make person party defendant—Likelihood of there being conflicting findings if that person not made defendant.)
('18) 5 AIR 1918 Mad 1071 (1071) (DB). (Refusing to implead son of hereditary trustee in a scheme suit.)
('10) 6 Ind Cas 570 (572) (Cal).
('22) 9 AIR 1922 Mad 174 (175) : 46 Mad 186. (Order erroneously holding that suit was not bad for multifariousness.)
('22) 9 AIR 1922 Mad 436 (436) (DB). (Joinder of claims as administrator and as partner — Order directing plaintiff to elect.)
('11) 7 Nag L R 130 (133) : 12 Ind Cas 357 (359).
('15) 2 AIR 1915 Cal 87 (91) (DB). (Order directing trial of case piecemeal.)
('21) 8 AIR 1921 Pat 323 (323) (DB). (Do.)
('25) 12 AIR 1925 Cal 204 (206) (DB). (Trial of the suit was sought to be complicated by dragging in issues which were outside its scope and wholly irrelevant and unnecessary and the trial of which would inevitably prolong the litigation.)
† ('24) 11 AIR 1924 Pat 761 (764) (DB). (Issue of commission tending to unnecessary prolonging the litigation.)
('20) 7 AIR 1920 Pat 131 (137) : 5 Pat L Jour 550 (DB). (Refusal of a right to cross-examine witness.)
† ('10) 7 Ind Cas 436 (442) (DB) (Cal). (Order tending to cause needless delay and wasteful litigation.)
('31) 18 AIR 1931 Mad 542 (549) (DB). (Amendment of plaint by including barred claim — Non-interference would only multiply proceedings.)
('31) 18 AIR 1931 Mad 1 (2, 5) (DB). (Order of remand allowing an amendment of barred claim.)
('36) 23 AIR 1936 Lah 619 (621) (DB). (Improper refusal to add party.)
[But see ('30) 17 AIR 1930 Nag 51 (51). (Court refused to interfere though refusal to add parties would lead to multiplicity of proceedings.)]

38. †('16) 3 AIR 1916 Mad 903 (906). (Allowing inconsistent or alternative claim to be made after all the evidence is closed.)
('22) 9 AIR 1922 Mad 49 (49, 50). (The legal representative of a deceased plaintiff allowed to set up a claim not open to original plaintiff.)
('30) 17 AIR 1930 Mad 322 (325). (Order allowing amendment of plaint—Same not justified in law.)

(3) Where the effect of the order is to cause unnecessary delay or expense.[39]

(4) Where the order passed is perverse or such that unless set aside irreparable harm is likely to be caused to one of the litigants.[40]

(5) Where the effect of the order is to make the trial take an illegal course.[41]

(6) Where the order works manifest injustice.[42]

As to whether the High Court will interfere with an interlocutory order in the exercise of its discretion under this section where another remedy is open to the party either under section 105 or otherwise, see Note 8.

An interlocutory order *which is appealable* as an order under S. 104 or O. 43 R. 1, is not revisable under S. 115 which applies only to cases *in which no appeal lies* to the High Court.[43] See also Note 7.

('13) 19 Ind Cas 672 (672) (Mad). (Court converting of its own accord a suit for declaration into one for possession.)
('11) 12 Ind Cas 173 (174) (Mad).
('20) 57 Ind Cas 784 (785) (Nag). (Order impleading rival claimant as co-plaintiff.)
[*See* ('36) 23 AIR 1936 Cal 47 (48) : 62 Cal 289. (An order by the Full Bench of the Presidency Small Cause Court, allowing an application under S. 38 of the Presidency Small Cause Courts Act and sending the case back for retrial, which order is influenced by what was told them in their private room at an *ex parte* enquiry is improper and ought to be set aside in revision.)]

39. ('25) 12 AIR 1925 Mad 585 (586). (Refusal of amendment.)
† ('34) 21 AIR 1934 Cal 503 (505) (DB).
('26) 13 AIR 1926 Mad 1124 (1125). (Refusal to allow just prayer for amendment.)
('27) 14 AIR 1927 Mad 212 (213). (Refusal to amend a suit for partition into a claim for a fresh partition.)
('32) 1932 Mad W N 290 (293).
('25) 12 AIR 1925 Mad 707 (707). (If an election petition is not maintainable at all an order holding the same to be maintainable will be set aside.)
('30) 17 AIR 1930 Mad 216 (217). (Decision upon preliminary issue relating to jurisdiction is open to revision.)
('25) 12 AIR 1925 Mad 820 (821) (DB). (Suit not maintainable at all—High Court can interfere and thus prevent further waste of time and money.)
('19) 6 AIR 1919 Nag 150 (152) : 15 Nag L R 21. (Order going to the root of the case and allowing the continuance of a litigation which the lower Court had no jurisdiction to allow to continue.)
✠('31) 18 AIR 1931 Nag 17 (20): 27 Nag L R 251. (Erroneous decision that a suit which was time-barred was not so barred.)
('36) 23 AIR 1936 Pat 250 (252).
[*See* ('25) 12 AIR 1925 Mad 188 (189). (Refusal to amend plaint for setting aside sale for fraud into one that plaintiff was a minor at the time.)]

40. ('22) 9 AIR 1922 Mad 321 (324). (Where the lower Court posted a case for final hearing on preliminary issue of law, settled long before the High Court's refusal to interfere.)
('23) 10 AIR 1923 Mad 690 (692).
† ('10) 6 Ind Cas 574 (576) (DB) (Cal.)
('27) 14 AIR 1927 Mad 188 (189). (Grant of injunction without a *prima facie* case.)
('08) 18 Mad L Jour 302 (303). (Grant of injunction to party out of possession.)
('23) 10 AIR 1923 Pat 411 (413) (DB).
('28) 15 AIR 1928 Nag 222 (222).
('24) 11 AIR 1924 Pat 176 (179) (DB). (Will not interfere unless for avoiding irreparable loss.)
('18) 5 AIR 1918 Low Bur 25 (26).
('31) 18 AIR 1931 Rang 193 (194). (Order impounding a document.)
('12) 17 Ind Cas 361 (362) (DB) (Cal). (Where Court required applicant to whom injunction was granted to furnish security — *Held* it was passed to prevent a failure of justice, so no revision.)
('10) 38 Cal 230 (252) : 8 Ind Cas 107 (114) (DB).
('25) 12 A I R 1925 Cal 1118 (1119) (DB). (Order refusing to examine a witness on commission amounting to a denial of justice.)
('08) 31 Mad 60 (61) (DB). (Order issuing commission as being beyond the scope of Section 386.)
('27) 14 AIR 1927 Mad 524 (525).
('24) 11 AIR 1924 Cal 971 (974). (Issue of commission is a question of jurisdiction and not one of mere discretion — Grounds alleged for issue of commission should be carefully examined.)
('24) 11 AIR 1924 Mad 846 (846) : 47 Mad 934. (Court not properly understanding provisions of Order 11 Rule 14.)
('20) 7 AIR 1920 All 191 (192).
('26) 13 AIR 1926 Mad 166 (168). (Refusing injunction on Judge's own private opinion.)
('22) 9 AIR 1922 Cal 42 (44) (DB). (Wrong refusal to grant commission and examine witnesses.)
('24) 11 AIR 1924 Mad 541 (541). (Refusal to allow defendant to examine himself on commission when plaintiff was so examined.)
('21) 8 AIR 1921 Nag 9 (10). (Order directing plaintiffs to elect as to which of them is to remain on record when both can remain.)
('32) 19 AIR 1932 Pat 9 (11): 11 Pat 161 (DB). (Court fixing arbitrary valuation and returning plaint.)

41. ('23) 10 AIR 1923 Mad 321 (322): 46 Mad 574. (Refusal to issue commission.)
† ('14) 1 AIR 1914 Bom 42 (45): 38 Bom 381 (DB).
[*See* ('33) 20 AIR 1933 All 523 (525): 55 All 719. (Decision that defendant is not entitled to take part in the case amounts to a case decided.)]

42. ('18) 5 AIR 1918 Mad 1137 (1139).

43. ('25) 12 AIR 1925 Cal 510 (511) (DB). (Dismissal of an application under O. 21 R. 90 for default.)
('02) 1902 Pun Re No. 31, p. 118 (119).

6. "Subordinate Court." — See also section 3.

This section does not apply unless —

(1) the decision sought to be revised is that of a *Court*, and

(2) such Court is *subordinate* to the High Court.

The word '*Court*' does not include any person acting in an *administrative capacity*[1] nor a person acting as a *persona designata*.[2] It has been held by the High

Note 6

1. ('40) 27 AIR 1940 Cal 450 (451). (Assumed— The judge issuing or refusing to issue a notice under S. 167 of the Ben. Ten. Act at the instance of an applicant is not acting merely in a ministerial capacity. He acts as a Court.)
('40) 27 AIR 1940 Oudh 237 (238) : 15 Luck 332 (DB). (All the orders of Courts under the Succession Act, the Probate and Administration Act, etc., relating to the administration of the assets of deceased persons are in a sense administrative but they are at the same time judicial orders. So also an order passed by a Court under S. 73, C. P. Code, though an administrative order is a judicial order and revision under S. 115 lies.)
('82) 1882 All W N 143 (143) (DB). (An order refusing to discharge a surety.)
†('32) 19 A I R 1932 All 568 (569) : 54 All 1085 (SB). (Collector acting under S. 18 of the Land Acquisition Act acts as an administrative officer.)
('11) 9 Ind Cas 943 (944) (DB) (Bom). (Order of a Talukdari Settlement Officer.)
('90) 1890 Pun Re No. 107, p. 314 (315). (Proceedings under Reg. 1 of 1798 are ministerial.)
('24) 11 AIR 1924 Lah 55 (57, 58) : 4 Lah 1 (DB). (Order of District Magistrate under Part 2 of the Lunacy Act with respect to reception, care and treatment of the lunatic.)
('10) 1910 Pun Re No. 104 : 8 Ind Cas 1160 (1160). (Order under S. 92, C. P. Code, granting permission to sue.)
('22) 9 AIR 1922 Mad 337 (339) (DB). (Order punishing a village munsif for misconduct under S. 7, Madras Hereditary Village Officers' Act.)
('20) 7 AIR 1920 Sind 70 (71) : 13 Sind L R 212 (DB). (Proceedings under S. 36 of the Legal Practitioners' Act.)
('32) 19 AIR 1932 Nag 50 (51) : 28 Nag L R 4. (Do. — But Court can interfere under general powers of superintendence.)
†('37) 24 A I R 1937 Cal 705 (708) : I L R (1938) 1 Cal 400 (DB). (A Collector acting under S. 18 of the Land Acquisition Act is not functioning as a Court but is acting in a purely ministerial or administrative capacity.)
†('39) 26 AIR 1939 Rang 6 (8) : 1938 Rang L R 623. (Order of Collector refusing to make reference under S. 49, Land Acquisition Act, is administrative and hence is not subject to revision.)
2. ('43) 30 AIR 1943 Cal 250 (251) : ILR (1942) 2 Cal 478. (District Judge acting under S. 40A, Bengal Agricultural Debtors Act, does not act as *persona designata*, but as Court.)
('43) 30 AIR 1943 Cal 470 (473) : 47 Cal W N 473 (477) (DB). (District Judge or Additional District Judge, exercising his powers under S. 40A, Bengal Agricultural Debtors Act, acts as a Court and not as a *persona designata*.)
('39) 26 AIR 1939 Bom 471 (472) (DB). (The Chief Judge of Bombay Small Causes Court acting under S. 217 of the City of Bombay Municipal Act as a *persona designata*.)
('26) 13 AIR 1926 Bom 344 (345) 50 Bom 357 (DB). (A District Judge acting under S. 22 of the Bombay District Municipal Act, III of 1901.)
✠('33) 20 AIR 1933 All 764 (766, 772) : 55 All 1008 (DB). (District Judge acting under U. P. District Boards Act.)
('33) 20 AIR 1933 Bom 105 (106) (DB).
('32) 19 AIR 1932 Mad 560 (560). (Sub-Judge passing order in capacity of Election Commissioner— No revision lies.)
('33) 20 AIR 1933 Rang 41 (41) : 11 Rang 1 (DB). (District Judge acting under the Mandalay Election Rules.)
†('34) 21 AIR 1934 Sind 110 (111) (DB). (Judge acting under S. 19, Bombay Local Boards Act, acts as *persona designata* — His order is not open to revision.)
('97) 21 Bom 279 (281) (DB). (District Judge acting under S. 23 of the Bombay District Municipal Act (Amendment Act), II of 1884.)
('23) 10 AIR 1923 Bom 421 (423) (DB). (Chief Judge acting under the powers given to him by S. 33 of the Bombay City Municipal Act.)
('30) 17 AIR 1930 Bom 231 (231) : 54 Bom 224 (DB). (Chief Judge, Small Cause Court, Bombay, acting under S. 219 of the Bombay City Municipal Act, III of 1888.)
('27) 14 AIR 1927 Mad 93 (95) : 50 Mad 121 (FB). (Chief Judge of the Presidency Small Cause Court of Madras acting under R. 2 of the Rules framed under the Madras City Municipal Act.)
✠('26) 13 AIR 1926 Rang 25 (31) : 3 Rang 560 (FB). (Chief Judge, Rangoon, Small Cause Court, performing the functions assigned to him by S. 14, Rangoon Municipal Act.)
('27) 14 AIR 1927 Rang 1 (3) : 4 Rang 304 (FB). (Chief Judge of the Rangoon Small Cause Court, when exercising the powers vested in him by Section 18, Rangoon Rent Act (1920), acts as *persona designata*. Overruling AIR 1923 Rang 94 : 11 Low Bur Rul 387 (FB); also AIR 1925 Rang 367.)
('16) 3 AIR 1916 Bom 196 (196) : 40 Bom 509 (DB). (District Judge acting under the Bombay District Municipalities Act, S. 160.)
†('17) 4 AIR 1917 Bom 31 (32) : 42 Bom 119 (DB). (District Judge acting under S. 4 of Act XII of 1850.)
('29) 16 AIR 1929 Rang 352 (354). (District Judge trying an election dispute is a *persona designata*.)
('37) 24 AIR 1937 Sind 6 (6) : 30 Sind L R 351 (DB). (Judge of Civil Court acting as Commissioner under Workmen's Compensation Act is not a subordinate Court but *persona designata*.)

Court of Madras that a Subordinate Judge holding an enquiry in an election petition under the Madras District Municipalities Act, 1920, or a District Judge trying the validity of an election under the Madras Local Boards Act, 1902, is not a *persona designata* and his orders are therefore capable of being revised under this section.[3] It has been held that where it is provided that a matter is to be decided by a certain *Court*, the presiding officer of such Court will act as a *Court* and not a *persona designata* but that where it is provided that a certain "Judge" is to decide a matter, the entire provisions of the statute will have to be looked into for the purpose of determining whether the judicial officer acts as a Court or as a *persona designata*.[4]

The mere fact that a person exercises *judicial* functions is not sufficient to constitute him a 'Court.'[5] It has accordingly been held that the following persons are not 'Courts' :

(1) A District Registrar;[6]

(2) The Rent Controller of Rangoon.[7] So also a District Judge exercising powers as Rent Controller under the Bengal House Rent Control Order, 1942, is not a *Court*.[8]

(3) It has been held by the High Courts of Allahabad,[9] Bombay,[10]

('39) 26 AIR 1939 Sind 165 (167) : I L R (1939) Kar 131. (City of Karachi Municipal Act, 1933, Ss. 16, 17 — Tribunals constituted by and for purposes of new Act are special — Small Cause Judge passing orders under Ss. 16 and 17 does not act as Court but as *persona designata*.)

† ('38) 25 AIR 1938 Sind 153 (157) : I L R (1939) Kar 121 (DB). (District Judge acting under Section 22, Bombay District Municipal Act, acts as *persona designata*.)

('39) 26 AIR 1939 Bom 279 (281) : 41 Bom L R 490 (494). (Where a Judge or presiding officer of a Court, as distinguished from the Court itself is performing any function as vested in him, such a Judge may be considered as a *persona designata*, and cannot be regarded as a Civil "Court subordinate" to the High Court, within the meaning of Section 115, C. P. C. In considering whether the Judge acts as a Court or as a *persona designata*, the important point to be investigated is what is the source of his authority—The nature of the proceedings and the action taken therein may also be relevant and may be considered.)

† [*See* ('34) 21 AIR 1934 All 260 (263) : 56 All 656 (FB). (District Judge acting under the Land Acquisition Act is not a *persona designata*, but a Court.)

('07) 31 Bom 604 (609) (DB). (Chief Judge, Small Cause Court, acting under S. 33 of the City of Bombay Municipal Act.)

('35) 22 AIR 1935 Nag 5 (7, 8): 31 Nag L R 1. (See S. 58, C. P. Municipalities Act — Local Government reversing decision on election petition—Civil Court cannot enquire into facts of case.)

('39) 26 AIR 1939 Rang 143 (144) (DB). (District Judge exceeding his authority and sending case for disposal to additional District Judge—Latter purporting to pass judgment as Court—Order is open to revision in the peculiar circumstances of the case.)

[See however ('41) 28 AIR 1941 Pat 65 (68) : 20 Pat 373 (FB). (*Persona designata* may be a Court—Commissioner appointed under Workmen's Compensation Act, is a Court.)]

[But see ('33) 20 AIR 1933 Rang 2 (3): 10 Rang 517 (SB). (District Judge's decision as to validity of election under Burma Rural Self-Government Act—District Judge is subordinate to High Court.)

† ('31) 18 AIR 1931 Bom 582 (586, 587) : 55 Bom 544 (DB). (District Court exercising judicial functions under S. 198, Bombay City Municipalities Act of 1925, according to the procedure laid down in the Land Acquisition Act, is a subordinate Court.)

3. ('23) 10 AIR 1923 Mad 254 (256) : 46 Mad 123. (Sub-Court holding an enquiry into election under the Madras District Municipalities Act.)

† ('23) 10 AIR 1923 Mad 192 (194, 195) : 46 Mad 536 (DB). (A District Judge trying the validity of an election under the Madras Local Boards Act, XIV of 1902.)

('23) 10 AIR 1923 Mad 360 (360) (DB).

('24) 11 AIR 1924 Mad 561 (562) : 47 Mad 369 (FB). (Election under the Local Boards Act.)

[*See also* ('29) 16 AIR 1929 Nag 282 (283).]

[But see ('32) 19 AIR 1932 Mad 560 (560). (Under the new election rules the election commissioner is a *persona designata*.)]

4. ('43) 30 AIR 1943 Cal 247 (248) (DB).

5. ('07) 30 Mad 326 (327) (DB).

✠ ('24) 11 AIR 1924 Mad 442 (445) : 47 Mad 357 (FB).

('30) 17 AIR 1930 Nag 271 (271): 26 Nag L R 309.

6. ('07) 30 Mad 326 (327) (DB).

('28) 15 AIR 1928 Mad 475 (475) : 51 Mad 245.

[*See also* ('88) 12 Bom 36 (43). (Sub-Registrar not a "Court" within S. 195 of the Cr. P. C.)]

7. ('26) 13 AIR 1926 Rang 33 (41, 43) : 3 Rang 410 (FB).

8. ('43) 30 AIR 1943 Cal 247 (250) (DB).

[But see ('26) 13 AIR 1926 Cal 708 (709) (DB). (Assumed.)]

9. ('32) 19 AIR 1932 All 568 (569) : 54 All 1085 (SB).

10. ('23) 10 AIR 1923 Bom 290 (292) : 47 Bom 699 (DB).

Lahore,[11] Madras,[12] Patna,[13] Rangoon[14] and Nagpur[15] that a Collector dealing with an application under S. 18 of the Land Acquisition Act, 1894, is not a 'Court.' The decisions of the High Court of Calcutta are conflicting.[16] The Oudh Judicial Commissioner's Court has held that the Collector in such cases is a Court.[17] The Calcutta High Court[18] has also held that a Collector acting under S. 49, proviso 2 of the said Act is a Court and that the Calcutta Improvement Trust Tribunal in acting under S. 32 of the Land Acquisition Act is acting as a Court.[19] But a Collector acting under S. 11 of the said Act is not a 'Court'.[20]

(4) The Collector acting under the powers given by S. 69 and Schedule III of this Code.[21]

(5) A Revenue Officer when making a settlement of rent under Chapter II of the Madras Estates Land Act is not a Civil Court. Consequently, the Board of Revenue when directing the revision of his proceedings under S. 172 of that Act is also not a Civil Court. The High Court cannot, therefore, revise an order made or purporting to be made by the Board of Revenue under S. 172 of the Madras Estates Land Act.[22]

(6) A Revenue Officer acting under S. 26G of the Bengal Tenancy Act is not a Court.[23]

See also the undermentioned cases.[24]

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11. † ('40) 27 AIR 1940 Lah 299 (302): I L R (1941) Lah 100 (DB). (A I R 1916 Lah 37 : 1916 Pun Re No. 67 overruled.)
('30) 17 AIR 1930 Lah 242 (242).
('15) 2 AIR 1915 Lah 94 (94): 1915 Pun Re No. 65 (DB).

12. † ('24) 11 AIR 1924 Mad 442 (445) : 47 Mad 357 (FB). (Overruling AIR 1919 Mad 583 : 42 Mad 231.)
('17) 4 AIR 1917 Mad 824 (825) (DB). (Proceedings before Land Acquisition Officer were held to be administrative.)

13. † ('40) 27 AIR 1940 Pat 102 (106) : 19 Pat 321 (SB). (A case under Proviso 2 to S. 49 which like S. 18 gives the Collector no alternative but to refer the question to the Court—Overruling AIR 1917 Pat 176 : 2 Pat L J 204.)

14. † ('34) 21 AIR 1934 Rang 118 (118, 120) : 12 Rang 275 (DB). (Collector refusing to make a reference is not a Court.)
(1900-02) 1 Low Bur Rul 132 (133).
[But see ('72-92) 1872-92 Low Bur Rul 509.)]

15. ('30) 17 AIR 1930 Nag 271 (271) : 26 Nag L R 309.
('37) 24 AIR 1937 Nag 12 (12): ILR (1938) Nag 149.

16. ('08) 12 Cal W N 241 (245). (Collector is Court.)
('34) 21 AIR 1934 Cal 758 (759) : 61 Cal 1041 (DB). (Act of Collector in refusing to make reference under S. 18 is judicial act though he is not Court.)
('38) 25 AIR 1938 Cal 250 (252) (DB). (Land Acquisition Collector, assuming that he is a Court while dealing with applications under S. 18 of the Land Acquisition Act, is not a Court subordinate to the High Court, and the High Court has therefore no jurisdiction to interfere with his order under that Section in revision under S. 115, C. P. Code.)
('37) 24 AIR 1937 Cal 705 (709) : I L R (1938) 1 Cal 400 (DB). (Collector not Court and order not subject to revisional jurisdiction of High Court.)

17. ('13) 22 Ind Cas 652 (654) : 16 Oudh Cas 374 (377).
('32) 19 AIR 1932 Oudh 180 (181): 7 Luck 578 (DB).

18. ('12) 13 Ind Cas 470 (471) (DB) (Cal).

19. ('32) 19 AIR 1932 Cal 660 (661).

20. ('05) 32 Cal 605 (629) : 32 Ind App 93 (PC). (Proceedings of Collector in making an award are administrative and not judicial.)
('10) 38 Cal 230 (241) : 8 Ind Cas 107 (109) (DB).

21. ('33) 20 AIR 1933 Bom 369 (370) (DB).
Also see S. 70 Note 8.

22. ('32) 19 AIR 1932 Mad 612 (639, 640) : 55 Mad 883 (FB).

23. ('40) 27 AIR 1940 Cal 111 (112) : ILR (1940) 1 Cal 329 (DB). (Mere fact that his order might have the effect of a "decree" of a Civil Court does not make him a Court.)
('40) 44 Cal W N 426 (426).

24. ('43) 30 AIR 1943 Cal 470 (473) : 47 Cal W N 473 (476) (DB). (Debt Settlement Board not a "Court.")
('43) 30 AIR 1943 Nag 97 (98). (Lower Court impounding document under Stamp Act—Section 115 does not enable the High Court to call in question the action either of the Collector or the Chief Controlling Revenue Authority.)
('42) 29 AIR 1942 Mad 742 (743). (Deputy Collector acting under S. 3 (5), Madras Estates Land Act, is not subordinate to High Court.)
('39) 26 A I R 1939 Mad 901 (901). (Order of Collector under S. 20 A, Madras Estates Land Act — No revision.)
('37) 24 AIR 1937 Cal 720 (725) : I L R (1938) 1 Cal 146 (DB). (*Obiter*— A District Magistrate when normally functioning as a Court exercises

A Court will be said to be *subordinate* to the High Court only when it is subject to its *appellate jurisdiction* though, as a matter of fact in any particular case, an appeal may not lie to the High Court.[25] But a single Judge of the High Court is not a Court *subordinate* to the High Court.[26] The reason is that the 'Court' referred to in S. 115 means a Court *other* than the High Court.[27] Similarly, the High Court of Kumaun is not a Court subordinate to the High Court of Allahabad.[28] The following Courts have been held to be Courts subordinate to the High Court :

(1) His Britannic Majesty's Courts in Zanzibar,[29] the Court of the Resident at Aden[30] (Aden has ceased to be part of British India under the Government of India Act of 1935. See section 1 Note 1), a District or Deputy Collector acting under the Bombay Mamlatdars' Courts Act[31] are all Courts subordinate to the High Court of Bombay.

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jurisdiction in criminal matters and not in civil matters — When therefore some new function is imposed upon him by some special Act, although he acts as a Court and not as an individual, that Court is not subject to the civil jurisdiction of the High Court within the contemplation of Sec. 115.)

('35) 22 AIR 1935 Mad 309 (310) (DB). (An order by the Deputy Collector acting under the Madras Estates Land Act under Order 21 Rule 101, C. P. C., is one revisable by the High Court, and not by the District Collector under S. 205 of the Estates Land Act, and therefore an application to the District Collector for revision is incompetent — But when the District Collector declines to interfere with the Deputy Collector's order, the High Court cannot interfere with that order under Sec. 115, though the District Collector is wrong in dismissing it on the merits.)

('37) 24 AIR 1937 Mad 293 (294). (It is open to the High Court to interfere in revision with an order of the Sub-Collector refusing to set aside a rent sale under S. 131 of the Madras Estates Land Act or with an order of the Collector under S. 205 of the Act on revision against it.)

25. ('42) 29 AIR 1942 Pat 1 (10, 20):21 Pat 1 (FB). (Orissa Tenancy Act, Section 204 (as amended by Act 8 of 1938)—Collector acting under S. 204 (2), (3), (4) and (5) is subordinate to High Court within S.115, C. P. Code, and is amenable to revisional jurisdiction of High Court—Collector's power of revision under S. 204 (5) is not restricted to cases within S. 204 (3) (Per Full Bench; Manohar Lall J., dissenting) : AIR 1940 Pat 249 and 5 Cut L T 64, overruled.)

('42) 29 AIR 1942 Pat 33 (34) : 21 Pat 173 (DB). (The Commissioner appointed under the Workmen's Compensation Act being subject to the appellate jurisdiction of the High Court is a Court subordinate to High Court.)

('40) 27 AIR 1940 Cal 111 (112): ILR (1940) 1 Cal 329 (DB). (Revenue officer acting under S. 26G of the Bengal Tenancy Act—Assuming him to be a Court he is not a subordinate Court as he is not subject to the appellate jurisdiction of the High Court.)

('40) 44 Cal W N 426 (426) (Do.)

('23) 10 AIR 1923 Bom 290 (291) : 47 Bom 699 (701) (DB).

('32) 19 AIR 1932 All 651 (652) : 54 All 891. (The Court of the District Magistrate while deciding an appeal under S. 318 of the U. P. Municipalities Act, is not subordinate to the High Court.)

†('34) 21 AIR 1934 All 260 (263):56 All 656 (FB). (Court acting under the Land Acquisition Act is subordinate to the High Court.)

('10) 38 Cal 230 (242) : 8 Ind Cas 107 (109) (DB).

†('26) 13 AIR 1926 Rang 33 (41) : 3 Rang 410 (FB).

('14) 1 AIR 1914 Cal 890 (892) (DB).

('38) 25 AIR 1938 Cal 671 (673): ILR (1938) 2 Cal 162. (Section 115 applies to suits and proceedings in the Presidency Small Cause Court.)

('36) 23 AIR 1936 Oudh 132 (133) : 12 Luck 19 (DB).

[*See* ('32) 19 AIR 1932 All 568 (570):54 All 1085 (SB). (Collector acting under S. 18 of the Land Acquisition Act is not subordinate to the High Court.)

('32) 19 AIR 1932 All 598 (599):54 All 282. (Do.)

('39) 26 AIR 1939 Oudh 177 (177) : 181 Ind Cas 58 (59). (A Court of Revenue is not subordinate to the High Court—Order of Assistant Collector in execution proceedings under the Oudh Rent Act is not revisable by High Court.)]

26. ('93) 17 Bom 514 (519). (An order by a Judge in Chambers for payment of costs to a party's attorney.)

('16) 3 AIR 1916 Cal 973 (973) : 43 Cal 90 (94) (DB).

('15) 2 AIR 1915 Cal 695 (695) (DB).

('27) 14 AIR 1927 Oudh 59 (59) : 2 Luck 1 (DB).

†('35) 22 AIR 1935 Oudh 72 (75) (DB).

27. ('93) 17 Bom 514 (519) (SB).

[*See* ('40) 27 AIR 1940 F C 4 (5) : ILR (1939) Kar (FC) 191 : 1940 FCR 12 (FC). (High Court's decision in previous case cannot be revised.)

28. ('23) 10 AIR 1923 All 291 (291, 292) : 45 All 383.

29. ('11) 36 Bom 105 (108) : 12 Ind Cas 687 (687) (DB).

†('96) 20 Bom 480 (484) (FB). (Jardine, J., dissenting.)

30. ('10) 34 Bom 267 (275) : 5 Ind Cas 867 (868) (DB).

('33) 20 AIR 1933 Bom 194 (195) (DB). (Court of the Judicial Assistant at Aden.)

('29) 16 AIR 1929 Bom 190 (191) (DB).

31. ('12) 37 Bom 114 (116): 17 Ind Cas 676 (677) (DB).

(2) The Madras Village Courts,[32] and the Agent to the Governor of Madras at Vizagapatam acting under the Agency Rules[33] are Courts subordinate to the High Court of Madras.

(3) Civil Courts purporting to act under the Religious Endowments Act, 1863.[34]

(4) Courts acting on a reference under S. 55 of the Bengal Land Registration Act, 1876.[35]

(5) Presidency Small Cause Courts.[36]

(6) Deputy Commissioner acting under the Punjab Court of Wards Act, 1903.[37]

(7) The Sub-divisional Officer acting under S. 2 of the Santhal Parganas Act, 1855.[36]

See also the undermentioned cases.[39]

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† ('15) 2 AIR 1915 Bom 17 (18):39 Bom 552 (DB). [*See* ('38) 25 AIR 1938 Bom 159 (160) : I L R (1938) Bom 259.]

32. ('27) 14 AIR 1927 Mad 786 (787).
('17) 4 AIR 1917 Mad 726 (726) (DB). (But under S. 107, Government of India Act, 1915.)

33. ('11) 12 Ind Cas 73 (74) (DB) (Mad). [See however ('93) 16 Mad 229 (229).]

34. ⁂('17) 4 AIR 1917 P C 71 (74) : 40 Mad 793 (801) : 44 Ind App 261 (PC). (Purporting to act under the provisions of S. 10 of the Religious Endowments Act.)
('03) 26 Mad 85 (88).
† ('15) 2 AIR 1915 Mad 827 (829, 830) : 38 Mad 594 (DB). (Recognizing the validity of an election in a temple committee.)

35. ('08) 35 Cal 120 (131) (DB).
('08) 35 Cal 571 (573).

36. ('08) 31 Mad 490 (491).
('11) 21 Mad L Jour 525 (526) (DB).
('93-1900) 1893-1900 Low Bur Rul 61.
('16) 3 AIR 1916 Mad 387 (389) (DB).

37. ('10) 1910 Pun Re No. 6 : 4 Ind Cas 949 (951) (DB).

38. ('14) 23 Ind Cas 876 (877) (DB) (Cal.) (Assumed.)

39. ('43) 30 AIR 1943 Oudh 169 (171). (Oudh Chief Court has got power to entertain a revision under S. 115, C. P. Code, against the order of the District Judge under S. 61 (2) of the Stamp Act.)
('42) 29 AIR 1942 Lah 228 (231):ILR (1943) Lah 1 (FB). (Section 115 covers orders passed by subordinate Court acting judicially under powers conferred on it by special Act —Order of Appellate Court accepting Deputy Commissioner's revision petition under S. 21A, Punjab Alienation of Land Act, is open to revision under S. 115, C. P. Code. AIR 1937 Lah 637 overruled.)
('42) 29 AIR 1942 Pat 1 (20) : 21 Pat 1 (FB). (Orissa Tenancy Act, (as amended in 1938) S. 204 — Collector acting under S. 204 (2), (3), (4) and (5) is subordinate to High Court.)
('40) 27 AIR 1940 Pat 249 (250) (DB). (The High Court has no power to revise the order of the Collector passed in appeal in a case in which the subject-matter is valued at less than Rs. 100 and to which the provisions of Clause (3) of S. 204 of the Orissa Tenancy Act apply, as in these circumstances the Collector cannot be held to be subordinate to the High Court.)
('38) 25 AIR 1938 Bom 301 (302). (Sessions Judge acting under S. 111 of the Bombay Municipal Boroughs Act in revision from a decision of the Magistrate under S. 110 of that Act, is a Court subordinate to the High Court within the meaning of S. 115 C. P. C., and a revision application would therefore lie to the High Court under S. 115 C. P. C., against an order passed by the Sessions Judge under S. 111 of the Municipal Boroughs Act but such an application being a second application in revision, the High Court would not interfere unless it appears that there has been some grave abuse of its power by the Sessions Court, or the decision is manifestly erroneous or unjust.)
('39) 26 AIR 1939 Bom 477 (478) : ILR (1939) Bom 571 (DB). (The High Court has jurisdiction under S. 115, C. P. Code in a proper case to entertain an application in revision against an order in revision passed by the Sessions Judge under S. 111 of the Bombay Municipal Boroughs Act against an order of a Magistrate under S. 110 of that Act, but such applications should be very sparingly entertained.)
('39) 26 AIR 1939 Bom 478 (480) : ILR (1939) Bom 701. (AIR 1939 Bom 477 : ILR (1939) Bom 571 followed.)
('36) 23 AIR 1936 Mad 187 (187) : 59 Mad 356 (FB). (Agency District Munsif's Court of Rayagada is a Civil Court — High Court can exercise powers of superintendence under S. 107, Government of India Act of 1915.)
† ('38) 25 AIR 1938 Mad 634 (637) : I L R (1938) Mad 988. (Section 36 of the Legal Practitioners' Act confers a special jurisdiction on a subordinate Court; and an order passed by a District Judge under S. 36 declaring a person a tout is an order which the High Court has power to revise under S. 115, C. P. Code, being a case decided by Court subordinate to the High Court—Section 439, Cr. P. Code, does not apply to such a case — Nor can it be revised under the Government of India Act, 1935—The jurisdiction to revise is, however, of an exceptional character and cannot be invoked except in furtherance of justice—If the Judge in passing the order had no clear conception of the law on the subject or if he has failed to apply the law to the facts of the case and bases his finding on mere suspicion or conjecture, the High Court would interfere with the order.)

The mere fact that a Court has *exclusive* jurisdiction over a matter under a certain Act does not affect the revisional jurisdiction of the High Court unless such revisional jurisdiction has otherwise been expressly or impliedly ousted.[40]

An appellate officer appointed by the Provincial Government under S. 40 of the Bengal Agricultural Debtors Act, 1936, is not a Court *subordinate* to the High Court.[41]

Even where the decision sought to be revised is that of a 'Court' and such Court is 'subordinate' to the High Court, a revision will not necessarily lie under S. 115 of the Code. Under S. 4 of the Code "nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force." Thus, under the Rent Acts of the various Provinces, the right of revision to the High Court has been either expressly or impliedly excluded. In all such cases, there will be no right of revision under this section.[42] Where, however, there is no such exclusion,

('38) 25 AIR 1938 Lah 855 (855). (A Commissioner appointed under the Workmen's Compensation Act and adjudicating a claim made under the Act is a "Court subordinate to the High Court" within the meaning of S. 115.)

✠('38) 25 AIR 1938 All 456 (458): ILR (1938) All 702 (FB). (The Court exercising jurisdiction under S. 5 of the U. P. Agriculturists Relief Act is a Civil Court, and as such subordinate to the High Court.)

('37) 24 AIR 1937 Oudh 143 (143). (Oudh Rent Act—Assistant Collector of the second class is not a Court subordinate to the Chief Court within the meaning of S. 115.)

('39) 26 AIR 1939 Oudh 177 (178). (Collector executing decree for under-proprietary rent is not subordinate to High Court and latter Court cannot act in revision.)

40. ('43) 30 AIR 1943 Cal 470 (473): 47 Cal W N 473 (477) (DB). (Orders of District Judge under S. 40A of Bengal Agricultural Debtors Act are revisable by High Court.)

('42) 29 AIR 1942 Oudh 21 (22). (High Court cannot revise orders passed under U. P. Encumbered Estates Act (XXV of 1934.)

('42) 29 AIR 1942 Oudh 291 (297): 18 Luck 1 (FB). (A revision under S. 46, Encumbered Estates Act or S. 115, C. P. Code, does not lie against a decision of the lower Appellate Court.)

('42) 29 AIR 1942 Oudh 458 (459) (FB). (Case under U. P. Agriculturists' Relief Act.)

('41) 28 AIR 1941 Oudh 497 (497): 16 Luck 775. (By a specific provision in the U. P. Tenancy Act S. 115, C. P. Code, has been excluded from applying to cases under that Act.)

('41) 28 AIR 1941 Oudh 566 (567) (DB). (Section 115, C. P. Code, does not apply to orders passed under U. P. Encumbered Estates Act by virtue of S. 47 of that Act.)

† ('35) 22 AIR 1935 All 310 (315, 316): 57 All 810 (DB). (Local Government conferring power on District Court under proviso to S. 3, Companies Act—That Court has exclusive original jurisdiction—But this does not oust revisional jurisdiction of High Court—District Court acting under Companies Act is subordinate to High Court.)

41. ('38) 25 AIR 1938 Cal 688 (688) (DB).
('38) 25 AIR 1938 Cal 448 (448) (DB).

42. ('90) 12 All 198 (199) (DB). (Order of Collector under S. 18, N. W. F. Provinces Rent Act.)
('32) 19 AIR 1932 All 589 (590) (DB). (Agra Tenancy Act.)
('16) 3 AIR 1916 All 266 (268, 269) (DB).
('18) 5 AIR 1918 All 14 (15): 41 All 28. (Matters under the Agra Tenancy Act.)
('19) 6 AIR 1919 All 146 (147): 41 All 226.
('19) 6 AIR 1919 All 96 (97): 42 All 83 (DB).
('23) 10 AIR 1923 All 580 (581): 45 All 567.
('25) 12 AIR 1925 All 800 (800). (Under the Agra Tenancy Act; now see U. P. Tenancy Act, 1939, Sch. 2, List 1.)
✠('26) 13 AIR 1926 All 398 (399) (FB). (Practically overruling AIR 1926 All 113: 48 All 104, under the Agra Tenancy Act.)
('29) 16 AIR 1929 All 735 (736): 51 All 1020 (DB). (Agra Tenancy Act.)
('32) 19 AIR 1932 All 273 (277): 54 All 573 (FB). (Do.)
('29) 16 AIR 1929 Oudh 389 (390): 4 Luck 539 (FB). (A I R 1928 Oudh 214: 3 Luck 150, Approved; AIR 1923 Oudh 18 and 14 Oudh Cas 38 must be taken to be overruled.)
† ('14) 1 AIR 1914 Cal 890 (892) (DB). (Revenue Officer under the Chota Nagpur Tenancy Act.)
('17) 4 AIR 1917 Pat 61 (62): 3 Pat L Jour 143 (DB). (Chota Nagpur Tenancy Act.)
('86) 9 Mad 332 (333) (DB). (Proceedings of the Deputy Collector.)
('93) 16 Mad 451 (452) (DB). (Collector acting under Madras Rent Recovery Act.)
('94) 17 Mad 298 (299) (DB). (Do.)
('24) 11 AIR 1924 Mad 119 (121): 47 Mad 250 (DB). (Order of the Board of Revenue under Estates Land Act.)
✠('28) 15 AIR 1928 Mad 1032 (1037, 1038) (FB). (High Court cannot revise orders of the Board of Revenue—Overruling AIR 1926 Mad 480: 49 Mad 499 and AIR 1919 Mad 672: 42 Mad 310.)
('32) 19 AIR 1932 Mad 529 (531): 55 Mad 942 (DB).
('35) 22 AIR 1935 Pat 417 (418) (DB). (Chota Nagpur Tenancy Act (VI of 1908), S. 218—Rent suit for Rs. 100 or less—No revision lies—Deputy Commissioner's order is final.)
('35) 22 AIR 1935 All 514 (515) (Agra Tenancy Act.)

section 115 will, of course, apply.[43]

7. **"And in which no appeal lies thereto."** — The powers of the High Court under this section can be invoked in respect of any case decided by a subordinate Court only in cases in which no appeal lies *to the High Court*.[1] The word 'appeal' is not restricted to a first appeal. It includes a second appeal.[2] Where, therefore, a first appeal or second appeal lies to the High Court from the case sought to be revised the High Court has no jurisdiction to interfere in revision.[3] Thus orders and decisions amounting

Also see Section 84 (3) of Reg. VII of 1901, N. W. F. P. Law and Justice, and the following cases :
('26) 13 AIR 1926 Bom 308 (309) (DB). (Collector acting under Bombay Act, III of 1874.)
('17) 4 AIR 1917 Mad 576 (577) (DB). (Board of Revenue, Madras.)
('17) 4 AIR 1917 All 59 (60): 39 All 91. (Collector ordering prosecution acting as a Revenue Court.)
('36) 63 Cal 136 (137): 163 Ind Cas 735 (736) (DB). (Terms of S. 13 of the Bengal Municipal Act are sufficiently wide to exclude interference by the High Court under S. 115.)
[But see ('96) 23 Cal 723 (728) (FB). (Special Judge acting under S. 108, Cl. 2, Bengal Tenancy Act, in regard to settlement of rent by Revenue Officer—Overruling 16 Cal 596.)]

43. ('19) 6 AIR 1919 Mad 510 (511, 512): 42 Mad 76 (DB).
('13) 40 Cal 518 (522) : 20 Ind Cas 420 (421) (DB). (Under the Chota Nagpur Tenancy Act.)
('35) 22 AIR 1935 Mad 367 (367). (Collector acting in exercise of revisionary powers under Madras Estates Land Act—Order by—Revision lies.)
('38) 25 AIR 1938 All 635 (636) (DB). (Decree or order under S. 9, Specific Relief Act — Revision lies.)
('34) 21 AIR 1934 Cal 666 (667). (The provision in S. 93, Bengal Village Self-Government Act, does not affect the revisional powers of the High Court.)
('36) 23 AIR 1936 Lah 695 (696): 17 Lah 768. (The provisions of S. 115, C.P. Code, are very wide and an order of the District Judge under S. 3, Charitable and Religious Trusts Act, is revisable.)
('38) 25 AIR 1938 Lah 753 (753): ILR (1939) Lah 196. (There is nothing in S. 192, Succession Act which takes away the right of revision by the High Court.)
[*See also* ('06) 11 Cal W N 112 (114) (DB). (Bengal Rent Recovery Act.)]

Note 7

1. ('43) 30 AIR 1943 Oudh 241 (242) (DB).
('41) 28 AIR 1941 All 55 (56) (DB). (Decision appealable as decree but no decree prepared and hence appeal not competent—No revision.)
('41) 28 AIR 1941 Oudh 598 (599) : 17 Luck 17 (DB).
('40) 27 AIR 1940 Pat 7 (9) : 18 Pat 777 (DB).
('29) 16 AIR 1929 All 793 (793) : 51 All 1023 (DB).
('33) 20 AIR 1933 Lah 327 (327).
('29) 16 AIR 1929 Oudh 91 (91): 4 Luck 347 (DB).
('36) 23 AIR 1936 Cal 267 (268) (DB). (Order directing execution to be dismissed for non-prosecution is not appealable—It is open to revision.)
('38) 25 AIR 1938 Pat 447 (449). (Order made by a lower Court under S. 151, C. P. C., is not appealable and hence the remedy of the aggrieved party is by way of revision.)
('36) 23 AIR 1936 All 479 (480) (DB). (Decision that certain persons are representatives of judgment-debtor is one under S. 47 — No appeal filed from it—Revision does not lie.)
('35) 22 AIR 1935 All 873 (875). (Order under S. 144, C. P. Code—No revision lies.)
† ('37) 24 AIR 1937 All 65 (75) : I L R (1937) All 317 (FB). (The mere fact that a decree is unappealable is no ground for holding that it cannot be challenged by an application in revision.)
✠('38) 25 AIR 1938 All 456 (458) : I L R (1938) All 702 (FB). (The mere fact that a right of appeal is denied to a litigant is no ground for holding that he is debarred from invoking the revisional jurisdiction of the High Court.)
[*See* ('95) 20 Bom 480 (482) (FB).]
[*See also* ('37) 24 AIR 1937 All 691 (693) (DB). (Order refusing to set aside *ex parte* decree— No revision is maintainable as party aggrieved can appeal from *ex parte* decree.)]

2. ('43) 30 AIR 1943 Cal 177 (179) (DB).
✠('31) 18 AIR 1931 All 294 (296) : 53 All 612 (FB).
('30) 17 AIR 1930 All 604 (605) (DB).
† ('28) 15 AIR 1928 Mad 794 (795).
('13) 20 Ind Cas 51 (52) (DB) (Cal).
('24) 11 AIR 1924 Lah 487 (487).
('97) 20 Mad 155 (156) (DB).
('90) 3 C P L R 177 (178).
('29) 16 AIR 1929 Cal 226 (227) (DB).
('12) 17 Ind Cas 391 (391) (Mad). (Suit for maintenance where vakil consented to an order, at a special rate with no power.)
('90) 12 All 581 (587).
('36) 23 AIR 1936 Lah 963 (965) (DB). (Second appeal held did not lie—Revision entertained.)
[But see † ('33) 20 AIR 1933 Rang 64 (67) : 11 Rang 134.]

3. ('41) 28 AIR 1941 Cal 264 (265) (DB). (Order appealable as decree under S. 47—No revision.)
('41) 28 AIR 1941 Cal 518 (520) (DB). (Decision as to court-fee.)
('81) 1881 Pun Re No. 13, page 22 (23) (DB).
('84) 1884 Pun Re No. 71, page 194 (194) (DB).
('30) 17 AIR 1930 All 604 (605) (DB).
('93) 6 C P L R 17 (18).
('24) 11 AIR 1924 Oudh 16 (16).
('17) 4 AIR 1917 Mad 659 (660) (DB).
('26) 96 Ind Cas 173 (173) (Lah).
('81) 1881 All W N 24 (25) (DB).
('85) 7 All 276 (281) (DB). (NOTE. — View of Oldfield, J., on another point was reversed and that of Mahmood, J., was affirmed in 7 All 875 (FB).)

to *decrees* and which are open to a second appeal to the High Court, cannot be revised under this section.[4] If no first or second appeal lies *to the High Court* from the decision it *can* interfere in revision[5] and the mere fact that the decision is appealable to a Court *other* than the High Court or that it has been appealed against, is no bar to the exercise of the power under S. 115,[6] though it will be a matter for the High Court to consider

('85) 7 All 914 (916) (DB).
('92) 1892 Pun Re No. 125, Page 420 (422) (DB).
('14) 1 AIR 1914 Mad 143 (143) (DB). (Order of District Court — Appeal lay to High Court — No revision lies.)
('12) 15 Ind Cas 34 (34) (All). (Appealable order of District Judge.)
('06) 9 Oudh Cas 354 (356) (DB). (Order of Subordinate Judge appealable to High Court.)
('87) 1887 Pun Re No. 36, page 76 (78) (DB). (Order of District Judge appealable to High Court.)
('91) 14 Mad 462 (464) (DB). (Order appealable to High Court.)
('27) 14 AIR 1927 Cal 844 (844) : 54 Cal 716 (DB). (Order of Sub-Judge appealable to High Court under O. 43 R. 1.)
('15) 2 AIR 1915 All 171 (171).
('25) 12 AIR 1925 Oudh 70 (71). (Appellate order itself appealable to High Court.)
('90) 3 C P L R 166 (167). (Do.)
('85) 7 All 681 (687) (DB). (Order of Sub-Judge under S. 372 of the old Code appealable to High Court.)
('35) 22 AIR 1935 Pat 121 (121) (DB). (Order dismissing appeal as abated — No revision as second appeal lies.)

4. ('43) 30 AIR 1943 Cal 177 (179) (DB). (Order rejecting an application under S. 26-G (6), Bengal Tenancy Act, which has the force of a "decree.")
('40) 27 AIR 1940 Cal 257 (259, 260): ILR (1940) 1 Cal 393 (DB). (Order under S. 47, in execution proceedings vacating a stay order.)
('39) 26 AIR 1939 Rang 376 (377). (Order under O. 21 R. 16 — Revision is incompetent.)
† ('86) 8 All 109 (111) (FB). (Order dismissing a suit for failure to furnish security for costs is a decree and so appealable.)
('33) 20 AIR 1933 Bom 185 (186) (DB). (Decision under S. 47, C. P. Code—Remedy of appeal open.)
('12) 19 Ind Cas 736 (736) (All). (Suit for declaration dismissed on the ground that it is not maintainable.)
† ('17) 4 AIR 1917 Mad 285 (286) (DB). (Order declaring a suit to have abated being a decree is appealable.)
('25) 12 AIR 1925 Mad 886 (887). (Final decree — Application for mesne profits in a partition suit.)
('31) 18 AIR 1931 Mad 471 (474) : 54 Mad 337 (DB).
('11) 34 All 123 (126) : 12 Ind Cas 603 (604) (DB). (When case is decided under O. 17 R. 3.)
('12) 14 Ind Cas 119 (120) (All). (Do.)
('12) 17 Ind Cas 836 (837) (DB) (All). (Do.)
('23) 10 AIR 1923 Pat 223 (223) (DB). (Do.)
('20) 7 AIR 1920 Oudh 41 (42) (DB). (The intervenor in a rent suit under S. 138, Oudh Rent Act, cannot question the order of the Rent Court.)
('85) 7 All 42 (43, 44) (DB). (Order rejecting memorandum of appeal as time-barred is a decree.)
('81) 1881 All W N 51 (51) (DB).
('86) 8 All 191 (194) (DB).
('99) 1899 Pun Re No. 5, page 23 (24).
† ('14) 1 AIR 1914 Lah 153 (154) : 1914 Pun Re No. 80 (DB).
('25) 12 AIR 1925 Lah 191 (192).
('25) 12 AIR 1925 Rang 199 (199).
('82) 1882 All W N 53 (53) (DB).
('82) 1882 All W N 55 (55) (DB).
('83) 1883 Pun Re No. 114, page 353 (354) (DB).
('09) 3 Low Bur Rul 131 (132). (Order under S. 47, C. P. Code.)
('02) 5 Oudh Cas 377 (378, 379). (Do.)
('92) 14 All 520 (521) (DB). (Order under S. 87, T. P. Act, extending time for payment of mortgage money.)
† ('29) 16 AIR 1929 Pat 141 (144) : 8 Pat 717 (DB).
('17) 4 AIR 1917 Upp Bur 16 (17) : 11 Upp Bur Rul 103. (Order under S. 55 (4), C. P. Code, rejecting an application for forfeiture of security bond. See however 15 All 183.)
('25) 12 AIR 1925 Pat 16 (17) : 3 Pat 344 (DB).
('93) 16 Mad 20 (22) (DB). (Decree under S. 47.)

5. ('42) 29 AIR 1942 Oudh 480 (481). (Order returning plaint for presentation to proper Court.)
('41) 28 AIR 1941 Cal 530 (532) : I L R (1941) 2 Cal 402 (DB).
('39) 26 AIR 1939 Bom 389 (390). (Order of amendment of decree under Ss. 151 and 152.)
('12) 13 Ind Cas 147 (148) (DB). (All).
† ('83) 5 All 42 (43) (DB).
('82) 8 Cal 837 (841) (DB).
('01) 1901 Pun Re No. 48, page 157 (158).
('29) 16 AIR 1929 Mad 84 (84).
('17) 4 AIR 1917 All 397 (397) (DB).
('02) 1902 Pun Re No. 72, page 261 (264). (Revision will lie even though the appellate order is declared to be "final" by S. 104 (2).)
('20) 7 AIR 1920 Lah 290 (290, 291).
† ('09) 3 Ind Cas 724 (724) (DB) (Mad).
('25) 12 AIR 1925 Cal 1237 (1237) (DB).
('97) 1 Cal W N 626 (631).
† ('15) 2 AIR 1915 Bom 269 (271) : 40 Bom 86 (DB).
('39) 26 AIR 1939 Lah 376 (378) : 41 Pun L R 381 (383). (Conditional decree in pre-emption suit — Subsequent order dismissing suit for default — Revision lies as it is not appealable.)
[*See* ('16) 3 AIR 1916 Mad 809 (810) (DB).
('16) 3 AIR 1916 Mad 1088 (1089). (Decision of Subordinate Judge on the Small Cause Side.)
('09) 1909 Pun Re No. 77, page 299 (300) : 3 Ind Cas 607 (608) (DB).]

6. ('43) 30 AIR 1943 Oudh 241 (242) (DB).
('34) 21 AIR 1934 All 250 (251). (In this case High Court interfered with an order of a Munsif granting review even after an appeal against the order was disposed of.)
('38) 25 A I R 1938 All 6 (6): I L R (1938) All 22 (DB).

whether it will exercise its *discretion* in favour of interferences where another remedy open to a party is not pursued by him. See also Note 8.

8. Other remedy open. — It has been seen already in Note 3 that in cases in which S. 115 applies the High Court has a *discretion* to interfere or not according to the circumstances of the case. The general rule, however, is, that the special and extraordinary powers under this section will not be exercised in favour of interference where the applicant has *another remedy* open to him which he has not pursued.[1] Thus, where the applicant

† ('36) 23 AIR 1936 Cal 786 (787).
† ('35) 22 A I R 1935 Pat 86 (88). (Order rejecting plaint by Sub-Judge — High Court can interfere though appeal lies to District Judge.)

Note 8

1. ('43) 30 A I R 1943 Mad 377 (377). (Order refusing a review of judgment — No revision as the applicant could have appealed against the judgment.)
('42) 29 AIR 1942 Pat 251 (258): 21 Pat 197 (DB).
('40) 187 Ind Cas 838 (839) (DB) (Pat). (Matter still under investigation and not finally decided by lower Court—Revision undesirable.)
✠('31) 18 AIR 1931 All 333 (335, 336): 53 All 466 (DB). (Order striking off the name of a party.)
('32) 19 AIR 1932 Bom 511 (513).
('32) 19 A I R 1932 Pat 319 (321). (Interlocutory order demanding additional court-fee will not be interfered in revision, as there is remedy by way of appeal against decree.)
('33) 20 AIR 1933 Nag 221 (221): 30 Nag L R 133. (Determination of jurisdiction — Remedy held to be under O. 46 R. 7.)
('33) 20 AIR 1933 Pat 158 (158, 159).
('33) 20 A I R 1933 Pat 625 (625). (Dismissal of appeal for non-appearance — Since remedy is by way of application for restoration revision does not lie.)
('33) 20 AIR 1933 Rang 259 (260).
('33) 20 A I R 1933 Sind 329 (330) : 27 Sind L R 190 (DB).
† ('88) 10 All 119 (122, 123).
('22) 9 AIR 1922 Pat 315 (316) : 1 Pat 68 (DB).
† ('29) 16 AIR 1929 Nag 66 (67).
('28) 113 Ind Cas 409 (410) (Mad).
('81) 1881 Pun Re No. 13, p. 22 (23) (DB). (Appeal dismissed for default—No steps to have it restored —No interference.)
('29) 118 Ind Cas 193 (193) (DB) (Sind). (Order returning plaint — It may be presented in proper Court.)
('28) 108 Ind Cas 804 (805) (Pat).
('23) 10 AIR 1923 Bom 395 (395) (DB). (Review.)
('31) 134 Ind Cas 160 (160) (Pat).
('08) 4 Mad L Tim 325 (326). (By an application under S. 38 of the Presidency Small Cause Courts Act.)
('89) 11 All 383 (384) (DB).
('93) 15 All 405 (407).
('16) 3 AIR 1916 Mad 1014 (1015): 38 Mad 15 (DB).
('22) 9 AIR 1922 Mad 3 (4).
('36) 23 A I R 1936 Lah 761 (762). (Notice for attachment of salary of Government servant—Objection raised by Secretary of State — Court holding salary to be attachable — No appeal filed by the Secretary of State—Revision is not competent.)
('36) 23 A I R 1936 Lah 521 (523) (DB). (Custody Court deciding question of priority under O. 21, R. 52—Aggrieved party has remedy by suit.)
† ('35) 22 AIR 1935 Lah 934 (934).
† ('35) 22 A I R 1935 Pat 385 (388, 390) : 14 Pat 488 (DB).
('36) 23 A I R 1936 Cal 812 (812). (Order rejecting application for restitution under S. 144 on ground of limitation amounts to decree and is appealable —High Court cannot interfere under S. 115.)
('35) 22 A I R 1935 Cal 157 (157) (DB). (Dismissal of suit under O. 7 R. 11 (b) and (c) — Appeal and second appeal competent—Revision from Appellate Court's order does not lie.)
('38) 25 AIR 1938 Mad 217 (218). (Where a decree is passed after declaring certain persons as *ex parte* the proper procedure for those persons is to have preferred an appeal against the decree and not to come by way of revision under S. 115 against the order declaring them *ex parte*.)
('36) 23 AIR 1936 Pat 190 (191). (Order directing court-fees to be paid under S. 7 (iv) (c), Court-fees Act — Remedy by way of appeal open to plaintiff — No likelihood of irreparable loss if order is not set aside — High Court will not interfere.)
† ('34) 21 AIR 1934 Rang 243 (243). (Petitioner must satisfy the Court that he has no other remedy open.)
('36) 23 AIR 1936 Rang 12 (14). (He must satisfy the Court that he has no other remedy open to him to set right what he alleges to have been done illegally, irregularly or without jurisdiction by a Subordinate Court.)
('39) 41 Pun L R 102 (104). (No revision lies against an order dismissing a suit under O. 9 R. 8, C. P. Code, as another remedy is open to the plaintiff by way of an application for restoration of the suit with an appeal against the order, if that application is dismissed.)
[*See* ('42) 29 AIR 1942 Pesh 29 (29). (Application for leave to sue as pauper dismissed — The right to sue on paying full court-fee is not another remedy open and so revision is not barred.)
('35) 22 AIR 1935 Mad 196 (198). (No other remedy open except revision — Revision entertained.)
('31) 18 AIR 1931 Bom 284 (285) : 55 Bom 411. (In cases under the Dekkhan Agriculturists' Relief Act where the revisional powers of the District Judge suffice.)
('11) 1 A I R 1914 Bom 245 (245) : 39 Bom 165 (DB). (Do.)]
[*See also* ('41) 28 AIR 1941 Nag 268 (270): ILR (1942) Nag 577. (C. P. Relief of Indebtedness Act provides a complete code of appeal for any person aggrieved by order of Debt Relief Court — Party cannot omit that procedure and agitate the question by revision to High Court.)

could have *appealed* against the decision complained against and has not done so, a revision will not ordinarily be entertained.[2] Similarly, where an interlocutory order can be questioned in an appeal against the final decree in the suit under S. 105 of the Code, the High Court will not ordinarily interfere in revision.[3] Similarly, where the aggrieved party could bring a *separate suit* to challenge the order sought to be revised, the High Court will not, as a rule, interfere in revision.[4] Thus, an order under S. 73 of the

('37) 24 AIR 1937 Mad 948 (950). (Application under S. 32, Land Acquisition Act, for investment of money in purchase of lands—Dismissal—Applications for review and for opportunity to adduce fresh evidence — Rejection — Revision against latter orders not competent as the proper procedure was to have the order dismissing the petition corrected.)]

[See however ('41) 28 AIR 1941 Mad 262 (265) (DB). (Principle that revision should not be allowed when other remedy is open should be applied before admission of revision application.)]

2. ('42) 29 AIR 1942 Mad 519 (521) (DB). (Decree amended—Appeal must be against amended decree — No revision lies.)

('41) 28 AIR 1941 Mad 817 (819) : I L R (1942) Mad 60 (DB). (Application for final decree in suit for sale on mortgage dismissed —Dismissal being appealable no revision lies.)

('41) 28 AIR 1941 Pat 385 (387): 20 Pat 417 (DB).

('40) 27 AIR 1940 Mad 538 (539).

('39) 26 AIR 1939 All 648 (649). (Party not going in appeal under S. 45, U. P. Encumbered Estates Act, against order passed under the Act—Revision petition under S. 115, C. P. Code, is incompetent.)

('39) 26 AIR 1939 Rang 376 (377). (Order under O. 21 R. 16 is decree and is appealable—Revision application is incompetent.)

('18) 5 AIR 1918 Nag 51 (51).

('34) 21 AIR 1934 Cal 479 (479) (DB). (A decision under S. 47, C. P. Code, which is appealable as a decree.)

('33) 20 AIR 1933 Mad 217 (218). (Order granting review.)

† ('34) 21 AIR 1934 Pat 281 (282). (Order under S. 47 which is appealable as a decree.)

† ('33) 20 AIR 1933 Rang 64 (67) : 11 Rang 134.

('34) 21 AIR 1934 Rang 188 (189).

† ('26) 91 Ind Cas 334 (334) (Oudh). (Order under O. 47 R. 1.)

('83) 12 Cal L Rep 449 (450) (DB). (An order setting aside an *ex parte* decree is appealable under S. 588, C. P. Code of 1882.)

† ('28) 15 AIR 1928 Mad 124 (124).

('29) 16 AIR 1929 Mad 489 (489).

('16) 3 AIR 1916 Mad 1014 (1015): 38 Mad 15 (DB).

('13) 6 Sind L R 166 (167) : 19 Ind Cas 450 (450) (DB).

('39) 26 AIR 1939 Pat 570 (571): 18 Pat 694 (696): 1939 Pat W N 530 (532) (DB). (Order under S. 47, C. P. Code, not appealed against — No revision.)

('35) 22 AIR 1935 Pat 121 (121) (DB). (Dismissal of appeal as abated—No revision as second appeal lies.)

✠ ('35) 22 AIR 1935 Pat 186 (188). (Order deciding the amount of court-fees payable by plaintiff.)

('37) 18 Pat L Tim 374 (376) (DB). (Order refusing to set aside *ex parte* decree—No revision as order is appealable.)

('35) 158 Ind Cas 998 (999): 18 Nag L Jour 72 (75). (Party not appealing from final decree.)

('35) 22 AIR 1935 All 873 (875). (Order under S. 144, C. P. Code, which is subject to appeal.)

† ('37) 24 AIR 1937 All 691 (693, 694) (DB). (Order refusing to set aside *ex parte* decree — No revision lies as *ex parte* decree is appealable.)

[*See also* ('43) 45 Pun L R 287 (289). (Order refusing to entertain application under S. 33, Arbitration Act, is not appealable but may be revised.)]

3. ('40) 187 Ind Cas 838 (839) (DB) (Pat). (Final decree not passed — Matter in revision could be raised in the appeal from the final decree — No revision.)

('39) 26 AIR 1939 Rang 448 (448) : 1939 Rang L R 591 (DB). (Rejection of evidence by trial Court — No revision lies.)

('25) 12 AIR 1925 Nag 62 (63).

✠ ('83) 7 Bom 341 (372) (FB).

('33) 20 AIR 1933 Rang 263 (264) (DB). (Issues in a suit decided separately — No revision will be entertained against interlocutory decision on each issue as there is remedy of appeal against the first decree.)

† ('32) 19 AIR 1932 Bom 81 (83) (DB).

† ('89) 11 All 383 (385) (DB). (Order granting review.)

('35) 22 AIR 1935 Pat 90 (91).

[*See also* ('32) 19 AIR 1932 Cal 831 (832).]

4. ('42) 29 AIR 1942 Cal 230 (232) : I L R (1941) 2 Cal 366.

('42) 29 AIR 1942 Oudh 387 (387, 388).

('42) 29 AIR 1942 Pat 251 (258): 21 Pat 197 (DB).

('39) 26 AIR 1939 Cal 719 (719).

† ('88) 10 All 119 (122).

✠ ('85) 7 All 407 (410) (DB). (Suit.)

('69) 6 Bom H C R A C 174 (176).

('06) 31 Bom 138 (140) (DB).

† ('09) 3 Ind Cas 780 (782) (DB) (Bom).

('20) 7 AIR 1920 Bom 67 (67) : 44 Bom 595 (DB).

('70) 14 Suth W R 212 (213) (DB).

('71) 15 Suth W R 170 (170) (DB).

† ('77) 3 Cal 243 (248) (DB).

('98) 1898 Pun Re No. 21, p. 58 (59) (FB).

('01) 1901 Pun Re No. 15, p. 52 (52, 53) (DB).

('03) 1903 Pun Re No 8, p. 28 (29). (Action against surety—Separate suit will lie.)

('16) 3 AIR 1916 Lah 201 (202) : 1915 Pun Re No. 99 (DB). (Suit to set aside a decree by minors on coming of age as being contrary to law.)

('15) 2 AIR 1915 Lah 105 (105) : 1915 Pun Re No. 66 (DB). (Suit to enforce an arbitration award.)

† ('24) 11 AIR 1924 Lah 471 (473).

('29) 16 AIR 1929 Lah 777 (777) (DB). (When a suit was decreed against the surety and dismissed against the principal debtor because he was not served.)

Code[5] or under O. 21 Rr. 58, 60, 61 or 62[6] or under O. 21 Rr. 98, 99 or 101[7] or a decision under S. 9 of the Specific Relief Act, 1877,[8] can be challenged by a separate suit, and will not, therefore, be interfered with in revision as a general rule.

But the rule as to non-interference stated above is not an inflexible one and will depend upon the special circumstances of each case.[9] Thus, the High Courts have interfered in the following cases :

† ('24) 11 AIR 1924 Mad 119(123):47 Mad 250 (DB).
('25) 12 AIR 1925 Nag 31 (31). (Where a suit was dismissed for default under O. 9 R. 3 a fresh suit lies under O. 9 R. 4.)
† ('24) 11 AIR 1924 Pat 134 (135) (DB). (Order of Collector in mutation proceedings can be challenged in separate suit.)
('29) 16 AIR 1929 Nag 317 (318). (Order under S. 209, Succession Act, is a summary one and could be set aside by a suit.)
('95) 20 Bom 630 (632) (DB).
('36) 23 AIR 1936 Pat 167 (169). (Party losing on reference under S. 55, Bengal Land Registration Act, entitled to bring suit under S. 59 of the Act—High Court will not interfere in revision.)
[*See also* ('08) 18 Mad L Jour 566 (567) (DB). (Remedy by application under S. 38, Small Cause Courts Act.)]
Also see G. I., S. 107 N. 2.

5. See Note 22.

6. See Note 23.
('42) I L R (1942) Kar 160 (161, 162) (DB). (Order under O. 21 R. 58.)
('34) 21 AIR 1934 Rang 212 (213) (DB).

7. ('38) 25 AIR 1938 Cal 192 (192).
('38) 25 AIR 1938 Cal 577 (578). (But High Court has power to interfere in revision—Simply because another remedy is open, application for revision cannot be said to be *mala fide*.)
('33) 20 AIR 1933 All 959 (960).
('33) 20 AIR 1933 Pat 604 (605).
† ('30) 17 AIR 1930 Cal 348 (348).
('11) 10 Ind Cas 183 (186) (Lah).
('12) 14 Ind Cas 282 (283) (Mad).
† ('15) 2 AIR 1915 Mad 744 (744).
('09) 12 Oudh Cas 109 (110) : 2 Ind Cas 284 (284).
('36) 23 AIR 1936 Mad 940 (940). (Order on application under O. 21 R. 100 — Though revision lies High Court will not interfere unless there are cogent reasons for interference and petitioner will suffer hardship if driven to suit—Normal remedy is by way of suit.)
[But see ('84) 6 All 172 (173) (DB).]

8. ✠('08) 30 All 331 (333) (DB).
('32) 19 A I R 1932 Oudh 89 (40). (Applications in revision are not in definite terms barred by the section but they are not to be lightly entertained.)
† ('11) 33 All 647 (649): 11 Ind Cas 814 (814) (DB).
† ('34) 21 AIR 1934 All 541 (542).
('31) 18 AIR 1931 All 205 (206) : 53 All 414.
('88) 12 Bom 221 (225) (DB).
('16) 3 AIR 1916 Cal 621 (622) (DB).
† ('14) 1 AIR 1914 Mad 382 (384) (DB).
('26) 13 AIR 1926 Mad 18 (18).
('18) 5 AIR 1918 Nag 105 (106).
('24) 11 AIR 1924 Nag 38 (39).
† ('26) 13 AIR 1926 Nag 290 (291): 22 Nag L R 30.
('21) 63 Ind Cas 809 (809) (All).
('10) 4 Sind L R 80 (82): 8 Ind Cas 215 (216) (DB).
('37) 24 AIR 1937 Oudh 183 (184) : 13 Luck 18.

9. ('40) 27 AIR 1940 Mad 538 (538, 539). (Order amending decree under S. 152, C.P.C., passed without jurisdiction—Order set aside in revision.)
('40) 27 AIR 1940 Oudh 237 (239, 240) : 15 Luck 332 (DB). (Order under S. 73—High Court entertained revision but dismissed it on merits.)
† ('29) 16 AIR 1929 Nag 356 (357).
('34) 21 AIR 1934 Bom 343 (347) : 58 Bom 623. (Order passed illegally and with material irregularity.)
† ('34) 21 AIR 1934 Lah 119 (119). (Where the lower Court had committed obvious mistakes.)
('33) 20 AIR 1933 Pat 158 (159). (Order on a claim petition without considering evidence is a fit case for revision.)
('33) 20 AIR 1933 Pesh 52 (52). (Order under S. 73 of the Code.)
† ('33) 20 AIR 1933 Rang 64 (68) : 11 Rang 134.
('31) 18 AIR 1931 Cal 385 (386): 58 Cal 55. (Where the onus of proof was misapplied leading to an erroneous conclusion interference was made.)
† ('10) 13 Oudh Cas 341 (344) : 8 Ind Cas 876 (877) (DB). (The date of hearing on which the suit was dismissed was fixed by chief ministerial officer in the Judge's absence.)
('08) 35 Cal 120 (131) (DB).
† ('27) 14 AIR 1927 Cal 578 (578) (DB).
('27) 14 AIR 1927 Cal 340 (341) (DB).
('14) 1 AIR 1914 All 234 (235) (DB). (When the Court summarily rejected the application under O. 21 R. 100 the High Court will interfere.)
✠('06) 28 All 72 (74).
✠('83) 7 Bom 341 (372) (FB).
(1900) 4 Cal W N 695 (698) (DB).
('26) 13 AIR 1926 Lah 612 (612). (When after close of arguments behind the back of the opposite side, Court allowed defendants to examine witnesses.)
('27) 14 AIR 1927 Lah 911 (912). (Where all defendants except one were served out but the plaintiff defaulted in process-fee, to a particular defendant, and the suit was dismissed as against all.)
('25) 12 AIR 1925 Nag 17 (18). (Where a lessee of the property deposited the decree amount under O. 21 R. 89 but did not disclose his interest, it is wrong to dismiss the petition on that ground.)
('27) 14 AIR 1927 Mad 799 (799). (But it would require very strong grounds to induce the Court to interfere.)
† ('26) 13 AIR 1926 Mad 179 (181). (When a petition under S. 73 was dismissed on the ground that the petitioner's application in execution did not end successfully.)
('30) 17 AIR 1930 Bom 375(378): 54 Bom 479 (DB). (When District Judge entertained an appeal against an order made by the Sub-Judge under O. 21 R. 98.)

(1) Where it is not clear whether another remedy is available to the applicant.[10]

(2) Where the other remedy is barred.[11]

(3) Where non-interference will lead to multiplicity of proceedings and unnecessary expense and delay.[12]

(4) Where the other remedy is inconvenient or not expeditious and would involve so much expense as to practically amount to no remedy at all.[13]

(5) Where grave injustice or a *defeat* of the provisions of law is likely to result from non-interference.[14]

('18) 5 AIR 1918 Cal 252(252)(DB). (Where a suit for possession under the Specific Relief Act was dismissed for want of title.)
('10) 8 Ind Cas 613 (614) (Low Bur). (Court in a petition under O. 21 Rr. 101, 102 adjudicating a question of title.)
('31) 18 AIR 1931 Lah 666 (666).
('81) 1881 Bom P J 133 (135). (Patently wrong order on an application by a purchaser at an execution sale for possession.)
('28) 15 AIR 1928 All 588 (589): 51 All 338. (19 Ind Cas 736, Dissented from.)
('22) 9 AIR 1922 Nag 115 (115) : 18 Nag L R 71. (Where the decree of the Court below is manifestly wrong.)
† ('31) 18 AIR 1931 All 663 (663) : 53 All 532. (Decree entirely without juriediction.)
('96) 21 Bom 777 (778, 779) (DB). (Mamlatdar's decision without jurisdiction.)
† ('36) 23 AIR 1936 Mad 91 (93): 59 Mad 303. (Misapprehension of Section of Code — Refusal to exercise jurisdiction —Interference proper though other remedy by suit open.)
('37) 24 AIR 1937 Nag 30 (31) : I L R (1937) Nag 82. (Where the order of lower Court is obviously wrong, it is open to the High Court to interfere in revision if litigation will thereby be shortened.)
('38) 25 AIR 1938 Cal 577 (578). (Order under O. 21 R. 100 — Separate suit though maintainable revision cannot be said to be *mala fide*.)
('36) 23 AIR 1936 Lah 560 (561).
('35) 22 AIR 1935 Rang 395 (396) (DB). (Plaintiff attaching property which defendant alleged to be wakf property — Court holding wakf illusory—Attachment order continued — Revision is competent though there is remedy by suit.)
('35) 22 AIR 1935 Cal 279 (280): 62 Cal 417 (DB). (Order demanding additional court-fee—Fact that plaintiff would have a right of appeal after plaint has been rejected is no bar to revision.)
[*See* ('38) 25 AIR 1938 All 635 (636) (DB). (Only appeal is prohibited from decree in suit under S. 9 of Specific Relief Act.)]
[*See also* ('34) 21 AIR 1934 Mad 669 (669) : 151 Ind Cas 765 (765).
('25) 12 AIR 1925 Nag 236 (238).
('34) 21 AIR 1934 Mad 558 (559).]

10. † ('96) 18 All 163 (168) (DB).
('32) 19 AIR 1932 Lah 176 (176). (Other remedy doubtful.)
† ('23) 10 AIR 1923 Mad 663 (664).
('21) 8 AIR 1921 Nag 9(10). (Other remedy doubtful.)
('21) 8 AIR 1921 Nag 17 (18). (No other way to obtain possession, so interfered.)
† ('38) 25 AIR 1938 Rang 360 (362) (DB).
[*See also* ('34) 21 AIR 1934 Pat 50 (52).]

11. ('24) 11 AIR 1924 Nag 298 (299).

12. ('42) 29 AIR 1942 Mad 614 (616): ILR (1942) Mad 376 (DB).
('41) 28 AIR 1941 Mad 262 (265) (DB).
✠('09) 32 Mad 334 (336).
† ('32) 19 AIR 1932 Lah 176 (177).
('33) 20 AIR 1933 Lah 48 (49): 14 Lah 243. (Order under Section 73 of the Code.)
('33) 20 AIR 1933 Rang 259 (260).
('31) 18 AIR 1931 Mad 1 (5) (DB). (Order of remand allowing amendment of a barred claim.)
('28) 15 AIR 1928 Rang 83 (84) : 5 Rang 742.
('18) 5 A I R 1918 All 405 (405): 40 All 216 (DB). (When petitioners were clearly entitled to possession by virtue of a sale from the auction purchaser.)
('84) 6 All 125 (128, 129) (DB). (A person was held entitled for mesne profits by an order under this Section, though he might recover in a separate suit.)
('27) 14 AIR 1927 Cal 156 (157): 53 Cal 913 (DB). (When applicants were clearly entitled to possession, and the Court dismissed the application under O. 21 R. 100 on an erroneous view of the law.)
('29) 16 AIR 1929 Lah 175 (176). (Order unnecessarily remanding a case for trial on an issue of jurisdiction on a misappreciation of law and facts.)
('31) 18 AIR 1931 Lah 302 (302). (Order of remand passed in appeal under S. 151, C. P. C., appeared to have been passed without jurisdiction.)
† ('19) 6 AIR 1919 Pat 425 (430) : 4 Pat L Jour 94 (FB).
† ('39) 26 AIR 1939 Lah 52 (53).
[*See also* ('36) 23 AIR 1936 Pat 160 (161). (Improper order of remand can be interfered with in revision.)]

13. ('42) 29 AIR 1942 Mad 614 (616) : ILR (1942) Mad 376 (DB).
('41) 28 AIR 1941 Nag 289 (290) : ILR (1942) Nag 478.
('39) 26 AIR 1939 Cal 719 (719).
('05) 2 All L Jour 370 (371).
† ('25) 12 AIR 1925 All 610 (612) : 48 All 175 (FB).
('33) 20 AIR 1933 All 374 (376) : 55 All 256.
('03) 1903 Pun Re No. 76, p. 318 (319) (DB).

14. † ('31) 18 AIR 1931 All 632 (634) : 54 All 183 (FB).
('33) 20 AIR 1933 Bom 313 (314). (Party having right of suit or to apply under Mamlatdar's Courts Act—Latter remedy refused—The order deprives him of his right and so though there was another remedy, High Court interfered in revision.)

The powers of the High Court under S. 115 should, however, be liberally utilised where the applicant has no other remedy,[15] though even in such cases the High Court may, in its discretion, refuse to interfere.[16] Where the case does not fall under the terms of this section no revision will lie even though no other remedy may be open.[17] See also Note 2.

9. Jurisdiction. — The word 'jurisdiction' has been used in this section in its broad legal sense as meaning the power of administering justice according to the means which the law provides and subject to the limitations imposed by that law upon the judicial authority; such limitations may be territorial or pecuniary or they may relate to the nature of the litigation or the domicile or nationality of the parties or the class or rank to which the tribunal belongs.[1] Section 115 contemplates three cases in which the revisional powers of the High Court may be exercised —

(1) the *assumption* by the lower Court of a jurisdiction which it does not possess,

(2) its *failure* to exercise a jurisdiction which it does possess, and

(3) where there is exercise of jurisdiction which the Court possesses but the exercise has been in a manner which is illegal or materially irregular.[2]

In *Balkrishna Udayar* v. *Vasudeva Ayyar*[3] their Lordships of the Privy Council observed as follows :

> "It will be observed that the Section applies to jurisdiction alone, the *irregular* exercise or *non-exercise* of it or the *illegal assumption* of it. The Section is not directed against the *conclusions* of law or fact in which the question of jurisdiction is not involved."

As to the meaning of 'jurisdiction' generally, see Notes 3 to 14 on section 9.

✠('83) 7 Bom 341 (357, 372) (FB).
('22) 9 AIR 1922 Lah 63 (64).
† ('39) 26 AIR 1939 Sind 137 (141) : I L R (1939) Kar 330 (DB). (The High Court will interfere if a defect of law and a grave wrong are manifest, for the High Court will not permit a case to proceed on jurisdiction snatched and having no basis or justification.)

15. † ('21) 8 AIR 1921 Sind 80 (80) : 15 Sind L R 135 (DB).
('24) 11 AIR 1924 Sind 49 (51) (DB). (Refusal to order a stay of suit when the matters were referred to an arbitration was considered an illegal exercise of jurisdiction.)
[*See also* ('15) 2 AIR 1915 Bom 269 (270) : 40 Bom 86 (DB).]

16. ('42) 29 AIR 1942 Oudh 179 (180). (Decree or order under Specific Relief Act, S. 9, not open to appeal or review—Revision not barred but interference in revision must be in exceptional cases.)
('09) 4 Ind Cas 20 (21) (DB) (Cal).
('19) 6 AIR 1919 Lah 203 (204) : 1919 Pun Re No. 169.
† ('14) 1 AIR 1914 Lah 179 (179).
('11) 1911 Pun Re No. 96 : 11 Ind Cas 231 (232) (DB).

17. ('40) 27 AIR 1940 Pat 102 (106) : 19 Pat 321 (SB). (Land Acquisition Deputy Collector—Order refusing to make reference to Civil Court under S. 18, Land Acquisition Act—No revision.)

Note 9

1. ('85) 7 All 345 (350) (DB).
('14) 1 AIR 1914 Cal 888 (390, 391) : 41 Cal 323 (DB).
[*See* ('36) 23 AIR 1936 Lah 783 (784). (Jurisdiction means jurisdiction of the Court and not the competence of a party to sue.)]

2. † ('85) 7 All 345 (351) (DB).
('21) 8 AIR 1921 Upp Bur 27 (29) : 4 Upp Bur Rul 16.
† ('16) 3 AIR 1916 Pat 75 (75, 76) : 1 Pat L Jour 465 (DB).
('32) 19 AIR 1932 All 223 (224) (DB).
('32) 19 AIR 1932 Oudh 210 (213) : 7 Luck 601 (FB). (Mussalman Wakf Act, 1923.)
[*See* ('33) 20 AIR 1933 All 86 (87, 88) (DB).]

3. ('17) 4 AIR 1917 P C 71 (74) : 40 Mad 793 : 44 Ind App 261 (PC).
Also see the following cases:
('43) 30 AIR 1943 Bom 42 (43). (Distinction between appellate and revisional jurisdiction pointed out.)
('43) 30 AIR 1943 Lah 65 (71) : I L R (1943) Lah 257 (FB).
('42) 29 AIR 1942 Pat 312 (313).
('42) 29 AIR 1942 Sind 41 (41, 42) : I L R (1941) Kar 570 (DB). (Jurisdiction of arbitrators to proceed with arbitration challenged on ground of its subject-matter being subject of pending suit — Question of jurisdiction is involved.)
('42) 29 AIR 1942 Sind 57 (58, 59) : I L R (1941) Kar 587 (DB). (Judge failing to distinguish conditions in England and India—Instead of considering particular case considered another decision — No question of jurisdiction arises.)

10. "Exercised a jurisdiction not vested in it by law." — When a Court has no legal authority to decide the cause at all but nevertheless under an erroneous construction of the law or of a misapprehension of facts proceeds to do so as if it had such authority, it "exercises a jurisdiction not vested in it by law"[1] and such action will be a ground for interference under this section. Thus, where the lower Appellate Court entertains an appeal from an order which is not appealable,[2] or where a Court entertains a suit or appeal which it has no jurisdiction to entertain,[3] or passes an order which it has

('42) 29 AIR 1942 Sind 79 (80) : I L R (1942) Kar 36 (DB).
('42) 29 AIR 1942 Sind 115 (116) : I L R (1942) Kar 38 (DB).
('32) 19 AIR 1932 All 140 (140) (DB).
('20) 7 AIR 1920 Upp Bur 42 (43) : 3 Upp Bur Rul 179.
('26) 13 AIR 1926 Oudh 183 (184). (Defect of expression in stating conclusions in judgment is no defect of jurisdiction.)
('29) 16 AIR 1929 Sind 92 (93) : 23 Sind L R 403 (DB).
('82) 8 Cal 832 (833) (DB).
('17) 4 AIR 1917 All 78 (79): 39 All 723 (DB).
('85) 7 All 336 (338) (FB).
Also see G. I.—S. 107 Note 2.

Note 10

1. See Section 9 Notes 3 and 4.
('43) 30 AIR 1943 Bom 42 (43) (DB).
('42) 29 AIR 1942 Pat 234 (235) (DB). (Order correct and not without jurisdiction—No revision).
('26) 97 Ind Cas 246 (246) (Cal).
('92) 16 Bom 708 (711) (DB). (Erroneous construction of statute.)
('92) 16 Bom 711*n* (DB).
('94) 4 Mad L Jour 280 (281). (Misconstruction of a rule of practice.)
('23) 10 AIR 1923 Mad 490 (492). (Wrong view of law that the maxim *actus curiæ neminem gravabit* applied, where in fact it did not.)
('25) 12 AIR 1925 Mad 1201 (1204) : 48 Mad 676 (DB). (Wrong interpretation of a rule.)
('26) 13 AIR 1926 Cal 1030 (1031).
† ('26) 13 AIR 1926 Bom 266 (269) : 50 Bom 215 (DB).
('23) 10 AIR 1923 Mad 192 (196) : 46 Mad 536 (DB).
('23) 10 AIR 1923 Cal 321 (321).
✠ ('20) 7 AIR 1920 Cal 305 (308): 46 Cal 962.
('35) 22 AIR 1935 Pat 385 (388): 14 Pat 488 (DB). (Mistake as to extent of jurisdiction—Lower Court while determining ambit of its jurisdiction construing legislative enactment.)
('38) 25 AIR 1938 Nag 169 (173).
('35) 22 AIR 1935 Pesh 174 (175).
('35) 39 Cal W N 915 (917). (Compensation awarded on misinterpretation of S. 95, C. P. C., by assuming jurisdiction in respect of a matter over which Court would not have had jurisdiction if statute had been rightly interpreted.)
('37) 24 AIR 1937 Pat 104 (105).
[*See* ('38) 25 AIR 1938 Mad 603 (604). (Court cannot be said to have acted without jurisdiction, if it is subsequently found by a higher Court that the findings of fact which were essential for the exercise of such jurisdiction were incorrect or erroneous.)
('33) 20 AIR 1933 Sind 229 (230): 27 Sind L R 261 (DB). (Facts ousting jurisdiction must be patent on the face of the record.)]
[*See also* ('38) 25 AIR 1938 Nag 537 (538).]

2. ('41) 28 AIR 1941 Mad 867 (868).
('41) 28 AIR 1941 Pat 616 (617) (DB).
('23) 10 AIR 1923 Bom 214 (215) (DB).
('32) 19 AIR 1932 Lah 416 (416) : 13 Lah 798. (District Court entertaining appeal from order in execution proceedings in a suit under S. 9, Specific Relief Act—Revision lies.)
† ('32) 19 AIR 1932 Mad 714 (716). (High Court in such a case can revise the order of the first Court also.)
† ('36) 23 AIR 1936 Lah 83 (84).
[*See also* ('12) 15 Ind Cas 669 (670) (Cal). (Appeal from rent suits for less than Rs. 50.)]
[But see ('41) 28 AIR 1941 Cal 441 (441).]
See for further discussion Ss. 100 & 101, Note 15.

3. ('43) 30 AIR 1943 Mad 284 (285). (Notice under S. 80 not given though necessary—Court has no jurisdiction to entertain suit—Question does not cease to be one of jurisdiction merely because Court wrongly decides question.)
('20) 7 AIR 1920 All 175 (176). (Civil Court entertaining a suit cognisable by a Revenue Court.)
('34) 21 AIR 1934 Lah 540 (541).
† ('33) 20 AIR 1933 Rang 185 (186): 11 Rang 337 (FB). (A case of an appeal to the District Judge against an order in an election petition.)
('89) 13 Bom 650 (653) (DB). (Civil Court not invested with small cause powers entertaining small cause suit.)
('04) 31 Cal 340 (343). (Small Cause Court entertaining suits for title.)
('23) 10 AIR 1923 Mad 330 (330). (Suits not entertainable before the Village Munsif.)
('66) 6 Suth W R Act X of 1859, 56 (56) (DB).
('66) 1866 Suth W R Misc 77 (80) (FB).
('70) 14 Suth W R 254 (254) (DB). (Decision under Section 15 of the Charter Act.)
('07) 1907 Pun L R No. 16, page 37 (37).
('10) 1910 Pun Re No. 52 : 6 Ind Cas 939 (939).
('15) 1915 Pun L R No. 78, page 224 (225).
('29) 114 Ind Cas 440 (440) (Lah).
† ('99) 23 Bom 321 (324) (DB). (Special Judge entertaining an appeal on a finding that a person was not an agriculturist under the Dekkhan Agriculturists' Relief Act.)
('17) 4 AIR 1917 All 166 (166). (Order of dismissal of suit for not securing service on defendant.)
('26) 13 AIR 1926 All 55 (56, 57): 48 All 27 (DB). (Entertaining an appeal against order revoking reference to arbitration.)
(1865) 3 Suth W R 24 (25) (DB).
('26) 13 AIR 1926 Cal 1236 (1237) (DB).
('30) 132 Ind Cas 180 (181) (Lah).

no legal authority to pass,[4] the High Court can interfere in revision. Thus, where the High Court *passes a decree* on certain terms and remits the case to the lower Court for disposal under the decree, the lower Court has no power to *dismiss the suit* itself under O. 17 R. 2 and O. 9 R. 8 and if it does so, it will be an exercise of jurisdiction not vested in it by law.[5] For other similar instances of assumption of jurisdiction, see the undermentioned cases.[6]

('20) 7 AIR 1920 Pat 703 (704) : 5 Pat L Jour 97. (Order in a pending suit that a receiver is liable to account for a particular period only.)
('25) 12 AIR 1925 Pat 525 (526) : 4 Pat 718 (DB).
('01) 25 Bom 417 (418) (DB).
('12) 15 Ind Cas 669 (670) (DB) (Cal).
('13) 40 Cal 537 (540) : 21 Ind Cas 120 (121) (DB).
('24) 11 AIR 1924 Cal 487 (489) (DB).
('03) 26 Mad 176 (178).
('09) 33 Mad 323 (326) : 1 Ind Cas 543 (544) (FB).
('10) 5 Ind Cas 742 (742) (DB) (Mad).
('28) 15 AIR 1928 Pat 451 (451).
[*See also* ('08) 12 Cal W N 835 (837).]
[But see ('24) 11 AIR 1924 Nag 17 (18) : 19 Nag L R 179. (Small Cause Court—Trial of small cause suit as a regular suit without objection.)
('27) 14 AIR 1927 Nag 164 (165).]

4. ('42) 29 AIR 1942 Oudh 135 (137) : 17 Luck 391. (Trustees appointed under scheme not providing for removal of trustee—Proper procedure for removal of trustee is by suit properly instituted under S. 92 and not by mere application—Removal on application is without jurisdiction.)
('41) 28 AIR 1941 Cal 156 (158) : I L R (1940) 2 Cal 277. (Restoring under S. 151 execution application dismissed as time-barred—Aggrieved judgment-debtor's remedy is by application under S. 115.)
('41) 22 Pat L T 965 (967). (Execution petition dismissed for default—Court has no jurisdiction to restore application—Remedy of decree-holder is to file fresh application.)
('40) 27 AIR 1940 Oudh 405 (409) : 16 Luck 79 (DB). (Court remitting an award for reconsideration under Sch. II para. 14 (c) when it had no authority to do so.)
('03) 25 All 509 (525) (FB).
('34) 21 AIR 1934 Pat 284 (287). (Order of remand under inherent power held in this case to be an illegal assumption of jurisdiction.)
('33) 20 AIR 1933 Rang 110 (111). (Re-opening *ex parte* decree on a time-barred application amounts to exercise of jurisdiction not vested by law.)
† ('17) 4 AIR 1917 All 78 (79) : 39 All 723 (DB). (Court finding that valuation in plaint was fictitious but instead of rejecting plaint fixing its own valuation.)
('39) 26 AIR 1939 Pat 518 (519) : 181 Ind Cas 896 (896). (Order directing portion of a holding to be sold at a time, contrary to the provisions of Bihar Tenancy Act.)

5. † ('24) 11 AIR 1924 P C 198 (200) : 4 Pat 61 : 51 Ind App 321 (PC).
('30) 17 AIR 1930 Mad 158 (159) : 53 Mad 393 (DB).
Also see O. 9 R. 8, Note 3.

6. ('43) 30 AIR 1943 Nag 97 (98) : I L R (1943) Nag 520. (Court impounding documents which it had no jurisdiction to impound.)
('43) 30 AIR 1943 Oudh 241 (243) (DB). (Court amending decree contrary to provisions of S. 8, U. P. Debt Redemption Act.)
('41) 28 AIR 1941 Mad 706 (706). (Order under S. 148 without jurisdiction.)
('41) 28 AIR 1941 Pat 44 (44). (Court has no jurisdiction to direct a party to amend his plaint—If it does so revision lies.)
('40) 27 AIR 1940 Bom 121 (126) : I L R (1940) Bom 299 (FB). (Court allowing withdrawal of suit on ground not contemplated by O. 23 R. 1 (2).)
('08) 35 Cal 1104 (1106, 1107) (DB). (Order by Judge in reference under the Land Acquisition Act directing refund.)
('32) 19 AIR 1932 Cal 857 (858). (Order enforcing landlord's right of pre-emption in a case to which Sections 182 and 26 of the Bengal Tenancy Act did not apply, held to be without jurisdiction.)
('32) 19 AIR 1932 Lah 515 (516). (One Court issuing injunction to another Court to stay confirmation of a sale—Latter Court refusing to comply with it—It acts without jurisdiction.)
('31) 18 AIR 1931 Cal 319 (320). (Extension of time granted, order being manifestly erroneous.)
('26) 13 AIR 1926 Lah 344 (345). (Do.)
('26) 13 AIR 1926 Lah 379 (381) : 7 Lah 161. (Do.)
('27) 14 AIR 1927 Lah 342 (343). (Do.)
('29) 16 AIR 1929 Cal 140 (141) (DB). (Do.)
('24) 11 AIR 1924 Oudh 330 (331). (Do.)
('31) 18 AIR 1931 All 318 (319). (Where the trial Court extended time for paying deficient court-fee after the passing of a decree.)
('23) 10 AIR 1923 Cal 612 (614) (DB). (Decree directing dismissal of suit on non-payment of court-fee within time—No power to extend time and receive court-fee long afterwards.)
('23) 10 AIR 1923 Lah 162 (163). (Do.)
('81) 3 All 576 (578). (Order allowing deposit of mortgage money after foreclosure.)
('16) 3 AIR 1916 Mad 882 (882) : 39 Mad 882. (Extension of time granted for payment after time fixed had expired.)
('07) 3 Nag L R 55 (66). (Do.)
('29) 16 AIR 1929 Pat 537 (545). (Issuing notice by the District Judge under Regulation XVII of 1806 which was not in force.)
('03) 26 Mad 224 (226).
('29) 16 AIR 1929 Lah 254 (254). (Compromise of suit — Decree wider than compromise.)
('06) 33 Cal 487 (496). (Allowing claim after confirmation of sale.)
('16) 3 AIR 1916 All 33 (34) : 38 All 690. (Gratuitous assumption that a previous application for execution was not *bona fide*.)
('26) 13 AIR 1926 All 401 (401). (Appellate Court passing an order on assumed jurisdiction.)

('24) 11 AIR 1924 All 376 (378): 46 All 372. (Court administering the Succession Certificate Act appointing a receiver.)
('97) 21 Bom 775 (776). (Mamlatdar's Court ousting third person in execution of decree.)
('96) 21 Bom 777 (779). (Decree of Court giving joint possession—Mamlatdar has no jurisdiction to place one in exclusive possession.)
('97) 23 Bom 47 (49).
('82) 9 Cal 295 (297, 299) : 9 Ind App 174 (PC). (Revenue Court transferring rent decrees, passed by it to another district for execution.)
('86) 12 Cal 515 (519). (Court executing a decree granting injunction.)
('96) 24 Cal 129 (133). (Liberty given to withdraw suit after disposal of reference to High Court.)
('01) 28 Cal 680 (684).
('07) 5 Cal L Jour 445 (447).
('25) 12 AIR 1925 Mad 707 (707). (Lower Court exercising a jurisdiction under election rules not vested in it.)
('88) 1888 Pun Re No. 95, p. 253 (257) (DB). (Order with necessary sanction required by the Punjab Government Rules.)
('24) 11 AIR 1924 Mad 713 (715). (Setting aside abatement after limitation.)
('12) 14 Ind Cas 711(712) (Oudh). (Limitation question, as to how far a question of jurisdiction.)
('26) 13 AIR 1926 Nag 388 (389).
('25) 12 AIR 1925 Oudh 402 (403). (Application for correction in the bond dismissed without considering merits.)
('14) 1 AIR 1914 Mad 301 (303).
('28) 15 AIR 1928 Mad 1077 (1082). (Court admitting evidence as to qualification of voter and how he voted.)
('05) 7 Bom L R 288 (289).
('16) 3 AIR 1916 Pat 306 (307).
('86) 1886 Pun Re No. 70, p. 152 (153) (DB). (Giving a decree after holding that plaintiff has no cause of action.)
('17) 4 AIR 1917 P C 71 (74) : 40 Mad 793 : 44 Ind App 261 (PC).
('39) 26 AIR 1939 Sind 137 (142) : I L R (1939) Kar 330. (Judge setting aside order passed by his predecessor and thus usurping appellate jurisdiction which he does not possess—High Court can set aside order in revision.)
('37) 24 AIR 1937 Nag 334 (335) : ILR (1939) Nag 641. (Where the lower Court itself has to determine whether it has jurisdiction or not to try the case, and it exercises its discretion wrongly and proceeds to try the case the High Court has power to interfere in revision.)
('37) 24 AIR 1937 Lah 63 (64). (Order for execution of award which (award) was a nullity.)
('35) 22 AIR 1935 Pesh 157 (157). (Right of way granted by Court — No finding as to its existence in past nor right claimed as easement of necessity —Court acts without jurisdiction.)
('38) 25 AIR 1938 Oudh 107 (109) : 14 Luck 13. (Order under S. 5, U. P. Agriculturists' Relief Act passed by Court exercising jurisdiction not vested in it by law — Revision lies.)
('38) 25 AIR 1938 Bom 159 (160) : I L R (1938) Bom 259. (The High Court under S. 115 has jurisdiction to interfere with an order passed by the Collector under S. 23 (2) of the Mamlatdar's Courts Act, setting aside in appeal the order of the Mamlatdar disagreeing with the latter's findings of fact — The Collector in setting aside the order of the Mamlatdar exercises a jurisdiction not vested in him.)
('39) 26 AIR 1939 Bom 279 (282, 283) : 41 Bom L R 490 (496). (Where the lower Court threatens to invade vested rights of the subject by assuming jurisdiction which it does not possess and it is about to resort to the use of the machinery at its disposal, the High Court as a superior Court will show a strong leaning against construing the powers under S. 115 so as to oust or restrict its jurisdiction.)
('37) 24 AIR 1937 Cal 732(735). (Where the Appellate Court rejects a memorandum of appeal on the ground that it is out of time before registering the appeal, the Appellate Court assumes a jurisdiction which it does not possess, as the Civil Procedure Code does not authorize the Appellate Court to pass such order at that stage.)
('37) 24 AIR 1937 Rang 449 (449). (Property of judgment-debtor sold — Order for delivery of possession made and possession delivered without obstruction—Subsequent obstruction by judgment-debtor — Court issuing fresh order of delivery of possession—No fresh order held could be issued—Court acted without jurisdiction and order could be set aside in revision.)
('35) 22 AIR 1935 All 398 (402). (Order of dismissal on merits, duly embodied in decree — Same Judge has no jurisdiction four months later to recall the order for merely arbitrary reasons — *Held*, High Court can interfere in revision and set aside order.)
('36) 23 AIR 1936 Pesh 176 (178). (Appellate Court reversing finding of fact arrived at in another suit.)
('35) 18 Nag L Jour 123 (125). (Where a regular Court entertains a suit of small cause nature which it has no jurisdiction to entertain or try and tries it to the exclusion of the Small Cause Court.)
('38) 25 AIR 1938 Pesh 81 (82). (Order under S. 151 is not appealable — Order passed on appeal is without jurisdiction and open to revision.)
('36) 23 AIR 1936 Cal 420 (420). (District Judge having no jurisdiction to appoint receiver in proceedings under Ss. 9 and 10, Mussalman Wakf Validating Act, appointing receiver under misapprehension of scope of Act—Order is liable to be set aside in revision.)
('37) 24 AIR 1937 All 207 (208). (Loan providing for compound interest—Court altering it into simple interest—*Held*, Court had no jurisdiction to do so and hence revision could lie.)
('37) 24 AIR 1937 Pat 104 (105). (Lower Court setting aside sale on a misunderstanding of law.)
('37) 24 A I R 1937 Pat 647 (651) : 16 Pat 729. (Court passing an order under S. 151, C. P. Code without jurisdiction.)
('37) 24 AIR 1937 Pat 477 (479). (Suit filed in Civil Court by witness in criminal case for recovery of additional expenses — Suit not vexatious but only misconceived—S. 35A, C. P. C., has no application — Order for special damages against such witness

See also the case noted below.[7]

11. "Failed to exercise a jurisdiction so vested." — Where a Court having jurisdiction to decide a matter, thinks erroneously under a misapprehension of the law or of the facts that it has no such jurisdiction, and declines to exercise the same, there is a failure to "exercise the jurisdiction vested in it" and the High Court can interfere in revision.[1] Where, however, the Court rightly assumes jurisdiction but *decides*

is without jurisdiction and can be set aside in revision.)

[*See also* ('11) 10 Ind Cas 299 (300) (Lah) (Rev). ('31) 18 AIR 1931 Cal 673 (675). (Where a decree is obtained not against the proper person who represents the estate and the estate is sought to be sold in execution of such a decree the decree is liable to be set aside in revision for want of jurisdiction.)]

As to whether under S. 38 of the Presidency Small Cause Courts Act, a Full Bench has jurisdiction to go into questions of fact, see the following cases :

('17) 4 AIR 1917 Mad 135 (139) : 40 Mad 355 (FB).
('17) 4 AIR 1917 Mad 485 (487).
('11) 38 Cal 425 (427) : 12 Ind Cas 11 (12).
('17) 4 AIR 1917 Bom 53 (54) : 42 Bom 80.
('97) 24 Cal 455 (460).
('14) 22 Ind Cas 32 (33) (Cal).

As to the powers of the High Court to interfere with a decision given by Small Cause Court in a Presidency town, see the following cases :

('16) 3 AIR 1916 Mad 871 (872).
('11) 10 Ind Cas 551 (551) (Mad).
('97) 20 Mad 358 (360).
('03) 30 Cal 588 (591).
('08) 31 Mad 490 (492).
('10) 8 Ind Cas 160 (160) (Mad).

7. ('42) 29 AIR 1942 Cal 32 (35) : I L R (1941) 2 Cal 373 (DB). (Divorce suit transferred by Single Judge of High Court sitting on Original Side, from one District Court to another District Court—Rules relating to power of transfer ambiguous — Transferee Court held not without jurisdiction.)

Note 11

1. ('43) 30 AIR 1943 Lah 65 (78) : I L R (1943) Lah 257 (FB). (Order staying suit on receipt of intimation from Debt Conciliation Board — Court erroneously assuming that it cannot go into the question of the jurisdiction of the Board fails to exercise jurisdiction vested in it by law.)
('42) 29 AIR 1942 Pat 33 (34) : 21 Pat 173 (DB). (Commissioner under Workmen's Compensation Act, not considering question of status under Act.)
('40) 27 AIR 1940 Nag 337 (340) : ILR (1941) Nag 150. (Court proceeding on wrong view of the law as regards the scope and object of O. 21 R. 88, C. P. Code.)
('40) 27 AIR 1940 Oudh 441 (442) : 16 Luck 184 (DB). (Order staying a pauper suit under S. 10 on the erroneous view of law that it should be deemed to be filed when the plaint was registered and not on date of application to sue in *forma pauperis* amounts to a refusal to exercise jurisdiction.)
('38) 25 AIR 1938 Pat 240 (242) : 17 Pat 107 (DB). (Order 21 R. 90 (Patna Amendment) Proviso (i)—Judgment-debtor applicant asked to deposit cash security—Court not judicially considering whether judgment-debtor's application for permission to give landed security fails to exercise jurisdiction.)
('93) 20 Cal 8 (11) (P C).
('31) 18 AIR 1931 All 332 (332) (DB). (Refusal to exercise jurisdiction by erroneous order staying suit.)
('25) 12 AIR 1925 All 267 (270) : 47 All 140 (DB). (Refusal to exercise — Appellate Court concurring —Revision lies against orders of both Courts.)
('33) 20 A I R 1933 All 374 (376) : 55 All 256. (Refusal to allow amendment.)
† ('34) 21 AIR 1934 All 25 (27) (DB). (Refusal to act under O. 1 R. 10 on the ground that it has no jurisdiction.)
† ('34) 21 AIR 1934 All 260 (264) : 56 All 656 (FB). (District Judge declining to exercise jurisdiction in reference by Collector under Land Acquisition Act, S. 18.)
('34) 21 AIR 1934 Bom 252 (253) : 58 Bom 485 (DB).
('11) 12 Ind Cas 75 (75) (Mad).
('23) 10 AIR 1923 Mad 230 (232) (DB). (Refusal to release property from attachment on a wrong construction of S. 64 and O. 21 R. 2, C. P. C.)
('23) 10 AIR 1923 Mad 435 (436) : 46 Mad 938 (DB).
('06) 8 Bom L R 567 (569) (DB). (Failing to set aside *ex parte* decree on an erroneous view of limitation.)
('30) 34 Cal W N 733 (735).
('86) 9 Mad 375 (376) (DB). (Erroneous construction of the Legal Practitioners' Act.)
('02) 12 Mad L Jour 473 (475) (DB).
('35) 22 AIR 1935 All 455 (456). (Court having jurisdiction to decide application for refund of court-fee not doing so—Revision is competent.)
('39) 43 Cal W N 973 (978) (DB). (Order of a District Judge rejecting a reference made under S. 18 of the Land Acquisition Act in the erroneous view that the party at whose instance the reference was made was not entitled to demand a reference, is open to revision under S. 115.)
† ('35) 22 AIR 1935 All 310 (321) : 57 All 810 (DB).
('37) 24 AIR 1937 Nag 39 (40) : ILR (1937) Nag 97.
('36) 162 Ind Cas 860 (860) (Nag). (Judgment-debtor alleging that execution was taken out in bad faith—Court refusing to give him opportunity of proving it and refusing to grant compensatory costs—Failure to exercise jurisdiction.)
('36) 23 AIR 1936 Pesh 38 (39).
('39) 26 AIR 1939 Mad 196 (199). (Court declining to entertain application due to misapprehension of true effect of statutory rules of Civil Procedure Code—Revision lies.)
('38) 25 A I R 1938 Mad 555 (556) (DB). (Attachment of judgment-debtor's share in tarwad property—Pending attachment registration of tarwad as impartible — Court's order declining to proceed with execution on wrong view of law — Order is liable to revision.)

against the rights of a party under an error of law, there is no *failure to exercise* jurisdiction but only an erroneous conclusion arrived at *in the exercise of it.*[2] In the following cases a Court will be deemed to have failed to exercise a jurisdiction vested in it by law :

(1) Where it refuses to entertain or it rejects a plaint, application, or memorandum of appeal on the erroneous view that it has *no power* to entertain or deal with it.[3] Thus, the erroneous rejection of an application under

('37) 24 AIR 1937 Mad 405 (406). (Application to revoke submission on ground of want of jurisdiction of arbitrator — Refusal of Court to decide question of jurisdiction—Revision lies.)
('39) 26 AIR 1939 Pat 263 (264).
('39) 26 A I R 1939 Lah 222 (222). (Objection to sale refused to be entertained by Court owing to erroneous belief that it was not entertainable in view of O. 21 R. 90, proviso—Error of law affects jurisdiction of Court—Revision is competent.)
('36) 23 AIR 1936 Cal 275 (276) : 63 Cal 49 (DB). (Refusing, under an erroneous construction of the section to entertain and decide application which the statute directs the Court to decide.)
('35) 22 A I R 1935 Sind 212 (213) : 29 Sind L R 399 (DB).
('35) 22 A I R 1935 Pat 86 (88). (Refusal to allow amendment on the assumption that it has no power to amend.)
('36) 23 AIR 1936 Lah 574 (574). (Court dismissing objection by judgment-debtor and refusing to apply the provisions of the Punjab Relief of Indebtedness Act.)
('37) 24 AIR 1937 Nag 267 (267) : 165 Ind Cas 926 (927) : I L R (1937) Nag 159. (Court refusing to entertain defence.)
('36) 23 AIR 1936 Mad 91 (93) : 59 Mad 303 (DB). (Misapprehension of S. 63, C. P. C. —Refusal to exercise jurisdiction vested by law—Interference is proper though another remedy open.)
[*See also* ('38) 25 A I R 1938 All 86 (88) : I L R (1938) All 153. (Stay of whole suit under S. 7 of U. P. Encumbered Estates Act—Plaint disclosing two sets of causes of action — Failure to order separate trial—Revision lies.)]

2. ('19) 6 A I R 1919 Pat 501 (502) : 4 Pat L Jour 340 (DB).
† ('35) 22 AIR 1935 Pat 201 (202).
[*See* ('35) 22 AIR 1935 Mad 117 (117). (But an order refusing permission to a minor-defendant on attaining majority to file an additional written statement is not one with which the High Court will interfere in revision, because there is no refusal to exercise a jurisdiction vested in the lower Court which it was bound to exercise.)]

3. ('43) 30 AIR 1943 Nag 204 (205) : ILR (1943) Nag 241 (FB). (Refusing to entertain appeal from finding which amounts to decree.)
('43) 45 Pun L R 287 (289). (Order refusing to consider application under S. 33, Arbitration Act.)
('42) 29 AIR 1942 Cal 230 (232) : I L R (1941) 2 Cal 366.
('42) 29 AIR 1942 Pat 237 (238). (Decree on promissory note—Execution — Application by judgment-debtor on date of sale to fix value of property under S. 13, Bihar Money-Lenders Act — Dismissal.)
('40) 27 AIR 1940 Mad 808 (809). (Application under Madras Agriculturists' Relief Act.)
('40) 42 Pun L R 364 (365). (Order returning appeal for presentation to proper Court.)
† ('39) 26 AIR 1939 Cal 669 (672): I L R (1939) 2 Cal 401 (DB). (Per Roxburgh J.— District Judge refusing a reference to him under the Land Acquisition Act on the ground of want of jurisdiction.)
('38) 25 AIR 1938 Mad 555 (556) (DB). (Court declining to deal with execution petition on the ground that it had no jurisdiction to do so in view of S. 46 of the Madras Marumakkathayam Act, 1933.)
('34) 21 AIR 1934 Lah 176 (176). (Claim petition under O. 21 R. 58 rejected as not maintainable treating the decree wrongly as a mortgage decree—Revision lies.)
('87) 9 All 232 (233, 234) (DB). (Refusal to entertain claim on the ground of want of jurisdiction based on erroneous view of law—Revision lies.)
('24) 11 AIR 1924 All 263 (265) : 46 All 73. (Refusal to permit execution of decree.)
('34) 21 AIR 1934 Cal 812 (815) : 61 Cal 903 (DB). (Refusal to set aside a sale on a wrong construction of S. 14A, Bengal Patni Regulation.)
('34) 21 AIR 1934 Lah 44 (45). (Order returning plaint for presentation to another Court—Revision lies.)
('32) 19 AIR 1932 Nag 70 (71) : 28 Nag L R 54. (Rejection of an application under O. 46 R. 7.)
('34) 21 AIR 1934 Oudh 352 (354) : 8 Luck 734. (Application to amend plaint, judgment and decree eminently just and equitable—Court refusing it — High Court can interfere.)
('86) 10 Bom 200 (202) (DB). (Do.)
('94) 18 Bom 734 (736) (DB). (Do.)
('95) 19 Bom 544 (546) (DB). (Do.)
('25) 12 AIR 1925 Cal 679 (680) (DB). (Do.)
('10) 5 Ind Cas 742 (743) (Mad). (Do. — Order for payment of expenses to witness.)
('24) 11 AIR 1924 Mad 32 (32) (DB). (Do.)
('92) 16 Bom 550 (551, 552) (DB). (Refusal to execute a revised decree.)
('14) 1 AIR 1914 Cal 910 (912) (DB). (Refusal to sell a holding under the Bengal Tenancy Act.)
('85) 11 Cal 146 (149) (DB). (Order restraining the decree-holder from executing his decree merely on the possibility of the lower Court's decision being reversed in appeal.)
('20) 7 AIR 1920 Mad 232 (233). (Refusal to entertain application.)
('18) 5 AIR 1918 All 422 (425) : 40 All 674. (Refusal to entertain application under O. 21 R. 89 on the ground that applicant was a minor and not properly represented.)
('81) 18 AIR 1931 All 594 (595) (DB).

O. 21 R. 89, or R. 90 on the ground that the applicant had no *locus standi* to apply, is a failure to exercise jurisdiction.[4] The reason is that the Court could only adjudicate upon the application if it was prosecuted by a person fulfilling the character required by R. 89, and the decision upon the point whether the applicant has the necessary legal character is clearly a question involving jurisdiction inasmuch as it is the very basis and foundation of

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† ('31) 18 AIR 1931 All 756 (757) : 53 All 959 (DB). (Refusal to entertain application under O. 21 R. 89 for want of deposit of poundage fee.)
('05) 32 Cal 146 (153) (DB). (Plaint not received on the ground that as presented, defendant will be put to great inconvenience and trouble.)
('90) 1890 Pun Re No. 75, page 219 (223) (FB). (Suit to recognize the assignment of a decree.)
('29) 16 AIR 1929 Lah 605 (607). (Wrongly refusing to accept plaint.)
† ('30) 17 AIR 1930 Lah 611 (613). (Order returning plaint on ground of want of jurisdiction.)
('30) 17 AIR 1930 Nag 207 (208):26 Nag L R 300. (Memorandum of appeal.)
('20) 7 AIR 1920 Lah 120 (120). (Do.)
('25) 12 AIR 1925 Lah 479 (480). (Do.)
† ('91) 13 All 320 (323) (DB). (Do.)
('11) 12 Ind Cas 107 (108) (DB) (All). (Do.)
('29) 16 AIR 1929 Lah 125 (125). (Do.)
('03) 31 Cal 344 (348) (DB). (Do.)
('27) 14 AIR 1927 Lah 134 (135). (Do.)
('96) 1896 Pun Re No. 54, page 154 (158) (DB). (Do.)
('09) 31 All 610 (612). (Rejection of application for review on the ground of want of jurisdiction.)
('29) 16 AIR 1929 Cal 513 (513). (Application for review of a decree obtained by fraud.)
('11) 12 Ind Cas 172 (173) (Mad). (Declining jurisdiction to grant review, because succession certificate was not put in though application had been made for the same.)
('96) 20 Bom 281 (283). (Review.)
('10) 13 Oudh Cas 109 (112) : 6 Ind Cas 977 (978) (DB). (Rejection of application to add parties.)
('02) 5 Oudh Cas 91 (92). (Failure to exercise jurisdiction under Ss. 32 and 372 of the old Code.)
('94) 21 Cal 539 (541) (DB). (Refusal to add party.)
('16) 3 AIR 1916 Cal 80 (82) (DB). (Failure to order transposition of some defendants.)
('19) 6 AIR 1919 All 189 (190) : 41 All 515 (DB). (Refusal of application of legal representative to be brought on the record.)
('02) 26 Bom 317 (319) (DB). (Do.)
('12) 14 Ind Cas 544 (550) (DB) (Mad). (Do.)
('22) 9 AIR 1922 Cal 514 (515) : 49 Cal 928 (DB). (Rejecting an application to fix a standard rent on the ground that the Calcutta Rent Act of 1920 does not apply.)
† ('26) 13 AIR 1926 All 346 (346, 350): 48 All 432 (DB). (Rejection of application by mortgagee of a decree under O. 21 R. 16, on the ground that the applicant was not such an assignee as is contemplated by the terms of the rule.)
('29) 16 AIR 1929 Bom 467 (467) : 53 Bom 773 (DB). (Refusing permission to bring a suit under S. 9, Specific Relief Act, because tenant is in actual possession.)
('29) 16 AIR 1929 Nag 179 (180). (Refusing to a discharged defendant the benefit of S. 47 in a petition under O. 21 R. 58.)
('09) 2 Ind Cas 856 (857) (DB) (Cal). (Rejecting an insolvency application.)
('20) 7 AIR 1920 Pat 519 (520). (Refusing to entertain a plaint.)
('25) 12 AIR 1925 Lah 174 (174). (Suit thrown out on an erroneous ground that it is not maintainable.)
('25) 12 AIR 1925 Cal 320 (322): 52 Cal 128 (DB). (Suit for partition thrown out on the erroneous construction of Court-fees Act.)
('31) 18 AIR 1931 Rang 332 (333). (Application by decree-holder under O. 21 R. 2 stating full satisfaction—Court refusing to record satisfaction.)

4. ('41) 28 AIR 1941 Mad 653 (653, 654).
('37) 24 AIR 1937 Cal 7 (8).
('22) 9 AIR 1922 Cal 95 (96) (DB).
('20) 7 AIR 1920 Mad 290 (291).
('13) 18 Ind Cas 579 (582) (DB) (Mad). (Because he is a purchaser after sale.)
('03) 30 Cal 425 (428) (DB).
('19) 6 AIR 1919 Pat 501 (502): 4 Pat L Jour 340. (If decision is the very basis and foundation of jurisdiction in its limited sense as distinguished from powers, it comes within the purview of the section.)
('23) 10 AIR 1923 Pat 490 (491) : 2 Pat 715 (DB). (Refusal to accept deposit tendered for the purpose of setting aside a sale.)
('19) 6 AIR 1919 Pat 465 (466) (DB). (Where a Court declines to accept a deposit by the debtor under O. 21 R. 89 on the ground that he has sold his interest to a third party.)
† ('21) 8 AIR 1921 Mad 157 (163) : 44 Mad 554 (FB). (Overruling AIR 1914 Mad 46 : 38 Mad 775 —Doubtful if AIR 1917 Mad 76 is good law.)
† ('95) 22 Cal 767 (783) (FB). (Refusal to set aside a sale under S. 310A of the old Code on the erroneous view that the section is not applicable.)
('26) 13 AIR 1926 Nag 10 (14, 15) : 21 Nag L R 102.
[*See* ('39) 26 AIR 1939 Mad 250 (251) : I L R (1939) Mad 374 (FB). (Per Varadachariar, J., in Order of Reference—Question whether applicant has *locus standi* to apply under O. 21 R. 90 is a question of jurisdiction.)]
[*See also* ('23) 10 AIR 1923 Mad 659 (660). (Wrongly admitting application under O. 21 R. 89.)
('34) 21 AIR 1934 Cal 812 (815) : 61 Cal 903. (District Judge bound to set aside sale under S. 14A, Bengal Patni Regulation, not doing so—Order amounts to failure to exercise jurisdiction vested in him.)]
[But see ('36) 23 AIR 1936 Pat 119 (121).)
('19) 6 AIR 1919 Mad 183 (184).]

the power to adjudicate upon the merits of the application.[5] The High Court of Allahabad has, however, held in the undermentioned cases[6] that the refusal of an application under O. 21 R. 89, on the ground that the applicant had no *locus standi* to apply is only an error in the *exercise of* jurisdiction and not a failure to exercise jurisdiction. The Oudh Chief Court has also proceeded on the view that an erroneous decision as to the *locus standi* of a person to apply to set aside a sale does not affect the jurisdiction of the Court.[7]

(2) Where it fails to decide one way or the other any question submitted to it for decision[8] as where it merely writes on the application "the petition will be recorded."[9]

(3) When it refuses to pass an order on the ground that it has *no* power to do so.[10] Thus, a refusal to confirm an execution sale when the conditions for setting aside the same are not present,[11] or a refusal to annul an execution sale when the proceedings were found to have been carried on against a deceased judgment-debtor,[12] is a failure to exercise jurisdiction vested in it.

(4) Where it fails, or refuses, to consider a case on the merits as it was bound to do.[13]

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5. ('24) 11 AIR 1924 Pat 506 (507). (Application under O. 21 R. 100—Misconstruction of law.)
† ('19) 6 AIR 1919 Pat 501 (502) : 4 Pat L Jour 340 (DB). (Order 21 Rule 89.)
('30) 17 AIR 1930 Pat 528 (529). (Suit for damages for tort.)
[*See* ('26) 13 AIR 1926 Nag 10 (14, 15) : 21 Nag L R 102.]

6. ('06) 28 All 84 (87, 88) (DB).
('23) 10 AIR 1923 All 392 (393) : 45 All 425 (FB).

7. ('41) 1941 Oudh W N 835 (836).
('37) 24 AIR 1937 Oudh 108 (110, 111).

8. ('27) 14 AIR 1927 Lah 808 (809).
('34) 21 AIR 1934 Pesh 33 (33) (DB). (Omission to give finding on necessary issue is failure to exercise jurisdiction.)
('35) 22 AIR 1935 Mad 150 (151). (Refusal to exercise Court's jurisdiction in deciding the preliminary point raised as to whether judgment-debtors were estopped from questioning the correctness of a proclamation order.)
† ('35) 22 AIR 1935 Pat 454 (455). (Where the lower Court did not consider the only question that it had to consider in the case, it must be deemed to have not exercised its jurisdiction.)

9. ('28) 15 AIR 1928 Mad 215 (215): 51 Mad 244.

10. † ('13) 18 Ind Cas 298 (298) (DB) (Cal). (Court finding possession in plaintiff, dismissing a suit under S. 9, Specific Relief Act, after an inquiry into title.)
('26) 13 AIR 1926 Cal 184 (186) (DB). (Refusal to order partition at instance of defendant.)
('34) 21 AIR 1934 Lah 537 (538). (Failure to exercise discretion in extending time for payment of additional court-fee on the ground that it had no power to so extend.)
('33) 20 AIR 1933 Pat 302 (303). (Refusal to grant an application under O. 1 R. 8 while the necessary allegations were made.)
('97) 1897 Pun Re. No. 13, p. 51 (52) (DB). (Order rejecting an application by a duly appointed guardian for custody of the minor on the ground that the proper course for the guardian would be to bring a civil suit.)
('10) 7 Ind Cas 966 (967) (DB) (Bom). (Refusal to consider correctness of the decision of the lower Court under Dekkhan Agriculturists' Relief Act, on the ground that the decision is not a decree.)
† ('11) 10 Ind Cas 527 (530) (DB) (Cal).
('29) 16 AIR 1929 Lah 694 (695). (Staying execution proceedings by wrongly applying S. 10, C. P. Code.)
('32) 19 AIR 1932 Nag 70 (71) : 28 Nag L R 54 (56). (Refusal to make a reference under O. 46 R. 7.)
('85) 8 Mad 192 (195) (DB). (Failure to exercise discretion under O. 41 R. 4.)
[*See also* ('19) 6 AIR 1919 Mad 714 (716).]

11. † ('93) 20 Cal 8 (11) : 19 Ind App 154 (PC).
('33) 20 AIR 1933 Lah 99 (100) : 13 Lah 761.
('32) 19 AIR 1932 All 403 (404) (DB).

12. *See* ('15) 2 AIR 1915 Cal 268 (271) (DB).
[*See also* ('23) 10 AIR 1923 Mad 230 (232). (Refusal to release property from attachment under erroneous construction of law.)
('97) 1897 Pun Re No. 8, p. 35 (38) (DB). (Do.)]

13. ('28) 15 AIR 1928 Lah 414 (416). (Refusing to consider application to set aside a sale on merits on the ground that auction purchaser was not made a party to it.)
('13) 40 Cal 518 (522) : 20 Ind Cas 420 (421) (DB). (Omission to hear appeal on the merits.)
('33) 20 AIR 1933 Rang 38 (39). (Objections to award filed in time — Refusal of Court to consider is failure to exercise jurisdiction.)
('25) 12 AIR 1925 Cal 357 (359) (DB). (District Judge's refusal to consider the allegation of an applicant for probate that certain properties have been erroneously included in the Schedule and not liable to court-fees.)
† ('87) 9 All 486 (492) (DB). (Dismissal of a suit by a sole surviving partner, because plaintiff was

(5) Where it misunderstands its own duties or its powers and thus, in substance, declines jurisdiction.[14]

12. Exercise of jurisdiction illegally or with material irregularity. — There is an almost irreconcilable conflict of opinion as to the proper interpretation of clause (c) of the section.[1] In *Amir Hassan Khan* v. *Sheo Baksh Singh*,[2] their Lordships of the Privy Council observed as follows :

> "The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, *act* illegally or with material irregularity. It appears that they had perfect jurisdiction to *decide* the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not *exercise* their jurisdiction illegally or with material irregularity."

On an interpretation of this decision, the High Court of Madras has held that it is only when a Court *decides a case perversely* that it can be said to act illegally or with material irregularity in the exercise of its jurisdiction and that other errors on questions of law or procedure are outside this clause.[3] According to what may be called the Calcutta view, cl. (c) has been purposely and advisedly left in indefinite language in order to empower the High Court to interfere with *gross and palpable* errors of subordinate Courts, and to prevent *manifest injustice* in non-appealable cases.[4]

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not competent to bring suit without joining the legal representatives of a deceased partner.)
('21) 8 AIR 1921 All 351 (353) : 43 All 50 (DB). (Omission to consider question of jurisdiction under S. 5, Religious Endowments Act, 1863.)
('11) 12 Ind Cas 136 (136) (DB) (Mad). (Failure to decide an issue and leaving it to be considered in execution.)
('20) 7 AIR 1920 Pat 536 (538). (Omission to consider plea.)
('07) 10 Oudh Cas 8 (10). (Omission to consider part of defence owing to an erroneous view of law —Jurisdiction.)
('27) 14 AIR 1927 Mad 921 (922).
† ('17) 4 AIR 1917 All 214 (215) : 39 All 297 (DB). (Court refusing to 'try the issues.')
('27) 14 AIR 1927 All 386 (387). (Failure to exercise discretion under S. 5, Limitation Act.)
('13) 21 Ind Cas 767 (768) (Mad). (Order without considering case on its merits.)
('35) 22 AIR 1935 Mad 547 (551) : 58 Mad 936 (DB). (Jurisdiction—Failure to exercise—Misconstruction of order of Court — Refusal to consider merits — Revision lies.)
[*See also* ('26) 13 AIR 1926 Mad 1142 (1143). (Defence of tenants in suit for ejectment considered and then rejected — No failure to exercise jurisdiction.)]

14. ('40) 27 AIR 1940 Oudh 381 (382) : 15 Luck 712 (DB). (Where the Court orders an application for recording an adjustment of decree under O. 21 R. 2, to be filed on the ground that no inquiry is contemplated by that rule, it declines to exercise jurisdiction vested in it by law.)
('21) 63 Ind Cas 858 (858) (DB) (All). (Misreading issue in the case.)
† ('28) 15 AIR 1928 Rang 67 (68) : 5 Rang 803. (Failing to grasp the fundamental point in the case.)
('25) 12 AIR 1925 Rang 188 (189). (Court holding that it had no inherent power to allow substitution of right copy of decree in appeal.)
('28) 15 AIR 1928 Lah 811 (812, 813).
('33) 20 AIR 1933 Oudh 225 (226). (Declining to proceed with execution is declining to exercise jurisdiction.)
('34) 21 AIR 1934 Pat 425 (425) : 148 Ind Cas 347 (348). (Refusal to allow an application under O. 1 R. 10 on the ground that it is opposed by plaintiff.)

Note 12

1. ('25) 12 AIR 1925 Oudh 291 (292, 293): 27 Oudh Cas 361.
2. ('85) 11 Cal 6 (8) : 11 Ind App 237 (PC).
3. ('15) 2 AIR 1915 Mad 1223 (1233) : 39 Mad 195 (FB).
✣('94) 17 Mad 410 (414, 415) (FB). (The view of Muthuswamy Iyer, J., in 11 Mad 220 (FB) was given up by him in this case.)
('15) 2 AIR 1915 Mad 391 (391, 392).
4. ✣('35) 22 AIR 1935 Cal 102 (106) (DB).
('37) 41 Cal W N 601 (602). (Lower Court giving to litigant benefit of contract to which he was not party — This amounts to an illegal exercise of jurisdiction or at any rate a material irregularity.)
('26) 13 AIR 1926 Cal 530 (531) (DB). (It is an illegality to write a judgment without assigning reasons.)
† ('96) 1 Cal W N 617 (625, 626) (DB).
('96) 1 Cal W N 626 (632) (DB).
('96) 1 Cal W N 633 (638) (DB).
('14) 1 AIR 1914 Cal 377 (378) (DB).
('24) 11 AIR 1924 Cal 633 (634) : 51 Cal 690 (DB).
('99) 3 Cal W N 581 (585) (DB). (Rejection of a document in contravention of S. 34, Stamp Act.)
('10) 6 Ind Cas 549 (551) (DB) (Cal).
('31) 18 AIR 1931 Cal 27 (28) : 58 Cal 111.
Also see the following cases which hold the same view:—
('16) 32 Ind Cas 851 (851) (U P B R).
('15) 29 Ind Cas 564 (565) (U P B R). (To hold service sufficient, where summons was affixed without making proper inquiries.)

In the undermentioned case[5] a Full Bench of the Nagpur High Court held that though a Court may have jurisdiction to make an order, if the effect of the order is finally to shut out a trial when it ought never to have been so shut out, then such an error must be regarded as a material irregularity although it may not be palpable or gross. In that case, it was held that an erroneous order of an Appellate Court demanding additional court-fee was an order affected with material irregularity although the error may not be palpable or gross. It has been held that where the law has prescribed the *manner* in which a Court shall exercise its jurisdiction and the Court *acts* in disregard of those provisions, it acts illegally or irregularly in the exercise of jurisdiction.[6] But where the Court exercises its jurisdiction in the manner prescribed but arrives at a *conclusion or decision* which is erroneous in law or fact, it does not *act* illegally or with material irregularity but *decides* erroneously in the proper exercise of jurisdiction.[7] It is submitted

('29) 16 AIR 1929 Nag 228 (229): 26 Nag L R 261.

5. † ('38) 25 AIR 1938 Nag 122 (126): I L R (1938) Nag 106 (FB). (Overruling AIR 1933 Nag 107: 29 Nag L R 125 (FB).)

6. ✣('85) 7 All 345 (347) (DB).
('33) 20 AIR 1933 All 295 (297): 55 All 216 (DB).
('32) 19 AIR 1932 Bom 584 (587) : 56 Bom 585. (Rejection of application to sue in *forma pauperis* in disregard of the specific provisions of Order 33.)
('33) 20 AIR 1933 Oudh 540 (542) : 9 Luck 225. (Appointing fresh arbitrators without complying with Para. 5 (2).)
('33) 20 AIR 1933 Oudh 547 (548) : 9 Luck 219. (Court acting without jurisdiction in passing decree in terms of award under Para. 16 — Revision is competent.)
('27) 14 AIR 1927 Rang 134 (134). (Suit entertained without previous permission under O. 1 R. 8 —Covered by clause (c) of the section.)
[*See also* ('38) 25 AIR 1938 Nag 107 (109): I L R (1938) Nag 436. (Irregularity must be analogous to one in procedure and must be of the Court whose order is being revised.)]

7. ('43) 30 AIR 1943 Oudh 192 (196).
('43) 30 AIR 1943 Oudh 300 (302).
('42) 29 AIR 1942 Cal 530 (532). (Even if a Small Cause Court Judge has ignored certain documents while arriving at his decision on the point at issue, omission does not come within the mischief of Section 115.)
('42) 29 AIR 1942 Oudh 361 (362) (DB).
('41) 28 AIR 1941 Rang 244 (246).
('40) 27 A I R 1940 Nag 386 (390) : I L R (1940) Nag 659. (Mistaken view of lower Court as to what constitutes misconduct of arbitrator — No revision.)
('40) 27 AIR 1940 Rang 75 (77).
✣('86) 8 All 519 (521, 534) (DB).
('34) 21 AIR 1934 All 4 (6) : 55 All 825 (DB).
('34) 21 AIR 1934 All 37 (39) (DB).
('33) 20 AIR 1933 Oudh 534 (534).
('37) 24 AIR 1937 Pat 639 (640) (DB).
('39) 26 AIR 1939 Pat 564 (565) : 1939 Pat W N 341 (342, 343) (DB).
('39) 26 AIR 1939 Oudh 129 (131) : 14 Luck 442 : 179 Ind Cas 1001 (1001) (DB). (Court disallowing application exercising jurisdiction following ruling of High Court to which it is not subordinate in the absence of ruling of High Court to which it is subordinate—*Held*, Court cannot be said to have exercised its discretion illegally or irregularly and no revision lies even if wrong view of law is taken.)
('35) 156 Ind Cas 1098 (1099) (Rang).
('37) 24 AIR 1937 Rang 61 (62).
('37) 24 AIR 1937 Rang 537 (538). (The Court certainly has jurisdiction to decide whether it has or has not jurisdiction to pass an order and even if it decides this question wrongly, there is no ground for revision.)
('36) 23 AIR 1936 All 449 (450). (Judge committing error of law in interpreting section of Act — He does not act with material irregularity or exercise jurisdiction not vested in him.)
('34) 21 AIR 1934 Rang 233 (234) (DB).
('34) 21 AIR 1934 Rang 230 (230).
('34) 21 AIR 1934 Rang 306 (307).
('38) 25 AIR 1938 Lah 827 (827).
('38) 25 AIR 1938 Lah 357 (358) (DB).
('35) 22 AIR 1935 Rang 158 (158).
('36) 23 AIR 1936 All 868 (869).
('37) 24 AIR 1937 Oudh 193 (194) : 13 Luck 81 (DB). (Wrong construction of terms of scheme framed under Section 92.)
('35) 22 AIR 1935 Oudh 154 (156) (DB). (Munsif having jurisdiction dismissing application under O. 21 R. 90 on ground of absence of substantial injury and appeal from his order also dismissed— *Held* revision under S. 115 was not competent.)
('37) 170 Ind Cas 125 (125) (All).
('35) 22 AIR 1935 Lah 120 (121).
('37) 24 A I R 1937 Pat 357 (358). (High Court cannot interfere on ground that findings of fact are perverse or view of law erroneous.)
('39) 26 AIR 1939 Lah 162 (163).
† ('36) 23 AIR 1936 Nag 157 (159) : I L R (1936) Nag 73. (A good working test is whether if the decision had been the other way, the illegality would still be there. If not, the flaw must lie in the decision, and not in the manner in which it is reached. Consequently it would not be revisable, and this test would not work in every case. But where it does, it could be decisive. The decision, whether on the question of limitation, or the character of the suit, or the starting point of limitation, is not revisable under Section 115.)
('36) 23 AIR 1936 Nag 280 (280) : I L R (1937) Nag 428.
† ('37) 24 AIR 1937 Oudh 108 (111). (Erroneous decision — Order as *to locus standi* of person to apply under O. 21 R. 89—No revision lies.)

that this last view is the correct view. The use of the word 'acted' indicates the true position and refers to the class of cases where the Court having jurisdiction violates a rule of law or of procedure *prescribing the mode* in which such jurisdiction is to be exercised. The arriving at a *conclusion* or *decision* is only a mental operation and the Court cannot be said to be "acting" in so coming to a conclusion or decision on a question of law or fact.[8] The decision in *Amir Hassan Khan* v. *Sheo Baksh Singh*[9] is perfectly intelligible upon this principle. There is no necessity, nor is there anything in the language of the section, to limit the meaning of the words in clause (c) to *perverse decisions* only[10] though where the Court is perverse, i. e., where it wilfully or consciously disregards the provisions of law, it is certainly acting illegally in exercise of its jurisdiction.[11]

Where there is an *illegality* in the exercise of jurisdiction the order of the Court is void and of no effect and nothing more need be shown for maintaining a revision. Where, however, there is an *irregularity* in the exercise of jurisdiction such irregularity must be shown to be a *material* one, i. e., one which would have affected the decision of the case upon the merits.[12] Whether an act is illegal or merely irregular seems to depend upon the *importance* of the provision of law disregarded.[13] Thus, where the law *expressly prohibits* a thing to be done, a disregard of such a provision has been held to amount to an illegality.[14] The distinction, however, between what is illegal and what is materially irregular, has not been very clearly drawn by the decisions[15] and very often the same thing is some times treated as an illegality and sometimes as a material irregularity. Thus, it was held in the undermentioned case[16] that a Court acts *illegally* in the exercise of its jurisdiction if it arrives at a conclusion without any evidence to support it. The same thing has been treated as a *material irregularity* in other cases.[17]

('39) 26 AIR 1939 Mad 733 (733, 734) : (1939) 2 Mad L Jour 44 (45).
('36) 23 AIR 1936 Sind 205 (206) (DB). (The fact that the High Court, if it had been the trial Court, might have come to a different conclusion is not sufficient to justify interference under S. 115.)
[*See* ('35) 22 AIR 1935 Pat 191 (192). (Decision on matter in which Court has jurisdiction—Question of jurisdiction is not involved.)]
[*See also* ('33) 20 AIR 1933 All 295 (297) : 55 All 216.
('88) 1888 Pun Re No. 105, page 278 (280) (DB).]
Also see Note 13.

8. See the dissenting judgment of Davis, J., in ('94) 17 Mad 410 (421) (FB).
9. ('85) 11 Cal 6 (8) : 11 Ind App 237 (PC).
10. †('04) 2 Low Bur Rul 333 (339, 340) (DB).
11. †('83) 7 Bom 341 (358, 359) (FB).
('32) 19 AIR 1932 Bom 584 (587) : 56 Bom 585.
('85) 9 Bom 82 (85) (DB).
('03) 25 All 509 (524) (FB).
('21) 8 AIR 1921 Upp Bur 27 (29) : 4 Upp Bur Rul 16.
('15) 2 AIR 1915 Mad 391 (391).
('15) 2 AIR 1915 Mad 1122 (1123).
('39) 26 AIR 1939 Pat 430 (431). (Erroneous decision on question of law or fact — Order unjustifiable and almost perverse — High Court will interfere.)
† ('35) 22 AIR 1935 Bom 222 (225) : 59 Bom 430. (Provisions of Order 41 disregarded.)
('36) 23 AIR 1936 Mad 526 (527). (Perverse decision on question of law or procedure — Mortgage bond on the face of it discharged and in the possession of the obligor—It is material irregularity to make the latter to prove the fact of discharge.)
12. ('86) 13 Cal 225 (230). (Misapplication of S. 73.)
† ('19) 6 AIR 1919 Low Bur 151 (153): 9 Low Bur Rul 263 (DB).
('38) 177 Ind Cas 138 (140) (DB) (Pat). (Sale fixed for 18th — Sale actually under hammer that day but in fact held on the 20th, a day not fixed for sale—There is no illegality but mere irregularity.)
13. *See* ('02) 25 Mad 61(98):28 Ind App 257(PC).
14. ('20) 7 AIR 1920 Cal 305 (308) : 46 Cal 962. (Order attaching in execution a provident fund deposit — Provident Funds Act, S. 4.)
('32) 19 AIR 1932 All 337 (339) : 54 All 490 (DB). (Court taxing costs in contravention of R. 1, Ch. 21 of the Allahabad High Court Rules.)
('86) 8 All 111 (115) (FB).
('86) 8 All 519 (530) (DB).
('30) 17 AIR 1930 Rang 129 (129) : 7 Rang 766. (Attaching house of agriculturist—NOTE : Correctness of this case on another point is doubted in A I R 1933 Rang 227 : 11 Rang 372 (FB).)
('80) 1880 Pun Re No. 78, page 175 (176, 177) (DB).
[*See also* ('27) 14 AIR 1927 Mad 786 (788).
('94) 18 Bom 737 (738) (DB).]
15. ('86) 13 Cal 225 (230).
('98) 2 Cal W N 474 (477) (DB).
('11) 9 Ind Cas 132 (132) (DB) (Cal).
16. ('87) 9 All 398 (409) (DB).
17. ('25) 12 AIR 1925 Mad 877 (878) (DB).
('32) 19 AIR 1932 Pat 9 (11) : 11 Pat 161 (DB). (Arbitrary decision based on speculative factors and on no evidence.)

The following are all illustrations of the classes of cases in which High Courts have interfered under this clause, on the ground of illegality or material irregularity in the exercise of jurisdiction :

(1) Where the lower Court decides a case without considering the materials placed before it or in disregard of the evidence.[18]

(2) Where it decides on evidence not legally taken[19] or without considering the

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('25) 12 AIR 1925 Mad 494 (495). (Order setting aside abatement based on no evidence.)
('26) 13 AIR 1926 Lah 566 (566).
('31) 18 AIR 1931 All 452 (452) (DB).
('86) 1886 Pun Re No. 29, page 51 (52) (DB). (Decree based on admission when there is no evidence of it.)
('12) 14 Ind Cas 793 (793) (Lah).
('25) 12 AIR 1925 Lah 278 (278).
('06) 10 Cal W N 14 (16). (In this case it was held to be without jurisdiction.)
('23) 10 AIR 1923 Mad 503 (504).
[*See also* ('19) 6 AIR 1919 Lah 123 (123).]

18. ('43) (1943) 1 Mad L Jour 318 (319). (District Munsif exercising jurisdiction much irregularly by deciding not on the record before him but on what he supposed should have been the record.)
('42) 29 AIR 1942 Sind 57 (59) : I L R (1941) Kar 587 (DB).
('41) 28 AIR 1941 Rang 244 (246).
('40) 27 AIR 1940 Lah 180 (181).
('40) 27 AIR 1940 Rang 75 (77). (Failure to consider facts or law is illegality.)
('40) 27 AIR 1940 Sind 30 (32) : I L R (1939) Kar 669. (Court acting solely on spot inspection.)
('23) 10 AIR 1923 Nag 292 (293) : 19 Nag L R 72.
('34) 21 AIR 1934 Bom 343 (347) : 58 Bom 623. (Disregard of the important piece of evidence.)
('34) 21 AIR 1934 Lah 198 (198). (Decision in support of which there is no evidence on record may be set aside in revision.)
('34) 21 AIR 1934 Rang 135 (137).
('34) 21 AIR 1934 Rang 214 (215) (DB).
('30) 1930 Mad W N 1227 (1228). (Inconsistent finding as to service opposed to facts.)
('24) 11 AIR 1924 Nag 44 (45): 19 Nag L R 165 (DB).
('10) 8 Ind Cas 552 (552) (Lah).
('15) 2 AIR 1915 Lah 242 (243). (Judgment without considering whole evidence.)
('15) 2 AIR 1915 Lah 290 (291). (Do.)
('27) 14 AIR 1927 Rang 302 (303). (Do.)
('19) 6 AIR 1919 Pat 481 (482) (DB). (Do.)
† ('09) 2 Ind Cas 946 (948) (DB) (Cal).
('92) 1892 Pun Re No. 17, p. 80.
('06) 1906 Upp Bur Rul 42.
('15) 2 AIR 1915 Cal 417 (419) (DB).
('20) 7 AIR 1920 Cal 459 (460, 463) (DB). (Petition for probate granted without considering relationship of parties to deceased.)
† ('25) 12 AIR 1925 Cal 254 (255) (DB). (Petition for stay of execution of decree.)
('13) 18 Ind Cas 318 (318) (Lah). (Not properly deciding all the grounds of appeal.)
('06) 1906 Pun Re No. 29, p. 110 (112).
(1900) 1900 Pun L R p. 200 (200). (Failure to notice ground of appeal.)
('11) 12 Ind Cas 97 (98) (DB) (Mad).
('10) 1 Upp Bur Rul 14 (17) : 8 Ind Cas 466 (468).
('20) 7 AIR 1920 Low Bur 136 (137) : 10 Low Bur Rul 332.
('26) 13 AIR 1926 Rang 205 (206): 4 Rang 221 (DB).
('81) 1881 All W N 65 (65). (Decree unsupported by evidence.)
('87) 11 Bom 435 (438). (Raising a question of the execution of an instrument when execution was admitted.)
('14) 1 AIR 1914 Cal 521 (523) (DB). (Treating matter as appeal instead of like revision under S. 153, Bengal Tenancy Act.)
('38) 25 AIR 1938 Mad 634 (637) : ILR (1938) Mad 988. (Court of revision cannot be expected to weigh the evidence laid before the lower Court but if there was no evidence at all from which the Court has drawn inferences High Court will interfere.)
('38) 25 AIR 1938 Nag 216 (217) : I L R (1940) Nag 526. (Judgment superficial—No consideration of evidence.)
('39) 26 AIR 1939 Pesh 9 (13). (Disregard of important factors resulting in miscarriage of justice.)
('35) 22 AIR 1935 All 705 (706). (Refusal to look into terms of bond.)
('37) 172 Ind Cas 752 (753) : 39 Pun L R 499 (501).
('34) 21 AIR 1934 Rang 356 (357).
('23) 4 L R All (Rev) 248 (248).
('23) 10 AIR 1923 All 145 (146).
('17) 4 AIR 1917 Low Bur 83 (84).
('24) 11 AIR 1924 Rang 318 (319). (Disposal of appeal without considering ground of appeal namely that plaintiff was not permitted to call further witnesses.)
[*See also* ('34) 21 AIR 1934 Lah 34 (34). (Dismissal of suit under O. 9 R 3—Order refusing to restore, was set aside in revision.)]

19. ('14) 1 AIR 1914 Cal 575 (577) (DB). (Decision on evidence of witness examined in absence of parties.)
('77) 3 Ind App 259 (286) : 26 Suth W R 55 (70) (PC). (Decision based on Judge's own knowledge of the case.)
('16) 3 AIR 1916 Mad 547 (548).
('36) 23 AIR 1936 Pesh 72 (74).
('35) 22 AIR 1935 Mad 184 (185). (Arbitrator improperly admitting evidence — Confirmation of award by Court—Award can be set aside.)
[*See* ('36) 1936 Oudh W N 237 (239). (Court acts with material irregularity in basing its conclusions on surmises for which there is no justification from the evidence on the record.)]
[*See also* ('36) 23 AIR 1936 Pesh 12 (14). (Where in a pre-emption suit the lower Courts import irrelevant considerations into the discussion of evidence and refuse to give the vendee the full sum proved to have been paid, merely because those considerations raise suspicions in their minds with regard to genuineness of the price paid, they commit a material irregularity.)]

question of its admissibility.[20]

(3) Where it arrives at a conclusion in opposition to the finding expressed in the body of the judgment.[21]

(4) Where it decides a case without giving reasons for its judgment.[22]

(5) Where it disregards and does not apply its mind to, or misapplies the provisions of any law.[23]

[But see ('26) 13 AIR 1926 Pat 29 (30). (One piece of inadmissible evidence but finding arrived at on the rest of the evidence.)]

20. † ('26) 13 AIR 1926 All 161 (162). (A letter not properly proved.)
('94) 18 Bom 369 (372) (DB). (Acting on unstamped hundi legally inadmissible.)
('94) 18 Bom 614 (616) (DB).
('94) 18 Bom 745 (747) (DB).
('11) 9 Ind Cas 806 (810) (DB) (Cal). (Previous deposition without proof.)
('97) 1897 Pun Re No. 68, p. 311 (315) (DB).

21. ('29) 16 AIR 1929 Mad 841 (841).
('35) 22 AIR 1935 All 280 (281). (Proportionate costs awarded in judgment—Total costs entered in decree—Revision lies.)

22. ‡ ('16) 3 AIR 1916 All 65 (66) (DB). (Application for adjournment.)
('90) 1890 Pun Re No. 72, p. 197 (199). (Court of final appeal not stating the true points for determination nor the reasons for its decision.)
('27) 14 AIR 1927 Lah 798 (799).
('38) 25 AIR 1938 All 31 (32) : I L R (1938) All 48 (DB).

[But see ('35) 22 AIR 1935 Mad 105 (106). (Failure to state reasons for order is no ground for revision.)]

23. ('42) 29 AIR 1942 Nag 78 (79) : I L R (1942) Nag 675. (Decree set aside under O. 9 R. 13 without considering whether there was jurisdiction to do so or not.)
('42) 29 AIR 1942 Sind 57 (59) : I L R (1941) Kar 587 (DB). (Judge enunciating principle that suit must be stayed if difficult point of law arises — S. 115 applies.)
('41) 28 AIR 1941 Cal 58 (59) : I L R (1940) 2 Cal 334.
('41) 28 AIR 1941 Oudh 433 (435) : 16 Luck 778. (Genuineness of document presumed contrary to Evidence Act, S. 90.)
('41) 28 AIR 1941 Rang 244 (246).
('40) 27 AIR 1940 Rang 75 (76).
('39) 26 AIR 1939 All 668 (669, 670) (DB). (Injunction granted under S. 151, but against the spirit of the section.)
('39) 26 AIR 1939 Rang 413 (416). (Lower Court failing to take into account the difference between a mortgage and a pledge.)
('12) 15 Oudh Cas 234 (238) : 15 Ind Cas 523 (524) (DB). (Entering into an uncertified adjustment of decree to see whether execution application is in time.)
('33) 20 AIR 1933 All 49 (50).
('33) 20 AIR 1933 All 648 (649). (Court failing to apply its mind to question of limitation even though attention was drawn to it.)
('32) 19 AIR 1932 Cal 448 (450) : 59 Cal 329 (DB). (Adding a party under O. 1 R. 10 when the Court had no power to act under that rule held to be an irregularity.)
('33) 20 AIR 1933 Lah 139 (140). (Modification of an award in contravention of the provisions of Sch. II Para. 12.)
('33) 20 AIR 1933 Lah 260 (261). (Failure to consider extension of time under S. 5, Limitation Act.)
('33) 20 AIR 1933 Lah 335 (336). (Wrongly applied a section of an Act whereby injustice was caused.)
('32) 19 AIR 1932 Mad 217 (217). (Suit triable by Munsif sent to Sub-Court by order of District Judge—It amounts to material irregularity.)
('32) 19 AIR 1932 Pat 342 (343). (Purchaser bringing money on last day unable to deposit it owing to delay in passing challans in spite of his diligence —Order setting aside sale is revisable.)
('32) 19 AIR 1932 Pat 346 (347) : 11 Pat 627 (DB). (Lower Court following a decision of another High Court as against a decision of its own High Court.)
('33) 20 AIR 1933 Pat 61 (62). (Consolidation of suits with little in common at one party's instance.)
† ('19) 6 AIR 1919 Low Bur 151 (153) : 9 Low Bur Rul 263 (DB).
('30) 17 AIR 1930 Lah 572 (573).
('16) 3 AIR 1916 Bom 55 (56) : 41 Bom 402 (DB). (When lower Court discharged surety under O. 38 R. 1 on death of defendant.)
('30) 17 AIR 1930 Lah 512 (512). (Court refusing to proceed against surety.)
('15) 2 AIR 1915 Cal 87 (91) (DB).
('24) 11 AIR 1924 Lah 380 (380). (Court assuming market value of property for jurisdiction in pre-emption suit.)
('26) 13 AIR 1926 Lah 402 (403). (Disregard of Section 99, C. P. Code.)
('29) 16 AIR 1929 Lah 824 (824). (Following obsolete decisions.)
('28) 15 AIR 1928 Mad 484 (485). (Erroneous construction of "good faith.")
('12) 15 Ind Cas 431 (431) (Low Bur). (The failure of the lower Court to keep in view the distinction between a case where ownership had passed and a case where the goods were merely bailed.)
('91) 1891 Pun Re No. 65, p. 319 (320). (Appellate Court acting in contravention of old S. 578 of the Code.)
('23) 10 AIR 1923 Lah 431 (431).
('09) 4 Ind Cas 314 (316) (Lah). (Failure to consider the effect of prior peaceful possession as owner.)
('95) 19 Bom 133 (135) (DB). (Suit in ejectment — Tenant wrongly allowed to deny landlord's title.)
('28) 15 AIR 1928 Bom 548 (549) (DB).
('27) 14 AIR 1927 Mad 935 (935).
('30) 17 AIR 1930 Nag 207 (208) : 26 Nag L R 300. (Judge wrongly thinking that appeal is untenable.)

('17) 4 AIR 1917 All 166 (166). (Entertaining appeal which does not lie.)
('29) 16 AIR 1929 Rang 210 (211). (Court overlooking canon of interpretation that the statutory provision in the nature of taxation should be interpreted liberally in favour of subject.)
('07) 9 Bom L R 936 (941) (DB).
('88) 15 Cal 47 (49, 50) (DB).
('16) 3 AIR 1916 Cal 318 (319) : 42 Cal 926 (931) (DB). (Applying S. 11 to proceedings under S. 10.)
† ('89) 1889 Pun Re No. 42, page 145 (147).
('86) 13 Cal 225 (230).
('25) 12 AIR 1925 Rang 300 (300) : 3 Rang 211. (Applying O. 25 R. 1 to a suit not for payment of money.)
('27) 14 AIR 1927 Rang 90 (91). (Applying wrong law is ground for revision.)
('84) 8 Bom 395 (397, 398) (DB). (Order directing next friend to obtain a certificate under S. 2, Act XX of 1864 for filing suit on behalf of a minor member of a joint Hindu family.)
('17) 4 AIR 1917 Low Bur 177 (177).
†('04) 2 Low Bur Rul 333 (340) (DB).
('29) 16 AIR 1929 Rang 145 (146) : 7 Rang 339.
('23) 10 AIR 1923 Mad 254 (257): 40 Mad 123.
('11) 11 Ind Cas 833 (834) (Lah).
('11) 12 Ind Cas 623 (623) (Lah).
('29) 115 Ind Cas 351 (352) (Mad). (Decision without reference to the principles on which the case should be decided.)
('11) 11 Ind Cas 849 (850) (Low Bur). (Where the provisions of S. 107, T. P. Act, were overlooked.)
('12) 15 Ind Cas 423 (424) (Low Bur).
('15) 2 AIR 1915 Low Bur 148 (148). (Disregard of S. 74, Contract Act, for assessing damages.)
('09) 1 Ind Cas 163 (164) (All). (Court ignoring the rules as to the service of summons on an official.)
('25) 12 AIR 1925 Rang 37 (38). (A failure to consider the effect of a previous Full Bench decision.)
('95) 1895 Pun Re No. 7, page 31 (32). (Applying a rule of limitation not contained in the Limitation Act.)
('29) 16 AIR 1929 Cal 225 (226). (Omission to apply its attention to O. 21 R. 60.)
('32) 19 AIR 1932 Cal 349 (350) (DB). (Ordering full costs to respondent on returning appeal memorandum for presentation to proper Court.)
('32) 19 AIR 1932 All 337 (339): 54 All 490 (DB). (Taxation of costs in contravention of Ch. 21, R. 1, Allahabad High Court Rules — *Held*, illegality.)
('21) 8 AIR 1921 Lah 60 (61). (A question of estoppel.)
† ('21) 8 AIR 1921 Sind 159 (162) : 16 Sind L R 207 (FB). (Rule of estoppel.)
('24) 11 AIR 1924 Rang 349 (350) : 2 Rang 202.
('98) 1898 Pun Re No. 66, page 227 (230) (DB). (Wrongly placing burden of proof.)
('21) 8 AIR 1921 Lah 166 (166). (Dissenting from 1912 Pun Re No. 102.)
('30) 17 AIR 1930 Lah 572 (572). (Suit on promissory note—Execution proved — Plea as to failure of consideration — Onus wrongly thrown on plaintiff.)
('31) 18 AIR 1931 Mad 534 (538). (Decree-holder asked to begin the case instead of claimant in a petition under O. 21 R. 100.)
('23) 10 AIR 1923 Mad 607 (608) (DB). (Onus.)
('23) 10 AIR 1923 Pat 295 (295). (Do.)
('11) 11 Ind Cas 774 (774) (Low Bur). (Do.)
('15) 29 Ind Cas 61 (62) (DB) (U P B R). (Do.)
('88) 1888 Pun Re No. 104, page 274 (277) (DB). (Omission to ascertain that the conditions requisite for effecting substituted service exist.)
('01) 24 Mad 685 (689) (DB). (Application under S. 18 of Religious Endowments Act, 1863—Highly irregular — Leave granted thereon.)
('33) 20 AIR 1933 Mad 367 (367). (Wrong principle applied by lower Court in question of court-fees — High Court can interfere.)
('34) 21 AIR 1934 Mad 399 (400) : 57 Mad 705. (Failure to distinguish between an application by a plaintiff to be examined on commission and an application by a defendant.)
('35) 22 AIR 1935 Nag 209 (211): 31 Nag L R 413. (Application by idols to sue in *forma pauperis* rejected on ground that they are not "persons"—Decision amounts to conscious violation of specific rules of Civil Procedure Code—Revision lies.)
† ('38) 25 AIR 1938 Mad 634 (637) : I L R (1938) Mad 988. (Where the lower Court has acted without any clear conception of the law on the subject or has failed to apply the law to the facts of the case, it acts illegally, and in any case with material irregularity justifying interference by the High Court in revision.)
('38) 25 AIR 1938 Mad 321 (321). (Court deciding under S. 9 (5), Madras Hindu Religious Endowments Act, must advert to both the provisions contained in S. 9 (5) — Failure to do so would be ground for revision under S. 115.)
('37) 24 AIR 1937 Nag 326 (327). (Although the High Court will not ordinarily interfere in revision in a case under S. 9, Specific Relief Act, where there has really been no trial of the case at all and the suit has been dismissed under a misapprehension of the scope of S. 9, the High Court will interfere in revision.)
('36) 23 AIR 1936 Oudh 185 (188) : 12 Luck 52 (DB). (Order made in violation of provisions of O. 45 R. 15 is quite irregular.)
('39) 26 AIR 1939 Sind 137 (141) : ILR (1939) Kar 330 (DB). (Allowing a question to be argued which cuts at the very root of the plaintiff's case but which is not raised in the pleadings.)
('35) 22 AIR 1935 All 34 (35) : 57 All 482. (Judgment-debtors jointly and severally liable for decree — Application for reference to arbitration by decree-holder and only some of them — Order of reference by Court is illegal — Revision is competent.)
('35) 22 AIR 1935 All 381 (382). (Order under O. 23 R. 1 passed by Court without exercising discretion judicially, i. e., without applying its mind to the matter before it with due reference to the provisions of Order 23.)
('37) 24 AIR 1937 All 598 (604) : ILR (1937) All 805 (FB). (Application under S. 30, U. P. Agriculturists' Relief Act — Failure of Court to apply its mind to material provisions of law — Revision lies.)
('38) 25 AIR 1938 Cal 789 (790) (DB). (Court disposing of suits under O. 17 R. 2 thereby depriving plaintiffs of right of appeal instead of acting under O. 17 R. 3—Revision lies.)

(5a) Where a subordinate Court fails to follow a decision of the High Court to which it is subordinate,[24] or follows a decision without noticing that it does not apply to the case.[25]

(6) Where it misinterprets the evidence[26] or misapprehends the facts.[27]

('35) 22 AIR 1935 Cal 38 (39). (Order not in accordance with provisions of S. 88, Bengal Village Self-Government Act.)
('38) 25 AIR 1938 Bom 209 (210). (Order dismissing application as barred by limitation — Disregard of S. 4, Limitation Act, and refusal to apply it.)
('35) 62 Cal L Jour 308 (309) (DB). (Court setting aside sale under S. 174 (3) of the Bengal Tenancy Act in the absence of deposit as contemplated by that provision.)
('38) 25 AIR 1938 All 153 (156) : I L R (1938) All 305 (DB). (Lower Court wrongly interpreting section of a statute and refusing to grant relief — High Court should interfere.)
('35) 22 AIR 1935 Pesh 186 (189). (Where the Court dismisses an application for restoration of a suit dismissed in default under the impression that Art. 163, Limitation Act, applies to the case which does not in fact so apply, it constitutes a material irregularity and the order is open to revision.)
('38) 25 A I R 1938 Pesh 49 (50). (Court ignoring fundamental principles of law.)
('34) 21 AIR 1934 Mad 617 (617). (Refusal to go into the question of jurisdiction before proceeding to hear the suit on merits may amount to material irregularity.)
('35) 22 AIR 1935 Lah 161 (161). (Appellate Court setting aside lower Court's order and remanding suit to lower Court with issue re-framed with directions to take additional evidence if required—Order is illegal.)
('36) 23 AIR 1936 Lah 693 (694). (Refusal to grant extension of time due under the law.)
('36) 23 A I R 1936 Lah 746 (747). (Where the Judge omits to apply an obvious principle of law he acts illegally in the exercise of his jurisdiction.)
('25) 12 AIR 1925 Rang 381 (382). (Court overlooking the provisions of S. 6, Limitation Act.)
[*See* ('32) 19 A I R 1932 Cal 220 (221). (Court ordering unequal division of shares.)
('38) 25 A I R 1938 All 26 (27) (DB). (Court reducing interest without application by judgment-debtor but after giving parties opportunity of being heard—Decision though contrary to provisions of S. 30 (2), U. P. Agriculturists' Relief Act, should not be interfered with in revision if justice has been done.)]
[*See also* ('29) 16 A I R 1929 Bom 220 (222) : 53 Bom 432 (DB). (Failure of plaintiff to annex controller's order under S. 17, Bombay Rent (War Restrictions) Act, 1918—Proceeding with suit.)]

24. ('41) 28 AIR 1941 Rang 22 (23). (Also, failure to grasp the essentials of a reported ruling of the High Court.)
('39) 26 AIR 1939 Rang 433 (434):1939 Rang L R 587.
('33) 20 AIR 1933 Mad 94 (95).
('32) 19 AIR 1932 Pat 346 (347): 11 Pat 616 (DB).
Also see Note 13.

25. ('41) 28 AIR 1941 Pesh 76 (78).

26. ('43) 30 AIR 1943 Pesh 17 (18).
('39) 26 AIR 1939 Rang 413 (414, 416).
('29) 16 AIR 1929 Mad 204 (205) (DB).
('33) 20 AIR 1933 Pesh 67 (69). (Concurrent findings based on misinterpretation of document can be revised.)
('10) 7 Ind Cas 713 (714) (Lah).
('19) 6 AIR 1919 Lah 91 (92).
[*See also* ('11) 9 Ind Cas 1008 (1009) (Lah).]

27. † ('11) 9 Ind Cas 806 (809) (DB) (Cal). (Inferring estoppel without any finding or issue.)
† ('88) 1888 Pun Re No. 105, page 278 (281) (DB). (Assuming wrongly that plaintiff did not tender his evidence.)
† ('89) 1889 Pun Re No. 206, page 721 (724) (DB).
('90) 1890 Pun Re No. 108, page 316 (318).
('89) 1889 Pun Re No. 130, page 458 (459).
† ('92) 1892 Pun Re No. 26, page 108 (110) (DB).
✣('97) 1897 Pun Re No. 60, page 261 (265) (FB). (NOTE.—This case is overruled on another point in 1907 Pun Re No. 12 (FB).)
('15) 2 AIR 1915 All 60 (60, 61).
('12) 15 Ind Cas 897 (899) (DB) (Cal). (Order consolidating suit on mortgage, a money suit and partnership suit when the substantial questions were not identical.)
('25) 12 A I R 1925 All 253 (253) (DB). (Lower Court finding that mortgagor was member of an agricultural tribe, opposed to facts, and referring case to Collector.)
('26) 13 AIR 1926 All 604 (605). (Appellate Court treating findings as being the opposite of what they really are.)
('30) 17 A I R 1930 Bom 129 (131) : 54 Bom 105 (DB). (Judge inferring misconduct from facts which cannot be taken into consideration.)
('14) 1 AIR 1914 Lah 174 (175) (DB).
('20) 7 AIR 1920 Lah 178 (179). (As to the nature of the contract.)
('27) 14 AIR 1927 Mad 427 (429) (DB). (Lower Court has not correctly perceived the evidence and case from a correct standpoint.)
('20) 7 AIR 1920 Pat 137 (138).
('22) 9 AIR 1922 Nag 104 (105, 106) : 19 Nag L R 131. (Court assuming that the contract made on behalf of minor, was made by minor himself.)
('23) 10 AIR 1923 Nag 108 (108). (Decision on imaginary facts.)
('25) 12 AIR 1925 Pat 125 (127) : 3 Pat 683 (DB). (Court below seemed to have treated the matter of a commission to examine the plaintiff as if it was merely a commission to examine witnesses.)
('11) 9 Ind Cas 32 (33) (Mad). (Dismissal of plaintiff's suit simply on the ground of certain discrepancies between the terms of the pro-notes and the description of them in the plaint.)
('29) 16 AIR 1929 Rang 244 (245) : 7 Rang 300.
('31) 18 AIR 1931 Rang 111 (112).
('27) 14 AIR 1927 Mad 227 (228).

(7) Where it decides a case in the absence of the party whose rights are affected by such decision[28] or without hearing him,[29] or without giving him an opportunity of being heard,[30] or without giving him an opportunity of

('39) 26 AIR 1939 Lah 470 (470) : 41 Pun L R 492 (493). (Court holding that the defendant has admitted a certain claim of the plaintiff when the defendant has not done any such thing.)

† ('35) 22 AIR 1935 P C 185 (186) : 62 Ind App 257 : 57 All 678 (PC). (Trial Judge misapprehending nature of application to be added as party to suit and dealing with it summarily, acts with material irregularity.)

28. ✠('26) 13 AIR 1926 P C 142 (144) : 54 Cal 338 : 53 Ind App 271 (P C).

† ('29) 16 AIR 1929 All 761 (761) (DB). (Collector, in a suit for money against minors.)

('94) 18 Bom 594 (596, 597) (DB). (Order returning purchase money of an execution sale in the absence of judgment-creditor.)

('28) 15 AIR 1928 Lah 414 (417).

('14) 1 AIR 1914 Oudh 425 (426) : 18 Oudh Cas 66 (DB).

('31) 18 AIR 1931 Oudh 410 (411) (DB).

('32) 19 AIR 1932 All 166 (168) (DB).

('24) 11 AIR 1924 Lah 570 (570, 571).

('94) 18 Bom 606 (607) (DB). (When Court acted on endorsement of Post Office on a registered packet 'refused,' without satisfying whether it referred to defendant.)

[*See also* ('43) 30 AIR 1943 Oudh 315 (315, 316): 1943 O W N 138 (140). (Refusal to add party.)

('42) 29 AIR 1942 Oudh 338 (338) : 18 Luck 56. (Pre-emption suit — Benami sale — Refusing to make real vendee party to suit—Revision lies.)]

29. ✠('07) 34 Cal 929 (933) (DB).

('33) 20 AIR 1933 All 196 (196). (Commencement to write judgment before hearing whole evidence and arguments is irregular.)

('22) 9 AIR 1922 Bom 207 (209) : 47 Bom 11 (DB). (Application to set aside an *ex parte* decree.)

('29) 16 AIR 1929 Lah 878 (879).

('23) 10 AIR 1923 Pat 102 (102) (DB). (Sale proclamation settled without hearing parties by taking petition earlier than date fixed.)

('30) 17 AIR 1930 Lah 177 (178) (Main evidence excluded by Court through error of law.)

30. ('41) 22 Pat L Tim 965 (967). (Restoring execution application dismissed for default — Notice to judgment-debtor not given.)

('33) 20 AIR 1933 All 751 (751) (DB). (Dismissal of claim on the ground of delay without giving opportunity to claimants to explain delay.)

('33) 20 AIR 1933 Lah 421 (421). (Allowing claim without investigation—Revision will lie.)

✠('86) 8 All 111 (115) (FB). (Ordering a dismissed suit to be restored to file without notice to defendant.)

('33) 20 AIR 1933 All 313 (314) (DB). (Award filed —Decree without giving time to party to file objections is a material irregularity.)

('33) 20 AIR 1933 All 523 (525) : 55 All 719 (DB). (Refusing to allow a defendant to cross-examine the plaintiff's witnesses.)

('33) 20 AIR 1933 Lah 538 (539). (Court refusing to summon proper witness acts with illegality and not only with material irregularity.)

('13) 19 Ind Cas 241 (242) (Mad). (Setting aside *ex parte* decree without notice to plaintiff.)

('26) 13 AIR 1926 All 17 (18) (DB). (Transfer of suit without notice.)

('20) 7 AIR 1920 Oudh 213 (213) : 23 Oudh Cas 216 (DB). (Do. See however AIR 1923 Oudh 240 (240).)

('17) 4 AIR 1917 Mad 217 (217) (DB). (Order for refund of poundage fees on a sale being set aside without any notice to the judgment-debtor.)

('19) 6 AIR 1919 Mad 868 (868). (Ascertainment of mesne profits in a partition suit without notice.)

('22) 9 AIR 1922 Mad 63 (65). (Amendment of a sale certificate without giving notice.)

('24) 11 AIR 1924 Mad 813 (814). (Impleading legal representative without notice to another claimant.)

('29) 16 AIR 1929 Mad 49 (49). (Allowing commutation under S. 40, Estates Land Act.)

('23) 10 AIR 1923 Pat 180 (183) (DB).

('18) 5 AIR 1918 Oudh 111 (112). (Notice to pleader may be sufficient.)

('28) 15 AIR 1928 Mad 592 (594) (DB). (One party applying to Court to prevent pleader of opposite party from appearing — Court preventing the pleader.)

('09) 4 Ind Cas 550 (551) (Lah). (Notice of hearing not given.)

('06) 29 Mad 324 (326). (Wrongly holding as regards service, and thereupon passing *ex parte* decree.)

('98) 1 Oudh Cas 166 (168). (Notice to parties of time and place at which Court is to be held not given.)

('69) 1869 Pun Re No. 60. (When no date was fixed and appeal dismissed for default.)

† ('19) 6 AIR 1919 Mad 14 (15) (DB). (Do.)

('22) 9 AIR 1922 All 72 (73) : 44 All 325. (Taking up a case after the hours fixed by the High Court and dismissing it for default.)

('96) 18 All 119 (121) (DB).

('11) 9 Ind Cas 857 (858) (All). (Dismissal of appeal —Pleader's physical inability to argue the case.)

('25) 12 AIR 1925 Nag 236 (238). (Senior counsel absent and his belated request for adjournment refused—Junior counsel's unpreparedness.)

('07) 11 Cal W N 112 (116) (DB).

('01) 3 Bom L R 130 (131) (DB). (Restoration petition—Dismissal for want of affidavit is a material irregularity.)

('37) 24 AIR 1937 Oudh 268 (269) : 13 Luck 111 (DB). (Court cannot dismiss objection under O. 21 R. 58 without giving opportunity to objector to explain delay — Where no such opportunity is given order can be set aside in revision.)

('36) 162 Ind Cas 860 (860) (Nag). (Judgment-debtor alleging bad faith — Court refusing to give opportunity of proving it.)

[*See also* ('36) 23 AIR 1936 Sind 1 (2) (DB). (Arbitrators claiming certain amount as fees — Amount grossly reduced by Court without hearing them — Material irregularity.)]

obeying the orders of the Court.[31]

(8) Where it takes a mistaken view of the question at issue,[32] or decides an issue which does not properly arise,[33] or omits to decide issues which properly arise.[34]

(8a) Where the lower Court wrongly places the onus of proof.[35]

[See however ('21) 8 AIR 1921 Bom 219 (219): 45 Bom 860 (DB). (Failure to give notice where none is required to be given is not a ground of revision.)]

31. ('15) 2 AIR 1915 All 133 (134) (DB). (Dismissing appeal for failure to furnish security.)
('26) 13 AIR 1926 Cal 1017 (1018) (DB). (Dismissing execution petition for failure to pay process.)
('26) 13 AIR 1926 Lah 571 (571). (For failure to amend plaint and pay costs of adjournment.)
('11) 9 Ind Cas 132 (133) (DB) (Cal). (Suit brought in plaintiff's name but plaint describing him in representative capacity ; failure to give option to plaintiff to say in what capacity he wishes to proceed is illegal.)
† ('20) 7 AIR 1920 Pat 82 (84). (When plaint did not contain the settlement of rental as per record of rights, and suit dismissed for that defect.)
('16) 3 AIR 1916 Mad 1164 (1164) (DB). (Omission to produce succession certificate.)
('12) 34 All 348 (350) : 14 Ind Cas 507 (508). (Dismissing a suit because the person acting as agent had no proper power as required by law.)
† ('35) 158 Ind Cas 250 (250) (Peah). (Failure of a Court to fix a time for payment of process fee amounts to a material irregularity, and if the Court, which has not fixed a time for the same, dismisses a suit under O. 9 R 2, C P. Code, for failure to pay process-fees, the High Court will interfere in revision.)
('36) 23 AIR 1936 Lah 560 (561). (Dismissal of suit without informing parties of date fixed.)
† ('35) 22 AIR 1935 Oudh 119 (120): 10 Luck 476 (DB). (Rejection of appeal for non-payment of deficient court-fee—Appellant not given opportunity to make good deficiency—Court acts illegally and with material irregularity.)
[*See also* ('19) 6 AIR 1919 Lah 203 (203) : 1919 Pun Re No. 169,)]

32. ('41) 28 AIR 1941 Mad 510 (512): ILR (1941) Mad 559 (DB). (Judge misdirecting himself as to basis of decision.)
('39) 41 Pun L R 909 (910).
✠ ('88) 12 Bom 617 (620) (DB).
('05) 29 Bom 213 (219) (DB).
('32) 19 AIR 1932 Nag 177 (179): 28 Nag L R 221. (Appeal from order granting review—Appellate Court confusing between reasons for review and merits of order—Revision lies.)
('33) 20 AIR 1933 Nag 188 (188): 29 Nag L R 164. (Finding of fact reached owing to misconception of method by which question should be considered can be interfered with.)
('20) 7 AIR 1920 Cal 459 (460) (DB).
('27) 99 Ind Cas 946 (947) (Cal).
('93) 1893 Pun Re No. 89, page 355 (357). (Suit based on adoption of plaintiff, decided on defendant's title.)

33. ('22) 3 L R All (Rev) 219 (221).
† ('29) 16 AIR 1929 Lah 294 (295). (Plea of *res judicata* which did not at all arise.)
('30) 17 AIR 1930 Lah 80 (80). (Decision based on question not arising in case.)
('29) 16 AIR 1929 Nag 347 (348). (Do.)
† ('21) 8 AIR 1921 Sind 159 (165) : 16 Sind L R 207 (FB).
('26) 13 AIR 1926 Mad 947 (948). (Court taking point not disclosed in election petition.)
('31) 18 AIR 1931 Mad 534 (536). (Court finding a case not set up.)
('98) 1898 Pun Re No. 41, page 141 (146) (DB).
('28) 15 AIR 1928 Lah 299 (301).
('35) 22 AIR 1935 Peah 174 (175). (Where a Court decides a suit, adjudicating on a case not put forward by the parties, it amounts to an irregularity in respect of which the High Court's power of revision may be invoked.)

34. ('94) 1894 Pun Re No. 19, page 44 (46).
('11) 10 Ind Cas 405 (405) (Lah).
† ('12) 13 Ind Cas 657 (658) (DB) (Cal). (Per Stephen J., *contra*.)
('25) 12 AIR 1925 Mad 884 (885) (DB). (Defendant challenging plaintiff's title—Court ignoring issue —Revision should be allowed.)
('12) 14 Ind Cas 627 (628) (DB) (Cal).
('13) 18 Ind Cas 610 (610) (Lah). (No adjudication was made as to minority.)
('16) 3 AIR 1916 Mad 583 (584). (In a suit on an award when it was contested that the arbitrators were guilty of misconduct and an issue was not raised.)
† ('20) 7 AIR 1920 Mad 843 (846).
('23) 10 AIR 1923 Mad 134 (135). (Issue as to under valuation.)
('28) 15 AIR 1928 Mad 815 (816) : 51 Mad 860 (DB). (Suit for setting aside *ex parte* decree—Validity of substituted service not considered.)
('36) 23 AIR 1936 Peah 97 (100). (Failure by Appellate Court to notice important ground of appeal.)
('39) 26 AIR 1939 Pat 216 (217). (Lower Appellate Court not dealing with points raised.)
('35) 22 AIR 1935 Lah 964 (965). (When the executing Court did not give any consideration to the question whether the Collector's proposal ought to be confirmed in the circumstances, but proceeded to adopt it as a matter of course, the Court failed to exercise judicially the discretion which is vested in it under S. 72, C. P. Code — It amounts to a material irregularity in the exercise of its jurisdiction and revision is competent.)
('39) 26 AIR 1939 Pat 74 (75).
('35) 22 AIR 1935 Pat 454 (455).
[*See also* ('33) 20 AIR 1933 Rang 156 (157).]

35. ('41) 28 AIR 1941 Rang 244 (246).
('38) 25 AIR 1938 All 520 (521). (Where the plaintiff's evidence does not satisfy the Court and the Court wrongly places the burden of proof on the defendant and proceeds to decide an issue on a

(9) Where it declines to examine the evidence offered in support of a case[36] or to go into the merits.[37]

(10) Where it orders the execution of a decree which is inexecutable,[38] or orders execution contrary to the directions contained in decree,[39] or orders notice in garnishee proceedings to a firm to pay into Court a debt really due by the individuals of the firm,[40] or attaches, in the execution of a personal decree, property which the judgment-debtor holds as trustee for another.[41]

(11) Where the lower Appellate Court decides an appeal on a case not raised in the first Court;[42] or remands a case after framing issues which do not arise[43] or after practically deciding the whole case itself,[44] or passes an order of remand which it is incompetent to pass[45] or without setting aside

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presumption raised against the defendant because of non-production of certain documents, High Court can interfere in revision.)
('35) 22 AIR 1935 Cal 710 (711).
† ('35) 22 AIR 1935 Mad 784 (784).
('31) 18 AIR 1931 Rang 136 (137) : 9 Rang 71. (Onus wrongly placed — Interference in revision not justified in absence of grave injustice having been caused.)
('36) 23 AIR 1936 Mad 526 (527).
('39) 26 AIR 1939 Lah 562 (562) : 41 Pun L R 513 (514).
('35) 22 AIR 1935 Rang 131 (132).
† ('39) 26 AIR 1939 Mad 644 (645): (1939) 1 Mad L Jour 334 (337). (To disregard the direction of the statute with regard to burden of proof is a perverse decision and conscious departure from the rule of procedure — High Court will interfere — A I R 1923 Mad 607 followed.)
[But see ('26) 92 Ind Cas 46 (46) (Oudh).
('19) 6 AIR 1919 Cal 266 (269) (DB).
('34) 151 Ind Cas 548 (548) (Lah). (The fact that the burden of proof as to certain issues was not correctly placed is no ground for interference in revision. AIR 1924 Lah 425: 5 Lah 288 followed.)
† ('39) 26 AIR 1939 Mad 733 (734): (1939) 2 Mad L Jour 44 (45). (Burden of proof wrongly placed — High Court will not interfere.)]

36. † ('21) 64 Ind Cas 85 (86) (Cal).
('83) 13 Bom 642 (649) (DB).
('33) 20 AIR 1933 Pat 278 (279).
('27) 14 AIR 1927 Lah 239 (239). (Application for restoration of suit.)
('29) 16 AIR 1929 Lah 878 (879). (Application to restore an application for restoration of a suit dismissed for default.)
('85) 7 All 345 (352) (DB).
('18) 5 AIR 1918 Pat 100 (102, 103) : 4 Pat L Jour 20 (DB).
('19) 6 AIR 1919 Pat 573 (574) (DB). (Petition to set aside execution sale.)
† ('23) 10 AIR 1923 Pat 530 (531) (DB).

37. ('12) 15 Oudh Cas 78 (80): 15 Ind Cas 212 (213). (Though defendant made default in filing written statement.)
('97) 1897 Pun Re No. 34, page 157 (159).
('88) 1888 All W N 126 (126).

38. ('99) 20 All 311 (314): 1899 All W N 124 (125) (DB). (Declaratory decree for partition did not complete the decree by allotting specific shares.)

39. ('12) 16 Ind Cas 235 (236) (DB) (Cal). (Sale contrary to directions in decree.)
('30) 17 AIR 1930 Lah 103 (104). (Ordering arrest in execution of mortgage decree.)

40. ('10) 8 Ind Cas 856 (856) (Mad).

41. ('01) 28 Cal 574 (583).

42. ('41) 28 AIR 1941 Rang 244 (246).
('09) 33 Bom 35 (38) : 1 Ind Cas 456 (457) (DB).
† ('27) 14 AIR 1927 Lah 73 (74).
('10) 6 Ind Cas 1010 (1011) (Lah).
('14) 1 AIR 1914 Lah 39 (41) : 1913 Pun Re No.34 (DB).
('25) 12 AIR 1925 Lah 68 (69). (That plaintiff was not entitled to sue.)
† ('25) 12 AIR 1925 Mad 357 (357). (Decreeing suit on a point of *res judicata* not raised by parties.)
('26) 13 AIR 1926 Rang 214 (215) : 4 Rang 202. [*See also* ('36) 23 AIR 1936 Rang 235 (236) : 14 Rang 511. (Where the lower Court decrees the suit on a case which is not to be found in the pleadings and is inconsistent therewith it acts illegally in the exercise of its jurisdiction and with material irregularity.)]

43. ('28) 15 AIR 1928 Mad 984 (985) (DB).
('29) 16 AIR 1929 Mad 205 (207) (DB).

44. ('23) 10 AIR 1923 Mad 113 (113).

45. ('40) 27 AIR 1940 Nag 349 (353): ILR (1940) Nag 538 (DB).
('40) 27 AIR 1940 Oudh 367 (368, 369) : 16 Luck 65 (DB). (Appellate Court allowing amendment of plaint to such an extent as to change the nature of the suit and ordering remand with a *de novo* trial—Material irregularity.)
('25) 12 AIR 1925 Mad 171 (171, 172) (DB).
('27) 14 AIR 1927 Cal 850 (852) : 55 Cal 219 (DB).
('27) 14 AIR 1927 Cal 401 (402) (DB). (Anomalous order of remand by Appellate Court.)
('05) 9 Cal W N 492 (494) (DB). (District Judge interfering with Munsif's decision under Bengal Tenancy Act on a question of law under S. 153.)
('28) 15 AIR 1928 Mad 991 (994) (DB). (Improper rejection of evidence by trial Court — Appellate Court ordering remand.)
('31) 18 AIR 1931 Mad 791 (791, 792).
('28) 15 AIR 1928 Mad 984 (985) (DB). (Remand not shown to be without jurisdiction — No interference by High Court.)
('32) 1932 Mad W N 848 (850). (Do.)
[*See also* ('27) 14 AIR 1927 Mad 1111 (1112). (Do.)
('27) 14 AIR 1927 Mad 335 (336) (DB). (Do.)]

the lower Court's decree.[46]

(12) Where it refuses to record a compromise in a proceeding under O. 21 R. 90[47] or where it passes a decree on a compromise in the absence of a completed compromise before the Court.[48]

(12a) Where it confirms an execution sale under O. 21 R. 92 without disposing of an application to set aside the sale under O. 21 R. 90.[49]

(13) Where it appoints a person as a *guardian ad litem* of another, without his consent[50] or where it appoints such guardian to a person of unsound mind without considering the question of his unsoundness of mind.[51]

(14) Where the Court passes a decree on compromise by the guardian *ad litem* without enquiring whether it was for the benefit of the minor[52] or allows reference to arbitration by the guardian without passing an order under section 462 (O. 32 R. 7) of the Code.[53]

(15) Where it proceeds with a suit stayed under section 10 of the Code.[54]

(16) Where it refuses to issue a sale certificate to the auction purchaser[55] or omits to draw up a decree in pursuance of a judgment.[56]

(17) Where the Income-tax Commissioner refuses to make a reference to the High Court under S. 66 clause 2 of the Income-tax Act.[57]

(18) Where it omits to determine who the real legal representatives are,[58] or refuses to issue a certificate for refund of court-fee where the case was remanded under O. 41 R. 23,[59] or refuses to issue summons.[60]

(19) Where it passes an instalment decree not allowed by the law.[61]

(20) Where it passes a decree on a contract *prima facie* void in law.[62]

(21) Where it grants reliefs not prayed for without reference to any provision of law.[63]

For other cases where the lower Court was held to have acted illegally or with material irregularity in the exercise of jurisdiction, see the undermentioned decisions.[64]

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46. ('24) 11 AIR 1924 Rang 177 (178) : 1 Rang 656 (DB).
47. ('29) 16 AIR 1929 Lah 886 (887).
48. ('98) 1898 Pun Re No. 50, page 164 (167) (DB).
49. ('42) 29 AIR 1942 Cal 480 (481) (DB).
50. ('09) 4 Ind Cas 1108 (1108) (Mad).
51. ('22) 9 AIR 1922 Cal 86 (86) (DB).
52. ('89) 1889 Pun Re No. 105, page 368(373)(DB). ('35) 22 AIR 1935 Oudh 287 (289) : 11 Luck 30.
53. ('42) 29 A I R 1942 All 85 (89) : I L R (1941) All 807 (DB).
('40) 27 AIR 1940 Sind 178 (180) : I L R (1940) Kar 327 (DB).
('95) 1895 Pun Re No. 37, page 153 (155) (DB).
54. ('29) 16 AIR 1929 All 957 (959) (DB).
55. ('17) 4 AIR 1917 Pat 697 (697) : 1 Pat L Jour 446 (DB).
56. ('43) 30 AIR 1943 Nag 204 (209): ILR (1943) Nag 241 (FB). (Wrong omission to draw up a decree in accordance with a finding or interlocutory order which amounts to a decree.)
('12) 8 Nag L R 92 (95, 96): 15 Ind Cas 935 (936).
('12) 37 Bom 60 (63) : 17 Ind Cas 637 (637) (DB). (NOTE.—This case is overruled on another point in AIR 1914 Bom 149 : 39 Bom 339 (FB).)
57. ('24) 11 AIR 1924 Lah 662 (663).
58. ('19) 6 A I R 1919 Mad 510 (511) : 42 Mad 76 (79) (DB).
59. ('18) 5 AIR 1918 Bom 157(158):42 Bom363(DB).
60. ('85) 9 Bom 308 (310) (DB).
61. *See* ('07) 11 Cal W N 857 (858) (DB). (Though decree was wrong, it was held to be an error of law only.)
62. † ('12) 15 Ind Cas 35 (36) (All). (It is an illegality.)
('15) 2 AIR 1915 Mad 635 (636) : 37 Mad 385.
('24) 11 AIR 1924 Mad 159 (160). (Bond given for future adulterous cohabitation.)
('24) 11 AIR 1924 Nag 101 (103) : 21 Nag L R 6. (Not given as part and parcel of an illegal transaction.)
63. † ('24) 11 AIR 1924 Mad 911 (911).
('26) 13 AIR 1926 Pat 519 (520). (Addition of party having no *locus standi*.)
('24) 11 AIR 1924 Oudh 11 (14) (DB).
('35) 22 AIR 1935 Pesh 157 (157).
64. ('43) 30 AIR 1943 Bom 160 (164): ILR (1943) Bom 186. (Amendment of written statement raising the plea that suit was barred under S. 80, C. P. Code, allowed after five years—Plaintiff materially prejudiced — *Held*, Court's order was materially irregular.)

See also the undermentioned cases[65] where the exercise of jurisdiction was held to be neither illegal nor irregular.

('43) 30 AIR 1943 Pat 53 (55) : 21 Pat 544 (DB). (Stay under Arbitration Act granted when it ought not to have been granted.)

('42) 29 AIR 1942 Lah 228 (232): ILR (1943) Lah 1 (FB). (Application under S. 21A, Punjab Alienation of Land Act — Facts not apparent on face of record—Court must frame issue, institute enquiry and come to decision on it — Court not making enquiry but merely relying on Naib-Tahsildar's report to Collector in mutation proceedings—Court acts illegally and with material irregularity.)

('42) 29 AIR 1942 Pesh 57 (58). (First Court taking view against established facts—Second Court dismissing suit on technical ground—Courts held committed material irregularity and High Court could interfere in revision.)

('42) 29 AIR 1942 Sind 7 (8, 9) (DB). (Judge allowing amendment adding issue against party's wishes after case is already referred to arbitration—Judge in such case deals with matter referred in manner not provided in Sch. II, C. P. Code.)

('41) 28 AIR 1941 Cal 618 (622) (DB). (Application under scheme framed under S. 92, C. P. Code — Order deciding only some of questions raised—Revision under cl. (c) lies.)

('41) 28 A I R 1941 Nag 133 (134). (Decision as to when person claiming paramount title is necessary party to a mortgage suit can be interfered with in revision.)

('41) 28 AIR 1941 Nag 205 (207): ILR (1942) Nag 258. (Order of Court rejecting act performed by party through recognised agent—No direction to perform it in person.)

('41) 28 AIR 1941 Pat 43 (44): 19 Pat 935 (DB). (Order directing sale of preliminary decree for accounts in partnership action such decree being held attachable but not saleable.)

('41) 28 AIR 1941 Rang 244 (246, 247). (Decision on point waived by party.)

('40) 44 Cal W N 701 (702). (An incorrect order under O. 41 R. 6 (2) can be interfered with in revision.)

('40) 27 A I R 1940 Oudh 342 (346) : 15 Luck 641 (DB). (Civil Court proceeding with a suit in spite of its finding that its jurisdiction is temporarily ousted by U. P. Encumbered Estates Act.)

('40) 27 A I R 1940 Oudh 405 (408) : 16 Luck 79 (DB). (Decree passed in absence of party—Decree set aside without Court satisfying itself as to the sufficiency of the cause of absence of the party.)

('40) 27 AIR 1940 Pat 437 (438) (DB). (Refusal to issue commission under O. 26 R. 4, to examine witness living more than 200 miles from Court house—Revision lies.)

('39) 26 AIR 1939 Mad 750 (750). (Temporary injunction granted without *prima facie* case being made out.)

('36) 23 AIR 1936 Pat 591 (593): 15 Pat 738 (DB). (Where it refuses to grant time for substitution of legal representative of a deceased pauper applicant.)

('37) 24 AIR 1937 All 753 (753) : I L R (1937) All 943. (Refusal to give relief under U. P. Agriculturists' Relief Act.)

('35) 22 AIR 1935 All 310 (321): 57 All 810 (DB). (But Court not judicially considering what it ought to have done—There is illegal or irregular exercise of jurisdiction.)

('37) 24 AIR 1937 Mad 767 (769). (Registration of firm subsequent to suit, filed on its behalf — Suit should be allowed to proceed — Plaint should be treated valid from date of registration—Defendants not objecting to suit until a year elapsing after their written statement—Suit dismissed by lower Court on objection — Case held fit for interference in revision.)

('37) 24 AIR 1937 Lah 352 (352): 38 Pun L R 431 (432). (Omission to write judgment in accordance with law.)

('39) 26 AIR 1939 Lah 470 (470, 471): 41 Pun LR 492 (493). (It is material irregularity to hold an item proved which the trial Court has held not proved without stating on what evidence the Appellate Court relies for proof of the item.)

('39) 26 AIR 1939 Pat 30 (32). (Trial Court refusing to consolidate the suits although there is sufficient unity in the issues in suits to warrant consolidation—High Court can interfere in revision.)

('36) 23 AIR 1936 Pesh 185 (186). (Company in liquidation itself starting execution proceedings—It cannot rely on S. 171, Companies Act, to debar persons from raising objections under O. 21 R. 58 —Order refusing to entertain objections is open to revision.)

('38) 25 AIR 1938 Nag 411 (412). (Suit for specific performance of contract of sale — Lower Courts failing to give effect to decree which is in terms of agreement between parties—High Court can rectify error under S. 115.)

('36) 23 A I R 1936 Lah 883 (885). (Refusal to entertain appeal which is competent constitutes error in exercise of jurisdiction.)

('35) 22 AIR 1935 All 147 (147). (Application under S. 7, Charitable and Religious Trusts Act—Judge should not dispose of matter without allowing parties to produce evidence — When he so does, there is irregular exercise of jurisdiction.)

('38) 25 AIR 1938 Sind 76 (78): 32 Sind LR 709 (DB).

† ('35) 22 AIR 1935 All 343 (345) (DB). (Disallowing decree-holders' prayer to attach property of judgment-debtor without adequate reasons, by allowing objections of third party before attachment is effected.)

('37) 39 Pun L R 582 (583). (Court acts with material irregularity in the exercise of its jurisdiction in placing a construction on an award which is not in accordance with the evidence given by the arbitrator himself.)

65. ('42) 29 A I R 1942 Oudh 344 (345) (DB). (Refusal to issue commission.)

('42) 29 AIR 1942 Oudh 361 (362) (DB). (Application to sue as a pauper—Lower Court taking into consideration applicant's statement besides the allegations in plaint to determine whether there is subsisting cause of action—No material irregularity.)

('42) 29 AIR 1942 Oudh 395 (397). (Not taking into consideration a certain statute is itself not sufficient unless the order of the Court is against the provision.)

('42) 29 AIR 1942 Oudh 426 (427). (The Munsif, who passed a decree on award, referring to the arbitrator to see whether there was a mistake in the award—The Munsif did not act illegally—No interference.)
('42) 29 AIR 1942 Oudh 431 (432) (DB). (Wrong decision on a point of law is no ground for revision.)
('42) 29 AIR 1942 Pat 251 (257): 21 Pat 197 (DB). (The limits of summary enquiry under Part VII of the Succession Act are a matter to be judicially determined by the Court holding the enquiry.)
('41) 28 AIR 1941 Mad 831 (832) (DB). (Order of lower Court on application under S. 20, Madras Agriculturists' Relief Act neither perverse nor embodying irregularity—No interference in revision.)
('41) 28 AIR 1941 Pat 394 (395) (DB). (Finding on evidence.)
('40) 27 AIR 1940 Mad 909 (909). (Suit on pro-note —Mere fact that it was decreed by Village Court on lesser degree of proof than would have been required by District Munsif does not justify interference in revision.)
('40) 27 AIR 1940 Sind 190 (190):ILR (1940) Kar 34 (DB). (Order as to arbitration fees in arbitration proceedings.)
('39) 26 AIR 1939 All 646 (648). (Admission of evidence by lower Appellate Court which was refused by trial Court.)
('16) 3 AIR 1916 Mad 632 (632) (DB). (Undervaluation of property in sale proclamation is not a material irregularity.)
('24) 11 AIR 1924 Pat 816 (817) (DB). (Rejecting of certificate of an unregistered medical practitioner.)
('32) 19 AIR 1932 All 76 (78).
('33) 20 AIR 1933 Lah 266 (266). (Granting leave under S. 20, cl. (b) without first issuing notice to opposite party is neither illegality nor material irregularity.)
('34) 21 AIR 1934 Lah 349 (350). (Execution application dismissed for default—Revision against the order—Jurisdiction of lower Court held to be neither illegal nor irregular.)
('33) 20 AIR 1933 Oudh 255 (256). (Order under O. 23 R. 1.)
('33) 20 AIR 1933 Oudh 345 (345) (DB). (Order of refusal to receive documentary evidence.)
('34) 21 AIR 1934 Rang 202 (203). (Remanding case on matter of opinion is not acting with material irregularity.)
('84) 1884 All W N 167 (167) (DB). (Appellate Court going into merits of appeal in dismissing appeal for default.)
('14) 1 AIR 1914 Bom 302 (302):38 Bom 190 (DB). (Judge having both small cause and ordinary jurisdiction transferring small cause to ordinary side without return of plaint.)
('81) 7 Cal 330 (333) (DB).
('99) 26 Cal 74 (77) (DB).
('86) 1886 Pun Re No. 102, page 247 (248) (DB).
('15) 2 AIR 1915 Lah 253 (254) : 1916 Pun Re No. 28 (DB). (Court giving advice to arbitrators.)
('15) 2 AIR 1915 Mad 281 (282) (DB). (Court vacating order recording satisfaction of decree obtained by fraud—Inherent power.)
('13) 21 Ind Cas 781 (781) (Mad). (Citing opponent as witness.)
('16) 3 AIR 1916 Mad 504 (505). (Court attaching debt without inquiring into its existence.)
('25) 12 AIR 1925 Mad 1207 (1208). (Election Court deciding as a question of fact if the returning officer's decision regarding validity of vote was correct.)
('26) 13 AIR 1926 Mad 256 (257). (Setting aside *ex parte* decree on the ground of absence of pleader.)
('27) 14 AIR 1927 Mad 536 (537) : 50 Mad 654. (Transfer of a part-heard election enquiry.)
('15) 12 AIR 1925 Oudh 433 (434). (Order dismissing suit for plaintiff's absence though his case was closed.)
('18) 5 AIR 1918 Pat 338 (340) (DB). (Order giving allowance to a sharer in a pending administration sut.)
('22 9 AIR 1922 Pat 38 (39) (DB).
('24 11 AIR 1924 Pat 387 (387) : 2 Pat 906 (DB). (Oder extending time for payment of money under conpromise decree)
('29)16 AIR 1929 Rang 113 (113) (DB). (Order by liqudator under S. 47, Burma Co-operative Societies Act—Civil Court ordering execution — No irregularity.)
('29) 16 AIR 1929 Rang 223 (225).
('25) 12 AIR 1925 Pat 760 (761). (Suit for partition —Ooission to partition a portion of suit property —Subsequent partition of the same—No irregularity.)
('31) 8 AIR 1931 Cal 52 (53) (DB).
('23) 10 AIR 1923 Mad 188 (191)(DB). (Proceedings unde S. 36, Legal Practitioners' Act — Petition without particulars of acts—Trial on such petition —Noirregularity.)
('24) 11 AIR 1924 Pat 529 (530) (DB). (Refusal of adjournment unless costs are paid immediately.)
('95) 19 Bom 286 (288) (DB). (Revisional Judge under Dekkhan Agriculturists' Relief Act has only to see if there was failure of justice.)
('37) 24 AIR 1937 Pat 349 (351). (Appeal—Dismissa under O. 41 R. 11 (2) summarily—Absence of judment expressing acceptance of finding of trial Gurt.)
('37) 17 Ind Cas 212 (213) (Pat). (Order of Judge in lowe Appellate Court refusing to revise order of predecessor-in-office who had disposed of appeal filed with insufficient court-fee.)
('35) 22AIR 1935 All 204 (205) (DB). (Bidder applyig for not enforcing sale on ground that he has bid under misapprehension —Court believing him and ordering return of deposit—There is no materil irregularity in exercise of jurisdiction.)
('34) 21AIR 1934 All 530 (530). (Finding on oral evidene and incidentally on construction of letters —Quesion of construction cannot be examined in revisiot)
('36) 23AIR 1936 Pesh 213 (214). (Court can review uiler S. 151 previous order fixing court-fees notwitstanding provisions contained in S. 12, Court-fes Act—Taking up question of court-fees for secad time does not amount to materinl irregularit.)
('39) 26AIR 1939 Rang 183 (184):1939 Rang L R 514 (81). (*Bona fide* order of Judge upon material befre him that advocate could not appear on behalf f party by reason of his being interested on

A plea that the Court *refused* to exercise jurisdiction cannot be raised along with the plea that the Court acted with material irregularity in the exercise of jurisdiction.[66] An objection to an application for revision that the lower Court had jurisdiction to hear and decide the matter and that it did not exercise its jurisdiction illegally or with material irregularity is not a *preliminary* objection inasmuch as such objection cannot be decided without going into the merits of the application for revision.[67]

13. Error of law or fact. — An error of law or fact by which a Court assumes a jurisdiction which it has not, or declines to exercise a jurisdiction which it has, will come under clauses (a) and (b).[1] And an error of law in the *mode* prescribed for the exercise of jurisdiction will come under clause (c). But a *conclusion or decision* arrived

behalf of opposite party in matters collateral to suit in question—High Court will not interfere in revision.)

('38) 25 AIR 1938 Rang 241 (242): 1939 Rang L R 14 (DB). (Objection by party that pleader engaged by opposite party should not be allowed to appear as he had been previously engaged by him in same litigation—Parties heard and objection accepted in lower Court — Application to set aside the order does not lie under S. 151 or S. 115 of the Code or S. 85, Government of Burma Act.)

('35) 22 AIR 1935 Rang 521 (521). (Court confirming sale in favour of person not properly represented — No material irregularity and hence revision is not competent.)

('39) 26 AIR 1939 Pat 95 (96). (Court in declaring party as pauper not acting illegally or with material irregularity—Revision does not lie.)

('38) 25 AIR 1938 Lah 223 (225). (Party is entitled to know details of claim preferred against him — Aggrieved party not ignorant of nature of claim against him—Details of claim supplied to him on date of hearing — Failure by arbitrator to allow him further opportunity to meet case against him does not amount to judicial misconduct—Conclusion of lower Court on the point cannot be attacked in revision.)

('38) 25 AIR 1938 Cal 615 (618) (DB). (Where decree-holder applies to withdraw from execution proceedings on the ground that a third party has acquired some interest in the property and it is rejected, no revision lies especially at the instance of the judgment-debtor who has no *locus standi*.)

('38) 25 AIR 1938 Cal 793 (794) (DB). (Lower Court deciding on construction of written leases that certain tenancies are ordinary occupancy holdings and awarding landlord transfer fees on that footing under S. 65-J, Bengal Tenancy Act —There can be no interference under S. 15.)

('37) 24 AIR 1937 All 786 (787) : I L R (1938) All 1 (DB). (One of several trustees not impleaded in suit — Such trustee later on joined and summons issued to him—Trustee refusing to take summons — Court proceeding *ex parte* against him — No non-compliance with provisions of O. 31 R. 2—No material irregularity in procedure followed by Court justifying interference in revision.)

('35) 22 AIR 1935 All 476 (477). (Adjournment — Decision of lower Appellate Court as to whether there was sufficient cause for adjournment held not open to revision.)

('35) 60 Ind Cas 519 (519) : 18 Nag L Jour 132 (134). (Decision in pending suit that certain evidence is inadmissible—Court does not act illegally or with material irregularity.)

('34) 21 AIR 1934 Oudh 491 (492) (DB). (Order allowing application to set aside order dismissing suit for default—Such order to be sparingly interfered with.)

('36) 23 AIR 1936 Nag 157 (159) : I L R (1936) Nag 73. (Where what the Court has done is only to decide the starting point of limitation, it has every power to do so and such an order is not revisable.)

('39) 26 AIR 1939 Pat 564 (565) : 1939 Pat W N 341 (343) (DB). (Refusal to decide some issues as preliminary issues in suit.)

('36) 23 AIR 1936 Oudh 172 (172) (DB). (No second appeal lies from order rejecting application for setting aside sale which has been confirmed—Nor can such appeal be treated as application for revision, even though lower Court wrongly holds that time for confirmation of sale cannot be extended without consent of parties.)

('35) 22 AIR 1935 Pat 143 (144). (Court fixing value of attached holding and ordering sale of part of the holding under O. 21 R. 17 — Order not irregular.)

66. † ('26) 13 AIR 1926 Cal 773 (775) : 53 Cal 679 (DB).

67. ('35) 22 AIR 1935 All 310 (314) : 57 All 810 (DB).

Note 13

1. ‡ ('35) 22 AIR 1935 Pat 385 (388) : 14 Pat 488 (DB). (If a particular jurisdiction originates in some special law or enactment, the High Court can always interfere in the sense that it can construe the law and in accordance with that construction compel the lower Court to exercise such jurisdiction or to refrain from exercising such jurisdiction if not warranted by law or the enactment in question.)

('37) 24 AIR 1937 Pat 647 (651) : 16 Pat 729 (DB). (The decision on a question of law can be interfered with if in fact a question of jurisdiction does arise.)

('37) 24 AIR 1937 Pat 651 (652) (DB). (Where matter of jurisdiction arises High Court can interfere in a question of law or fact.)

† ('38) 25 AIR 1938 Pat 22 (24): 16 Pat 766 (FB). (High Court will interfere where the jurisdiction is derived from statute and matter is one of construction of statute.)

('36) 23 AIR 1936 Pat 119 (121).

at in the proper exercise of jurisdiction, which is erroneous in law or fact is as has been observed in Note 12, not a ground for revision.[2] In *Balakrishna Udayar* v.

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2. *See also the following cases* :
('43) 30 AIR 1943 All 21 (22). (Appeal decided on wrong principle of law — Not ground for interference)
('43) 30 AIR 1943 Mad 11 (11).
('43) 30 AIR 1943 Oudh 192 (196).
('43) 30 AIR 1943 Oudh 300 (302).
('42) 29 AIR 1942 Cal 530 (532). (Even if a Small Cause Court Judge has ignored certain document while arriving at his decision on the point at issue, such omission does not come within the mischief of Section 115.)
('42) 1942 Oudh W N 624 (626).
('42) 29 AIR 1942 Pat 133 (135).
('42) 29 AIR 1942 Pat 251 (258): 21 Pat 197 (DB).
('42) 203 Ind Cas 234 (235) (Oudh).
('42) 29 AIR 1942 Sind 57 (59) : I L R (1941) Kar 587 (DB). (Failure to distinguish between condition in India and England.)
('41) 28 AIR 1941 Mad 46 (47).
('41) 28 AIR 1941 Pat 638 (640).
('40) 27 AIR 1940 Oudh 353 (354) (DB).
('40) 27 AIR 1940 Pat 612 (612).
('39) 26 AIR 1939 Rang 448 (448): 1939 Rang L R 591 (DB). (Rejection of evidence.)
† ('33) 20 AIR 1933 All 86 (89) (DB).
('33) 20 AIR 1933 All 557 (558) (DB). (Dismissal of application under O. 38 R. 5 on an erroneous view.)
('34) 21 AIR 1934 All 368 (370) : 56 All 721 (DB).
('34) 21 AIR 1934 All 541 (542).
† ('34) 21 AIR 1934 All 620 (622): 57 All 17 (FB). (Decision on a question of court-fee.)
('34) 21 AIR 1934 Bom 299 (300) : 58 Bom 597 (DB). (Small Cause Court deciding the stamp duty payable under a vakalatnama.)
('33) 20 AIR 1933 Cal 20 (21) (DB).
('33) 20 AIR 1933 Lah 940 (941). (Trial Court returning plaint for want of jurisdiction—Appellate Court remanding case finding that trial Court has jurisdiction—Revision does not lie from appellate order.)
('34) 21 AIR 1934 Lah 165 (166). (Leave to amend plaint refused—Decision held to be only erroneous.)
('34) 21 AIR 1934 Lah 230 (231).
('32) 19 AIR 1932 Mad 716 (720).
('33) 20 AIR 1933 Oudh 240 (241).
('34) 21 AIR 1934 Pat 550 (551). (Order setting aside an award.)
('33) 20 AIR 1933 Sind 82 (84) : 26 Sind L R 491 (DB).
('33) 20 A I R 1933 Sind 229 (230, 231) : 27 Sind L R 261 (DB).
('34) 21 AIR 1934 Rang 230 (231).
('34) 21 AIR 1934 Rang 306 (307).
('89) 16 Cal 749 (751) : 16 Ind App 104 (P C).
('26) 95 Ind Cas 838 (839) (Cal)
('28) 113 Ind Cas 539 (540) (Lah).
('29) 118 Ind Cas 141 (142) (Pat).
('29) 116 Ind Cas 660 (661) (Nag).
('85) 7 All 407 (409) (DB).
† ('85) 7 All 661 (664) (FB).
('85) 1885 All W N 259 (259) (DB). (Order adding a party under old S. 32, C. P. Code.)
('86) 8 All 111 (114, 115) (FB). (Failure to exercise jurisdiction vested by law.)
('86) 1886 All W N 57 (57) (DB). (Small Cause Court after inquiry and finding that it relates to immovable property non-suiting plaintiff.)
('87) 9 All 104 (105, 106) (FB).
('90) 1890 All W N 233 (234) (DB). (Holding that the particular property was not attachable under law.)
('98) 20 All 299 (302). (The fact that the Subordinate Judge wrongly rejected the pauper application on the ground that the applicant has no *prima facie* case is no ground.)
('03) 25 All 509 (526) (FB).
('04) 26 All 572 (573) (DB).
('05) 27 All 380 (382) (DB).
('05) : All L Jour 370 (371) (DB). (Order rejecting a peition for rateable distribution.)
('06) 28 All 84 (87) (DB).
('09) 31 All 38 (41) (DB).
('14) 1 AIR 1914 All 125 (125).
('18) 5 AIR 1918 All 186 (186)(DB). (The finding of a lower Court in a suit on a note executed by defendant that the defendant-executant is a minor but that s he fraudulently misrepresented his age is liable is a mistake of law.)
('20) 7 AIR 1920 All 142 (142).
('23) 10 AIR 1923 All 465 (466) : 46 All 295.
('24) 11 AIR 1924 All 691 (691).
('27) 14 AIR 1927 All 573 (574). (Whether or not an award is valid.)
† ('29) 6 AIR 1929 All 581 (585): 51 All 957 (DB). (Error of judgment in accepting the proposal of sale of trust property by a particular person.)
('29) 16 AIR 1929 All 593 (595) : 51 All 910 (DB).
('30) 17 AIR 1930 All 122 (123) (DB).
('30) 17 AIR 1930 All 158 (160) (DB).
('31) 18 AIR 1931 All 72 (73) (DB). (Dismissal of a receiver appointed by lower Court in the exercise of discetion.)
('31) 18 AIR 1931 All 425 (426) (DB).
† ('31) 18 AIR 1931 All 667 (668) (DB).
('32) 19 AIR 1932 All 379 (381) (DB).
('05) 30 Bom 113 (115) (DB).
('06) 30 Bom 625 (630) (DB). (Revision against an order dimissing review.)
('85) 11 Cal 45 (49) (DB). (Releasing in execution the shae of a person who was no party to the suit.)
('88) 15 Cal 446 (449) (DB).
('89) 16 Cal 749 (752) : 16 Ind App 104 (PC).
('92) 19 Cal 544 (561) (FB).
('95) 22 Cal 729 (734): 22 Ind App 90 (PC). (Where decree was obtained in a personal capacity and not as manger, Court of Wards.)
('97) 24 Cal 133 (140) (DB).
('98) 26 Cal 74 (76) (DB).
('07) 11 Cal W N 857 (858) (DB). (Order for payment o the amount of rent decreed by instalments.)
('09) 3 Ind Cas 466 (467) (DB) (Cal). (Error of law in comig to a decision on the question of possession in suit under S. 9, Specific Relief Act.)
('10) 6 Ind Cas 327 (331) (DB) (Cal).

† ('11) 11 Ind Cas 125 (126) (DB) (Cal). (Summary rejection of application to deposit decree amount to save tenancy.)
('15) 2 AIR 1915 Cal 278 (280) (DB).
('16) 3 AIR 1916 Cal 642 (644) (SB).
('16) 3 AIR 1916 Cal 887 (888) (DB).
('17) 4 AIR 1917 Oudh 24 (25).
('20) 7 AIR 1920 Cal 75 (75). (Rent suit dismissed on the ground that while the holding consisted of two plots, only one was described in the plaint.)
('20) 7 AIR 1920 Cal 71 (72) (DB). (Order staying or refusing stay of execution.)
('21) 8 AIR 1921 Cal 749 (750).
('23) 65 Ind Cas 512 (513) (DB). (Cal).
('23) 10 AIR 1923 Cal 280 (280) (DB).
('25) 12 AIR 1925 Cal 814 (816) (DB). (Order of Court in accepting plaint valuation as correct in spite of objection.)
† ('26) 13 AIR 1926 Cal 773 (775): 53 Cal 679 (DB). (That O. 9 R. 4 does not apply to execution proceedings is only an error of law.)
('27) 14 AIR 1927 Cal 928 (929) (DB). (Lower Court thinking that O. 9 R. 9 did not apply to set aside a dismissal for default.)
('85) 1885 Pun Re No. 64, p. 134 (135) (DB).
('86) 1886 Pun Re No. 111, p. 63 (64) (DB). (Lower Appellate Court remanding a case to a Court other than the Court which tried it.)
('90) 1890 Pun Re No. 6, p. 13 (14, 15).
('94) 1894 Pun Re No. 9, p. 15 (16).
(1900) 1900 Pun L R 237 (238) (DB). (Order to a bank to furnish copies of an account from its book under S. 6, Act XVIII of 1891, though not proper is not open to revision.)
('11) 9 Ind Cas 1018 (1018) (Lah).
('13) 19 Ind Cas 847 (847) (Lah).
('15) 2 AIR 1915 Lah 105 (105) : 1915 Pun Re No. 66 (DB). (Rejection of private award in toto where part of award is valid and separable is at the most an error of law.)
('18) 5 AIR 1918 Lah 331 (335) : 46 Ind Cas 189 (190).
('27) 14 AIR 1927 Lah 43 (44). (Refusal to excuse delay under S. 5 of the Limitation Act.)
('27) 14 AIR 1927 Lah 847 (847) (DB). (When leave to amend was given.)
('27) 14 AIR 1927 Lah 862 (862).
('28) 15 AIR 1928 Lah 102 (103). (Error in applying a proper test to decide a question of fact.)
('28) 15 AIR 1928 Lah 427 (428). (Decision whether a decree was passed under O. 17 R. 2 or R. 3.)
† ('29) 16 AIR 1929 Lah 26 (27).
('30) 17 AIR 1930 Lah 468 (469). (Restitution of property sold in execution under S. 151.)
('30) 17 AIR 1930 Lah 574 (575).
('87) 10 Mad 51 (52) (DB). (Order refusing to amend a decree to bring it in conformity with judgment.)
('88) 11 Mad 303 (304) (DB). (Personal decree against adult sons is only an error but one against minor sons is materially irregular.)
('82) 16 Mad 424 (426) (DB). (Amending a decree to bring it in conformity with the plaint.)
('94) 17 Mad 371 (372) (DB).
('04) 27 Mad 504 (509) (DB). (Order refusing restoration of property sold but directing refund of excess money.)
('08) 31 Mad 458 (460). (But where the mistake of law is caused by the case not being properly heard then there will be interference by the High Court on the ground of material irregularity.)
('08) 18 Mad L Jour 249 (249). (That one of the arbitrators being a party's pleader was insufficient to invalidate award.)
('11) 11 Ind Cas 835 (837) (Mad).
('11) 12 Ind Cas 250 (253) (DB) (Mad). (Wrong view of the presumption as to consideration for pro-notes.)
('12) 16 Ind Cas 405 (406) (DB) (Mad).
('14) 1 AIR 1914 Mad 141 (142).
('14) 1 AIR 1914 Mad 216 (217, 218). (Wrong view on the question of law relating to service of summons.)
('32) 19 AIR 1932 Mad 472 (473). (Do.)
('85) 11 Cal 261 (263).
('14) 1 AIR 1914 Mad 149 (149). (Order refusing to excuse delay in presenting an appeal is not open to revision though the appeal was as a matter of fact presented in time.)
('16) 3 AIR 1916 Mad 387 (388, 389) (DB).
('17) 4 AIR 1917 Mad 404 (405).
('19) 6 AIR 1919 Mad 183 (184). (Decision dismissing an application by prior vendor of portion of property to set aside a sale.)
('22) 9 AIR 1922 Mad 8 (4).
('29) 16 AIR 1929 Mad 624 (624).
('30) 17 AIR 1930 Mad 486 (488).
('30) 17 AIR 1930 Mad 528 (531) : 53 Mad 378. (Transfer of territorial jurisdiction—Trial of pending suit by Court having jurisdiction without transfer order—Irregularity is merely technical.)
† ('31) 18 AIR 1931 Mad 83 (90): 54 Mad 627 (DB).
('15) 2 AIR 1915 Nag 91 (92) : 11 Nag L R 99. (Erroneous view of the law as regards ancestral property of a Hindu.)
('16) 3 AIR 1916 Nag 86 (88) : 13 Nag L R 116.
('22) 9 AIR 1922 Nag 128 (129).
('22) 9 AIR 1922 Nag 264 (265).
('26) 13 AIR 1926 Nag 472 (473).
('29) 16 AIR 1929 Nag 317 (318).
('30) 17 AIR 1930 Nag 136 (136).
(1900) 3 Oudh Cas 321 (323). (Confirming execution sale ordered to be postponed.)
('08) 11 Oudh Cas 238 (239) (DB).
('26) 13 AIR 1926 Oudh 28 (30) (DB).
('26) 13 AIR 1926 Oudh 80 (80). (Where the Court below decided that the death of one of several arbitrators did not render the award invalid.)
('26) 13 AIR 1926 Oudh 183 (184). (Defect in judgment was only due to want of experience.)
('29) 16 AIR 1929 Oudh 26 (29) : 4 Luck 93 (DB). (That High Court would come to a different conclusion on fact in a petition under O. 21 R. 90.)
('31) 18 AIR 1931 Oudh 408 (410) (DB).
('18) 5 AIR 1918 Pat 520 (521) (DB). (Appointment of guardian *ad litem*.)
('19) 6 AIR 1919 Pat 476 (477).
('20) 7 AIR 1920 Pat 266 (266) : 5 Pat L Jour 263 (DB). (Appellate Court taking additional evidence under O. 41 R. 27.)
('22) 9 AIR 1922 Pat 376 (377) : 1 Pat 48 (DB).

('24) 11 AIR 1924 Pat 37 (38) : 2 Pat 800. (That notice was not served within a month of deposit under O. 21 R. 89.)
('25) 12 AIR 1925 Pat 372 (374) (DB.) (Subordinate Judge deciding a question following a ruling of another High Court.)
('15) 2 AIR 1915 Lah 175 (175). (Do.)
('29) 16 AIR 1929 Pat 747 (748). (Order on the question of possession under O. 38 R. 8 based on an enquiry into title.)
('93-1900) 1893-1900 Low Bur Rul 548.
('01) 1 Low Bur Rul 142 (142).
('11) 12 Ind Cas 855 (857) (Low Bur).
('14) 1 AIR 1914 Low Bur 62 (63): 7 Low Bur Rul 101.
('17) 4 AIR 1917 Low Bur 42 (43).
('19) 6 AIR 1919 Low Bur 45 (45). (Fatal defect in a suit—Objection not taken in the first Court but only in appeal.)
('29) 16 AIR 1929 Rang 21 (22): 6 Rang 667.
('29) 16 AIR 1929 Rang 187 (188).
('29) 16 AIR 1929 Bom 198 (199). (Court taking one view out of conflicting authorities.)
('31) 18 AIR 1931 Rang 136 (137): 9 Rang 71. (Do.)
('26) 23 Mad L W 603 (604). (Do.)
('29) 16 AIR 1929 Rang 270 (271). (Erroneous decision on issue.)
† ('14) 1 AIR 1914 Sind 141 (141) : 8 Sind L R 190 (DB).
('19) 6 AIR 1919 Sind 104 (104) : 13 Sind L R 98 (DB). (Erroneous view as to misconduct of an arbitrator.)
('74) 22 Suth W R 277 (277) (DB).
('31) 136 Ind Cas 251 (252) (Oudh).
('32) 19 AIR 1932 All 113 (114) : 53 All 519 (DB). (Judge wrongly applying a ruling.)
('82) 8 Cal 832 (833) (DB).
('94) 21 Cal 799 (806) (DB). (Erroneous legal conclusion in petition to set aside sale.)
('18) 5 AIR 1918 Cal 415 (419) (SB).
('19) 6 AIR 1919 Mad 869 (870).
('18) 5 AIR 1918 Nag 263 (264).
† ('24) 11 AIR 1924 Cal 493 (495). (Court holding that a notice under S. 77 of the Railways Act is not necessary on the facts of the case.)
('22) 9 AIR 1922 All 441 (441).
('12) 1912 Pun Re No. 119 : 18 Ind Cas 529 (530). (Order passed in appeal remanding a case under O. 41 R. 23)
('19) 6 AIR 1919 Cal 312 (314) (SB). (Where the lower Court ordered in a suit for redemption of jewels their production under O. 39 R. 7.)
('28) 15 AIR 1928 Lah 140 (141, 142) : 9 Lah 308 (DB).
('37) 24 AIR 1937 Pat 25 (27). (Lower Appellate Court decreeing permanent reduction in assessment contrary to provisions of Municipal Act — Error of law — No interference.)
† ('35) 22 AIR 1935 Mad 399 (401).
('39) 26 AIR 1939 Lah 162 (163).
('35) 22 AIR 1935 Pat 186 (188). (Decision on matters of court-fee not affecting jurisdiction—Question of law.)
('39) 26 AIR 1939 Pat 430 (431) : 1939 Pat W N 229 (230). (But if the order is absolutely unjustifiable and perverse, High Court can interfere.)
('36) 23 AIR 1936 Pat 119 (121). (But if before assuming jurisdiction Judge determines a question of law or fact to determine the question of jurisdiction, a wrong decision in a case of this kind is certainly revisable by the High Court.)
('37) 170 Ind Cas 125 (125) (All).
('35) 22 AIR 1935 Pat 448 (449).
('35) 22 AIR 1935 Pat 191 (192).
('37) 167 Ind Cas 672 (672) (Pat). (Order in claim case based on findings of fact which are conclusive —No interference.)
('35) 22 AIR 1935 Pat 16 (17). (Decision as to whether arbitrator's conduct amounts to misconduct—No revision.)
('37) 24 AIR 1937 All 65 (69, 70) : I L R (1937) All 317 (FB). (Decision overruling objection not relating to validity of award and passing decree in terms of award—No revision lies.)
('35) 22 AIR 1935 Pat 267 (269).
('35) 22 AIR 1935 All 456 (457). (Court having jurisdiction to set aside award on proof of misconduc—No revision is competent even if Court took erroneous view of law.)
('36) 23 AIR 1936 All 868 (869).
('37) 24 AIR 1937 All 740 (742) : I L R (1937) All 913 DB).
('37) 24 AIR 1937 All 598 (604) : I L R (1937) All 805 FB).
('36) 63 Ind Cas 573 (575) (Cal). (Court having jurisdiction to decide an election petition under the Bengal Municipal Act, misconstruing a section of the Act—No revision.)
('36) 23 AIR 1936 Cal 706 (707).
('38) LR (1938) Lah 125 (126, 127).
('35) 22 AIR 1935 Lah 972 (972).
('34) 21 AIR 1934 Lah 1019 (1019)). (Interference in revision sought for under S. 44, Punjab Courts Act.)
('34) 21 AIR 1934 Lah 825 (827). (Order in review though wrong on merits is not revisable if Court had jurisdiction.)
('35) 22 AIR 1935 Lah 120 (121).
('35) 22 AIR 1935 Lah 602 (604) : 16 Lah 1090 (DB).
('35) 22 AIR 1935 Lah 951 (951). (Court taking one view of law points—Another view possible—No question of jurisdiction—No revision lies.)
('36) 23 AIR 1936 Lah 521 (523) (DB). (Where the Custody Court decided that certain person is not entitled to any priority, no revision is competent even if the decision is erroneous in law as the custody Court has jurisdiction to decide such question. Further the petitioner has remedy to file a regular suit.)
('38) 25 AIR 1938 Lah 357 (358) (DB). (Error by lower Court in drawing certain presumptions and conclusions is no ground for revision.)
[*See* (33) 20 AIR 1933 Mad 697 (698, 699). (In the absence of objection by party Court is not bound *suo motu* to remit award under para. 14—High Court will not interfere in revision with decree passed on award as made.)
('34) 21 AIR 1934 Mad 392 (394) : 57 Mad 808 (DB). Correctness of decision based on Bench decision cannot be interfered with in revision by another Bench.)]

Vasudeva Iyer,[3] their Lordships of the Privy Council observed as follows :

"The section applies to jurisdiction alone, the irregular exercise, or the non-exercise of it, or the illegal assumption of it. The section is not directed against *conclusions* of law or fact in which the question of jurisdiction is not involved."

Thus, an erroneous decision on a question of *limitation* or of *res judicata* is not a ground for revision[4] unless, in arriving at such conclusion, the Court has failed to

[*See also* ('77) 3 Cal 243 (247) (DB).
('33) 20 AIR 1933 Lah 327 (328).
('36) 23 AIR 1936 Pat 490 (491).]
[But see ('33) 20 AIR 1933 Mad 496 (496).]

3. ('17) 4 AIR 1917 PC 71 (74) : 40 Mad 793 : 41 Ind App 261 (PC).
Also see the following cases :
('42) 1942 Oudh W N 624 (626).
('42) 29 AIR 1942 Sind 41 (41, 42) : ILR (1941) Kar 570 (DB).
('33) 20 AIR 1933 Oudh 240 (241).
('33) 20 AIR 1933 Oudh 534 (534) (DB).
('27) 14 AIR 1927 Cal 965 (966) (DB).
('31) 18 AIR 1931 Oudh 408 (410) (DB).
('29) 115 Ind Cas 176 (176) (Nag).
('32) 19 AIR 1932 All 140 (140) (DB).

4. ('43) 30 AIR 1943 Mad 245 (245).
('41) 28 AIR 1941 Bom 271 (272) (DB).
✣('84) 11 Cal 6 (8) : 11 Ind App 237 (PC). (Wrong decision on a question of *res judicata*.)
('33) 20 AIR 1933 Lah 317 (318) : 14 Lah 51 (Do.)
('33) 20 AIR 1933 Mad 231 (231). (Do.)
('33) 20 AIR 1933 Lah 783 (783). (Question of limitation.)
('33) 20 AIR 1933 Rang 263 (263, 264) (DB).
('32) 137 Ind Cas 513 (513) (Lah). (Wrong application of S. 19, Limitation Act.)
('12) 15 Ind Cas 33 (33) (All). (Wrong decision on a question of *res judicata*.)
('30) 17 AIR 1930 All 702 (704) (DB). (Question of limitation.)
('85) 9 Bom 432 (434) (DB). (Question of *res judicata*.)
† ('87) 11 Bom 488 (492) (DB). (Do.)
✣('32) 19 AIR 1932 Bom 81 (82) (DB). (Do.)
('99) 1899 Pun Re No. 26, page 140 (144). (Do.)
('10) 1910 Pun Re No. 2: 6 Ind Cas 735 (736). (Do.)
('11) 10 Ind Cas 679 (680) (DB) (Lah). (Do.)
('31) 32 Pun L R 130 (130). (Do.)
('21) 8 AIR 1921 Oudh 54 (55) : 24 Oudh Cas 243. (Do.)
('15) 2 AIR 1915 Mad 907 (908). (Decision of a question of limitation is not one of jurisdiction.)
† ('27) 14 AIR 1927 Mad 660 (661). (Do.)
('20) 7 AIR 1920 All 181 (181). (Do.)
('15) 2 AIR 1915 All 54 (55) (DB).
('25) 12 AIR 1925 All 164 (165).
('12) 39 Cal 473 (476) : 15 Ind Cas 547 (548).
('17) 4 AIR 1917 Cal 572 (572) (DB).
('28) 15 AIR 1928 Cal 189 (190).
('28) 15 AIR 1928 Cal 202 (204) (DB).
('86) 1886 Pun Re No. 22, page 39 (39) (DB).
('30) 17 AIR 1930 Lah 112 (113).
('31) 133 Ind Cas 439 (439) (Lah).
('78) 1 Mad 401 (402) (DB).
('10) 6 Ind Cas 745 (746) (Mad).
('08) 4 Nag L R 184 (186).
† ('27) 14 AIR 1927 Nag 389 (389).
('30) 17 AIR 1930 Nag 88 (88). (A revision does not lie on the ground that burden of proving that an application was within time was placed on the wrong party.)
('18) 5 AIR 1918 Pat 390 (390) : 3 Pat L Jour 376 (DB). (Whether a petition for the restoration of a suit is or is not barred.)
('22) 9 AIR 1922 Pat 308 (308).
('24) 11 AIR 1924 Pat 37 (38) : 2 Pat 800 (DB). (Notice to the auction purchaser should go within 30 days of sale in a petition under O. 21 R. 90.)
('85) 1885 All W N 32 (33) (DB). (Dismissal of suit as time-barred.)
('12) 14 Ind Cas 52 (53) (DB) (All). (Wrongly treating an application under O. 21 R. 89 as time-barred though money was deposited within 30 days.)
('26) 13 AIR 1926 Lah 355 (356). (Appeal held barred.)
('29) 16 AIR 1929 Lah 26 (27).
('27) 14 AIR 1927 Oudh 615 (615). (Suit dismissed as time-barred.)
('88) 1888 All W N 148 (149).
('98) 20 All 78 (79) (DB). (Suit wrongly held not barred.)
('27) 14 AIR 1927 All 358 (359) : 49 All 454. (Wrongly allowing a time-barred application to set aside an *ex parte* decree.)
† ('12) 15 Ind Cas 679 (681) (DB) (Cal). (Where the lower Appellate Court held that the application under O. 21 R. 90 was not time-barred as the applicant was a minor, over-looking the fact that, when the sale took place, the father of the applicant was alive.)
('13) 19 Ind Cas 594 (595) (DB) (Cal). (Application to set aside execution sale wrongly held not barred.)
† ('24) 11 AIR 1924 Lah 666 (667). (Granting application under O. 9 R. 13 which was barred.)
✣('94) 17 Mad 410 (415, 416) (FB). (Admitted appeals after they had become time-barred.)
† ('35) 22 AIR 1935 Mad 835 (838) : 59 Mad 62 (DB). (*Res judicata*.)
('39) 26 AIR 1939 Lah 48 (48). (Decision that suit was barred as *res judicata*.)
('36) 23 AIR 1936 Lah 100 (102). (Wrong decision on question of *res judicata*.)
('38) 40 Pun L R 461 (462) (DB).
('34) 21 AIR 1934 Pesh 103 (105). (Wrong decision on a question of limitation.)
('39) 26 AIR 1939 Mad 740 (742) : (1939) 2 Mad L Jour 353 (356)(DB). (Misinterpretation of limitation law.)
[*See* ('15) 2 AIR 1915 Lah 209 (210).
('37) 24 A I R 1937 Pat 528 (530). (It is not the practice of the High Court to interfere in revision in the exercise of discretion by the Court below under S. 5, Limitation Act, even when the exercise of that discretion is founded on a mistaken view of the law.)]

Also see S. 11 Note 6.

consider all the necessary matters,[5] or has misapprehended the nature of the claims,[6] or has not applied its mind to the question at all.[7] Similarly, an erroneous conclusion as to the admissibility or inadmissibility of evidence,[8] or an erroneous construction of a document,[9] or of the section of an Act,[10] or an erroneous appreciation of evidence,[11] is no

[See however ('12) 14 Ind Cas 711 (712) (DB) (Oudh). (Refusal to entertain an application on the ground of limitation or a wrongful entertaining of an application which is barred by limitation is a good ground for interference in revision, the question of limitation in such cases being virtually one of jurisdiction.)]

5. ('07) 1907 Pun L R No. 79, page 416 (419).
('06) Pun Re No. 121, page 462 (462).
† ('30) 17 AIR 1930 All 477 (478) (DB).

6. ('13) 19 Ind Cas 5 (6) (Lah).

7. ('97) 1 Cal W N 67 (69) (DB).
† ('33) 20 AIR 1933 Pat 132 (134).
('13) 18 Ind Cas 391 (392) (DB) (Cal).
('13) 18 Ind Cas 392 (392) (DB) (Cal).
† ('16) 3 AIR 1916 Cal 651 (653) (DB). (An application to set aside *ex parte* decree.)
('38) 25 AIR 1938 Rang 87 (87) (DB). (Order without adjudicating on question of limitation—Interference).
('16) 3 AIR 1916 Cal 907 (908) (DB).
('26) 13 AIR 1926 Cal 444 (445) (DB).
('20) 7 AIR 1920 Lah 346 (348).
('24) 11 AIR 1924 Lah 603 (604).
('13) 9 Nag L R 35 (38) : 19 Ind Cas 425 (426).
('27) 14 AIR 1927 Mad 436 (437).
('24) 11 AIR 1924 Pat 36 (36) (DB).
('05) 1905 Upp Bur Rul C. P. Code 26 (27).
† ('18) 5 AIR 1918 Low Bur 141 (142) : 9 Low Bur Rul 71.
('29) 16 AIR 1929 Rang 304 (306).
('12) 13 Ind Cas 21 (22) (All).
('85) 1885 All W N 257 (257) (DB).
('26) 95 Ind Cas 4 (5) (Lah).
[See however ('17) 4 AIR 1917 Mad 667 (667).
('18) 5 AIR 1918 Mad 1173 (1173). (Where plea of limitation was not pressed.)
('25) 12 AIR 1925 Oudh 34 (34). (Revision lies on a question of limitation.)]

8. ('14) 1 AIR 1914 Cal 826 (827) (DB). (Holding evidence admissible.)
† ('18) 5 AIR 1918 Pat 607 (608) (DB). (Do.)
('90) 1890 All W N 234 (234) (DB). (Holding evidence not admissible.)
('99) 23 Bom 177 (179) (DB). (Do.)
('99) 3 Cal W N 581 (583) (DB). (Do.)
('06) 9 Oudh Cas 107 (108). (Do.)
('23) 10 AIR 1923 Cal 322 (322). (Do.)
† ('29) 16 AIR 1929 Pat 633 (634). (Do.)
† ('27) 14 AIR 1927 Bom 664 (665) (DB). (Do.)

9. ('42) 29 AIR 1942 Mad 413 (415) (DB).
('03) 1903 All W N 12 (12).
('34) 21 AIR 1934 All 530 (530, 531).
('34) 21 AIR 1934 Lah 67 (67) : 15 Lah 305.
('91) 1891 Pun Re No 60, page 307 (308).
('18) 5 AIR 1918 Cal 925 (927) : 45 Cal 519 (DB).
('25) 12 AIR 1925 Pat 318 (319).
('28) 15 AIR 1928 Lah 713 (713).
('23) 10 AIR 1923 All 269 (269). (Question of interpretation of document capable of more than one meaning.)
† ('28) 15 AIR 1928 Lah 284 (285).
('39) 26 AIR 1939 Sind 360 (360) : ILR 1939 Kar 342 (342) (DB). (Question of construction of document.)
('35) 22 AIR 1935 Mad 160 (161).
('35) 22 AIR 1935 Lah 971 (971).
[See ('37) 24 AIR 1937 Oudh 193 (194): 13 Luck 31 (DB). (Wrong construction of scheme framed under S. 92, C. P. Code.)]
[But see ('27) 14 AIR 1927 Lah 44 (45). (Misconstruction of pleadings is ground for revision.)
('36) 23 AIR 1936 Lah 801 (802). (Where a document cannot possibly bear the construction that has been placed by the lower Court on it, and its inerpretation is clearly wrong the High Court has juisdiction to revise its decree.)]

10. ('05) 32 Cal 572 (575) (DB). (Erroneous construction of section 47.)
('86) 13 Cal 90 (93) (DB).
('03) 30 Cal 397 (400) (SB).
('18) 5 AIR 1918 Cal 896 (897) (DB). (Section 10. Carriers Act.)
('35) 62 Cal L Jour 349 (351). (Misconstruction of S. 23(2) (iii) of the Bengal Tenancy Act.)
† ('36) 23 AIR 1936 All 449 (450) (DB). (Judge committing error of law in interpreting section of Act—He does not act with material irregularity or exercie jurisdiction not vested in him.)
('37) 24 AIR 1937 Mad 36 (37) : ILR (1937) Mad 189 (DB).
('11) 8 Ind Cas 859 (859) (Mad). (Wrong interpretationof O. 22 R. 3.)
('11) 11 Ind Cas 138 (138) (Mad). (Section 87, Negotible Instruments Act.)
('26) 13AIR 1926 Mad 319 (320). (Error by Court in contruing rules for election in disposing of an election petition.)
('28) 15AIR 1928 Mad 199 (199). (Where it was held tht the result of an election had been materially flected by the improper rejection of some ballot apers.)
† ('27) 27 Mad W N 838 (840). (Construction of legal povisions—Two meanings possible.)
('27) 197 Mad W N 842 (843) (DB). (Election rules — Doutful construction.)
('29) 16 AIR 1929 Mad 257 (257). (Election rules — Contruction of.)
('28) 15AIR 1928 Mad 983 (984). (Section 56, Local-loards Act.)
('25) 12 AIR 1925 Oudh 373 (374). (Article 75 of the Limitation Act.)
('24) 11 AIR 1924 Rang 212 (213). (Misconstruing S. 92, Evidence Act.)
('21) 64 Ind Cas 563 (564) (Cal). (Erroneous construction of the rules framed by the High Court.)
('23) 10 AIR 1923 Pat 90 (91) (DB). (Rules framed by the High Court as regards costs of proceedings in subordinate Courts is no ground for revision.)
[*See also* ('29) 16 AIR 1929 Rang 210 (211). (Overloking an elementary principle of interpretatin of statutes.)]

11. ('43) 30 AIR 1943 Pesh 54 (56).

ground for revision. Similarly, an erroneous decision as to what constitutes a material irregularity in setting aside an execution sale is no ground for revision.[12] But where a particular question of law has been decided in one way by a High Court or by the Privy Council, the failure of a subordinate Court to follow such a binding precedent is an illegal or irregular exercise of jurisdiction, with which the High Court will interfere.[13] It is not a mere error of law.

14. Error of procedure. — An error of procedure in the exercise of jurisdiction is an irregular exercise of jurisdiction and, if the irregularity is material, may be interfered with in revision.[1] An error of procedure resulting in a failure of justice is a material irregularity within the meaning of cl. (c).[2] Where a Court disposes of a case not raised by the parties and to which evidence had not been directed,[3] or where it entertains a suit without the permission required therefor under O. 1 R. 8,[4] it commits a material irregularity in the exercise of jurisdiction. See Note 2 above for a full discussion.

15. Wrong decision of lower Appellate Court as to the jurisdiction of the trial Court. — As has been seen in Notes 10 and 11, where the trial Court erroneously thinks that it has, or that it has no jurisdiction to act in a particular manner or to pass a particular order, there is either an illegal assumption of jurisdiction or a failure to exercise the jurisdiction which it has. But suppose the order of the trial Court as to its own jurisdiction is appealed against and the Appellate Court either *confirms* such order or *reverses* it, can the *lower Appellate Court itself* be said to have exercised a jurisdiction not vested in it or to have failed to exercise a jurisdiction which it has or to have exercised its jurisdiction illegally or with material irregularity? According to the High Courts of Allahabad,[1] Bombay,[2] Calcutta,[3] Madras,[4] Patna[5] and Nagpur,[6] the decision of

('19) 6 AIR 1919 Mad 796 (797).
† ('30) 17 AIR 1930 Mad 225 (226).
('22) 9 AIR 1922 Lah 290 (290) : 3 Lah 79
('08) 1908 Pun L R No. 208, page 665 (666
† ('10) 6 Nag L R 49 (50) : 6 Ind Cas 42 (429).
(One item of evidence has been given undu weight or misappreciated.)
('94) 16 All 39 (40).
('99) 21 All 181 (183) (DB).
Also see Govt. of India Act, 1915—S. 107 Note 2.

12. ('32) 19 AIR 1932 All 140 (140) (DB).
('29) 16 AIR 1929 Oudh 26 (29) : 4 Luck 8.
('94) 21 Cal 799 (806) (DB).
('13) 18 Ind Cas 715 (717, 718) (DB) (Cal).

13. ('33) 20 AIR 1933 Mad 94 (95).
('37) 24 AIR 1937 Rang 197 (198).
Also see Note 12.

Note 14

1. † ('16) 3 AIR 1916 Mad 1164 (1164) (DB). (Order without giving opportunity to the other side to put forth its case.)
('35) 22 AIR 1935 Bom 216 (218). (Remand in disregard of method of procedure enjoined by Code amounts to material irregularity.)
('14) 1 AIR 1914 Cal 388 (390, 391) : 41 Cal 323 (338) (DB). (In this case it was held that there was no error of procedure to justify interference.)
[But see ('20) 7 AIR 1920 Pat 567 (568) : 4 Pat L Jour 642 (DB). (Error of procedure held not to be within the section.)]
2. ('20) 7 AIR 1920 Pat 82 (84).
3. † ('24) 11 AIR 1924 Pat 341 (342).
4. ('27) 14 AIR 1927 Rang 134 (134).

Note 15

1. ('43) 1943 All W R H C 133 (134).

*('30) 17 AIR 1930 All 713 (717, 720, 721):53 All 75 (FB).
† ('38) 25 AIR 1938 All 17 (18) : I L R (1938) All 40 (DB).
*('86) 8 All 111 (113) (FB).
('30) 17 AIR 1930 All 158 (160) (DB).
('26) 13 AIR 1926 All 58 (61) : 48 All 168 (DB).
The following cases are, in view of the Full Bench Ruling in AIR 1930 All 713: 53 All 75, no longer good law :
('98) 1898 All W N 74 (75) (DB).
('18) 5 AIR 1818 All 415 (415) (DB).
('21) 8 AIR 1921 All 226 (227) : 43 All 334 (DB).
('21) 8 AIR 1921 All 236 (237) (DB).

2. ('39) 26 AIR 1939 Bom 485 (485, 486) : I L R (1939) Bom 472.
('91) 15 Bom 148 (151, 152) (DB).
('92) 16 Bom 608 (617, 618) (DB).
('28) 15 AIR 1928 Bom 548 (549) (DB).
[*See* ('96) 20 Bom 50 (53) (DB)].

3. ('05) 32 Cal 146 (153) (DB). (1 Cal W N 626 dissented from.)
('20) 7 AIR 1920 Cal 977 (977).

4. ('40) 27 AIR 1940 Mad 821 (822).
*('15) 2 AIR 1915 Mad 1223 (1229, 1235): 39 Mad 195: 18 Ind Cas 555 (560, 565) (FB).
('16) 3 AIR 1916 Mad 739 (739).
('29) 16 AIR 1929 Mad 396 (398) (DB).
('30) 17 AIR 1930 Mad 216 (216, 217).

5. *See* ('22) 9 AIR 1922 Pat 525 (526) : 1 Pat 232 (DB).

6. ('41) 28 AIR 1941 Nag 278 (279, 281 282) : I L R (1941) Nag 543 (DB). (AIR 1937 Nag 39 : I L R (1937) Nag 97 held correctly decided.)

the Appellate Court is revisable under S. 115. There is a difference of opinion in the Lahore High Court[7] and the Oudh Chief Court.[8] It has also been held in the undermentioned cases[9] that the order of the Court of the first instance can itself be revised notwithstanding that it was appealed against.

16. "May make such order in the case as it thinks fit." — When once the jurisdiction to revise is established, there is no limitation imposed on the power of the Court as to the mode of disposal.[1] The High Court may finally dispose of the case itself[2] or pass any other order which may satisfy the justice of the case.[3] What the order should

('32) 19 AIR 1932 Nag 70 (71): 28 Nag L R 54.
('34) 21 AIR 1934 Nag 257 (258).
7. ('22) 9 AIR 1922 Lah 100 (101). (Revision lies.)
('23) 10 AIR 1923 Lah 412 (413). (Do.)
('25) 12 AIR 1925 Lah 174 (174). (Do.)
† ('29) 16 AIR 1929 Lah 605 (606). (Do.)
('30) 17 AIR 1930 Lah 611 (612). (Do.)
('34) 21 AIR 1934 Lah 536 (537).(No revision lies.)
('24) 11 AIR 1924 Lah 349 (350). (Should only be exercised in exceptional cases to remedy an injustice.)
('86) 1886 Pun Re No. 46, p. 87 (88) (DB). (No revision lies.)
('11) 1911 Pun Re No. 4 : 9 I. C. 674 (675). (Do.)
('13) 19 Ind Cas 237 (238) (DB) (Lah). (Do.)
('24) 11 AIR 1924 Lah 278 (279). (Do.)
('26) 13 AIR 1926 Lah 47 (47). (Do.)
('29) 16 AIR 1929 Lah 83 (84). (Do.)
('30) 128 Ind Cas 51 (51) (Lah).
8. ('43) 30 A I R 1943 Oudh 307 (307) (DB). (Appellate order confirming lower Court's order that Revenue and not Civil Court had jurisdiction—Revision lies.)
('42) 29 AIR 1942 Oudh 370 (371) (DB). (Appellate order setting aside order under O. 7, R. 10 and directing trial Court to dispose of suit according to law is merely interlocutory — No revision lies.)
('42) 29 AIR 1942 Oudh 480 (481).
('05) 8 Oudh Cas 257 (259). (Revision lies.)
('29) 16 A I R 1929 Oudh 91 (92) : 4 Luck 317 (DB). (Do.)
('26) 13 AIR 1926 Oudh 31 (32). (Does not lie.)
('30) 17 AIR 1930 Oudh 2 (3) : 4 Luck 667 (DB). (Do.)
9. ('41) 28 A I R 1941 Nag 278 (279, 281, 282) : I L R (1941) Nag 543 (DB). (High Court can act *suo motu* and revise the order of the first Court although it is moved by a motion to revise the order of the appellate Court.)
† ('26) 13 AIR 1926 All 58 (61) : 48 All 168 (DB).
('34) 21 AIR 1934 Lah 108 (108).
('32) 19 AIR 1932 Nag 70 (71) : 28 Nag L R 54.
('74) 11 Bom H C R 194 (195) (DB).
('33) 20 AIR 1933 Lah 210 (211).
[*See also* ('42) 29 AIR 1942 Mad 741 (741, 742). (Lower appellate Court wrongly entertaining appeal and dismissing it on merits—High Court in second appeal can only set aside incompetent appellate order—Interference with trial Court's order can be only in revision.)
('71) 6 Mad H C R 360 (363).
('25) 12 AIR 1925 Oudh 163 (163.)]

Note 16

1. ('41) 28 AIR 1941 All 215 (216). (Entire proceedings are open to revision.)

('98) 1898 Pun Re No. 41, page 141 (148) (DB).
2. ('98) 1898 Pun Re. No. 41, p. 141 (148) (DB).
('32) 19 AIR 1932 Mad 714 (716). (Appeal entertained against a non-appealable order—High Court in addition to setting aside the appellate order can also revise the order of the first Court if necessary and justified.)
('22) 9 AIR 1922 Pat 359 (360) : 4 Pat L Jour 195 (DB).
('35) 22 A I R 1935 Pesh 21 (22). (Under S. 115, C. P. Code, in cases where a Court below has failed to exercise jurisdiction vested in it, the High Court may pass such orders as it thinks fit, and it is not incumbent upon the High Court to remand the case for exercise of that jurisdiction by the Court below.)
('38) 25 AIR 1938 Oudh 107 (108) : 14 Luck 13 (DB). (The Chief Court has power under its revisional jurisdiction to amend decree so as to make it conform with the judgment.)
('81) 3 All 203 (205, 206) (FB).
('31) 18 AIR 1931 Lah 748 (749).
3. ('42) 29 A I R 1942 Mad 296 (297) (DB). (Contention of petitioner upheld by lower Court but rejected by High Court—Petitioner should be given opportunity to establish subsidiary contention which he would have raised in lower Court had it rejected his contention.)
('81) 3 All 417 (420) (DB).
('33) 20 AIR 1933 Cal 559 (560) (DB).
('19) 6 AIR 1919 All 76 (78) : 42 All 18 (DB).
('17) 4 AIR 1917 Mad 223 (224) (DB). (May expunge seditious, blasphemous, or irrelevantly scandalous or indecent remarks in the judgment.)
('02) 6 Cal W N 346 (348) (DB).
('15) 2 A I R 1915 Oudh 171 (172). (When pre-emption money deposited on last day was not sent to bank in time due to mistake of Court, order refusing to deliver property was set aside.)
('36) 23 AIR 1936 Lah 909 (910). (Time fixed by lower appellate Court already expired and appeal dismissed for want of payment of court-fees—High Court, even then, can extend time in revision.)
('36) 23 AIR 1936 Nag 140 (143) : ILR (1936) Nag 188. (When High Court as a Court of revision, under its inherent powers to remand, remands a case for further evidence on an issue and findings, retaining seisin of the case, it has no power to scrutinize or review the evidence — The powers of that Court are limited by S. 115 and all it can do is to determine whether the lower Court exercised its jurisdiction with material irregularity in arriving at the finding it did on the issue remanded to it for trial.)

be in any particular case will depend on the circumstances of that case.[4] As a general rule, when justice has been done between the parties, the High Court will very rarely interfere with the findings of fact or the orders of the lower Court.[5] Similarly, where the

4. ('03) 27 Bom 563 (574) (DB). (Where the Court, instead of remitting the case for a new trial, reversed the decree dismissing the suit and passed a decree for the plaintiff.)

5. ('43) 30 AIR 1943 Pesh 54 (56).
('42) 29 AIR 1942 Pat 293 (295).
('15) 2 AIR 1915 All 241 (242).
('32) 19 AIR 1932 Oudh 156 (158) : 7 Luck 642 (DB).
('94) 18 Bom 449 (452) (DB).
† ('04) 28 Bom 458 (460) (DB).
('11) 36 Bom 123 (126) : 12 Ind Cas 709 (710) (DB). (When fresh documentary evidence cannot be taken by a collector revising a Mamlatdar's order.)
('04) 8 Cal W N 621 (624) (DB). (Revision of restoration order on *ex parte* decree.)
('09) 36 Cal 189 (191, 192) : 1 Ind Cas 741 (742) (DB). (Order under old Section 108.)
('09) 1 Ind Cas 151 (152) (DB) (Cal).
('22) 66 Ind Cas 127 (128) (DB) (Cal).
('25) 12 AIR 1925 Cal 1223 (1225) (DB).
('26) 13 AIR 1926 Cal 245 (246) (DB). (Amendment of a patently wrong decree.)
('29) 16 AIR 1929 Cal 78 (80) : 55 Cal 1084. (Where the evidence was not taken down in a manner provided by O. 18 but was dictated to the stenographer, who typed it and was later verified and signed by the Judge.)
('36) 23 AIR 1936 Pesh 213 (214).
('34) 21 AIR 1934 Pesh 103 (105). (Concurrent findings of Courts below cannot be interfered with in revision.)
('32) 19 AIR 1932 Cal 441 (442) : 59 Cal 311. (Notice not taken in the prescribed way—No prejudice—Will not be interfered with.)
('01) 1901 Pun Re No. 19, p. 63 (65) (DB).
('02) 1902 Pun Re No. 36, p. 135 (139) (FB). (A Divisional Judge hearing an appeal which he cannot hear.)
('03) 1903 Pun L R No. 14, page 32 (33).
('04) 1904 Pun L R No. 73, page 266 (268).
('07) 1907 Pun Re No. 125, page 611 (613). (Lower Court hearing an appeal triable by a superior Court.)
('10) 1911 Pun Re No. 1 : 8 Ind Cas 733 (735).
('11) 1911 Pun Re No. 93 : 11 Ind Cas 445 (446). (An oral acknowledgment of a debt.)
('11) 9 Ind Cas 744 (745) (Lah).
('12) 13 Ind Cas 720 (720) (Lah). (Error on a technical point.)
('32) 19 AIR 1932 Mad 223 (224). (Do.)
('13) 18 Ind Cas 251 (251) (Lah). (Objection to jurisdiction not raised — No failure of justice — Will not be revised.)
('19) 6 AIR 1919 Lah 297 (297). (Where a certain inadmissible evidence was admitted.)
† ('23) 73 Ind Cas 873 (873, 874) (Lah).
('26) 96 Ind Cas 822 (823) (Lah).
('27) 14 AIR 1927 Lah 55 (55, 56). (No revision, as petitioner had acquiesced in the order setting aside the *ex parte* decree.)
('29) 16 AIR 1929 Lah 777 (777) (DB). (Surety claiming discharge in revision on ground of dismissal of suit against principal — Revision not competent.)
('32) 19 AIR 1932 Lah 305 (306).
('98) 8 Mad L Jour 149 (151) (DB). (When small cause was tried in ordinary way and also in appeal without objection.)
('14) 1 AIR 1914 Mad 298 (298). (Refusing to amend a plaint at a late stage.)
('15) 2 AIR 1915 Mad 335 (335) (DB). (New defendants added — Plaint not amended — Defendants not prejudiced.)
('16) 3 AIR 1916 Mad 882 (882) : 39 Mad 882. (Extending time for payment of mortgage money.)
('18) 5 AIR 1918 Mad 1060 (1062) (DB). (Land acquisition Judge reviewing an order passed by him under the Land Acquisition Act though without power.)
('22) 9 AIR 1922 Mad 63 (65).
('24) 11 AIR 1924 Mad 586 (586) (DB). (Where S. 151 was applied for S. 47 but the order was just.)
('26) 13 AIR 1926 Mad 1059 (1060). (Where lower Court granted extension of time allowed by the decree from 2 to 6 months, applying Ss. 148 and 151 though none of the provisions applied.)
('27) 14 AIR 1927 Mad 1009 (1009) (DB). (Order as to costs acquiesced in cannot be challenged in revision.)
('29) 16 AIR 1929 Mad 790 (791). (Plaint with defective or no signature, filed with plaintiff's knowledge.)
('24) 11 AIR 1924 Nag 293 (294). (Where execution sale was held only 29 days after the proclamation.)
('22) 9 AIR 1922 Pat 315 (316) : 1 Pat 68 (DB). (Though the order passed by the Court below was passed on an invalid reference to the Civil Court by the Land Registration Deputy Collector under S. 55 of the Land Registration Act (VII B. C. of 1876.)
('25) 12 AIR 1925 Pat 36 (37) : 3 Pat 778 (DB). (Lower Court's order under S. 151, C. P. C., passed without jurisdiction setting aside its own decree is not revisable where the decree would have been successfully avoided in review.)
('26) 13 AIR 1926 Pat 218 (222) : 5 Pat 36 (FB). (Restoration though O. 9 R. 4 did not apply.)
('29) 16 AIR 1929 Rang 198 (200). (Appellate Court though without power deciding rightly a case under S. 73, C. P. Code.)
('13) 7 Sind L R 186 (187) : 24 Ind Cas 831 (831) (DB). (Where a Court allowed interest to a party when the merits of the case did not entitle him to interest, and the Court, on an application under S. 152, C. P. Code, modified its judgment by disallowing such interest.)
('14) 1 AIR 1914 Sind 61 (62) : 8 Sind L R 327 (DB). (Where S. 151 was applied to rectify a mistake of the Court and to restore an execution petition, it will not be interfered with.)

interference is likely to work not in the interest of justice but rather against it, the High Court will not interfere.[6] Where, however, a particular order creates an anomalous position[7] or leaves the matter in a muddle,[8] the High Court will set it aside in revision. Thus, while a Small Cause Judge returned a plaint which had been returned by the Munsif to be presented before the former and the Munsif adhered to his previous order, the High Court is entitled to make such an order as would enable the plaintiff to have his action tried.[9] But a party who, by his conduct creates a particular position, cannot in revision, seek to set it aside.[10]

16a. Nature of order made in revision against a decree. — An order passed in revision from a decree is a decree as much as an appellate decree.[1]

But, an order *dismissing* a petition for revision does not substitute a decree of the revisional Court for that of the Court below. When a revising Court refuses to exercise its power of revision, it does not confirm any decree but merely declines to interfere, leaving the decree of the Court below intact as the decree of that Court.[2]

17. Laches in making the application. — Applications in revision are not governed by any law of limitation.[1] Revision is a purely discretionary remedy. It is a *privilege* and not a right and corresponds to the remedies in England known as *certiorari* and *mandamus*. The invariable rule in all these cases is that the party aggrieved must

[*See* ('41) 28 AIR 1941 Nag 261 (263). (The 'justice' referred to in the above rule, however, relates to a right to which a party has a legal claim and not purely moral claim—If plaintiff's suit is barred by time, the above rule does not apply.)
('32) 19 AIR 1932 Mad 157 (158). (Revision against order disallowing objections to award—Mere illegality is not enough, but there must be some harm resulting from such illegality.)
('20) 7 AIR 1920 All 112 (115) : 42 All 626 (DB). (Order setting aside an order rejecting an appeal for failure of the appellant to give security for costs.)
('25) 12 AIR 1925 All 51 (52). (When a suit was disposed of as a small cause without objection.)]
[*See also* ('41) 28 AIR 1941 Mad 17 (17, 18). (Failure to object to maintainability of appeal does not make appellate order valid—But it can be taken into consideration by High Court whether it should interfere in revision from appellate decision.)]
Also see Note 2.
6. ('30) 17 AIR 1930 Lah 417 (418). (Order extending time under S. 5, Limitation Act, for a petition under S. 9, Provincial Insolvency Act.)
('33) 20 AIR 1933 All 154 (155)(DB). (Application under O. 1 R. 8 held to be *mala fide* and hence dismissed—*Held*, order should not be interfered with.)
('25) 12 AIR 1925 All 264 (266) (DB).
('98) 28 Bom 458 (460) (DB).
('11) 12 Ind Cas 903 (903) (Low Bur).
('31) 18 AIR 1931 Cal 425 (427).
('05) 1905 Pun L R No. 109, page 423 (424). (*Ex parte* decree set aside in 30 days after date of order.)
('08) 31 Mad 414 (415).
('14) 1 AIR 1914 Mad 159 (160). (Where a petition under S. 195, Cr. P. Code, was wrongly dismissed for default and subsequently restored.)
('28) 15 AIR 1928 Mad 559 (560). (Amendment of plaint to bring case within the Court's pecuniary jurisdiction at late stage allowed though irregular.)
('25) 12 AIR 1925 Pat 153 (154). (Where S. 148 was applied to extend time to a conditional order for payment of costs though it did not apply.)
('30) 17 AIR 1930 Pat 279 (280).
('21) 8 AIR 1921 Oudh 168 (169).
('38) 25 AIR 1938 Pat 447 (449). (The High Court under S. 115, C. P. Code, ought not obviously to interfere in revision so as to restore an order which itself is without jurisdiction, or founded on irregularity in the exercise of jurisdiction, although the order under revision is one without jurisdiction.)
[*See also* ('40) 27 AIR 1940 Pat 670 (671). (High Court will not interfere in revision where such interference will lead to contradictory orders.)]
7. † ('27) 14 AIR 1927 Lah 435 (439) : 8 Lah 617.
('33) 20 AIR 1933 Bom 245 (250). (Two appeals and one revision in cases disposed of by one judgment —Decision of lower Court held to be wrong in appeals—Revision should also be allowed.)
8. ('42) 29 AIR 1942 Pat 293 (295).
('25) 12 AIR 1925 All 202 (202) (DB).
('32) 19 AIR 1932 Bom 210 (213).
9. † ('22) 9 AIR 1922 Pat 368 (369).
('34) 21 AIR 1934 Nag 257 (258).
Also see O. 7 R. 10, Note 12.
10. ('86) 9 Mad 451 (452) (DB).
† ('04) 28 Bom 264 (274, 275) (DB).

Note 16a

1 † ('34) 21 AIR 1934 All 134 (135) : 56 All 608. (In the Allahabad High Court a decree is invariably prepared in such cases.)
2. ('35) 22 AIR 1935 Pesh 91 (92).

Note 17

1. ('42) 29 AIR 1942 Pat 251 (254) : 21 Pat 197 (DB). (Usual practice of the Court is not to entertain applications presented beyond 90 days.)
('33) 20 AIR 1933 Pesh 51 (52).

come to the Court at the *earliest possible moment*. When, therefore, there has been a great and unexplained delay or *laches* in making the application, the Court will refuse to interfere.[2] Where, however, the petitioner is not to be blamed for the delay[3] or where there are exceptional circumstances[4] the High Court will not refuse to exercise its powers under the section. Thus, when the petitioner failed in his attempt to set aside an *ex parte* decree and then filed a suit to vacate the same for want of jurisdiction but the Court held that the relief could not be granted, and then a revision was preferred to the High Court, the circumstances were held sufficient to explain the delay in applying for revision.[5] The practice of the High Court of Patna is to entertain applications in revision only if they are filed within three months of the date of the order sought to be revised.[6]

18. Application in revision treated as appeal. — Where an application for revision is filed in a case in which an appeal lies, the Court may treat the petition as an

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[*See* ('42) 29 AIR 1942 Oudh 340 (341) (DB). (No special period is prescribed for an application for revision and therefore if any article is applicable it is Art. 181 of the Limitation Act which prescribes a three years' period from the time when the right to apply accrues.)

('40) 27 AIR 1940 Rang 91 (93) : 1940 Rang L R 237. (According to the practice in the Rangoon High Court, revision application may be filed at any time within 90 days of the order.)

('36) 23 AIR 1936 Sind 172 (173) : 30 Sind L R 271 (DB). (The period of 90 days provided by the Rules of the Sind Court in case of a revision application is subject to the High Court's discretion.)]

2. ('42) 29 AIR 1942 Oudh 392 (393). (Ordinarily if an application is filed beyond the period of limitation prescribed for an appeal it ought to be considered to have been unduly delayed.)

('42) 29 AIR 1942 Pat 251 (254) : 21 Pat 197 (DB). (Decision on preliminary issue as to maintainability of application—Unsuccessful party not challenging decision in revision — Revision after final decision —Interference on preliminary point.)

('17) 4 AIR 1917 All 215 (215) (DB). (Where the order complained of was passed very early and the applicant took part in the proceedings and lost and then came in revision to set aside the same.)

('38) 25 AIR 1938 All 98 (100): I L R (1938) All 148 (DB). (Nine months.)

† ('36) 23 AIR 1936 Oudh 185 (187) : 12 Luck 52 (DB). (Interference in revision being discretionary the practice of the Chief Court is to refuse to entertain applications for revision if they are made too late and to demand an explanation from the applicant for the delay in case the application is made more than ninety days after the passing of the order.)

('35) 22 AIR 1935 Lah 120 (121). (Considerable delay in filing a petition is not in itself a sufficient ground for rejcting the petition where once it has been admitted to hearing.)

('33) 20 AIR 1933 Lah 175 (176). (Delay of one year.)

('69) 1 N W P H C R 271 (272) (DB).

† ('82) 4 All 154 (154). (Application made after 17 months against order setting aside an execution sale.)

('10) 8 Ind Cas 529 (529) (All). (Delay of five and half months.)

('26) 13 AIR 1926 All 228 (228, 229). (7 months.)

† ('83) 7 Bom 341 (372) (FB).

('74) 22 Suth W R 522 (523) (DB).

('78) 2 Cal L Rep 545 (547) (DB).

('76) 1876 Pun Re No. 50, page 92 (93) (DB). (Eight and half months.)

('90) 1890 Pun Re No. 34, page 92 (94).

('11) 10 Ind Cas 129 (130) (Lah). (Two months.)

('11) 10 Ind Cas 183 (186) (Lah). (Preliminary order unchallenged till after the enquiry had been made and final order passed.)

('13) 18 Ind Cas 795 (795) (Lah). (17 months' delay.)

† ('14) 1 AIR 1914 Lah 249 (250) : 1914 Pun Re No. 25 (DB). (One year.)

('11) 12 Ind Cas 169 (170) (Mad).

('14) 1 AIR 1914 Mad 299 (299). (Eight months from date of order and after an inexcusable delay of five months.)

('18) 5 AIR 1918 Oudh 116 (117). (Where a plaint was returned by the Court of first instance for presentation to the proper Court and the plaintiff delayed long after the order of return and also after the lower appellate Court's order.)

('21) 8 AIR 1921 Oudh 141 (142): 24 Oudh Cas 282.

('23) 10 AIR 1923 Oudh 272 (272). (One year.)

('25) 12 AIR 1925 Oudh 608 (608). (Three years of unexplained delay.)

('30) 17 AIR 1930 Oudh 496 (496) (DB).

[*See also* (1900) 1900 Pun L R No. 7. (Extreme remissness of petitioner.)]

3. ('84) 6 All 125 (126) (DB).

† ('36) 23 AIR 1936 Oudh 185 (187) : 12 Luck 52 (DB). (If the applicant was not a party to any of the orders which he seeks to revise and they were all passed behind his back and without notice to him, the delay on the part of the applicant should be condoned.)

('28) 15 AIR 1928 Mad 528 (530) : 51 Mad 672 (DB).

4. ('42) 29 AIR 1942 Mad 757 (758).

('15) 2 AIR 1915 Cal 290 (291) (DB).

('22) 9 AIR 1922 Mad 63 (64).

('69) 11 Suth W R 56 (57).

[*See also* ('30) 17 AIR 1930 Oudh 496 (496) (DB).]

5. ('29) 16 AIR 1929 Oudh 383 (383).

6. ('42) 29 AIR 1942 Pat 251 (254): 21 Pat 197 (DB).

('33) 20 AIR 1933 Pat 582 (582).

appeal, provided the same was filed within the time prescribed for filing the appeal[1] and provided the proper court-fee is paid.[2] In cases where the time for filing the appeal had expired on the date when the revision was converted into an appeal, the Court has ample jurisdiction to excuse the delay under S. 5 of the Limitation Act.[3] If a revision is treated as a second appeal *ex parte*, the respondents are not precluded from showing that no second appeal lay.[4] An application for revision to the High Court cannot be returned for presentation as an appeal to *another* Court.[5]

19. Appeal treated as an application in revision. — In cases where no appeal lies but an appeal is wrongly preferred, the Court has a very wide discretion to allow the appeal to be treated as a petition for revision, where the conditions of S. 115 are satisfied.[1]

Note 18

1. ('98) 25 Cal 757 (778) (FB). (Suit to file an award which was rejected on objection by opposite party on the ground that there was no reference at all to arbitration.)
('32) 19 AIR 1932 Bom 77 (78).
('34) 21 AIR 1934 Pat 281 (282).
('11) 10 Ind Cas 51 (53) (Cal). (Order setting aside a sale under O. 21 R. 89.)
('11) 10 Ind Cas 542 (543) (DB) (Cal). (Where the lower Court wrongly refused to entertain an appeal as being barred by limitation.)
('15) 2 AIR 1915 Cal 268 (271) (DB).
('84) 7 Mad 555 (556) (DB). (Application presented as an appeal — But amended and received as an application under this Section — But ultimately held that an appeal lay and therefore treated as an appeal.)
('19) 6 AIR 1919 Mad 358 (358).
('25) 12 AIR 1925 Pat 16 (17) : 3 Pat 344 (DB).
('15) 29 Ind Cas 678 (678) (U P B R).
('17) 4 AIR 1917 Upp Bur 9 (10) : 2 Upp Bur Rul 106. (Second appeal.)
('27) 14 AIR 1927 All 120 (120) : 49 All 178. (Appeal admitted as revision can again be treated as appeal.)
Also see Section 149 Note 11.
2. ('43) 30 AIR 1943 Cal 177 (179) (DB).
(1900) 23 Mad 101 (104) (DB).
[*See also* ('27) 14 AIR 1927 Cal 581 (584). (DB).]
3. ('18) 5 AIR 1918 Lah 67 (68) : 1917 Pun Re No. 95 (DB). (On the facts of this case extension of time under S. 5, Limitation Act, was not granted.)
† ('20) 7 AIR 1920 Lah 450 (451) (DB). (The facts were so peculiar and the order of the Court below was so manifestly unjust, that the Chief Court extended the time under S. 5 of the Limitation Act.)
('22) 9 AIR 1922 Lah 233 (234) : 2 Lah 1 (DB). (Period cannot be extended where no sufficient cause has been shown.)
4. ('94) 1894 Pun Re No. 80, page 274 (275) (DB).
5. ('42) 29 AIR 1942 Mad 657 (658).

Note 19

1. ('43) 30 AIR 1943 All 21 (22). (Appeal decided on wrong principle of law — Not ground for interference—Appeal not treated as revision.)
('43) 30 AIR 1943 Bom 30 (32).
('43) 30 AIR 1943 Cal 244 (245, 246) (DB).
('43) 30 AIR 1943 Oudh 192 (194).
('42) 29 AIR 1942 All 85 (87): ILR (1941) All 807 (DB).
('42) 29 AIR 1942 All 261 (262): ILR (1942) All 360.
('42) 29 AIR 1942 Lah 275 (277): ILR (1943) Lah 17 (FB).
('41) 28 AIR 1941 All 55 (56) (DB). (Appeal filed as against decree — But no decree passed for want of payment of deficiency in court-fee—Party having right of appeal from decree when passed — *Held*, appeal could not be treated as revision.)
('41) 28 AIR 1941 All 355 (357). (Practice of filing appeal though known to be incompetent and then requesting it to be treated as revision condemned.)
('41) 28 AIR 1941 Cal 58 (59): ILR (1940) 2 Cal 334.
('41) 28 AIR 1941 Mad 73 (73). (Appeal against order under S. 23, Madras Agriculturists Relief Act, incompetent—Appeal treated as revision.)
('41) 1941 Oudh W N 835 (835).
('41) 28 AIR 1941 Pat 43 (44) : 19 Pat 935 (DB).
('41) 28 AIR 1941 Pat 394 (394) (DB).
('41) 28 AIR 1941 Pat 616 (617) (DB).
('40) 27 AIR 1940 All 387 (388) : ILR (1940) All 499 (DB).
('40) 27 AIR 1940 Bom 239 (240) : ILR (1940) Bom 353 (DB).
(1940) 42 Pun L R 364 (365).
('40) 27 AIR 1940 Oudh 367 (368): 16 Luck 65 (DB).
('40) 27 AIR 1940 Oudh 421 (422): 15 Luck 730 (DB).
('40) 27 AIR 1940 Pat 7 (9) : 18 Pat 777 (DB). (Conditions not satisfied—Appeal cannot be treated as revision).
('28) 15 AIR 1928 Lah 414 (416).
('26) 13 AIR 1926 Cal 790 (791) (DB).
('25) 12 AIR 1925 Sind 253 (254) : 18 Sind L R 130 (DB).
('12) 13 Ind Cas 147 (148) (DB) (All).
('92) 5 C P L R 81 (82).
('34) 21 AIR 1934 Bom 252 (253) : 58 Bom 485 (DB). (Appeal against order refusing stay under O. 41 R. 6 (2) treated as revision.)
† ('33) 20 AIR 1933 Cal 496 (497) (DB). (Order of remand under O. 41 R. 25 is not appealable — Appeal can be treated as revision.)
('32) 19 AIR 1932 Lah 538 (539). (Appeal filed against a non-appealable order of remand.)
('33) 20 AIR 1933 Lah 73 (74).
('33) 20 AIR 1933 Lah 135 (136). (Conditions of Section not satisfied — Appeal not treated as revision.)
('33) 20 AIR 1933 Lah 421 (421).
('34) 21 AIR 1934 Lah 198 (198). (Second appeal against an appellate order under the Provincial Insolvency Act treated as revision.)

20. Revision in cases of discretionary and final orders. — Where the lower Court passes an order in the exercise of its discretion, the High Court will not

('33) 20 AIR 1933 Mad 152 (153) : 56 Mad 453 (DB).
('32) 19 AIR 1932 Oudh 61 (62). (Appellate order by District Court under S. 75 of the Provincial Insolvency Act — Second appeal to High Court treated as revision.)
('33) 20 AIR 1933 Pesh 46 (46) (DB). (Appeal not maintainable — Question of jurisdiction raised — Appeal can be converted into revision.)
† ('04) 26 All 358 (361) (DB).
('05) 27 All 380 (381) (DB).
('06) 1906 All W N 58 (59) (DB).
('06) 1906 All W N 62 (63).
('27) 14 AIR 1927 All 563 (563) : 49 All 812 (DB).
('04) 28 Bom 458 (460) (DB). (Second appeal against an order raising an attachment.)
('09) 34 Bom 171 : 4 Ind Cas 830 (831) (DB). (Second appeal against a decree of a small cause nature.)
('11) 36 Bom 105 : 12 Ind Cas 687 (687) (DB).
('80) 6 Cal L Rep 234 (236) (DB). (Appeal against order allowing an appeal in a case in which no appeal lay.)
('02) 6 Cal W N 614 (615) (DB).
('05) 32 Cal 518 (525) (DB).
† ('11) 38 Cal 421 (424) (DB).
('21) 8 AIR 1921 Cal 380 (381). (Appeal against appellate order dismissing an appeal on the ground that no appeal lay.)
('20) 7 AIR 1920 Cal 797 (797) (DB).
('23) 10 AIR 1923 Cal 612 (614) (DB).
('24) 11 AIR 1924 Cal 487 (490) (DB). (Appeal heard and disposed of without jurisdiction.)
('27) 14 A I R 1927 Cal 850 (853) : 59 Cal 219 (DB).
('15) 2 AIR 1915 Lah 100 (101). (Second appeal treated as revision when a ruling has been misapplied.)
† ('85) 8 Mad 192 (195) (DB). (Appeal against an appellate decree by a party to a suit who did not appeal against the original decree.)
('07) 17 Mad L Jour 199 (200) (DB).
('14) 1 AIR 1914 Mad 675 (676) : 38 Mad 256 : 21 Ind Cas 308 (310) (DB).
('16) 3 AIR 1916 Mad 376 (378):39 Mad 593 (DB). (Even if presented out of time.)
('12) 15 Ind Cas 367 (368) (DB) (Mad). (Appeal against an order of remand not passed under O. 41 R. 23.)
('18) 5 AIR 1918 Mad 409 (410) (DB).
† ('18) 5 AIR 1918 Mad 191 (193) : 41 Mad 554 (DB). (When the issue is one of jurisdiction.)
('19) 6 AIR 1919 Mad 949 (950) (DB).
('21) 8 AIR 1921 Mad 612 (614) (DB).
('26) 13 A I R 1926 Mad 559 (565) : 49 Mad 580 (DB).
† ('29) 16 AIR 1929 Mad 205 (207, 208) (DB).
('07) 3 Nag L R 85 (87).
('16) 34 Ind Cas 689 (689) (DB) (Oudh).
('17) 4 AIR 1917 Oudh 49 (50).
('25) 12 AIR 1925 Nag 183 (185).
('26) 13 AIR 1926 Nag 65 (65). (Appeal cannot be converted into revision long after the expiry of limitation for a revision.)
('13) 7 Low Bur Rul 138 (139) : 25 Ind Cas 933 (934).
('24) 11 AIR 1924 Rang 177 (178) : 1 Rang 656 (DB). (An order of remand directing further evidence to be taken not under O. 41 R. 23.)
† ('26) 13 AIR 1926 Rang 205 (206) : 4 Rang 221 (DB).
('36) 23 AIR 1936 Lah 301 (303).
('36) 23 AIR 1936 Lah 83 (84).
* ('35) 22 AIR 1935 Mad 842 (847) : 58 Mad 972 (FB).
('38) 25 AIR 1938 Nag 122 (126) : I L R (1938) Nag 106 (FB).
('39) 26 AIR 1939 All 34 (35) (DB).
('35) 22 AIR 1935 Pat 456 (457) (DB). (Lower Court altering character of suit—Though no appeal lies, High Court can treat appeal as revision.)
('35) 22 AIR 1935 Lah 161 (162). (Appellate Court setting aside lower Court's order and remanding suit to lower Court with issue re-framed with directions to take additional evidence if required—Order is illegal and is not appealable—But High Court can treat appeal as revision and set it aside in exercise of revisional power.)
('36) 23 AIR 1936 Lah 33 (35).
[*See* ('42) 29 AIR 1942 Sind 144 (145) : I L R (1942) Kar 343 (DB).
('36) 23 AIR 1936 Oudh 172 (172) (DB). (No second appeal lies for setting aside a sale which has been confirmed — Nor can such appeal be treated as revision though lower Court wrongly holds that time for confirmation cannot be extended without consent of parties.)
('35) 22 AIR 1935 Pat 177 (178) (DB). (It would not be proper to utilize the power of the Court in revision in order to entertain an appeal when an appeal is expressly prohibited by C. P. C. or where the appeal has long been barred by limitation.)]
[*See also* ('37) 24 AIR 1937 Nag 385 (396) : ILR (1938) Nag 395 (DB). (Where the Court discharges a defendant without his specifically asking for the same and without giving the plaintiff an opportunity to state his case and such order is set aside on review, the defendant has no right of appeal from such order as the *status quo* is restored and even if the appeal is treated as a revision application, it will be premature.)
('31) 9 Cal L Rep 86 (89) (DB).
('81) 7 Cal 330 (333) (DB).
('25) 12 AIR 1925 Oudh 622 (623) : 29 Oudh Cas 86.]
[See however ('39) 26 AIR 1939 Sind 360 (360) : I L R (1939) Kar 342 (344) (DB). (Section 115, C. P. C., was only intended to relate to questions of jurisdiction and not to questions of law or construction of document or a wrong decision by a Judge. These are not matters affecting jurisdiction and cannot constitute sufficient grounds for treating an appeal as an application in revision, when an appeal is expressly prohibited by law. S. 115 is intended only to supplement the Code in relation to matters on which the Code is silent, and not provide the parties with a right of second appeal.)]

interfere with it in revision.[1] 'An improper or wrong exercise of discretion is not a ground

Note 20

1. ('43) 30 AIR 1943 Oudh 147 (148) (DB). (Refusal to decide question of jurisdiction as preliminary issue.)
('42) 29 AIR 1942 Bom 82 (84) : ILR (1941) Bom 629 (DB). (Order under O. 22 R. 10.)
('42) 29 AIR 1942 Mad 604 (606) : ILR (1942) Mad 868. (Discretion to excuse delay under S. 5, Limitation Act.)
('42) 29 AIR 1942 Oudh 395 (398).
('42) 29 AIR 1942 Pat 35 (37). (Discretion as to fixing of instalments under Bihar Money-Lenders Act.)
('41) 28 AIR 1941 Pat 408 (409) (DB). (Refusal to interfere in exercise of inherent power.)
('39) 26 AIR 1939 All 646 (648). (Admission of evidence by lower appellate Court.)
('37) 24 AIR 1937 Oudh 268 (269) : 13 Luck 111 (DB).
('17) 4 AIR 1917 Cal 815 (816) (DB).
† ('33) 20 AIR 1933 All 86 (90) (DB). (Grant of injunction in the exercise of discretion after considering balance of convenience — Discretion should not be interfered with in revision.)
('33) 20 AIR 1933 All 106 (107) : 54 All 1048.
('33) 20 AIR 1933 All 311 (311, 312). (Order as to costs.)
('32) 19 AIR 1932 Cal 576 (579) (DB).
('32) 19 AIR 1932 Cal 831 (832).
('33) 20 AIR 1933 Cal 786 (787) (DB). (Question of interest.)
('34) 21 AIR 1934 Cal 102 (103). (In this case an order refusing amendment of plaint was set aside in revision in the circumstances of the case)
('33) 20 AIR 1933 Lah 1007 (1007). (Judge using discretion in refusing to refer matter to arbitration — High Court will not interfere.)
('33) 1933 Mad W N 648 (649). (Application for issue of commission refused as being too late— High Court will not interfere with order.)
('34) 21 AIR 1934 Mad 337 (342) : 57 Mad 892 (DB). (Enquiry under O. 22 R. 10 in the exercise of discretion.)
('33) 20 AIR 1933 Oudh 425 (426). (Court is not bound but has discretion to amend decree — High Court will not interfere unless exercise of discretion is obviously wrong or unjust.)
('33) 20 AIR 1933 Pat 239 (241).
('32) 137 Ind Cas 513 (513) : 33 Pun L R 330 (331). (Discretionary order—Permission to adduce additional evidence under O. 41 R. 27.)
('82) 1882 All W N 118 (118). (Disallowing interest.)
('01) 1901 Pun Re No. 55, page 175 (177). (Do.)
('21) 63 Ind Cas 230 (230) (All). (Order setting aside an abatement.)
('12) 16 Ind Cas 404 (404) (DB) (All). (Permission to amend the plaint by substituting a new genealogical table for that given already.)
('25) 12 AIR 1925 All 218 (218). (Granting instalment decree.)
('26) 13 AIR 1926 All 142 (143) : 48 All 199 (DB). (Order restoring suit on condition of payment of costs.)
('31) 18 AIR 1931 All 765 (766) (DB).
('84) 8 Bom 264 (268) (DB). (Collector when granting a certificate under S. 10, Bombay Hereditary Offices Act, II of 1874.)
('94) 18 Bom 61 (64) (DB). (Transfer of execution proceedings under a decree from one subordinate Court to another.)
('94) 18 Bom 347 (348) (DB). (Special Judge under Dekkhan Agriculturists' Relief Act setting aside decree of Sub-Judge.)
('95) 19 Bom 116 (119) (FB). (Special Judge under Bombay Act XVII of 1879 exercising his discretion and granting a rehearing.)
('95) 19 Bom 286 (288) (DB). (Special Judge under Dekkhan Agriculturists' Relief Act setting aside Sub-Judge's decree on facts.)
('95) 19 Bom 675 (678) (DB).
† ('95) 19 Bom 790 (795, 796) (DB). (Order granting a succession certificate on applicant's furnishing security.)
('98) 22 Bom 520 (524) (DB).
† ('32) 19 AIR 1932 Bom 228 (230) (DB).
('09) 4 Ind Cas 116 (118) (DB) (Cal). (Where the witnesses to a claim are same, allowing plaintiff to proceed with two suits together.)
('12) 17 Ind Cas 361 (362) (DB) (Cal). (When plaintiff filed a suit in ejectment and applied for a temporary injunction and the Court ordered defendant to furnish security.)
('16) 3 AIR 1916 Pat 268 (269) : 1 Pat L Jour 92 (DB). (Where a Court extended time in a pre-emption suit for depositing money under S. 148, Civil Procedure Code.)
('19) 6 AIR 1919 Cal 979 (980) (DB). (Restoration of a dismissed suit for default in the ends of justice.)
('19) 6 A I R 1919 Cal 323 (324, 325) (DB). (Order allowing substitution of parties under O. 22 R. 10.)
('19) 6 AIR 1919 Cal 234 (234). (Fixing rent under S. 105, Bengal Tenancy Act.)
('23) 10 AIR 1923 Lah 506 (508). (Decision that no grounds existed for exercise of inherent power)
('22) 64 Ind Cas 563 (564) (Cal). (Rejection of an application under O. 1 R. 10.)
('22) 67 Ind Cas 252 (253) (DB) (Cal). (Refusal to admit additional evidence in appeal.)
† ('28) 15 A I R 1928 Cal 421 (423) : 55 Cal 748 (DB). (Issue of a commission under Order 26.)
('02) 5 Oudh Cas 151 (152) (DB).
('30) 17 AIR 1930 Cal 426 (428) (DB). (Admitting appeal out of time under S. 5, Limitation Act.)
('14) 1 AIR 1914 Lah 9 (11): 1914 Pun Re No. 10: 20 Ind Cas 203 (205) (DB). (Dismissal of an application for restitution and failing to act under Section 151.)
('16) 3 A I R 1916 Mad 1220 (1221) : 39 Mad 235 (FB).
('83) 6 Mad 227 (228) (DB). (Junior widow impleaded in an execution petition by senior widow.)
('84) 7 Mad 581 (586) (DB). (Admitting appeal out of time.)
('87) 10 Mad 98 (100). (Refusing leave under S. 18 of the Religious Endowments Act XX of 1863.)

for interference.[2] But when the discretion is exercised *perversely* so as to cause serious

('07) 30 Mad 274 (276) (DB). (Restoration of suit dismissed for default.)
('09) 4 Ind Cas 1130 (1130) (Mad). (Setting aright of a wrong order.)
('10) 33 Mad 412 (413) : 5 Ind Cas 291 (291) (DB).
('14) 1 AIR 1914 Mad 149 (149). (Order refusing to excuse delay in presentation of an appeal.)
('19) 6 AIR 1919 Mad 479 (481) (DB). (Refusing to extend time for setting aside an abatement.)
('22) 9 A I R 1922 Mad 193 (193). (When delay is excused under S. 5, Limitation Act, in admitting an appeal.)
('26) 13 AIR 1926 Mad 591 (592).
('28) 113 Ind Cas 313 (313) (Mad). (Where the Court amended an issue at a late stage but before passing of a decree.)
('29) 16 AIR 1929 Mad 192 (193). (Allowing examination of witness on commission.)
('30) 17 AIR 1930 Mad 72 (74). (Order as to costs.)
('31) 18 AIR 1931 Mad 10 (11). (Granting extension of time for discharge under S. 43, Provincial Insolvency Act.)
('14) 1 AIR 1914 Nag 60 (62) : 10 Nag L R 139. (Refusing to extend time spent in obtaining copies.)
('20) 7 AIR 1920 Nag 149 (149). (Grant of adjournment on payment of costs.)
('26) 13 AIR 1926 Nag 156 (157). (Court's discretion for extending time for payment of deficient court-fee.)
('27) 14 AIR 1927 Nag 253 (255). (Application for appointment of curator.)
('29) 16 AIR 1929 Nag 288 (288). (Allowing secondary evidence of a lost document.)
('28) 111 Ind Cas 141 (142) (Nag). (An order passed under O. 1 R. 10, C. P. Code.)
('24) 11 AIR 1924 Oudh 348 (349) (DB). (Fixing of high fee of commissioner.)
('25) 12 AIR 1925 Oudh 148 (148). (Appellate Court excusing delay in filing appeal.)
† ('31) 18 AIR 1931 Oudh 408 (409) (DB). (Discretion in the appointment of a person as mutwalli.)
('18) 5 AIR 1918 Pat 520 (521) (DB). (Appointment of a pleader as a guardian for the suit.)
('26) 13 AIR 1926 Oudh 160 (160). (Question of sufficiency of security.)
('28) 108 Ind Cas 804 (804) (Pat). (Exercise of inherent jurisdiction.)
('17) 4 AIR 1917 Low Bur 31 (31). (Compensation in breaches of contracts of service.)
('14) 1 AIR 1914 Sind 105 (107) : 8 Sind L R 275 (DB). (Grant of adjournments.)
('81) 3 All 508 (509) (DB). (Order granting or withholding sanction to prosecute by Civil Court.)
('36) 23 AIR 1936 Lah 904 (905). (Refusal to stay suit under S. 19, Arbitration Act, in exercise of discretion—No interference.)
('36) 23 AIR 1936 Lah 140 (140).
('35) 153 Ind Cas 259 (259) (Lah). (Discretion under S. 5, Limitation Act.)
('35) 22 AIR 1935 Cal 102 (107) (DB).
('34) 21 AIR 1934 Cal 780 (781) (DB). (Exercise of inherent power.)
('35) 22 AIR 1935 All 49 (49). (Court considering matter judicially and refusing to exercise discretion under S. 151—S. 115 does not apply—No question of jurisdiction arises.)
('36) 23 AIR 1936 Pesh 97 (99). (Lower Court exercising discretion vested in it by S. 5, Limitation Act—High Court will not interfere.)
('35) 22 AIR 1935 Pesh 182 (185) (DB). (One Court notifying to another a complicated situation and suggesting that proceedings in the other Court may be stayed — Other Court should give weight to such suggestion and give reasons for refusing to comply with such request — That is matter of Court's discretion and High Court is reluctant to interfere with such discretion.)
('38) 25 AIR 1938 Mad 979 (980) : I L R (1938) Mad 317.
('35) 22 AIR 1935 Nag 68 (68). (Parties to mortgage — Person claiming paramount title may be joined as a party to a mortgage suit if just and convenient — High Court should not interfere under S. 115.)
('38) 25 AIR 1938 Mad 347 (348) : I L R (1938) Mad 667 (FB). (Court thinking that guardian acted properly throughout—It has full discretion to discharge him and his order cannot be challenged in revision.)
('37) 24 AIR 1937 Pat 38 (39). (Judge in exercise of his discretion rejecting application to be added as intervenor of person depositing landlord's fee under S. 26 (O), Bihar Tenancy Act—High Court in revision will not interfere.)
('37) 24 AIR 1937 Pat 528 (530). (Even when such exercise is founded on a mistaken view of the law.)
('39) 26 AIR 1939 Lah 170 (171). (Court accepting security in exercise of its discretion—No material irregularity—No revision lies against order accepting security.)
[*See* ('42) 29 AIR 1942 Pat 451 (452). (Order under S. 12, Bihar Money-Lenders Act—Reasons for order not stated—*Held*, High Court was not satisfied whether discretion was exercised judiciously — Revision allowed.)
('37) 24 AIR 1937 Lah 206 (207). (*Obiter*—Order refusing to stay under S. 19, Arbitration Act — No appeal lies but revision is entertainable.)
('33) 20 AIR 1933 All 343 (344). (Order restraining returning officer from holding election.)
('06) 16 Mad L Jour 526 (528).]
[*See also* ('91) 15 Bom 180 (182). (Special Judge under Bombay Act XVII of 1879 exercising his discretion in setting aside the decree of a subordinate Judge.)]

2. ('23) 10 AIR 1923 Mad 690 (692). (Refusal to add parties.)
('28) 113 Ind Cas 313 (313) (Mad). (Amendment of issue at late stage.)
('16) 3 AIR 1916 Mad 381 (385). (Bare failure to exercise discretion as regards costs.)
† ('26) 13 AIR 1926 Cal 1112 (1113) (DB). (Amendment of pleading.)
('31) 18 AIR 1931 Lah 672 (672). (Order under S. 41, Provincial Insolvency Act.)
('67) 7 Suth W R 519 (520) (FB). (Sending a witness to a Magistrate for refusing to attend Court in obedience to a summons.)
† ('18) 5 AIR 1918 All 418 (419) : 40 All 612 (DB).
('11) 12 Ind Cas 173 (174) (Mad). (Amending pleading.)
('28) 111 Ind Cas 141 (142) (Nag).

prejudice to a particular party, the High Court will be justified in interfering with it.[3] It was held in the undermentioned case[4] that the Judge's order as to whether a ballot paper is valid or not, is *final* under R. 12 of the rules for the decision of disputes relating to election to local bodies, and cannot be interfered with in revision. But where the revisional power is not distinctly barred by any specific provision, it remains.[5]

As to whether the High Court will interfere in revision against an order which has been declared to be final by a particular Act, see the undermentioned cases.[6]

† ('93) 16 Mad 424 (428) (DB).
('27) 14 AIR 1927 Rang 311 (313) : 5 Rang 615 (DB). (Order extending time for performance is not revisable unless discretion is wrongly exercised.)
('38) 25 AIR 1938 Lah 548 (550) : I L R (1938) Lah 289 (DB).

3. ('42) 29 AIR 1942 Pat 451 (452). (Order for payment of decree amount by instalments under Bihar Money Lenders Act — No reasons given — Discretion not appearing to have been judicially exercised — Interference in revision.)

† ('16) 3AIR1916 Pat75(76):1 Pat L Jour 465 (DB).
('33) 20 AIR 1933 All 957 (958) (DB). (Order refusing amendment of plaint — *Held*, exercise of discretion was arbitrary — Hence revisable.)
('25) 12 AIR 1925 Cal 293 (294) (DB). (Order setting aside sale under S. 173 of Bengal Tenancy Act — Not revisable unless prejudice caused.)
('31) 18 AIR 1931 Cal 268 (269) (DB).
('14) 1 AIR 1914 Mad 203 (203). (A refusal by a subordinate Court to issue a commission to examine certain witnesses is not an abuse of process warranting an interference by the High Court.)
('23) 10 AIR 1923 Lah 506 (508). (Exercise of discretion under S. 151 not shown to be perverse—No interference.)
('37) 24 AIR 1937 Oudh 282 (283) : 13 Luck 171 (DB). (Court disallowing plaintiff costs of suit — Discretion as to costs based on erroneous view of law—Order as to costs can be interfered with under Section 115.)
('35) 22 AIR 1935 Mad 230 (232).
('36) 23 AIR 1936 Pat 250 (252). (Court summarily rejecting prayer for trying preliminary issue on point of law—No opinion expressed as to whether point of law would be sufficient to dispose of case—High Court would interfere in revision.)
† ('35) 22 AIR 1935 All 705 (706) (DB). (Discretion exercised capriciously.)
('37) 21 AIR 1937 Pat 21 (22). (Refusal to issue commission to a pardanashin lady at her place of residence which is different from the place of suit.)
('35) 22 AIR 1935 Cal 336 (337) : 62 Cal 61 (DB). (By acting under S. 151, Court having no jurisdiction to do so, depriving a party of a valuable right which he had acquired by virtue of the law of limitation—High Court can interfere in revision.)
[*See* ('37) 24 AIR 1937 Mad 338 (339). (Order under O. 1 R. 10 can be revised when the Court fails to exercise a discretion vested in it due to error.)
('38) 25 AIR 1938 Pat 413 (417) : 17 Pat 507.
('34) 21 AIR 1934 Mad 84 (85) : 57 Mad 542. (Excess fee paid by mistake of party—Certificate should be granted even in revision.)]
[*See also* ('40) 27 AIR 1940 Pat 475 (476). (Order under S. 151 can be revised.)]

4. ('29) 16 AIR 1929 Mad 793 (793).

5. † ('29) 16 AIR 1929 All 581 (584) : 51 All 957 (DB).
[*See* ('32) 19 AIR 1932 Oudh 39 (40). (Decree under S. 9, Specific Relief Act, may be revised.)
('32) 19 AIR 1932 Oudh 210 (213) : 7 Luck 601 (FB). (Revision lies against order of Court under Mussalman Waqf Act of 1923 if conditions of section are satisfied.)]
[*See also* ('33) 20 AIR 1933 Rang 2 (3) : 10 Rang 517 (SB). (Order of District Judge as to validity of election — Rule providing that the order shall be final—Revisional powers will not be exercised unless the order is made without jurisdiction.)]

6. ('43) 30 AIR 1943 Oudh 304 (305). (Order on award not revisable.)
('41) 28 AIR 1941 All 131 (132) (FB). (Revision lies against appellate orders under U. P. Encumbered Estates Act, S. 45 (2) or revisional orders under S. 46 of said Act.)
('40) 27 AIR 1940 Oudh 335 (337) : 15 Luck 612 (FB). (Section 45 (5) of the U. P. Encumbered Estates Act 1934 as it stood before amendment of 1939 bars revision under S. 115, C. P. Code, against the appellate order or decree of District Judge.)
('32) 19 AIR 1932 Cal 727 (729). (Order of District Judge under S. 88 of the Bengal Village Self-Government Act, V of 1919 is final—High Court will discourage application in revision.)
('38) 25 AIR 1938 All 47 (47) : I L R (1938) All 110. ('Final' in Section 45 (5), U. P. Encumbered Estates Act, means finality for purposes of appeal —High Court can interfere in revision under Section 115.)
('38) 25 AIR 1938 All 456 (459) : I L R (1938) All 702 (FB). (The provision about the finality of the decision of the Appellate Court contained in S. 5 (2) of the U. P. Agriculturists' Relief Act, cannot warrant the inference that the Legislature meant in any way to control or limit the revisional jurisdiction conferred on the High Court by S. 115, C. P. Code.)
('38) 25 AIR 1938 Cal 465 (466). (Order of District Judge arising out of proceedings under Ss. 36 to 40 of the Bengal Municipal Act is final and High Court has no power to revise it.
('38) 25 AIR 1938 Cal 359 (360). (Order of District Magistrate on petition under R. 1 (a) of Election Rules under Bengal Local Self Government Act is final and no revision lies to High Court.)
('38) 25 AIR 1938 Oudh 162 (165). (Application under S. 4, U. P. Encumbered Estates Act—Applicant making default in paying charges for issue of notice under S. 11 — Special Judge dismissing application and further refusing to restore it—Appeal lies to District Judge under S. 45 (2)—Revision under S. 115 does not lie.)

21. Orders under Sections 152 and 153. — The High Courts of Allahabad,[1] Bombay[2] and Calcutta[3] and the Chief Court of the Punjab[4] have held that an order passed under S. 206 of the old Code (now S. 152) constitutes an adjudication separate from that concluded by the decree and amounts to a decision of a 'case' capable of being revised. The same view has been taken under the present Code also.[5] Accordingly, it has been held that if a Court refuses to amend a decree in conformity with the judgment it amounts to a refusal to exercise jurisdiction.[6] In an old Allahabad case,[7] when the decree was amended from "I dismiss the appeal" to "I accept the appeal" it was considered to be a grave irregularity in the exercise of jurisdiction. Similarly, a Court has no power to vary or amend a decree when it is in conformity with the judgment and an amendment under such circumstances, will be open to revision.[8]

The High Court of Madras on the other hand, held in the undermentioned case[9] that no revision lies against an order of amendment, and that the only remedy of the aggrieved party is to appeal against the *amended decree* and, if necessary, to invoke the provisions of section 5, Limitation Act. This view has however been doubted in a later decision.[10]

Clerical and arithmetical mistakes caused by accidental slips or omissions in judgments, orders and decrees may at any time be corrected under S. 152 and a refusal to correct them would amount to a failure to exercise jurisdiction.[11] When in a mortgage

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Note 21

1. † ('85) 7 All 875 (876) (FB).
2. ('07) 31 Bom 447 (449) (DB).
3. ('01) 28 Cal 177 (179) (DB).
('05) 9 Cal W N 605 (608) (DB).
4. ('88) 1888 Pun Re No. 101 p. 266 (269).
5. ('41) 28 AIR 1941 Oudh 66 (66) : 16 Luck 252. (Amendment under S. 152—Revision lies.)
('34) 21 AIR 1934 All 100 (101) (DB).
[*See* ('11) 1911 Pun Re No.24:10 Ind Cas 850(850).
('27) 14 AIR 1927 Lah 68 (68). (Order of amendment of a decree in regard to the amount of the pleader's fee allowed as costs.)]
[*See also* ('39) 26 AIR 1939 Bom 389 (390). (Order of amendment of decree under Ss. 151 and 152 is not a decree—Application for revision is maintainable.)
('37) 24 AIR 1937 Oudh 246 (247) : 13 Luck 186. (Order refusing to amend decree — High Court, even if precluded from interfering in revision, can interfere under S. 151.)
('36) 23 AIR 1936 Oudh 81 (82). (Decision under S. 152, C. P. C., allowing amendment of preliminary decree is an order and not a decree and is open to revision.)
('38) 25 AIR 1938 Lah 4 (5). (Amended decree though appealable, revision from order amending decree is entertainable, if order is passed without jurisdiction.)]
[See however ('27) 14 AIR 1927 Cal 114 (116) (DB). (Order amending decree not open to revision as appeal lies on amended decree.)]
6. ('84) 6 All 125 (129) (DB).
†('86) 8 All 519 (532) (DB).
('91) 1891 All W N 114 (114) (DB). (Delay in applying when not caused by petitioner is no ground to refuse.)
('10) 6 Ind Cas 707 (707) (All).
('18) 5 AIR 1918 All 208 (209) (DB).
('24) 11 AIR 1924 Lah 621 (622). (When judgment is given against a person sued in a representative capacity, the decree giving a personal liability was refused to be amended.)
('29) 16 AIR 1929 Lah 664 (664) (DB).
('31) 18 AIR 1931 Oudh 422 (424) (DB).
('15) 2 AIR 1915 All 1 (1) (DB). (But not when the refusal arose from a mistake of law or fact.)
7. ('85) 7 All 875 (876) (FB).
8. ('93) 15 All 121 (122) (DB). (Decree was amended by adding interest from date of suit till date of payment when judgment awarded only a specified sum.)
† ('34) 21 AIR 1934 All 100 (101) (DB).
('14) 1 AIR 1914 Cal 387 (387). (Where the Court acts under S. 151 in a case where it should not have done.)
('28) 108 Ind Cas 737 (738) (Lah).
[*See* ('30) 17 AIR 1930 Lah 589 (591).
('13) 18 Ind Cas 725 (726) (Cal). (An amendment to a sale certificate to show the purchase of a larger share of the property than what was stated in the sale proclamation under S. 152 is beyond jurisdiction.)]
9. ('01) 24 Mad 646 (650) (DB).
10. ('40) 27 AIR 1940 Mad 538 (539). (Though ordinarily revision may not lie in such cases, it will lie in exceptional circumstances.)
11. ('15) 2 AIR 1915 All 188 (189) : 37 All 313 (DB). (When the operative part of the decree omitted to mention the rights of a prior mortgagee and directing sale subject to it.)
('20) 7 AIR 1920 All 64 (65). (Though decree was passed by a predecessor-in-office.)
(1900) 27 Cal 5 (7) (DB). (Clerical error in the form of the probate granted, though decree was passed by a predecessor-in-office.)
('13) 20 Ind Cas 588 (589) (DB) (Cal). (Where the sale notice is wrongly described but the property intended to be sold and purchased was the same it is only a clerical mistake.)

suit the mother was appointed guardian for her minor sons, who were defendants in the suit, but a preliminary decree was passed against them with the father as guardian and further proceedings were conducted without reference to the mother, the mistake was held to be not a mere clerical error capable of being rectified, but one of non-representation of the minors.[12]

From the use of the word "may" in S. 152, the Allahabad High Court has held[13] that the Court has a *discretion* to grant the relief and so when a District Court refused to correct a decree passed by it on appeal on the ground that the appellant was guilty of laches, the High Court held that the discretion was rightly exercised in the peculiar circumstances of the case. On the other hand, the High Court of Calcutta[14] is of opinion that the use of the words "at any time" enlarges the power of the Court to grant the relief and does not make it *discretionary*.

The revisional powers cannot be exercised *ultra vires* and without authority; and so, on an application for revision against an order refusing to amend a decree, the High Court cannot direct amendment unless one of the reasons specified in the Code as justifying amendment is established.[15]

The only Court that can amend a decree, after it has been affirmed or varied in appeal is the Appellate Court. The original Court granting an amendment in such a case acts without jurisdiction.[16]

See also Notes 7 and 20 on section 152.

22. Orders under Section 73. — The High Court will not generally interfere with a wrong order of rateable distribution as another and more effective remedy by way of a suit is available to the aggrieved party under cl. (2) of S. 73.[1] This, however, does not

('25) 12 AIR 1925 Cal 420 (421) (DB). (Decree omitting to include names of some of the defendants.)
✣('29) 16 AIR 1929 Lah 400 (401).
('30) 17 AIR 1930 Mad 421 (421). (A refusal to correct an arithmetical error.)
('14) 1 AIR 1914 Mad 143 (143) (DB).
('25) 12 AIR 1925 Oudh 373 (373). (Expense of summoning witnesses wrongly included in costs.)
('24) 11 AIR 1924 Rang 104 (105). (An item mortgaged if omitted in plaint and decree can be corrected and it will not be disturbed.)
('35) 22 AIR 1935 Oudh 461 (462) : 11 Luck 413 (DB). (Section 151 can be resorted to in the interests of justice.)
('36) 23 AIR 1936 Pesh 196 (197).
('37) 24 AIR 1937 Lah 894 (894).
[*See* ('38) 25 AIR 1938 All 466 (467) (F B). (In the peculiar circumstances of this case, the High Court considered it inexpedient to interfere with the order of the lower Court refusing to amend the decree.)
('34) 21 AIR 1931 Oudh 352 (354) : 8 Luck 734.)]

12. ('28) 15 AIR 1928 Mad 1057 (1058).
[*See* ('15) 2 AIR 1915 All 102 (104) : 27 Ind Cas 922 (924). (So also when in the preparation of the decree, two sets of pleaders' fee were erroneously charged instead of one.)]

13. ('25) 12 AIR 1925 All 187 (188) : 47 All 44 (DB).
('25) 12 AIR 1925 All 556 (556) (DB). (The Court is not bound to grant the application in every case. It has jurisdiction to dismiss it. But failure by the Court to exercise this jurisdiction on the ground of its non-existence amounts to material irregularity.)
[*See* ('15) 2 AIR 1915 Lah 213 (214).]

14. ✣('24) 11 AIR 1924 Cal 895 (897) (DB).

15. ('13) 1913 Pun Re No. 47 : 17 Ind Cas 418 (419).

16. † ('10) 32 All 295 (300) : 37 Ind App 70 (P C).
('15) 2 AIR 1915 Mad 1068 (1068).
('17) 4 AIR 1917 Mad 589 (589).
[*See* ('32) 19 AIR 1932 All 337 (339) : 54 All 490. (Revision treated as application for amendment to prevent multiplicity of proceedings.)]

Note 22

1. See Note 8 and also Note 25 on S. 73.
('40) 27 AIR 1940 Nag 302 (303) : I L R (1942) Nag 139.
† ('36) 23 AIR 1936 Oudh 132 (133) : 12 Luck 19 (DB).
('36) 23 AIR 1936 Oudh 185 (187) : 12 Luck 52 (DB).
('36) 23 AIR 1936 Pesh 52 (53).
('35) 22 AIR 1935 Lah 971 (971).
('35) 22 AIR 1935 Mad 399 (400).
('33) 20 AIR 1933 Sind 229 (231) : 27 Sind L R 261 (DB).
('33) 20 AIR 1933 Sind 329 (330) : 27 Sind L R 190 (DB).
✣('32) 19 AIR 1932 Lah 96 (97).
† ('27) 14 AIR 1927 Mad 1030 (1030) (DB).
('25) 12 AIR 1925 Oudh 666 (666).
† ('15) 2 AIR 1915 Mad 547 (548) (DB).
† ('12) 17 Ind Cas 254 (254) (Lah).
('12) 17 Ind Cas 389 (389) (Mad).

mean that the aggrieved party should be confined to that remedy "if the circumstances of the case warrant an interference." Accordingly when Courts have acted in defiance of the terms of S. 73 and thereby assumed a jurisdiction which they did not possess or declined jurisdiction in a proper case, the High Court will interfere to set matters right.[2]

See Note 25 on section 73 also.

23. Orders in claim cases. — As has been seen in Note 8, no application will ordinarily be entertained to revise an order passed under O. 21 Rr. 60, 61 or 62 inasmuch as the party against whom the order is made has a special remedy by way of a suit.[1] But this does not bar the High Court's power of interference in exceptional cases.[2] Thus, if the

('06) 1906 Pun Re No. 128, p. 481 (485) (DB).
† ('05) 2 All L Jour 370 (371) (DB).
('05) 1905 Pun Re No. 65, p. 218 (219).
('05) 1905 Pun Re No. 82, p. 256 (256).
('97) 1 Cal W N 633 (636) (DB).
('94) 4 Mad L Jour 87 (88).
('86) 9 Mad 508 (510) (DB).
2. ('40) 27 AIR 1940 Oudh 237 (239) : 15 Luck 332 (DB).
('25) 12 AIR 1925 Oudh 287 (287).
('32) 19 AIR 1932 All 411 (413) : 54 All 516 (DB). (Interfered to avoid long and expensive litigation.)
('33) 20 AIR 1933 Lah 48 (49) : 14 Lah 243.
('34) 21 AIR 1934 Lah 119 (119).
('34) 21 AIR 1934 Oudh 110 (111). (Disallowing rateable distribution in defiance of predecessor's order.)
† ('33) 20 AIR 1933 Pesh 52 (53).
('09) 4 Ind Cas 52 (53) (DB) (Cal).
('11) 10 Ind Cas 527 (529, 530) (DB) (Cal). (Rateable distribution was refused because lower Court thought that execution petition was not put in before sale.)
('16) 3 AIR 1916 Cal 371 (372) (DB). (Giving rateable distribution to a person who has simply obtained an attachment before judgment.)
('22) 9 AIR 1922 Cal 19 (21).
('81) 4 Mad 383 (384) (DB). (Giving a share to decree-holder whose execution has been dismissed.)
('92) 15 Mad 372 (376) (DB). (Wrongly refusing to entertain an application.)
('09) 32 Mad 334 (335) : 4 Ind Cas 509 (510). (Refused because there was other property of the judgment-debtor available.)
('21) 8 AIR 1921 Mad 481 (482) (DB).
('26) 13 AIR 1926 Mad 179 (181). (Where the lower Court thought that petitioner was not entitled to rateable distribution, because his execution did not end successfully.)
('31) 1931 Mad W N 1012 (1014).
('26) 13 AIR 1926 Nag 380 (381).
('07) 10 Oudh Cas 129 (131) (DB).
('24) 11 AIR 1924 Pat 434 (435) (DB).
† ('31) 18 AIR 1931 Pat 405 (408): 11 Pat 250 (DB).
('38) 177 Ind Cas 269 (270) (DB) (Pat). (Court declining to exercise jurisdiction vested in it under Section 73.)
[*See also* ('40) 27 AIR 1940 Nag 302 (303) : ILR (1942) Nag 139.
('33) 20 AIR 1933 Pat 277 (278). (Sum distributed not forming part of assets liable to be rateably distributed—Revision lies.)]
[But see ('21) 8 AIR 1921 Pat 401 (402) : 5 Pat L Jour 415 (DB).]

Note 23

1. ('38) 25 AIR 1938 Rang 319 (320) (DB). (Dismissal of objections to attachment under O. 21, R. 58—Party has remedy of suit.)
('36) 163 Ind Cas 812 (813) (Cal).
† ('36) 23 AIR 1936 Rang 306 (306): 14 Rang 516. (Unless it can be shown that the Judge passing the order has in passing it failed to exercise jurisdiction vested in him by O. 21, Rr. 58-62—Where the Court has so failed to exercise its jurisdiction its order is open to revision.)
('36) 23 AIR 1936 Sind 2 (3) : 30 Sind L R 288 (DB). (Order under O. 21, R. 58.)
† ('34) 21 AIR 1934 Rang 230 (230).
('33) 20 AIR 1933 Lah 317 (318) : 14 Lah 51.
('30) 17 AIR 1930 Pat 394 (395).
† ('29) 16 AIR 1929 Nag 66 (67).
('29) 16 AIR 1929 Rang 297 (298) : 7 Rang 466 (DB).
('26) 13 AIR 1926 Cal 1149 (1151) : 53 Cal 767 (DB).
('26) 93 Ind Cas 868 (869) (Lah).
('23) 10 AIR 1923 Oudh 208 (208).
('21) 64 Ind Cas 469 (469) (All).
('19) 6 AIR 1919 Cal 857 (858) (DB).
† ('18) 5 AIR 1918 Mad 914 (915) (DB).
† ('18) 5 AIR 1918 Upp Bur 45 (46) : 3 Upp Bur Rul 13. (Error consists in misappreciation of evidence or misconstruction of the law.)
('17) 4 AIR 1917 All 177 (178).
('13) 21 Ind Cas 461 (462) (Mad).
('07) 1 Sind L R 226 (226, 227).
('04) 28 Bom 458 (460) (DB). (Under the peculiar circumstances of the case High Court has interfered.)
('97) 1897 Pun Re No. 8, p. 35 (37, 38) (DB).
('93) 15 All 405 (407).
† ('88) 10 All 119 (122).
('86) 9 Mad 130 (133) (DB).
✣ ('85) 8 Mad 484 (493) (FB).
('73) 20 Suth W R 202 (202) (DB).
2. ('26) 13 AIR 1926 Nag 257 (259). (But the mere fact that if he files a suit the onus will be on him is no ground for interference in revision.)
('33) 20 AIR 1933 Pat 158 (159). (Where order is passed without consideration of evidence, High Court will interfere.)
('23) 10 AIR 1923 Mad 663 (664).
† ('36) 23 AIR 1936 Rang 306 (306): 14 Rang 516. (High Court will interfere where Court passing the order has failed to exercise jurisdiction vested in it.)

lower Court fails to determine the only real question that has to be decided, namely, that of possession[3] and disposes of the petition on a determination of the question of title[4] which it was not competent to investigate, or allows a claim in express violation of the Code, as for example, after the execution sale[5] or against mortgaged property which was brought for sale,[6] or refuses to entertain a claim on the erroneous view that the decree under execution is a mortgage decree,[7] the High Court will interfere. Similarly, if a Court improperly refuses to investigate a claim[8] or in investigating the question of possession it considers questions really extraneous to the issue[9] such as fraud or the *benami* character of the transaction on which the claim was based,[10] or the liability of the petitioner to discharge the debt,[11] the High Court will interfere.

An order of the executing Court refusing to entertain objections under O. 21 R. 58 is not an order under O. 21 R. 61 and as therefore, the objectors have no right of suit under O. 21 R. 63, the order is open to revision.[12]

24. Orders setting aside or refusing to set aside sales. — An order under O. 21 R. 72 or R. 92 setting aside or refusing to set aside an execution sale is now made expressly appealable by O. 43 R. 1 cl. (j). Under the old Code the order was appealable as a decree under S. 244 (now S. 47) if the question was decided between the parties to the suit or their representatives though the auction purchaser was interested in the result. But when the question was between a party to a suit and the auction purchaser, it was doubted whether an appeal lay and so revision was allowed.[1] So, when the Court set aside an execution sale at the instance of an attaching creditor[2] or a Mahomedan co-heir,[3] this section was held to apply and the order was held to be one passed without jurisdiction on the ground that they were not persons competent to apply. Under the present rule where an application is erroneously dismissed on the ground that it was made by a person not entitled to apply, it has generally been held that the action of the lower Court amounted to a refusal to exercise jurisdiction. See Note 11.

No second appeal lies from an order made under O. 21 R. 89[4] but a revision will lie from those orders passed in appeal and made in disregard of those provisions or in the

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3. ('29) 16 AIR 1929 Pat 751 (752).
('29) 16 AIR 1929 Cal 225 (226).
('09) 4 Ind Cas 125 (125) (DB) (Mad).
('16) 3 AIR 1916 Mad 19 (19).
('28) 15 AIR 1928 Mad 124 (125).
('27) 14 AIR 1927 Nag 286 (288).
('21) 60 Ind Cas 616 (618) (Pat).
('23) 10 AIR 1923 Rang 195 (196) : 1 Rang 276.
† ('87) 14 Cal 617 (620) (DB). (Really went behind and saw whether his possession was lawful or not.)
Also see O. 21 R. 61, Note 2.

4. ('15) 2 AIR 1915 Cal 116 (117) (DB).
('33) 20 AIR 1933 Rang 259 (260).
('25) 12 AIR 1925 Mad 588 (588). (Possession.)
('31) 18 AIR 1931 Lah 666 (666).
('37) 1937 Mad W N 320 (320).
† ('39) 26 AIR 1939 All 117 (120).
Also see O. 21 R. 61, Note 2.

5. ('06) 33 Cal 487 (496) (DB).
('12) 15 Ind Cas 53 (54) (DB) (Cal).
('11) 9 Ind Cas 194 (195) (DB) (Cal).
('29) 16 AIR 1929 Pat 746 (747). (Order based on erroneous view of fact and law.)

6. ('05) 27 All 700 (701) (DB).
(13) 18 Ind Cas 215 (216) (DB) (Cal).
('18) 5 AIR 1918 Lah 368 (368) : 1918 Pun Re No. 58.
[*See also* ('21) 8 AIR 1921 Cal 479 (480) (DB).]

7. ('34) 21 AIR 1934 Lah 176 (176).

8. ('37) 24 AIR 1937 Oudh 268 (269) : 13 Luck 111 (DB). (Objection summarily dismissed on supposed ground of unnecessary delay.)
('75) 24 Suth W R 422 (423) (DB). (Refusing to receive evidence.)
('72) 17 Suth W R 74 (74) (DB).
('79) 4 Cal L Rep 74 (76) (DB).
('29) 16 AIR 1929 Rang 152 (153) : 7 Rang 132.

9. (1900) 1 Low Bur Rul 180 (182).

10. † ('27) 14 AIR 1927 Pat 316 (318).

11. ('91) 18 Cal 290 (296) (DB).

12. ('36) 23 AIR 1936 Pesh 185 (186).

Note 24

1. ('01) 25 Bom 631 (635, 636) (DB). (Order of rejection on the ground that judgment-debtor had disposed of his property before sale.)

2. ('02) 6 Cal W N 57 (60) (DB).

3. ('03) 30 Cal 425 (427, 428).

4. ('11) 38 Cal 339 (341) : 10 Ind Cas 345 (345) (DB).
('30) 17 AIR 1930 Cal 249 (250) (DB).

illegal or irregular exercise of jurisdiction.[5] Thus, if the judgment-debtor deposits the amount mentioned in the sale proclamation together with the 5 per cent. of the purchase money in time, a refusal to set aside a sale was held to be an irregular exercise of jurisdiction.[6] But an *application* is necessary, a mere deposit not being enough; it will be violating the principle of the rule if the sale is set aside without such an application though an oral application has been considered sufficient.[7] No order could be made setting aside a sale under O. 21 R. 89, without notice as provided under R. 92, but there is no jurisdiction to confirm the sale for failure to pay process fees when the auction purchaser appears in the proceeding by a pleader.[8] When the deposit falls short, due to a mistake of the Court, and is subsequently made good, the Court acts with material irregularity in refusing to set aside the sale.[9] No application for revision will lie from an order dismissing an application under R. 89 on the ground that an application under R. 90 was previously dismissed.[10] See also the undermentioned cases.[11]

As in the case of applications under O. 21 R. 89 so in applications under R. 90, only a first appeal is provided by S. 104 and O. 43 R. 1 cl. (i). But if the application raises a question concerning the execution, discharge or satisfaction of the decree within the meaning of S. 47 and when no petition is put in under R. 89, the executing Court is bound to decide it and the decision so given being a decree, a second appeal will lie.[12] An instance of the kind is to be found where a sale is held without issuing a proper notice provided by Order 21 Rule 22.[13] When a Court rejects an application to set aside a sale summarily[14] or without allowing the petitioner an opportunity to substantiate his allegations[15] or without considering the evidence let in by him[16] or by misapplying the law of limitation,[17] it was

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5. ('36) 23 AIR 1936 Oudh 172 (172) (DB). (Assumed—No interference was necessary on facts of the case.)
[*See* ('07) 1907 Pun Re No. 92, p. 439 (441).]
6. ('23) 10 AIR 1923 All 315 (317). (It is immaterial even if the sale proclamation contained a different decree amount of another decree-holder claiming rateable distribution.)
('19) 6 AIR 1919 Pat 465 (466) (DB). (Though the heirs of the judgment-debtor ceased to take interest colluding with the auction-purchaser and the private purchaser has intervened.)
† ('30) 17 AIR 1930 Oudh 9 (10). (It does not include costs and interest not covered by the proclamation.)
('29) 16 AIR 1929 Nag 10 (11). (Refusal to confirm a sale where the amount is not deposited in time is without jurisdiction.)
('87) 14 Cal 321 (323) (DB). (Under S. 174, Ben. Ten. Act, where Government Promissory Notes were deposited, it was held not a proper deposit.)
7. See O. 21 R. 89, Note 17.
8. ('22) 67 Ind Cas 286 (287) (DB) (Cal).
9. ('30) 17 AIR 1930 Cal 249 (250) (DB).
[But see ('20) 7 AIR 1920 Cal 392 (392).]
10. ('98) 1898 All W N 148 (149) (DB).
11. ('37) 24 AIR 1937 Pat 113 (116) : 16 Pat 202 (FB). (Parties agreeing that on default in payment of the decretal amount by a certain date the sale should be confirmed—Sale confirmed — Order one under O. 21 R. 89—Appeal lay and even if appeal did not lie, revision lay.)
('37) 24 AIR 1937 Pat 537 (540). (Sale in execution of rent decree—Transferee from judgment-debtor depositing in Court 5 per cent. for payment to stranger auction purchaser on last day of limitation — In lieu of depositing in Court under Section 174 (1), Bengal Tenancy Act, transferee filing petition that payment had been made out of Court —Landlord decree-holder assenting to same — Court held was bound to affirm sale unless money actually deposited in Court within limitation—Sale set aside—Case held fit for interference in revision.)
('36) 23 AIR 1936 Oudh 55 (56) : 11 Luck 418 (DB). (Execution sale—Decree-holder consenting to accept decretal amount from judgment-debtor and have sale set aside though beyond time — Court setting aside sale — Equities held were in favour of judgment-debtor and High Court should not interfere in revision.)
('38) 25 AIR 1938 Mad 307 (312). (An order rejecting an auction-purchaser's application for confirmation of the sale is not an appealable matter nor can it be revised.)
12. See O. 21 R. 90, Note 50.
13. ('24) 11 AIR 1924 Mad 431 (436) : 47 Mad 288 (FB).
14. ('25) 12 AIR 1925 Nag 289 (291).
15. † ('29) 16 AIR 1929 All 793 (793) : 51 All 1023 (DB).
16. ('25) 12 AIR 1925 Cal 515 (516). (Where a sale was set aside after seven years and the judgment did not discuss all points.)
('21) 8 AIR 1921 Cal 251 (252) : 48 Cal 119 (DB).
17. ('26) 13 AIR 1926 All 305 (306) : 48 All 286. (Because fuller particulars of fraud were given only after 30 days.)
† ('28) 15 AIR 1928 All 354 (354). (Section 18, Limitation Act.)
('24) 44 Cal L Jour 565 (568).

held to be a sufficient ground for interference. When the auction purchaser[18] or the decree-holder[19] is not impleaded in the petition in time it is not a mere error of law but an irregularity of procedure justifying interference. The sale can be set aside only on proof of substantial injury[20] and in the absence of it, a Court acts without jurisdiction in setting aside the sale.[21] Where a Court dismisses an application to set aside a sale under O. 21 R. 90 on the erroneous ground that a certain irregularity did not lead to substantial injury, the decision will not be interfered with in revision as there is no want of jurisdiction or irregularity in exercise of jurisdiction in such a case.[22] Where an incumbrance was not mentioned in a sale proclamation and the price fetched was inadequate and when no notice was issued under O. 21 R. 66, and nevertheless the sale was confirmed by the lower Court, it was held to be a fit case for revision.[23] It will be a failure to exercise jurisdiction to refuse to confirm a sale in the absence of a petition either under R. 89 or R. 90.[24] Similarly, where a sale is confirmed while an application to set it aside is pending, the order will be interfered with in revision.[25]

When a petition is put in under Order 9, which does not apply to execution proceedings, to set aside an *ex parte* order setting aside the execution sale, the High Court, in revision, will not convert it into one of review.[26]

Fraud of the auction purchaser in colluding with the execution creditor and purchasing property at a depreciated value is a good ground to set aside a sale and a Court acts with material irregularity in refusing to do so.[27] See also the undermentioned cases.[28]

See also Note 13.

25. Order permitting withdrawal of suit. — See O. 23 R. 1, Note 41.

26. Orders under Order 33. — Some of the earlier decisions of the Allahabad High Court[1] took the view that orders on applications in *forma pauperis* did not come

('13) 18 Ind Cas 391 (392) (DB) (Cal). (A failure to consider S. 7, Limitation Act, is not, when raised for first time.)
18. ✣('29) 16 AIR 1929 All 593 (595) : 51 All 910 (DB).
('28) 15 AIR 1928 Cal 189 (190).
19. ('93) 15 All 407 (409).
20. ('30) 17 AIR 1930 Pat 58 (60). (One of the most usual forms of showing that is to show that the property has been sold at a gross under-value.)
('24) 11 AIR 1924 Nag 293 (294).
('24) 11 AIR 1924 Pat 785 (786).
('22) 9 AIR 1922 Lah 35 (36).
('31) 18 AIR 1931 Pat 63 (64) (DB).
('12) 13 Ind Cas 597 (597) (DB) (Cal).
[*See* ('35) 22 AIR 1935 Rang 521 (521). (Sale confirmed in favour of person who had bid through an agent — Latter not having a proper power of attorney—No material irregularity.)]
21. ('25) 12 AIR 1925 Sind 253 (254): 18 Sind L R 130 (DB). (Sale set aside under inherent power).
('24) 11 AIR 1924 Pat 785 (786).
('01) 24 Mad 311 (315).
('86) 9 Mad 145 (146) (DB).
('37) 24 AIR 1937 Pat 357 (358). (Where the Court below sets aside a sale contrary to the proviso to O. 21 R. 90, C. P. Code, without determining whether the applicant has sustained substantial injury, there is an error affecting jurisdiction calling for interference by the High Court in revision.)
22. ('35) 22 AIR 1935 Oudh 154 (156) (DB).
23. ('29) 16 AIR 1929 Pat 588 (589).
('29) 16 AIR 1929 Cal 736 (737).
24. ('93) 20 Cal 8 (11) : 19 Ind App 154 (PC).
('27) 14 AIR 1927 Lah 71 (72).
('33) 20 AIR 1933 Lah 99 (100) : 13 Lah 761.
25. ('33) 20 AIR 1933 All 137 (138).
26. ('26) 13 AIR 1926 Cal 735 (736). (Petition to set aside an *ex parte* order setting aside an execution sale.)
27. †('78) 2 Mad 261 (269) (DB).
28. ('38) 25 AIR 1938 Pat 240 (242) : 17 Pat 107 (DB). (Order 21, Rule 90 (Patna amendment), Proviso (i) — Application for permission to give landed property as security instead of deposit — Court not applying mind to it and refusing—Dismissal of application to set aside sale for failure to make deposit — Appeal—order refusing to accept security—Revision is maintainable.)
('31) 18 AIR 1931 All 594 (595) (DB). (Where an application for restoration of an application under O. 21 R. 90, not limited to O. 9, is dismissed on the ground that it is not entertainable, without being considered on merits, there is a failure to exercise jurisdiction.)
('31) 18 AIR 1931 Cal 425 (426). (Where the trial Court wrongly entertains a time-barred application under O. 21 R. 90 and sets aside the sale but the decision is reversed on appeal which is incompetent under S. 173 of the Ben. Ten. Act the High Court will not interfere in revision.)

Note 26

1. ('82) 1882 All W N 39 (39) (DB).
('82) 1882 All W N 69 (69) (DB).

within the words "*case decided*" and were of such an interlocutory character as not to come within the meaning of the section. But in 1910 a Division Bench of the said High Court drew a distinction between cases where the pauper's application was *rejected* and cases where it was *allowed*.[2] In the former case the pauper's case was held to have come to an end and was therefore a "case decided" within the meaning of the section capable of being revised, while in the latter case it was held that no "case" was decided. It was apparently on this ground that two of the earlier decisions of that Court permitting revision could be supported. One was a case[3] where the lower Court without paying attention to the exact meaning of the word "pauper" considered certain extraneous and irrelevant matters and another[4] where the lower Court inquired into what would be the result of the suit if leave was not granted and thus rejected the application. After the Full Bench decision in *Budhu Lal* v. *Mewa Ram*[5] authoritatively laid down in 1921 that interlocutory orders did not amount to a case decided under the section, it was held that even applications where leave was refused could not be revised,[6] though the old distinction between cases where the application was refused and those where it was allowed was also adopted in some rulings.[7] Independently, however, of this view it was held by the said High Court that in considering the question of pauperism, if a Court wanders from the issue, and enters on a question of the pauper's title[8] or the maintainability of the suit,[9] it would be an exercise of jurisdiction not vested by law. The Full Bench ruling has been subsequently distinguished as an authority only for the proposition that no revision lies from a mere finding, though relating to a question of jurisdiction and not as laying down a broader proposition that no revision will ever lie from an order which is merely interlocutory one. Further, when the matter is altogether at *an end* and plaintiff is entirely out of Court, the order is not merely an interlocutory one but a "case decided" and so is revisable.[10] See also the undermentioned decisions.[11] The Lahore High Court has held that an order granting or refusing an application for leave to sue in *forma pauperis* is a 'case decided.'[12]

('82) 1882 All W N 92 (92) (DB).
('81) 4 All 91 (92) (DB). (Rejection of the application because it was presented by pleader.)
('85) 7 All 661 (664) (FB). (Application rejected because claim was barred.)

2. ('10) 32 All 623 (624) (DB).
3. ('88) 10 All 467 (470).
4. ('93) 1893 All W N 218 (219).
5. ('21) 8 AIR 1921 All 1 (5) : 43 All 564 (FB).
6. ('22) 9 AIR 1922 All 1 (1): 44 All 248. (Pigot, J., reserved his opinion though he was inclined in favour of the revision.)
('26) 13 AIR 1926 All 446 (446) : 48 All 493.
('22) 9 AIR 1922 All 208 (208) (DB). (Application for leave to sue in *forma pauperis*—Order admitting the application is not revisable.)
7. ('42) 29 AIR 1942 All 319 (319) : I L R (1942) All 859 (DB). (An order rejecting an application for leave to sue in *forma pauperis* is revisable.)
† ('42) 29 AIR 1942 All 347 (349) (DB). (An order granting leave to sue as a pauper is not open to revision.)
('31) 18 AIR 1931 All 659 (660) (DB). (Leave to sue as pauper granted—No revision lies.)
8. ('23) 10 AIR 1923 All 577 (578) : 45 All 548 (DB).
9. ('25) 12 AIR 1925 All 275 (276). (Because it is barred by *res judicata*.)
10. † ('30) 17 AIR 1930 All 758 (760) : 52 All 927 (DB).
('33) 20 AIR 1933 All 295 (296) : 53 All 216. (But where the application is converted into a plaint, no revision lies.)
11. ('17) 4 AIR 1917 All 355 (355) (DB). (Where the lower Court acted within its jurisdiction in refusing an application for leave to sue in *forma pauperis*, the revision was held not to lie.)
('17) 4 AIR 1917 All 186 (186) (DB). (*Held*, that the lower Court had discretion to grant the application or not, and that it was not possible to say that the Court acted illegally and with material irregularity in granting the application.)
12. ('41) 28 AIR 1941 Lah 128 (131) : ILR (1941) Lah 697 (DB). (1912 Pun Re No. 87 overruled.)
('27) 14 AIR 1927 Lah 56 (56).
('85) 1885 Pun Re No. 21, page 40 (41).
† ('26) 13 AIR 1926 Lah 642 (643).
('34) 21 AIR 1934 Lah 231 (231).
('29) 16 AIR 1929 Lah 498 (498).
('82) 1882 Pun Re No. 99, page 281 (282) (DB).
('19) 6 AIR 1919 Lah 4 (5) : 1919 Pun Re No. 134.
[*See also* ('36) 23 AIR 1936 Pesh 69 (71). (Order rejecting application to sue in *forma pauperis* is revisable.)]
[See however ('34) 21 AIR 1934 Lah 295 (296). (No revision lies from order allowing pauper application—1912 Pun Re No. 87 followed—Defendant can have no possible grievance in such a case, the Crown alone being affected — High Court may interfere in a proper case.)]

The High Court of Nagpur and the Chief Court of Sind have maintained the distinction pointed out by the Allahabad Court though interference would be made only in cases where there is some illegality or material irregularity in the procedure adopted by the lower Court in rejecting the application.[13] In Oudh[14] the application in *forma pauperis* was itself held to be a "case decided" and therefore if the lower Court committed an irregularity in deciding it, it could be revised whether the application was allowed or rejected. This view, it is submitted, is the correct view, and has been upheld by all the other High Courts. The Madras, Patna and Rangoon High Courts[15] have also rejected the distinction referred to above between the rejection and the allowing of the application. Accordingly when the lower Court, after considering the whole question of pauperism and in the exercise of discretion comes to a proper decision it will not be interfered with when there is no error of jurisdiction.[16] If, on the other hand, the lower Court commits an

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13. ('41) 28 AIR 1941 Nag 330 (333, 334) : I L R (1942) Nag 459. (Assumed.)
('11) 7 Nag L R 49 (49) : 10 Ind Cas 471 (471). (Order granting leave to sue in *forma pauperis* — Not revisable.)
✠('24) 11 AIR 1924 Nag 44 (45) : 19 Nag L R 165 (DB). (Order refusing permission—Revision lies.)
† ('33) 20 A I R 1933 Sind 82 (83) : 26 Sind L R 491 (DB).
('25) 12 A I R 1925 Nag 343 (344) (DB). (Where there is not any material irregularity, the High Court will not interfere in revision.)
† ('27) 14 AIR 1927 Nag 340 (341). (Wrong conclusion on facts and evidence is no ground for interference.)
('28) 15 AIR 1928 Nag 24 (27). (Application rejected and court-fee demanded — Revision filed, but later on suits dismissed for non-production of stay order — Still revision is maintainable.)
('30) 17 AIR 1930 Nag 53 (54). (Absence to record reasons does not vitiate the order.)
('35) 22 AIR 1935 Nag 209 (211) : 31 Nag L R 413. (Lower Court rejecting application to sue in *forma pauperis* on erroneous assumption, its decision thus amounting to a conscious violation of the rules of the Civil Procedure Code — Decision is open to revision.)
[*See also* ('36) 23 AIR 1936 Nag 280 (280) : ILR (1937) Nag 428. (Application for leave to sue in *forma pauperis* rejected—Second application — Objection that it was barred — Trial Court has jurisdiction to decide if application is barred.)]
[But see ✠('38) 25 AIR 1938 Nag 210 (211): ILR (1940) Nag 463. (Order allowing person to sue as pauper is revisable when the conditions of S. 115 are satisfied.)]
14. ('42) 29 AIR 1942 Oudh 169 (171) : 17 Luck 462 (DB).
('42) 29 AIR 1942 Oudh 239 (240) : 17 Luck 605 (DB).
('42) 29 AIR 1942 Oudh 240 (242) : 17 Luck 628. (Section 47 of the Encumbered Estates Act (XXV of 1934) is no bar to such a revision.)
('42) 29 AIR 1942 Oudh 361 (362) (DB).
('40) 27 AIR 1940 Oudh 148 (151) : 15 Luck 365 (FB).
('40) 27 AIR 1940 Oudh 353 (353) (DB).
('09) 12 Oudh Cas 381 (382) : 4 Ind Cas 777 (778).
('15) 2 AIR 1915 Oudh 3 (3).
† ('23) 10 AIR 1923 Oudh 118 (119).
('25) 12 AIR 1925 Oudh 74 (74) (DB).
('26) 13 AIR 1926 Oudh 204 (204).
✠('38) 25 AIR 1938 Oudh 146 (149) : 14 Luck 116 (DB). (There is no distinction between cases where application has been granted and where it has been rejected — Neither is an interlocutory order.)
[*See also* ('35) 22 A I R 1935 Oudh 20 (21) : 10 Luck 265 (DB). (Result of dismissal of application is an end to the proceeding, hence rejection of application constitutes case decided.)
('37) 24 AIR 1937 Oudh 481 (481) : 13 Luck 560 (DB).
('36) 1936 Oudh W N 237 (239) (DB). (Order rejecting application revised on ground of material irregularity.)]
15. ('26) 13 AIR 1926 Mad 958 (958).
('38) 25 AIR 1938 Pat 209 (209) (DB).
('31) 18 AIR 1931 Rang 318 (318, 319). (Case of refusal of leave to sue in *forma pauperis*.)
('31) 18 AIR 1931 Rang 129 (131) : 9 Rang 86. (Do.)
† ('31) 18 AIR 1931 Rang 131 (134) : 9 Rang 92. (Do.)
16. ('42) 29 AIR 1942 Nag 47 (48) : I L R (1942) Nag 625. (Applicant under O. 33, R. 1 claiming share in joint family property — Court granting application on ground that claim to share in property did not constitute sufficient means — Decision is not wrong and even if wrong no material irregularity in the exercise of jurisdiction.)
('40) 27 AIR 1940 Oudh 353 (354) (DB). (Application to sue as pauper — Court deciding on allegations in plaint that no cause of action was disclosed and rejecting the application—Order even if erroneous in law is not revisable.)
('98) 20 All 299 (302) (DB). (Lower Court dismissing application on the ground that applicant had not shown a *prima facie* reasonable cause of action is not guilty of any irregularity or illegality — No revision lies.)
('67) 7 Suth W R 486 (487) (DB). (No revision lies from an order granting leave.)
('25) 12 AIR 1925 Cal 990 (991) (DB).
('30) 17 A I R 1930 All 831 (832) (DB). (So also omission to give details as to the value of the applicants' property not illegal.)
('29) 16 AIR 1929 Lah 821 (822).
('19) 6 AIR 1919 Pat 58 (59) : 1919 Pat H C C 232 (234) (DB). (The decision that a benamidar could not sue is wrong in law—*Held*, that it was an error in law at best which could not be interfered with in revision.)

irregularity in the exercise of jurisdiction as where it declines to give notice to the Government Pleader or to the defendant before disposing of the application,[17] or where it does not properly consider the sufficiency or otherwise of the evidence as to pauperism,[18] or where it enters into the merits of the case and dismisses the application after finding that the claim is unsustainable,[19] the High Court will interfere. It will also interfere where the Court commits obvious errors of law.[20]

No doubt the Court has to satisfy itself *prima facie* that the plaint discloses a subsisting cause of action but it will be acting without jurisdiction if it travels beyond the plaint to ascertain the same, as, for instance, by taking the evidence of witnesses besides that of the petitioner.[21] Where plaintiff is allowed to sue as a pauper, security for costs

('24) 11 AIR 1924 Pat 667 (669) (DB). (When on materials Court finds that petitioner is not a pauper.)
('27) 14 AIR 1927 Pat 352 (352).
('39) 26 AIR 1939 Pat 95 (96). (The fact that the lower Court wrongly holds that the ornaments worn by a female applicant are her necessary wearing apparel cannot be a ground for holding that it has acted illegally or with material irregularity in adopting that view.)
[*See* ('26) 13 AIR 1926 Lah 642 (643). (Agreement to pay small fee to counsel out of the suit amount in case of success does not bring it under O. 33 R. 5.)]

17. ('27) 14 AIR 1927 Cal 464 (464) (DB).
('34) 21 AIR 1934 All 424 (425): 56 All 895 (DB). (By allowing a party to appeal as a pauper without hearing the Government pleader a case is decided —AIR 1933 All 11: 54 All 394 not followed.)
('94) 1894 Pun Re No. 130, p. 494 (496, 497) (DB).
Also see O. 33 R. 6 N. 1.

18. ('42) 29 AIR 1942 All 319 (320): I L R (1942) All 859 (DB).
('41) 28 AIR 1941 Pat 638 (640).
('40) 27 AIR 1940 Oudh 148 (152) : 15 Luck 365 (FB). (Application to sue in *forma pauperis* in a representative capacity—Application rejected on ground that plaintiff is not a pauper taking his personal property into consideration—Court acts illegally in exercise of its jurisdiction.)
('40) 27 AIR 1940 Pat 263 (263). (Order rejecting application on Munsif's report without hearing applicant.)
('15) 2 AIR 1915 Mad 652 (653) (DB). (Dismissal of petition only on the ground of omission to include one item of property in the schedule to the petition—High Court will interfere.)
('85) 1885 Pun Re No. 21 page 40 (41). (Revision lies when the lower Court acted illegally or with material irregularity.)
('27) 14 AIR 1927 Rang 283 (284). (Failure to consider whether there was an agreement contrary to O. 33 R. 1.)
('29) 16 AIR 1929 Lah 746 (748). (Court rejecting application considering that next friend is not a pauper.)
('26) 13 AIR 1926 Mad 958 (958).
('14) 1 AIR 1914 Cal 721 (722) (DB). (Rejection of application because petitioner possessed ornaments 6 months prior to date of application is bad.)
('06) 8 Bom L R 642 (644) (DB). (Rejection of application because pauper had Rs. 1600 worth of property with him for a suit requiring Rs. 1775 court-fee.)
† ('31) 18 AIR 1931 Rang 318 (319). (Conclusion based on conjecture.)

19. ('10) 6 Ind Cas 703 (703) (All).
('03) 8 Cal W N 70 (73) (DB).
✠('32) 19 AIR 1932 Bom 584 (588): 56 Bom 585.
('98) 2 Cal W N 474 (478) (DB).
† ('03) 13 Mad L Jour 292 (295) (FB). (That the evidence showed no cause of action.)
('03) 27 Mad 120 (121): 13 Mad L Jour 425 (426).
('12) 15 Ind Cas 184 (184) (Mad).
('12) 16 Ind Cas 612 (614) (Mad).
('14) 1 AIR 1914 Mad 256 (258). (Because certain unsustainable claims were added.)

20. ('36) 23 AIR 1936 Mad 83 (84).
('25) 12 AIR 1925 Rang 381 (382). (Overlooking the provisions of Limitation Act and wrongly holding application barred.)
('28) 15 AIR 1928 Pat 28 (29).
('28) 15 AIR 1928 Lah 271 (271). (When the Court thought that property which was the subject-matter of the suit could be treated as means.)
('19) 6 AIR 1919 All 213 (214) (DB). (Treating an application as a plaint and directing its return for presentation to proper Court.)
('30) 17 AIR 1930 Rang 324 (325).
('93) 16 Mad 454 (455) (DB). (For non-production of a succession certificate.)
[*See also* ('38) 25 AIR 1938 Rang 453 (454) (DB). (Where the Court to which an application under O. 33 R. 1 for leave to sue in *forma pauperis* is presented, dismisses the application although satisfied that the applicants are paupers, holding that the suit is not maintainable in view of the provisions of S. 47, and where in coming to this conclusion, it not only refers to certain proceedings mentioned in the proposed plaint but makes use of the information obtained therefrom, the use of such information is irregular and it amounts to a material irregularity in the conduct of the proceedings in the lower Court which vitiates the order passed therein.)
('36) 23 AIR 1936 Pat 591 (593) : 15 Pat 738 (DB). (One of the applicants for leave to sue as pauper dying during pendency of application — Legal representative is entitled to be brought on record—Court not granting time for substitution acts with material irregularity.)]

21. ('41) 28 AIR 1941 Mad 398 (399).
('24) 11 AIR 1924 Mad 80 (80).
† ('32) 19 AIR 1932 Bom 584 (588) : 56 Bom 585.

should be ordered only under exceptional circumstances, and an order rejecting the application for failure to furnish the same is improper and will be set right in revision.[22]

A pauper whose application is rejected may be allowed to pay the necessary court-fee and it will be a failure to exercise jurisdiction if the permission is refused.[23]

The Government is entitled, at any time, to apply to the Court to make an order for the payment of court-fees.[24] And if no provision is made for the payment of court-fee to Government, the Government may appeal against the decree.[25] Under the Code of 1882, it was held that Government not being a party to the suit, had no right of appeal but it was held that the Collector could in such cases move the High Court under this section.[26]

27. Orders under Order 47. — See O. 47 R. 7, Note 16.

27a. Orders under Order 45.—This section is applicable to an order granting or refusing a certificate under Order 45.[1]

27b. Decision as to court-fee, whether revisable. — It has been held that an order demanding additional court-fee is revisable under this section as in such cases there is a refusal to exercise jurisdiction in the matter and try the case on the merits unless the additional court-fee demanded is paid.[1] But a decision holding that the court-fee paid is sufficient is, it has been held, not subject to the revisional jurisdiction of the High Court as there is no refusal to exercise jurisdiction in such cases.[2] See also

('27) 14 AIR 1927 Mad 441 (442).
('25) 12 AIR 1925 Pat 30 (30) : 3 Pat 275 (DB).
('13) 18 Ind Cas 491 (491) (Lah). (Failure to see the existence of an award as a bar to the cause of action was held illegal.)
[*See also* ('33) 20 AIR 1933 Pat 284 (285). (Going beyond the plaint in considering whether it discloses a cause of action.)]

22. ('28) 15 AIR 1928 Lah 960 (960).
✠('22) 9 AIR 1922 Lah 87 (88) : 3 Lah 30 (DB).

23. ('18) 5 AIR 1918 All 194 (194) : 40 All 38 (DB).
('24) 11 AIR 1924 Nag 105 (108).
('80) 5 Cal 807 (810) : 6 Cal L Rep 223 (227) (DB). (Refusal to permit court-fee being paid was held proper when pauper did not offer till just before judgment.)

24. See Order 33 Rule 12.

25. See Order 33 Rule 13.

26. ('98) 21 All 133 (137) (FB).
('91) 15 Bom 77 (78) (DB). (NOTE.—This case is overruled on another point in 31 Bom 10).
('93) 18 Bom 454 (456) (DB).
('98) 21 Mad 113 (114) (DB).
[But see (1900) 23 Mad 73 (82) (DB). (But where no question of jurisdiction is involved, no revision lies.)]

Note 27a

1. ('37) 24 AIR 1937 Mad 930 (936) (DB).

Note 27b

1. ('42) 29 AIR 1942 Mad 585 (585).
('42) 29 AIR 1942 Pat 60 (62): 20 Pat 780 (DB).
('42) 29 AIR 1942 Sind 76 (77) : ILR (1942) Kar 61 (DB).
('41) 28 AIR 1941 All 298 (300) : ILR (1941) All 558 (DB).
✠('38) 25 AIR 1938 Pat 22 (25) : 16 Pat 766 (FB).
✠('38) 25 AIR 1938 Nag 122 (126) : ILR (1938) Nag 106 (FB).
('35) 22 AIR 1935 Cal 279 (280) : 62 Cal 417 (DB). (Order for payment of additional court-fee not supportable under the law.)
('39) 26 AIR 1939 Pat 274 (275): 18 Pat 267 (DB). (The High Court has jurisdiction to interfere in revision with the decision of the lower Court on the question of the classification of the suit for purposes of court-fee, where such decision has been adverse to the plaintiff).
[*See also* ('36) 23 AIR 1936 Pesh 140 (141) (DB). (The Appellate Court undoubtedly has jurisdiction to decide the correct amount of court-fee, but if its decision on the point results in its refusal to exercise jurisdiction in respect of the merits of the appeal before it, and if that decision is wrong it results in a refusal to exercise jurisdiction vested in it.)]
[But see ('42) 29 AIR 1942 Pesh 23 (24). (Order requiring additional court-fee is *prima facie* an interlocutory order which cannot be taken into consideration in revision.)
✠('39) 26 AIR 1939 Mad 380 (382). (An order of a trial Court determining the proper court-fee payable on a plaint and holding that it is insufficiently stamped, is not revisable by the High Court ; and such an order, which by itself does not fall under S. 115. C. P Code, cannot be revised by the High Court merely because it is bound to be followed by some other order which may be without jurisdiction.)]

2. ('38) 25 AIR 1938 Pat 22 (25) : 16 Pat 766 (FB)
✠('36) 23 AIR 1936 Pat 85 (86) : 15 Pat 340 (DB).
('38) 25 AIR 1938 Nag 122 (126) : ILR (1938) Nag 106 (FB).

the undermentioned decisions.[3] For fuller discussion see S. 149 Note 14 and O. 7 R. 11, Note 12.

28. High Court's power of superintendence. — See Note 5 and Section 224, Government of India Act, 1935 in Appendix II.

29. High Court's revisional powers under other Acts.

1. Guardians and Wards Act, 1890—Section 47, Guardians and Wards Act enacts that in certain cases specifically mentioned therein an appeal shall lie to the High Court from the orders passed by the subordinate Courts and S. 48 of the same Act while enacting that all other orders are final has expressly saved the extraordinary powers of the High Court to interfere in cases where the lower Courts have not properly exercised their powers.[1] But the application for revision will be considered under S. 48 only where the Court exercised jurisdiction not vested by law, or declined to exercise jurisdiction vested by law or exercised the same in an illegal or irregular manner. As to the circumstances in which the High Courts have interfered under this section with the order of the lower Court, see the undermentioned cases.[2-3]

2. Bombay Regulation, II of 1827 — See Note 2.

3. Punjab Courts Act, VI of 1918, Section 44 — As to the powers of the High Court of the Punjab under S. 44 of the Punjab Courts Act, 1918, see the undermentioned cases.[4]

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3. ('42) 29 AIR 1942 Sind 76 (77) : I L R (1942) Kar 61 (DB). (The Judicial Commissioner's Court should not hear a revision application against an order in an appeal from a decree, on which the proper court-fee, arising from the decree of the trial Court has not been paid by the applicant.)
('40) 27 A I R 1940 Mad 821 (821). (Decision by Appellate Court under S. 7 (v) (c), Court-fees Act, holding land to be overvalued and determining annual income—No revision lies.)
('36) 23 AIR 1936 Mad 411 (411). (Where the decision on a question of court-fee also bears upon the valuation of the suit for purposes of jurisdiction, and the suit may have to be filed in a higher Court if the court-fee question should be decided in a different way, the High Court is justified in interfering in revision, although the point has been decided in plaintiff's favour.)

Note 29

1. † ('07) 31 Bom 590 (594).
('25) 12 AIR 1925 Oudh 260 (261).
† ('15) 2 AIR 1915 Cal 49 (51, 52) (DB).
('01) 1901 Pun Re No. 48, p. 157.
2-3. ('28) 15 AIR 1928 Nag 291 (291).
('14) 1 AIR 1914 Oudh 425 (426) : 18 Oudh Cas 66 (DB). (Where no notice was served upon a person interested in the result of an application for guardianship.)
('31) 18 AIR 1931 Cal 59 (60) (DB). (Party against whom order passed desirous of putting fresh facts for consideration of Court throwing different light on case—Court not hearing same.)
('07) 17 Mad L Jour 199 (200). (Order allowing the guardian after termination of guardianship to spend the minor's property for the marriage of his sister.)
('23) 10 A I R 1923 Lah 89 (89). (Orders under S. 34 of the Guardians and Wards Act.)
('09) 12 Oudh Cas 78 (83) : 2 Ind Cas 237 (238). (Where the order granting permission for sale did not recite the necessity for it.)
('30) 17 AIR 1930 Lah 1017 (1018). (Where the Court wrongfully cancelled a lease granted by a guardian which was perfectly within his competence.)
('15) 2 AIR 1915 Cal 1 (4) : 42 Cal 351. (Selecting suitable bridegroom without leaving the choice in the first instance to the guardian.)
('32) 19 AIR 1932 Bom 156 (158) : 56 Bom 71 (DB). (Selection of bridegroom without consulting proper guardian, without taking evidence and consulting minor.)
('18) 5 AIR 1918 Cal 242 (243) (DB). (Improper orders of the District Court refusing payment of money to the guardian of the person of a minor.)
('15) 2 AIR 1915 All 199 (200) : 37 All 515 (DB). (Refusal to order custody of minor to the guardian.)

In the following cases it was held that the High Court cannot interfere :

('15) 2 AIR 1915 Lah 293 (295). (Lower Court's order not unjust or perverse—No revision.)
('26) 13 AIR 1926 All 301 (301) : 48 All 300 (DB). (Order fixing amount spent for marriage of minor.)
('25) 12 AIR 1925 Oudh 260 (261). (Order fixing remuneration of outgoing guardian.)
('38) 25 AIR 1938 Nag 495 (497) : ILR (1940) Nag 221 (DB). (Order appointing guardian and fixing amount of maintenance of ward—Order is neither appealable nor revisable.)
4. ('10) 1910 Pun Re No. 2 : 6 Ind Cas 735 (736).
('09) 1909 Pun Re No. 45, page 148 (150) : 2 Ind Cas 76 (77).
('04) 1904 Pum Re No. 70, p. 200 (202) (DB).
('14) 1 AIR 1914 Lah 418 (418) (DB).
('89) 1889 Pun Re No. 86, p. 316 (317).
('96) 1896 Pun Re No. 36, p. 97.
('11) 11 Ind Cas 33 (34) (Lah). (Suit for declaration—Compromise decree for possession is beyond what is demanded by the plaint.)
('11) 11 Ind Cas 518 (518) (Lah). (Where the only question is one of law.)
('14) 1914 Pun Re No. 4 (Rev) : 25 Ind Cas 831 (832). (Do.)

4. Provincial Small Cause Courts Act, section 25 — The powers of the High Court under S. 25 of the Small Cause Courts Act are much wider than those given by this section[5] and the provisions of S. 115 of the Code are therefore not a safe guide for the exercise of the powers under S. 25 of the Small Cause Courts Act.[6] As to the circumstances in which the High Courts will interfere under the section, see the undermentioned cases.[7]

('14) 1914 Pun Re No. 1 (Rev) : 25 Ind Cas 867 (868). (Do.)
('07) 1907 Pun Re No. 65, p. 367 (368) (DB).

5. † ('41) 28 AIR 1941 Bom 67 (68) : ILR (1941) Bom 153 (DB).
('24) 11 AIR 1924 Rang 54 (54) : 1 Rang 372. (Sanction to prosecute given—Set aside.)
('04) 27 All 192 (193).
('05) 27 All 531 (537) (DB).
('22) 3 L R All 17 (20).
('11) 11 Ind Cas 15 (16) (Lah).
('28) 15 AIR 1928 Lah 274 (275).
('07) 17 Mad L Jour 62 (63). (To transfer the liability from one defendant to another.)
('32) 19 AIR 1932 Oudh 106 (107).
('26) 13 AIR 1926 Rang 205 (206) : 4 Rang 221 (DB).
† ('14) 1 AIR 1914 Sind 98 (100) : 8 Sind L R 164 (DB).
('34) 21 AIR 1934 All 107 (108). (High Court may under S. 25 call for a case to satisfy itself that a decree or order made in any case has been decided by a Court according to law.)
('39) 26 AIR 1939 All 590 (591) : ILR (1939) All 709.
[*See* ('34) 21 AIR 1934 Lah 165 (166). (Even under that Act a case must have been decided and no revision lies against interlocutory orders.)]

6. ('95) 21 Bom 250 (255) (DB).
('04) 1904 Pun Re No. 66, p. 186 (189) (DB).
[See however ('93) 15 All 139 (140).
('94) 16 All 476 (477) (FB).
('99) 21 All 89 (90) (DB).]

7. ('43) 30 AIR 1943 Nag 141 (142) : ILR (1943) Nag 272. (Although the High Court will seldom interfere with question of fact, where the initial error in law has entirely vitiated the whole treatment of the case by the Judge of the Small Cause Court, the High Court will interfere and will do what it thinks just.)
('42) 29 AIR 1942 Rang 70 (74) : 1941 Rang L R 724. (High Court is not debarred from going into question of law (inference from proved facts).)
('42) 29 AIR 1942 Oudh 202 (203). (Decree in favour of plaintiff who alone could not sue.)
('41) 28 AIR 1941 Bom 67 (68) : ILR (1941) Bom 153 (DB). (Apart from the grounds, under S. 115, C. P. Code, when there is reason to think that there has been no fair trial or that a palpable injustice has been committed, or even in the case of a simple error of law if it is a matter of general importance the High Court will interfere under S. 25 of the Provincial Small Cause Courts Act—In this case there was error of law but not being a matter of general importance no interference.)
('41) 28 AIR 1941 Oudh 111 (112). (Revision on point of limitation.)
('40) 27 AIR 1940 Sind 228 (229) (DB). (Judge without coming to any decision regarding finding in favour of defendant solely on theory that when neither side could be believed contention of defendant should be preferred — Onus of proof lay on defendant—Finding should be interfered with in revision.)
✠('91) 13 All 277 (278) (SB). (Revisional powers only exercisable where it appears that some substantial injustice has been done to a party on misapprehension of law or from a material error in procedure.)
('04) 1904 Pun Re No. 66, p. 186 (190) (DB). (Do.)
('97) 1897 All W N 138 (138). (Where no cause of action was disclosed in the plaint a decision was reversed.)
('24) 11 AIR 1924 All 691 (691). (Gross errors of law.)
('07) 5 Cal L Jour 413 (415) (DB). (Error of law occasioning failure of justice.)
('95) 1895 Pun Re No. 66, p. 330 (332). (Errors of law.)
('16) 3 AIR 1916 Lah 304 (304). (Error of law or procedure.)
('15) 2 AIR 1915 Mad 307 (307). (Error of law when there is no injustice will not be interfered with.)
† ('12) 14 Oudh Cas 343 (355) : 13 Ind Cas 803 (807) (DB). (Defiance of well-known principles of law.)
('05) 27 All 531 (537) (DB). (Misappreciation of evidence.)
('14) 1 AIR 1914 All 153 (153) (DB).
('97) 1897 Pun Re No. 32, p. 149 (152) (DB). (Unreliable or no evidence.)
('10) 7 Ind Cas 530 (530) (Lah). (Do.)
('13) 19 Ind Cas 943 (944) (Lah).
('14) 1 AIR 1914 Lah 42 (42). (The Courts below assumed the existence of certain facts and did not consider all the material points and misapprehended the case.)
('15) 2 AIR 1915 Lah 237 (237).
† ('14) 1 AIR 1914 Sind 98 (100) : 8 Sind L R 164 (DB). (Decree was opposed to evidence.)
('12) 15 Ind Cas 186 (186) (Mad).
('91) 13 All 533 (537). (Judgment not in accordance with O. 20 R. 4.)
† ('99) 23 Bom 334 (337, 338) (DB) (Do.)
✠('96) 6 Mad L Jour 50 (51). (Do.)
('95) 1895 Pun Re No. 78, p. 373 (375, 376). (Do.)
('01) 1901 Pun Re No. 57, page 180 (181). (Do.)
('12) 15 Ind Cas 202 (202) (Mad). (Disallowing costs without reasons.)
('15) 2 AIR 1915 Nag 65 (66) : 11 Nag L R 189. (Do.)
('09) 2 Ind Cas 488 (488) (Mad).
('11) 11 Ind Cas 15 (16) (Lah).
('07) 29 All 468 (470). (Rejection of review on the ground of supposed deficiency of stamp.)
('13) 19 Ind Cas 782 (782) (All). (Error on point of limitation.)
('13) 20 Ind Cas 175 (176) (DB) (All). (Do.)

('15) 2 AIR 1915 All 161 (162). (Do.)
('93) 17 Bom 510 (511) (DB). (Do.)
('93) 15 All 139 (140). (Do.)
('95) 17 All 422 (423) (DB). (Do.)
('12) 15 Oudh Cas 319 (320): 17 Ind Cas 470 (471). (Do).
('11) 11 Ind Cas 259 (260) (All). (Substantial injustice should have been done.)
('95) 21 Bom 250 (255) (DB). (Do.)
('02) 6 Cal W N 480 (483). (Do.)
('16) 3 AIR 1916 Cal 230 (230) (DB). (Do.)
('16) 3 AIR 1916 Cal 422 (423) (DB). (Do.)
('88) 1888 Pun Re No. 79, page 206(208,210) (DB). (Do.)
('01) 1901 Pun Re No. 19, page 63 (65)(DB). (Do.)
('17) 4 AIR 1917 Pat 332 (333) : 2 Pat L Jour 627 (DB). (Do.)
('91) 14 Mad 406 (407) (DB). (Do.)
('12) 17 Ind Cas 748 (750) (Mad). (Do.)
('15) 2 AIR 1915 Mad 338 (339). (Do.)
('16) 3 AIR 1916 Mad 433 (434) (DB). (Do.)
('17) 4 AIR 1917 Mad 349 (350) (DB). (Do.)
('98) 11 C P L R 91 (92). (Do.)
('12) 14 Ind Cas 2 (4) (Oudh). (Do.)
('11) 9 Ind Cas 470 (471) (Low Bur).
('25) 12 AIR 1925 Rang 310 (311) : 3 Rang 471. (Conclusions of Small Cause Court not shown to be perverse—No interference by High Court).
('26) 13 AIR 1926 Pat 575 (576). (Refusal to summon witnesses—Serious prejudice to party—Revision allowed.)
('17) 4 AIR 1917 All 159 (160): 39 All 101. (Small cause suit tried by a Munsif on the original side and his decision reversed on appeal.)
('01) 25 Bom 417 (417, 418) (DB). (Do.)
('03) 26 Mad 176 (178, 179). (Do.)
('22) 9 AIR 1922 Mad 352 (353) (DB). (Do.)
† ('16) 3 AIR 1916 Pat 31 (32). (Do.)
('09) 33 Mad 323 (326) : 1 Ind Cas 543 (544) (FB). (Do—Overruling 27 Mad 478.)
('14) 1 AIR 1914 All 119 (119). (Original suit tried as small cause is an exercise of jurisdiction not vested by law.)
('92) 14 All 413 (416) (DB). (Unless facts ousting jurisdiction are patent on record, High Court will not interfere.)
('15) 2 AIR 1915 Cal 378 (379) (DB). (Do.)
('10) 5 Ind Cas 742 (742) (DB) (Mad). (Application not necessary.)
('12) 14 Ind Cas 793 (793) (Lah). (Satisfaction of decree out of Court is no bar to revision)
('98) 1898 Pun Re No. 23, page 66 (68).
('07) 17 Mad L Jour 62 (63).
('35) 22 AIR 1935 Mad 554 (555). (Where the decree is passed without jurisdiction by the lower Court, the High Court ought to interfere in revision.)
('36) 23 AIR 1936 Mad 132 (133) : 59 Mad 428. (Decision of Small Cause Court fundamentally wrong—Revision petition held justified.)
('34) 21 AIR 1934 Nag 257 (258). (Order returning plaint for presentation to proper Court—High Court could revise.)
('37) 24 AIR 1937 Nag 68 (69). (Where the Small Cause Court returns a plaint for presentation to the proper Court on the ground that it has no jurisdiction to try the suit, there is so far as the Small Cause Court is concerned a case finally decided by that Court and the order is open to revision by the High Court.)
('37) 24 AIR 1937 Nag 136 (137) : I L R (1937) Nag 266. (Interlocutory orders can be revised under S. 25.)
('39) 26 AIR 1939 Nag 19 (19). (Revision application from Small Cause Court decision — Findings of fact are to be accepted, unless they are perverse or unreasonable.)
† ('36) 23 AIR 1936 Sind 160 (163) : 30 Sind L R 226 (DB). (*Held*, that even if the order was an interlocutory order, the High Court could interfere under S. 25, Provincial Small Cause Courts Act, as the order in question amounted to a case decided.)
('35) 22 AIR 1935 All 372 (373). (Section 25 limits the High Court in revision to grounds of law that might be raised in a second appeal and does not cover a revision on a question of fact.)
('35) 62 Cal L Jour 530 (532). (Suit of small cause nature tried as ordinary suit by Judge having powers of Small Cause Court Judge — No appeal lies from decree—Remedy of aggrieved party is not by way of appeal but by way of revision.)
† ('36) 161 Ind Cas 423 (424) (Oudh). (High Court will not ordinarily exercise its discretionary powers in revision under S. 25 of the Small Cause Courts Act, if no injustice appears to have been done by the decision of the trial Court, even though the question raised is one of limitation.)
('36) 23 AIR 1936 Oudh 223 (224) : 12 Luck 124 (DB). (Plea raising question of fact cannot be raised for first time in revision.)
('36) 23 AIR 1936 Oudh 247 (248) (DB). (No injustice done to any party—High Court should not ordinarily exercise its discretionary power.)
('36) 23 AIR 1936 Oudh 297 (298). (No miscarriage of justice—High Court will not interfere.)
('37) 24 AIR 1937 Oudh 364 (385) : 13 Luck 263. (Suit dismissed for non-payment of court-fees—Application for restoration under S. 151, C. P. Code—Suit restored and decree passed—Judgment-debtor making application under S. 25 attacking not decree itself but order of restoration—Restoration of suit under S. 151, C. P. Code, held was wrong—But order of restoration being interlocutory order and application being after passing of decree, High Court could not interfere—Proper remedy of applicant was to attack decree itself.)
('36) 23 AIR 1936 Pesh 1 (2). (The revisional Court would not upset the judgment of a Small Cause Court on a bare technicality if substantial justice has been done.)
('34) 21 AIR 1934 All 107 (108) (DB). (Lower Court setting aside decree which was not an ex parte decree by summary order in which it has not given consideration to the points that it would be necessary to determine in setting aside an *ex parte* decree—High Court interfered.)
('35) 22 AIR 1935 All 379 (381). (Revisional power can be exercised only where substantial injustice has directly resulted from material misapplication or misapprehension of law.)

5. Provincial Insolvency Act (V of 1920), section 75 — Under that section the High Court may, for the purpose of satisfying itself that an order made in any appeal by the District Court is according to law, call for the case and pass such order with respect thereto as it thinks fit. See also the undermentioned cases.[8]

6. Other Acts — See the undermentioned decisions.[9]

('35) 22 AIR 1935 All 437 (438). (Lower Court refusing restoration—High Court should not interfere in revision.)
('35) 22 AIR 1935 All 690 (691). (Finding of fact cannot be considered in revision.)
('35) 22 AIR 1935 All 716 (717). (Substantial injustice done to party by decreeing wages barred by time—High Court can interfere in revision.)
('35) 22 AIR 1935 All 842 (843). (Question of jurisdiction involved — High Court should interfere though equity is in favour of opposite party.)
†('36) 23 AIR 1936 Cal 497 (503) : I L R (1937) 1 Cal 1 (FB). (Finding on pure question of fact supported by documentary evidence cannot be assailed in revision under S. 25.)
('33) 20 AIR 1933 Lah 452 (453). (Where issue is framed and then changed, onus being shifted to other side, evidence should be allowed to be adduced—High Court interfered.)
('35) 22 AIR 1935 Lah 137 (138). (High Court will not interfere with an erroneous decision on a point of limitation, where the judgment of the lower Court does substantial justice between the parties.)
('35) 22 AIR 1935 Lah 206 (208). (It is open to the High Court in revision under S. 25 to hold that the facts found by the trial Court do not in law constitute misconduct.)
('36) 23 AIR 1936 Pat 84 (84). (Cases cannot be argued like second appeals — High Court cannot interfere wherever question of law is wrongly decided—It will interfere only when substantial injustice is caused.)
('36) 23 AIR 1936 Pat 562 (563) (DB). (Patna High Court when exercising revisional powers under S. 25 will not interfere with lower Appellate Court's decision if it is sound on merits.)
('39) 26 AIR 1939 Nag 64 (65). (Incorrect view of law — High Court will interfere only when law is well-known.)

[*See* ('36) 23 AIR 1936 Pesh 148 (148). (Where the decision of a suit involves the decision of legal inferences to be drawn from the established facts and the question is an important question of law, revision is competent even if the suit is of a small cause nature.)]

[*See also* ('35) 22 AIR 1935 Cal 556 (557). (Suit filed as Small Cause suit — Munsif transferred and successor not having Small Cause powers appointed—Suit transferred to his Court—Before commencement of hearing, Munsif invested with powers of Small Cause Court Judge to try such suits—Decision of Munsif is final and not appealable—Only revision is competent.)]

[See however ('25) 12 AIR 1925 All 51 (52).]
[But see ('12) 15 Ind Cas 547 (548) (Cal). (An error on a point of limitation by the Small Cause Court cannot be revised.)
('17) 4 AIR 1917 Mad 76 (76) : 32 Ind Cas 3 (3) (DB). (Do.)]

8. ('39) 26 AIR 1939 Lah 460 (461). (Order passed in first instance by Receiver — Revision under S. 75 does not lie — Revision however may be treated as made under S. 115, C. P. C.)
('32) 1932 Mad W N 59 (60). (Lower Court in a proceeding under S. 53 of the Act proceeding on a mistaken view as to burden of proof—High Court can interfere.)
('33) 20 AIR 1933 Nag 39 (40) : 28 Nag L R 295. (Powers of High Court under S. 75 are wider than under Civil Procedure Code.)
('36) 23 AIR 1936 All 80 (82) : 58 All 639 (DB). (In insolvency cases the High Court has power to act under the C. P. Code only subject to the provisions of the Provincial Insolvency Act. Where therefore that Act specifically provides for appeals and revisions in a particular manner, any action taken by the High Court under the C. P. Code will not be subject to the provisions of the Insolvency Act but in contravention of such provisions. The High Court cannot interfere under any provision of the C. P. Code when a distinct procedure is prescribed by the Provincial Insolvency Act.)
('37) 24 AIR 1937 Nag 31 (32):ILR (1937) Nag 512. (High Court in revision is entitled to act *suo motu* on facts being brought to its notice at the instance of creditor.)
('36) 23 AIR 1936 All 489 (489) (DB). (Scope of revision under S. 75 is much wider than that under S. 115, C. P. Code.)
† ('37) 24 AIR 1937 All 4 (5) (DB). (High Court has very wide powers of revision under Insolvency Act—Whether second appeal from order by Insolvency Court is treated as appeal or revision is immaterial.)
('38) 25 AIR 1938 All 59 (61) : ILR (1938) All 84 (DB). (In exercising revisional jurisdiction under the Insolvency Act the High Court has got wider powers than the powers vested in that Court by Section 115.)
('37) 24 AIR 1937 Rang 189 (190). (Petition under S. 9 (1), Provincial Insolvency Act—Act of insolvency not set out with precision — Ground not raised in lower Court even in revision — Debtors not themselves raising it—Exercise of discretionary powers in revision held not proper.)
('37) 24 AIR 1937 Mad 930 (932) (DB). (Powers of High Court under S. 75 are wider but High Court will not interfere on questions of fact unless there has been a patent miscarriage of justice.)

9. ('43) 30 AIR 1943 Pesh 54 (55) (Peshawar Judicial Commissioner's Court has power to revise orders of Courts over which it has superintendence and control under S. 10, N.W.F.P. Courts Regulation.)
('42) 29 AIR 1942 Nag 5 (8) : ILR (1941) Nag 581. (High Court cannot revise decision of District Court made under S. 20, C. P. and Berar Relief of Indebtedness Act (XIV of 1939).)

30. Sanction to prosecute. — As to High Court's powers of revision in regard to proceedings for prosecution under S. 476 of the Criminal Procedure Code, see the Authors' Commentaries on the Criminal Procedure Code, 2nd (1941) Edn., S. 476B, Note 13.

31. Orders under the Provincial Small Cause Courts Act. — See Note 29.

32. Appeal and review. — By clause 15 of the present Letters Patent no appeal lies from an order made in the exercise of revisional jurisdiction or of the powers of superintendence under S. 107 of the Government of India Act, 1915 by a High Court.[1] There can be no review or re-hearing of an application for revision dismissed for default.[2] The proper course is to prefer a second application for revision.[3] An application for review may also be treated as one for revision.[4]

('42) 29 AIR 1942 Pesh 60 (61)(DB). (Under S. 34, N. W. Frontier Province Courts Regulation (I of 1931), Judicial Commissioner's Court has power to call for the records of Courts subordinate to it and of no other.)

('41) 28 AIR 1941 All 215 (216). (Section 253 of Agra Tenancy Act.)

('41) 28 AIR 1941 Bom 184 (186) : I L R (1941) Bom 427. (A Magistrate or Bench of Magistrates hearing an appeal under S. 86 of the Bombay District Municipal Act is a *persona designata* and not a Court, and the decision of the Magistrate or Bench of Magistrates is not open to revision under S. 115, C. P. Code.)

('41) 28 AIR 1941 Bom 361 (363):ILR (1941) Bom 658 (DB). ("A Magistrate acting under S. 110 of the Bombay Municipal Boroughs Act is not a *persona designata* but an ordinary Court, whose decision is subject to revision by the Court to which appeals from his decisions would ordinarily lie".)

('41) 28 AIR 1941 Cal 530 (532) : ILR (1941) 2 Cal 402 (DB). (Orders made under S. 36 (6) (a) (i) and (ii) of the Bengal Money-lenders Act are revisable.)

('41) 28 AIR 1941 Lah 1 (5) : ILR (1941) Lah 133 (DB). (Order under S. 36, Legal Practitioners Act, not revisable—AIR 1938 Mad 634 : I L R (1938) Mad 988 not approved.)

('41) 28 AIR 1941 Mad 510 (511) : ILR (1941) Mad 559 (DB). (Order under S. 84 (2), Madras Hindu Religious Endowments Act — No appeal lies—Order is revisable.)

('41) 28 AIR 1941 Nag 163 (165, 166) : ILR (1942) Nag 602. (Revision lies to High Court against order passed on an application under S. 25 (2) of the Central Provinces Land Alienation Act.)

('41) 28 AIR 1941 Oudh 65 (66). (Appellate orders by a District Judge in a rent suit were not revisable prior to the enactment of U. P. Tenancy Act (XVII of 1939).)

('41) 28 AIR 1941 Oudh 433 (435) : 16 Luck 778. (Revision from an order of a District Judge passed in appeal in a redemption suit under U. P. Agriculturists' Relief Act.)

('40) 27 AIR 1940 Oudh 33 (34) : 15 Luck 163 (FB). (U. P. Agriculturists' Relief Act (XXVII of 1934), S. 5 (2)—Revision does not lie against decision of appellate Court granting or refusing instalments.)

('40) 27 AIR 1940 Sind 30 (31, 32) : I L R (1939) Kar 669. (Karachi City Municipal Act, Ss. 117 (1) and 251—Revision against orders passed in appeal lies to Judicial Commissioner's Court as *persona designata* — When exercising revisional powers Judicial Commissioner's Court will be guided and controlled by S. 115, C. P. Code.)

('38) 25 AIR 1938 Oudh 262 (262) (DB). (Order under S. 3, Charitable and Religious Trusts Act, is revisable.)

Note 32

1. ('21) 8 AIR 1921 Cal 217 (219) (DB).
('31) 18 AIR 1931 Pat 292 (293): 10 Pat 428 (DB).
('28) 15 AIR 1928 Mad 169 (170) : 51 Mad 165 (DB).
('35) 22 AIR 1935 All 889 (891) (DB).
Also see Letters Patent (Cal) cl. 15 Notes 5, 6.

2. ('01) 1901 Pun Re No. 54, p. 172 (174) (FB).
('81) 1881 Pun Re No. 75 p. 169 (170) (DB).

3. ('28) 15 AIR 1928 Lah 550 (551).
('01) 1901 Pun Re No. 54, p. 172 (175) (FB).
('37) 24 AIR 1937 Lah 685 (686).

4. ('01) 1901 Pun Re No. 54, p. 172 (175) (FB).

PART IX.

SPECIAL PROVISIONS RELATING TO THE CHARTERED HIGH COURTS

116. [S. 631.] This Part applies only to High Courts which are, or may hereafter be, [a][constituted by His Majesty by Letters Patent.]

Part to apply only to certain High Courts.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915."

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117. [S. 632.] Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts.

Application of Code to High Courts.

[1877, S. 632; See Ss. 120, 129 and O. 49 R. 3.]

1. Scope of the section. — This section declares that the provisions of the Code shall apply to Chartered High Courts also *save as otherwise provided in Parts IX and X of the Code or in rules.*[1] Thus, Ss. 16, 17 and 20 of the Code are declared by S. 120 in this Part (IX) to be inapplicable to the High Court in the exercise of its original civil jurisdiction. Again, under S. 129 of the Code, the High Court can make rules as to its own procedure in the exercise of its original civil jurisdiction and such rules will prevail over the provisions of the Code.[2] For rules not applicable to Chartered High Courts, see O. 49 R. 3. See also Notes on section 114.

2. Rules include forms. — "Rules" means rules and forms contained in the First Schedule or made under S. 122 or S. 125. See section 2 (18).

3. Security for costs in Letters Patent Appeals. — See O. 41 R. 10 Note 5.

4. Review in Letters Patent Appeals. — It has been seen in Note 1 on S. 114 that there is a difference of opinion among the several High Courts in India on the maintainability of an application for review of decrees in appeals under the Letters Patent. In cases where such review lies, appeals from orders passed on such applications for review are governed by the provisions of Order 47 Rule 7.[1]

5. Letters Patent Appeals. — See Section 104, Note 6 and Notes on Clause 15 of the Letters Patent (Madra, Bombay and Calcutta).

Section 117 — Note 1

1. ('28) 15 AIR 1928 Mad 385 (386).
2. See Notes on Section 129.

Note 4

1. † ('89) 16 Cal 788 (793) (DB). (Not maintainable.)
('88) 12 Bom 171 (173) (DB).
†('86) 9 Mad 253 (255, 256) (DB).

118. [S. 634.] Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs;

Execution of decree before ascertainment of costs.

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

1. **Taxation of costs and limitation.**—Where a decree provides for payment of costs "when taxed and noted," limitation for the execution of the decree as to costs runs from the date of such taxation.[1]

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119. [S. 635.] Nothing in this Code shall be deemed to authorise any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorised him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

Unauthorized persons not to address Court.

[1877, S. 635; See Letters Patent.]

1. **Scope of the section.** — It has been held that the words "the power of the High Court" to make rules concerning "advocates, vakils and attorneys" in this section are not limited to the power of the High Court under Clauses 9 and 10 of the Letters Patent to make rules for the *admission* of advocates, vakils and attorneys and to their *professional conduct*, and that they also include the power of the High Court under the Government of India Act, 1915 (now see the Government of India Act, 1935), to make rules regulating the practice of the Court.[1]

2. **Right of advocates to appear and plead on any side.** — See Letters Patent (Calcutta), Clauses 9 and 10.

3. **Right of vakils to appear or plead or act on the original side.** — See Letters Patent (Calcutta), Clauses 9 and 10.

4. **Vakil's right to practise in the Presidency Small Cause Courts.**—See Letters Patent (Calcutta), Clauses 9 and 10.

5. **Attorney's right to address Court.** — See Letters Patent (Calcutta), Clauses 9 and 10.

6. **Recognised agent.** — See Note 5 on Clause 10, Letters Patent (Calcutta).

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120. [S. 638.] (1) The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

Provisions not applicable to High Court in original civil jurisdiction.

[1877, S. 638. As to rules, see O. 49 R. 3.]

Section 118 — Note 1

1. *See* ('32) 19 AIR 1932 Bom 378 (385).

Section 119 — Note 1

1. ('28) 15 AIR 1928 Mad 472 (473).

1. Amendments made after 1908. — Originally this section had another sub-section which corresponded to S. 638 of the old Code. It ran as follows :

"(2) Nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an Insolvent Court."

That sub-section was repealed by the Presidency Towns Insolvency Act, III of 1909, Section 127 and Schedule III thereof.

2. Scope of the section. — This section declares that Ss. 16, 17 and 20 of the Code shall not apply to the Chartered High Courts in the exercise of their original civil jurisdiction. The exercise of such jurisdiction is regulated by Cl. 12 of the Letters Patent. Thus, where one only of several defendants resides within jurisdiction, S. 20 will enable a suit to be brought against all the defendants after obtaining leave to sue them. But as this section does not apply to the High Court and as the Letters Patent does not confer jurisdiction on the High Court in such cases, no suit can be brought in the High Court against all the defendants.[1] It has been held by the Rangoon High Court[2] that although Ss. 15 and 21 of the Code are not expressly mentioned in this section, they do not apply to a Chartered High Court in the exercise of its original civil jurisdiction.

As to rules not applicable to Chartered High Courts, see O. 49 R. 3.

3. Original civil jurisdiction. — The Charters divide the civil jurisdiction conferred on the High Courts into four classes—ordinary original, extraordinary original, appellate, and those special matters which are the subject of special provisions. The expression "ordinary jurisdiction" embraces all such as is exercised in the ordinary course of law and without any special step being necessary to assume it. It is opposed to "extraordinary jurisdiction" which the Court may assume at its discretion upon special occasions and by special orders.[1]

Section 120 — Note 2

1. ('23) 10 AIR 1923 Mad 272 (274) (DB).
2. ('35) 22 AIR 1935 Rang 517 (520).

Also see S. 15, N. 1 and S. 21, N. 4.

Note 3

1. ('89) 13 Bom 525 (533) : 16 Ind App 156 (PC).
[*See also* Clauses 11 12 and 13 of the Charters of Madras, Bombay and Calcutta High Courts.]

PART X.

RULES

121. [New.] The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

Effect of rules in First Schedule.

1. **Rules.** — The re-arrangement of the Code into the "body of the Code" and "Rules" is for the purpose of giving a much needed elasticity to judicial procedure, and to enable minor defects to be remedied, as they arise, without resort to the Legislature.[1] But, except for the fact that the rules in the First Schedule can be amended, annulled or added to by the High Courts, such rules have the same force as if enacted in the body of the Code and it is incorrect to say that they are not so imperative as the sections in the body of the Code.[2]

The whole of this Part is new except Ss. 129, 130 and 131 which correspond to S. 652 of the old Code.

The rules passed in accordance with the procedure in this Part, are not on the same footing as the circulars in the Manual of Civil Circulars issued by the High Court. Unless the latter is passed under some enactment which gives it the force of law, it would not have the force of law.[3]

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122. High Courts [a][constituted by His Majesty by Letters Patent] [b][and the Chief Courts of Oudh and Sind] may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

Power of certain High Courts to make rules.

[1882, *cf.* S. 652, first para.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915."

b. Substituted by the Sind Courts (Supplementary) Act, XXXIV of 1926, S. 2 and Schedule which Act came into force on 15th April 1940 [see Sind Government Gazette Notification (Home Department Political) No. 1499H-39 dated 28th March 1940.]

Synopsis

1. Amendments after 1908.
2. Scope and object of the section.
3. Extent of High Court's power to make rules.
4. High Courts to which the section applies.

Section 121 — Note 1

1. See Report of the Select Committee.
('42) 29 AIR 1942 All 387 (389) : I L R (1942) All 862 (DB).
2. ('37) 24 AIR 1937 Pat 307 (310). (Non-recording of reasons for admission of additional evidence in Appellate Court is illegal.)
3. ('26) 13 AIR 1926 Bom 548 (549) : 50 Bom 793 (DB).

1. Amendments after 1908.

(i) The words which originally occurred in the section in the place of the words "constituted by His Majesty by Letters Patent" were "established under the Indian High Courts Act, 1861." By S. 2 of the amending Act XIII of 1916, the words "or the Government of India Act, 1915" were added after the words "established under the Indian High Courts Act, 1861," so that the section as amended applied to High Courts established under the Indian High Courts Act, 1861 or the Government of India Act, 1915. The words "constituted by His Majesty by Letters Patent" were substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the words "established under the Indian High Courts Act, 1861 or the Government of India Act, 1915."

(ii) The section originally contained the words "Chief Courts of the Punjab and Lower Burmah"; these were replaced by the words "Chief Court of Lower Burmah" by S. 2 of Act XVIII of 1919. The words "and the Chief Court of Lower Burmah" were subsequently repealed by S. 3 of the amending Act, XI of 1923.

(iii) The words "and the Chief Court of Oudh" were inserted by Act XXXII of 1925 and the words "Chief Courts of Oudh and Sind" were substituted for the words "Chief Court of Oudh" by the Sind Courts (Supplementary) Act, XXXIV of 1926, S. 2 and Schedule thereof, which Act was brought into force on the 15th April 1940.

2. Scope and object of the section. — Under the former Code also, the High Courts enjoyed certain rule-making powers in regard to procedure; but they had no power to alter the provisions of the Code, however urgent such alteration might be in view of peculiar local conditions. This defect, as has been seen in Note 1 on S. 121, is remedied under the present Code, by dividing the Code into sections and rules and by empowering the High Courts to adapt the rules to local conditions. Under this power the High Courts referred to in this section can add to, annul or alter the rules in the First Schedule. The rules so made have the force of law.[1] But in making them the formalities prescribed by the Code should be complied with.[2] See Notes on Ss. 126 and 128. Where a new rule, viz., R. 122 in O. 21 inconsistent with Rule 43 of the same order was introduced by the Allahabad High Court,[3] it was held that the former rule prevailed.

3. Extent of High Court's power to make rules. — As will be seen in Note 1 on S. 128, the rules framed by the High Court under this Part, though they may annul, alter or add to the rules in the First Schedule, should not be inconsistent with the provisions in the *body of this Code*.[1] Nor can the High Court make rules conflicting

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Section 122 — Note 2

1. † ('09) 1 Ind Cas 163 (164) (All).
('03) 5 Bom L R 394 (395) (DB). (Rules requiring application for execution to be accompanied by copy of decree — Rule not complied with—Application not one in accordance with law within Art. 179(4) of the Limitation Act of 1877.)
('28) 15 AIR 1928 Bom 123 (126) : 52 Bom 459 (DB). (Such rules are applicable to both appellate and original sides unless expressly stated to the contrary.)
('31) 18 AIR 1931 All 756 (757)†: 53 All 959 (DB). (Rule requiring poundage fee along with application under O. 21 R. 89 should not be construed as taking away Court's jurisdiction to excuse delay in payment of poundage.)
2. ('42) 29 AIR 1942 Lah 201 (202) (DB).
† ('21) 8 AIR 1921 Pat 509 (510) (DB). (Formalities prescribed by Ss. 123 and 124 not complied with — Rules cannot be deemed to be made under Section 122.)
('05) 1905 All W N 83 (84) (DB). (Resolution of High Court not published in Gazette is not enforceable but may be looked at for the purpose of interpreting an order.)
3. ('31) 18 AIR 1931 All 567 (567, 568, 572) : 54 All 263 (FB).

Note 3

1. ('42) 29 AIR 1942 Lah 201 (202) (DB).

with the provisions of any *other enactment* for the time being in force. Thus, the rules made under this section should not be inconsistent with the provisions of the Letters Patent.[2] Similarly, they cannot vary the period of limitation fixed by the Limitation Act for any proceeding.[3] Thus, a rule requiring a copy of the *trial* Court's judgment to be filed along with the memorandum of second appeal will not entitle the appellant to exclude the time requisite for obtaining copy of such judgment.[4] Nor will a rule dispensing with the necessity of filing a copy of *judgment appealed from* along with the memorandum of appeal disentitle the appellant from excluding the period requisite for obtaining a copy of the judgment.[5] But a rule extending the provisions of S. 5 of the Limitation Act to applications under O. 9 R. 9[6] or R. 13[7] of the Code is not *ultra vires*. The reason is that S. 5 of the Limitation Act expressly applies to any application to which it may be made applicable by or under any enactment for the time being in force.

The rule-making power of the High Courts is confined to the regulation of *procedure*.[8] See also the undermentioned cases.[9]

4. High Courts to which the section applies. — The section as it stood prior to its amendment by the Government of India (Adaptation of Indian Laws) Order, 1937, applied to High Courts established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and the Chief Court of Oudh.[1] A High Court within the meaning of the Government of India Act, 1915, is a High Court established in British India by Letters Patent. (See Government of India Act, 1915, S. 10.) The Patna High Court being such a Court, S. 122 applies to it.[2] In an earlier decision of the Patna High Court it was however held that the section does not apply to the Patna High Court.[3] The reason given was that the Patna High Court was not a High Court established under the Indian High Courts Act, 1861. Apparently their Lordships' judgment is based on the section as it stood prior to the amendment by Act XIII of 1916. At that time, the section did not contain the expression "or the Government of India Act, 1915." It was inserted in the section by the amending Act XIII of 1916. Their Lordships' attention does not seem

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2. ('26) 13 AIR 1926 Rang 1 (2) : 3 Rang 546 (FB).
† ('30) 17 AIR 1930 All 558 (559) (DB).
Also see G. I.—Section 108, Note 3.

3. ('30) 17 AIR 1930 Rang 228 (231) : 8 Rang 380 (FB).
† ('08) 32 Bom 14 (24, 25) (FB).

4. † ('18) 5 AIR 1918 All 389 (390) : 40 All 1 (FB).
('23) 10 AIR 1923 Lah 96 (96).

5. ('28) 15 AIR 1928 P C 103 (104, 105) : 6 Rang 302 : 55 Ind App 161 (PC).

6. ('29) 16 AIR 1929 Bom 262 (263, 264) : 53 Bom 453 (DB).

7. † ('25) 12 AIR 1925 Mad 14 (17) : 47 Mad 824 (FB).
('17) 4 AIR 1917 Mad 957 (957) : 40 Mad 105.
Also see S. 128, N. 1 and O. 9 R. 13, N. 28.

8. ('42) 29 AIR 1942 Lah 201 (202) (DB).
('09) 3 Sind L R 171 : 4 Ind Cas 1154 (1155) (DB). (Rule requiring applications to be written on durable paper affects procedure and cannot be construed as affecting provisions of any Article of Limitation Act or any rule of law having universal application.)
('37) 24 AIR 1937 Rang 419 (420) : 1937 Rang L R 268 (FB).

9. ('42) 29 AIR 1942 Oudh 488 (488). (Rule 19 of Ch. XII of the Chief Court Rules of Oudh which provides for the presentation of an appeal, etc., to the Registrar or other officer within the Court hours is mandatory — Hence if an appeal is presented after those hours it is not a valid presentation at all—The rules framed by the Chief Court are not inconsistent with the provisions of Ss. 122 and 128, C. P. Code.)
('40) 27 AIR 1940 Pat 264 (267-270) : 19 Pat 531 (FB). (Order 21, R. 90, Proviso (i) (b) (Patna) — Proviso (i) (b) framed under S. 122 is not *ultra vires* — Order 21, R. 90 being rule of procedure Proviso (i) (b) cannot be said to affect substantive right — Proviso (i) (b) merely puts applicant to terms and makes deposit entirely discretionary with Court.)
('37) 24 AIR 1937 Rang 419 (420) : 1937 Rang L R 268 (FB). (Proviso (b) to O. 21 R. 90 introduced by Rangoon High Court, as such proviso stood before 27th January 1937 took away an existing right and as such was *ultra vires*.)

Note 4

1. See Note 1.
2. ('21) 8 AIR 1921 Pat 509 (510) (DB).
3. ('21) 8 AIR 1921 Pat 83 (84, 85) : 5 Pat L Jour 719 (DB).

to have been drawn to this amendment. Since the amendment of the section by the Government of India (Adaptation of Indian Laws) Order, 1937, the section clearly applies to all High Courts constituted by His Majesty by Letters Patent.

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123. [New.] (1) A Committee, to be called the Rule Committee, shall be constituted at the town which is the usual place of sitting of each of the High Courts and Chief Courts referred to in section 122.

Constitution of Rule Committees in certain Provinces.

(2) Each such Committee shall consist of the following persons, namely : —

(a) three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or a Divisional Judge for three years,

(b) a barrister practising in that Court,

(c) an advocate (not being a barrister) or vakil or pleader enrolled in that Court,

(d) a Judge of a Civil Court subordinate to the High Court, and

(e) in the towns of Calcutta, Madras and Bombay, an attorney.

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president :

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee.

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf; and whenever any member retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf [a][by the Provincial Government].

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "by the Governor-General in Council or by the Local Government, as the case may be."

1. Amendments after 1908.

(a) By the amending Act XIII of 1916, the words "the town which is the usual place of sitting of each of the High Courts and *Chief Courts* referred to in section 122," were substituted for the words "each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon." See NOTE on S. 124.

(b) By the Repealing and Amending Act, XVIII of 1919, the words "of the Chief Court" were substituted for the words "Chief Courts." The said words, namely, "of the Chief Court" were, however, repealed by Act XI of 1923. By Act XXXII of 1925, the words "and of the Chief Court" were again inserted in the section after the words "High Courts." By Act XXXIV of 1926, the words "Chief Courts" have again been substituted for the words "of the Chief Court."

(c) In sub-section (2) (a) after the words "District Judge or" the words "in the Punjab or Burma" originally occurred. They were substituted by Act XVIII of 1919 by the words "in Burma." These latter words were also repealed by Act XI of 1923.

Committee to report to High Court.

124. [New.] Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration.

1. Report of the Rule Committee. — The Rule Committee referred to in the section is the Rule Committee constituted under S. 123.[1] This section shows that a rule can be passed under S. 122 only after the opinion of the Rule Committee is taken into consideration. It has been held by the Patna High Court that S. 123 as it originally stood did not apply to the Patna High Court[2] and that a rule framed by it without reference to a Rule Committee, at a time when there was no Rule Committee in existence, is not *ultra vires*.[3] A contrary view has, however, been taken in a later case of the same High Court.[4] See Note 4 on section 122.

Power of other High Courts to make rules.

125. [New.] High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions as [a][the Provincial Government] may determine :

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the words "in the case of the Court of the Judicial Commissioner of Coorg, the Governor-General in Council, and in other cases the Local Government."

1. Scope of the section. — The rules under this section should not be inconsistent with the provisions in the body of the Code.[1] A rule requiring a party to file along with his application duly filled up printed forms for processes upon the opposite party is not inconsistent with the body of the Code and is not *ultra vires*.[2] The words "as, in the case of . . . . the Local Government, may determine" were substituted for the

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Section 124 — Note 1

1. ('21) 8 AIR 1921 Pat 83 (84) : 2 Pat L Jour 719 (DB).
2. See Note 1 on Section 123.
3. ('21) 8 AIR 1921 Pat 83 (84, 85): 5 Pat L Jour 719 (DB).
4. ('21) 8 AIR 1921 Pat 509 (510) (DB).

Section 125 — Note 1

1. See section 128.
2. ('21) 8 AIR 1921 Pat 428 (429) (DB).

words "as the Governor-General in Council may determine," by S. 2 and Schedule I of the Devolution Act (XXXVIII of 1920).

2. Power of High Court to extend within its jurisdiction rules of other High Courts. — A rule by a High Court extending within the local limits of its jurisdiction any rules which have been made by any other High Court will be valid only if it has been *previously published*. Where the rule extending the rules of another High Court is duly published, it is not necessary that the *extended* rules themselves should be published.[1]

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[a]**126.** Rules made under the foregoing provisions shall be subject to the previous approval of the Government of the Province in which the Court whose procedure the rules regulate is situate or, if that Court is not situate in any Province, to the previous approval of the Governor-General.

Rules to be subject to approval.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original section.

1. Amendment of the section. — The whole section has been altered as above by the Government of India (Adaptation of Indian Laws) Order, 1937. The section as it originally stood in the Code prior to its alteration ran as follows:

"Rules made under the foregoing provisions shall be subject to the previous approval of the following authorities, namely, —

(a) if the rule is made by a High Court established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, to the approval of the authority prescribed by the proviso to S. 107 of the latter Act for rules made under that section;

(b) if the rule is made by any other High Court, to the approval of the Local Government."

2. Rules subject to approval. *(Omitted).*

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127. [New.] Rules so made and approved shall be published in the [a][Official Gazette . . . .], and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

Publication of rules.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, Para. 4 (1) for "Gazette of India or in the Local Official Gazette, as the case may be." As under Para. 4 (1) the words 'Official Gazette' have to be substituted for "Gazette of India" and also for "Local Official Gazette," the substitution will strictly read "Official Gazette or in the Official Gazette, as the case may be." But the last words are omitted as being redundant.

1. Amendments after 1908. — By Act XXIV of 1917, the word "approved" was substituted for the word "sanctioned" which occurred in the section as it originally stood.

Note 2

1. ('21) 8 AIR 1921 Pat 428 (429) (DB).

128. [New.] (1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

Matters for which rules may provide.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely :—

(*a*) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service;

(*b*) the maintenance and custody, while under attachment, of live-stock and other moveable property, the fees payable for such maintenance and custody, the sale of such live-stock and property, and the proceeds of such sale;

(*c*) procedure in suits by way of counter-claim, and the valuation of such suits for the purposes of jurisdiction ;

(*d*) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts;

(*e*) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not ;

(*f*) Summary procedure —

(*i*) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising —

on a contract express or implied; or

on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only ; or

on a trust; or

(*ii*) in suits for the recovery of immoveable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant ;

(*g*) procedure by way of originating summons;

(*h*) consolidation of suits, appeals and other proceedings;

(*i*) delegation to any Registrar, Prothonotary or master or other official of the Court of any judicial, quasi-judicial and non-judicial duties; and

(*j*) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.

Synopsis

1. Scope of the section.
2. Defendant claiming indemnity against third party — Clause (e).
3. Suit for debts — Summary procedure — Clause (f).
4. Originating summons — Clause (j).
5. Delegation of judicial duties — Clause (i).
6. Counter claims. See O. 8 R. 6, Note 15.

1. Scope of the section. — This section enacts that the rules framed under the provisions of this Part may provide for any matter relating to the *procedure* of Civil Courts and it indicates the sort of rules that may be framed. A rule extending the provisions of S. 5 of the Limitation Act to applications under O. 9 R. 13 of the Code is a matter of *procedure* and is not *ultra vires*.[1] But a new rule in lieu of O. 34 R. 2, limiting the right of the mortgagee to recover interest at the mortgage rate for the whole period allowed for redemption is one dealing with *substantive rights* and is not a rule of procedure. Such a rule will be *ultra vires*.[2] The Lahore High Court has held that the amendments made by that High Court introducing a new rule, R. 23A in O. 41 and altering O. 43 R. 1 (u) are not *ultra vires* although the affect of the amendments is to provide for a new right of *appeal*, the decision proceeding on the ground that the High Court can, under its rule-making powers, lay down a new procedure for a particular purpose and also provide for an appeal from an order passed in following that procedure.[3]

A rule framed under the provisions of this part must not be inconsistent with the provisions in the body of the Code.[4] The words "consistent with body of the Code" mean "consistent with the *sections* of the Code" and not with the rules in the First Schedule which can be altered by the High Court.[5]

This section relates only to rules made under the Code by the High Courts with the advice of the Rule Committee constituted under S. 123. It does not affect the validity of rules framed under the previous Code.[6] As to the validity of rules framed under the old Code, see Note 2 on section 157.

Section 128 — Note 1

1. ('25) 12 AIR 1925 Mad 14 (17) : 47 Mad 824 (FB).
('17) 4 AIR 1917 Mad 957 (957) : 40 Mad 105.
Also see S. 122, N. 3 and O. 9 R. 13 N. 28.

2. ('11) 12 Ind Cas 18 (20) (Low Bur).

3. ('42) 29 AIR 1942 Lah 201 (202, 203) (DB).

4. ('42) 29 AIR 1942 Lah 201 (202) (DB). (Order 41 R. 23A providing for a remand being made in cases in which the lower Court has not disposed of a suit on a preliminary point is not inconsistent with S. 151 or any other provision in the body of the Code and is not *ultra vires*.)
† ('21) 8 AIR 1921 P C 80 (83) : 48 Cal 481 : 48 Ind App 76 (PC).
('25) 12 AIR 1925 Oudh 492 (492) : 28 Oudh Cas 169.
('09) 3 Sind L R 171 (172) : 4 Ind Cas 1151 (1155) (DB).
† ('30) 17 AIR 1930 All 558 (560) (DB).
('34) 21 AIR 1934 Mad 692 (694) : 58 Mad 285 (DB). (Rule 178 of Madras Civil Rules of Practice which prohibits the sale of a decree in execution of another decree is not *ultra vires* because under S 51 of the Code the power to order the sale of any property is subject to any limitations that may be prescribed by rules.)
[*See* ('42) 29 AIR 1942 All 387 (389) : ILR (1942) All 862. (Neither alterations in rules of Sch. I nor those rules themselves should be inconsistent with body of Code—No rule in Sch. I can confer jurisdiction upon Court which it would not have under body of Code.)]
[*See also* ('42) 29 AIR 1942 Oudh 488 (488). (Oudh Chief Court Rules, Chap. XII, R. 19 is not inconsistent with the provisions of Ss. 122 and 128.)]

5. ('27) 14 AIR 1927 Bom 599 (600) (DB).
('21) 8 AIR 1921 Lah 73 (73) : 2 Lah 227.

6. ('29) 16 AIR 1929 Mad 641 (650) : 52 Mad 56 (FB). (Per Thiruvenkatachariar J. in the order of reference.)

2. Defendant claiming indemnity against third party — Clause (e). — Under this clause rules may be framed relating to procedure when the defendant claims to be entitled to contribution or indemnity against any person whether a party to the suit or not. In England, rules have been framed restricting third party procedure to the cases referred to in S. 128 (2) (e), namely to cases of contribution and indemnity.[1]

3. Suit for debts — Summary procedure — Clause (f). — A suit on a negotiable instrument provided for under O. 37 of the Code also falls under the category of suits of the nature referred to in this clause.[1] The period of limitation for a suit under the summary procedure under this clause is six months from the date when the debt or liquidated demand becomes payable or the property becomes recoverable.[2] In the Bombay Presidency the period of limitation for such a suit is three years.[3] The period of limitation for an application for leave to defend such a suit is 10 days from the date when the summons is served.[4]

See also the undermentioned case.[5]

4. Originating summons — Clause (j). — An originating summons means every summons other than a summons in a pending cause or matter.[1] Where the disputed facts are complex and involve a considerable amount of oral evidence, an originating summons is not the proper procedure to be taken.[2]

5. Delegation of judicial duties—Clause (i).—Under S. 637 of the old Code any *non-judicial* or *quasi-judicial* act required to be done by a Judge could be done by the Registrar of the Court or by such other officer of the Court as the Court might direct to do such act.[1] Under the present section rules may be framed for the delegation of any judicial and non-judicial duties. It is doubtful whether a rule under the old Code delegating *judicial* duties to the Registrar and which was, therefore, *ultra vires* under the old Code is validated by this section.[2]

6. **Counter claims.** — See Order 8 Rule 6, Note 15.

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129. [S. 652, para. 3.] **Notwithstanding anything in this Code, any High Court** [a][constituted by His Majesty by Letters Patent] **may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.**

Power of Chartered High Courts to make rules as to their original civil procedure.

a. Substituted by the Government of Indian (Adaptation of Indian Laws) Order, 1937, for "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915."

Note 2

1. ('19) 6 AIR 1919 Cal 189 (189) : 46 Cal 48.

Note 3

1. ('27) 14 AIR 1927 Sind 90 (92) : 21 Sind L R 257.
2. See Article 5 of the Limitation Act.
3. See Article 64A of the Limitation Act, Sch. I, inserted by the Bombay Act VI of 1937.
4. See Article 159 of the Limitation Act.
5. ('10) 34 Bom 192 (198) (DB). (Under S. 128 such suits as were maintainable in respect of debts at the time of the Common Law Procedure Act, 1852, are still maintainable in British India.)

Note 4

1. See R. S. C., O. 71 R. 1A.

2. ('19) 6 AIR 1919 Bom 29 (30).

Note 5

1. ('16) 3 AIR 1916 Cal 488 (492) : 43 Cal 903 (928, 931) (FB)
('07) 34 Cal 619 (623) : 5 Cal L Jour 405 (412) (SB). (Granting of leave under Cl. 12 of the Charter is a judicial act which cannot be delegated to a ministerial officer.)
('91) 15 Bom 93 (98). (Grant of leave to sue is a judicial act and cannot be delegated.)
[*See also* ('95) 18 Mad 236 (246, 248) (FB). (Which was a case under the Presidency Small Cause Courts Act Ss. 18, 33)]
2. ('18) 5 AIR 1918 Cal 681 (682) (DB).

1. Amendments after 1908. — By the amending Act XIII of 1916, the words and figures "or the Government of India Act, 1915," were inserted, after the words "established under the Indian High Courts Act, 1861" which originally occurred in the section. The words "constituted by His Majesty by Letters Patent" have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the words "established under the Indian High Courts Act, 1861 or the Government of India Act, 1915."

2. Scope of the section. — Under this section, a Chartered High Court may make rules to regulate its own procedure in the exercise of its *original civil jurisdiction*. Such rules need *not be consistent* with the provisions in the body of the Code but *must be consistent* with the Letters Patent, establishing the High Court.[1] Where a rule passed under this section is inconsistent with the provisions of the Code (e. g., O. 41 R. 10) the former rule prevails over the latter.[2] A *resolution* of the High Court in regard to the mode of calculation of Counsel's fee, is not binding as a *rule*.[3]

The section enacts that it shall not affect the validity of rules in force at the commencement of the Code.[4]

3. Letters Patent. — The Letters Patent referred to in the section may be legitimately read as referring to the Letters Patent of 1865 which was in force at the time of the passing of the Code.[1]

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[a]**130.** A High Court not constituted by His Majesty by Letters Patent may, with the previous approval of the Provincial Government, make with respect to any matter other than procedure any rule which a High Court so constituted might under section 224 of the Government of India Act, 1935, make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town.

Powers of other High Courts to make rules as to matters other than procedure.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original section.

1. Amendment of the section. — The whole section was replaced by the present section by the Government of India (Adaptation of Indian Laws) Order, 1937. The section formerly ran as follows :

"A High Court not established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, may with the previous approval of the Local Government, make, with respect to any matter other than procedure, any rule which any High Court so established might, under S. 15 or S. 107, respectively, of those Acts make with respect to

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Section 129 — Note 2

1. ('07) 34 Cal 619 (624):5 Cal L Jour 405 (410) (SB). ('32) 19 A I R 1932 Cal 1 (1, 2) : 59 Cal 870 (DB). (Order 8 Rule 4 (5) being contrary to rules under Cl. 37, Letters Patent, latter prevail though the former was enacted by the Legislature.) ('36) 23 A I R 1936 Lah 369 (370). (Section 129, C. P. Code, expressly authorises the Bombay High Court to make rules to regulate its own procedure in the exercise of its original civil jurisdiction. A payment order under R. 874 in favour of a solicitor when validly made can be executed as a decree.) Also see Letters Patent (Cal), Cl. 37 Note 1.
2. ('13) 37 Bom 572 (574) (DB).
† ('25) 12 AIR 1925 Mad 1132 (1133) (DB). ('30) 17 AIR 1930 Cal 324 (324, 325) : 57 Cal 106. (Order 21 Rule 86 not applicable where Original Side Rules are framed by High Court under this section in this matter.)
3. ('05) 1905 All W N 83 (84) (DB).
4. ('10) 37 Cal 853 (855).

Note 3

1. ('24) 11 AIR 1924 Cal 1025 (1027) : 51 Cal 905 (DB).

any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town."

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131. [S. 652, para. 4.] Rules made in accordance with section 129 or section 130 shall be published in the [a][Official Gazette] and shall from the date of publication or from such other date as may be specified have the force of law.

Publication of rules.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Gazette of India or in the local official Gazette, as the case may be." See also foot-note to the text of Section 127.

1. Scope of the section. — Rules made by the High Court under sections 129 and 130 and published in the Official Gazette have the force of law[1] from the date of publication or from such other date as may be specified.[2]

Section 131 — Note 1

1. ('09) 6 All L Jour 45 (48).
† ('01) 4 Oudh Cas 303 (305) (DB).
('03) 5 Bom L R 394 (395) (DB).
('04) 27 Mad 121 (123) (DB). (High Court may require security for costs of appeal, if the rules framed by it under S. 652 old (now Ss. 122, 129, 131) authorise it.)
2. ('28) 15 AIR 1928 All 708 (708) : 50 All 865.

PART XI.

MISCELLANEOUS

132. [S. 640.] (1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

Exemption of certain women from personal appearance.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

[1877, S. 640; 1859, S. 21; See O. 26 R. 1.]

1. **Customs and manners of the country.**—This section applies to women, who according to the customs and manners of the country, ought not to be compelled to appear in public, e. g., *pardanashin* ladies.[1] The custom set up must not be one of a varying or uncertain character.[2] The right conferred by the section does not depend on the rank or station in life of a lady,[3] and cannot be refused on the ground that the lady has appeared in public before[4] or a charge of immorality is made against her.[5] Even though a lady may have given up the use of the *pardah* she is entitled to the benefit of the section, if, having regard to her social position and the feeling of her class, the Court is satisfied that she should not be *compelled* to appear in the witness-box.[6] But a lady may completely alter her mode of life and cease to be included in the statutory description of a woman "who, according to the customs and manners of the country, ought not to be compelled to appear in public." When this transformation has taken place, she can no longer claim, as of right, the statutory exemption formulated in section 132.[7]

2. **"Shall be exempt from personal appearance in Court."** — The exemption from personal appearance under this section is a right which no Court has

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Section 132 — Note 1

1. ('10) 8 Ind Cas 418 (421) (DB) (Oudh).
('27) 14 AIR 1927 Mad 524 (524). (Hindu widow — *Held*, no custom provided that she should remain in seclusion for more than one year from her husband's death.)
('99) 1899 Pun Re No. 19, page 114 (117) (DB). (A khatri woman is entitled to the benefit of this section.)
2 Hyde 88. (Though a lady may not belong to the pardanashin class Court may extend the privilege to her if she is not accustomed to appear in public.)

2. ('90) 14 Bom 584 (586). (Parsi woman — Section 132 does not apply.)

3. ('75) 24 Suth W R 375 (375) (DB). (A lady of humble rank may be entitled to exemption.)
('67) 8 Suth W R 282 (283) (DB). (All women of high rank not necessarily entitled to exemption.)

4. ('99) 26 Cal 650 (652).
† ('99) 26 Cal 651*n* (652*n*).
('99) 3 Cal W N 753 (753).
[*See* ('88) 15 Cal 775 (779) (DB). (Case decided with reference to S. 503, Cr. P. Code.)

5. ('01) 5 Cal W N ccxxxii (ccxxxii) (DB).

6. ('18) 5 AIR 1918 Cal 111 (112) : 45 Cal 492.

7. ('18) 5 A I R 1918 Cal 743 (744) : 45 Cal 697 (DB).

power to refuse,[1] and applies to *parties* as well as witnesses.[2] According to the Calcutta High Court in the undermentioned cases[3] the exemption is only in respect of *appearance* and not *attendance* in Court. Women can be compelled to come to Court, so long as they do not become visible to the public gaze. The High Court of Allahabad has, however, held that the words "personal appearance" used in the section mean "personal attendance" and that an exempted person cannot be compelled to *attend* Court.[4] The Sind Judicial Commissioner's Court has also taken the same view.[5] The Calcutta High Court itself has taken this view in other decisions.[6] If a commission is issued for the examination of a woman entitled to the benefit of this section, she cannot decline to be examined at any place other than of her own choice.[7]

See Ss. 20 and 32 (ii) of the C. P. Land Revenue Act (II of 1917) and S. 53 (2) of the Bombay Salt Act (II of 1890) for the application of this section and S. 133 to proceedings under the said Acts.

3. Sub-section (2)—Exemption of women from arrest in execution.—The Code exempts women from arrest in execution of money decrees (see S. 56) and decrees for restitution of conjugal rights (see Order 21, Rule 32).

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133. [S. 641.] (1) The [a][Provincial Government] may, by notification in the [b][Official Gazette], exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption.

Exemption of other persons.

(2) The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the [a][Provincial Government] and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

[1877, Ss. 641, 93 ; 1859, Ss. 22 and 23 ; See O. 26, R. 1.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

b. Substituted by *ibid* for "local official Gazette."

Note 2

1. ('28) 15 AIR 1928 Cal 814 (815) (DB).
† ('33) 20 A I R 1933 All 551 (553, 554) : 55 All 666 (DB). (Pardanashin lady examined on commission—Allegation of tutoring by somebody from behind—If true, proper course is exclusion of such evidence and not to order personal attendance.)
('01) 24 All 172 (173) (Pauper appeal may be presented by duly authorised agent.)
('25) 12 A I R 1925 Mad 905 (906). (Even though the pleader undertakes to produce her in Court.)
('71) 15 Suth W R 129 (130) (DB). (Residing in the town where Court sits and willing to admit the Court to an interview at her residence.)
('35) 22 A I R 1935 Sind 205 (206) : 25 Sind L R 298.
2. ('11) 11 Ind Cas 668 (668) (Mad).
† ('33) 20 AIR 1933 All 551 (553) : 55 All 666 (DB).
3. ('29) 16 AIR 1929 Cal 528 (528) : 56 Cal 865.
('72) 18 Suth W R 230 (230) (DB).
4. ('33) 20 AIR 1933 All 551 (553) : 55 All 666 (DB).
5. ('35) 22 AIR 1935 Sind 205 (206) : 25 Sind L R 298.
6. ('42) 29 AIR 1942 Cal 143 (144) : I L R (1941) 2 Cal 155. (A I R 1933 All 551 : 55 All 666 relied on.)
[*See also* ('28) 15 A I R 1928 Cal 814 (815). (Section 132 recognises the right of ladies who are behind the parda to require that their evidence if necessary, should be taken on commission.)]
7. † ('21) 8 AIR 1921 Cal 229 (231) : 48 Cal 448.
Also see O. 26 R. 1, Note 3.

1. Legislative changes. — The words "and may, by like notification, withdraw such privilege" which occurred in the corresponding S. 641 of the former Code have been omitted in the present section.

2. Scope of the section. — No person, of whatever position and respectability he may be, is entitled to exemption from personal appearance under this section in the absence of a notification by the Government, even though it may be derogatory to his dignity to attend personally in Court as a witness.[1] But where a notification under this section exists, the exemption is absolute and not even the Court *suo motu* can compel personal attendance.[2] See also Notes on Order 26 Rule 1.

Arrest other than in execution of decree.

134. [New.] The provisions of sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code.

1. Scope of the section. — Sections 55, 57 and 59 refer in terms to the arrest of a *judgment-debtor*, i.e., to arrest in execution of a decree. The present section makes the provisions of those sections applicable to *all* arrests under the Code.

Exemption from arrest under civil process.

135. [S. 642.] (1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process[8] while going to, presiding in, or returning from, his Court.

(2) Where any matter is pending before a tribunal[6] having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties[7] thereto, their pleaders, mukhtars, revenue-agents and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process[8] other than process issued by such tribunal for contempt of Court[3] while going to or attending[5] such tribunal for the purpose of such matter, and while returning from such tribunal.[4]

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.

[1877, S. 642.]

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. No exemption in case of process for contempt of Court.
4. "While going to or attending such tribunal ..... and while returning from such tribunal."
5. Arrest of person while in custody or while returning home on release from custody.
6. "Tribunal," meaning of.
7. Parties.
8. Civil process.
9. Remedies of exempted person on being illegally arrested.
10. Appeal.

Section 133 — Note 2

1. ('15) 2 AIR 1915 Mad 915 (919) (DB). (Pandara Sannadhis as such, not exempt.)

† ('17) 4 AIR 1917 Bom 155 (157) : 42 Bom 136 (DB).

2. (1863) Marsh 627.

1. Legislative changes. — The following changes should be noted:

(a) The words "and except as provided in S. 337A, sub-s. (5) and Ss. 256 and 643" which occurred in the beginning of sub-s. (2) of the corresponding S. 642 of the Code of 1882 have been omitted.

(b) The words "other than process issued by such tribunal for contempt of Court" in sub-s. (2) are new. See Note 3.

(c) Sub-section (3) is new.

2. Scope and object of the section. — The exemption conferred by this section is not for the personal benefit of the individual, but for the furthering of public interest and the better administration of justice.[1]

The privilege is really that of the Court and the principle on which it is founded is that freedom from the fear of arrest encourages willing attendance and thus tends to the advancement of justice.[2]

In cases in which this section does not, in terms apply, the English law should be followed. The English law in this respect is approximately the same as the law under the section.[3]

3. No exemption in case of process for contempt of Court. — It was held by the Calcutta High Court that the exemption created does not apply in the case of process issued for contempt of Court.[1] The section has been amended in the present Code so as to give effect to that ruling.

4. "While going to or attending such tribunal . . . and while returning from such tribunal." — The parties to a suit and the other persons referred to in the second sub-section are privileged *eundo, morando et redeundo*, i. e., in going to, attending and returning from such tribunal[1] and the exemption continues during such period as is reasonably and *bona fide* occupied in these acts.[2] A wide construction cannot be placed upon sub-s. (2).[3] It is not the intention of the Legislature that a person holding a warrant of arrest or a Civil Court process should be able to pounce upon a person the moment the Court rises for the day or that the slightest deviation for the purpose of business or refreshment robs a party of the protection afforded by the sub-section. But where a person has been lingering in the Court compound for one hour after the Court finished its work and the place where he was arrested was not on the way between the Court and his house, he cannot be said to be attending a Court so as to be exempt from arrest.[4] Where a native of Pàtna came to Madras to be present at the trial of a suit in which he was the plaintiff,

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Section 135 — Note 2

1. ('29) 16 AIR 1929 Oudh 426 (426) : 5 Luck 302 (FB).
('90) 13 Mad 150 (158) (FB).
† ('75) 14 Beng L R App 13 (14).
† ('76) 1 Cal 78 (91).
2. ('09) 32 All 3 (6): 3 Ind Cas 46 (47) (DB).
‡ ('31) 18 AIR 1931 Bom 175 (175) : 55 Bom 612.
3. ('80) 5 Cal 106 (108). (Arrest under a writ from a Small Cause Court—English law followed.)

Note 3

1. ('70) 4 Beng L R O C 90 (91).

Note 4

1. ('81) 4 Mad 317 (318).
('29) 16 AIR 1929 Oudh 426 (426): 5 Luck 302 (FB).
('30) 17 AIR 1930 Lah 736 (736). (No case pending before any Court—No exemption.)
† ('20) 7 AIR 1920 Mad 355 (356): 43 Mad 272 (DB).
2. ('68) 4 Mad H C R 145 (146).
('38) 25 AIR 1938 All 356 (357) (DB). (As to what is a reasonable time, it is a question of fact and must depend on the circumstances of each case.)
('75) 14 Beng L R (App) 13 (13). (The person claiming the privilege must be coming, staying and returning in the real belief that his attendance is necessary for the actual trial.)
† ('31) 18 AIR 1931 Bom 175 (178) : 55 Bom 612. (Reasonable period — A question of fact in each case.)
3. ('38) 25 AIR 1938 All 356 (358) (DB). (Section has been enacted in public interest with a view to ensure smooth and speedy administration of justice and cannot be given a wide interpretation so as to help a judgment-debtor who has deliberately avoided execution of a decree.)
4. ('33) 20 AIR 1933 Cal 11 (12).

but on the day of hearing the suit was adjourned for seven weeks and he was staying in Madras waiting for the next adjourned hearing, it was held by the Madras High Court that he was within the principle of privilege as a suitor while so staying in Madras, and could not be arrested under a civil process.[5] The Allahabad High Court has dissented from this view and has held[6] that it was too great an extension of the scope of the privilege. In that case A, resident of Bombay, went to Benares to attend a case there and put up at the dak bungalow there. After the Court work was finished he returned to the dak bungalow and thence proceeded to the railway station and took train to Allahabad. While seated in the train he was arrested. It was held that the privilege ceased when A returned to the dak bungalow, and that in any view he could not be deemed to be returning from the Court as he had taken train to Allahabad which was not his home. See also the undermentioned cases.[7]

A person claiming exemption from arrest under this section must return straight from the Court to his home. If he adopts a circuitous route in order to attend some other business on the way he is not exempt from arrest.[8] This does not mean that a deviation of a few yards[9] or the selection of a little longer but more convenient route[10] or even getting a petition prepared on the way when it does not cause unreasonable delay[11] necessarily disentitles a person to the protection extended by this section.

Where a party has a *clear interest* in being present at a trial it is enough to bring him within the protection of this section. It is immaterial that he is precluded from being *heard* at the trial, as, for instance, in the case of a defendant in a suit under Order 37, who has not obtained leave to defend the suit.[12]

5. Arrest of person while in custody or while returning home on release from custody. — Where a judgment-debtor is arrested and brought before the Court in execution of a decree and is in the custody of the Court's officers, he cannot be said to be "attending" the Court, as his presence in Court is not *voluntary*. Hence, he can be arrested in execution of another decree under such circumstances.[1] Where a judgment-debtor is released from jail on the ground of his arrest being illegal and is proceeding home on such release, he cannot be said to be returning from *Court*. Hence, in such circumstances, he is not exempt from arrest under this section.[2]

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5. ('81) 4 Mad 317 (318).
6. ('10) 32 All 3 (6, 7) (DB).
7. ('40) 27 AIR 1940 Rang 112 (112) : 1940 Rang L R 253. (Person attending Court not going in the direction of his home—Arrest is legal—32 All 3 followed.)

('38) 25 AIR 1938 All 356 (358) (DB). (Preliminary decree in partition suit — Decree-holder applying for execution by arrest of judgment-debtor—Judgment-debtor bolting away, but on assurance of Court that he would be exempt from arrest while appearing on fixed date before receiver for giving accounts, he coming home and then arrested two days before date fixed for appearing—Section 135 (2) held did not apply.)

('35) 22 AIR 1935 Pat 6 (8) : 14 Pat 242 (DB). (The principle which would apply to a person living in the place in which the Court is situate must be applied to the person who takes up temporary lodgings in that place, that is to say protection extends only from his temporary lodgings to the Court or from the Court to his temporary lodgings — Hence an arrest effected when he has left his temporary lodgings and is taking a walk is legal.)

('35) 22 AIR 1935 Nag 216 (216). (The privilege of exemption from arrest granted under the provisions of S. 135 (2) enures for the benefit of a party while he is going to or attending a Court and lasts till he returns from the Court to his ordinary place of residence though such place may be different from the place where the tribunal is situate: A I R 1931 Bom 175 : 55 Bom 612 followed; AIR 1935 Pat 6 : 14 Pat 242, not followed.)

8. ('24) 11 AIR 1924 All 676 (677) : 46 All 663. (Circuitous route taken for visiting son on route.)
('31) 18 AIR 1931 Bom 175 (178) : 55 Bom 612.
9. ('24) 11 AIR 1924 All 676 (677) : 46 All 663.
10. ('80) 5 Cal 106 (109).
11. ('16) 3 AIR 1916 Lah 318 (319).
12. ('80) 5 Cal 106 (108).

Note 5

1. ('24) 11 AIR 1924 Mad 900 (901) (DB).
2. ('90) 13 Mad 150 (158).

6. "Tribunal," meaning of. — An arbitrator appointed by the High Court to take a reference in a suit pending before it is a "tribunal" within the meaning of S. 135. Hence a defendant in the suit while attending before such arbitrator is exempt from arrest under this section.[1]

An Income-tax Officer is also a tribunal within the meaning of this section and a person on his way to appear before him in pursuance of a notice under S. 23 of the Income-tax Act is exempt from arrest under this section.[2]

The word "tribunal" in this section will include a foreign Court.[3]

7. Parties. — The wording of the section is wide enough to include not only civil litigants but also parties to criminal cases. Thus, a person coming to appear as an accused before a Criminal Court is entitled to exemption from arrest under this section.[1]

8. Civil process. — This section only exempts persons from liability to arrest under *civil process*. Hence, it does not preclude the arrest of a person under process issued by a Criminal Court.[1]

In the Code of 1877, instead of the words "under civil process" the words "under the Code" were used. Hence, it was held that the exemption conferred by this section did not apply to process not issued under the Code, as, for instance, process issued by the Small Cause Court[2] or by a Rent Court under the Rent Act.[3] These decisions require reconsideration in view of the above change in the language of the section. In this connexion it may be pointed out that in the undermentioned case[4] the principle of S. 135 was held applicable to arrest under the Presidency Towns Insolvency Act.

9. Remedies of exempted person on being illegally arrested.—A person who is arrested in contravention of this section has various remedies :

(1) He can apply for his release to the Court which ordered his arrest[1] or to the High Court under S. 491 (1) (b) of the Criminal Procedure Code.[2]

(2) On being released from such illegal arrest, he is entitled to a refund of the sum paid by him to obtain his release.[3]

(3) He cannot, however, maintain a suit for damages for illegal arrest in the absence of proof of malice and want of reasonable and probable cause.[4]

(4) He can prosecute the person causing the arrest for an offence under S. 342 of the Indian Penal Code.[5]

10. Appeal. — An order disallowing a claim to exemption from arrest under this section is one falling under S. 47 and as such is appealable.[1]

Note 6

1. ('78) 5 Cal L Rep 170 (171).
2. ('33) 20 AIR 1933 Lah 214 (215).
3. ('35) 22 AIR 1935 Nag 216 (216). (Word "tribunal" in S. 135 (2) is used to cover tribunal both of British India as well as of Native State.)

Note 7

1. ('29) 16 AIR 1929 Oudh 426(426):5 Luck 302 (FB).

Note 8

1. ('29) 16 AIR 1929 Lah 785 (785).
2. ('80) 5 Cal 106 (108).
3. ('82) 4 All 27 (29, 30, 33) (DB).
4. ('15) 2 AIR 1915 Mad 282 (286) (DB). (An insolvent in attendance in Court as witness cannot be arrested.)

Note 9

1. *See* ('10) 20 Mad L Jour 186 (187) (DB).
2. ('79) 5 Cal L Rep 170(171). (NOTE.— In view of the express enactment of S. 491, Cr. P. Code, the decisions in 1 Cal 78 and 5 Cal L Rep 170 pronounced before the Criminal Procedure Code was enacted are not of much importance.)
† ('76) 1 Cal 78 (91).
3. ('29) 16 AIR 1929 Oudh 426 (426):5 Luck 302 (FB).
4. ('30) 17 AIR 1930 Rang 131(132):7 Rang 598(DB).
5. ('16) 3 AIR 1916 Lah 318 (319, 320).
[But see ('35) 22 AIR 1935 Cal 551 (551). (*Held* in this case that the peon who arrests does not commit any offence.)]

Note 10

1. ('24) 11 AIR 1924 Mad 900 (900) (DB).
('10) 5 Ind Cas 909 (910) (DB) (Mad).
('10) 32 All 3 (6) (DB).

Exemption of members of legislative bodies from arrest and detention under civil process.

135A. (1) No person shall be liable to arrest or detention in prison under civil process —

[a](a) if he is a member of a 'unicameral Legislature or of either Chamber of a bicameral Legislature constituted under the Government of India Act, 1935, during the continuance of any meeting of such Legislature or Chamber;

(b) if he is a member of any committee of such [b][Legislature or Chamber], during the continuance of any meeting of such committee;

[c](c) if he is a member of either Chamber of such a bicameral Legislature, during the continuance of a joint sitting, meeting, conference or joint committee of the Chambers of that Legislature;

and during the fourteen days before and after such meeting or sitting.

(2) A person released from detention under sub-section (1), shall, subject to the provisions of the said sub-section, be liable to re-arrest and to the further detention to which he would have been liable if he had not been released under the provisions of sub-section (1).

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original clause.

b. Substituted by *ibid* for "Chamber or Council."

c. Substituted by *ibid* for the original clause.

1. Scope. — This section is new. It was inserted into the Code by Act XXIII of 1925. Its object is to confer on members of the Central and Provincial Legislatures immunity from arrest and imprisonment under civil process to the extent necessary to enable them to discharge their duties as members of such Legislatures.

Procedure where person to be arrested or property to be attached is outside district.

136. [S. 648.] (1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or moveable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay, [a][* * * * *] the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras [b][or Bombay], as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.

[1877, S. 648.]

a. The words "or of the Chief Court of Lower Burma" repealed by the Government of India (Adaptation of Indian Laws) Order, 1937.

b. Substituted by *ibid* for "Bombay or Rangoon."

Synopsis

1. Legislative changes.
2. The arrest or attachment must be under any provision of the Code.
3. Such arrest or attachment to be otherwise than in execution of a decree.
4. Order of arrest for contempt of Court.
5. The person to be arrested or property to be attached must be outside the Court's jurisdiction.
6. Jurisdiction of District Court to which the warrant or order is sent.
7. Power of Court to order attachment before judgment of property situated outside its jurisdiction.

1. Legislative changes.

This section corresponds to S. 648 of the former Code. The chief alteration made is that the words "where an application is made" have been substituted in the place of the words "where any Court desires." As to the effect of this alteration, see Note 7.

Alterations prior to Code of 1908 :

The words in the Code of 1877, "outside the district within which the Court issuing the warrant of arrest or making the order of attachment is situate" were converted in the Code of 1882 into the words "outside the local limits of its jurisdiction." As to the effect of this alteration, see Note 5. It may be noted that there is no material change in this respect in the present Code.

2. The arrest or attachment must be under any provision of the Code. — This section in terms applies only to cases in which the arrest or attachment is ordered under any provision of the Code. Hence it applies to an order for arrest under O. 39 R. 2 for disobedience of a temporary injunction.[1] As to order for arrest for contempt of Court, see Note 4.

Section 136 — Note 2

1. † ('26) 13 AIR 1926 Mad 574 (575) (DB).
† ('28) 15 AIR 1928 Cal 462 (463): 55 Cal 777 (DB).
('31) 18 AIR 1931 Cal 279 (280): 57 Cal 1280.
(*Semble* — Enforcement under this section of an order of temporary injunction against party, resident outside jurisdiction.)
('37) 24 AIR 1937 Cal 172 (174).
('34) 21 AIR 1934 Cal 818 (819): 61 Cal 971 (DB).

3. Such arrest or attachment to be otherwise than in execution of a decree. — The section expressly provides that the procedure laid down by it does not apply to arrest or attachment in execution of a decree. The procedure to be followed in such cases is laid in S. 39.

4. Order of arrest for contempt of Court.—An order for arrest for contempt of Court passed by a Judge on the original side of the High Court is not one passed *under the Code*, and S. 136 does not, therefore, apply to such cases.[1] Independent of that section, a Judge on the original side of a High Court, has no power to order the arrest of a person in the moffusil for contempt of Court.[2] But the High Court on its *Appellate Side* can order such an arrest.

5. The person to be arrested or property to be attached must be outside the Court's jurisdiction. — Section 136 provides for the procedure to be followed in cases where the person to be arrested or the property to be attached is *outside the local limits of the jurisdiction of the Court* to which the application for arrest or attachment is made. It has been held by the High Court of Calcutta that a person residing in the moffusil is outside the local limits of its jurisdiction in respect of an order under O. 39 R. 2 passed in the exercise of its original civil jurisdiction.[1] The High Court of Madras has left the question open whether, in respect of an order under O. 39 R. 2, passed in the exercise of its *appellate jurisdiction*, such person can be deemed to be residing "outside the local limits of its jurisdiction" within the meaning of this section.[2] But it has held that even if S. 136 did not strictly apply to the case, it was competent to it in the exercise of its powers of supervision and control over the Courts in the moffusil, to adopt the procedure laid down in S. 136 and send the order for arrest to the District Court within whose jurisdiction the person to be arrested resided.[3]

Under this section a Court may issue a warrant of arrest even against a person in another *province*.[4]

The corresponding S. 648 in the Code of 1877 contained the words "outside the district within which the Court issuing the warrant of arrest or making the order of attachment is situate." Hence, it was held that that section did not apply to cases in which the person to be arrested or property to be attached was within the district in which the Court ordering the attachment or arrest was situated although outside its local jurisdiction.[5] In view of the change in the language of the present section, these decisions are only of academic importance.

6. Jurisdiction of District Court to which the warrant or order is sent. — This section provides that the order for arrest or attachment must be sent to the District Court within the local limits of whose jurisdiction the person to be arrested resides

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Note 4

1. ('28) 15 AIR 1928 Cal 462 (463) : 55 Cal 777 (DB).
2. ('28) 15 AIR 1928 Cal 462 (463) : 55 Cal 777 (DB).

Note 5

1. ('28) 15 AIR 1928 Cal 462 (463) : 55 Cal 777 (DB).
   [*See also* ('34) 21 AIR 1934 Cal 818 (820): 61 Cal 971 (DB). (The High Court in its original jurisdiction has power to make an order of injunction and when that is disobeyed, to order the arrest of the person disobeying, though he might reside beyond the limits of its ordinary original jurisdiction and also to transfer the same for execution to a District Judge within whose jurisdiction such person resides. Such orders are not *ultra vires* or without jurisdiction.)]
2. ('26) 13 AIR 1926 Mad 574 (575) (DB).
3. ('26) 13 AIR 1926 Mad 574 (575) (DB).
4. *See* ('37) 24 AIR 1937 Cal 172 (173, 174). (Injunction by Calcutta High Court against person in Burma.)
5. ('79) 4 Cal 823 (825) (DB).
   ('78) 2 Bom 560 (561) (DB).

or the property to be attached is situated.[1] In the case of arrest, bare residence is enough for the purpose of this section. Thus, where an officer proceeding from Burma to England on leave resides for a few days in Madras on his way, that is enough to give jurisdiction to the Madras Court to arrest him under section 136.[2]

7. Power of Court to order attachment before judgment of property situated outside its jurisdiction. — Under the former Code there was a conflict of decisions as to whether a Court had the power to order the attachment before judgment of property outside its jurisdiction. On the one hand it was held that under Ss. 483 and 484 (corresponding to the present O. 38 R. 5) a Court could not attach before judgment property outside its jurisdiction. It was further held that the old S. 648 (corresponding to S. 136) did not enlarge the Court's power in this respect and that that section applied only where the Court had power to order such attachment under any other provision of the Code.[1] On the other hand, it was held that under S. 648 a Court did have the power to order the attachment before judgment of property situated outside its local jurisdiction.[2] Under the present Code, the words in the old Ss. 483 and 484 which imposed the restrictions as to the property being within the Court's jurisdiction have been omitted in O. 38 R. 5 and the words "where any Court desires" in S. 648 have been replaced in the present section by the words "where an application is made." Hence, there is no room for doubt under the present Code that S. 136 read with O. 38 R 5 (1) (a) empowers a Court to order the attachment before judgment of property situated outside its jurisdiction.[3]

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137. [S. 645 and compare Ss. 49, 200, 201.] (1) The language which, on the commencement of this Code, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the [a][Provincial Government] otherwise directs.

Language of subordinate Courts.

(2) The [a][Provincial Government] may declare what shall be the language of any such Court and in what character applications to and proceedings in such Courts shall be written.

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English; but if any party or his pleader is unacquainted with English a translation into the language of the Court shall, at his request, be supplied to him; and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

Note 6

1. ('41) 28 AIR 1941 All 212 (214). (An attachment made by any Court except the District Court and without the intervention of the District Court, would be unauthorised and invalid.)
† ('37) 24 AIR 1937 Pat 603 (605) (DB). (Where a warrant is sent to the Munsif, the warrant is defective.)
('37) 24 AIR 1937 Rang 367 (369): 1937 Rang L R 249. (Shan States have no District Judge—Issue of order of attachment before judgment—Order sent to Court of Assistant Superintendent at Kalaw — Such Court not being District Court, order is wrong.)
2. ('85) 8 Mad 205 (206, 207).

Note 7

1. ('03) 5 Bom L R 570 (574).
('07) 1907 Upp Bur Rul 13.
('85) 8 Mad 20 (21) (DB).
('02) 1 Low Bur Rul 310 (311).
2. ('08) 31 Mad 502 (504, 505).
('03) 7 Cal W N 216 (218).
3. † ('11) 10 Ind Cas 794 (796) (Low Bur).
*('31) 18 AIR 1931 Rang 279 (280) : 9 Rang 561. (Court ordering attachment under this section has power to remove it.)
Also see O. 38 R. 5, Note 17.

1. Sub-section (3).—This section corresponds to section 645 of the former Code. Sub-section (3) is new. It deals with writings other than the *record of evidence*. Hence, pleadings and applications may be in English subject to a translation being supplied to the other side where necessary. Compare section 138 and Order 18, Rule 9.

Power of High Court to require evidence to be recorded in English.

138. [S. 185A.] (1) The High Court may, by notification in the [a][Official Gazette], direct with respect to any Judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "local official Gazette."

1. Amendment after 1908. — The words "High Court" were substituted for the words "Local Government" by S. 2 and Schedule, Part I, of the Decentralisation Act (IV of 1914).

Oath on affidavit by whom to be administered.

139. [S. 197.] In the case of any affidavit under this Code—

(a) any Court or Magistrate, or

(b) any officer or other person whom a High Court may appoint in this behalf, or

(c) any officer appointed by any other Court which the [a][Provincial Government] has generally or specially empowered in this behalf, may administer the oath to the deponent.

[1877, S. 197; See O. 19.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

1. Legislative changes. — The words "or other person" in clause (b) are new. See Note 4.

2. Scope of the section. — An affidavit is a declaration as to facts made in writing and sworn before a person having authority to administer an oath.[1] Order 19 lays down the circumstances under which affidavits may be used as a mode of proof. The present section declares the persons who are competent to administer the oath to the deponent in cases where affidavits can be used as a mode of proof.

3. "Any Court or Magistrate"—Clause (a). — The person before whom an affidavit is sworn must be acting in the capacity of a Court or of the officer authorised

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Section 139 — Note 2

1. ('10) 4 Sind L R 88 (92) : 8 Ind Cas 897 (897). [*See also* ('32) 19 AIR 1932 Cal 160 (160) : 58 Cal 1389 (DB). (Affidavit differentiated from solemn affirmation.)]

to administer an oath.[1] Hence, an affidavit sworn in the Bar Library before a pleader who is also an Honorary Magistrate is not admissible under this section.[2]

A Village Munsif under the Madras Village Courts Act (1888) is a Court within the meaning of this clause.[3]

4. Any officer or other person appointed by the High Court — Clause (b). — The expression "other person" shows that the person appointed by the High Court need not necessarily be an officer.

See also the undermentioned case.[1]

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140. [S. 645A.] (1) In any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

Assessors in causes of salvage, etc.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed.

1. Legislative changes. — The words "or as may be prescribed" in sub-ss. (1) and (2) are new.

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141. [S. 647, Para. 1.] The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

Miscellaneous proceedings.

[1877, S. 647; 1861, S. 38; See S. 388, Indian Succession Act.]

Synopsis

1. Legislative changes.
2. To what proceedings the section applies.
3. Appeals in execution matters.
4. Proceedings for restitution.
5. Letters Patent Appeal.
6. "Court of Civil jurisdiction."
7. "Procedure provided in this Code."
8. "In regard to suits."
9. "As far as it can be made applicable."

NOTE to the Synopsis. See the Notes indicated for the following topics:

Appeals. See Note 8.
Execution proceedings. See Note 2.
Miscellaneous proceedings under C. P. C., S. 144, O. 9 and O. 21. See Note 2.
Proceedings in Small Cause Court. See Note 2.
Proceedings under the Arbitration Act. See Note 2.
Proceedings under the Bengal Tenancy Act. See Note 2.
Proceedings under the Companies Act. See Note 2.
Proceedings under the Guardians and Wards Act. See Note 2.
Proceedings under the Indian Divorce Act. See Note 2.
Proceedings under the Land Acquisition Act. See Note 2.
Proceedings under the Legal Practitioners' Act. See Note 2.
Proceedings under the Lunacy Act. See Note 2.
Proceedings under the Probate and Administration Act. See Note 2.
Proceedings under the Registration Act. See Note 2.
Proceedings under the Religious Endowments Act. See Note 2.
Reference under O. 46 R. 1. See Note 7.

Note 3

1. ('10) 4 Sind L R 88 (92) : 8 Ind Cas 897 (898).
2. ('10) 5 Ind Cas 537 (538) (Cal).
3. ('04) 27 Mad 223 (227) (DB).
See also R. 34 of the Madras Civil Rules of Practice.

Note 4

1. ('33) 20 AIR 1933 Pat 713 (714).

1. Legislative changes.

(1) The words "herein prescribed" have been changed into "provided in this Code in regard to suits."

(2) The words "other than suits and appeals" have been omitted.

2. To what proceedings the section applies.—The corresponding section of the former Code (section 647) as it originally stood ran as follows :

"The procedure herein prescribed shall be followed, so far as it can be made applicable, in all proceedings in any Court of civil jurisdiction *other than suits* and appeals."

In interpreting this section there arose a conflict of views as to whether proceedings in *execution* were "proceedings other than suits or appeals" to which this section could be applied.[1] In order to set this conflict at rest the Legislature, by Act VI of 1892, added an explanation to the section as follows :

"*Explanation.* — This Section does not apply to applications for the execution of decrees which are proceedings in suits."

In *Thakur Prasad* v. *Fakirullah*,[2] a case which arose before the explanation was added to the section their Lordships of the Privy Council observed as follows :

"Their Lordships think that the proceedings spoken of in S. 647 include *original* matters in the nature of suits such as proceedings in probates, guardianships and so forth and do not include executions . . . . Their Lordships' attention has been called to the recent Act VI of 1892 which would appear to have been passed in order to avoid the disturbance of practice caused by the Allahabad rulings . . . . . their Lordships have thought it right to state their opinion that the Act of 1892 does nothing more than express the true meaning of the Civil Procedure Code."

The explanation and the words "other than suits and appeals" were thus rendered superfluous and unnecessary and have accordingly been omitted from the present section. As a result it would therefore seem to be clear that S. 141 does not apply to *any* proceedings in execution[3] but only to proceedings which are *original* matters in the nature of suits. There has, however, been a conflict of opinion in respect of the following points due to different interpretations of the said Privy Council decision :

Section 141 — Note 2

1. *Applicable* :

('67) 8 Suth W R 64 (64) (DB).
('69) 12 Suth W R 428 (429) (DB).
('81) 5 Bom 680 (681) (DB).
('82) 6 Bom 681 (683) (DB).
('90) 12 All 179 (183) (DB). (Section 373 of Act of 1877).
('9-) 22 Bom 778 (781, 782) (DB).
('90) 12 All 392 (395) (FB).
('89) 11 All 228 (232). (Section 375 of Act of 1877.)
('76) 1 All 180 (181) (FB).
('72) 4 N W P H C R 10 (10) (DB).
('73) 5 N W P H C R 164 (165) (DB).
('76) 1 All 178 (179) (FB) (Power of Appellate Court to stay execution.)
('85) 7 All 359 (361, 362) (DB).
('84) 10 Cal 416 (422, 423) (DB). (Restoration of execution proceedings dismissed for default.)
('84) 10 Cal 538 (540) (DB).
('69) 11 Suth W R 567 (569) (DB). (Striking of execution proceedings.)
('85) 8 Mad 548 (550) (FB).
('94) 17 Mad 67 (68) (DB). (Amendment of execution application.)
('73) 10 Bom H C R 19 (20) (DB).
('81) 7 Cal 163 (165) (DB).
('88) 10 All 119 (122).
('68) 10 Suth W R 450 (451) (DB).

Not applicable :

('69) 11 Suth W R 494 (494) (DB).
('91) 18 Cal 462 (466) (DB).
('91) 18 Cal 515 (518) (DB).
('92) 15 Mad 240 (241) (DB).
('88) 15 Cal 177 (179) (DB).
('91) 18 Cal 635 (638, 639) (DB).

2. ('95) 17 All 106 (111) : 22 Ind App 44 (PC). (Reversing 12 All 179 on appeal.)

See also the following cases decided on the basis of the Privy Council decision and the explanation to Section 647 :

('02) 26 Bom 76 (82) (DB).
('97) 19 All 98 (100) (FB).
('95) 18 Mad 131 (134).
('21) 8 AIR 1921 Bom 463 (463) (DB).
[*See also* ('87) 9 All 36 (41, 42).]

3. † ('14) 1 AIR 1914 Sind 61 (62) : 8 Sind L R 327 (DB).

(1) Whether proceedings under O. 21 Rr. 89, 90, 91, 97 and 100 are proceedings in execution or *original* matters in the nature of suits.

(2) Whether an application to restore a suit dismissed for default is an original matter in the nature of a suit.

(3) Whether S. 141 applies *only* to original matters or to *all* matters whether original or not, provided they are not execution proceedings.

On the *first* point all the Courts except the High Court of Patna and the Chief Court of Oudh have held that such proceedings are proceedings in execution, and that

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† ('33) 20 AIR 1933 All 783 (784) : 55 All 891 (FB).

† ('37) 24 AIR 1937 Bom 111 (112) : I L R (1937) Bom 144. (Reference to arbitration in execution proceedings at the instance of the parties is without jurisdiction.)

† ('39) 26 AIR 1939 Lah 223 (223). (Order 9 Rr. 4 and 9 inapplicable but High Court has inherent power to restore.)

('35) 22 AIR 1935 Pat 408 (409). (As S. 141, C. P. Code, does not apply to execution of decrees, the Panchayat has no jurisdiction to transfer an execution against an immovable property under the C. P. Code, in contradistinction to powers conferred by S. 59 (3) Bihar and Orissa Village Administration Act, 1922.)

† ('39) 26 AIR 1939 Mad 578 (579). (Provisions of O. 26 R. 4 are not applicable to execution proceedings and have not been made so by S. 141.)

† ('31) 18 AIR 1931 Sind 97 (98) : 25 Sind L R 475 (FB). (Order 9 R. 9 does not apply.)

('16) 3 AIR 1916 Pat 331 (332) (Do.)

† ('15) 2 AIR 1915 Mad 811 (812) : 38 Mad 199 (DB). (Order 2 R. 2 does not apply.)

('16) 3 AIR 1916 Mad 767 (767) (DB). (Do.)

† ('18) 5 AIR 1918 Pat 67 (68) : 4 Pat L Jour 330 (DB). (O. 9 does not apply.)

('92) 14 All 64 (66) (DB). (Section 11.)

('91) 13 All 564 (568) (DB). (Do.)

('88) 15 Cal 177 (179) (DB). (Section 24—The contrary view taken in 1 All 180; 8 Mad 548 (FB) and 5 Bom 680 is obsolete in view of the Privy Council case in 17 All 106: 22 Ind App 44 (PC).)

('94) 16 All 390 (394) (DB). (O. 9 R. 9.)

† ('93) 15 All 84 (94) (FB). (Do.)

('22) 9 AIR 1922 Nag 267 (269) : 18 Nag L R 152 (Do.)

('11) 11 Ind Cas 385 (387) (DB) (Cal). (Do.)

('29) 16 AIR 1929 Lah 744 (745). (O. 9 does not apply to proceedings in execution.)

('95) 18 Mad 131 (133). (O. 17 Rr. 2 and 3.)

('92) 1892 Pun Re No. 37, p. 148 (149) (DB). (O. 23 Rules 1 and 2.)

('86) 10 Bom 62 (64, 65) (DB). (Do.)

('02) 26 Bom 76 (82) (DB).

† ('25) 12 AIR 1925 Cal 812 (813) : 52 Cal 559 (DB) (Schedule 2.)

('17) 4 AIR 1917 Mad 185 (186): 40 Mad 780 (DB). (O. 2 R 2 and S. 11 Expl. 4 not applicable.)

('14) 1 AIR 1914 Cal 126 (127) : 41 Cal 1 (DB). (O. 9 R. 13 not applicable to application under O. 21 R. 100.)

† ('17) 4 AIR 1917 Cal 31 (32) (DB). (O. 9 R. 9 not applicable.)

('18) 5 AIR 1918 Mad 1011 (1012) (DB). (O. 9 does not apply to execution proceedings at all.)

('23) 10 AIR 1923 All 460 (460) : 45 All 148 (DB). (O. 9 R. 9 not applicable—AIR 1914 Cal 126 : 41 Cal 1 and AIR 1918 Pat 67 : 4 Pat L Jour 330 followed.)

('21) 8 AIR 1921 Lah 67 (67): 2 Lah 66 (DB). (O. 9 R. 9 does not apply.)

('15) 2 AIR 1915 Cal 539 (540) (DB). (O. 9 R. 9 not applicable to application under O. 21 R. 90.)

† ('23) 10 AIR 1923 Nag 18 (19). (O. 9 R. 9 not applicable.)

('25) 12 AIR 1925 Cal 360 (360) (DB). (Proceeding under O. 21 R. 90.)

† ('25) 12 AIR 1925 Cal 510 (511) (DB). (Application under O. 21 R. 90. Dissenting from AIR 1916 Cal 613; AIR 1916 Cal 221 and AIR 1917 Cal 548: 44 Cal 950 and following AIR 1919 Pat 192 : 4 Pat L Jour 135 (FB).)

('29) 16 AIR 1929 All 485 (487) (DB). (Setting aside sale under O. 21 R. 91 — O. 9 R. 13 not applicable.)

('23) 10 AIR 1923 All 544 (544). (Application under S. 47 for cancellation of sale—Following AIR 1923 All 460: 45 All 148.)

('24) 11 AIR 1924 Pat 346 (347) (DB). (Application to set aside execution sale under O. 21 R. 90.)

† ('25) 12 AIR 1925 Mad 126 (127). (Application to set aside sale under O. 21 R. 90—AIR 1915 Mad 811 : 38 Mad 199 and AIR 1919 Pat 192 : 4 Pat L Jour 135 (FB), relied on.)

('21) 8 AIR 1921 Sind 55 (56) : 17 Sind L R 105 (DB). (Proceedings under O. 21 R. 90.)

('26) 13 AIR 1926 Bom 377 (378) : 50 Bom 457 (DB). (Application under O. 21 R. 89—AIR 1914 Cal 126 : 41 Cal 1, followed and A I R 1917 Cal 548 : 44 Cal 950 and AIR 1916 Cal 613, dissented from.)

† ('26) 13 AIR 1926 Cal 773 (777) : 53 Cal 679 (DB). (Application to set aside sale—AIR 1916 Cal 221 : 12 Cal L Jour 6 and AIR 1917 Cal 548 : 44 Cal 950 held wrongly decided.)

('26) 13 AIR 1926 Lah 109 (109). (Objection under O. 21 R. 90.)

† ('19) 6 AIR 1919 Pat 192 (193) : 4 Pat L Jour 135 (FB). (Proceedings under O 21 R. 90.)

† ('29) 16 AIR 1929 Mad 757 (762) : 52 Mad 899 (FB). (Proceedings under C. P. Code, O. 21 Rr. 97 and 100.)

('08) 4 Low Bur Rul 75 (75). (Objection to attachment.)

('09) 2 Ind Cas 105 (106) (All) (DB). (Do.)

('94) 1894 Pun Re No. 62 p. 201 (203) (Do.)

('20) 7 AIR 1920 Cal 914 (915) (DB). (Proceedings under O. 21 R. 2.)

S. 141 cannot be applied thereto.[4] A Full Bench decision of the Patna High Court[5] has held that a proceeding under O. 21 R. 90 is one in execution. But in the undermentioned decision of the same High Court[6] it has been held, distinguishing the Full Bench case, that a proceeding under O. 21 R. 100 is an original matter in the nature of suits to which S. 141 can be applied. The Oudh Chief Court has held that a proceeding under O. 21 R. 90 is an original matter and that S. 141 applies thereto.[7] See also O. 9 General, Note 1.

For a discussion on the *second* point, see O. 9 General, Note 2.

On the *third* question it has been held in the undermentioned cases[8] that S. 141 applies to all matters not being proceedings in execution. They accordingly hold that

In the following case, the procedure provided by the Code in regard to suits was applied to execution proceeding despite the explanation to Section 647. It must be regarded as not rightly decided, so far as effect of S. 141 is concerned :

('94) 17 Mad 67 (68) (DB). (Order 6 R. 17 applied to execution proceedings.)

The opposite view held in the following cases that S. 141 applies to execution proceedings is no longer law :

('12) 13 Ind Cas 859 (860) (Lah).
('84) 10 Cal 416 (422) (DB).
('88) 10 All 119 (122).
('85) 7 All 359 (361).
('82) 6 Bom 681 (682) (DB).
('10) 7 Ind Cas 241 (241) (DB) (Cal).
[*See* ('35) 22 AIR 1935 Lah 145 (145). (An application under Sec. 292, Succession Act (1925) is really made in proceedings in the nature of execution and is no bar to a fresh application being entertained in the exercise of inherent jurisdiction when the first application had been dismissed in default and not on merits : 17 All 106 : 22 Ind App 44 (PC) distinguished.)]

4. ('14) 1 AIR 1914 Cal 126 (127) : 41 Cal 1 (DB). (Order 21 Rules 100 and 101.)
('15) 2 AIR 1915 Cal 539 (540) (DB). (Order 21 Rule 90.)
('25) 12 AIR 1925 Cal 360 (360) (DB). (Do.)
† ('25) 12 AIR 1925 Cal 510 (511). (Order 21 R. 90 —Dissenting from AIR 1916 Cal 613; AIR 1916 Cal 221; AIR 1919 Cal 50 : 45 Cal 950 and following AIR 1919 Pat 192: 4 Pat L Jour 135 (FB).)
† ('26) 13 AIR 1926 Cal 773 (777) : 53 Cal 679 (DB). (Order 21 R. 90 — AIR 1916 Cal 221 : 12 Cal L Jour 6 and AIR 1919 Cal 50 : 45 Cal 950 held wrongly decided — In view of this decision and of AIR 1925 Cal 510, the decision in 2 Ind Cas 156 and 3 Cal W N 344 must also be held to be not correct.)
('29) 16 AIR 1929 All 485 (487) (DB). (O. 21 R. 91.)
('25) 12 AIR 1925 Mad 126 (127). (O. 21 R. 90.)
† ('26) 13 AIR 1926 Bom 377 (378) : 50 Bom 457 (DB). (O. 21 R. 89.)
† ('21) 8 AIR 1921 Sind 55 (56) : 17 Sind L R 105 (DB). (Order 21 R. 90.)
† ('29) 16 AIR 1929 Mad 757 (762) : 52 Mad 899 (FB). (Order 21 Rr. 97 and 100.)
('26) 13 AIR 1926 Lah 109 (109). (O. 21 R. 90.)
('31) 18 AIR 1931 All 594 (594) (DB). (Order 9 does not apply to proceedings under O. 21 R. 90 dismissed for default but the Court may act under inherent power.)
[See however ('41) 28 AIR 1941 Cal 559 (560). (The observations in this case assume that an application under O. 21 R. 90 is a proceeding to which S. 141 applies.)]

5. ('19) 6 AIR 1919 Pat 192 (193) : 4 Pat L Jour 135 (FB). (Impliedly overruling AIR 1918 Pat 486 : 3 Pat L Jour 250.)
[*See also* ('24) 11 AIR 1924 Pat 346 (347) (DB). (Proceedings under O. 21 R. 90 — Point not decided.)]

6. ('23) 10 AIR 1923 Pat 239 (241) : 2 Pat 372 (DB).

7. ('20) 7 AIR 1920 Oudh 177 (178): 23 Oudh Cas 349. (Follows AIR 1916 Cal 613 which has been dissented from in later Calcutta decisions.)

8. ('41) 28 AIR 1941 All 101 (105, 108) : I L R (1941) All 193 (FB).
('09) 3 Ind Cas 904 (905) (DB) (All). (*Ex parte* disposal of such application — O. 9 R. 13 applies.)
✠ ('11) 7 Nag L R 32 (32) : 10 Ind Cas 705 (705).
('19) 6 AIR 1919 Lah 155 (156).
('37) 24 AIR 1937 Sind 273 (278) : 31 Sind L R 180. (Application under O. 34 R. 5 — O. 17 and O. 9 apply in view of S. 141.)
† ('20) 7 AIR 1920 Lah 304 (304) : 1 Lah 339.
('20) 7 AIR 1920 Lah 199 (200).
('27) 14 AIR 1927 Lah 71 (71).
('31) 18 AIR 1931 Mad 795 (796, 797). (Application for final decree under O. 34 R. 5 — O. 9 applies.)
('30) 17 AIR 1930 Nag 188 (189) : 26 Nag L R 154. (Application for personal decree in mortgage — O. 9 R. 9 will apply.)
('30) 17 AIR 1930 Rang 257 (258) : 8 Rang 316. (Do.)
† ('26) 13 AIR 1926 Rang 74 (75) : 3 Rang 534.
('25) 12 AIR 1925 All 773 (774, 775) : 47 All 878 (DB).

See also the following cases in which S. 141 was assumed to apply to proceedings which are not original matters :

('25) 12 AIR 1925 Mad 145 (146 to 149) : 47 Mad 800 (DB). (O. 18 R. 1, C. P. Code, applies to enquiry before Commissioner.)
('19) 6 AIR 1919 Nag 150 (151) : 15 Nag L R 21. (O. 1 R. 10 applies to application under O. 22 Rule 3.)

The following cases decided before the date of the Privy Council decision in 17 All 106: 22 Ind App 44 (PC) applied S. 647 (141) to non-original proceedings :

('85) 7 All 542 (544). (Petition for security for costs.)
('94) 21 Cal 479 (483). (Sale by Receiver.)

where an application to restore a suit dismissed for default is itself dismissed for default, an application will lie under O. 9 R. 9 to restore the application, by virtue of S. 141 independent of the question whether it is an original matter or not. The Bombay[9] and the Calcutta[10] High Courts have, on the other hand, held that S. 141 must be taken to apply *only* to original matters and that an application such as that mentioned above does not lie. See also the cases cited below[11] in which it was held that this section only applies to proceedings of an *original* nature.

In *Maha Ram* v. *Harbans*,[12] a recent Full Bench decision of the Allahabad High Court, the decision of the Privy Council in *Thakur Prasad* v. *Fakirullah*[13] was construed again and it was held that it did not necessitate the conclusion either (a) that this section was *confined* to proceedings of an original nature or (b) that it was not applicable *at all* to proceedings in execution. In this view it was held that the section applied to proceedings in a Civil Court under S. 271 of the Agra Tenancy Act of 1926 although such proceedings were not of an original character but only arose out of a reference by the revenue Court.

The views expressed in the above decision run counter to what may fairly be regarded as the established construction of the section, and may have to be reconsidered.

The following have been held to be the original matters of the nature contemplated by the section :

(1) Proceedings for the grant of probate[14] or letters of administration.[15]

(2) Proceedings under the Guardians and Wards Act, 1890.[16]

('75) 14 Suth W R 390 (391) (DB). (Inquiry into conduct of Civil Court's Amin — Costs can be awarded.)

9. ('21) 8 AIR 1921 Bom 463 (463) (SB). (Order 25 R. 1 not applicable to reference under S. 12, Revenue Jurisdiction Act.)

10. ('27) 14 AIR 1927 Cal 534 (535) : 54 Cal 405 (DB).

11. ('42) 29 AIR 1942 All 85 (88) : I L R (1941) All 807 (DB). (Though proceedings for restitution are not proceedings in execution, they are not original proceedings and so this section does not apply to them.)

('41) 28 AIR 1941 Rang 201 (202): 1941 Rang L R 246 (DB).

12. ('41) 28 AIR 1941 All 101 (105): I L R (1941) All 193 (FB).

('27) 14 AIR 1927 Cal 534 (535) : 54 Cal 405 (DB).

13. ('95) 17 All 106 (111) : 22 Ind App 44 (PC).

14. ('82) 8 Cal 880 (882) (DB). (Rule as to burden of proof.)

† ('36) 23 AIR 1936 Lah 863 (864) (DB). (Provisions of O. 9 R. 9 are applicable to probate proceedings—Application for grant of probate dismissed on default — Order is appealable under O. 43 R. 1 (c) or under S. 299, Succession Act — Affirming on Letters Patent Appeal AIR 1936 Lah 712.)

('38) 25 AIR 1938 Mad 486 (488). (Rules regarding pauper applications.)

('20) 7 AIR 1920 Cal 743 (745) (DB). (Guardian *ad litem* may be appointed.)

† ('94) 18 Bom 237 (238). (Probate may be obtained in *forma pauperis*.)

(1900) 27 Cal 350 (351).

[*See also* ('35) 22 AIR 1935 All 735 (735) (DB). (Proceedings for grant of succession certificate may be taken to be a suit — So assumed.)

15. ('43) 30 AIR 1943 Cal 19 (20) : ILR (1942) 2 Cal 194. (S. 10, C. P. C., applies to application for letters of administration.)

16. ('40) 27 AIR 1940 Nag 203 (205): ILR (1942) Nag 45. (O. 39 R. 2, sub-rule (3) applies to disobedience of interim injunctions restraining marriage of a minor under S. 12 of the Guardians and Wards Act—The powers were not exercised in this case as they were not invoked by any party to the proceedings.)

('06) 3 All L Jour 841 (842). (Statements of witnesses must be recorded in manner provided by C. P Code.)

† ('28) 15 AIR 1928 Lah 488 (489).

('34) 21 AIR 1934 Mad 496 (498) (DB). (O. 39 R. 10 applied to a petition under Guardians and Wards Act.)

† ('33) 20 AIR 1933 Nag 62 (64 to 66) :28 Nag L R 332. (O. 39 R. 2, sub-rule (3) applied to disobedience of interim injunction restraining marriage under S. 12 of the Guardians and Wards Act.)

('05) 1905 All W N 104 104 (105) (DB). (Evidence to be recorded as in suits.)

('81) 6 Cal 762 (763) (DB). (Case under Minors Act, Bengal Act XL of 1858—Depositions to be recorded as provided by Ss. 182 and 183 of the Code of 1877.)

† ('12) 36 Bom 20 (27) : 11 Ind Cas 554 (557). (Receiver may be appointed in such proceeding.)

('25) 12 AIR 1925 Lah 489 (489). (Do.)

('29) 16 AIR 1929 Nag 273 (273). (Appeal lies from order under O. 39 R. 2 in proceedings under the said Act.)

(3) Proceedings under the Companies Act, 1882, and under the Companies Memorandum of Association Act, 1895.[17]

(4) Application for the appointment of a common manager under S. 93 of the Bengal Tenancy Act, 1885.[18]

(5) Applications under section 158 of the Bengal Tenancy Act, 1885.[19]

(6) Application to file an agreement to refer to arbitration under paragraph 17 of Sch. II of the Code[20] or to file an award under the Arbitration Act, 1899,[21] or under para. 20 of Sch. II of the Code.[22] (Both Sch. II of the Code and Arbitration Act of 1899 have now been repealed by the Arbitration Act of 1940.)

(7) Application to a District Judge for sanction to lease wakf properties.[23]

(8) Application to the High Court for the exercise of its extraordinary jurisdiction under Bombay Regulation II of 1827.[24]

(9) Reference to the Court under the Land Acquisition Act, 1894.[25]

(10) Proceedings to compel registration.[26]

(11) Application under section 18 of the Religious Endowments Act, 1863, for leave to sue.[27]

(12) Proceedings in revision before the High Court.[28]

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17. ('03) 27 Bom 415 (418) (DB). (Companies Memorandum of Association Act.)
† ('87) 9 All 180 (182, 183) (SB). (S. 24, C. P. Code, applies to cases of winding up of companies.)
† ('20) 7 AIR 1920 Lah 51 (53) : 1 Lah 187 (DB). (O. 9 R. 13 applies *mutatis mutandis* to *ex parte* orders of Court under Companies Act.)
('36) 23 AIR 1936 All 826 (829) : 58 All 742 (FB). (Proceedings under S. 187, Companies Act, are proceedings in a Court of civil jurisdiction — S. 86 is therefore applicable to such proceedings — Per Thom J.)
('37) 24 AIR 1937 Lah 82 (83). (Company law does not affect power of review especially when by S. 141, C. P. C., provisions of Code are to be followed in proceedings under the Company law —*Obiter*.)
† ('37) 24 AIR 1937 Oudh 62 (63). (Civil Court can review its order passed under S. 120, Companies Act.)
('28) 15 AIR 1928 Lah 376 (377). (Liquidation Court can order attachment before judgment.)
Also see S. 86 Note 3.

18. † ('16) 3 AIR 1916 Cal 427 (427) : 43 Cal 986 (DB). (Receiver may be appointed under O. 40 R. 1 pending the application.)
('26) 91 Ind Cas 741 (741) (DB) (Cal). (O. 9 R. 13 applies to the proceeding.)
('99) 3 Cal W N 344 (345) (DB). (A proceeding under S. 174 does not come under Explanation to S. 647 of the Code of 1882.)

19. (97) 24 Cal 197 (206) (DB). (S. 45 of the Code of 1882 (now O. 2 R. 3) applies to the case.)

20. ('11) 1911 Pun Re No. 35: 9 Ind Cas 655 (656). (O. 2 R. 3 applies.)

21. ('40) 27 AIR 1940 Lah 164 (165). (Award against minor—Application by arbitrator for filing of award not containing prayer for appointment of guardian for minor—Minor can apply under O. 32 R. 5 to declare the order void as against him.)
('09) 3 Sind L R 128 (129) : 4 Ind Cas 609 (610). (Court can issue a temporary injunction in such cases.)
† ('24) 11 AIR 1924 Sind 56 (56). (O. 9 R. 13 applies to *ex parte* order for filing award.)
('22) 9 AIR 1922 Sind 6 (7) : 16 Sind L R 79. (C. P. Code., S. 10 applies to such case— This case was doubted in AIR 1928 Sind 169: 23 Sind L R 427.)

22. ('42) 29 AIR 1942 Bom 57 (58) : I L R (1942 Bom 94 (DB).

23. ('24) 11 AIR 1924 Cal 327 (328) (DB). (The fact that the Civil Procedure Code regulates its procedure does not make an order thereon appealable.) [*See also* ('20) 7 AIR 1920 Cal 129 (130) : 47 Cal 592 (DB).]

24. ('68) 5 Bom H C R A C 215 (216).

25. † ('89) 16 Cal 31 (32) (DB).
('05) 2 Cal L Jour 359 (368) (DB). (Objection of respondent can be dismissed for default of appearance—O. 9 Rr. 8 and 9 apply.)

26. ('77) 2 Cal 131 (139) (PC).

27. ('01) 24 Mad 685 (689) (DB). (Provisions of C. P. Code as to verification and presentation should be followed.)
('16) 3 AIR 1916 Mad 268 (271) (DB). (The decision in this case that proceedings under S. 10 of the Religious Endowments Act are not judicial proceedings and hence S. 141 does not apply to them is no longar law in view of the decision of the Privy Council in AIR 1917 P C 71 : 40 Mad 793 : 44 Ind App 261 (PC).)

28. ('07) 1907 Pun Re No. 97, p. 455 (457). (O. 9 R. 9 applies to revision proceedings.)
('92) 16 Bom 550 (551) (DB). (Order in revision to be executed by lower Court.)
('91) 13 All 533 (537). (Revision under Provincial Small Cause Courts Act S. 25 — High Court can remand case under S. 562, C. P. Code.)
('07) 17 Mad L Jour 62 (63). (Memo of cross-objections can be filed.)

(13) Application to sue in *forma pauperis*.[29]
(14) A proceeding under the Lunacy Act, 1912.[30]
(15) A proceeding under the Indian Divorce Act, 1869.[31]
(16) Issue sent by a Revenue Court for decision, under S. 271 of the Agra Tenancy Act, 1926.[32] (Now see U. P. Tenancy Act, XVII of 1939.)

See also the undermentioned cases.[33]

The following are not proceedings of the kind contemplated by the section:

(1) Application for review of order dismissing execution application.[34]
(2) Proceedings under O. 21 R. 58.[35]

But independent of this section some of the provisions of the Code may apply directly and of their own force to matters which do not come within the meaning of the word "proceedings" as defined by the Privy Council.[36] Thus, a proceeding in execution can be reviewed under O. 47 R. 1 by force of its own language and not by virtue of S. 141.[37]

In the undermentioned decision[38] the Sind Judicial Commissioner's Court expressed the view that the provisions of O. 7 apply, by reason of this section, to memoranda of appeals and that an appeal can be rejected under O. 7 R. 11. It is submitted that the view is not correct as an appeal is not an original proceeding. But O. 7 R. 11 will apply to appeals by reason of the provisions of S. 107. (See Notes on S. 107.)

[See however ('42) 29 AIR 1942 Mad 657 (658). (Revisional jurisdiction is peculiar to the High Court and there can be no question of returning civil revision petition for presentation as a civil revision petition or as an appeal to any other Court in the province, under the provisions of O. 7 R. 10, read with Ss. 107 (2) and 141.)]

29. ('14) 1 AIR 1914 Mad 256 (258). (Amendment can be ordered under O. 6 R. 17.)
† ('33) 20 AIR 1933 Mad 5 (5, 6). (O. 9 R. 9 applied.)
('29) 16 AIR 1929 Sind 136 (136). (Applicability of Order 22 to said applications.)
For an exception to the proposition see O. 22 R. 1, Note 10.
[But see ('13)7 Low Bur Rul 60 (62) : 20 Ind Cas 640 (641) (DB).]

30. ('18) 5 AIR 1918 Cal 353 (355) (DB). (Application under, to be verified as provided in C. P. Code.)

31. ('82) 6 Bom 416 (434). (S. 141 applied without reference to the Section.)

32. ('41) 28 AIR 1941 All 101 (104, 109) : I L R (1941) All 193 (FB). (Sch. II applicable.)
('34) 21 AIR 1934 All 86 (86) : 56 All 390. (Order 9 applicable.)

33. ('41) 28 AIR 1941 Cal 559 (560). (An application under S. 174 of the Bengal Tenancy Act to set aside a sale not being a proceeding in execution within the meaning of O. 23 R. 4, C. P. Code., S. 141 applies and therefore an application to record compromise arrived at in the course of an application under S. 174 is competent under O. 23 R. 3.)
('41) 28 AIR 1941 Mad 362 (363). (An application under S. 19 of the Madras Agriculturists Relief Act is an original matter within the meaning of S. 141 —O. 7 R. 10 applies to such application.)
('40) 27 AIR 1940 Cal 244 (246, 247) : ILR (1940) 1 Cal 344 (DB). (S. 141 governs insolvency proceedings by virtue of its own terms or by virtue of S. 5 (1) Provincial Insolvency Act.)
('35) 22 AIR 1935 Nag 125 (125). (An application under S. 201 of the C. P. Land Revenue Act is an original proceeding within the meaning of S. 141, C. P. Code—Revenue Courts are undoubtedly Courts of civil judicature and are authorised to receive affidavits under O. 19 R. 2, C. P. Code., by virtue of the provisions of S. 141, C. P. Code.)
('39) 26 AIR 1939 All 507 (509) : I L R (1939) All 587. (A proceeding under the U. P. Encumbered Estates Act is a proceeding in the nature of a suit to which the provisions of O. 32 R. 3, C. P. Code, are applicable by virtue of R. 6 of the Rules made under Encumbered Estates Act and of S. 141, C. P. Code. Where a creditor happens to be a minor, the failure to follow the mandatory provisions of O. 32 R. 3, C. P. Code, necessarily vitiates the whole proceeding so far as the minor is concerned.)
('35) 22 AIR 1935 Mad 612 (614) : 59 Mad 36. (Provisions of O. 21 Rr. 97 to 99 are applicable to proceedings under S. 78, Madras Hindu Religious Endowments Act.)
('38) 42 Cal W N 154(160) (DB). (By virtue of S. 141, C. P. C., O. 32 R. 7 applies to proceedings under S. 26-F, Bengal Tenancy Act.)

34. See case in foot-note 31.

35. ('36) 23 AIR 1936 All 378 (380) : 58 All 797 (DB). (Schedule 2 does not apply to proceedings under O. 21 R. 58.)

36. ('06) 3 Cal L Jour 276 (279) (DB). (Do.)
('23) 10 AIR 1923 Mad 144 (146) : 47 Mad 47. (Receiver can be made a party to execution proceedings—O. 1 R. 10.)
See also Note 3.

37. ('98) 2 Cal W N 606 (607) (DB).

38. ('39) 26 AIR 1939 Sind 221 (221): ILR (1939) Kar 527.

3. Appeals in execution matters. — As S. 141 does not apply to execution proceeding but only to *original* matters in the nature of suits, it is conceived that it does not apply to appeals from orders in execution.[1] But *independently* of S. 141, some of the provisions of the Code in regard to appeals may apply directly to appeals from orders in execution. Thus, where an order in execution is appealed from as a *decree* under S. 47, the appellate Court may require the appellant to give security for costs under O. 41, R. 10.[2] Similarly, the appellate Court can stay execution of the decree under S. 47 independently of section 141 and of Order 41, Rule 5.[3]

4. Proceedings for restitution. — Proceedings for restitution are not *original* proceedings and so this section does not apply to them.[1] Section 141 does not make S. 144 of the Code applicable to execution proceedings.[2] As to the *inherent* powers of the Court to order restitution in such cases, see section 144, Note 34.

5. Letters Patent Appeal.—Letters Patent Appeals are not original proceedings of the kind contemplated by S. 141.[1] But by virtue of S. 117 of the Code, the provisions of the Code are applicable to High Courts except as provided in Part IX or Part X or in rules. Hence the provisions of the Code may be followed in Letters Patent Appeals.[2]

6. "Court of civil jurisdiction." — The proceedings to which S. 141 applies are proceedings in a Court of *civil* jurisdiction. A proceeding under the Lunacy Act, 1912, is a "proceeding in a Court of civil jurisdiction." Consequently, the provisions of the Code as to verification of pleadings apply to such a proceeding.[1] Disciplinary proceedings under the Legal Practitioners' Act are, according to the High Courts of Madras[2] and Calcutta,[3] "proceedings in a Court of civil jurisdiction." The High Court of Patna, on the other hand, has held that they are not.[4] Proceedings under S. 195 of the Criminal Procedure Code for sanction to prosecute are not *civil* proceedings although they may be before the Judge of a civil Court.[5] A revenue Court is a Court of civil jurisdiction.[6] Debt Relief Courts under the Central Provinces and Berar Relief of Indebtedness Act are not civil Courts. They are special tribunals created *ad hoc* for the special purpose of the Act.[7] See also the undermentioned cases.[8]

Note 3

1. The contrary decisions in 1 All 178 (179) and 10 Suth W R 450 are not good law as they are based on the obsolete view that S. 141 applies to execution proceedings.)
[*See* ('01) 25 Bom 478 (484). (Doubtful whether it applies.)]
2. See O. 41 R. 10, Note 2.
3. ('01) 28 Cal 734 (737) (DB). (The appellate Court has as much power as the lower Court to stay execution.)

Note 4

1. ('42) 29 AIR 1942 All 85 (88) : ILR (1941) All 807 (DB). (Schedule II does not apply.)
2. ('15) 2 AIR 1915 Cal 530 (531) (DB).

Note 5

1. ('04) 27 Mad 121 (123).
2. ('17) 4 AIR 1917 Cal 626 (626):43 Cal 243 (SB).
✠('21) 8 AIR 1921 P C 80 (82) : 48 Cal 481 : 48 Ind App 76 (PC).

Note 6

1. ('18) 5 AIR 1918 Cal 353 (355) (DB).
2. ('03) 26 Mad 596 (597) (DB).
3. ('19) 6 AIR 1919 Cal 474 (475) (DB). (Distinguishing 6 Ind Cas 327 (Cal).)
(1900) 27 Cal 1023 (1033) (DB).
4. ('16) 3 AIR 1916 Pat 115 (116) : 1 Pat L Jour 576 (DB). (Inquiry under S. 14 is only administrative.)
5. ('07) 30 Mad 311 (313) (DB).
6. See S. 5 Note 2. *cf.* Application under S. 105, Bengal Tenancy Act, 1885, is not proceeding in Court of civil jurisdiction.
7. ('42) 29 AIR 1942 Nag 8 (11) : ILR (1941) Nag 588 (DB).
8. ('42) 29 AIR 1942 Cal 522 (524) : I L R (1942) 2 Cal 28 (DB). (*Obiter*—A Revenue Officer acting under S. 26 (G) (5), Ben. Ten. Act (VIII of 1885) is not a Court within the meaning of this section, and consequently O. 9, R. 9 has no application where the application under S. 26 (G) (5) is dismissed for default.)
('42) 29 AIR 1942 Lah 267 (268) (DB). (Revision lies under S. 115, C. P. Code, against an order of District Judge on an application under S. 33 of the Insurance Act, as he is a Court of civil jurisdiction.)
('40) 1940 Nag L Jour 638 (645). (The term 'Civil Court' does not comprise the Crown.)

7. "Procedure provided in this Code." — Section 141 deals with procedure and procedure alone.[1] It does not confer any *substantive right* not expressly given elsewhere by the Code. Thus, a right of appeal[2] cannot be claimed merely on the strength of S. 141.[3] Similarly, the section does not confer a right to refer to arbitration,[4] a right to a review[5] or a right to proceed by way of execution against a surety who is not a party to the proceeding, on the analogy of section 145 of the Code.[6]

On the same principle, the section does not confer on any *Court* the *power* of making a reference to the High Court under O. 46 R. 1 in any case not coming strictly within the purview of that rule.[7] But a *revision* to the High Court lies in cases coming under this section.[8]

Note 7

1. ('42) 29 AIR 1942 Nag 8 (11) : ILR (1941) Nag 588 (DB).
† ('28) 15 AIR 1928 Rang 137 (138) : 6 Rang 563 (DB).
('73) 19 Suth W R 122 (122) (DB).
('86) 10 Bom 433 (434) (DB).

2. *See the following cases:*
('04) 27 Mad 504 (508) (DB). (No right of appeal unless given by statute or some authority equivalent to statute.)
('87) 11 Mad 26 (34): 14 Ind App 160 (PC). (Right of appeal must be conferred by statute or some equivalent authority.)

3. † ('04) 27 Mad 504 (508) (DB).
† ('86) 10 Bom 433 (434) (DB).
('73) 19 Suth W R 122 (122) (DB).
('23) 10 AIR 1923 All 460 (460) : 45 All 148 (DB).
('23) 10 AIR 1923 Pat 180 (182) (DB).
('24) 11 AIR 1924 Cal 327 (328) (DB).
('25) 12 AIR 1925 All 431 (432) : 47 All 741 (DB).
('28) 117 Ind Cas 849 (851) (Cal). (O. 43 R. 1 (a) not applicable to order returning memorandum of appeal.)
('25) 12 AIR 1925 Lah 489 (490). (Order appointing receiver in proceeding under Guardians and Wards Act is made under O. 40 R. 1 and therefore within purview of O. 43 R. 1 (s). Hence it is appealable.)

Order 43 Rule 1 (c) which provides for an appeal against an order refusing to restore a suit dismissed for default cannot be applied by analogy to cases in which some other proceeding is dismissed for default. Thus there is no right of appeal against an order refusing to restore an application to set aside the dismissal of a suit for default. See the following cases :
('22) 9 AIR 1922 Cal 572 (573) (DB).
('23) 10 AIR 1923 Lah 302 (303).
('18) 5 AIR 1918 Pat 612 (613) : 2 Pat L Jour 720 (DB).
('23) 72 Ind Cas 547 (548) (Nag).
('13) 9 Nag L R 33 (34) : 19 Ind Cas 97 (98).
('32) 19 AIR 1932 Nag 101 (102) : 28 Nag L R 83 (DB). (AIR 1923 Nag 293 : 19 Nag L R 119 impliedly overruled.)
[But see ('37) 24 AIR 1937 Oudh 344 (347) : 13 Luck 246 (DB).]

Similarly there is no right of appeal against an order refusing to set aside dismissal for default, of an application to set aside an ex parte decree. See the following cases :
('19) 6 AIR 1919 Cal 125 (125) (DB).
('22) 9 AIR 1922 All 337 (337) (DB).
('24) 11 AIR 1924 All 682 (683) : 46 All 538.

So also there is no right of appeal against an order refusing to set aside the dismissal for default of an application to set aside an execution sale. See the following cases :
('97) 29 All 596 (597, 598).
('15) 2 AIR 1915 Cal 539 (540) (DB).
('10) 6 Ind Cas 148 (148, 149) (DB) (Cal).
('04) 31 Cal 207 (209) (DB).
('07) 10 Oudh Cas 353 (354).
('88) 11 Mad 319 (321) (DB).
(1900) 27 Cal 414 (415) (DB).
('17) 4 AIR 1917 Cal 815 (816) (DB).

NOTE: The decisions in (1889) 16 Cal 31, (1882) 4 Mad 295 and AIR 1923 Nag 293: 19 Nag L R 119 which are inconsistent with the above view cannot be supported.

4. † ('08) 30 All 137 (140) (DB).
('28) 15 AIR 1928 Rang 137 (138) : 6 Rang 563 (DB).
[See however ('41) 28 AIR 1941 All 101 (105, 109) : ILR (1941) All 193 (FB). (Schedule II only deals with procedure and Civil Court can refer to arbitration issue submitted to it under S. 271 of the Agra Tenancy Act of 1926.)]

5. ('19) 6 AIR 1919 Mad 244 (246) (DB).
[But see ('15) 2 AIR 1915 All 172 (174) : 37 All 380 (DB). (District Judge can reconsider an order granting letters of administration, whether under S. 114 or under the inherent powers of the Court recognised by S. 151 of the C. P. C., apart altogether from the provisions of S. 50 of the Probate and Administration Act.)]

6. ('26) 13 AIR 1926 Sind 35 (36) : 19 Sind L R 390 (DB). (Observations of Rupchand, A. J. C.)

7. ('42) 29 AIR 1942 Nag 8 (11) : ILR (1941) Nag 588 (DB). (District Judge acting under S. 20 of the C. P. & Berar Relief of Indebtedness Act — No reference to High Court lies — S. 141 cannot be invoked for making such reference.)
† ('11) 36 Mad 16 (17): 10 Ind Cas 879 (880) (DB).
('25) 12 AIR 1925 Cal 391 (392) (DB).
Also see O. 46 R. 1, Note 3.

8. ('42) 29 AIR 1942 Lah 267 (268). (Order of District Judge on an application under S. 33, Insurance Act — Order can be revised under S. 115 by virtue of S. 141.)

Similarly, the principle that a suit against a dead man is not maintainable, is a point of substance and not of procedure, and cannot, therefore, be applied to an application to set aside an *ex parte* decree, so as to make it incompetent by reason of the fact that the deceased plaintiff's name, instead of his legal representatives', appears in the application as a party.[9] The rule in S. 86 as to the protection of Ruling Chiefs and Sovereign Princes from being sued is not a rule of *procedure* within the meaning of this section.[10]

But Ss. 10 and 11,[11] O. 23 R. 1[12] and O. 39 R. 1[13] of the Code are rules of *procedure* and may, therefore, be applied to "proceedings" within the meaning of section 141.

8. "In regard to suits."—The word "suits" in S. 141 is used in a comprehensive sense so as to include appeals which are only continuations of suits. Hence, the procedure prescribed by the Code in regard to *appeals* governs appeals arising out of miscellaneous proceedings and miscellaneous proceedings in the nature of appeals.[1]

9. "As far as it can be made applicable." — Section 141 does not make the whole of the procedure in regard to suits applicable to proceedings under the section. Such procedure applies only *as far as it can be made applicable.*[1] Thus, the appointment of a guardian cannot be referred to arbitration because guardianship is not a matter purely of *private* right.[2] Similarly, a surety for a guardian cannot be proceeded against in execution under S. 145, Civil Procedure Code, because even the guardian himself cannot be proceeded against in execution in that way.[3] So also, though the procedure laid down in O. 22 requiring a plaintiff to bring on record the legal representatives of a deceased defendant may apply to applications to sue in *forma pauperis*, it does not follow that the *penalties* provided in O. 22 R. 4 can, without express provision in that behalf, apply to such applications.[4]

Again, where an express or special procedure is provided for a particular proceeding, section 141 cannot be applied so as to defeat the operation of such provisions. See the undermentioned cases.[5]

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9. ('27) 14 AIR 1927 Nag 251 (252): 29 Nag LR 71.

10. ('40) 27 AIR 1940 Cal 244 (246) : ILR (1940) 1 Cal 344 (DB). (Section 86 cannot be applied to insolvency proceedings by virtue of S. 141.)

11. ('43) 30 AIR 1943 Cal 19 (20) : ILR (1942) 2 Cal 194. (Section 10 deals with procedure—S. 141 is not limited to the internal procedure regulating the conduct of the trial of a suit.)

('22) 9 AIR 1922 Sind 6 (8) : 16 Sind L R 79.

12. ('42) 29 AIR 1942 Bom 57 (58) : ILR (1942) Bom 94 (DB).

13. ('09) 3 Sind LR 128 (129): 4 Ind Cas 609 (610).

Note 8

1. † ('28) 15 AIR 1928 Lah 488 (489). (Appeal under S. 47, Guardians and Wards Act.)

('79) 3 Bom 204 (205) (FB). (Section 98 applicable.)

(1900) 27 Cal 1023 (1033).

Note 9

1. ('20) 7 AIR 1920 Cal 743 (745) (DB).

('35) 22 AIR 1935 All 195 (197). (Order 2 R. 2 and S. 11, Expl. 4 do not apply to proceedings for restitution.)

† ('16) 3 AIR 1916 Mad 268 (271, 272) (DB).

('88) 10 All 97 (105) (DB).

2. † ('08) 30 All 137 (140) (DB).

('24) 11 AIR 1924 Mad 484 (484) : 47 Mad 459 (DB).

('28) 15 AIR 1928 Rang 137 (138) : 6 Rang 563 (DB).

3. ('27) 14 AIR 1927 Sind 262 (262) (DB).

4. See O. 22 R. 1, Note 10.

5. ('30) 17 AIR 1930 Mad 105 (107) (DB).

('06) 1906 Pun Re No. 143, page 514 (515). (Order appointing guardian is final under the Guardians and Wards Act — No review under S. 623 of the Code therefore can be made thereof.)

('12) 1912 Pun Re No. 116 : 15 Ind Cas 559 (559) (DB). (Do).

('03) 26 Mad 438 (440). (Decree under S. 9, Specific Relief Act—Order in execution of—Not appealable because S. 9 prohibits an appeal from any order in a suit.)

('24) 11 AIR 1924 All 376 (378) : 46 All 372 (DB). (Succession Certificate Act provides special procedure—Section 141 does not apply — But see AIR 1927 Sind 187 : 22 Sind L R 206 which dissents from this decision.)

(1900) 27 Cal 484 (487) (DB). (Prohibition of second appeal by S. 153 of the Bengal Tenancy Act.)

('13) 7 Low Bur Rul 60 (62) : 20 Ind Cas 640 (641) (DB). (Petition in *forma pauperis* not framed as per Rr. 2 and 3 of O. 33—Rule 5 requiring rejec-

Orders and notices to be in writing.

142. [S. 94.] All orders and notices served on or given to any person under the provisions of this Code shall be in writing.

1. **Legislative changes.** — The words "and shall be served in the manner hereinbefore provided for the service of summons" which occurred at the end of the old section have been omitted and reproduced in O. 48 R. 2. The alteration is merely verbal.

Postage.

143. [S. 95.] Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made :

Provided that the [a][Provincial Government] may remit such postage, or fee, or both, or may prescribe a scale of court-fees to be levied in lieu thereof.

[1877, S. 95.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

1. **Service by post.** — See Order 5 Rules 21, 25, 30 and Order 29 Rule 2 (b).

Application for restitution.

144. [S. 583.] (1) Where and in so far as a decree is varied or reversed,[3] the Court of first instance[17] shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made[19] as will, so far as may be,[21] place the parties in the position which they would have occupied[20] but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest,[23] damages, compensation and mesne profits,[22] which are properly consequential on such variation or reversal.

(2) No suit[20] shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. The decree must have been varied or reversed.
4. Modes of variation and reversal.
5. Effect of setting aside ex parte decree and passing the same decree on the merits.
6. Effect of reversal of main decree on dependent decrees.

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tion of the petition—Amendment cannot be made by resort to S. 141.)

('24) 11 AIR 1924 Pat 104 (106) : 3 Pat 67 (DB). (Proceedings under S. 105, Bengal Tenancy Act, S. 107 providing special procedure — Section 141 cannot be applied. NOTE.—The observation that Revenue Courts are not Civil Courts and therefore also S. 141 does not apply is, it is submitted, not correct. See Note 18 on Preamble.)

('12) 6 Sind L R 67 (70) : 16 Ind Cas 675 (676) (DB). (Mamlatdar's Courts Act itself providing its summary procedure—Section 141 does not apply.)

7. Who may apply for restitution.
8. Persons not actually parties.
9. Party not in possession.
10. Right of auction purchaser to apply for restitution.
11. Against whom restitution can be granted.
12. Transferee of a decree. See Note 11.
13. Auction purchaser.
14. Surety—Restitution against.
15. Third persons—Restitution against.
16. Trustee.
17. What Court can grant restitution.
18. Extent of power to grant restitution.
19. "Shall cause restitution to be made."
20. "Place the parties in the position which they would have occupied but for such decree . . . . . as has been varied or reversed."
21. "So far as may be."
22. Mesne profits.
23. Interest.
24. Refund of compensation money in land acquisition cases.
25. Possession of property or money obtained otherwise than in execution.
26. Splitting up claim of restitution.
27. Pecuniary jurisdiction of Court in awarding restitution. See Note 17.
28. Security for restitution.
29. Bar of suit.
30. Nature of proceedings under the section.
31. Appeal—Tenability of.
32. Court-fee.
33. Limitation.
34. Inherent power of Court to grant restitution.
35. Revenue Court.
36. Revision.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Applicability of Section 141. See Note 30.
Costs, interest, damages, etc. See Notes 20 and 23.
Court of first instance. See Note 17.
Directions for restitution in the reversing decree—Need for. See Note 19.
Restitution—Meaning of. See Note 2.
Restitution of property sold. See Note 13.

1. Legislative changes. — Under the corresponding S. 583 of the Code of 1882[1] a practice had grown up which was not justified by the language of that section and the same has now been recast in sub-section (1) of this section "so as to bring it into closer conformity with that practice."[2]

Sub-section (2), barring the institution of suits for relief claimable under this section is new. It compels litigants to have matters falling within the section cleared up in proceedings under this section only.[3] It necessarily implies the widest possible construction of sub-section (1).[4]

2. Scope and object of the section. — It is a cardinal principle of law that the acts of Courts should not be allowed to work injury on the suitors.[1] In the leading English case of *Rodger* v. *Comptoir D'Escompte de Paris*,[2] Lord Cairns said :

> "One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to the suitors and when the expression 'the act of the Court' is used it does not mean merely the act of the primary Court or of any intermediate Court of appeal but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter to the highest Court which finally disposes of the case."

Section 144 — Note 1

1. Section 583 of the Code of 1882 ran as follows : "When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for execution of decrees in suits."
2. See the Report of the Select Committee.
3. ('19) 6 AIR 1919 Bom 1 (10) : 43 Bom 433 (FB).
4. ('24) 11 AIR 1924 Sind 101 (102) : 17 Sind LR 73 (DB). (Thus, restitution is granted as against auction purchaser if his sale is not *bona fide*.)

Note 2

1. (1871) 40 L J P C 1 (3), Rodger v. Comptoir D'Escompte de Paris.
('22) 9 AIR 1922 P C 269 (271) : 19 Ind App 351 : 2 Pat 10 (PC).
('29) 16 AIR 1929 Nag 138 (138).
('37) 24 AIR 1937 Bom 173 (175).
2. (1871) 40 L J P C 1 (3, 4) : 19 W R (Eng) 449 (452).

The doctrine of restitution is based upon this principle[3] and contemplates a case where property has been received by the decree-holder under his decree and the decree is subsequently wholly or partially reversed or varied in other proceedings. In such a case the law raises an *obligation* on the party who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost,[4] and this obligation, it is the duty of the Courts to *enforce*, unless it is shown that restitution would be clearly contrary to the real justice of the case.[5]

Section 144 only embodies this doctrine of restitution and does not confer any *new* substantive rights which a successful party did not possess under the general law.[6] It merely *regulates* the *exercise* of the rights and prescribes a convenient *procedure* therefor.[7]

The section is a salutary provision of law enacted with a view to shorten litigation and to afford speedy relief and should not, therefore, be narrowly construed.[8]

In order that this section may apply, three conditions seem necessary to be satisfied —

(1) the restitution sought must be *in respect of the decree* which had been *varied* or *reversed*;[9]

(2) the party applying for restitution must be entitled to a *benefit under a reversing decree*;[10] and

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3. ('41) 28 AIR 1941 Mad 315 (315) : ILR (1941) Mad 498. (Object of section is to put right what was originally an error of the Court.)
('40) 27 AIR 1940 Cal 260 (263) : ILR (1940) 1 Cal 486 (DB).
('38) 25 AIR 1938 Cal 554 (557) (DB).

4. 6 Peters 17, Bank of United States v. Bank of Washington. (Followed in 23 Mad 306 (310).)
('32) 19 A I R 1932 All 239 (240) (DB). (Decree directing appointment of Receiver reversed in appeal—Party in possession before, can apply under this section.)
† ('32) 19 AIR 1932 Cal 29 (32) : 58 Cal 1070 (DB).
('33) 20 AIR 1933 Lah 791 (792). (It is also incombent on the Courts to restore the parties to *status quo*.)
(1900) 23 Mad 306 (310) (DB).
† ('39) 26 AIR 1939 All 66 (69) : ILR (1939) All 103 (DB).
[*See* ('37) 24 AIR 1937 Bom 101 (102):ILR (1937) Bom 150.]
[*See also* ('33) 20 AIR 1933 Lah 798 (800).]

5. † (1900) 23 Mad 306 (310) (DB). (Very purpose of restitution is to redress injustice.)
('68) 9 Suth W R 402 (407) (FB). (Per Peacock, C. J.)
('06) 33 Cal 927 (932, 933) (DB).
('72) 17 Suth W R 232 (233) (DB).
('03) 27 Mad 504 (507, 508) (DB).
('22) 9 AIR 1922 Nag 82 (84) : 18 Nag L R 24.
[*See also* ('37) 24 AIR 1937 Mad 95 (96).]

6. ('12) 16 Ind Cas 966 (966) (DB) (Cal). (It merely provides a more convenient procedure.)

7. ('40) 27 AIR 1940 Cal 260 (263) : ILR (1940) 1 Cal 486 (DB). (The right of a party to have restitution and the duty of the Court to give him restitution do not rest on the provisions of S. 144 of the Code, which defines the procedure only in one class of cases requiring restitution by enacting that the application for restitution is to be made in the Court of first instance. The other part of the section gives the measure of restitution and empowers that Court to determine the form and amount of restitution.)
('98) 8 Mad L Jour 276 (277).
('21) 8 AIR 1921 Lah 234 (235).
('28) 15 AIR 1928 All 293 (294) : 50 All 767 (DB).

8. ('41) 28 AIR 1941 Mad 315 (315) : ILR (1941) Mad 498.
† ('12) 17 Ind Cas 121 (122, 123) (DB) (Cal). (Suit for possession decreed in first Court — Plaintiff taking forcible possession—Subsequent reversal of decree — Application for restitution and mesne profits may be entertained.)
† ('29) 16 AIR 1929 Cal 814 (815) : 57 Cal 226 (DB).
('18) 5 AIR 1918 Pat 306 (307) (DB). (Section 47, C. P. C., must be read with this section and the word "parties" in this section must be taken to include their representatives.)

9. ('41) 28 AIR 1941 P C 128 (129) : 21 Pat 243 : ILR (1941) Kar P C 150 (PC). (Section has no application when there is no variation of decree.)
('39) 26 AIR 1939 Oudh 273 (274) (DB).
('14) 1 AIR 1914 Lah 9 (11) : 1914 Pun Re No. 10 (DB).
('30) 17 AIR 1930 Lah 39 (40). (Execution sale and realisation of decree amount by decree-holder — No notice to executing Court under S. 52, Provincial Insolvency Act by the Official Receiver before realisation of decree amount — No refund under this section.)

10. ('09) 31 All 364 (366):1 Ind Cas 744(744)(DB). (Auction purchaser in possession—Decree in execution of which he purchased set aside — Suit for recovery of possession from auction purchaser not barred.)
('85) 8 Mad 494 (495) (DB). (*A*'s appeal against *B* dismissed — *B* cannot claim restitution for the costs, etc., incurred.)

(3) the relief claimed must be *properly consequential* on the reversal or variation of the decree.[11]

If these conditions are satisfied, the Court *shall make* an order for restitution.

In the undermentioned case[12] it was held by the Madras High Court that where the lower Court orders court-fee to be paid by the defendant in a pauper suit and the order is reversed in appeal, the money paid as court-fee to the Government by the defendant under the lower Court's decree cannot be dealt with by way of restitution under this section. In giving reasons for this view, the High Court said as follows :

"Restitution seems to imply money paid by one party to the other or to the credit of the other and a restoration of that money with interest to the person entitled to it by the person to whom or to whose credit it was originally wrongly paid under orders of Court. In this case, the Government are the recipients of the money."

But, at the same time, it was held that S. 151 might well apply to the case.

Under the old Code a successful party in appeal was entitled to treat the appellate decree as containing a *direction* for restitution, which direction could be enforced *in execution of that appellate decree*. Such a right obtained by a party under the old Code is not defeated by the introduction of this section in the present Code, and he could still proceed to *execute* the appellate decree so obtained by him.[13]

Section 144 is not made applicable to execution proceedings by S. 141 of the Code.[14]

3. The decree must have been varied or reversed. — As has been seen already, this section will apply only where a decree has been *varied* or *reversed*. Where the original decree *stands good* as against a party no restitution can be had by him under this section.[1] The variation or reversal must, of course, have been by a Court of *competent jurisdiction* for otherwise there cannot be a *legal* variation or reversal.[2]

Again, the section will apply only where a *decree* is varied or reversed. It will not apply where an *order* (which is not a decree) is varied or reversed[3] though in such cases, the Court can order restitution under its inherent powers, on the analogy of S. 144.[4] The

† ('94) 17 Mad 82 (84) (DB).
11. ('22) 9 AIR 1922 All 465 (467) : 44 All 687 (DB). (Note the words of the section.)
('25) 12 AIR 1925 Oudh 654 (656) (DB).
('36) 23 AIR 1936 Mad 634 (635) (DB).
12. ('37) 24 AIR 1937 Mad 178 (179) (DB).
13. ('16) 3 AIR 1916 Mad 1204 (1205) (DB).
14. ('15) 2 AIR 1915 Cal 530 (531) (DB).

Note 3

1. † ('23) 10 AIR 1923 P C 167 (169) : 50 Ind App 301 : 46 Mad 895 (PC).
('12) 16 Ind Cas 945 (947) (DB) (Cal). (Decree of the trial Court revived by the order of the Judicial Committee.)
† (1865) 10 Moo Ind App 203 (211, 212) (PC).
('02) 25 Mad 426 (428) (DB).
('24) 11 AIR 1924 All 64 (65). (Decree must have been set aside in appeal or otherwise.)
('23) 10 AIR 1923 Oudh 16 (17). (Order directing execution under a mistake reversed — Decree not affected – S. 144 does not apply.)
('36) 23 AIR 1936 Lah 48 (49)
('37) 24 AIR 1937 Nag 151 (152) : I L R (1937) Nag 153.
2. ('98) 20 All 237 (239, 240) (DB).
('37) 24 AIR 1937 All 232 (234).
3. ('40) 27 AIR 1940 Lah 59 (60, 61) (DB). (Order confirming execution sale is not decree.)
('39) 26 AIR 1939 Lah 508 (508) (DB). (Sale set aside after confirmation—Application by judgment-debtor for mesne profits—Section does not apply.)
('22) 9 A I R 1922 Mad 99 (99) (DB). (Order for rateable distribution.)
('18) 5 AIR 1918 Pat 52 (53) : 2 Pat L Jour 206 (DB). (Order setting aside execution sale.)
('19) 6 AIR 1919 Mad 581 (581) : 41 Mad 467 (DB). (Do.)
† ('17) 4 AIR 1917 Pat 495 (496) : 2 Pat L Jour 361 (DB). (Do.)
('14) 1 AIR 1914 Cal 692 (692) (DB). (Do.)
('24) 11 AIR 1924 Rang 181 (181) : 1 Rang 770 (DB). (Order removing receiver.)
† ('35) 22 AIR 1935 Mad 783 (783) (DB). (Variation of order in appeal under S. 75, Provincial Insolvency Act.)
('35) 22 AIR 1935 All 126 (127).
[See however ('43) 30 AIR 1943 Mad 248 (250): I L R (1943) Mad 411 (DB). (Order on claim proceedings set aside on suit under O. 21 R. 63— S. 144 is assumed to apply.)]
4. ('40) 27 AIR 1940 Lah 59 (60, 61) (DB). (Order confirming sale, set aside— Application by auction purchaser for compensation for improvements falls under S. 151.)

Nagpur High Court has, however, held that the word "decree" in S. 144 covers an "order."[5] The decision is clearly against the definition of the word "decree" in S. 2 (2) of the Code and further, the decisions cited by that Court in support of its view do not bear it out. The decision cannot therefore be accepted as sound.

4. Modes of variation and reversal. — Section 583 of the old Code allowed restitution only in cases where the decree was reversed in *appeal* preferred under Chaps. 41 and 42 of that Code, corresponding to Orders 41 and 42 of the present Code. It did not, therefore, apply to variations and reversal *otherwise* than in appeal[1] nor to a variation or reversal in appeal to the Privy Council.[2]

This section contains no such restriction as to the manner in which a decree should be varied or reversed and none can be legitimately read into it, except, of course, that it should be in "accordance with law."[3] The section has also been transferred to the Part headed "Miscellaneous" from its position in the Chapter headed "Appeals from Original Decrees" under the old Code. The effect of it is to extend its operation to all cases of variations and reversals, *howsoever* they may have been effected.[4]

But, there is a conflict of decisions as to whether this section applies to cases where the variation of the decree or its reversal is in consequence of a decree in a separate suit. The High Courts of Allahabad[5] and Bombay[6] have held that this section only

('17) 4 AIR 1917 Pat 495 (496): 2 Pat L Jour 361 (DB). (Section does not apply when an order setting aside sale is reversed.)
('33) 20 AIR 1933 Mad 888 (888). (Decree against a dead man a nullity—Money recovered — There being no decree Court has inherent power to order restitution.)
† ('23) 10 AIR 1923 All 394 (396):45 All 369 (FB).
('96) 1896 Pun Re No. 49, p. 138 (139). (Order as to costs reversed in appeal—Restitution on general principles.)
('18) 5 AIR 1918 Pat 52 (53) : 2 Pat L Jour 206 (DB).
('14) 1 AIR 1914 Cal 692 (692) (DB). (Setting aside of auction sale.)
('19) 6 AIR 1919 Mad 581 (581) : 41 Mad 467 (DB). (Order refusing to set aside sale — Reversal of—No restitution under S. 144.)
('35) 22 AIR 1935 Mad 783 (783) (DB).
('38) 25 AIR 1938 Lah 833 (834).
[*See also* ('32) 19 AIR 1932 Bom 96 (98). (Section construed liberally.)]
Also see Note 34.

5. ✣('24) 11 AIR 1924 Nag 258 (261) : 20 Nag L R 93 (DB).
Also see the following cases :
('06) 9 Oudh Cas 101 (103) (DB).
('38) 25 AIR 1938 Lah 456 (456). (Order passed on appeal setting aside the sale of a judgment-debtor's property—Application for restitution on such order being passed falls under S. 144.)
('30) 17 AIR 1930 Mad 988 (990, 991) (DB).

Note 4

1. ('09) 31 All 364 (366) : 1 Ind Cas 744 (744) (DB).
('98) 20 All 139 (142) (DB).
('89) 1889 All W N 163 (164).
('06) 28 All 665 (667) (DB). (Case of review.)
[*See* ('05) 27 All 485 (487) (DB). (Application for restitution on amendment of decree treated as application under S. 244 (S. 47 of 1908 Code).
('02) 1902 Pun Re, No 76 p. 301 (304). (In this case order for restitution made on the supersession of the decree by decree in another suit was treated as falling under S. 244 (S. 47 of the Code of 1908).]
2. ('98) 29 All 139 (142) (DB).
3. † ('19) 6 AIR 1919 Sind 79 (79) : 13 Sind L R 153 (DB).
('22) 9 AIR 1922 Mad 70 (71) (DB).
4. ('43) 30 AIR 1943 Mad 248 (250) : I L R (1943) Mad 411 (DB). (Order on claim petition set aside in suit under O. 21 R. 63—Section applies.)
('22) 9 AIR 1922 Mad 70 (71) (DB).
('33) 1933 Mad W N 641 (642). (Section is not confined to cases where restitution is claimed on the reversal of the decree in first or second appeal.)
('17) 4 AIR 1917 Mad 293 (293) : 40 Mad 299 (DB).
✣('19) 6 AIR 1919 Bom 1 (10) : 43 Bom 433 (FB). (Reversal in second appeal.)
† ('26) 13 AIR 1926 Lah 488 (488) : 7 Lah 232 (DB). (Reversal by Privy Council.)
('19) 6 AIR 1919 Bom 175 (176) : 43 Bom 235 (DB). (*Ex parte* decree set aside.)
('35) 22 AIR 1935 Mad 476 (477). (Restitution can be applied for even where a decree is reversed by a compromise decree of the Appellate Court — 1933 Mad W N 641 followed.)
† ('31) 18 AIR 1931 Cal 42 (44) (DB). (Per Guha, J.)
[*See also* ('20) 7 AIR 1920 Bom 12 (12) : 44 Bom 702 : 57 Ind Cas 125 (125) (DB). (*Ex parte* decree set aside.)]
[But see ('15) 2 AIR 1915 All 434 (435) : 37 All 567 (DB). (Where it was held that the course prescribed by O. 45 R. 15 must be followed.)]
5. ('37) 24 AIR 1937 All 232 (234). (Words "Court of first instance" contemplate variation or reversal of decree by superior Court in appeal, revision or review — Section does not apply where decree is varied or affected by decision of a Court in another suit.)
† ('23) 10 AIR 1923 All 394 (395) : 45 All 369 (FB).
6. ('37) 24 AIR 1937 Bom 173 (174). (The reversal or variation must be in the same proceedings be-

applies where the decree is reversed or varied in appeal, revision or review and does not apply where the reversal or variation is consequent on a decree in a separate suit. The Calcutta[7] and Patna[8] High Courts and the Chief Court of Oudh[9] have also held that this section only applies where the decree is reversed or varied in appeal, revision or review. The Nagpur High Court also seems to be of the same view.[10] But the Madras High Court has held that even where the variation or reversal is the result of a decree in a separate suit, this section will apply.[11]

The variation or reversal of a decree contemplated by this section is that made either by the Court itself or by a superior Court interfering in appeal or revision or possibly by a decree in separate suit. This section does not apply to the case of a variation or reversal of a decree under a *private compromise* entered into between the parties, whether out of Court or in the course of an execution proceeding.[12] But where a decree is varied by the appellate *Court* this section will apply though such variation may be based on a compromise between the parties.[13] See also the undermentioned case.[14]

It has been held by the Bombay High Court that an order for costs made by the executing Court in claim proceedings is not automatically set aside if the party against whom it is made subsequently succeeds in the regular suit under O. 21 R. 63. The executing Court, therefore, has no power to grant a refund either under this section or under S. 151 where costs have been recovered.[15] But the High Court of Madras has taken a contrary view and held that the effect of the decree in the suit under O. 21 R. 63 in such a case is a reversal of the order in the claim proceedings and consequently the party succeeding in such suit is entitled to restitution of the costs of the claim petition which he had to pay to the other side.[16]

5. Effect of setting aside ex parte decree and passing the same decree on the merits. — Where an *ex parte* decree is set aside the defendant is *ipso facto* entitled to the restitution of any property which has passed to the decree-holder in

tween the parties—It may be as the result of a successful appeal or an application for review or in any other manner provided by the Code.)

7. ('29) 16 AIR 1929 Cal 814 (815) : 57 Cal 226 (DB).
('31) 18 AIR 1931 Cal 14 (15) (DB).
('31) 18 AIR 1931 Cal 42 (43) (DB). (Per Mukerji, J.)

8. ('16) 3 AIR 1916 Pat 299 (300) : 1 Pat L Jour 43 (DB).
('33) 20 AIR 1933 Pat 564 (565).
('30) 17 AIR 1930 Pat 280 (281) : 9 Pat 685 (DB).
[*See also* ('38) 25 AIR 1938 Pat 447 (448). (Section 144 is intended to be confined to cases in which the decree of a trial Court has been varied or reversed by some superior Court or by reason of some order passed by a superior Court. In other cases the order for restitution comes under S. 151 of the Code and is not appealable—Hence where a third party claimant establishes title to the property which had been sold in execution, the order of the Court directing the decree-holder to restore the purchase money to the auction purchaser comes under S. 151 and is therefore not appealable.)]

9. ('39) 26 AIR 1939 Oudh 273 (274) (DB).

10. *See* ('37) 24 A I R 1937 Nag 151 (152) : ILR (1937) Nag 153.

11. ('17) 4 AIR 1917 Mad 293 (293) : 40 Mad 299 (DB).
('33) 1933 Mad W N 641 (642). (Compromise decree in separate suit.)
[*See also* ('43) 30 AIR 1943 Mad 248 (250): ILR (1943) Mad 411 (DB). (Order in claim proceedings set aside in suit under O. 21 R. 63—Section applies—Suit under O. 21 R. 63 is in nature of appeal from order in claim proceedings.)]

12. ('33) 20 AIR 1933 All 743 (744) (DB).

13. ('40) 42 Pun L R 429 (431) (DB).

14. ('37) 24 AIR 1937 All 481 (489) : ILR (1937) All 628 (DB). (Suit to recover back money paid under decree — Test is whether original decree or judgment is reversed or superseded—Decrees not appealed against cannot be deemed to be superseded by order of Privy Council or decree of Appellate Court unless rights and liabilities of parties are expressly dealt with—Order or decree dealing with facts of particular case, cannot supersede other decrees obtained, though no such decrees could be passed, if decision said to supersede earlier decrees had been given before decision of such suits—3 Cal 30 (FB) held overruled by AIR 1923 P C 167 : 46 Mad 895 : 50 Ind App 301 (P C).)

15. ('43) 30 AIR 1943 Bom 129 (131, 132) : ILR (1943) Bom 171.

16. ('43) 30 A I R 1943 Mad 248 (250) : I L R (1943) Mad 411 (DB).

execution of such decree.[1] Where an *ex parte* decree is set aside on the application of the defendant and a sale in execution thereof is also set aside consequent on the setting aside of the decree, the sale cannot be revived on the passing of the same decree on the merits.[2] As to the effect of the subsequent passing of the same decree, where the sale has not been set aside before the passing of such decree, see Note 20.

6. Effect of reversal of main decree on dependent decrees. — It is a general rule of law that upon a reversal of a judgment, order or decree all connected or dependent judgments, orders or decrees fall with it.[1]

Illustrations.

1. *A* obtains a *preliminary* decree for partition against *B*. Pending appeal by *B* therefrom, *A* obtains a *final* decree, executes it and recovers money from *B*. The preliminary decree is then set aside by the Appellate Court. *B* is entitled to claim restitution from *A* of the amount recovered from him. The reason is that no effect remains in the final decree after the reversal of the preliminary decree.[2]

2. *A* obtains a decree for enhanced rent against *B*. Pending appeal by *B* therefrom, *A* files another suit against *B* for enhanced rent for another period and obtains a decree *conditional on the first decree being confirmed in appeal*, and recovers money from *B* in execution of that decree. The first decree is subsequently reversed on appeal. *Held*, that *B* is entitled to claim restitution from *A* of the money recovered from him under the second decree, as it was made conditional on the confirmation of the first decree and became infructuous on its being reversed in appeal.[3]

7. Who may apply for restitution. — In order to entitle a person to apply under this section two conditions must be satisfied —

(1) He must be a *party to the decree varied or reversed*,[1] and

(2) He must have become "*entitled to any benefit* by way of restitution or otherwise" under the reversing decree.[2] But it is not necessary that the decree by which the original decree is reversed or varied should declare the party's right to restitution. Where the effect of the decree of the Appellate

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Note 5

1. † ('07) 6 Cal L Jour 92 (94) (DB).
('37) 24 AIR 1937 Mad 150 (151). (In such cases there is no variation or reversal of the decree, strictly speaking, within the meaning of S. 144; but the Court has inherent power to order restitution.)
2. ('09) 3 Ind Cas 30 (31) (DB) (Cal).

Note 6

1. ('43) 30 AIR 1943 All 267 (269) (DB).
†('17) 4 AIR 1917 Cal 188 (191) (DB). (Specially judgments subsequently entered and dependent thereupon.)
('33) 20 AIR 1933 Pat 209 (209) (DB). (Application for execution of transferred decree — Execution dismissed and certificate of non-satisfaction sent to transferor Court — Execution allowed to proceed on appeal — On reversal the certificate of non-satisfaction also falls to the ground.)
('13) 21 Ind Cas 510 (512) (DB) (Cal).
('13) 19 Ind Cas 630 (632) (DB) (Cal).
2. ('18) 5 AIR 1918 Cal 457 (457) (DB). (Following 21 Ind Cas 510 (Cal).)
† ('31) 18 AIR 1931 All 655 (656) (DB). (Decree varied by the Appellate Court.)
[*See also* ('38) 25 AIR 1938 All 364 (366) : ILR (1938) All 494 (DB). (*A* obained a preliminary decree for foreclosure against *B*—Subsequently *A* applied for amendment of the preliminary decree and the application was allowed and the decree amended — *B* thereupon applied in revision to High Court and the amendment was set aside in revision — In the meanwhile *A* obtained a final decree for foreclosure on the basis of the amended decree and obtained possession of the properties in execution—*Held* that *B* was entitled to restitution of the property taken in excess of the original preliminary decree as the final decree would automatically conform with the preliminary decree as amended in revision.)]
3. ('80) 5 Cal 589 (592) (DB).

Note 7

1. ('93) 3 Mad L Jour 258 (259).
('19) 6 AIR 1919 Cal 503 (504) (DB).
('29) 16 AIR 1929 Lah 657 (658). (An objector under O. 21 R. 58 deemed a party to suit.)
† ('37) 24 AIR 1937 Bom 101 (103) : ILR (1937) Bom 150.
2. ('02) 25 Mad 426 (428) (DB). (Decree of reversal in appeal, limited to the interests of the appealing defendant alone—Non-appealing defendant cannot claim restitution.)
('94) 17 Mad 82 (84, 85) (DB). (Appeal not in favour of party—No restitution can be had.)
('30) 17 AIR 1930 Lah 852 (353).

Court is to reverse that of the lower Court, the party against whom the lower Court's erroneous decree has been enforced and who has lost possession of the property is entitled to apply for restitution under this section irrespective of the question whether or not the appellate decree declares the party's right to the property.[3]

8. Persons not actually parties. — It follows from what has been said in Note 7 that the party claiming restitution need not have been a party to the *appeal* in which the decree was varied or reversed[1] but *must* have been a party to the *original decree* so varied or reversed.[2] The appellate decree must also have been in effect and substance in *favour* of such a person.[3]

Illustration.

A decree is passed in favour of *X* against *A*, *B* and *C* based on a *ground common to all the defendants.*[4] *A* appeals without impleading *B* and *C* as parties and the decree is reversed under O. 41 R. 4 in favour of *all* the defendants. *B* and *C* though not parties to the *appeal* can claim restitution under this section of the property that had been taken from them in execution of the decree which was reversed.[5]

The Allahabad High Court has, however, expressed a view that the word "party" in section 144 is not used in the sense of "party to the *suit*" but means party to the *application*.[6] The reasoning behind the observations is not quite clear and seems to be against the wording of the section.

The word "party" will include his *representative*, whether by devolution or assignment, and the representative can therefore claim restitution under this section.[7] Thus, where a plaintiff dies and the suit abates, and the defendant recovers the costs from the representative of the plaintiff who thereafter applies and gets the abatement set aside, the representative can apply under this section for return of the costs paid by him.[8] Similarly, the *transferee* of the appellate decree is entitled to apply under this section for restitution of what his transferor was entitled to claim.[9]

9. Party not in possession. — A party is not entitled under this section to the restitution of property which was not in his possession before suit but was in the

('25) 12 AIR 1925 Rang 215 (216) : 3 Rang 251 (DB).
('86) 8 All 545 (548) (DB).
† ('37) 24 AIR 1937 Bom 101 (103): I L R (1937) Bom 150.

3. ('35) 22 AIR 1935 Mad 476 (477). (Reversal of decree in appeal — Party losing possession by first decision can apply for restitution.)
† ('37) 24 AIR 1937 Bom 101 (103): I L R (1937) Bom 150.

Note 8

1. ('08) 12 Cal W N 642 (643) (DB).
† ('37) 24 AIR 1937 Bom 101 (103): I L R (1937) Bom 150.
2. ('93) 3 Mad L Jour 258 (259).
('19) 6 AIR 1919 Cal 503 (504) (DB).
3. ('08) 18 Mad L Jour 39 (41) (DB).
('08) 12 Cal W N 642 (643) (DB).
('94) 4 Mad L Jour 1 (2) (DB).
† ('37) 24 AIR 1937 Bom 173 (174).
4. See O. 41 R. 4.
5. (1900) 24 Mad 341 (344) (DB).
† ('27) 14 AIR 1927 All 182 (183) (DB).
('37) 24 AIR 1937 Bom 101 (103, 104): I L R (1937) Bom 150. (Decree with costs against *A*, *B* and *C* — Decree for costs executed against *A* — Appeal by *B* and *C* — *A* not party — Decree reversed — *A* is entitled to restitution.)

Also see O. 41 R. 4, Note 6.

6. ('22) 9 AIR 1922 All 238 (238): 44 All 555 (DB).
7. ('43) 30 AIR 1943 All 202 (203): I L R (1943) All 312 (DB). (Suit on behalf of an estate—*A* representing the estate in original Court — *B* representing it in appellate Court — *B* is entitled to claim restitution.)
† ('18) 5 AIR 1918 Pat 306 (307) (DB).
('32) 19 AIR 1932 All 239 (240) (DB). (Son entitled to represent his deceased father.)
‡ ('24) 11 AIR 1924 Sind 101 (102) : 17 Sind L R 73 (DB).
8. ('22) 9 AIR 1922 Mad 70 (71) (DB).
9. ('41) 28 AIR 1941 Mad 480 (480) (DB). (Right of restitution is assignable — Right to recover mesne profits by way of restitution transferred — Whether O. 21 R. 16 is applicable or not the transfer may be recognized under S. 146 and the transferee allowed to apply for restitution.)
✠ ('06) 33 Cal 857 (860) (DB).
† ('18) 5 AIR 1918 Pat 306 (307) (DB).

possession of the opposite party and which therefore could not have been taken out of his possession under any decree of Court.[1] Where, however, the property in dispute is placed in the hands of the Receiver, the latter's possession will be on behalf of the rightful owner as ultimately found by the Court. Such owner, therefore, is entitled to the benefit of the section as soon as his title is established, where the Receiver's possession has been disturbed in the meanwhile under the reversed decree.[2]

10. Right of auction purchaser to apply for restitution. — An auction sale may be set aside —

(1) under certain circumstances[1] when the decree in execution of which the sale is held is set aside, or

(2) in other proceedings such as those under O. 21 Rr. 72 and 90 of the Code.

In either case the auction purchaser is entitled to a return of the purchase price less the mesne profits he has enjoyed. In fact where an auction sale is set aside, it is incumbent upon the Court to make the recovery of possession by the judgment-debtor conditional on his paying up to the purchaser the purchase money.[2]

Where, however, no such conditional order is passed, can the auction purchaser apply under *this section* for the return of the purchase money? It has been held that he cannot. The reason is that he is neither a *party to the decree varied or reversed* nor is he a person *entitled to any benefit* under the reversing decree.[3]

He may, of course, *sue* the judgment-debtor for a refund of his purchase money.[4]

11. Against whom restitution can be granted.—Under S. 583 of the Code of 1882 an appellate decree reversing a decree of the lower Court had to contain, or was deemed to contain, a *direction* for restitution in favour of the successful appellant, who had, in order to claim restitution, to *execute the appellate decree.* This, of course, could not be done against a person who was not a *party to the appellate decree.*

It was, therefore, held that the transferee of a decree reversed in appeal, or other person who was not a party to the appeal, could not be proceeded against under the section.[1]

Note 9

1. ‡('24) 11 AIR 1924 Cal 769 (771): 51 Cal 324 (DB).
('32) 19 AIR 1932 Pat 317 (318): 11 Pat 553 (DB). (Following AIR 1924 Cal 769 : 51 Cal 324.)
[*See also* ('12) 16 Ind Cas 966 (966) (Cal).
('21) 8 AIR 1921 Lah 234 (235).
('31) 18 AIR 1931 Mad 81 (82).]

2. ('41) 28 AIR 1941 Lah 343 (344) (DB).
('40) 27 AIR 1940 Mad 850 (870, 871) (DB). (Per Wadsworth and Stodart, JJ.; Burn J., contra.)
† ('28) 15 AIR 1928 Pat 260 (262, 263): 7 Pat 319 (DB).
† ('31) 18 AIR 1931 Rang 21 (22, 23) (DB). (Case of property in Court deposit.)

Note 10

1. For those circumstances, see Note 13.

2. † ('14) 1 AIR 1914 Cal 718 (719) (DB). (Order is made under the inherent powers of the Court.)
('24) 11 AIR 1924 All 273 (273, 274).
† ('22) 9 AIR 1922 PC 269 (271): 49 Ind App 351 : 2 Pat 10 (PC).
('17) 4 AIR 1917 Pat 55 (57) (DB).
[*See* ('38) 25 AIR 1938 Pat 447 (449). (Decree in favour of third party that the property sold in auction really belonged to him and not to the judgment-debtor—Auction purchaser's remedy to get back his purchase money is only by getting the sale set aside under O. 21 R. 91 and applying under O. 21 R. 93; without getting sale set aside there is no independent right to obtain refund under inherent powers of Court.)]

3. ('22) 9 AIR 1922 Mad 228 (229, 230) (DB). (Nor can he invoke the aid of S. 151, C. P. Code.)
† ('25) 12 AIR 1925 Rang 215 (216) : 3 Rang 251 (DB).

4. ('13) 18 Ind Cas 381 (382) (DB) (Bom).

Note 11

1. ('01) 5 Cal W N 426 (428) (DB). (Assignee of decree.)
('98) 20 All 139 (143) (DB). (Do.)
('97) 19 All 136 (139) (DB). (Do.)
('02) 24 All 288 (291) (DB). (Do.)
('17) 4 AIR 1917 Mad 293 (293) : 40 Mad 299 : 33 Ind Cas 739 (740) (DB). (Where he is a party to the reversing decree, he will of course be bound to make restitution.)
('85) 7 All 681 (687) (DB).
('05) 8 Oudh Cas 115 (115) (DB).

There is no such restriction under the present section. A right to claim restitution may now be enforced against a party or his *representative* or assignee even if he is not a party to the appeal.[2] A mortgages to C certain property and then sues B, who is in possession thereof, in ejectment, and obtains a decree and gets delivery of possession in execution. Pending appeal by B, C sues on his mortgage, obtains a decree and purchases the property in execution of his decree and obtains possession. A's decree is reversed in appeal. It was held that B can claim restitution from C of the property taken from him. The reason is that C is a *representative* of A and cannot be in a better position than A.[3]

Where the liability to make restitution is a joint one, a claim against *some only* of the persons liable in the absence of the others is not sustainable.[4]

Restitution can be ordered under this section only against a party who has benefited under the *reversed* decree.[5] Thus, suppose that in a suit for possession A obtains a decree against B and his usufructuary mortgagees. The decree being reversed on appeal B is given possession instead of the mortgagees. Here the mortgagees cannot claim the mortgaged property from B by way of restitution. The reason is that B was given possession of the property not under the reversed decree of the lower Court but under the reversing decree of the Appellate Court.[6] It has been held that where a decree is assigned and the assignee realises the decretal amount, the right of restitution on the reversal of the decree arises not only against the assignee of the decree but also against the original decree-holder.[7]

12. Transferee of a decree. — See Note 11.

13. Auction purchaser. — The question whether restitution can be claimed against an auction purchaser on the reversal of the decree in execution of which the sale

2. ('42) 29 AIR 1942 Mad 472 (473) : ILR (1942) Mad 949 (DB). (Person attaching a decree.)
('41) 28 AIR 1941 Mad 315 (315) : I L R (1941) Mad 498.
('40) 27 AIR 1940 Pesh 44 (47). (Assignee and attaching creditor of party are his representatives and liable to restitution—Suit by *K* against *M* dismissed with costs—*M* assigning decree for costs to *F*—*S*, in execution of his decree against *M* attaching decree for costs — *F* and *S* dividing costs equally between themselves—Subsequent reversal of decree for costs — *F* and *S* are liable for restitution.)
('16) 3 AIR 1916 Mad 745 (746) : 38 Mad 36 : 17 Ind Cas 420 (422) (DB).
('32) 19 AIR 1932 Lah 527 (528, 529). (The representative can therefore also move the Court to ascertain the amount of restitution payable by him.)
('30) 17 AIR 1930 Mad 787 (788) : 53 Mad 796 (DB). (A decree-holder attaching another decree is representative of the decree-holder under attached decree.)
† ('24) 11 AIR 1924 Sind 101 (102) : 17 Sind L R 73 (DB). (Restitution granted against auction purchaser whose sale was not *bona fide*.)
('18) 5 AIR 1918 Mad 673 (674) (DB).
('20) 7 AIR 1920 Cal 550 (551, 552) (DB).
('17) 4 AIR 1917 Mad 293 (294) : 40 Mad 299 (DB).
† ('38) 25 AIR 1938 Oudh 169 (170): 14 Luck 106 (DB). ('Parties' in S. 144 must be taken to include their representatives and further representative does not mean only a party's legal representative but means his representative-in-interest—Judgment creditor of party attaching and withdrawing latter's money lying in Court is his representative and can be ordered to refund.)
('35) 22 AIR 1935 All 65 (66). (Restitution can be claimed against tenant deriving title from opposite party.)
('37) 24 AIR 1937 Mad 95 (96). (*A* suing *B* for possession—Receiver appointed—Profits pending suit deposited in Court — *A* claiming those profits — Trial Court refusing *A*'s claim — *A* appealing—*C* obtaining decree during pendency of *A*'s appeal, attaching profits lying in Court in *B*'s name—*A*'s title established on appeal—*A*'s claim for restitution against *C* is valid.)
[But see ('32) 19 AIR 1932 Rang 148 (150) : 10 Rang 480 (DB).
('30) 17 AIR 1930 All 415 (416) (DB). (Vendee from party—*Held* not to fall under the section.)]
3. ('23) 10 AIR 1923 Pat 371 (373) : 2 Pat 277 (DB).
('32) 19 AIR 1932 Lah 527 (528, 529).
('29) 16 AIR 1929 Cal 590 (591) (DB). (Analogous case of lease.)
4. *Compare* ('21) 8 AIR 1921 Pat 350 (351) (DB).
('17) 4 AIR 1917 All 117 (118) (DB). (Co-plaintiff —No decree in his favour—No restitution against him.)
5. ('36) 23 AIR 1936 Mad 634 (635) (DB).
6. ('36) 23 AIR 1936 Mad 634 (635) (DB).
7. ('41) 28 AIR 1941 Mad 315 (316) : ILR (1941) Mad 498.

took place, depends upon the question whether he is a *bona fide* purchaser. By the phrase "*bona fide* purchaser" the Courts imply the test of knowledge of the pending proceedings to set aside the decree, and opportunity to defend his own interests in those proceedings.[1]

In the case of *bona fide* purchasers the rule is that the sale will be upheld notwithstanding the reversal of the decree,[2] because otherwise there will be less inducement to intending purchasers to buy at an execution sale, and consequently less chance of the property fetching a proper value at such sales.[3] Another reason is that a purchaser cannot be expected to go behind the judgment to inquire into the irregularities in the suit.[4]

This, however, does not mean that an execution sale cannot be set aside on *other* grounds such as want of jurisdiction to sell the property,[5] fraud,[6] want of saleable interest in the judgment-debtor[7] and, the sale being affected by the doctrine of *lis pendens*,[8] etc. In such cases restitution can be ordered against the auction purchaser[9] under the inherent powers of the Court.[10]

The reason of the rule upholding an execution sale in favour of a *bona fide* purchaser disappears where the *decree-holder* is himself the purchaser, and has notice of all the proceedings in the suit. The rule itself consequently becomes inapplicable in accordance with the maxim *cessante ratione legis, cessat et ipsa lex.*[11] The *decree-holder* purchaser will, therefore, be bound, on the reversal of the decree, to make restitution to the person entitled thereto.[12] An assignee from such purchaser will be in no better position

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Note 13

1. ('43) 30 AIR 1943 Pat 325 (327) (DB). (But if sale is set aside, auction purchaser is entitled to refund of purchase money withdrawn by the decree-holder.)
† ('24) 11 AIR 1924 Sind 101 (103) : 17 Sind L R 73 (DB).
[But see ('17) 4 AIR 1917 Mad 250 (253, 254) (DB). (Where the test applied is the knowledge of and participation by the purchaser in the frauds or irregularities committed by the decree-holder.)]
2. ('37) 24 AIR 1937 Mad 694 (695).
[*See* ('38) 25 AIR 1938 Nag 525 (526): ILR (1940) Nag 302 (DB).]
3. ('13) 16 Oudh Cas 225 (231) : 21 Ind Cas 570 (572) (DB). (The Court must have jurisdiction to sell the property.)
('12) 14 Ind Cas 836 (836) (DB) (Mad). (Following 10 All 166 : 15 Ind App 12 (PC).)
(1900) 22 All 168 (176, 179, 181) (DB).
('26) 13 AIR 1926 All 35 (35, 36): 48 All 94 (DB). (Amendment of decree.)
('99) 26 Cal 734 (737) (DB). (No distinction between case of sale under money decree and that of sale under mortgage decree.)
('11) 38 Cal 622 (627) (DB).
('25) 12 AIR 1925 Lah 176 (177).
('03) 27 Mad 98 (100, 101) (DB). (But in the case of decree-holders purchasers the rule is otherwise.)
('17) 4 AIR 1917 Mad 250 (253) (DB).
('26) 13 AIR 1926 Mad 78 (80, 81) : 48 Mad 767 (DB). (Principle should not be extended to defendant or a party to the suit.)
† ('05) 29 Bom 435 (448) (FB). (Pendency of appeal immaterial to the applicability of this principle.)
('16) 3 AIR 1916 All 159 (160) : 38 All 240 (DB).
('10) 12 Cal L Jour 357 (367) (DB).
('85) 11 Cal 362 (365) (DB).
4. † ('15) 2 AIR 1915 Cal 203 (206) (DB).
✠ ('88) 10 All 166 (172) : 15 Ind App 12 (PC).
[*See* † ('23) 10 AIR 1923 Cal 538 (550) (DB). (Case of a decree obtained by fraud.)]
5. ✠ ('13) 41 Cal 590 (599, 600) : 41 Ind App 38 (PC). (Sale can be set aside where it is of property not attached.)
[But see ('97) 21 Bom 463 (464) (DB). (Sale in execution of satisfied decree — Not void on that ground : 14 Cal 18 : 13 Ind App 106 (PC) followed.)
('88) 15 Cal 557 (563). (14 Cal 18 : 13 Ind App 106 (PC) followed.)]
6. ('10) 5 Ind Cas 390 (395) (DB) (Cal).
7. ('24) 11 AIR 1924 All 273 (274).
8. ('01) 23 All 60 (65, 66) (DB). (NOTE.—But see the *obiter dictum* in 16 Oudh Cas 225.)
('03) 27 Bom 266 (270) (DB).
('06) 28 All 337 (339) (DB). (The decision however does not refer to the doctrine of *lis pendens*.)
('18) 5 AIR 1918 Cal 229 (230) (DB).
('31) 18 AIR 1931 All 655 (656) (DB). (Remedy under S. 144 is independent of remedy under O. 21 R. 90.)
9. ('37) 24 AIR 1937 Mad 694 (695). (Property sold on a wrong date.)
10. ('37) 24 AIR 1937 Mad 694 (695).
11. "When the reason for any law ceases so does the law itself."
12. † ('04) 31 Cal 499 (501, 502) (DB).
('97) 1897 All W N 28 (29) (DB).
('82) 5 Mad 106 (106, 107) (DB).
('73) 10 Bom H C R 297 (298).
('16) 3 AIR 1916 Mad 706 (707) (DB).
(1900) 27 Cal 810 (814) (DB).

than his assignor though he is a *bona fide* purchaser from the decree-holder,[13] unless the reversal of the decree has been obtained fraudulently by the decree-holder himself after the assignment.[14]

In the principles enunciated above there is no distinction between the auction purchaser at a sale in execution of a money decree and one in execution of a mortgage decree.[15]

The above discussion relates to cases where the decree of the first Court is *reversed* subsequently. Where the decree is modified the sale need not necessarily be set aside even in cases where the decree-holder is the purchaser. See Note 20.

14. Surety—Restitution against. — Section 144 applies only to the parties or the representatives of the original parties, and does not apply to sureties as against whom, therefore, no restitution can be claimed under this section.[1]

15. Third persons—Restitution against. — This section does not apply to third persons who are neither parties nor their representatives.[1]

16. Trustee. — Where a trustee of a temple obtains a decree and in execution thereof recovers money and hands it over to the temple and then the decree is reversed in appeal, restitution can be had only against the temple and not against the trustee *personally*.[1]

17. What Court can grant restitution. — Section 583 of the old Code required that the person entitled to restitution "shall apply to the *Court which passed the decree against which the appeal was preferred*." Thus, where a first Appellate

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†('88) 10 All 166 (172) : 15 Ind App 12 (PC).
('16) 3 AIR 1916 Pat 299 (300) : 1 Pat L Jour 43 (DB).
[*See also* ('10) 14 Cal W N 182 (182, 183) (DB). (Decree set aside under S. 108, C. P. C. (old Code) — It cannot be taken to be revived by any subsequent proceedings and the proceedings under it are consequently invalid.)
('07) 6 Cal L Jour 102 (104) (DB).]

13. ('20) 7 AIR 1920 Cal 550 (551, 552) (DB). (Decree-holder settling property with a tenant — Tenant held liable for restitution.)
('16) 3 AIR 1916 Cal 710 (711) : 22 Cal L Jour 412 (414) (DB).
[*See also* ('15) 2 AIR 1915 Cal 363 (364) (DB).]
[See however ('03) 13 Mad L Jour 231 (236) (DB).
('90) 30 Mad 295 (297) (DB).]

14. ('25) 12 AIR 1925 Cal 1074 (1076) (DB). (Decree-holder entering into compromise with the judgment-debtor behind the back of the assignee.)
[*See also* ('24) 11 AIR 1924 Sind 101 (103, 104) : 17 Sind L R 73 (DB).]

15. ('99) 26 Cal 734 (737) (DB).

Note 14

1. ('40) 27 AIR 1940 Mad 850 (852) (DB). (But they may be made parties in such proceedings as they are vitally interested in the amount due by way of restitution—Per Burn, J.)
†('19) 6 AIR 1919 P C 55 (58) : 42 All 158 : 46 Ind App 228 (PC).
('98) 1898 Bom P J 830.
('38) 25 AIR 1938 Nag 101 (102) : ILR (1938) Nag 354 (DB).

Note 15

1. ('41) 28 AIR 1941 All 28 (29). (Decree for pre-emption on payment of certain amount—Plaintiff depositing amount in Court—Part of amount taken out by original purchaser and part by judgment-creditor of original purchaser in execution of his own decree—Ultimately decree for pre-emption reversed—Plaintiff applying under S. 144 making original purchaser and his judgment-creditor respondents—*Held*, judgment-creditor was not a party to the suit and therefore as against him the proceedings under S. 141 were misconceived.)
('19) 6 AIR 1919 P C 55 (58) : 42 All 158 : 46 Ind App 228 (PC). (Such as sureties.)
('32) 19 AIR 1932 Cal 29 (34) : 58 Cal 1070 (DB).
('13) 16 Oudh Cas 225 (230) : 21 Ind Cas 570 (572) (DB).
('32) 19 AIR 1932 Bom 326 (327) (DB). (Nominee of decree-holder.)
('37) 24 AIR 1937 Lah 169 (170). (Section 144 only permits restitution 'as far as may be' and does not justify restitution when rights of third parties intervene. Where after reversal of a decree the attachment of certain money was removed and the judgment-debtor paid the money to *A* and subsequently there was a second decree after remand in decree-holder's favour — *Held*, *A* could not be made to restore money paid to him.)
[*See also* ('30) 17 AIR 1930 All 415 (416) (DB).]

Note 16

1. ('04) 14 Mad L Jour 377 (378) (DB).

Court reverses a decree of the original Court, which reversal is again set aside by the second Appellate Court, it was held that the application should be made to the first Appellate Court against whose decree the second appeal was preferred and not to the original Court.[1]

Under the present section, the application should be made in all cases to "the Court of first instance." It is only the Court which executes the decree that has jurisdiction to order restitution to the parties.[2]

Where the Court of first instance loses its territorial jurisdiction or ceases to exist, the Court which gets such jurisdiction will be "the Court of first instance."[3]

Where a decree is transferred for execution to another Court, the latter Court can exercise the same powers as the Court of first instance.[4]

The jurisdiction of the Court of first instance is not ousted by the fact that the value of the subject-matter of the restitution exceeds the limits of its pecuniary jurisdiction,[5] nor by the fact that after its decree has been set aside, the case has been transferred for re-hearing to another Court.[6]

18. Extent of power to grant restitution. — Before the passing of the Code of 1908, there was no *legislative expression* as to the *extent* of the power of the Court to make restitution. This section now specifies that the power extends to "cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such a decree as has been varied or reversed." The Courts ought not to adopt a narrow construction so as to restrict the application of this salutary provision of law which has been enacted with a view to shorten litigation, and afford speedy relief.[1] In *L. Guran Ditta* v. *T. R. Ditta*,[2] their Lordships of the Privy Council observed as follows :

> "The duty of the Court when awarding restitution under Section 144 of the Code is imperative. It shall place the applicant in the position in which he would have been if the order had not been made : and for this purpose the Court is armed with powers (the 'may' is empowering, not discretionary) as to mesne profits, interest and so forth."

Note 17

1. ('01) 5 Cal W N 287 (289) (DB).

NOTE. — But the practice was otherwise. See Notes on Section 37.

2. † ('27) 14 AIR 1927 Mad 898 (899) (DB).

('22) 9 AIR 1922 All 71 (72) : 44 All 283 (DB). (Ejectment decree of Revenue Court reversed by District Judge and confirmed by High Court. Revenue Court is the "Court of first instance.")

('31) 18 AIR 1931 Rang 21 (23) (DB). ("Court of first instance" means Court which did the act which turned out to be wrong.)

('28) 15 AIR 1928 Pat 502 (504).

('38) 25 AIR 1938 Cal 554 (556) (DB). (Decree passed by Court *A*—Purchase of judgment-debtor's property by decree-holder in execution at *A*—Sale set aside—Decree transferred to Court *B*—Appeal against order setting aside sale allowed — Meanwhile decree executed in Court *B*—Application by judgment-debtor for restitution in Court *B*—Court *B* cannot grant restitution as it is not Court of first instance.)

† ('37) 24 AIR 1937 All 515 (523, 524) : I L R (1937) All 670 (DB). (Application for restitution by person who is successful in appeal to Privy Council—Applicant should only approach Court of first instance and need not apply to High Court under O. 45 R. 15.)

[*See* ('21) 8 AIR 1921 All 241 (241) (DB).]

3. ('26) 13 AIR 1926 Mad 813 (814). ("Court of first instance" must be interpreted on principles laid down in S. 37 (b), C. P. Code.)

('21) 8 AIR 1921 Mad 103 (104) (DB). (Ceases to exist.)

('37) 24 AIR 1937 All 515 (520): I L R (1937) All 670 (DB).

4. ('13) 7 Sind L R 19 (21): 20 Ind Cas 540 (541). (The transferee Court has under S. 42 the same powers as the transferor Court.)

Also see S. 42 Note 1.

5. ('89) 13 Bom 485 (488) (DB). (8 Bom 31, Followed.)

[Compare ('02) 1902 Pun Re No. 29, page 114 (115).]

6. ('20) 7 AIR 1920 Bom 12 (12): 44 Bom 702 (DB).

Note 18

1. ('12) 17 Ind Cas 121 (122) (DB) (Cal).

Also see S. 144 Note 2.

2. ('35) 22 AIR 1935 P C 12 (13) (PC).

19. "Shall cause restitution to be made." — The section is mandatory.[1] The Court has *no discretion* to grant restitution or not, in matters falling within the terms of the section.[2] It is the legal effect of a decree of reversal that a party against whom the decree reversed was given is to have restitution of all that he had been deprived of under it.[3] It is not necessary that the reversing decree should contain any direction or provision for restitution.[4]

But in cases not falling within the terms of the section restitution is not a matter of *right* but depends upon the *discretion* of the Court and will be ordered only when the justice of the case demands it.[5]

20. "Place the parties in the position which they would have occupied but for such decree . . . as has been varied or reversed."—The object of restitution is to restore the *status quo ante* between the parties.[1] Under the old Code the power of the Court to grant restitution was wider than what has been conferred under this section. Under sub-s. (1) the Court is limited, in granting restitution, to place the parties "in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed."[2] The object of this is clearly to enable the Court

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Note 19

1. † ('26) 13 AIR 1926 Lah 685 (687).
('18) 5 AIR 1918 Mad 673 (674) (DB). (Section gives no discretion to Court.)
('17) 4 AIR 1917 Mad 250 (254) (DB).
(22) 9 AIR 1922 P C 269 (271) : 2 Pat 10 : 49 Ind App 351 (PC).
('74) 22 Suth W R 435 (436) (DB).
† ('35) 22 AIR 1935 P C 12 (13) (PC).
('35) 22 AIR 1935 All 65 (66).
[*See also* ('28) 15 AIR 1928 Oudh 208 (208).]

2. ('20) 7 AIR 1920 All 127 (128).
('78) 3 Cal 720 (723, 724) (DB).
('28) 15 AIR 1928 Rang 293 (294) (DB).

3. ('68) 10 Suth W R 131 (132) (DB). (Reversal of a decree for possession only gives right to mesne profits.)
('32) 19 AIR 1932 Cal 313 (315) (DB). (Joint and several decree against *A* and *B*—Amount deposited by *A* on his own behalf and also for *B* — Decree reversed as against *A* only—*A* is entitled to restitution of full amount and not of an amount proportionate to his share.)
('09) 32 All 79 (84) : 4 Ind Cas 376 (378) (DB).
('21) 8 AIR 1921 All 241 (241). (Refund of costs—Interest allowed.)
('73) 20 Suth W R 49 (49) (Do.)
('86) 8 All 262 (264) (DB). (Do.)
† (20) 7 AIR 1920 All 127 (128). (Refund of costs.)
('06) 3 Cal L Jour 181 (182) (DB).
('25) 12 AIR 1925 Lah 177 (178). (Refund of purchase price deposited under pre-emption decree—Appellate Court awarded a higher amount and on the same not being paid, the suit was dismissed.)
('26) 13 AIR 1926 Rang 126 (126). (Decree modified in small part—Judgment-debtor is not entitled to have execution sale set aside but is entitled to the balance of the sale proceeds.)
('68) 9 Suth W R 402 (407, 408) (FB). (Per Peacock, C. J.)
('75) 23 Suth W R 441 (442) (DB). (Reversal of decree for possession gives right to mesne profits.)
('97) 21 Bom 55 (57) (DB).
† ('17) 4 AIR 1917 Cal 188 (192) (DB).
('94) 21 Cal 340 (343) (DB). (Partition decree set aside—Party successful is entitled to be placed in joint possession.)
('15) 2 AIR 1915 Cal 502 (503) (DB). (Decree absolute erroneous—Mortgaged property has to be restored.)
† ('37) 24 AIR 1937 Mad 229 (230). (Decree against *A* and *B* jointly and severally—Amount deposited by *B* on behalf of himself and *A*—Decree reversed as against *B* only—*B* entitled to restitution of whole amount.)
[*See also* ('04) 27 Mad 504 (508) (DB).]
Also see Note 22.

4. ('94) 21 Cal 989 (996, 997) (DB).
('93) 21 Cal 340 (343) (DB).
('89) 13 Bom 485 (488) (DB).
('15) 2 AIR 1915 P C 92 (93) : 38 All 163 : 43 Ind App 43 (PC). (Affirming the reasons given in 32 All 79 (84, 85.)
('70) 14 Suth W R 465 (465) (DB).
('16) 3 AIR 1916 Mad 1201 (1205) (DB).

5. ✣ ('17) 4 AIR 1917 Cal 188 (192) (DB). (But the test of what is just must be determined with reference to the imperative requirements of the law applicable to the subject-matter.)

Note 20

1. ('17) 4 AIR 1917 Mad 185 (185) : 40 Mad 780 (DB).
('18) 5 AIR 1918 Mad 1293 (1294) (DB).
('20) 7 AIR 1920 Cal 919 (920) (DB).
('27) L R 8 All 319 (320) (Rev) (DB). (Ejectment decree against tenant with sub-tenancy reversed—Sub-tenancy will be revived.)

2. ('37) 24 AIR 1937 Mad 229 (230). (The same principle applies even where one defendant had paid the money into Court on behalf of himself and other co-defendants who had succeeded in the appeal.)
('37) 24 AIR 1937 Cal 478 (479) (DB).
('35) 22 AIR 1935 Cal 206 (208):62 Cal 217 (DB).
('38) 25 AIR 1938 Oudh 169 (170) : 14 Luck 106.

to place a party who has been *prejudicially* affected by a decree which has been varied or reversed *in his favour* in the same position as he would have occupied if the decree had stood originally in the same terms as it stood after the variation or reversal. The prejudice to be removed by restitution must, thus, be the result of *the erroneous terms of the original decree.*[3] Thus, where A obtains a decree against B for Rs. 8000 and the same is modified in appeal into a decree for Rs. 7500 and in the meanwhile B's properties X and Y are sold for Rs. 7000 and Rs. 3000 respectively in execution of the original decree to the decree-holder himself, it was held by the High Court of Madras that whether the decree was for Rs. 8000 or Rs. 7500 the property Y should necessarily have been sold and that, therefore, B was not prejudiced by the sale and that the sale ought not to be set aside.[4] The same view has been held by the High Court of Calcutta also in the undermentioned case,[5] and by the Patna High Court.[6] Rankin, C. J., in the former case observed :

> "If the judgment-debtor could, and would have paid what was due, and thus prevented a sale, it seems to me to be clear enough that he can get the sale set aside as against the decree-holder by way of restitution. Where it appears, however, that the sale would not have been prevented had the original decree been correct, I see no object to be served in setting aside sale. In any event, the Legislature in 1908 has since laid down the law on the matter."

In *Ban Gyi Maung* v. *Ma Ngwe Bon*,[7] where a decree for the recovery of Rs. 550 was modified in appeal into one for Rs. 110, the High Court of Rangoon set aside the sale in favour of the decree-holder on condition that the judgment-debtor deposited the decree amount in Court. His Lordship did not advert to the principles stated by the High Courts of Madras and Calcutta, but the decision can be supported on those principles, inasmuch as the judgment-debtor could have easily paid the amount due under the appellate decree and have averted the sale. He was thus *prejudiced* by the sale, which was therefore rightly set aside. In *Shivbai Babya Swami* v. *Yesoo Cheoo Nayakin*,[8] where A obtained an *ex parte* decree against B and purchased the latter's property in execution thereof and subsequently B got the *ex parte* decree set aside, but on a re-trial of the case a decree on the same terms as before was passed against him, it was held by the High Court of Bombay that the sale "being no longer based on any solid foundation should be set aside." It is submitted that this decision should be reconsidered in the light of the principles enunciated by the High Courts of Madras and Calcutta.

Where the decree subsequently passed in appeal is for a *larger* amount than the amount due under the original decree, there could possibly be no prejudice to the judgment-debtor and this section will have no application.[9]

The restoration is to be as nearly as possible to their positions *at the time* the erroneous order was passed and not to later positions taken up by them of their own accord as resulting from that order.[10] Such restoration may be ordered after taking

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3. ('40) 27 AIR 1940 Mad 850 (871, 872). (The words do not indicate that the parties are to be placed in a position which they would have occupied had no decree been passed or had the right decree been passed. Per Wadsworth J.)
† ('22) 9 AIR 1922 Mad 96 (96) (DB).

4. ('22) 9 AIR 1922 Mad 96 (96) (DB).
[But see ('04) 27 Mad 98 (101) (DB). (Case decided under the old Code.)]

5. † ('32) 19 AIR 1932 Cal 303 (307) : 59 Cal 647 (DB).
[*See also* ('38) 42 Cal W N 1032 (1037) (DB). (*Obiter.*)]
[But see ('20) 7 AIR 1920 Cal 550 (552) (DB). (Not followed in AIR 1932 Cal 303:59 Cal 647.)]

6. ('41) 28 AIR 1941 Pat 130 (132) (DB). (Decree for money—Execution sale — Subsequent reduction of decree amount in second appeal—Such reduced amount higher than price fetched at sale — Finding that judgment-debtor unable to pay up even reduced amount on date of sale or within 30 days thereof.)

7. ('29) 16 AIR 1929 Rang 157 (157, 158): 7 Rang 107 (DB).

8. ('19) 6 AIR 1919 Bom 175 (176) : 43 Bom 235 (DB).

9. ('42) 29 AIR 1942 P C 30 (31): ILR (1942) Kar (PC) 14 : 69 Ind App 10 (PC).

10. ('17) 4 AIR 1917 Pat 55 (58) : 37 Ind Cas 863 (865, 866, 869) (DB).

evidence in the matter, if necessary.[11]

Where a party has obtained possession or recovered money under an erroneous decree, it will not be a restoration of the *status quo ante* merely to restore the possession or to return the money recovered. The party deprived of it would have lost the *profit* of the property or the *interest* on the money, of which he had been deprived. The Court has therefore been empowered to pass "any orders including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits" consequential on the variation or reversal of the decree.[12]

But the restitution claimed must have been *properly consequential* on the reversal or variation.[13] Thus, where a judgment-debtor, pending appeal by him against the decree sells his property and deposits the decree amount in Court fearing that he may not succeed in the appeal, but the appeal is subsequently allowed, he cannot claim damages caused by the private sale, in restitution, he being under no obligation to pay the amount and the damages claimed also not being consequential on the reversal of the decree.[14] But when property is being held by a receiver until one of the rival claimants succeeds in establishing his title and the property is then made over to one of the parties who has obtained a decree recognising his title, the making over of the property to him must be regarded as consequent on the decree although the decree may not be for *possession*, and where the decree is reversed in appeal and the title of the rival claimant is recognised by the appellate decree, the restitution of possession to him will be properly consequential on the reversal of the decree.[15]

('06) 29 All 143 (144) (DB).
('97) 21 Bom 55 (57) (DB). (Uncertified payment.)
('94) 21 Cal 340 (343). (Partition decree reversed — Defendant will be restored to joint possession.)
('08) 12 Cal W N 642 (644) (DB).
('20) 7 AIR 1920 Lah 499 (499).
('73) 20 Suth W R 238 (239, 240) (DB).
('29) 16 AIR 1929 All 527 (528). (In ordering restitution, the Court cannot ignore other proceedings whereby the parties' rights are affected.)
('29) 16 AIR 1929 Oudh 426 (426) : 5 Luck 302 (FB). (Money recovered under illegal arrest in execution of a decree.)

[*See also* ('17) 4 AIR 1917 Mad 314 (315) (DB). (NOTE.—This case is overruled on another point in AIR 1941 Mad 36: ILR 1941 Mad 212 (FB).]

11. ('20) 7 AIR 1920 Cal 919 (919, 920) (DB). (Question of prior possession as between parties to proceeding under this section.)
('98) 8 Mad L Jour 276 (278).

12. † ('12) 14 Ind Cas 456 (457) (DB) (Cal). (Refund of profits got by party in possession under erroneous decree.)
✠ ('34) 21 AIR 1934 All 626 (631) (FB).
('87) 11 Bom 724 (726) (DB). (Money recovered.)
(1865) 2 Suth W R 275 (275) (DB). (Do.)
† ('35) 22 AIR 1935 P C 12 (13) (PC). (The word 'may' is empowering and not discretionary.)

[*See* ('35) 22 AIR 1935 Cal 206 (208): 62 Cal 217 (DB). (But in assessing what a party may have lost or of what he may have been deprived during his dispossession, the law takes into account not what he could have made, but what his opponent did in fact make or could with reasonable diligence have made. There may be cases in which in addition to mesne profits claimed on the ground of the wrong-doer remaining in possession, damages or compensation may be claimed on other grounds.)]

[*See also* ('18) 5 AIR 1918 Lah 313 (313). (Refund of costs.)]

13. ('43) 30 AIR 1943 All 202 (203) : ILR (1943) All 312 (DB). (Decree for specific performance — Property delivered not under specific direction of Court but on account of the decree — Decree set aside in appeal—Property directed to be returned.)
('41) 28 AIR 1941 Lah 343 (344) (DB).
('40) 27 AIR 1940 Oudh 1 (7) : 15 Luck 43. (Suit under O. 21 R. 103 — Dismissal in lower Court—Dispossession of plaintiff which would not have taken place but for dismissal—Plaintiff succeeding in appeal — Order for possession made under this section—No necessity to invoke aid of S. 151.)
('39) 26 AIR 1939 All 66 (69) : ILR (1939) All 103 (DB). (Suit for specific performance of contract of sale decreed—Execution delayed for four years owing to objections of other party which were ultimately disallowed by the High Court—Application under S. 144 claiming compensation for loss of profits of property for four years—*Held*, claim was not properly consequential and not maintainable by application under S. 144, and the decree for specific performance entitled the plaintiff only to the execution of the sale-deed and did not award him possession, and the loss of profits of four years which had resulted to the plaintiff owing to the delay in execution of his sale-deed could not be said to be properly consequential as it was remote and indirect.)

14. ('27) 14 AIR 1927 Mad 353 (354) (DB).
[*See* ('32) 19 AIR 1932 Cal 303 (307) : 59 Cal 617 (DB).]

15. ('41) 28 AIR 1941 Lah 343 (344) (DB).

It has been held that where a judgment-debtor against whom an *ex parte* decree was passed, chooses to set aside the sale held in execution of the decree by making the necessary deposit under O. 21 R. 89 and afterwards the *ex parte* decree also is set aside, the judgment-debtor would not be entitled to claim a refund of the amount which he had deposited as the auction purchaser's compensation. The reason given is that such a deposit is not made by the judgment-debtor directly in connexion with the decree which has been passed against him but is made in order that he may obtain a special privilege which the law provides.[16] But where an objection on the ground of limitation was overruled and a sale was held in execution in spite of the objection it was held that on the Appellate Court reversing this decision the judgment-debtor who had got the sale set aside by making a deposit under O. 21 R. 89, was entitled to a refund of the money deposited, under this section.[17]

21. "So far as may be." — It will not be possible in many cases to restore the *exact status quo ante* between the parties. Crops, for instance, which have been removed by the respondent pending appeal cannot be restored. In such cases the Court can grant damages representing the *value* (but only the net value) of the moveable property of which restitution is claimed.[1]

The Court is, in fact, bound to do everything and make every order fairly and properly consequential on the reversal of the original judgment so as to restore the parties to the same position as they would have occupied but for the erroneous decree or order.[2]

Where each party is found entitled to restitution from the other, the restitution should, as nearly as possible, be *simultaneous*. Thus, where an auction sale is set aside, the judgment-debtor can claim restitution only on payment to the purchaser of the puachase money. In such a case, the restoration of the property must be made *conditional* on the payment back of the purchase money so that the mutual restoration is, as far as possible, *simultaneous*.[3]

Where a decree for pre-emption obtained by a plaintiff is reversed in appeal, the plaintiff is entitled to restitution of the money deposited by him and which had been taken by the defendant vendee.[4] In such a case it cannot be said that because the plaintiff is unsuccessful in the appeal, there could be no question of restitution to him.

As the section only permits restitution "so far as may be," such restitution cannot be ordered so as to prejudice the rights of third parties.[5]

On an application for restitution of property the Court may, if it is necessary, appoint a receiver and make over the property to him until the claims of the parties are finally decided.[6]

22. Mesne profits.—The use of the words 'damages,' 'compensation' and 'mesne profits' indicates that the possession obtained under an erroneous decree subsequently reversed is *wrongful* possession.[1] On the reversal of the decree, the judgment-debtor will

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16. ('39) 43 Cal W N 104 (106).
17. ('43) 30 AIR 1943 All 267 (269, 270) (DB). (AIR 1942 All 14, Reversed.)

Note 21

1. ('11) 12 Ind Cas 105 (105) (DB) (Mad).
('89) 13 Bom 485 (488).
2. ('98) 1898 Bom P J 335 (DB). (Such as giving costs and interest on refund.)
('29) 16 AIR 1929 Lah 657 (658).
('31) 18 AIR 1931 Oudh 12 (12). (Restitution should clear the account between parties.)
[*See* ('34) 21 AIR 1934 Lah 45 (46).]
3. † ('17) 4 AIR 1917 Pat 55 (57) (DB).
('29) 16 AIR 1929 Rang 157 (158): 7 Rang 107 (DB).
4. ('34) 21 AIR 1934 All 13 (14) (DB). (Pre-emption decree — Deposit of money by plaintiff — Decree set aside in appeal — Right of plaintiff to get his money back is covered by S. 144.)
5. ('37) 24 AIR 1937 Lah 169 (170).
6. ('41) 28 AIR 1941 Lah 343 (344, 345) (DB). (Applicant for restitution entitled to joint possession—Further appeal pending.)

Note 22

1. ('15) 2 AIR 1915 Mad 1133 (1134) (DB).

be not only entitled to the possession of the property taken from him but also to *mesne profits* during the period he was kept out of possession.[2] Where, however, the Appellate Court sets aside the decree and *remands* the case for fresh or further enquiry and the question of nature of the possession of the party who has been in possession under the decree is still *sub judice*, an application for mesne profits by the successful appellant will be premature and cannot be granted, though the possession taken from him will be restored.[3] A plaintiff obtains a decree for possession under which he obtains possession. The decree is reversed in appeal whereupon the defendant gets back possession. The appellate decree is reversed in further appeal. The plaintiff is entitled to mesne profits from the date on which the defendant got possession under the appellate decree. The plaintiff is not disentitled to such mesne profits because he failed to obtain a decree for future mesne profits in the trial Court.[4]

It has been held by the Calcutta High Court in the undermentioned case[5] that a person who obtains possession of immovable property under a decree which at the time was a valid decree but has subsequently been set aside in appeal, can in no sense be regarded as a trespasser during such period Hence, for that period, such person is liable to his opponent, the real owner, for compensation or damages and *not* for mesne profits in the strict sense of the expression. But since the reversal of the decree in his favour, such person becomes a trespasser and is liable for mesne profits for such period as he continues in possession.

The criterion for the calculation of mesne profits is not what the person out of possession could have realized if he had not been dispossessed. The criterion is what the person in wrongful possession actually realized or could have, with due diligence, realized.[6]

('30) 17 AIR 1930 Cal 89 (91, 92): 56 Cal 550 (DB). (Case of a compromise appellate decree and so no wrongful possession.)
† ('39) 26 AIR 1939 All 66 (69) : ILR (1939) All 103 (DB).

2. ('40) 27 AIR 1940 Mad 850 (861) (DB).
('75) 23 Suth W R 441 (442) (DB).
('68) 10 Suth W R 131 (132) (DB).
('73) 20 Suth W R 238 (249) (DB).
('74) 21 Suth W R 195 (195) (DB).
('99) 21 All 1 (3) (DB).
('78) 3 Cal 720 (724) (DB).
('87) 14 Cal 484 (486) (DB).
† ('94) 21 Cal 989 (997) (DB).
('95) 22 Cal 501 (503, 504) (DB).
('24) 11 AIR 1924 Lah 166 (167).
('24) 11 AIR 1924 Lah 486 (487).
('88) 11 Mad 261 (262) (DB).
† ('91) 15 Mad 203 (209) (DB).
('09) 32 All 79 (85): 4 Ind Cas 376 (378) (DB).
('13) 19 Ind Cas 1 (2) (DB) (All).
('14) 1 AIR 1914 Cal 692 (692) (DB). (Sale in execution set aside on account of fraud of decree-holder—Judgment-debtor is entitled to compensation though not to mesne profits strictly so called.)
('17) 4 AIR 1917 Lah 426 (428) : 1917 Pun Re No. 61.
('18) 5 AIR 1918 Pat 396 (398) : 3 Pat L Jour 367 (DB).
('20) 7 AIR 1920 Cal 550 (552) (DB).
('19) 6 AIR 1919 Lah 218 (220) (DB).
† ('05) 8 Oudh Cas 254 (256) (DB).
('06) 9 Oudh Cas 254 (258).
('08) 11 Oudh Cas 235 (236, 237) (DB).
('29) 16 AIR 1929 Cal 590 (591) (DB). (Dispossession in execution of decree—Appeal against decree — Pending appeal, respondent leased the lands — Reversal on appeal — In restitution, held lessee not liable for mesne profits but only the lessor respondent.)
('96) 1896 Pun Re No. 28, page 79 (79).
('26) L R 7 All 228 (228) (Rev).
('39) 26 AIR 1939 All 66 (69): ILR (1939) All 103 (DB).
('34) 21 AIR 1934 Lah 991 (992, 993) (DB). (Preemption decree — Price deposited by plaintiff — Decree reversed by Chief Court and amount withdrawn by plaintiff — Trial Court decree restored in appeal to Privy Council—Plaintiff is entitled to mesne profits under S. 144 for the period of deposit.)
[*See also* ('15) 2 AIR 1915 P C 92 (93) : 38 All 163 : 43 Ind App 43 (PC).
('09) 31 All 551 (556): 36 Ind App 197 : 13 Oudh Cas 180 : 3 Ind Cas 798 (799) (PC).
('91) 4 C P L R 167 (168).]
Also see Note 19 and O. 45 R. 15 Note 12.

3. ('40) 27 AIR 1940 Bom 30 (32). (AIR 1923 Nag 101 : 18 Nag L R 200 relied on.)
('23) 10 AIR 1923 Nag 101 (101): 18 Nag L R 200.

4. ('40) 27 AIR 1940 Mad 850 (872) (DB). (Per Stodart and Wadsworth, JJ.—AIR 1927 Mad 898 Explained.)

5. ('35) 22 AIR 1935 Cal 206 (207, 208) : 62 Cal 217 (DB).

6. ('37) 24 AIR 1937 Cal 478 (480) (DB). (AIR 1929 P C 300 : 57 Cal 1 : 56 Ind App 290 (PC) and A I R 1935 Cal 206 : 62 Cal 217 Relied on.)

Moreover, the person in wrongful possession is not liable for the gross profits but for the net profits after making all legitimate deductions, such as collection charges, etc.[7]

Where a judgment-debtor is granted restitution by way of mesne profits against the decree-holder auction-purchaser, the former is entitled to set off the mesne profits awarded against the decretal amount due.[8]

There was a difference of opinion under the old Code as to whether the claims to mesne profits by way of restitution should be made in an *application* under S. 583 or by a *suit*.[9] Under this section it is clear that it should be claimed only in an application and not by a separate suit.

23. Interest. — Where a sum of money is recovered in execution of a decree which is subsequently reversed, the judgment-debtor is entitled to get back not only the sum recovered but also *interest* for the period that the amount has been withheld from him.[1] The reason is, in the words of their Lordships of the Privy Council in *Rodger* v. *The Comptoir D'Escompte de Paris*,[2] "that the perfect judicial determination, which it

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('35) 22 AIR 1935 Cal 206 (207) : 62 Cal 217.
[But see ('72) 17 Suth W R 257 (258) (DB).]

7. ('41) 28 AIR 1941 Mad 36 (37) : ILR (1941) 212 (FB). (Landlord obtaining possession of his tenant's land in execution of decree for ejectment —Decree subsequently reversed — Application by tenant under S. 144 for mesne profits—Landlord is entitled to deduct rent payable by tenant from mesne profits for period of his possession : A I R 1917 Mad 314 Overruled.)

† ('37) 24 AIR 1937 Cal 478 (480) (DB). (Landlord taking possession in execution of decree for ejectment subsequently reversed — Landlord is entitled to claim deduction of rent payable to himself by tenant.)

8. ('12) 14 Ind Cas 456 (457) (DB) (Cal).

9. ('85) 7 All 197 (199) (DB). (Not by application under Section 583.)

† ('94) 21 Cal 989 (997) (DB). (May be recovered by application in the suit.)

Note 23

1. ('41) 28 AIR 1941 Nag 195 (197) : ILR (1942) Nag 273 (DB). (Where the decretal amount is reduced on appeal, the plaintiff is liable to pay interest at the court rate on the difference between the amount of the trial Court's decree and that of the appellate decree.)

(1854) 6 Moo Ind App 1 (26, 27) (PC).
('98) 20 All 430 (432) (DB).
('85) 7 All 432 (433, 434) (DB).
('86) 8 All 262 (264) (DB). (Costs wrongfully recovered.)
('96) 18 All 262 (264).
('99) 21 All 1 (3) (DB).
('79) 4 Cal 229 (230). (Six per cent., interest was allowed on costs recovered.)
('86) 9 Mad 506 (507, 508) (DB).
('11) 35 Bom 255 (257) : 10 Ind Cas 818 (818) (DB).
('13) 18 Ind Cas 381 (382) (DB) (Bom).
✣ ('17) 4 AIR 1917 Cal 188 (194). (Six per cent., was given in this case.)
('18) 5 AIR 1918 Mad 511 (512) : 41 Mad 31 (DB).
('32) 19 AIR 1932 Cal 313 (315). (Costs deposited in Court — Interest runs only from date of withdrawal of amount.)
('17) 4 AIR 1917 Pat 696 (696) (DB). (Liability to pay interest not affected by execution of security bond by which principal alone was secured.)
('18) 5 AIR 1918 Oudh 119 (120) : 20 Oudh Cas 327 (DB). (Cost recovered — Interest should be allowed on it.)
('25) 12 AIR 1925 Bom 313 (314) (DB).
('26) 13 AIR 1926 Lah 488 (488): 7 Lah 232 (DB). (Reversal of decree in Privy Council — Interest allowed.)
('24) 11 AIR 1924 Mad 87 (87) (DB). (Interest was substituted as compensation.)
('71) 15 Suth W R 74 (75) (DB).
('73) 20 Suth W R 49 (49) (DB). (Costs wrongfully recovered.)
('31) 18 AIR 1931 Mad 561 (561) : 54 Mad 887 (DB). (Do).
('96) 1896 Pun Re No. 82, page 259 (260) (DB).
('98) 1898 Bom P J 335 (DB).
† ('35) 22 AIR 1935 P C 12 (13) (PC).
('34) 21 AIR 1934 All 13 (14) (DB). (Pre-emption decree set aside in appeal—Plaintiff is entitled to restoration of money deposited into Court and withdrawn by defendant together with interest thereon.)
[*See* ('34) 21 AIR 1934 Lah 604 (604). (Executing Court has discretion to allow interest even if refund is occasioned by compromise which does not mention interest.)]
[*See also* ('05) 28 Mad 355 (356, 357) (DB).
('37) 24 AIR 1937 Mad 178 (179) (DB). (An application by the petitioner claiming interest on the refund of the court-fee paid by him in the trial Court falls under S. 151 but it is discretionary to the Court to award it.)]

2. (1871) 24 Law Tim 111 (112) : 19 W R (Eng) 449 (452).

must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them with interest during the time that the money has been withheld." The interest is payable not only up to the date of the *application* for restitution but also up to the date of realisation.[3] Where the Court gives a specific direction for refund of a certain amount without giving any direction as to interest, no interest will be allowed.[4]

The *rate* of interest allowable is, however, in the judicial discretion of the Court which will not be interfered with in appeal.[5] Ordinarily unless special circumstances are shown, the court rate of interest is to be allowed.[6] No evidence need be taken as to what would be the proper rate of interest to be awarded.[7]

Where no interest is *claimed* in an application for restitution it will not be allowed.[8]

In granting restitution, it has been held, it is the injury which has been caused to the party who is ultimately successful, that the Court seeks to remedy. The Court is not concerned with the actual benefit which may or may not have been gained by the other party.[9] Thus, where a defendant against whom a decree was passed deposited into Court certain amount which the decree-holder did not draw out as he was unable to furnish security as ordered by the Court, it was held that the defendant was entitled, on the reversal of the decree, to get back the amount with interest thereon, though the other party did not get any benefit from the money deposited.[10] In other decisions,[11] however, the point is emphasised that the position of *both* the parties is to be considered and interest is not to be ordered in such cases unless the party from whom interest is claimed has in some way benefited by the money deposited in Court or is in some way to blame. Thus, in the undermentioned case,[12] the judgment-debtor applied for stay of execution pending the appeal against the decree. Stay was ordered on condition of his giving security for the amount of the decree. The judgment-debtor, instead of giving immovable

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3. ('41) 28 AIR 1941 Mad 36 (37) : I L R (1941) Mad 212 (FB). (A I R 1917 Mad 314 overruled on another point.)

4. ('40) 27 AIR 1940 Cal 260 (264): ILR (1940) 1 Cal 486(DB). (Privy Council while allowing appeal directing costs paid by the appellant to be refunded —No interest allowed.)

5. ('22) 9 AIR 1922 P C 233 (234) : 44 Mad 570 : 48 Ind App 150 (PC).

6. ('43) 30 AIR 1943 All 267 (270) (DB).
('42) 1942 Pat W N 103 (106)(DB). (6 per cent., to be allowed.)
('41) 28 AIR 1941 Nag 195 (196): ILR (1942) Nag 273 (DB). (Court rate must be taken as the rate that fairly compensates the litigants.)

7. ('41) 28 AIR 1941 Nag 195 (196) : ILR (1942) Nag 273 (DB).

8. ('89) 13 Bom 485 (489).

9. † ('33) 20 AIR 1933 Mad 33 (35, 37) : 55 Mad 1025 (DB).
('25) 12 AIR 1925 Bom 313 (314) (DB). (Money paid under decree by one defendant — Plaintiff pursuing his appeal against another defendant and succeeding — First defendant while withdrawing money is entitled to interest thereon.)
('29) 16 AIR 1929 Pat 593 (594) (DB). (Following AIR 1925 Bom 313.)
[But see ('25) 12 AIR 1925 Rang 215 (217) : 3 Rang 251 (DB). (Money lying in Court and none deriving benefit from it—No interest is payable.)
('13) 19 Ind Cas 1 (1)(DB)(All). (Money deposited in Court by pre-emptor after first Court's decree —Decree set aside by Appellate Court—Plaintiff not entitled to interest on deposit money as it was held that the suit ought not to have been brought.)
('66) 6 Suth W R 285 (285) (DB). (Defendant depositing decretal amount in Court — Decree reversed in appeal — Plaintiff not withdrawing money—Interest not allowed.)]

10. ('33) 20 AIR 1933 Mad 33 (35, 37) : 55 Mad 1025 (DB).

11. ('42) 29 AIR 1942 Mad 166 (167) (DB).
('42) 1942 Pat W N 103 (104, 105, 106) (DB). (Interest allowed not from date of deposit but from date on which there was no obstacle to its withdrawal by the other side.)
('40) 27 AIR 1940 Pesh 44 (47). (Interest not ordered as party who had received the money was not at fault—A I R 1922 P C 269 : 49 Ind App 351 : 2 Pat 10 (PC) relied on.)

12. ('42) 29 AIR 1942 Mad 166 (167) (DB). (Reversing A I R 1940 Mad 15.)

property as security deposited the decretal amount in Court and on the appeal being allowed, withdrew the money from the Court. It was held that under the circumstances, he was not entitled to interest on his money as he was not required by the stay order to deposit *money* into Court and he alone was responsible for the loss of interest he had suffered.

24. Refund of compensation money in land acquisition cases. — Where Government deposits money in a land acquisition case and that is taken by a party and on appeal to the High Court the amount payable is reduced, the party must refund the excess amount to the Government with interest in accordance with the principle of restitution.[1] In a reference to the civil Court under S. 18 of the Land Acquisition Act, the Court has inherent power to order the refund of compensation money paid to a wrong person.[2]

25. Possession of property or money obtained otherwise than in execution. — It is not necessary for the application of the section that the possession of the property or money should have been obtained *in execution* of the decree which was subsequently reversed.[1] The section would apply even if the possession of the property or money was taken *otherwise* than in execution provided it was obtained *under colour of*, or *in consequence* of, the decree.[2] Restitution of possession of immovable property can be ordered under this section even though the original decree under which possession was taken was not one for *possession* but was only a declaratory one.[3]

Where possession is obtained by the decree-holder independent of, and in *opposition* to, the decree, this section does not apply. Thus, where A gets only a decree for *injunction* against B and then enters into *possession* with the aid of the police and the decree is subsequently reversed in appeal, B cannot be given restitution by removal of the superstructure erected on the property.[4]

26. Splitting up claim of restitution. — The principle of constructive *res judicata*, whether S. 11 Explanation IV or O. 2 R. 2 of the Code is invoked in its aid, cannot be applied to proceedings under this section.[1] Where therefore a party is entitled by way of restitution to *two* reliefs, the claiming of *one* only of such reliefs in an application does not bar a subsequent application for the *other* relief. Thus, where A is entitled to the

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Note 24

1. ('11) 35 Bom 255 (257) : 10 Ind Cas 818 (818) (DB).
('30) 17 AIR 1930 Mad 577 (578) : 53 Mad 708 (DB).
2. ('13) 21 Ind Cas 111 (112) (DB) (Cal).

Note 25

1. ('13) 21 Ind Cas 84 (85) (DB) (Cal).
('87) 1887 Bom P J 75 (DB).
[*See also* ('07) 29 All 348 (350) (DB).]
2. ('41) 28 AIR 1941 Lah 343 (343, 344) (DB).
('41) 28 AIR 1941 Pat 577 (581): 20 Pat 346 (DB).
† ('20) 7 AIR 1920 All 190 (191): 42 All 568 (DB).
('27) 14 AIR 1927 Lah 37 (38) : 8 Lah 41 (DB). (A I R 1920 All 190 : 42 All 568 followed.)
('27) 14 AIR 1927 Lah 625 (626): 8 Lah 356 (DB). (Payment made not in consequence of any decree not recoverable.)
('10) 5 Ind Cas 776 (776) (DB) (Mad).
('37) 24 AIR 1937 All 728 (730). (Decree-holder obtaining decree for holding charge of institution —Decree-holder obtaining possession of buildings under colour of decree—Decree set aside on appeal — Decree-holder must restore possession under Section 144.)
[*See also* ('05) 2 Cal L Jour 537 (539, 540) (DB). (Decree for confirmation of possession only — However decree-holder obtaining possession in execution.)]
3. ('41) 28 AIR 1941 Lah 343 (344) (DB). (Suit for establishment of title consequent on proceedings under Cr. P. C., S. 145.)
4. ('18) 5 AIR 1918 Mad 1293 (1294) (DB).
('37) 24 AIR 1937 Mad 315 (316).

Note 26

1. † ('17) 4 AIR 1917 Mad 185 (185): 40 Mad 780: 38 Ind Cas 806 (806, 808) (DB).
('19) 6 AIR 1919 Sind 79 (79) : 13 Sind L R 153 (DB). (Suit for declaration that decree is null and void—Omission to ask for restitution—Right is not relinquished — Subsequent application is maintainable.)
† ('35) 22 AIR 1935 All 195 (197). (S. 141 does not require that O. 2 R. 2 or S. 11 Expl. 4 should be applied to such proceedings.)
Also see O. 2 R. 2, Note 31.

restoration of a *property* and *mesne profits*, a first application for the restitution of the *property* does not bar a subsequent application for the *mesne profits*.[2] The same principle will apply where a party is entitled to restitution of a sum of money and the interest thereon.[3]

A second application for the *same relief*, as was previously granted, is, however, clearly barred on the principles of *res judicata*.[4]

See also the undermentioned case.[5]

27. Pecuniary jurisdiction of Court in awarding restitution. — See Note 17.

28. Security for restitution. — The Appellate Court has an inherent power to call upon the respondent to furnish security (notwithstanding the decree has been executed) for the due performance of any decree that might be made in appeal.[1]

Where a decree-holder, at the time of the withdrawal of money, executes a security bond by which the *principal* alone is secured, the Court is not deprived thereby of the power to award *interest* also under this section, if the decree is subsequently reversed.[2]

Where third persons stand surety for restitution, such restitution can be ordered against them, only if the conditions of the security bond are satisfied.[3]

29. Bar of suit. — Section 583 of the old Code did not *expressly* bar a suit for restitution. There was consequently a great divergence of judicial opinion as to whether such a suit was barred or not.[1]

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2. ('18) 5 AIR 1918 Pat 396 (397) : 3 Pat L Jour 367 (DB).
('21) 8 AIR 1921 Nag 112 (113) : 17 Nag L R 62.
('35) 22 AIR 1935 Cal 206 (208): 62 Cal 217 (DB).

3. ('17) 4 AIR 1917 Mad 185 (185) : 40 Mad 780: 38 Ind Cas 806 (806) (DB).
('35) 22 AIR 1935 All 195 (197).

4. ('17) 4 AIR 1917 Mad 202 (203) (DB).

5. ('37) 24 AIR 1937 Mad 173 (174, 175). (Application after reversal of decree on appeal—Grant of — Subsequent reversal of appellate decision — Appellate decision restored on Letters Patent Appeal—Fresh application for restitution lies.)

Note 28

1. ('05) 33 Cal 927 (934, 942) (DB).

2. ('17) 4 AIR 1917 Pat 696 (696) : 2 Pat L Jour 149 (DB).
† ('30) 17 AIR 1930 Mad 577 (578) : 53 Mad 708 (DB).
[But see ('32) 19 AIR 1932 Bom 326 (327) (DB). (Money paid to nominee of decree-holder on his executing bond binding himself to repay it—No reference to interest made in bond—Nominee not liable to pay interest.)]

3. *See* ('37) 24 AIR 1937 Mad 229 (231). (*A* obtained decree against *B* and *C*—Both appealed and *B* deposited the decretal amount in Court—*A* withdrew the amount after furnishing sureties *E* and *F* who executed a bond to pay the amount personally or out of the property secured on condition of "defendants" succeeding in appeal. Only *B* succeeded in appeal and applied for restitution — *Held*, *E* and *F* could not be held liable as they had taken liability only on the condition of success of both the defendants.)

Note 29

1. ✠('84) 7 All 170 (173, 174) (FB). (Suit not barred.)
('85) 7 All 197 (199) (DB). (Restitution by way of mesne profits is only by way of suits.)
('85) 7 All 432 (433, 434) (DB). (Restitution directed by appellate decree—Separate suit is barred.)
('99) 21 All 1 (3) (DB). (Appellate Court decree directing restitution—Separate suit barred.)
(1900) 22 All 79 (80, 81) (DB). (Can apply in execution.)
('02) 24 All 361 (364) (DB). (Application for restitution disallowed—No appeal preferred — Separate suit barred.)
('03) 25 All 441 (442) (DB). (Separate suit is barred.)
('04) 26 All 149 (151) (DB). (Restitution due by virtue of reversal of rent decree — Both remedies are open.)
('06) 28 All 665 (667, 669) (DB). (Remedy is only by application.)
('07) 29 All 143 (144) (DB). (Suit not necessary.)
('91) 4 C P L R 167 (169). (Both remedies are open.)
('07) 29 All 348 (350) (DB). (Suit barred.)
('08) 30 All 476 (478) (DB). (Either remedy can be adopted.)
('89) 13 Bom 485 (487) (DB). (Separate suit is barred.)
† ('78) 3 Cal 30 (37, 38) (FB). (Remedy is by suit.)
('78) 4 Cal 625 (627) (DB). (Suit for mesne profits not barred.)
('86) 13 Cal 326 (330) (DB). (Separate suit lies to recover purchase money on reversal of decree under which sale in execution took place.)
† ('87) 14 Cal 605 (610) (DB). (*Quære* — Whether suit would lie.)

Sub-section (2) of the present section which has now been newly added, makes it clear that "no suit shall be instituted" for any relief *which could be claimed by way of application under sub-s. (1)*,[2] and even if a case does not fall within the strict terms of this section, the Court will not, in the interests of justice, be astute to force the parties to a separate suit.[3]

A suit, however, will *not* be barred in the following cases :

(1) Where restitution cannot be obtained by an application under S. 144 (1).[4]

(2) Where the relief claimed is *not properly consequential* on the variation or reversal of the decree[5] as in a case where the decree reversed is a mere *declaratory* decree.[6]

(3) Where the judgment-debtor seeks his remedy by an application under this section and on the objection of the defendant he is driven to a separate suit.[7]

The Nagpur Judicial Commissioner's Court holds that a suit which is barred under S. 144 (2) may nevertheless be converted into an application for restitution under S. 144 (1), for, the proceedings under S. 144 are in substance execution proceedings coming under S. 47 of the Code and under that section the suit can be treated as a proceeding.[8]

('87) 14 Cal 484 (485) (DB). (Court can give restitution in execution but separate suit is not barred.)
('94) 21 Cal 989 (993) (DB). (Separate suit not necessary.)
('95) 22 Cal 501 (506) (DB). (Suit is not barred.)
('06) 33 Cal 857 (860) (DB). (Suit not necessary.)
('08) 35 Cal 265 (270) (DB). (Suit not barred.)
('88) 11 Mad 261 (262) (DB). (Though suit is not barred remedy by application is not taken away.)
('93) 16 Mad 287 (289) (DB). (Suit is barred.)
('90) 13 Mad 437 (441) (DB). (Suit not barred)
('01) 24 Mad 341 (344, 345) (DB). (Restitution by award of mesne profits can be enforced by suit or in execution.)
('09) 31 All 364 (366) : 1 Ind Cas 744 (744) (DB). (Suit for possession from auction purchaser not barred.)
('09) 31 All 551 (556) : 36 Ind App 197 : 13 Oudh Cas 180 : 3 Ind Cas 798 (799) (PC). (Can be recovered in execution.)
('12) 16 Ind Cas 131 (132) (DB) (Cal). (Restitution can be had by summary process or by suit — No reference is found to this section.)
† (1865) 10 Moo Ind App 203 (211, 212) (PC). (Can be recovered in new suit or by summary process.)
('02) 6 Cal W N 710 (712) (DB). (Suit not barred— Restitution can be had in execution also.)
('79) 4 Cal L Rep 577 (578, 579) (DB). (Question must be decided in execution and not by separate suit.)
('96) 1896 Pun Re No. 82, p. 259 (260) (DB). (Suit is barred.)
(1865) 2 Suth W R 275 (275) (DB). (Separate suit is barred.)
(1865) 4 Suth W R 66 (66) (DB). (No separate suit.)
('70) 4 Beng L R (App) 64 (65) (DB). (Suit is barred.)
('75) 23 Suth W R 441 (442) (DB). (Can proceed in execution—Case was under Act XXIII of 1861.)

2. ('41) 45 Cal W N 346 (347). (Proceedings for possession under S 26G of Bengal Tenancy Act.)
('12) 13 Ind Cas 179 (180) (DB) (Mad).
('19) 6 AIR 1919 All 212 (213) (DB).
('22) 9 AIR 1922 All 71 (72) : 44 All 283 (DB).
† ('31) 18 AIR 1931 Mad 713 (714) (DB).
('27) 14 AIR 1927 Nag 373 (374).
('31) 18 AIR 1931 Cal 14 (15) (DB).
('34) 21 AIR 1934 Lah 991 (992) (DB). (Application for mesne profits.)

3. ('38) 25 AIR 1938 Pat 468 (470). (Restitution under inherent power.)
('12) 17 Ind Cas 121 (123) (DB) (Cal).

4. † ('22) 9 AIR 1922 All 465 (467) : 44 All 687 (DB). (Suit for damages for bringing a false suit.)
('10) 6 Ind Cas 648 (649) (Lah). (Pre-emption suit — Plaintiff's right to mesne profits from date of suit to his decree is not one of restitution but a claim to compensation — Right can be enforced only by suit.)
('16) 3 AIR 1916 Pat 299 (300) : 1 Pat L Jour 43 (DB). (*Ex parte* decree set aside by the Court passing it—Suit is maintainable.)
('37) 24 AIR 1937 Mad 315 (316). (Party taking possession of property unlawfully in pursuance of injunction order — No delivery through Court — Application for restitution not maintainable — Remedy is suit.)

5. ('22) 9 AIR 1922 All 465 (467): 44 All 687 (DB).
('31) 18 AIR 1931 Cal 517 (517) : 58 Cal 465. (Sale set aside under O. 21 R. 90 — Restitution of property ordered under inherent powers and not under this section—No bar of suit for mesne profits.)
† ('39) 26 AIR 1939 All 66 (69) : I L R (1939) All 103 (DB).

6. ('22) 9 AIR 1922 All 465 (467): 44 All 687 (DB).
('69) 12 Suth W R 411 (412) (DB). (Case under the Code of 1859.)
('39) 26 AIR 1939 All 66 (69) : I L R (1939) All 103 (DB).

7. ('16) 3 AIR 1916 Mad 745 (746) : 38 Mad 36 : 17 Ind Cas 420 (421) (DB).

8. ('22) 9 AIR 1922 Nag 198 (199) : 16 Nag L R 204.

30. Nature of proceedings under the section. — Proceedings under S. 583 of the old Code were proceedings in *execution* of the appellate decree[1] though section 244 (now S. 47) was held not to apply in its entirety to such proceedings.[2]

The present section has given rise to a conflict of opinion as to whether proceedings thereunder are proceedings in execution are not. The Allahabad, Calcutta, Lahore and Nagpur High Courts hold that they are not,[3] though the Allahabad and Lahore High Courts hold that they are in the *nature* of execution proceedings.[4] On the other hand the Bombay, Madras, Patna and Rangoon High Courts and the Oudh Judicial Commissioner's Court hold that the proceedings *are* proceedings in execution.[5]

If the application is one in execution, then section 141 would not apply thereto. Otherwise it would apply and an application under S. 144 dismissed for default may be restored by applying O. 9 R. 9 thereto.[6]

The nature of proceedings becomes important also where the question is whether Art. 181 or Art. 182 of the Limitation Act applies to such proceedings, and whether the

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Note 30

1. ('97) 20 Mad 448 (449) (DB).
† ('09) 31 All 551 (556): 36 Ind App 197: 13 Oudh Cas 180: 3 Ind Cas 798 (799) (PC).
('99) 22 All 79 (80, 81) (DB).
[*See also* ('07) 6 Cal L Jour 102 (104) (DB).
('97) 1 Cal W N 656 (657) (DB).]

2. ('08) 35 Cal 265 (269) (DB).

3. ('42) 29 AIR 1942 All 85 (87, 88) : ILR (1941) All 807 (DB).
('41) 28 AIR 1941 Nag 313 (316) : ILR (1941) Nag 662 (DB).
('32) 19 AIR 1932 Cal 308 (309) : 59 Cal 337 (DB).
† ('22) 9 AIR 1922 All 223 (226): 44 All 407 (DB).
('25) 12 AIR 1925 All 137 (138) : 47 All 98.
('21) 8 AIR 1921 All 321 (323) (DB). (Forms under O. 21 ought not to be used in proceedings for restitution.)
('22) 9 AIR 1922 All 238 (238) : 44 All 555 (DB).
('14) 1 AIR 1914 Lah 415 (416) : 1913 Pun Re No. 110 (DB).
† ('26) 13 AIR 1926 Lah 685 (686).
('24) 11 AIR 1924 Lah 166 (167).
('18) 5 AIR 1918 Lah 378 (379, 380) : 1918 Pun Re No. 67 (DB).
('38) 25 AIR 1938 Lah 456 (457).
('39) 26 AIR 1939 Cal 612 (613) : 43 Cal W N 859 (861).
✠ ('39) 26 AIR 1939 All 66 (67) : ILR (1939) All 103 (DB).
('35) 22 AIR 1935 All 195 (196).
('37) 24 AIR 1937 Cal 152 (154, 155) : ILR (1937) 1 Cal 637 (DB).
('37) 24 AIR 1937 All 515 (519) : ILR (1937) All 670 (DB). (AIR 1934 All 626 : 57 All 26 (FB) followed.)
('35) 22 AIR 1935 Nag 76 (77).
('21) 8 AIR 1921 Nag 112 (113) : 17 Nag L R 62.
[*See* ('35) 22 AIR 1935 All 126 (127). (Restitution is converse of idea embodied in S. 47.)]
[But see ('23) 10 AIR 1923 Nag 101 (101) : 18 Nag L R 200.]

4. ('22) 9 AIR 1922 All 238 (238) : 44 All 555 (DB).
('18) 5 AIR 1918 Lah 378 (379, 380) : 1918 Pun Re No. 67 (DB).

5. ('21) 8 AIR 1921 Bom 67 (67) : 45 Bom 1137 (DB).
† ('33) 20 AIR 1933 Rang 180 (183): 11 Rang 275 (DB).
('17) 4 AIR 1917 Bom 210 (211): 41 Bom 625 (DB).
† ('26) 13 AIR 1926 Mad 813 (814).
('17) 4 AIR 1917 Mad 194 (195) (DB).
('17) 4 AIR 1917 Mad 185 (185) : 40 Mad 780 (DB).
('16) 3 AIR 1916 Mad 1204 (1205) (DB). (Case decided with reference to S. 583 (old Code).)
('26) 13 AIR 1926 Oudh 199 (199, 200) : 1 Luck 40 (DB).
('37) 24 AIR 1937 Mad 150 (150).
('36) 23 AIR 1936 Oudh 185 (188) : 12 Luck 52 (DB).
✠ ('34) 21 AIR 1934 Pat 246 (248, 251, 253) : 13 Pat 411 (FB). (Overruling AIR 1925 Pat 1 : 3 Pat 371 (FB) and AIR 1928 Pat 598 : 7 Pat 794.)
[*See* ('37) 24 AIR 1937 Mad 173 (175, 176). (Application for restitution may be made in such manner as the nature of each case might require and need not follow in every case the procedure in O. 21 R. 11, C. P. Code.)]
[But see ('41) 28 AIR 1941 Oudh 297 (298) : 16 Luck 591 (DB). (The proceedings on an application under S. 144 are not proceedings in execution to which the provisions of sub-ss. (2) and (3) of S. 7 of U. P. Encumbered Estates Act would be applicable, but rather proceedings to which the provisions of cl. (b) of sub-s. (1) of S. 7 must be applied.)
('39) 26 AIR 1939 Rang 32 (34) : 1938 Rang L R 635 (DB).
('15) 2 AIR 1915 Low Bur 141 (142): 8 Low Bur Rul 262.
('30) 17 AIR 1930 Rang 241 (242, 243) : 8 Rang 271.]

6. ('22) 9 AIR 1922 All 223 (226) : 44 All 407 (DB). (This case however did not consider the question whether a proceeding under this section is in the nature of an original proceeding to which alone S. 141 has been held to be applicable by the Privy Council in 17 All 106: 22 Ind App 44 (PC). See notes on Section 141.)

court-fee payable on the memorandum of appeal from an order under this section is to be *ad valorem* under Sch. I, Art. 1 of the Court-fees Act, or under Sch. II, Art. 11 thereof.

The adjustment of a claim for restitution before it has been ordered by the Court is not the adjustment of a decree.[7]

Where the claim in an application for restitution is for money, the claim is one for a *debt* and hence a succession certificate is necessary for such application by the heir of the successful party.[8]

See also Notes 31, 32 and 33.

31. Appeal — Tenability of. — The determination of a question under this section has been *expressly* declared to be a decree under S. 2 (2) and is appealable as such under S. 96.[1] But does an adjudication in an application for restitution *not falling* within S. 144 amount to a decree? There is a difference of opinion on this point. The Calcutta High Court holds that it is a decree under S. 2 (2).[2] The Patna High Court holds that it is not,[3] while Mr. Justice Chapman of the same Court has expressed an *obiter dictum* in the undermentioned case[4] that it will amount to a decree. The Nagpur High Court has held that an order for restitution under S. 151 is appealable on the analogy of an order under this section.[5] The Madras High Court has held that an order for restitution made as between the parties to the suit would be appealable as falling under S. 47 though it is not covered by this section.[6] The Lahore High Court[7] and the Oudh Chief Court[8] have held that an order for restitution under S. 151 is not appealable.

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7. † ('36) 23 AIR 1936 Mad 840 (841).
8. ('42) 29 AIR 1942 Mad 445 (445) (DB).

Note 31

1. ('41) 28 AIR 1941 Nag 313 (313) : ILR (1941) Nag 662 (DB).
('24) 11 AIR 1924 All 64 (65). (Decision wrong as being under S. 144—Appeal lies.)
('32) 19 AIR 1932 Pat 317 (319): 11 Pat 553 (DB). (Decision on the footing that S. 144 was applicable — Appellate Court finding that matter is not governed by S. 144—Appeal lies.)
† ('34) 21 AIR 1934 Pat 109 (109) : 13 Pat 108 (DB). (Order for restitution by delivery of possession—Obstruction by stranger—Application under O. 21 R. 97 to remove obstruction dismissed—The order is still one under this section and an appeal lies.)
('24) 11 AIR 1924 Nag 328 (330) :20 Nag L R 170.
('15) 2 AIR 1915 Cal 530 (531) (DB).
('12) 14 Ind Cas 836 (836) (DB) (Mad).
† ('25) 12 A I R 1925 Cal 102 (103) (DB). (No distinction between a decree in suit and a decree in a proceeding under this section.)
('14) 1 AIR 1914 Mad 328 (329):38 Mad 1120 (DB). (Order for restitution is tantamount to a decree.)
('35) 22 AIR 1935 All 873 (875).
[*See also* ('98) 8 Mad L Jour 276 (277). (Case under old Code.)]
2. † ('27) 14 AIR 1927 Cal 285 (286) (DB).
[But see ('37) 24 A I R 1937 Cal 152 (155, 156) : ILR (1937) 1 Cal 637 (DB). (Order under S. 151 is not appealable — An appeal may, however, lie if the order passed under S. 151 is one which in substance comes under S. 47 or S. 144 of the Code: AIR 1931 Cal 779, explained.)]
3. ('17) 4 AIR 1917 Pat 495 (497) : 2 Pat L Jour 361 (DB).
('30) 17 AIR 1930 Pat 280 (282) : 9 Pat 685 (DB).
† ('38) 25 AIR 1938 Pat 447 (449). (Order of restitution under S. 151 is not appealable.)
4. ('18) 5 AIR 1918 Pat 52 (53) : 2 Pat L Jour 206 (DB).
[*See also* ('38) 1938 Pat W N 310 (311). (*Held* that the Court having decided the rights of the parties and in effect given a decree which was capable of execution, the order was appealable, though it was styled as falling under S. 144 or S. 151 or under both Sections 144 and 151.)]
5. ('43) 30 A I R 1943 Nag 172 (174). (Supratdar returning property to successful objector on orders of Court—Application by him against decree-holder for costs of custody and transport — Order on, is appealable.)
('40) 27 AIR 1940 Nag 349 (352) : ILR (1940) Nag 538 (DB). (*Obiter.*)
† ('38) 25 A I R 1938 Nag 326 (328) : ILR (1939) Nag 350 (DB). (If the inherent powers are used to expand a remedy in order to do justice to cover a case not within the exact words of but within the purpose of a procedural section, the Court is in effect using its inherent powers to act as if the orders were made under the section in question. In such a case, even justice demands that one side should be given a remedy and other side should, as a matter of justice, be allowed the right to appeal that would have existed had a particular section really applied instead of its being applied by means of a fiction.)
6. ('36) 23 AIR 1936 Mad 636 (638).
7. ('40) 27 AIR 1940 Lah 59 (61) (DB).
('39) 26 AIR 1939 Lah 508 (508) (DB). (But memorandum of appeal was treated as petition for revision.)
8. ('39) 26 AIR 1939 Oudh 273 (275) (DB).

The decision in order to constitute a determination of a question under this section and therefore a decree, must have been one *on the merits* of the application and must not relate to matters *incidentally* connected with or *collateral* to the decision of any such question.[9]

An order dismissing an application for restitution on the ground that the applicant had already obtained restitution[10] or an order holding that the application is not time-barred[11] are not decisions on the merits and therefore are not decrees which are appealable. But it has been held that the *rejection* of a prayer for restitution under this section amounts to a determination of a question under this section.[12] It has been held by the Rangoon High Court that an order on an application on the original side of the High Court under this section is not a "judgment" within the meaning of clause 13 of the Letters Patent of the Rangoon High Court and hence is not appealable.[13]

32. Court-fee. — The Court-fee payable on a memorandum of appeal against an order under S. 144 depends upon the question whether such an application is one for execution, discharge or satisfaction of the decree within the meaning of S. 47 of the Code.

Under the Court-fees Act, 1870, the Court-fee payable on memorandum of appeal against *decrees* is *ad valorem* under Sch. I Art. 1 thereof. But under S. 35 of the Act, the Provincial Governments have directed that the fee payable on appeals from orders under S. 47 of the Code [which are "decrees" under S. 2 (2) of the Code] shall be limited to the amounts chargeable with a *fixed* fee under Art. 11, Sch. II of that Act.[1]

If an order under S. 144 is therefore considered to be one under S. 47, then the fee chargeable is that under Art. 11 Sch. II of the Court-fees Act. If not, it will be payable as on an appeal from a decree *ad valorem* under Art. 1 of Sch I of the Act, on the amount dealt with by the order.

There is a conflict of decisions as to whether an order under this section is to be considered as one under S. 47 for purposes of court-fees. According to the High Courts of Madras,[2] Patna[3] and Lahore,[4] such an order is to be treated as falling under S. 47 for purposes of court-fees. But the contrary view has been held by the High Courts of Allahabad,[5] Calcutta,[6] Nagpur[7] and Rangoon[8] according to which an appeal from such an order must be stamped with *ad valorem* court-fee.

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9. † ('14) 1 A I R 1914 Lah 415 (416) : 1913 Pun Re No. 110 (DB). (The question of limitation is collateral to the merits of the application.)
('33) 20 AIR 1933 Pat 498 (499)(DB). (Preliminary objection to application that it is barred by limitation — Court holding that it is not barred — No appeal lies against the order.)
10. ('14) 1 A I R 1914 Lah 9 (11) : 1914 Pun Re No. 10 : 20 Ind Cas 203 (205) (DB).
11. ('14) 1 A I R 1914 Lah 415 (416) : 1913 Pun Re No. 110 (DB).
12. ('36) 23 AIR 1936 Cal 812 (812).
13. ('38) 25 AIR 1938 Rang 446 (446) (DB).

Note 32

1. *See* (1) Calcutta High Court Civil Rules and Orders, Vol I, Rule 688 (A) (3) ; (2) Madras Government Notification No. 358, dated 11th October 1921 (Fort St. George Gazette, pp. 1008-1011); (3) Bombay Government Notification No. 590, dated 22nd September 1921 (Bombay Government Gazette, pp. 2271 to 2274); (4) U. P. Government Notification No. M. 600/X-501 dated 25th March 1942; (5) Bihar and Orissa Government Notification No.2576-L A 25, dated 5th December 1921 (Bihar and Orissa Gazette dated 7-12-1921.)
2. ('23) 10 AIR 1923 Mad 270 (271).
3. ('17) 1 Pat L W 150*n*.
('25) 12 AIR 1925 Pat 577 (580) : 4 Pat 249.
4. ('27) 14 AIR 1927 Lah 635 (636).
('28) 15 AIR 1928 Lah 143 (143, 144).
[But see ('30) 17 AIR 1930 Lah 24 (25).]
5. ('01) 1901 All W N 180 (182).
('25) 12 AIR 1925 All 137 (138) : 47 All 98.
6. ('37) 24 AIR 1937 Cal 152 (155) : I L R (1937) 1 Cal 637 (DB). (Even application for restitution under S. 151 requires *ad valorem* court-fee.)
('38) 42 Cal W N 152 (154).
[But see ('18) 5 AIR 1918 Cal 335 (335).
('10) 6 Ind Cas 125 (125) (DB) (Cal).]
7. ('41) 28 AIR 1941 Nag 313 (316) : I L R (1941) Nag 662 (DB). (AIR 1922 Nag 62 : 18 Nag L R 15, Overruled.)
8. ('30) 17 AIR 1930 Rang 241 (243) : 8 Rang 271.
('39) 26 AIR 1939 Rang 32 (33, 34) : 1938 Rang L R 635 (DB).
[But see ('33) 20 AIR 1933 Rang 180 (183) : 11 Rang 275 (DB).]

33. Limitation.—There is a great divergence of judicial opinion as to whether Art. 181 or Art. 182 of the Limitation Act applies to an application for restitution under this section. See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 181, Note 7 and Art. 183, Note 4.

34. Inherent power of Court to grant restitution. — It has already been seen in Note 2 that this section does not confer any *new* rights which a successful party did not possess otherwise than under the general law.[1] The jurisdiction to make restitution is *inherent* in every Court and will be exercised whenever the justice of the case demands it.[2]

Note 34

1. ('12) 16 Ind Cas 966 (966) (DB) (Cal).
2. ('43) 30 AIR 1943 Nag 172 (174). (Property of judgment-debtor attached—Property made over to supratdar — Judgment-debtors' mother claiming property as her own—Objection allowed and under order of Court supratdar restoring property to objector—Supratdar claiming costs of bringing property to Court at instance of decree-holder and of taking back again when decree-holder declined to accept it—*Held* supratdar was entitled to restitution under S. 151.)
('42) 29 AIR 1942 Nag 132 (133). (Attachment by creditor of debtor's property—Insolvency Court asking to deliver property to *interim* receiver — Petition allowed to be withdrawn under S. 14, Provincial Insolvency Act—Insolvency Court must return property not to debtor but to executing Court.)
('41) 28 AIR 1941 P C 128 (129) : 21 Pat 243 : ILR (1941) Kar P C 150 (PC). (Restoration of possession held not necessary in this case as the successful party was a trespasser.)
('41) 28 AIR 1941 Pat 577 (581) : 20 Pat 346 (DB).
('40) 27 AIR 1940 Lah 59 (60, 61) (DB). (Reversal of order—Inherent power of restitution can be exercised.)
('38) 25 AIR 1938 Lah 833 (833). (A surety who is a party to an order holding him liable for payment to the decree-holder can, on reversal of that order on appeal, apply to the Court for restitution under the inherent jurisdiction of the Court, apart from Section 144.)
('38) 25 AIR 1938 Pat 468 (469). (The fact that a suit is maintainable at the instance of the party is no ground for refusing redress under S. 151.)
('31) 18 AIR 1931 Cal 42 (45) (DB).
('25) 12 AIR 1925 Cal 1145 (1145, 1146).
('20) 7 AIR 1920 Cal 438 (439) (DB). (Execution taken out without deducting amount of cross-decree —Court has inherent power to compel refund of excess amount recovered.)
('13) 19 Ind Cas 439 (439) (Lah). (Refund of money by decree-holder to auction purchaser on sale being set aside.)
('24) 11 AIR 1924 All 718 (718, 719) : 46 All 767 (DB). (Costs disallowed as being not necessary for the ends of justice.)
† ('32) 19 AIR 1932 Cal 29 (31) : 58 Cal 1070 (DB). (*Ex parte* decree set aside—Restitution under inherent powers of Court.)
('33) 20 AIR 1933 All 117 (118) (DB). (Provincial Insolvency Act, 1920, S. 5—Adjudication annulled yet distribution ordered—Order set aside — Payments under distribution order can be ordered to be refunded.)
('33) 20 AIR 1933 All 218 (221) : 55 All 221 (DB). (Decree rendered inoperative in a separate suit—Restitution may be granted under inherent powers though the terms of this Section do not apply.)
† ('34) 21 AIR 1934 Mad 320 (322) : 57 Mad 849 (DB). (Money improperly drawn out under decree —Permission to draw subject to execution of bond undertaking to repay—Court has inherent power to accord restitution.)
('34) 21 AIR 1934 Lah 322 (323). (Mesne profits not granted as possession was not wrongful.)
('34) 21 AIR 1934 Pat 150 (151) (DB).
('71) 7 Moo P C (N S) 314 (PC).
('26) 13 AIR 1926 All 274 (276). (Sale under prior mortgage decree—Subsequent sale under decree on subsequent mortgage to which the prior decree-holder and purchaser were parties — Court can order refund of the money received from the latter by the former.)
('11) 35 Bom 255 (258) : 10 Ind Cas 818 (819) (DB). (Refund of money wrongly taken from Court.)
('13) 18 Ind Cas 144 (144) (Low Bur). (Property sold in execution held not liable for attachment in claim suit—Court can order restitution to successful claimant.)
† ('87) 14 Cal 484 (486) (DB).
('14) 1 AIR 1914 Cal 692 (692) (DB). (Sale set aside on ground of fraud—Court has inherent power to grant mesne profits from auction purchaser.)
('05) 2 Cal L Jour 537 (539, 540) (DB). (Decree for confirmation of possession only — Decree-holder obtaining possession in execution—Court can grant restitution under its inherent powers.)
('06) 33 Cal 927 (932, 934). (Respondent may be ordered to furnish security pending appeal.)
('06) 3 Cal L Jour 181 (182) (DB). (*Ex parte* decree set aside—Court has inherent power to order restitution.)
('07) 6 Cal L Jour 662 (666) (DB).
('16) 3 AIR 1916 Cal 241 (244) : 43 Cal 269 (DB). (Money deposited in Court wrongly withdrawn — Court has inherent power to order restitution.)
('26) 13 AIR 1926 Lah 685 (687).
✠ ('22) 9 AIR 1922 P C 269 (271) : 49 Ind App 351 : 2 Pat 10 (PC). (Auction sale—Deposit of price by purchaser and subsequent discharge of incumbrance — Sale set aside — Judgment-debtor must refund deposit before claiming restoration of possession.)

Such powers will be exercised, where an application is not strictly within this section,[3]

('16) 3 AIR 1916 Cal 264 (265) (DB). (Return of money taken from Court.)
('14) 1 A I R 1914 Cal 718 (719). (Auction sale — Court can order both judgment-debtor and decree-holder to return moneys taken from Court and pay it back to the purchaser.)
† ('22) 9 AIR 1922 Cal 28 (29, 30) (DB). (Re-call of money improperly paid out of Court.)
('66) 1866 Beng L R Sup Vol 605 (607) (FB).
('17) 4 A I R 1917 Lah 426 (428) : 1917 Pun Re No. 61.
('18) 5 AIR 1918 Mad 511 (512):41 Mad 316 (DB). (Interest was ordered to be paid.)
('28) 15 AIR 1928 Mad 945 (947) (DB).
('08) 11 Oudh Cas 235 (236) (DB). (Mesne profits can be ordered.)
('23) 10 AIR 1923 Oudh 16 (17). (Execution wrongly ordered by Court.)
('17) 4 AIR 1917 Pat 495 (497) : 2 Pat L Jour 361 (DB). (Sale set aside by first Court but upheld on appeal — Purchase money withdrawn by auction purchaser on the setting aside of the sale can be recalled after the appellate order.)
('24) 11 AIR 1924 Pat 800 (801) (DB). (Executing Court delivering possession by wrong interpretation of decree — High Court holding interpretation to be erroneous—Court has inherent power to restore possession.)
('18) 46 Ind Cas 475 (476) (Rev) (Bur).
('24) 11 AIR 1924 Rang 181(181): 1 Rang 770(DB).
('07) 29 All 143 (144) (DB).
('02) 6 Cal W N 710 (712) (DB).
('06) 28 All 665 (669) (DB). (Return of the property and mesne profits.)
('37) 24 A I R 1937 Mad 178 (179) (DB). (Trial Court ordering defendant in pauper suit to pay court-fee—Appellate Court reversing order — Application claiming interest on refund of court-fee paid in trial Court in pauper suit is one under Section 151.)
('38) 25 AIR 1938 Oudh 221 (223, 224) : 14 Luck 186. (Though S. 144 does not in terms apply to processes issued in contravention of the terms of S. 7 (1) (a), U. P. Encumbered Estates Act, such processes can be set aside under the provisions of S. 151, C. P. Code.)
† ('38) 25 AIR 1938 Oudh 169 (170): 14 Luck 106 (DB).
('38) 25 AIR 1938 Pat 447 (448). (Third party claimant establishing title to property sold in execution —Order of Court directing decree-holder to restore purchase-money to auction purchaser comes under Section 151.)
('37) 24 AIR 1937 All 232 (234). (Restitution can be granted under S. 151, C. P. C., if it cannot be obtained in any other way.)
('39) 26 AIR 1939 All 66 (69) : ILR (1939) All 103 (DB).
('36) 23 AIR 1936 Mad 636 (639). (Dispute between parties regarding land—Court intervening and issuing notice under S. 145, Cr. P. C. — Receiver appointed—Plaintiff getting possession from receiver for cultivation and putting himself under direction of court as regards disposal of money realized from cultivation — Plaintiff getting possession in subsequent decree by Court — Decree set aside on appeal — Court held could pass just and proper orders for disposal of profits accrued to plaintiff.)
† ('35) 22 AIR 1935 Mad 783 (783) (DB). (Insolvency of mortgagor—Payment by Official Receiver to first mortgagee—Objection by second mortgagee to rate of interest upheld on appeal — Court has power to order refund of excess payment.)
('35) 22 AIR 1935 Cal 90 (90) (DB).
[*See* ('08) 4 Low Bur Rul 263 (264).
('32) 19 AIR 1932 Bom 428 (429). (Party obtaining copies from Banks under the Bankers' Books Evidence Act by order of Court — Order subsequently vacated—Court ordered restitution of the copies to the Banks.)]
[*See also* ('95) 22 Cal 501 (504) (DB).].

3. ('42) 29 AIR 1942 Mad 472 (474) : ILR (1942) Mad 949 (DB). (*P* obtaining mortgage decree against *D* and in execution putting mortgaged property to sale and purchasing it himself—On deposit by *D* under O. 21, R. 89 sale set aside — *T* who held decree against *P* attaching portion of deposit and obtaining payment—Mortgage decree set aside on appeal by *D*—Court held could order restitution by ordering *T* to refund amounts withdrawn.)
('30) 17 AIR 1930 Pat 280 (281, 282) : 9 Pat 685 (DB). (Execution sale set aside under O. 21 R. 90 —Application for restitution comes under S. 151.)
('25) 12 AIR 1925 Mad 365 (366).
('33) 20 AIR 1933 Pat 564 (566) (DB).
('21) 8 AIR 1921 Nag 112 (113) : 17 Nag L R 62.
('27) 14 AIR 1927 Lah 635 (637). (Power of restitution is not limited to S. 144.)
('24) 11 AIR 1924 Lah 583 (584). (Power to grant restitution is not confined to this section.)
† ('21) 63 Ind Cas 43 (44) (DB) (Lah). (Decree for possession — Execution stayed pending appeal — Appeal dismissed—Court can award mesne profits for the period the decree-holder was kept out of possession due to stay order.)
('30) 17 AIR 1930 Pat 473 (476) (DB). (Court exercised inherent jurisdiction to restore the heirs to possession when possession was taken without notice to them.)
† ('31) 18 AIR 1931 Cal 779 (780) (DB). (Restitution under inherent jurisdiction, sale being set aside under O. 21 R. 92.)
('27) 14 AIR 1927 Lah 346 (347). (Mesne profits from date of decree up to the disposal of appeal can be granted in exercise of inherent power.)
('24) 11 AIR 1924 Rang 181 (181) : 1 Rang 770 (DB).
('06) 33 Cal 927 (932) (DB).
† ('22) 9 AIR 1922 Cal 28 (29, 30) (DB).
('35) 22 AIR 1935 Cal 90 (90) (DB). (Section 144 is not exhaustive—Court has inherent power to pass such order as to do effective and complete justice between parties.)
('35) 22 AIR 1935 Mad 783 (783). (Variation or reversal of order—Restitution can be ordered under inherent power.)
('37) 24 AIR 1937 Mad 95 (96).
('34) 21 AIR 1934 Lah 1023 (1024). (Court has inherent power to grant restitution apart from Section 144.)

either under S. 151 or S. 47 of the Code.[4]

Illustrations.

1. *A* purchases a property in a sale held in execution of a decree and obtains possession thereof. On the application of *B*, the judgment-debtor, the sale is set aside. *B* applies for restitution of possession and mesne profits from *A*. Does the application lie under Section 144? No : for, no *decree* has been varied or reversed. But the restitution can be granted under Section 151,[5] on the principle that an erroneous act of the Court should not be allowed to do injury to the suitors.[6]

2. *A* obtains a decree against *B* and recovers the money due under the decree by execution. Subsequently it appears to the Court that *B* was dead at the time of the institution of the suit. The decree is a nullity and the Court, having levied execution while there was legally no decree, has inherent power to rectify the mistake and order restitution.[7]

There is one distinction between the exercise of the powers under S. 144 and the exercise of the Court's inherent jurisdiction. While the section is mandatory the exercise of the power under S. 151 depends upon the *discretion* of the Court which will be used only in the interests of justice.[8]

The inherent powers of a Court do not extend to convert an application which has nothing to do with restitution into one for restitution.[9] Nor does it extend to ordering

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('39) 26 AIR 1939 All 66 (69) : ILR(1939) All 103 (DB). (But where the relief claimed is not really restitution and can appropriately be claimed in a suit, recourse cannot be had to the inherent powers.)

('39) 26 AIR 1939 Nag 101 (102) : ILR (1939) Nag 492. (Suit remanded — Meanwhile in execution defendant depositing sum which plaintiff withdrew — Fresh decree for lesser amount passed on remand — Defendant applying for refund of surplus — Refund held could be granted under S. 151.)

('37) 24 AIR 1937 Mad 150 (151). (*Ex parte* decree set aside and retrial ordered—Execution taken out by mortgagee decree-holder prior to retrial—New decree awarding amount less than that realized by sale—Restitution granted under S. 151, C. P. C.—The setting aside of *ex parte* decree does not amount to reversal or variation nor does the new decree passed after retrial amount to reversal or variation of the original decree as that decree has been already set aside.)

[*See* ('14) 1 AIR 1914 Lah 9 (11) : 1914 Pun Re No. 10 : 20 Ind Cas 203 (205) (DB).

('10) 6 Ind Cas 508 (511, 512) (DB) (Cal).]

4. ('42) 29 AIR 1942 All 14 (16). (Reversed on another point in AIR 1943 All 267.)

† ('20) 7 AIR 1920 Bom 12 (12):44 Bom 702 (DB). (*Ex parte* decree set aside — Property must be restored whether under S. 47 or this section.)

('33) 20 AIR 1933 All 218 (221) : 55 All 221 (DB). (Power under S. 151 will be exercised where it is necessary for preventing injustice and where it does not contravene any statutory provision.)

('19) 6 AIR 1919 Bom 175 (176):43 Bom 235 (DB).

Also see S. 47 Note 60.

5. ('39) 26 AIR 1939 Lah 508 (508) (DB). (Order confirming execution sale set aside on appeal.)

('14) 1 AIR 1914 Cal 692 (692, 693) (DB).

('18) 5 AIR 1918 Pat 52 (53) : 2 Pat L Jour 206 (DB).

('94) 21 Cal 989 (997) (DB). (Mesne profits.)

('12) 14 Ind Cas 456 (457) (DB) (Cal).

('37) 24 AIR 1937 Mad 694 (695). (Mesne profits also can be awarded.)

[*See also* ('19) 6 AIR 1919 Bom 175 (176) : 43 Bom 235 (DB).

('36) 23 AIR 1936 Lah 497 (498,499). (Execution sale set aside—Court can order decree-holder to refund purchase money to auction purchaser.)]

6. † ('22) 9 AIR 1922 P C 269 (271) : 49 Ind App 351 : 2 Pat 210 (PC).

('02) 6 Cal W N 710 (712) (DB).

('22) 9 AIR 1922 Nag 82 (84) : 18 Nag L R 24.

7. ('33) 20 AIR 1933 Mad 888 (888). (Under S. 151, C. P. Code.)

8. ('17) 4 AIR 1917 Cal 188 (192) (DB). (But the test of what is just must be determined with reference to the imperative requirements of the law applicable to the subject-matter.)

('37) 24 AIR 1937 Mad 178 (179) (DB). (Interest refused in view of peculiar circumstances of the case.)

9. † ('17) 4 AIR 1917 Mad 453 (453) : 34 Ind Cas 774 (775) (DB).

[*See also* ('39) 26 AIR 1939 All 66 (69) : I L R (1939) All 103 (DB). (Where the relief claimed is not really restitution and can appropriately be claimed in a suit, recourse cannot be had to the inherent powers of the Court under S. 151.)

('37) 24 AIR 1937 Pat 647 (650) : 16 Pat 729 (DB). (Decree against Hindu father and sons based on compromise — Sale of family property in execution — Purchase by decree-holder — Full satisfaction of decree entered — Subsequent suit by sons to declare compromise decree not binding on them—Decree releasing half share in property — Decree and sale remaining as a whole — Application by decree-holder for compensation not maintainable — Doctrine of *caveat emptor* applied.)]

restitution against a person who is neither a party to nor bound by any order of the appellate or reversing Court.[10]

35. Revenue Court. — The jurisdiction to make restitution being inherent in all Courts, the principles of S. 144 will apply to Revenue Courts also.[1]

36. Revision. — No revision lies from an order on an application falling under S. 144, for such an order is *appealable* as a decree under S. 2 (2).[1] Where the Court refuses to order restitution in the exercise of its discretion in a case not falling within S. 144, the order is not open to revision.[2]

It has been seen in Note 31 that in cases of restitution not falling within S. 144 there is a difference of opinion as to whether the order made amounts to a "decree." Where the order is held not to amount to a decree and no other remedy is open, a revision will lie.[3]

Enforcement of liability of surety.

145. [S. 253.] Where any person has become liable as surety —

(*a*) for the performance of any decree[3] or any part thereof, or

(*b*) for the restitution of any property taken in execution of a decree,[4] or

(*c*) for the payment of any money,[5] or for the fulfilment of any condition imposed on any person,[6] under an order of the Court in any suit or in any proceedings consequent thereon,

the decree or order may be executed against him,[7] to the extent to which he has rendered himself personally liable,[8] in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal[12] be deemed a party within the meaning of section 47 :

Provided that such notice[14] as the Court in each case thinks sufficient has been given to the surety.

[1877, S. 253; 1859, S. 204; See S. 55 (4); O. 25 R. 1; O. 38 Rr. 2 and 5; O. 41 R. 10; O. 45 R. 7.]

Synopsis

1. Legislative changes.
2. Scope, applicability and object of the section.
2a. Security by person primarily responsible — Applicability of the section.
2b. Security in favour of the Court—Applicability of the section.
2c. "Has become liable as surety."
3. Security for the performance of any decree.
4. Security for restitution of property taken in execution of a decree — Clause (b).
5. Security for payment of money.
6. Security for fulfilment of any condition imposed on any person—Clause (c).
6a. Under an order of the Court—Clause (c).

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10. ('19) 6 AIR 1919 Mad 581 (581) : 41 Mad 467 (DB). (Order refusing to set aside execution sale reversed in appeal—Auction purchaser not party to proceedings — Claim to restitution not maintainable.)

Note 35

1. ('04) 26 All 149 (151, 152) (DB). (Restitution due in virtue of the modification in appeal of the decree of a Rent Court.)
('22) 9 AIR 1922 All 71 (72) : 44 All 283 (DB).
('67) 7 Suth W R 520 (521) (FB).
('90) 1890 Rent Act Rul No. 56. (1900 Jacob Reprint, page 84.)
† ('18) 46 Ind Cas 475 (476) (Rev) (Bur).

Note 36

1. See S. 115 of the Code and the Notes thereon.
('35) 22 AIR 1935 All 873 (875).
2. ('14) 1 AIR 1914 Lah 9 (11) : 1914 Pun Re No. 10 : 20 Ind Cas 203 (205) (DB).
3. ('02) 1902 Pun Re No. 76, page 301 (304).
('34) 21 AIR 1934 Lah 108 (108).
('67) 7 Suth W R 520 (521) (FB).
('85) 8 Mad 494 (495). (Order allowing interest.)

6b. "In any suit or in any proceedings consequent thereon."
7. "The decree or order may be executed against him."
8. "To the extent to which he has rendered himself personally liable."
9. Discharge of surety.
9a. Surety, if can recover sum forfeited.
10. Form of surety bond.
10a. Enforceability of surety bond in execution apart from the section.
11. Maintainability of separate suit by or against the surety.
12. Appeal.
13. Limitation.
14. Notice to surety.

NOTE to the Synopsis. See the Notes indicated for the following topics:

Appellate decree. See Note 3.
Enforcement of surety bond. See Notes 8 and 11.
Ex parte decree. See Note 3.
Liability of legal representative of surety. See Note 9.
Oral contract of suretyship. See Note 10.
Proceedings. See Note 9.
Refund of security money. See Notes 7 and 12.
Registration. See Note 10.
Revision. See Note 12.
Such person shall be deemed a party. See Note 12.
Surety bond — Whether to be in favour of Court. See Note 10.
Surety under adjustment. See Note 6.

1. Legislative changes. — The present section has altered the law in the following respects:

(1) The old section applied only to sureties for the performance of *decrees*. It did not apply to securities for the fulfilment of a condition imposed by an order of Court. It was also doubtful whether it applied to securities for the performance of appellate decrees and to securities for restitution of property taken in execution of a decree. It did not also apply to securities for payment of money which were not securities for the performance of decrees. The present section applies to all these kinds of securities.

(2) The word "personally" has been newly added in the present section before the word "liable."

(3) The competency of an appeal from an order under this section is made clearer by the provision as to the surety being deemed a "party" for purposes of appeal.

(4) Notice under the present section need not be in writing.

2. Scope, applicability and object of the section. — The object of this section is to provide a *summary remedy* for the enforcement of the liability of a surety who has given security for any of the purposes enumerated in the section. But for this section, the party for whose benefit the security has been given would have to file a separate *suit* to enforce the security. This section dispenses with the necessity of a suit and enables him to enforce the security by *execution proceedings* in the same manner as if the surety was a party to the decree or order in respect of which security has been given.[1] But the procedure provided by the section applies only to the extent to which the surety has rendered himself *personally* liable.

2a. Security by person primarily responsible — Applicability of the section. — A surety is one who takes upon himself, and guarantees the performance of, an

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Section 145 — Note 2

1. ('43) 30 AIR 1943 Mad 288 (291) : ILR (1943) Mad 509 (DB). (Object of S. 145, C. P. Code, appears to be twofold; it provides a summary remedy by way of an application available to the party entitled to enforce the surety bond and at the same time confers on the surety proceeded against a right of appeal as if he were a party within the meaning of S. 47, C. P. Code.)
('40) 27 AIR 1940 Mad 850 (852) (DB). (Surety can be proceeded against under S. 145 and not S. 144.)
('40) 1940 Nag L Jour 244 (245) (DB). (But for this section a suit would be necessary.)
('36) 23 AIR 1936 Lah 463 (464). (It does not matter that the name of the surety is not mentioned in the decree.)

obligation which rests primarily upon another. The surety's liability is an accessory one. Hence the section has no application unless the person sought to be proceeded against has taken upon himself the liability of *another*.[1] The liability need not be that of either the judgment-debtor or the decree-holder but it may be the liability of an officer of the Court.[2] Thus, this section applies to the enforcement of the liability of a person who has stood surety for a receiver.[3] See also Note 4.

2b. Security in favour of the Court — Applicability of the section. — The security under this section is intended to be given to some named officer or other individual and not to be a mere undertaking to the Court. The Court is not a juridical person. It cannot be sued. It cannot take property and as it cannot take property it cannot assign it.[1] Where therefore a security bond is executed in favour of the Court, this section has no application. But independently of this section it can be enforced by an order on an application to which the sureties are parties that the properties be sold unless, before a day named, the sureties find the money.[2]

In the undermentioned case[3] a security bond was executed in favour of a certificate officer under the Bengal Public Demands Recovery Act in respect of a debt due by a certificate debtor to a certificate holder. It was held that the certificate officer who was deemed to be a Court under S. 57 of the Act, could not maintain a suit on the surety bond, and that the certificate holder as the beneficiary under the bond could sue on it.

See also Note 11.

Note 2a

1. ('39) 26 AIR 1939 Cal 316 (319) (DB).
† ('16) 3 AIR 1916 Mad 521 (522) : 39 Mad 584 (DB).
('33) 20 AIR 1933 Mad 691 (693) : 56 Mad 989 (DB).
2. ('39) 26 AIR 1939 Cal 316 (319) (DB).
[*See* ('28) 15 AIR 1928 Nag 294 (294). (In this case it was only decided that in the particular circumstances of the case the surety was a surety for a party to the suit and so the objection that the surety was not a surety for a party was groundless. But the case does not decide the question whether this section will not apply unless the surety is a surety for a party to the suit.)
('16) 3 AIR 1916 Mad 521 (522) : 39 Mad 584 (DB). (The remark in this decision that the section contemplates proceedings against a third party who has given an undertaking for the due discharge of the obligations resting upon a party to the suit only means that the section does not apply to the enforcement of the liability of the person on whom the primary responsibility lies.)]
3. ('40) 27 AIR 1940 Rang 151 (151) (DB).
('15) 2 AIR 1915 Cal 331 (334) (DB).
('27) 14 AIR 1927 Rang 334 (334).
('20) 7 AIR 1920 Low Bur 58 (59) : 10 Low Bur Rul 236 (DB).

Note 2b

1. ('42) 29 AIR 1942 Lah 6 (10) (DB). (Correct course is to have a charge created either in favour of some actual person such as an officer of the Court or one of the parties.)
('39) 18 Pat 719 (722) (DB).
2. ('39) 18 Pat 719 (722) (DB). (Judgment-debtor passing security bond in favour of and in name of presiding officer of Court, hypothecating immovable property as security for satisfaction of decree —Decree-holder can enforce security bond and bring the properties to sale without his obtaining an assignment of the bond.)
† ('19) 6 AIR 1919 P C 55 (59) : 42 All 158 : 46 Ind App 228 (PC).
('33) 20 AIR 1933 Mad 691 (693) : 56 Mad 989 (DB).
('33) 20 AIR 1933 Mad 342 (342).
('34) 21 AIR 1934 Cal 64 (67) : 60 Cal 1298 (DB).
('34) 21 AIR 1934 Mad 186 (188, 189) : 57 Mad 688 (DB). (Assumed case.)
('34) 21 AIR 1934 Mad 262 (264) : 57 Mad 803 (DB).
('28) 15 AIR 1928 Bom 42 (47, 48) : 52 Bom 116 (DB).
('24) 11 AIR 1924 All 105 (107) : 45 All 649 (DB).
('26) 13 AIR 1926 All 657 (658).
('28) 15 AIR 1928 All 527 (529) : 51 All 346.
('29) 16 AIR 1929 Rang 126 (127) : 7 Rang 352 (DB).
('29) 16 AIR 1929 Lah 393 (394).
('27) 14 AIR 1927 Mad 416 (420) (DB).
† ('95) 17 All 99 (102).
('16) 3 AIR 1916 All 57 (59, 60) : 38 All 327 (DB).
('24) 11 AIR 1924 Cal 485 (486, 487) : 51 Cal 150 (DB). (The decision to the contrary in AIR 1919 Cal 773 is not good law.)
[*See also* ('36) 23 AIR 1936 Mad 589 (591). (The same procedure can be followed even where subsequent to the property being given as security, the property is alienated to a third party inasmuch as such alienation will be affected by the principle of *lis pendens*.)]
Also see O. 31 R. 14, Note 4.
3. ('37) 24 AIR 1937 Cal 625 (630) : ILR (1937) 2 Cal 698 (DB). (Certificate-holder's suit not barred by the principle in (1861) 30 L J Q B 265, Tweddle v. Atkinson.)

2c. "Has become liable as surety."—Where A was appointed commissioner to attach certain moveable property and keep it in custody and he after attaching such property locked the goods in a shop and appointed two watchmen to look after the shop and locks, it was held that the watchmen could not be said to have *become liable as sureties* and that this section did not apply.[1]

3. Security for the performance of any decree. — The old S. 253 used the words "whenever a person has *before* the passing of a decree *in an original suit* become liable as a surety," etc. Hence it did not apply to securities given *subsequent to the passing of a decree*[1] except when the bond expressly stipulated for its enforcement in execution.[2] There was also a conflict of views between the Calcutta and the other High Courts as to whether the section applied to *appellate* decrees.[3] The present section makes it clear that it applies to securities for the performance of *any* decree whether original or appellate, and to all securities whether given *before* or subsequent to the passing of a decree.[4] The words of the section are wide enough to cover a case where an *ex parte* decree is set aside on security being given for the performance of the decree that may be passed at the re-hearing.[5] See also the undermentioned case.[6]

4. Security for restitution of property taken in execution of a decree — Clause (b). — Where during the pendency of an appeal against a decree, the decree-holder wishes to execute the decree, he may be allowed to do so under O. 41 R. 6 on his furnishing security for restitution, in the event of the decree being reversed, of any property taken in execution. The security in such a case is really a security for the performance of the appellate decree. Under the present section such a security can be enforced in execution. But this was disputed under the former Code. See Note 3.

Note 2c

1. ('33) 20 AIR 1933 All 385 (386).

Note 3

1. ('86) 8 All 639 (641) (DB).
('81) 3 All 809 (811) (DB).
('84) 7 Mad 284 (287) (DB).
('08) 11 Oudh Cas 342 (343, 344).
('97) 19 All 247 (248) (DB).
('06) 30 Bom 506 (507) (DB).
('08) 1908 Pun Re No. 143, page 664 (665) : 1908 Pun W R No. 193, p. 722. (In this case the bond was held to fall within S. 336 (now S. 55) and enforceable under that section.)
('05) 1905 Pun Re No. 50, page 180 (181). (Bond under S. 337A (O. 21 R. 40) — Though the language of S. 204 of the Code of 1859 (now S. 145) did not require that security must have been given before the passing of a decree, the cases decided under that Code also held that the section did not apply to securities given subsequent to the passing of a decree.)
('71) 3 N W P H C R 88 (89) (DB).
('70) 13 Suth W R 35 (36) (DB).
('67) 7 Suth W R 329 (330) (DB).
('71) 1871 Pun Re No. 62, page 169 (170).
('76) 1876 Pun Re No. 75, page 154 (154) (DB).

2. ('06) 4 Cal L Jour 311 (316).

3. ('95) 22 Cal 25 (27, 28). (No.)
('95) 23 Cal 212 (216). (No.)
('88) 15 Cal 497 (501, 502). (No.)
('86) 12 Cal 402 (405, 406). (No—The words 'in an original suit' were not present in S. 204 of the Code of 1859—Hence that section was held applicable to sureties for the performance of appellate decrees, even by the Calcutta High Court.)
('78) 3 Cal L Rep 505 (507). (No.)
('78) 3 Cal 318 (319). (Bond given as security under S. 342 of 1859 Code (O. 41 R. 10) — Security can be enforced under S. 204 (S. 145).)
('72) 9 Beng L R App 17 (17). (By Act VIII of 1859 security for costs of appeal was expressly made realizable in execution.)
('88) 12 Bom 411 (415). (Yes.)
(1900) 25 Bom 409 (415). (Yes.)
('01) 3 Bom L R 549 (553). (Yes.)
('99) 23 Bom 478 (483). (Yes.)
('80) 2 All 604 (607) (FB). (Yes.)
('95) 17 All 99 (101, 102). (Yes.)
('09) 4 Ind Cas 1005 (1005) (Lah). (Yes.)
('06) 1906 Pun Re No. 109, page 387 (389) (FB). (This supersedes 1895 Pun Re No. 77 and 1886 Pun Re No. 109.)
('06) 1906 Pun Re No. 125, page 469 (470). (Yes.)
('07) 4 Low Bur Rul 197 (199). (Yes.)
('89) 13 Mad 1 (5, 6). (Yes.)
('14) 1 AIR 1914 Mad 328 (329) : 38 Mad 1120. (Dissenting from 15 Mad 203.)
[*See* ('89) 16 Cal 323 (325, 326).]

4. ('35) 22 AIR 1935 Lah 189 (190). (The expression "any decree" is wide enough to cover a decree that has already been passed as well as a decree that may be passed after the person concerned has become liable as surety.)

5. *See* ('89) 26 Cal 222 (224).

6. ('34) 21 AIR 1934 Mad 186 (189) : 57 Mad 688 (DB).

Where moveable property is attached under O. 21 R. 43 of the Code, and the attaching officer makes over such property to a third person on his passing a security bond for the production of such property in Court when called upon, it has been held by the High Court of Madras in the undermentioned cases[1] that S. 145, cl. (b) has no application to the case, the reason being that this clause is *prima facie* intended for cases in which restitution is sought against a *party* who has *taken the property in execution of the decree or order in his favour* and that the custodian of attached property under O. 21 R. 43 cannot be said to be a person who has "taken the property in execution of a decree." The Allahabad High Court has also held in the undermentioned cases[2] that this section does not apply to the enforcement of the security bond in such a case. The Madras High Court in a later case,[3] the Nagpur Judicial Commissioner's Court,[4] the Allahabad High Court in the undermentioned cases[5] and the Lahore High Court[6] have, on the other hand, held that section 145 will apply to such cases.

In the undermentioned case,[7] the Calcutta High Court pointed out that a surety is a person who guarantees the performance of an obligation by *another* and held that a person to whom moveable property attached in execution is handed over for safe custody will be liable to be proceeded against under this section as a surety only if the primary responsibility for producing the thing when required rests on another person, say the officer of the Court who has attached it, and not where the responsibility is only that of the person giving security for the safe custody of the property. It is submitted that this view is correct. (See Note 2a.)

See also Note 6a.

5. Security for payment of money. — See the following provisions of the Code under which such security is taken :

(1) *Section 55 sub-section (4)* — Security on behalf of judgment-debtor arrested in execution.
(2) *Order 25 Rule 1* — Security for costs of suit.
(3) *Order 32 Rule 8* — Security for costs by retiring next friend.
(4) *Order 38 Rule 2* — Security on behalf of person arrested before judgment.
(5) *Order 38 Rule 5* — Security in cases of attachment before judgment.
(6) *Order 41 Rule 10* — Security for costs of first appeal.
(7) *Order 45 Rule 7* — Security for costs of Privy Council appeal.

6. Security for fulfilment of any condition imposed on any person — Clause (c). — The old S. 253 applied only to securities for the performance of a *decree*. Hence it did not apply to securities for the fulfilment of a condition imposed upon a

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Note 4

1. ('20) 7 AIR 1920 Mad 321 (322) (DB).
('19) 6 AIR 1919 Mad 649 (649) (DB).
('26) 13 AIR 1926 Mad 1005 (1006) (DB).
2. ('35) 22 AIR 1935 All 767 (769). (AIR 1933 All 385 and A I R 1926 All 406 : 48 All 510 relied on.)
('20) 7 AIR 1920 All 245 (245) : 42 All 394.
3. ('33) 20 AIR 1933 Mad 219 (220).
4. † ('24) 11 AIR 1924 Nag 258 (262, 263):20 Nag L R 93 (DB). (Overruling AIR 1919 Nag 23 : 16 Nag L R 178 and 13 C P L R 104.)
[But see ('21) 8 AIR 1921 Nag 130 (131).]
5. ('21) 8 AIR 1921 All 220 (220, 221).
('29) 16 AIR 1929 All 266 (266, 267).
† ('31) 18 AIR 1931 All 567 (568, 571):54 All 263 (FB). Impliedly overruling A I R 1926 All 406 : 48 All 510.)
('36) 23 AIR 1936 All 555 (557) (DB).
6. ('28) 15 AIR 1928 Lah 181 (183) (DB).
('32) 136 Ind Cas 268 (269) (Lah).
('25) 12 AIR 1925 Lah 412 (413).
[But see ('27) 28 Pun L R 525 (533) (DB). (Supurdar is not a surety under Section 145.)
7. † ('39) 26 AIR 1939 Cal 316 (319) (DB).

person under an order of the Court. Thus, where certain documents were returned to the defendant in a suit on his furnishing security for their production in Court whenever required, it was held that the liability of the surety could not be enforced by summary proceedings under S. 253.[1] Similarly, where a judgment-debtor was arrested in execution of a decree but was released on security being given for his appearance in Court, it was held that S. 253 was not applicable to the case.[2] The decision in such cases would be different under the present Code.[3]

This section refers to a "condition imposed on any person" and not to "any other person" and is therefore applicable to a person who is a surety for himself just as much as to one who is a surety for some one else.[4]

6a. Under an order of the Court — Clause (c). — This clause will apply only where there is an *order of the Court* for the payment of money or for the fulfilment of any condition imposed on any person. Where the proceedings against the surety are not to enforce any decree or order of the Court, the section will not apply.[1] Where, under O. 21 R. 43, moveable property is attached and made over by the attaching officer to a third person on his passing a bond undertaking to produce the property in Court whenever required, it was held by the High Court of Madras in the undermentioned cases[2] that the liability of the surety arose not under any *order of the Court* but from an act of the attaching officer under an authority conferred on him by law, and that therefore the section did not apply to such cases. Without adverting to this aspect of the question, a later case of the same High Court has laid down that S. 145 will apply to such cases.[3]

It was also held by the High Court of Madras in the undermentioned cases[4] that the 'order' referred to was one *enforceable through execution by one party to the suit or proceeding against another party thereto* : where therefore security was given on behalf of the next friend of a minor under O. 32 R. 6 for withdrawing the latter's money from Court, it was held that it was not done under any order of the Court in favour of one party *enforceable against another party*, but under an order passed for the protection of the minor's interest against that minor's own next friend and that therefore S. 145 did not apply to the case. In another case,[5] however, where a next friend of a minor plaintiff applied for withdrawing the minor's money from Court to be utilized for purchasing Government Promissory Notes and depositing the same in Court and he was allowed to do so on security, it was held that S. 145 would apply and the security could be enforced in execution.

Where attached properties are released on security that they will be produced when called for, there is no order "for the payment of any money or for the fulfilment of any condition imposed on any person," the surety being liable to pay *owing to default*. The section does not apply to such a case.[6]

Note 6

1. ('99) 22 Mad 268 (269) (DB).
2. ('84) 7 Mad 273 (274) (DB).
('95) 19 Bom 694 (696) (DB).
(1900) 1900 All W N 156 (157) (DB).
[*See* ('70) 14 Suth W R 63 (65).]
3. ('17) 4 AIR 1917 Mad 237 (238). (Security under S. 55 (4) for production of judgment-debtor.)
4. ('31) 18 AIR 1931 Rang 65 (65).

Note 6a

1. ('33) 20 AIR 1933 All 269 (272) : 55 All 346 (FB).
2. ('26) 13 AIR 1926 Mad 1005 (1006) (DB).
('20) 7 AIR 1920 Mad 321 (322) (DB).
3. ('33) 20 AIR 1933 Mad 219 (220).
4. ('18) 5 AIR 1918 Mad 661 (663):41 Mad 40 (DB).
('34) 21 AIR 1934 Mad 262 (263) : 57 Mad 803 (DB).
[*See also* ('36) 23 AIR 1936 Mad 953 (954). (A bond given to the Judge of a Court in pursuance of an order of the Court under O. 32 R. 6, C. P. Code, must be enforced by a suit upon the bond —Such a bond is not enforceable by execution in the manner provided by Section 145, C.P. Code.)]
5. † ('33) 20 AIR 1933 Mad 678 (679): 56 Mad 687 (FB).
6. ('26) 13 AIR 1926 Mad 1005 (1006).
[*See also* ('33) 20 AIR 1933 Mad 342 (342).]

6b. "In any suit or in any proceedings consequent thereon." — The order imposing the condition must be passed "in any suit or any proceedings consequent thereon."[1] A proceeding for the grant of letters of administration though it may take the form of a suit is not a "suit or a proceeding consequent thereon." Hence, a surety under an administration bond does not come within the purview of this section.[2] But, can the section be applied by virtue of S. 141 of the Code to such proceedings? In the undermentioned case[3] Kennedy, J. C., was of the opinion that it could be, while Rupchand Bilaram, A. J. C., was of the opinion that it could not, on the ground that S. 145 deals with something more than mere *procedure*, that it confers a *substantive right* of making a person, not a party to a pending suit, amenable to the jurisdiction of the Court in execution proceedings and that it, therefore, could not be applied to proceedings other than suits. See S. 141, Note 7.

Where the judgment-debtor deposited the decree amount into Court and the next friend of the minor decree-holder applied for withdrawing the money and for re-depositing it in the form of Government Promissory Notes, it was held that such an application was a "proceeding consequent on the suit" and that a surety for such re-deposit can be proceeded against under this section.[4]

7. "The decree or order may be executed against him." — This section provides for the enforcement of the surety's liability by *execution* against the surety of the decree or order in connexion with which the security was given. But the Court is not *bound* to issue execution against the surety. It has a discretion to refuse such execution.[1] If execution is issued the Court cannot declare a forfeiture in favour of the Government but the security money should be paid to the decree-holder.[2] The decree-holder must apply it towards the satisfaction of his decree and is not entitled to it over and above the decree amount as a solatium for delay brought about in the execution of his decree.[3]

The mere fact that the applicant for execution mentions the breach of one condition in the security bond as having given him the right to apply for execution does not disentitle the Court from ordering execution if in the course of the proceedings it finds that some other condition has been broken.[4]

The legality of the order for security cannot be questioned by the surety in the execution proceedings against him under this section.[5]

The Court has no power under the section to order the refund of moneys deposited as security. But refund can be ordered under section 151.[6]

For the purpose of determining the *jurisdiction* of the Court to proceed against the surety, the same considerations will apply as if he were a *judgment-debtor* against whom a decree was being executed.[7] The section does not mean that the *application* for

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Note 6b

('25) 12 AIR 1925 Rang 135 (137):2 Rang 567 (DB).

1. ('28) 15 AIR 1928 Rang 249 (252):6 Rang 474. (The proceedings for the grant of letters of administration is not a suit.)
('26) 13 AIR 1926 Sind 35 (36) : 19 Sind L R 390 (DB).
[*See also* ('25) 12 AIR 1925 Sind 25 (26): 17 Sind L R 257.]
2. ('28) 15 AIR 1928 Rang 249 (252):6 Rang 474.
3. ('26) 13 AIR 1926 Sind 35 (36) : 19 Sind L R 390 (DB).
4. ('33) 20 AIR 1933 Mad 678 (678, 679) : 56 Mad 687.

Note 7

1. ('22) 9 AIR 1922 Bom 340 (341) : 46 Bom 702.
2. ('12) 39 Cal 1048 (1050) : 16 Ind Cas 118 (119) (DB).
('36) 23 AIR 1936 Sind 244 (246) : 30 Sind L R 177.
[*See also* ('22) 9 AIR 1922 Bom 340 (340, 341) : 46 Bom 702.]
3. ('21) 8 AIR 1921 Cal 559 (560) (DB).
Also see S. 55 Note 13.
4. ('36) 23 AIR 1936 Sind 244 (246) : 30 Sind L R 177 (DB).
5. ('36) 23 AIR 1936 Cal 143 (145).
Also see O. 38 R. 5, Note 15.
6. ('11) 12 Ind Cas 692 (693) (DB) (Mad).
('26) 13 AIR 1926 Lah 544 (544).
7. ('40) 1940 Nag L Jour 244 (246, 247) (DB).

execution against the surety must necessarily be in the form set out in O. 21 R. 11. The section only means that the security can be enforced in any manner provided for the execution of decrees that is by arrest, attachment, etc.[8]

8. **"To the extent to which he has rendered himself personally liable."** — The word "personally" has been newly added in the present section. Under the former section there was a conflict of opinion as to whether the section applied to cases where the surety had not undertaken a *personal* liability but had merely given a charge on his property.[1] Under the present section it is clear that it applies only where the surety has rendered himself *personally* liable.[2] If therefore a security bond were given by the Government on behalf of the Secretary of State for India in Council, S. 145 would not apply to the case, as the Secretary of State would not be personally liable under the bond.[3] For the same reason, where a surety bond does not create a personal liability but merely creates a *charge* or *mortgage* on the surety's property, it cannot be enforced by proceedings under *this section*.[4] Where, however, the charge on the surety's property is declared by the *decree* itself, the liability can be enforced by executing the decree and no suit on the mortgage is necessary.[5] The reason is that in such a case the surety is virtually in the position of a judgment-debtor.[6]

Where the surety makes himself personally liable and, in addition, charges his property, it is only the *personal* liability that can be enforced under this section.[7] The decree-holder may give up the mortgage and enforce the *personal liability* of the surety by attachment and sale of the property charged.[8] Order 34 R. 14 does not preclude such a course because there is no *decree* for the payment of money against the surety in such cases as required by that rule.[9] See also O. 34 R. 14, Note 4.

Where a judgment-debtor himself gives his property as security, the property can be sold in execution under section 47.[10]

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8. ('42) 29 AIR 1942 Sind 134 (135) : ILR (1942) Kar 79 (DB).

Note 8

1. ('17) 4 AIR 1917 All 104 (106) : 39 All 225 (DB). (Observation of Banerji, J.)
2. ('16) 3 AIR 1916 Cal 30 (30) (DB).
('34) 21 AIR 1934 Mad 262 (263):57 Mad 803 (DB).
3. ('11) 38 Cal 754 (775):9 Ind Cas 862 (872) (DB).
4. ('19) 6 AIR 1919 P C 55 (59) : 42 All 158 : 46 Ind App 228 : 22 Oudh Cas 212 (PC).
† ('17) 4 AIR 1917 All 104 (105, 106) : 39 All 225 (DB).
('16) 3 AIR 1916 Cal 30 (31). (Equitable charge on Government Promissory note).
† ('28) 15 AIR 1928 Bom 42 (48):52 Bom 72 (DB).
('34) 21 AIR 1934 Lah 138 (139) : 15 Lah 282 (FB). (Per Division Bench — Bond creating both personal liability and hypothecating property — Surety can be proceeded against under this section — AIR 1929 Lah 393 followed.)
('36) 23 AIR 1936 All 549 (551) (DB).
5. ('26) 13 AIR 1926 Cal 889 (891, 892) : 54 Cal 1 (DB).
('28) 15 AIR 1928 Lah 209 (212).
6. ('28) 15 AIR 1928 Lah 209 (210).
7. ('34) 21 AIR 1934 Oudh 139 (140) : 9 Luck 534 (DB).
('35) 22 AIR 1935 Oudh 510 (514, 515) : 11 Luck 449. (Surety bond executed by member of joint Hindu family containing personal covenant — Personal liability of member is enforceable after his death against his son.)
8. ('15) 2 AIR 1915 Cal 533 (534) (DB).
('26) 13 AIR 1926 Bom 279 (280):50 Bom 339 (DB).
('27) 14 AIR 1927 Mad 416 (420) (DB).
('17) 4 AIR 1917 Pat 489 (489) (DB).
† ('16) 3 AIR 1916 All 57 (59) : 38 All 327 (DB).
('17) 4 AIR 1917 Pat 596 (596) : 2 Pat L Jour 197 (DB).
[*See also* ('17) 4 AIR 1917 All 104 (106) : 39 All 225.]
9. ('17) 4 AIR 1917 Pat 596 (596) : 2 Pat L Jour 197 (DB).
('16) 3 AIR 1916 All 57 (59, 60) : 38 All 327 (DB).
('17) 4 AIR 1917 Pat 489 (489) (DB).
See the following cases :
('28) 15 AIR 1928 Lah 802 (803, 804). (O. 34 R. 14 not being applicable in the Punjab, it is no bar to the surety's liability being enforced against the mortgaged property.)
('13) 18 Ind Cas 900 (904) (FB) (Cal). (Property already under attachment given as security—O. 34 R. 14 is no bar to sale of property consequent on the attachment.)
('17) 4 AIR 1917 Cal 82 (83, 84). (But where a suit is brought on the security bond and a money decree is obtained therein, the mortgaged property cannot be sold under the decree as O. 34 R. 14 clearly applies.)
10. ('24) 11 AIR 1924 Cal 485 (487) : 51 Cal 150 (DB).

A surety for costs payable by a party to a suit is personally liable for the costs and the mere fact that he deposits a certain amount by way of security does not exclude his personal liability.[11]

The surety's liability is co-extensive with that of the judgment-debtor and he is jointly and severally liable with the judgment-debtor for the decree amount. A decree against the principal can, in fact, be treated as a decree against him.[12] Hence, the party for whose benefit security has been given is not bound to execute the decree against the judgment-debtor before proceeding against the surety,[13] except where the decree otherwise provides.[14] Within the limits prescribed by the security bond, the surety's liability extends to any amount recoverable from the judgment-debtor.[15] Where a surety undertakes a liability not contained in the decree, he cannot afterwards dispute it.[16] The fact that security has been given does not take away any legal rights which the decree-holder may otherwise have. Hence, where security has been given by the judgment-debtor, the decree-holder is not bound to proceed only against the properties specified in the security bond but is entitled to attach and sell any property of the judgment-debtor which he could otherwise have proceeded against.[17] Where a Hindu father has become liable as a surety under this section, the liability can be enforced by execution proceedings under this section against the sons' share in the joint family property to the same extent as if a decree had been passed against the father.[18]

9. Discharge of surety.—The question whether a surety has incurred liability under his bond depends upon the terms of the bond.[1] Where there is a doubt about its

('18) 5 AIR 1918 Mad 442 (442) : 41 Mad 327 (DB).
('75) 2 Ind App 219 (233) (PC).
('30) 17 AIR 1930 Pat 108 (109) : 8 Pat 801 (DB).
† ('03) 30 Cal 1060 (1063).
NOTE. — Decision to contrary in 32 Cal 494 is not sound law especially in view of the Privy Council decision in 2 Ind App 219 (PC).

11. ('32) 19 AIR 1932 Mad 188 (188) (DB).

12. ('34) 21 AIR 1934 Bom 252 (254) : 58 Bom 485 (DB).
('38) 25 AIR 1938 Nag 148 (149) : ILR (1939) Nag 536 (DB). (Section 145 permits the execution of a decree (passed against a stranger) against the surety as though it were a decree passed against the surety —It may be that he is a party only for a limited purpose)

13. ('33) 20 AIR 1933 Nag 287 (289). (This section must be read with S. 128 of the Contract Act.)
('29) 16 AIR 1929 Lah 393 (394).
('13) 7 Sind L R 19 (20) : 20 Ind Cas 540 (541) (DB).
('26) 13 AIR 1926 All 657 (657) (DB).
('29) 16 AIR 1929 Lah 205 (206).
('25) 12 AIR 1925 Lah 552 (555).
† ('21) 8 AIR 1921 Nag 99 (100).

14. ('27) 14 AIR 1927 Lah 846 (846). (*Cf.* AIR 1928 Lah 209.)
('79) 4 Cal 331 (334) (PC).
('95) 19 Bom 578 (581) (DB). (Partition decree—Judgment-debtor depositing in Court property in obedience to decree—Execution must first proceed against property.)
[*See also* ('32) 19 AIR 1932 P C 131 (133) (PC). (Surety for deficiency in mortgage suit pending appeal — Surety liable only after hypotheca is exhausted and deficiency determined.)]

15. ('29) 16 AIR 1929 All 905 (906) (DB).
('07) 30 Mad 167 (168) (DB). (Decree against judgment-debtor for Rs. 5000 and against surety for Rs. 3000. Amounts received on rateable distribution of assets recovered from judgment-debtor plus amount recoverable from surety must not exceed Rs. 5000.)
('29) 16 AIR 1929 Lah 386 (387). (Supurdar's liability not limited to price of article but extends to decree amount.)
('16) 3 AIR 1916 Pat 66 (67). (Surety for removal of attachment—Surety's liability extends to decree amount.)
† ('99) 23 Bom 478 (483, 484) (DB). (Surety not liable where liability expressly excluded.)
('10) 5 Ind Cas 139 (141) (DB) (Cal). (Surety liable for sale expenses and poundage fees.)

16. ('27) 14 AIR 1927 Mad 416 (421) (DB). (Relying on 2 Ind App 219 (PC).)
[But see ('25) 12 AIR 1925 Pat 128 (129) (DB).]

17. ('18) 5 AIR 1918 Pat 384 (385) (DB).

18. ('38) 25 AIR 1938 Nag 148 (149) : ILR (1939) Nag 536 (DB).
('35) 22 AIR 1935 Oudh 510 (514, 515) : 11 Luck 449 (DB).

Note 9

1. *See the following cases :*
('42) 29 AIR 1642 Lah 6 (9) (DB). (Moveable and immovable properties charged—Details of moveables sufficient to identify them not given — Bond held created personal liability with charge upon specific immovable property.)
('14) 1 AIR 1914 Low Bur 54 (55).
('33) 20 AIR 1933 Mad 360 (361, 362).
('16) 3 AIR 1916 Lah 169 (170). (Surety for appearance of defendant—Notice not reaching defendant —Defendant not appearing—Surety not liable.)

construction, it must be considered in the light of the order directing security to be given.[2] A security bond must be construed strictly,[3] A surety cannot be held liable except to the extent to which he is *clearly bound.*[4]

Where a surety guarantees the performance of any decree that might be passed against a party, and the bond is not expressly limited to the Court's decree, the bond must be taken to have reference to the *ultimate issue* of the suit.[5] Thus, it will extend

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('70) 14 Suth W R 410 (411) (DB). (Security for restitution of property taken in execution — No execution held — Surety not liable though decree reversed.)

('87) 14 Cal 757 (760) (DB). (Obligation to produce debtor not discharged by his voluntary appearance in Court for his own purposes and then disappearing.)

('17) 4 AIR 1917 Mad 237 (238, 239) (DB). (Surety to produce debtor in Court — Bond providing for notice to surety—Surety may waive notice.)

('18) 5 A I R 1918 Lah 134 (135). (Bond making surety liable if dispute not settled — Surety not liable if dispute is compromised.)

('28) 15 AIR 1928 Lah 974 (975). (Surety to produce judgment-debtor on a day fixed — Decree-holder absent on that day—Surety is not exempt.)

('21) 8 A I R 1921 Pat 72 (73) : 5 Pat L Jour 417 (DB). (Surety for debtor filing insolvency petitions —Failure of debtor to do so within the prescribed time—Surety liable.)

('28) 15 AIR 1928 Lah 696 (697). (Surety to produce judgment-debtor on a particular day—Court closed on that day—Surety not bound to produce on any other day.)

('24) 11 AIR 1924 Lah 490 (491, 492). (Surety for appearance of debtor on any hearing till final decision — Judgment-debtor appearing and obtaining an adjournment—Judgment-debtor not appearing at adjourned hearing—Surety is liable.)

('31) 18 AIR 1931 All 243 (244) : 52 All 1014. (Surety for production of judgment-debtor—Judgment-debtor produced on the due date — Surety not liable for further default.)

('25) 12 AIR 1925 Rang 209(209): 3 Rang 53(DB). (Operative portion of bond and not recital controls its meaning.)

('24) 11 AIR 1924 Rang 347 (347). (Surety to produce debtor obtaining adjournment on false affidavit and producing debtor on the adjournment date — Surety is released though he may be proceeded against criminally.)

('32) 19 AIR 1932 Mad 188 (188) (DB).

('18) 5 AIR 1918 Cal 488 (489) (DB). (Security on behalf of claimant of attached property.)

('37) 24 AIR 1937 Rang 189 (192). (Preliminary decree on mortgage — Agreement between judgment-debtor and creditor to pay mortgage amount by instalments and on failure of one instalment, creditor to bring to sale mortgaged property—Sons of judgment-debtor also binding themselves as sureties to make up deficiency—Failure of debtor to pay instalment but property not brought to sale—Creditor proceeding against mortgagor and surety —No liability held attached to surety until mortgage property was sold.)

('38) 25 AIR 1938 Nag 259 (261) : I L R (1939) Nag 276 (DB). (Appeal by judgment-debtor against decree — Execution stayed on judgment-debtor's providing surety for due performance of any decree likely to be passed against him by Appellate Court —Surety using Form No. 3, Appendix G instead of Form No. 2, Appendix G of First Schedule to C. P. Code—Appeal and second appeal dismissed—*Held*, surety not liable unless bond was corrected.—Decree-holder directed to pursue remedy first against judgment-debtor.)

('34) 21 AIR 1934 Pat 176 (178))DB).

('37) 24 AIR 1937 Mad 229 (231). (Surety for restitution of property — Bond-making surety liable if both the defendants succeeded in appeal—Only one defendant succeeding—Surety not liable.)

('35) 22 AIR 1935 Lah 145 (146). (Where the surety undertook to produce the judgment-debtor on every date fixed and the first date on which the judgment-debtor absented himself was fixed by the Court in the presence of the judgment-debtor and the surety for the production of a protection order—*Held*, there was no need to give the surety specific notice to produce the judgment-debtor on that day.)

[*See* ('39) 26 AIR 1939 Lah 368 (368) : 41 Pun L R 282 (283) (DB). (Judgment-debtor not told to appear personally on a particular day—Surety is not liable unless notice to produce is given.)]

2. ('34) 21 AIR 1934 Mad 186 (188) : 57 Mad 688 (DB).

('34) 21 AIR 1934 Cal 569 (570) : 61 Cal 890 (DB).

† ('32) 19 AIR 1932 P C 131 (132) (PC).

('38) 25 AIR 1938 Nag 75 (75, 76) : I L R (1939) Nag 371. (Surety bond under S. 17 (1), Provincial Small Cause Courts Act — Decree set aside and new decree passed — Surety discharged as soon as *ex parte* decree was set aside.)

[*See also* ('37) 24 AIR 1937 Mad 229 (231). (In case of ambiguity construction favourable to surety to be adopted.)

3. ('42) 1942 Nag L Jour 39 (40, 41).

('41) 28 AIR 1941 Mad 151 (152).

('34) 21 AIR 1934 Lah 401 (401) (DB).

4. ('28) 15 AIR 1928 Bom 42 (46) : 50 Bom 72 (DB). (Bond covering liability of only one defendant—Obligation cannot be extended to others.)

5. ('32) 19 AIR 1932 Cal 858 (860): 59 Cal 1450 (DB).

('35) 22 AIR 1935 Lah 21 (23). (Temporary injunction—Discharge of, on producing surety — Bond-making surety responsible for decretal amount if suit not dismissed—Suit decreed — Decree paid—Appellate Court enhancing decretal amount — Surety is liable to pay the enhanced decretal amount.)

[*See also* ('41) 28 AIR 1941 Nag 61 (63) : I L R (1942) Nag 189. (Surety bond to prevent attachment before a judgment—Dismissal of claim for default and subsequent restoration — Surety not absolved.)]

to a decree passed on appeal,[6] or on remand by the Appellate Court,[7] or on a restoration of the suit dismissed once for default.[8] It will apply even to a *consent* decree provided there is no fraud or collusion in obtaining it[9] and provided that such decree is not excluded by or is not outside the scope of the security bond.[10]

But where an attachment before judgment is removed on security being furnished under O. 38 R. 5, the surety's liability comes to an end on the dismissal of the suit by the original Court.[11] The reason is that under O. 38 R. 9, if no security had been given, the attachment before judgment would itself have come to an end on the dismissal of the suit. But it has been held in the undermentioned cases[12] that the liability extends to the appellate decree also. The liability cannot, however, apply to a different proceeding altogether. Where a person gives security for production of property in one suit, he cannot be called upon to produce it in another.[13] As regards the liability and discharge of a surety under S. 55 (4), see Note 12 on S. 55 and the undermentioned cases.[14]

Section 17 of the Provincial Small Cause Courts Act requires that a defendant applying to set aside an *ex parte* decree should furnish security for the performance of the decree. It has been held that the security only applies to the *ex parte* decree itself in case the application should fail. Hence, where the *ex parte* decree is set aside the surety is discharged and he is not liable in respect of the decree that may be passed subsequently.[15]

A surety for the appearance of judgment-debtor is discharged if the judgment-debtor is in jail for a criminal offence and cannot be produced on the required date.[16] A surety for the appearance of the judgment-debtor if a particular pending proceeding is dismissed, is discharged if on the dismissal of such proceeding the judgment-debtor

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6. ('20) 7 AIR 1920 Bom 331 (331) : 44 Bom 34 (DB). (Surety in a trial Court must be deemed to have contemplated appeal which is an ordinary incident of litigation.)
('32) 19 AIR 1932 Mad 188 (188).
('27) 14 AIR 1927 Rang 321 (321) : 5 Rang 496 (DB).
† ('19) 6 AIR 1919 P C 55 (57) : 42 All 158 : 46 Ind App 228 : 22 Oudh Cas 212 (PC).
('73) 10 Bom H C R 1 (3).
('37) 24 AIR 1937 All 682 (684).
[But see ('34) 21 AIR 1934 Mad 13 (14).]

7. ('78) 2 Bom 654 (657) (DB).
† ('78) 3 Bom 204 (206) (FB).

8. ('41) 28 AIR 1941 Nag 61 (63): ILR (1942) Nag 180.
('32) 19 AIR 1932 Cal 858 (860): 59 Cal 1450 (DB).
('35) 22 AIR 1935 Mad 365 (367) : 58 Mad 721 (FB).

9. ('32) 19 AIR 1932 Cal 858 (863) : 59 Cal 1450 (DB).
† ('35) 22 AIR 1935 Nag 16 (19): 31 Nag L R 172.
('37) 24 AIR 1937 Cal 452 (454) (DB). (Compromise decree granting instalments.)

10. ('32) 19 AIR 1932 Pat 313 (314) : 11 Pat 590 (DB). (Compromise against implied terms of security bond—Surety is discharged.)
† ('33) 20 AIR 1933 Mad 309 (310) : 56 Mad 625 (DB).
('37) 24 AIR 1937 Lah 34 (35) : I L R (1937) Lah 59 (DB).

11. ('15) 2 AIR 1915 Mad 653 (654) (DB).
('15) 2 AIR 1915 Lah 217 (218).
('10) 8 Ind Cas 980 (981) (Low Bur).
('10) 5 Low Bur Rul 156 (157): 5 Ind Cas 985(986).
('27) 14 AIR 1927 Rang 316 (316) : 5 Rang 494.
('27) 14 AIR 1927 Rang 310 (310, 311) : 5 Rang 492 (DB).

12. ('37) 24 AIR 1937 All 682 (684). (Surety bond in general terms and not limited to decree of trial Court—Surety is liable to satisfy decree though passed on appeal.)
('37) 24 AIR 1937 Sind 272 (272) : 31 Sind L R 165 (DB). (Surety bond under O. 38 R. 5—Suit dismissed by trial Court but decreed in appeal — Surety is not discharged.)
('36) 23 AIR 1936 Rang 342 (344): 14 Rang 361 (DB). (Suit decreed in trial Court dismissed in first and second appeals but decreed in Letters Patent appeal—Surety is liable—AIR 1927 Rang 310: 5 Rang 492 distinguished.)
('27) 14 AIR 1927 Bom 84 (85): 51 Bom 31 (DB).
('88) 12 Bom 71 (76) (DB). (Where however the bond limits the amount for which the surety shall be liable to the amount of the first Court's decree, his liability cannot be enhanced though the appellate decree is for a higher amount.)

13. ('41) 28 AIR 1941 Nag 339 (342) : I L R (1942) Nag 198.
('24) 11 AIR 1924 All 64 (65).

14. ('24) 11 AIR 1924 Pat 487 (488) (DB). (Liability under S. 55 (4) enures to the benefit of the Court as well as to that of the decree-holder.)
('13) 21 Ind Cas 612 (613, 614) (DB). (Cal).

15. † ('36) 23 AIR 1936 All 593 (593).
('38) 25 AIR 1938 Nag 75 (75, 76) : I L R (1939) Nag 371.

16. ('23) 10 AIR 1923 Rang 26 (26): 4 Upp Bur Rul 99.

surrenders himself before the Court.[17] Where a judgment-debtor is released on security, but owing to the default of the decree-holder the execution petition is dismissed and the surety discharged, the liability is not automatically revived by the mere restoration of the execution petition.[18] It has been held in Rangoon[19] that where the surety has bound himself to make the judgment-debtor pay the decree amount on a specified date, or, in default, to pay it himself, the judgment-debtor's death before the prescribed date does not end the surety's liability. This view has, however, been dissented from in the undermentioned case.[20] A surety under O. 38 R. 5 (attachment before judgment) is not discharged by the death of the defendant pending the suit where the cause of action survives against the legal representative and the legal representative is brought on the record.[21] But where a person who is not the legal representative is brought on the record and a decree is passed against the estate of the deceased, neither the legal representative nor the surety is bound by the decree.[22]

The surety's liability being co-extensive with that of the principal debtor, the extinction or diminution of the latter's liability operates as a discharge of the surety to a corresponding extent.[23] Conversely, a surety is bound as long as the judgment-debtor is bound. Hence, when the decree is sought to be executed against the surety, no uncertified payment by the judgment-debtor can be recognized by the executing Court[24] [O. 21 R. 2 (3)]. The Sind Court has expressed a contrary view on this point.[25]

Where the Court varies the terms of the security bond without the surety's consent, the surety is discharged.[26] But where the variation is obviously for the benefit of the surety, he is not discharged.[27] Similarly, if the Court in whose favour the surety bond is executed is not in the least responsible for the change in the situation of the surety, the surety is not entitled to ask the Court to relieve him of his obligation under the bond on the ground that the decree-holder has arrived at a certain arrangement with the debtor.[28]

[But see ('22) 9 AIR 1922 All 390 (390): 44 All 174 (DB). (Where surety knew at the time of entering into the bond about the impending imprisonment, he cannot claim to be discharged by such imprisonment.)]

17. ('33) 20 AIR 1933 Cal 337 (338) (DB).

18. ('34) 21 AIR 1934 Lah 349 (351).
[*See* ('37) 24 AIR 1937 Mad 721 (723). (A surety who secures the release of an arrested judgment-debtor by undertaking to produce the judgment-debtor whenever called upon by the Court until the execution petition is finally disposed, cannot claim to be discharged from his liability on such a dismissal of the execution petition; he continues liable, and his liability can be enforced in the subsequent application for revival.)

19. ('10) 8 Ind Cas 985 (986) (Low Bur).]

20. ('23) 10 AIR 1923 Rang 26 (26): 4 Upp Bur Rul 99.

21. ('16) 3 AIR 1916 Bom 55 (56): 41 Bom 402 (DB).
('24) 11 AIR 1924 Lah 428 (429).
Also see O. 38 R. 5 Note 15.

22. ('27) 14 AIR 1927 Bom 63 (65): 50 Bom 802 (DB).

23. ('70) 13 Suth W R 403 (406) (DB). (Decree against judgment-debtor being set aside in appeal.)
('88) 12 Bom 71 (76) (DB). (Decree against principal debtor being reversed in appeal.)
('23) 10 AIR 1923 Mad 340 (341, 344) (DB). (Execution by merger of estates of principal debtor and creditor.)
('76) 25 Suth W R 250 (251) (DB).
('95) 19 Bom 578 (581) (DB). (Debtor himself performing one portion of obligation—Surety liable only for the rest.)
[*See* ('40) 27 AIR 1940 Bom 247 (249): I L R (1940) Bom 387 (DB). (The liability of a surety is co-extensive, but is not in the alternative. Both the principal debtor and the surety are liable at the same time to the creditors.)

24. ('23) 10 AIR 1923 Cal 313 (313) (DB).
('26) 13 AIR 1926 Mad 674 (675): 49 Mad 325 (DB).

25. ('26) 13 AIR 1926 Sind 105 (107): 20 Sind L R 362.

26. ('26) 13 AIR 1926 Bom 565 (566) (DB).

27. ('26) 13 AIR 1926 Sind 105 (108) : 20 Sind L R 362.

28. † ('35) 22 AIR 1935 Nag 258 (263, 264) : 31 Nag L R (Sup) 83 (DB). (The obligation which a surety incurs under the bond which he gives to the Court under the Code of Civil Procedure, is excluded from the definition of a "contract of guarantee" as contained in the Contract Act, and the provisions of Ss. 133 to 139 of the Act, cannot be made applicable to the bond given by a surety to the Court. The liability of the surety under

Is the surety discharged by the failure of the creditor to sue the principal debtor within the period of limitation? Yes, according to Allahabad,[29] Rangoon[30] and Nagpur.[31] No, according to Bombay,[32] Calcutta[33] and Madras.[34] The conflict is due to this reason. Under S. 134, Contract Act, *any omission* of the creditor, the legal consequence of which is the discharge of the principal debtor, operates as a discharge of the surety. Under S. 137 the mere forbearance of the creditor to sue the principal debtor does not discharge the surety. According to the first group of Courts mentioned above, S. 134 is the section applicable to such cases; while according to second group it is S. 137. In a later decision of the Allahabad High Court[35] it has been held that S. 134 of the Contract Act does not apply to a security bond executed in favour of the Court.

A contract[36] between the creditor and principal debtor, by which the creditor promises to give time to,[37] or not to sue,[38] the principal debtor, discharges the surety unless the surety assents to such contract.[39] Is the surety under this section discharged by the creditor entering into a compromise with the principal debtor? The answer to this question depends on the terms of the security bond.[40]

Under Ss. 142 and 143 of the Contract Act, 1872, a security which the creditor has obtained by misrepresentation or silence as to material circumstances is invalid.[41] A surety

such a bond may, however, be determined by the Court if it has itself been responsible for a change in the situation which materially affects the terms of the surety bond.)
[*See also* ('36) 23 AIR 1936 Lah 470 (471).]

29. † ('02) 24 All 504 (508) (DB).
('89) 11 All 310 (313) (DB).
('86) 8 All 259 (261) (DB).
[*See* ('16) 3 AIR 1916 Pat 203 (204) : 1 Pat L Jour 497. (The Patna High Court without deciding the point has expressed a leaning to the Allahabad view.)]

30. ('96) 2 Upp Bur Rul 308 (310).
[*See also* (1900) 1 Low Bur Rul 150 (150). (Waiver of claim against principal debtor — By virtue of S. 134, Contract Act, surety is discharged.)]

31. ('06) 2 Nag L R 42 (44).

32. ('25) 12 AIR 1925 Bom 244 (245) : 49 Bom 202 (DB).
('81) 5 Bom 647 (652) (DB).

33. ('86) 12 Cal 330 (333) (DB).
[*See* ('36) 40 Cal W N 465 (467). (The mere fact that an execution against the principal judgment-debtor has been allowed to be barred by lapse of time is no ground for the release or discharge of the surety.)]

34. ('10) 33 Mad 308 (310) (DB).

35. ('36) 23 AIR 1936 All 549 (552) (DB).

36. See S. 136, Contract Act.

37. ('27) 14 AIR 1927 Cal 239 (240) (DB).
('32) 19 AIR 1932 Pat 313 (314): 11 Pat 590 (DB).
('33) 20 AIR 1933 Mad 309 (312) : 56 Mad 625 (DB).
('79) 4 Cal 331 (336) (PC).
('79) 4 Cal 182 (134) (DB). (Acceptance of interest in advance operates as promise to give time.)
('37) 24 AIR 1937 Mad 584 (585). (But there is one exception to this general rule and that is when the decree-holder gives concession to the judgment-debtor, but his right to proceed against the surety is specifically reserved.)
[*See* ('36) 23 AIR 1936 Mad 576 (580). (Receiver appointed under consent order—Security for due discharge of his duties—Consent order providing that on default being made by receiver plaintiff to have another person appointed as receiver — Receiver making default—Plaintiff granting time to receiver — Surety discharged as contract was varied.)]
[*See also* ('39) 26 AIR 1939 Lah 368 (368) : 41 Pun L R 282 (283). (Judgment-debtor given time after time to pay decree without surety's consent — Surety is not liable.)]
[See however ('39) 26 AIR 1939 Mad 76 (76). (Surety for judgment-debtor undertaking to pay up if latter's application to set aside *ex parte* decree failed — Surety not discharged by Court giving time to judgment-debtor.)]
[But see (1900) 22 All 351 (352) (DB). (The agreement to give time must be supported by consideration.)]

38. *See* ('26) 13 AIR 1926 All 657 (658). (Mere collusion not amounting to such contract is not enough.)

39. ('01) 23 All 137 (147) : 27 Ind App 168 (PC). (Surety may have consented that the dealings between the creditor and the principal debtor shall not affect his liability.)

40. ('31) 18 AIR 1931 Bom 55 (56) : 55 Bom 97 (DB). (Terms not excluding compromise decree.)
('94) 1894 Bom P J 25 (25, 26). (Do).
('28) 15 AIR 1928 Cal 177 (178) : 55 Cal 91 (DB). (Decree on award by arbitrator—Bond construed as providing only for decree after contest.)
† ('20) 7 AIR 1920 Mad 355 (357) : 43 Mad 272 (DB). (Terms not limiting liability to contest decree.)
('26) 13 AIR 1926 Cal 818 (818). (Order giving leave to defend suit under O. 37 — Security bond passed without knowledge and consent of surety— Surety discharged.)

41. ('71) 3 N W P H C R 264 (266) (DB).

is discharged by the failure of the consideration for his bond.[42] Where the surety has not performed his obligation because the decree-holder has expressly dispensed with its performance, the surety is not liable to be proceeded against, under his bond.[43] Where a surety dies after the accrual of his liability under the bond, the liability can be enforced against his legal representatives to the extent of his estate in their hands.[44] Where the surety is not otherwise discharged from his liability the Court has no power to make an order for his discharge[45] except in the case provided for by Order 38 Rule 8 (arrest before judgment).[46] The High Court of Allahabad has, however, held in the undermentioned case[47] that the Court to which a guarantee is given has power in a proper case to exonerate the surety from all future transactions.

A surety may be precluded by estoppel[48] or *res judicata*,[49] from disputing his liability under the bond.

Where a bond is given to the Court, the liability of the surety cannot be determined by the surety by giving notice as in the case of a continuing guarantee.[50]

Where security for the appearance of a judgment-debtor in the course of certain execution proceedings has been given, the termination of such proceedings will not absolve the surety from a liability already incurred by him before such termination.[51]

9a. Surety, if can recover sum forfeited. — Where a man stands surety for the appearance of another, he should take every precaution to ensure the carrying out of his undertaking and he cannot be allowed on grounds of public policy to recover any sum forfeited under the bond from the principal or from any one else; for, if he is so allowed, it would only tend to render the surety callous and the whole object of demanding the bond would be defeated.[1]

10. Form of surety bond.—A surety bond may be in favour of the Court or the decree-holder. No particular form is necessary.[1] To make the section applicable, it is not necessary that the surety's liability must have accrued upon an application presented to the Court or a security bond filed in the proceedings.[2] According to the

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42. † ('25) 12 AIR 1925 Lah 552 (555).
('29) 16 AIR 1929 Lah 770 (771) : 11 Lah 77 (DB).

43. ('25) 12 AIR 1925 All 5 (6).
('24) 11 AIR 1924 Mad 241 (242) (DB). (Merely asking for production of debtor on a subsequent date does not amount to waiver of obligation to produce on a prior date.)
[*See also* ('37) 24 AIR 1937 Nag 269 (269, 270) : I L R (1939) Nag 497. (Surety undertaking that judgment-debtor would file insolvency within one month — Surety and judgment-debtor filing within one month certificate showing application to Debt Conciliation Board — Execution case struck off thereon—Order accepted by decree-holder—Security cannot be realized.)]

44. ('14) 1 AIR 1914 Mad 328 (329) : 38 Mad 1120 (DB).
('26) 13 AIR 1926 Sind 294 (295) : 19 Sind L R 165.

45. ('27) 14 AIR 1927 Mad 294 (295) (DB).
('28) 15 AIR 1928 Lah 61 (62).

46. ('29) 16 AIR 1929 Lah 435 (436).
[But see ('70) 13 Suth W R 403 (405) (DB).]

47. ('32) 19 AIR 1932 All 262 (262, 263) : 54 All 293 (DB).
[*See also* ('40) 27 AIR 1940 Mad 730 (731). (Surety can be discharged for good cause — But mere change of mind on surety's part is not such good cause.)]

48. ('06) 4 Cal L Jour 311 (315, 316) (DB).
('36) 23 AIR 1936 Mad 990 (991).

49. ('07) 31 Bom 128 (135, 136) (DB). (Abandonment of plea—*Res judicata*).
('30) 17 AIR 1930 Lah 80 (80). (*Res judicata.*)

50. ('40) 27 AIR 1940 Mad 730 (731).
('36) 23 AIR 1936 Mad 576 (578) (DB).

51. ('39) 26 AIR 1939 Sind 270 (272) : I L R (1939) Kar 401 (DB). (Dismissal of application—No retrospective effect.)
Also see S. 55 Note 12.

Note 9a

1. ('32) 19 AIR 1932 Lah 23 (23).

Note 10

1. † ('26) 13 AIR 1926 Cal 877 (879) : 53 Cal 515 (DB). (*Obiter*—Contract of suretyship may be oral.)
('33) 20 AIR 1933 Lah 913 (914) : 15 Lah 44. (It need not be in the form of a security bond or in writing or in favour of the Court.)
('35) 22 AIR 1935 Mad 209 (210) : 58 Mad 777 (DB).
('36) 23 AIR 1936 Lah 463 (464). (Surety making statement before Court and undertaking liability.)

2. ('12) 16 Ind Cas 959 (960) (DB) (Cal).

High Court of Madras,[3] however, the section does not apply to surety bonds executed *outside Court*.

According to the High Courts of Calcutta[4] Madras[5] and Rangoon[6] a surety bond charging immovable property with a sum exceeding one hundred rupees is compulsorily registrable. The High Courts of Bombay[7] and Lahore[8] have, on the other hand, held that it is not.

See also the undermentioned case.[9]

10a. Enforceability of surety bond in execution apart from the section. — A security can be enforced in execution under the inherent powers of the Court apart from the provisions of this section.[1]

11. Maintainability of separate suit by or against the surety.—As has been seen in Note 63 on S. 9 a regular suit is not barred by the fact that a *summary* and concurrent remedy is also provided for. It was held under the old section that the summary remedy under it was *additional* and not exclusive, and therefore it did not bar a regular suit to enforce the security.[1] The present section provides that the surety "shall, for the purposes of appeal, be deemed a party within the meaning of S. 47." This does not make the surety a party to the suit for all purposes.[2] He is a party only for the limited purpose of appeal. Hence, a *suit* to enforce the security is not barred under the present section also.[3]

('30) 17 AIR 1930 Lah 185 (186). (Surety signing deed of compromise, enough.)
('35) 22 AIR 1935 Mad 209 (210) : 58 Mad 777 (DB). (Letter addressed to decree-holder by surety undertaking to discharge the decree debt held sufficient.)
[*See also* ('39) 26 AIR 1939 All 517 (517). (On dismissal of his objection to attachment of certain property in execution of a decree against the judgment-debtor, objector suing decree-holder for a declaration of his title to the same but compromising suit, and on decree-holder's reducing his claim, undertaking to pay the amount within a certain time—Objector is a surety under S. 145 and is liable as the judgment-debtor; and the intention of the parties being to keep alive the original suit the decree-holder at his option can proceed in either of the suits.]

3. ('19) 6 AIR 1919 Mad 813 (815) (DB). (Surety bond taken out of Court and not recorded by Court —Section not applicable.)
('19) 6 AIR 1919 Mad 527 (527) (DB). (Security bond taken out of Court and filed in Court — Section applies.)
[But see ('35) 22 AIR 1935 Mad 209 (210) : 58 Mad 777 (DB). (Section applicable to suretyship outside Court.)]

4. ('99) 26 Cal 222 (224) (DB). (However the bond can be admitted to prove personal liability of the surety.)

5. ('08) 31 Mad 330 (332).

6. ('25) 12 AIR 1925 Rang 55 (58) : 2 Rang 429 (DB).
('10) 8 Ind Cas 985 (986) (Low Bur). (However if the bond contains personal covenant it may be admitted as regards such personal covenant.)

7. ('28) 15 AIR 1928 Bom 42 (44, 46): 52 Bom 72 (DB). (A security bond, being part of judicial proceedings and incorporated with it, provisions of S. 17, Registration Act, 1908, do not apply to it.)

8. ('34) 21 AIR 1934 Lah 138 (141, 142): 15 Lah 282 (FB). (Overruling AIR 1919 Lah 8: 1919 Pun Re No. 122.)

9. ('42) 29 AIR 1942 Lah 6 (9) (DB). (Prior to the acceptance of the security bond, it must be carefully scrutinized, especially when it relates to charges upon specific immovable property, and intention of personal liability must be clearly contained in the bond to balance the risk of executant not having power of disposal over the specified property in the bond.)

Note 10a

1. ('33) 20 AIR 1933 Mad 691 (693): 56 Mad 989 (DB).
('33) 20 AIR 1933 Mad 722 (723).
† ('26) 13 AIR 1926 Mad 1005 (1007) (DB).

Note 11

1. ('04) 7 Oudh Cas 210 (211) (DB).
('74) 6 N W P H C R 261 (264) (DB).
('03) 1903 Pun L R No. 31, page 93 (94).

2. † ('28) 15 AIR 1928 All 527 (528) (DB). (Application by surety to have sale set aside does not fall within S. 47.)
('31) 18 AIR 1931 Rang 206 (207) : 9 Rang 434 (DB).
('39) 26 AIR 1939 Lah 175 (176): ILR (1939) Lah 470.

3. ('43) 30 AIR 1943 Mad 288 (291) : ILR (1943) Mad 509 (DB).
† ('11) 36 Bom 42 (47): 12 Ind Cas 549 (550) (DB).
('28) 15 AIR 1928 Rang 249 (251) : 6 Rang 474.
('35) 22 AIR 1935 All 373 (374). (AIR 1929 All 266 dissented — Case law referred — Suit against supurddar.)
('37) 24 AIR 1937 Cal 625 (627) : ILR (1937) 2 Cal 698 (DB).
('39) 26 AIR 1939 Lah 175 (176) : ILR (1939) Lah 470.

Similarly, a suit *by* the surety to negative his liability is not barred.[4] But a suit for injunction restraining the *executing Court* from executing the decree against the surety cannot be maintained.[5]

Until an application is made for execution against the surety he does not become a "party."[6] Hence, he cannot apply to the executing Court for cancellation of his bond.[7] Nor will the rejection of such application made by him, where he makes one, constitute *res judicata*.[8] But it has been held that where the surety does not impugn the validity of the bond when it was executed but only states that by reason of subsequent events, the bond has become discharged, he can approach the Court in whose favour the bond was executed and apply for its cancellation though proceedings to enforce the bond may not have yet been taken.[9] But when it is sought to enforce the decree against him, he becomes a "party" and his objections therefore have to be determined in the proceedings and he cannot be compelled to file a separate suit to vindicate his objections.[10] For the same reason, his omission to raise any objection in proceedings against him under this section will make the decision as to his liability *res judicata* and he cannot dispute it afterwards.[11]

A surety cannot have a sale set aside by separate suit, where it is vitiated only by irregularities and not for want of jurisdiction.[12]

See also Note 9 on section 47.

12. Appeal. — This section provides that the decree or order may be executed against the surety "in the manner herein provided for the *execution of the decrees*" and that the surety shall for the purposes of appeal "be deemed a party within the meaning of S. 47." Hence an order enforcing[1] or refusing to enforce[2] a security under this section

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('38) 25 AIR 1938 Nag 148 (149) : ILR (1939) Nag 536 (DB). (Hindu father incurring liability as surety — Decree-holder can sue to enforce the surety's liability and in execution proceed against the sons' shares also—But this does not mean that the sons' shares cannot be proceeded against by execution proceedings under this section.)
[But see ('29) 16 AIR 1929 All 266 (266).]

4. ('27) 14 AIR 1927 Bom 63 (66) : 50 Bom 802 (DB).
† ('37) 24 AIR 1937 Lah 658 (660) : I L R (1938) Lah 140 (DB).
[*See* ('11) 38 Cal 754 (776) : 9 Ind Cas 862 (872) (DB). (Suit to enforce liability — Surety's objections to his liability can be gone into in such suit.)]
[But see ('05) 28 Mad 117 (118) (DB). (This was not followed in A I R 1920 Mad 75 : 43 Mad 325.)
('29) 16 AIR 1929 All 266 (266).]

5. ('25) 12 AIR 1925 Lah 618 (618).

6. *See* ('43) 30 AIR 1943 Mad 288 (291) : I L R (1943) Mad 509 (DB). (By the mere execution of a surety bond in favour of a party to the suit, a stranger does not entitle himself to the privileges of a party, nor is he bound by those restrictions which bind the latter.)

7. † ('20) 7 AIR 1920 Mad 75 (77) : 43 Mad 325 (DB).

8. ('25) 12 AIR 1925 Lah 552 (553).

9. ('43) 30 AIR 1943 Mad 288 (291) : ILR (1943) Mad 509 (DB).

10. ('25) 12 AIR 1925 Lah 552 (553).
('23) 10 AIR 1923 Mad 340 (342) (DB).

11. ('28) 15 AIR 1928 All 527 (530) : 51 All 346 (DB).
('30) 17 AIR 1930 Lah 399 (400).
[*See* ('25) 12 AIR 1925 Lah 618 (618).]
[*See also* ('42) 29 AIR 1942 All 260 (260) (DB). (Surety's property declared liable for sale in execution of a decree — Surety, cannot later on file a suit to declare his property not liable to sale.)
('42) 29 AIR 1942 Nag 107 (108): I L R (1942) Nag 779. (Surety made party to execution proceedings—Defence raised and decided—He cannot raise it again in separate suit.)]

12. ('28) 15 AIR 1928 All 527 (529) : 51 All 346 (DB).

Note 12

1. ('15) 2 AIR 1915 Cal 688 (688) (DB).
('34) 21 AIR 1934 Lah 538 (539). (When surety does not appeal, the order is final and cannot be questioned in subsequent proceedings.)
('11) 38 Cal 754 (776) : 9 Ind Cas 862 (872) (DB).
('15) 2 AIR 1915 Cal 237 (237, 238) (DB).
('32) 19 AIR 1932 Bom 77 (78).
('35) 22 AIR 1935 Rang 39 (41).
[*See also* ('33) 20 AIR 1936 Rang 64 (66): 11 Rang 134.]

2. ('17) 4 AIR 4917 Upp Bur 16 (17) : 2 Upp Bur Rul 103. (Security under S. 55 (4).)
('15) 2 AIR 1915 Mad 653 (654) (DB).
('33) 20 AIR 1933 Nag 287 (288).
[*See also* ('36) 23 AIR 1936 Lah 684 (684). (Order of District Judge under S. 299, Succession Act, refusing to assign a bond should not be considered to be of a purely formal or interlocutory nature and as such not open to appeal — The order might be considered to be in some respects similar

is appealable as a *decree*. This was also the law under the old Code.[3] It has been held that even where S. 145 does not apply, but the surety bond is enforced without recourse to suit in the manner mentioned by the Privy Council in *Raghubar Singh* v. *Jai Indra Bahadur Singh*[4] referred to in Note 2b, there is a right of appeal.[5]

But, until an application is filed for execution against a surety under this section, he is not a *party*[6] and hence an order discharging him before such application is made is not appealable.[7]

This section does not apply to an order for refund of security. Such refund can be ordered only under S. 151. Hence no appeal lies from an order for refund of security.[8]

13. Limitation. — See the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 182, Note 139.

14. Notice to surety. — Notice to the surety is a condition precedent to the validity of the proceedings against him under this section.[1] The surety may, however, *waive* the notice, in which case it need not be given.[2] The notice need not be "in writing"[3] as was necessary under the old Code. Nor need it necessarily be given by the Court.[4] It may be given by the decree-holder.[5] It may also be given by the Court to

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to one under S. 145, C. P. Code, and as order under that section is appealable, so order under S. 299 is also appealable.)]

3. ('88) 12 Bom 71 (76).
('03) 13 Mad L Jour 484 (484, 485). (Surety under S. 336 (now S. 55) can also appeal.)
('71) 15 Suth W R 538 (540).
('67) 8 Suth W R 24 (24).
('86) 1886 Pun Re No. 104, page 249 (250) (DB).
('93) 15 All 183 (185). (But surety under S. 336, now S. 55, could not appeal as he was not a surety for the payment of the amount of the decree and so could not be considered to be a party.)
[But see ('02) 1902 Pun L R No. 58, page 210 (210).
('02) 1902 Pun Re No. 72, page 261 (263).]

4. ('19) 6 AIR 1919 P C 55 (59) : 42 All 158 : 46 Ind App 228 : 22 Oudh Cas 212 (PC).

5. ('33) 20 AIR 1933 Mad 780 (781) : 56 Mad 909 (DB).
('38) 25 AIR 1938 Mad 215 (216). (Surety depositing money in Court and therefore not personally liable — S. 145 therefore not applicable — Still there is right of appeal as, under Privy Council ruling in A I R 1919 P C 55: 42 All 158 : 46 Ind App 228 : 22 Oudh Cas 212 (PC), surety is "party" to proceedings.)
[*See also* ('43) 30 AIR 1943 Nag 172 (174). (Supratdar returning property to successful objector on orders of Court — Application by him against decree-holder for costs of custody and transport — Order on, is appealable.)]
[But see ('33) 20 AIR 1933 Mad 342 (342).]

6. ('20) 7 AIR 1920 Mad 75 (77) : 43 Mad 325 (DB).

7. † ('33) 20 AIR 1933 All 382 (383, 384) : 55 All 548 (DB). (Application by surety for cancellation of surety bond — Order passed thereon is not open to appeal by decree-holder.)
('31) 18 AIR 1931 Lah 503 (503). (Do.)
See also cases cited under Note 11.
[*See* ('16) 3 AIR 1916 Bom 55 (56): 41 Bom 402. (Revision lies if S. 115 applicable.)]
[But see ('25) 12 AIR 1925 All 344 (345) (DB).)]

8. ('26) 13 AIR 1926 Lah 544 (544).

Note 14

1. ('78) 3 Cal 318 (319) (DB).
('16) 3 AIR 1916 Mad 1078 (1078, 1079).
('31) 18 AIR 1931 Mad 828 (829). (Court cannot order execution against surety directly on failure to produce judgment-debtor after a notice to produce. A further notice to show cause against execution is necessary.)
('31) 18 AIR 1931 Oudh 311 (311). (Pending order directing the sapurdar to deliver property in his custody on a certain date attachment of his property without notice is illegal.)
('23) 10 AIR 1923 Rang 26 (26): 4 Upp Bur Rul 99.
† ('28) 15 AIR 1928 Rang 249 (251) : 6 Rang 474.
('25) 12 AIR 1925 Rang 135 (137) : 2 Rang 567 (DB).
('29) 16 AIR 1929 Lah 205 (206).
('25) 12 AIR 1925 Lah 170 (171).
('36) 40 Cal W N 465 (467). (Service of notice — Proof — Record of service and of appearance of party in order sheet of Court is sufficient.)
('38) 25 AIR 1938 Lah 593 (593): I L R (1938) Lah 624. (It is immaterial however whether such notice is given by the Court which passed the decree or the Court to which it is sent for execution.)
('35) 22 AIR 1935 Lah 145 (146).

2. ('16) 19 Mad L Tim (Jour) 81 (82) (DB).
† ('37) 24 AIR 1937 Lah 772 (777). (Objection of want of notice not raised in executing Court — Objection deemed to be waived.)

3. ('37) 24 AIR 1937 Lah 772 (776). (All that is necessary under the law is that before the attachment actually takes place, the surety should have notice of the order directing attachment, the object being that he may be able to raise objections, if any, to the validity of the order.)

4. ✝ ('05) 29 Bom 29 (33) (DB).

5. ('05) 29 Bom 29 (34) (DB).

which the decree is sent for execution.[6] It has been held that only one notice is required by this section and where such notice has been given, a fresh notice is not necessary each time an application for execution is made against the surety.[7]

The mere *arrest* of the surety does not constitute the execution of the decree but *detention in prison* does constitute it. (See O. 21 R. 30.) Where notice is given to the surety at the same time as the order for arrest, *but before the order for imprisonment* (which is really the order for execution) the notice is valid.[8]

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146. [New.] Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

Proceedings by or against representatives.

[1882, *cf.* S. 582A; See Order 22.]

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. "Save as otherwise provided."
4. Application for execution by or against representatives.
5. Proceeding or application.
6. Appeal. See Note 5.
7. Application to set aside ex parte decree.
8. "Claiming under," meaning of.
9. Legal representative need not be brought on the record in order to maintain an application under this section.

1. Legislative changes. — This section is new. As to its effect on previous case-law, see Note 2.

2. Scope and object of the section. — There was no similar provision under the old Code and there was a conflict of opinion as to whether the legal representative of a defendant could apply to set aside an *ex parte* decree against the defendant under O. 9 R. 13, in the absence of express reference to a legal representative in that rule. The High Court of Calcutta[1] held that he could. The High Courts of Allahabad[2] and Madras,[3] on the other hand, held that he could not, though the Allahabad High Court held in a later case[4] that the legal representative can *continue* an application filed by the defendant. This section has been enacted to meet such cases and to set the conflict at rest.

This section should receive beneficial interpretation and be read as supplementing the rules.[5] Its scope should not be whittled down by placing a too limited and narrow construction upon it.[6] The section is wide enough to entitle a person to *continue* a

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6. ('05) 29 Bom 29 (34) (DB).
[*See* ('38) 25 AIR 1938 Lah 593 (593) : I L R (1938) Lah 624. (It is immaterial whether notice is given by the Court which passed the decree or the Court to which it is sent for execution : AIR 1929 Lah 205 and 29 Bom 29, relied on.)]
7. ('36) 40 Cal W N 465 (466).
8. ('27) 14 AIR 1927 Lah 131 (132).

Section 146 — Note

1. ('02) 29 Cal 33 (35, 36) (DB). (Defendant in S. 108, includes his legal representatives.)
2. ('99) 21 All 274 (276) (DB).
3. ('05) 28 Mad 361 (362) (DB).
4. ('07) 29 All 574 (575) (DB).
5. ('42) 29 AIR 1942 Mad 21 (22, 23) (DB). (The words "save as otherwise provided by this Code" should be interpreted liberally as premitting applications under S. 146 which do not conflict with the provisions of the Code.)
† ('21) 8 AIR 1921 Mad 599 (601) : 44 Mad 919 (FB).
6. † ('26) 13 AIR 1926 Mad 371 (372) (DB).

proceedings started by another under whom he claims.[7] The contrary opinion expressed *obiter* by Wallace, J., sitting as a single Judge in the undermentioned case[8] is, it is submitted, not correct.

But this section cannot enable A as claiming under B, to maintain an application which B himself could not have maintained. Thus, an assignee from the heir of a deceased plaintiff who was not himself brought on the record, cannot apply under O. 22 R. 10 inasmuch as the heir could not himself have applied under O. 22 R. 10, but could only have applied under O. 22 R. 3.[9] Similarly, where A whose suit is dismissed assigns his interest in the subject-matter of the suit to X and then files an appeal, the appeal is not maintainable as A has no longer any interest in the subject-matter of the suit. Nor can X be made the appellant in the appeal under this section as this section will not apply to the case because A himself had no right to file the appeal.[10]

As to when a person "claims under" another, see Note 8.

3. "Save as otherwise provided." — The opening words of the section expressly make it subject to the other provisions of the Code.

Illustrations.

1. *A's* property is sold in execution of a decree against him. *A* afterwards sells the property to *B* and then applies to have the execution sale set aside under O. 21 R. 89. *A's* application is rejected and he appeals from the order rejecting his application. *A* then withdraws the appeal. *B* is not entitled to continue the appeal as a person claiming under *A*. The reason is this. Order 21 Rule 89 precludes *B*, as the purchaser of the property *after the execution sale*, from applying under R. 89. Hence, by necessary implication it also restricts *B's* right of appeal from an order on such application because an appeal is only a continuance of the same proceeding.[1]

2. *A*, who "claims under" *B*, files an appeal jointly with *B*. Subsequently, *A* voluntarily withdraws from the appeal. Then *B* withdraws the appeal. *A* cannot continue the appeal because he has already withdrawn from it.[2] (See O. 23 R. 1.)

3. *A* files a suit for partition against *B*, *C* and *D*, and pending the suit mortgages his share to *X*. *A* thereafter dies leaving his widow. *X* applies to be impleaded as co-plaintiff or supplemental defendant. The application is not maintainable. The reason is that O. 22 R. 10 which governs such cases is not applicable inasmuch as there is no devolution or assignment absolutely of the plaintiff's interest on *X*, but only a derivative interest in the subject-matter. Section 146 cannot also be applied because, there is a specific provision governing such cases and a party cannot be allowed to avoid the conditions of such provision by purporting to proceed under the general provision.[3]

Similarly, O. 21 R. 16 precludes any one who is not a decree-holder or transferee of the *decree* by assignment in writing or by operation of law from applying to execute the decree. (See Note 4.)

See also the undermentioned decision.[4]

4. Application for execution by or against representatives. — Order 21 Rule 16 makes it clear that besides the decree-holder any person to whom the *decree* has

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7. ('26) 13 AIR 1926 Mad 573 (574) (DB). (Appeal.)
('21) 8 AIR 1921 Mad 599 (603, 605):44 Mad 919 (FB). (Application for execution.)
8. ('27) 14 AIR 1927 Mad 507 (508). (Application to set aside *ex parte* decree.)
9. ('25) 12 AIR 1925 Mad 1166 (1167).
‡ ('36) 23 AIR 1936 Pat 123 (125) : 15 Pat 82 (DB).
Also see O. 22 R. 10 Note 2.
10. ('35) 22 AIR 1935 Lah 119 (120).

Note 3

1. ('24) 11 AIR 1924 Mad 470 (472). (Dicta of Phillips, J.)
2. ('24) 11 AIR 1924 Mad 470 (471).
3. ‡ ('34) 21 AIR 1934 Mad 485 (489).
[*See also* ('42) 29 AIR 1942 Rang 15 (17) : 1941 Rang L R 371 (DB). (Section 146 cannot override O. 22 (Per Mosley, J.).]
4. ('35) 22 AIR 1935 Cal 738 (739) (DB). (Section 73 permits rateable distribution only when decrees are against the same judgment-debtor—Section 146 cannot enlarge its scope as it is expressly made subject to the other provisions of the Code — By reason of S. 146 the words 'passed against the same judgment-debtor' in S. 73 cannot be read as 'passed against the same judgment-debtor or the legal representative of the same judgment-debtor'.)

been transferred by assignment in writing or by operation of law, may execute the decree. Section 146 cannot be read as extending the scope of O. 21 R. 16 as the former is expressly made subject to the other provisions of the Code. Hence, a transferee of *property* which is the subject-matter of a suit[1] or which is covered by a decree[2] is not entitled to apply for the execution of a decree in favour of the transferor, although he may be a person "claiming under" the decree-holder within the meaning of this section.[3] Further, such a transferee is not a transferee of the decree within the meaning of O. 21 R. 16.[4] In a recent decision[5] the Madras High Court has, however, held that the transferee *pendente lite* of certain debts for which the suit was brought could apply for execution of the decree in the suit, by virtue of this section, though not under O. 21 R. 16. The decision proceeds on the ground that O. 21 R. 16 does not *prohibit* such application.

The expression "transferee" in O. 21 R. 16 is not confined to a transferee of the whole decree, but includes a transferee of a portion of the decree and hence such a person can apply to execute the decree.[6]

A decree may be executed against the property in the hands of a transferee thereof pending the suit.[7]

Where a decree-holder dies during the pendency of an execution application, his legal representatives may be substituted in the execution application and be allowed to continue the execution proceedings without a fresh application for execution.[8] The same principle applies where the execution has to proceed against the legal representatives of a judgment-debtor who dies during the pendency of an execution application.[9] It has also been held that an application by the legal representative of the decree-holder under O. 21 R. 16, in a pending execution application, is only a continuation of prior proceedings and not a fresh application for the purposes of S. 48 of the Code.[10] (For fuller discussion, see O. 22 R. 12, Note 1.)

See also O. 21 R. 16, Notes 3 and 19.

5. Proceeding or application. — An appeal is a "proceeding" contemplated by the section. Hence a person claiming under a party to the suit may prefer an appeal from the decree in the suit although he was not himself a party to the suit.[1]

Note 4

1. ('12) 17 Ind Cas 512 (513) (All).
('22) 9 AIR 1922 Pat 563 (564) (DB).
2. ('27) 14 AIR 1927 Mad 240 (241).
('08) 30 All 28 (30) (DB).
† ('24) 11 AIR 1924 Bom 426 (427, 428) (DB). (30 All 28, Followed.)
('22) 9 AIR 1922 All 98 (99). (Decision to contrary in AIR 1924 Mad 709 is opposed to authority — Moreover the judgment does not refer to O. 21 R. 16 or any of the rulings bearing upon it.)
3. ('19) 6 AIR 1919 Mad 755 (756) : 41 Mad 510 (DB).
4. ('24) 11 AIR 1924 Cal 661 (665) : 51 Cal 703 (DB).
5. ('42) 29 AIR 1942 Mad 21 (22, 23) (DB). (AIR 1921 Mad 599:44 Mad 919, Expl. and Relied on.)
6. See O. 21 R. 16 Note 7.
7. ('21) 8 AIR 1921 Mad 126 (132).
8. ('42) 1942 All W R (Rev.) 214 (215).
† ('32) 19 AIR 1932 Mad 73 (80, 82, 83) : 55 Mad 352 (FB). (Overruling A I R 1927 Mad 184 : 50 Mad 1.)
('31) 18 AIR 1931 Bom 423 (423) (DB).
('30) 17 AIR 1930 Sind 283 (284) : 24 Sind L R 195 (DB).
('37) 24 AIR 1937 Pesh 18 (19). (Transferee of decree or his legal representative can continue execution.)
9. ('36) 23 AIR 1936 Bom 456 (457). (34 Bom 142 and AIR 1931 Bom 425, Relied on.)
('30) 17 AIR 1930 Sind 16 (17) (DB).
('05) 2 Cal L Jour 544 (545) (DB).
† ('31) 18 AIR 1931 Mad 303 (308) (DB).
('28) 15 AIR 1928 P C 162 (164):55 Ind App 227: 3 Luck 314 (PC).
('09) 34 Bom 142 (151):4 Ind Cas 839 (841) (DB).
† ('20) 7 AIR 1920 All 171 (172):42 All 570 (DB).
[*See also* ('29) 16 AIR 1929 Mad 275 (280) (DB).]
10. ('27) 14 AIR 1927 All 165 (167) : 49 All 509 (FB).
('24) 11 AIR 1924 Pat 576 (578) : 3 Pat 596 (DB).
('21) 8 AIR 1921 Pat 180 (182) : 6 Pat L Jour 358 (DB).

Note 5

1. ('40) 27 AIR 1940 Mad 16 (16).
('18) 5 AIR 1918 Mad 409 (410) (DB). (Appeal by plaintiff's mortgagee.)

Applications under S. 144[2] or under O. 21 R. 2,[3] or under O. 21 R. 94,[4] or under O. 21 Rr. 95 and 98,[5] or under O. 34 R. 5,[6] are all examples of applications contemplated by the section.

As to when a person can be said to "claim under" another, see Note 8.

6. Appeal. — See Note 5.

7. Application to set aside ex parte decree. — As has been observed in Note 2, there was a conflict of decisions under the old Code as to whether the legal representative of a defendant against whom an *ex parte* decree had been passed, could apply to set it aside. The present section now makes it clear that such an application is maintainable. See O. 9 R. 13, Note 16.

8. "Claiming under," meaning of. — A person "claiming under" a party to a litigation is one who —

(1) has succeeded to the position of the latter in the litigation,[1] or

(2) has acquired from him, subsequently to the commencement of the litigation, an interest in its subject-matter.[2] In this case he can be said to claim under the party *only in respect of the rights and interests* in property which he has so acquired.[3] Further, the person claiming under the original party must be one who by a title derived from or under the party has *himself the right to take the proceeding or make the application* and not merely one who has a derivative interest in the property (like that of a mortgagee subsequent to suit) which may, in some manner, be affected by the result of the proceeding.[4]

Illustrations

(1) An *ex parte* decree is passed against *A*, a defendant in a suit. Subsequently *A* dies. *B*, his legal representative, may apply to set aside the *ex parte* decree.[5]

(2) *A*, who has obtained a preliminary decree in a mortgage suit assigns the decree to *B*. *B*, as a person claiming under *A*, may apply for a final decree.[6]

(3) *A*, an auction-purchaser, transfers the property purchased by him to *B*. *B* may apply to the Court under O. 21 R. 95 for possession of the property transferred.[7]

[In the above illustrations, B has *succeeded to* A's *position* in the litigation. The following illustration will show that this is not always necessary. It is enough

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('19) 6 AIR 1919 Mad 755 (756):48 Mad 510 (DB). (Transferee *pendente lite* of the suit property.)

('17) 4 AIR 1917 Oudh 176 (177) (DB). (Appeal may be filed by assignee of subject-matter.)

[*See* ('43) 30 AIR 1943 Mad 381 (383) (DB). (Representative of judgment-debtor has right of appeal under S. 47 from order under O. 21 R. 98.)]

2. ('41) 28 AIR 1941 Mad 480 (480) (DB). (Assignee of right to recover mesne profits by way of restitution under S. 144 can apply for recovery of same.)

3. ('12) 17 Ind Cas 617 (618) (DB) (Mad). (Assignee of a decree may apply to record satisfaction of it without applying for execution or having the assignment recognised.)

4. ('36) 23 AIR 1936 Bom 137 (138). (Application under O. 21 R. 94 may be made by assignee from auction-purchaser.)

5. ('18) 5 AIR 1918 All 405 (405):40 All 216 (DB). (Application under O. 21 R. 95 may be made by transferee from auction-purchaser.)

('11) 34 Mad 450 (452) (DB). (Application under Rule 98 may be filed against judgment-debtor's representative.)

('20) 7 AIR 1920 Mad 943 (944) (DB). (Application under O. 21 R. 98 may be made against judgment-debtor's representative.)

6. ('27) 14 AIR 1927 Mad 560 (561). (Assignee of preliminary decree may apply for final decree.)

Note 8

1. ('12) 17 Ind Cas 512 (513) (All).

2. ('37) 24 AIR 1937 Oudh 488 (490) : 13 Luck 554 (DB).

3. ('10) 33 Mad 459 (462) (DB).

4. ✠ ('34) 21 AIR 1934 Mad 485 (490).

5. ('15) 2 AIR 1915 Mad 1204 (1205) : 38 Mad 442 (DB).

✝ ('23) 10 AIR 1923 All 30 (30) (DB).

('25) 12 AIR 1925 Oudh 370 (371) : 27 Oudh Cas 299.

Also see O. 9 R. 13, Note 16.

6. ('27) 14 AIR 1927 Mad 560 (561).

7. ('18) 5 AIR 1918 All 405 (405): 40 All 216 (DB).

if B has acquired from A an *interest in the property* concerned in the litigation, *subsequently to the commencement thereof*]:

(4) *A* sues *B* to establish his right to certain property. *While the suit is pending*, *B* mortgages the property to *C*. The suit is decreed against *B*. *B* does not appeal from the decree. *C*, as a person claiming under *B*, may appeal from the decree.[8] If, in the above case, *B* had mortgaged the property to *C*, prior to the institution of the suit, *C* would not be a person claiming under *B*. This is shown by the next illustration.

(5) *A*, a mortgagee of immovable property, sues *B*, the mortgagor, for the enforcement of the mortgage. Prior to the suit, *B* has granted to *C*, a puisne mortgage of the property. *C* is not made a party to the suit. An *ex parte* decree is passed against *B* in the suit. *C* cannot apply to set aside the *ex parte* decree as a person claiming under *B*, because *C's* interest was not acquired *subsequently to the institution of the suit* but was acquired *before*.[9]

(6) *A*, a member of a Hindu joint family, obtains a preliminary decree for partition of his share of the family property. Then he transfers his rights in the family property to *B*. *B* takes no steps to be impleaded in the suit, but after the final decree, applies to execute it as a person claiming under *A*. *B* is not entitled to do so.[10] The reason is that *B* claimed under *A* only in respect of the *preliminary* decree which gave *A* merely an unspecified share in the family property. The right to secure *separate* possession granted by the final decree did not vest in *A* himself on the date of the transfer and could not pass to *B* under the transfer. *B* cannot therefore be said to "claim under" *A* in respect of that right which alone would enable him to execute the decree.

(7) A sues *B* and attaches before judgment, a debt due to *B* from *C*. The suit is decreed in *A's* favour. Upon this, under O. 38 R. 11, *A's* attachment before judgment ripens into attachment in execution. Then *B* sues *C* and obtains a decree on the debt. *A* does not attach this decree but applies for its execution as a person claiming under *B*. It was held by Venkatasubba Rao, J. that *A* was entitled to do so and by Reilly, J., that he was not.[11] It is respectfully submitted that the view of Reilly, J., is correct. *A* was neither the legal representative of *B* nor the assignee of *B's* decree. Hence, he had not *succeeded to B's position* as a decree-holder. Nor can he be said to have acquired any *interest in the subject-matter* of the suit inasmuch as his attachment cannot be said to create any interest in it; and even if it does, it cannot be said to have been acquired *subsequently* to the institution of *B's* suit, because the attachment was complete before *B* filed his suit. Under O. 21 R. 53 (3), a decree-holder, who attaches another *decree* of the nature specified in the said Rule, becomes a representative of the holder of the latter decree for the purposes of execution.[12]

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8. ('41) 28 AIR 1941 Mad 245 (245, 246) (DB).
† ('19) 6 AIR 1919 Mad 755 (756): 41 Mad 510 (DB). ("Claiming under" is wide enough to cover the case of devolution of interest mentioned in O. 22 R. 10.)
('24) 11 AIR 1924 Mad 709 (710) (DB) (Do.)

See also the following cases decided on the same principles:

('17) 4 AIR 1917 Oudh 176 (177) (DB). (Assignee of the subject-matter of the litigation between the date of decision of the first Court and the filing of appeal ought to be allowed to join in the appeal under this section.)
('21) 8 AIR 1921 Mad 126 (132) (DB). (Per Seshagiri Aiyer J.—Execution proceedings can be continued against the purchaser *pendente lite*.)
('29) 16 AIR 1929 Oudh 353 (354) (DB). (Decree for arrears of rent may be executed against transferee of holding.)
('24) 11 AIR 1924 Mad 470 (471). (Private purchaser from judgment-debtor after the property has been sold in auction claims under judgment-debtor.)
('20) 7 AIR 1920 Mad 943 (944) (DB). (Auction-purchaser under simple money decree of property against which mortgage decree has been passed is representative of the judgment-debtor for purpose of O. 21 R. 98 against whom proceedings can be taken under S. 146.)
('11) 34 Mad 450 (452) (DB). (Application to remove obstruction caused to delivery of possession to decree-holder purchaser by a purchaser from the judgment-debtor of the attached property after attachment must be disposed of under O. 21 R. 98.)
[*See also* ('40) 27 AIR 1940 Mad 16 (16). (A real owner can be allowed under S. 146, C. P. Code, to file an appeal against the dismissal of a suit instituted by his benamidar who has released his right in the property claimed in the suit by a deed which recites that the appellant is the real purchaser of the property.)]

9. ('26) 13 AIR 1926 Cal 1015 (1015) (DB).
[*See also* ('37) 24 AIR 1937 Oudh 488 (490): 13 Luck 554 (DB).]
Also see O. 9 R. 13, Note 15.

10. ('26) 13 AIR 1926 Mad 1129 (1129) (DB).

11. † ('26) 13 AIR 1926 Mad 371 (372, 376) (DB).

12. ('30) 17 AIR 1930 All 659 (661) (DB).
Also see O. 21 R. 53, Note 10.

(8) Under O. 21 R. 53, where *A* attaches in execution of his decree against *B*, a decree obtained by *B* against *C*, *A* becomes the representative of *B*. But *A* becomes the representative of *B* only for the limited purpose of executing the decree against *C*. He has no right to *adjust* the attached decree and release *C* from his liability under the decree.[13]

It has been held that a Hindu coparcener is not a person 'claiming under' the manager of the joint family against whom a suit is filed.[14]

9. Legal representative need not be brought on the record in order to maintain an application under this section. — To entitle a person to take a proceeding under section 146 as a person claiming under a party to a litigation, it is not necessary that he should have been brought on the record as such.[1] Again, where A, B, C and D are entitled as persons claiming under E to make an application, and A alone presents the application within limitation, B, C and D being brought on the record subsequently, the presentation of the application by A alone is not invalid in view of this section though it may be defective and the Court may not proceed with it.[2]

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147. [New.] In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person, were under no disability and had given such consent or made such agreement.

Consent or agreement by persons under disability.

[R. S. C., Order 16 Rule 21; See Order 32.]

1. Legislative changes. — This section is new. It is based on O. 16 R. 21 of the Rules of the Supreme Court. It has not made any substantive alteration in the law.

2. Scope of the section. — Order 32 R. 7 provides that a minor's guardian for suit or next friend *shall not enter* into any compromise or agreement with reference to the suit without the leave of the Court expressly recorded in the proceedings. The present section enacts the *substantive rule* that a minor *shall be bound* by a compromise entered into by his guardian in the prescribed manner.

See also Notes on O. 32 R. 7.

3. "Person under disability." — The section applies to consent or agreement given or made on behalf of a person who is deemed incapable of prosecuting or defending a suit personally, such as a minor or a lunatic. See O. 32 and compare also Contract Act, section 11.

4. "As to any proceeding." — The section does not apply to an agreement merely relating to the *conduct* of a suit, e. g., an agreement that an issue in a suit (not the suit itself) should be determined by the oath of the defendant.[1] See the Indian Oaths

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13. † ('37) 24 AIR 1937 Cal 468 (472, 473) (DB).

14. ('37) 24 AIR 1937 Sind 94 (95) : 30 Sind L R 467 (DB).

[*See also* ('40) 27 AIR 1940 Mad 876 (877). (A son who acquires certain property by virtue of a partition between himself and his father pending a suit by his father concerning such property, cannot be regarded as 'claiming under' his father so as to entitle him to get himself impleaded as a party to the appeal from the decree passed in the suit.)]

Note 9

1. ('15) 2 AIR 1915 Mad 1204 (1205) : 38 Mad 442 (DB).
('25) 12 AIR 1925 Oudh 370 (371): 27 Oudh Cas 299.

2. ('27) 14 AIR 1927 Bom 123 (124) : 51 Bom 143 (DB).

Section 147—Note 4

1. ('27) 14 AIR 1927 All 584 (584): 49 All 842 (DB).
('89) 12 Mad 483 (485) (DB).
(1900) 27 Cal 229 (231) (DB).

Act, 1873, S. 11. Such an agreement entered into by a guardian or a next friend will bind a minor although it was not sanctioned by the Court. But an agreement as to a matter beyond the mere conduct of a litigation is not binding on the minor unless made with the leave of the Court. The following are some examples of such agreements:

(a) Agreement to compromise a suit.[2]

(b) Agreement to withdraw a suit.[3]

(c) Agreement to refer a suit to arbitration.[4]

(d) Agreement not to appeal.[5]

(e) Waiver of objection to competency of Judge on account of his personal interest in the litigation.[6]

(f) Waiver of objection to irregular procedure.[7]

(g) Waiver of right of minor to compensation in land acquisition case.[8]

5. Leave must be express. — The leave of the Court must be *expressly* given. This was the rule even under the former Code.[1] In this respect the English law is different.[2] Order 32 R. 7 requires that the leave must be expressly *recorded* in the proceedings.

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148. [New.] Where any period is fixed or granted by the Court[1] for the doing of any act prescribed or allowed by this Code,[6] the Court[10] may, in its discretion,[8] from time to time, enlarge such period, even though the period originally fixed or granted may have expired.[7]

Enlargement of time.

[R. S. C., Order 64 Rule 7.]

Synopsis

1. "Where any period is fixed or granted by the Court."
2. Extension of time fixed by decree.
3. Extension of time fixed by consent decree.
4. Extension of time fixed by award.
5. "Act prescribed or allowed by this Code."
6. Discretion of Court.
7. Extension of time after the expiry of the period originally fixed.
8. Implied extension of time.
9. Extension of time by appeal being preferred.
10. Court to which application for extension should be made.
11. Appeal.
12. Revision.

NOTE to the Synopsis. See the Notes indicated for the following topics:

Application to Provincial Insolvency Act. See Note 5.

Court cannot extend period of limitation. See Note 1.

Extension of time for payment of court-fee. See Note 5.

Extension of time for payment of costs in conditional orders. See Note 5.

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2. See O. 32 R. 7 and the Notes thereon.

3. † ('89) 13 Bom 137 (146).
('04) 27 Mad 377 (380).

4. See O. 32 R. 7, Note 15.

5. (1889) 22 Q B D 577 (578), Rhodes v. Swithenbank. (Cited in 17 Bom 299.)
Also see S. 96 Note 10.

6. ('93) 17 Bom 299 (302) (DB).

7. †('23) 10 AIR 1923 Mad 301 (302) : 47 Mad 30 (DB).

8. ('91) 18 Cal 99 (106) : 17 Ind App 90 (PC).

Note 5

1. ('98) 21 Mad 91 (93) (DB).
('03) 7 Cal W N 90 (92) (DB).
('06) 29 Mad 104 (106) (DB).
('06) 28 All 585 (588, 589) : 33 Ind App 128 : 9 Oudh Cas 219 (PC).
('95) 17 All 531 (532) (DB).
('81) 3 Mad 103 (104) (DB).
('83) 9 Cal 810 (812) (DB).
Also see O. 32 R. 7, Note 3.

2. Story's Equity Jurisprudence., S. 1353 cited in 13 Bom 137 and 27 Mad 377.

Extension of time to amend plaint. See Note 5.
Extension of time for furnishing security. See Note 5.
Extension of time fixed by pre-emption decree. See Note 2.
Extension of time for making the award. See Note 5.
Extension of time to deposit money to set aside sale. See Notes 1 and 5.
Extension of time to deposit printing charges. See Note 1.
Extension of time for payment of money in mortgage suits. See Note 2.

1. "Where any period is fixed or granted by the Court." — The section applies only where any period is fixed or granted by the *Court*. It does not apply when a period is fixed by *law*.[1] See, for example, the following instances :

(1) *Law of Limitation* — A Court cannot extend a period fixed by the law of limitation.[2]

(2) *Civil Procedure Code, Section 55 (4)* — The period of one month fixed by section 55 (4) cannot be extended.[3]

(3) *Civil Procedure Code, O. 21 R. 92 (2)* — The period of thirty days prescribed by O. 21 R. 92 cannot be extended.[4]

(4) *Civil Procedure Code, O. 45 R. 7* — Under the former Code in which there was no section corresponding to S. 148, it was held by the Privy Council that S. 602 (O. 45 R. 7), was directory and not mandatory and that hence, the Court could extend the time for cogent reasons.[5] Section 148 would now impliedly exclude such a power. For a further discussion on this subject, see O. 45 R. 7, Note 7.

2. Extension of time fixed by decree. — The general principle enacted in the section is that, where by an order time is granted by the Court for doing any act prescribed or allowed by the Code, it may be extended by the Court from time to time.[1] There are, however, two important exceptions to this general rule :

Section 148 — Note 1

1. ('32) 19 AIR 1932 Mad 112 (113).
('32) 19 AIR 1932 Cal 126 (130) : 59 Cal 117 (DB). (Time fixed by O. 21 R. 85 of the Code.)
('33) 20 AIR 1933 Rang 8 (9).
2. † ('19) 6 AIR 1919 Pat 543 (544) : 4 Pat L Jour 428 (DB). (Limitation for application for restoration of suit dismissed for default.)
3. ('26) 13 AIR 1926 Mad 689 (690).
Also see S. 55 Note 12.
4. ('11) 10 Ind Cas 148 (152) (DB) (Cal).
('17) 4 AIR 1917 Pat 344 (344) : 2 Pat L Jour 164 (DB).
('33) 20 AIR 1933 Rang 8 (9). (Period fixed for deposit under O. 21 R. 89.)
('34) 21 AIR 1934 Lah 875 (876).
('34) 21 AIR 1934 Pesh 25 (26). (Period fixed by Art. 166, Limitation Act.)
Also see O. 21 R. 89, Note 28.
5. ('84) 10 Cal 557 (561) : 11 Ind App 7 (PC).

Note 2

1. ('14) 1 AIR 1914 All 55 (56) : 36 All 77 (DB). (Order for setting aside *ex parte* decree on payment of a sum within a period fixed.)
† ('18) 5 AIR 1918 Mad 638 (640). (Do.)
('24) 11 AIR 1924 Lah 222 (222). (Do.)
('33) 20 AIR 1933 All 261 (262). (Order remanding a suit for retrial provided a certain act is done within a fixed time—The time is not fixed by a decree as the order of remand is not a decree and hence it can be extended.)
('33) 20 AIR 1933 All 262 (264) : 55 All 326 (FB). (Affirming AIR 1933 All 261 on Letters Patent Appeal.)
('32) 19 AIR 1932 Lah 235 (236) (DB). (Order of remand directing payment of additional court-fee within time—Time can be extended.)
('34) 21 AIR 1934 Nag 109 (111) : 30 Nag L R 258. (Application to extend before decree—Court must consider it—Omission to consider through mistake—Mistake must be rectified though decree has to be re-opened—Party should not suffer for Court's negligence.)
† ('26) 13 AIR 1926 Nag 44 (48): 21 Nag LR 111. (Order for restoration of suit on payment of costs within time.)
('26) 13 AIR 1926 Pat 409 (411) : 5 Pat 306 (DB). (Order for withdrawal of suit with liberty—Condition as to payment of costs within certain time.)
† ('05) 8 Oudh Cas 241 (244). (Not a decree but an order for production of letters of administration.)
('36) 23 AIR 1936 Pat 310 (311) (DB). (Court has under O. 7 R. 11 and S. 148 full discretion to extend time for payment of deficit court-fee.)
('38) 25 AIR 1938 Mad 542 (543). (Power to grant time for payment of deficit court-fee is discretionary.)
('36) 23 AIR 1936 Cal 221 (223) (DB). (In view of S. 148 time granted to pay deficit court-fee can be enlarged from time to time.)
('36) 23 AIR 1936 Oudh 56 (58) : 11 Luck 567 (DB). (Lease for running mill owned by company in liquidation—Money to be deposited by lessee within fixed period not deposited — Court can extend time.)

(1) Where the Court *ceases to have jurisdiction* over the matter, after the order granting the period is passed. Thus, where a Court orders a plaint to be returned under O. 7 R. 10 for presentation to the proper Court and in that order a period is fixed within which such presentation is to be made, the period cannot be extended, as, after the order for return, the Court has no *jurisdiction* over the matter.[2] Similarly, where the order fixing time finally disposes of the matter and the Court has no longer seisin of the matter, the time fixed cannot be enlarged.[3] Thus, where an order provides that a suit dismissed for default should be restored to the file on condition that the plaintiff pays the costs of the opposite party on or before a particular date and directs that in case of default, the application for restoration is to stand dismissed, the time cannot be enlarged under this section.[4]

(2) Where a period is fixed or granted by a *decree*.[5]

The second exception above noted is based upon another general rule which is enacted in O. 20 R. 3, that when once a decree has been signed it shall not afterwards be altered or added to save as provided by S. 152 or on review. Section 148 cannot be allowed to operate so as to nullify this rule and it, therefore, follows that where a period is fixed or granted by a *decree* it cannot be extended by the Court,[6] though the *decree itself* may

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('36) 23 AIR 1936 All 371 (372). (Time fixed for depositing decree amount as condition of applying for setting aside *ex parte* decree was held not to be an essential part of the order and it was held that it could be extended.)

See also Note 5.

[*See* ('32) 19 AIR 1932 Bom 615 (617) : 56 Bom 231. (The High Court of Bombay has framed R. 288 similar to this section.)]

2. ('26) 13 AIR 1926 Mad 133 (134).

3. ('41) 28 AIR 1941 Mad 706 (706). (Where a Court has granted time within which a payment must be made and has declared that in default of payment within the time specified the proceedings will stand dismissed, there is no power under S. 148, C. P. Code, after the date on which the proceedings would stand dismissed to extend the time in which the payment was to be made—But the Court may extend time under S. 151.)

†('36) 23 AIR 1936 Oudh 125 (127, 128) : 11 Luck 241 (DB). (Where an application for restoration of an appeal which was dismissed for non-appearance of the appellant is allowed by the Court on condition that the appellant pays a certain amount to the opposite party by a certain date and that otherwise it should stand dismissed, and the appellant fails to pay that amount on the due date, the Court has no power to restore the application or to set aside the order of dismissal.)

('39) 26 AIR 1939 Cal 581 (581, 582) : ILR (1939) 1 Cal 468. (Application to set aside sale granted subject to applicant's depositing decretal amount within fixed period—Application to stand rejected on default—On applicant's failure to comply with order time cannot be extended.)

('39) 26 AIR 1939 Cal 309 (309). (Application for setting aside sale granted subject to applicant's depositing amount within certain period — Application to stand dismissed on default—Upon applicant's failure to comply with order, Court has no jurisdiction to extend time for making deposit.)

*†('36) 23 AIR 1936 All 477 (478, 479) (DB).

[*See also* ('35) 61 Cal L Jour 512 (514). (Appellate Court allowing amendment of plaint on payment of costs and providing that in case of default, appeal should stand dismissed—Payment of portion of costs only as per order of lower Court — Extension of time cannot be granted in absence of evidence to show that plaintiff was misled by order of trial Court.)]

4. †('36) 23 AIR 1936 All 477 (478).

Also see O. 9 R. 9, Note 10a.

5. See the next paragraph in the Notes.

('35) 22 AIR 1935 Rang 341 (343). (The Court has, therefore, no power to extend the time for payment of an instalment of decretal amount.)

6. ('40) 27 AIR 1940 Cal 275 (276). (Section does not apply in the case of a decree or order of a final character made by a Court, but it applies only to acts preliminary to or during the course of the trial of a case before the final order has actually been made.)

('40) 27 AIR 1940 Pat 50 (51) (DB).

('15) 2 AIR 1915 Oudh 197 (198). (Pre-emption decree.)

('14) 1 A I R 1914 Oudh 383 (388) : 17 Oudh Cas 377 (DB) (Do.)

('11) 8 Ind Cas 812 (813) (Lah). (Do.)

†('34) 21 A I R 1934 Oudh 17 (18) : 9 Luck 215 (DB). (Do.)

('34) 21 AIR 1934 Cal 21 (22) (DB).

('34) 21 A I R 1934 Oudh 44 (45) : 9 Luck 387 (DB). (Mortgage suit—Compromise decree providing for payment by instalments —Default in payment — Time cannot be extended.)

('13) 18 Ind Cas 600 (601) (Lah).

('22) 9 AIR 1922 Oudh 131 (132): 25 Oudh Cas 74.

('18) 5 A I R 1918 All 13 (14) : 41 All 47 (DB). (NOTE: — This case is overruled on another point in AIR 1924 All 218 : 46 All 328 (FB).)

('21) 8 AIR 1921 Lah 6 (7) (FB). (1913 Pun Re No. 60 dissented from.)

be varied or reversed by the *Appellate* Court under O. 41 R. 32 by granting a different period to that fixed by the lower Court.[7] But the above principle is subject to the qualification that where the decree which fixes the time is not intended to be final and the Court still retains control over the proceeding the Court may extend the time under this section.[8]

It was held by the Patna High Court in the undermentioned case[9] that where time is fixed for payment in a pre-emption decree, it could be extended by the Court. The decision was based simply on section 148 without any reference to O. 20 R. 3. The correctness of the decision was, however, doubted in a later case[10] of the same High Court. The High Courts of Madras,[11] Calcutta[12] and Rangoon[13] have held that where a decree

('12) 17 Ind Cas 912 (913) (All). (Payment of money into Court within a fixed time in pursuance of a decree is not an act prescribed or allowed by the Code within the meaning of S. 148.)

† ('13) 16 Oudh Cas 5 (6) : 19 Ind Cas 347 (347). (Pre-emption decree — S. 148 relates to proceedings antecedent to the passing of final decree.)

('13) 35 All 582 (586) : 21 Ind Cas 585 (586) (SB). (O. 20 R. 14 merely prescribes the form of the decree.)

('23) 10 AIR 1923 Nag 210 (211) : 19 Nag L R 8. (Pre-emption decree.)

('28) 15 AIR 1928 Oudh 492 (493). (Only applies to proceedings antecedent to final decree.)

('24) 11 AIR 1924 Lah 359 (359). (Payment under pre-emption decree is not an act prescribed or allowed by the Code—Follows 35 All 582 (SB).)

('23) 10 AIR 1923 Lah 372 (373). (Pre-emption decree.)

('09) 3 Ind Cas 497 (498) (DB) (All). (Do.)

('20) 7 AIR 1920 Oudh 25 (29) : 23 Oudh Cas 254. (Do.)

('96) 18 All 223 (227) (SB). (Do.)

('23) 10 AIR 1923 Lah 162 (163). (Do.)

('18) 5 AIR 1918 All 98 (99) : 40 All 579 (DB). (Direction in decree to pay court-fee within a particular period—Dissents from AIR 1917 All 164.)

('26) 13 AIR 1926 Mad 1059 (1060). (Time for succession certificate granted in decree.)

('23) 10 AIR 1923 Cal 612 (614) (DB). (Time for additional court-fee.)

('31) 18 AIR 1931 All 318 (319).

* ('28) 15 AIR 1928 Mad 154 (156, 157) (DB). (Test is to see if the proceedings in which time was originally granted is still pending or has been disposed of—Following AIR 1918 Mad 638.)

('24) 11 AIR 1924 Pat 663 (664) : 3 Pat 337 (DB). (In the special circumstances of the case the Court was held to have power to re-instate the appeal after it had been rejected for failure to pay the required court-fee within the time allowed.)

('20) 7 AIR 1920 All 173 (174) : 42 All 639 (DB). (Suit for possession for setting aside transfer — Decree on condition of payment of certain sum.)

('15) 2 AIR 1915 Oudh 226 (227): 18 Oudh Cas 58. (Decree in suit for possession of mortgaged property by puisne mortgagee against prior mortgagee.)

('24) 11 AIR 1924 Oudh 330 (331). (Suit for cancellation of instrument—Conditional decree.)

('15) 2 AIR 1915 Mad 69 (70) (DB). (Decree directing delivery of property to plaintiff on paying a certain sum within a certain time.)

('32) 19 AIR 1932 Mad 223 (223, 224).

('12) 1912 Pun Re No. 99 : 15 Ind Cas 941 (942). (Suit for cancellation of lease—Conditional decree.)

('18) 5 AIR 1918 Nag 66 (66) : 15 Nag L R 39. (Decree for rent providing that on failure to pay within a certain time defendant should be ejected.)

('24) 11 AIR 1924 Oudh 179 (179). (The general provisions of S. 148, C. P. Code, relate only to proceedings antecedent to the passing of a decree.)

('14) 1 AIR 1914 Mad 85 (86) (DB).

('10) 7 Ind Cas 36 (38) (DB) (All).

† ('10) 13 Oudh Cas 28 (31) : 5 Ind Cas 443 (444) (DB).

† ('38) 25 AIR 1938 All 497 (499, 501) (DB). (Judgment signed under O. 20 R. 3 directing plaintiff to pay deficiency in court-fee within certain time and adding that in default decree would be nullity — Court has no jurisdiction to extend period so fixed.)

[*See* ('33) 20 AIR 1933 Cal 20 (21) (DB). (Appellate decree allowing amendment of plaint on condition of paying additional court-fee and costs of defendant — Time extended for both — Order is correct as to the former though it is not so as to the latter.)]

Also see O. 20 R. 14, Note 7.

7. ('38) 25 AIR 1938 All 150 (151).

† ('28) 15 AIR 1928 Oudh 32 (33) : 2 Luck 425 (DB).

('10) 37 Cal 548 (550) : 6 Ind Cas 275 (276) (DB).

('90) 13 Mad 524 (526) (DB).

('21) 8 AIR 1921 Lah 6 (7) (FB).

8. ('40) 27 AIR 1940 Pat 50 (51) (DB). (Where the Court decreed the plaintiff's suit and ordered the plaintiff to make good the deficit court-fee within certain time otherwise he was not entitled to the decree and the suit was to be dismissed—*Held* the order was not a final order and the Court could accept the court-fee after the prescribed time.)

9. ('16) 3 AIR 1916 Pat 268 (269): 1 Pat L Jour 92.

NOTE.—It was also held by the Lahore High Court in earlier decisions (e. g., 1913 Pun Re No. 60) that a Court could extend the period fixed in a pre-emption decree for the payment of purchase money. But this view has not been followed in the later decisions. See cases cited in foot-note 6 above.

10. ('30) 17 AIR 1930 Pat 279 (280).

11. † ('23) 10 AIR 1923 Mad 284 (285) : 46 Mad 148 (DB). (Dissenting from AIR 1917 Mad 838.)

('26) 13 AIR 1926 Mad 144 (145).

12. ('33) 20 AIR 1933 Cal 580 (580).

13. ('27) 14 AIR 1927 Rang 311 (312) : 5 Rang 615 (DB).

for *specific performance of a contract* is passed on condition of a party paying a certain sum by a certain date, the Court could extend the time. The decisions rest their view on the provisions of section 35 (c) of the Specific Relief Act, 1877, and on the view that a decree for specific performance of a contract on certain conditions is in the nature of a preliminary decree, the original Court keeping control over the action and having full powers to make any just and necessary orders therein including extension of the time fixed by the decree. The Patna High Court[14] and the Oudh Chief Court[15] hold that the time fixed, even in a decree for specific performance, cannot be extended by the Court under section 148.

Under O. 34 Rr. 2, 4 and 7 (as amended by Act XXI of 1929) of the Code, the time fixed by a *preliminary decree for sale, redemption or foreclosure* may, at any time, *before the passing of the final decree*, be extended by the Court from time to time. For another exception to the rule, see Note 3.

Where a plaintiff in whose favour a conditional decree is passed, neither fulfils the condition within the time allowed nor applies for extension of time, he cannot execute the decree.[16]

3. Extension of time fixed by consent decree.—An exception to the rule that time fixed by a *decree* cannot be extended by the Court under S. 148 is furnished by *consent* decrees. It has been held in the undermentioned cases[1] that a Court can extend the time fixed in a consent decree for the doing of an act directed thereby, where time is not of the essence of the contract of compromise. The reason is that a consent decree cannot have greater validity than the compromise on which it is based, and hence, the Court can, in the exercise of its equitable jurisdiction, grant such *relief against forfeiture* as it might have granted if there had been no consent decree and a suit had been instituted to enforce the compromise. The Allahabad,[2] Lahore[3] and Patna[4] High Courts and the Oudh Judicial Commissioner's Court[5] have held that the general rule holds good even in the case of consent decrees and that, therefore, the time fixed by the decree could not be extended. See also the case noted below to the same effect.[6]

As to the power of the Court to extend the time fixed for payment of the mortgage money under a compromise decree in a suit to enforce or redeem a mortgage, see Notes on Order 34 Rules 2, 4 and 7.

('16) 3 AIR 1916 Low Bur 74 (74).

14. ('30) 17 AIR 1930 Pat 279 (280).

15. ('23) 10 AIR 1923 Oudh 16 (17).

16. ('24) 11 AIR 1924 Rang 375 (376) (DB).

Note 3

1. ('21) 8 AIR 1921 Cal 356 (358, 359) (DB).
('29) 16 AIR 1929 Nag 164 (168, 169): 25 Nag L R 110. (Distinguishing AIR 1926 Nag 280 which was a case of a mortgage decree fixing a period by consent and in which there was no question of equities or forfeiture.)
('19) 6 AIR 1919 Cal 68 (69) (DB).
('24) 11 AIR 1924 Mad 796 (796) (DB). (Extension cannot be granted where time is of the essence of the contract.)
('23) 10 AIR 1923 Nag 88 (90).

2. ('29) 16 AIR 1929 All 666 (666) (DB).

3. ('12) 1912 Pun Re No. 99: 15 Ind Cas 941 (942).

4. ('30) 17 AIR 1930 Pat 308 (310): 9 Pat 332 (DB).
('33) 20 AIR 1933 Pat 563 (564): 13 Pat 1 (DB)
('33) 20 AIR 1933 Pat 677 (678) (DB). (Compromise decree directing payment by instalments on fixed dates — Court has no power to grant extension of time for payment of instalments.)
[*See also* ('37) 24 AIR 1937 Pat 542 (545): 16 Pat 395 (DB). (Where time is of the essence of the contract, it cannot be extended.)
[But see ('24) 11 AIR 1924 Pat 387 (387): 2 Pat 906 (DB).
('25) 12 AIR 1925 Pat 691 (692) (DB).]

5. ('15) 2 AIR 1915 Oudh 197 (198).
('15) 2 AIR 1915 Oudh 226 (227): 18 Oudh Cas 58.

6. ('40) 27 AIR 1940 Mad 817 (818). (Where a definite period is fixed for the performance of an obligation as an essential part of the contract, the Court has no power to vary the terms and to grant an extension of time, if the time stipulated is an essential part of the terms of the contract embodied in the decree and not a mere threat of a penal nature.)

4. Extension of time fixed by award.—A valid award is final and conclusive as between the parties to it and a Court cannot interfere with any portion of it. Hence, the Court cannot extend the time fixed by an award.[1] It may also be noted that time fixed by an award is not time fixed by a *Court* and hence section 148 does not apply to it. (See Note 1.)

5. "Act prescribed or allowed by this Code." — The section applies only where time is fixed for doing an act prescribed or allowed by the *Code*.[1] Where a period is fixed by the Court to do a particular act under its inherent powers, it is an act allowed by S. 151 of this Code and therefore this section will apply to such a case.[2] "Code" includes not only the *body* of the Code but also the schedules and the rules made under S. 122 or S. 125 [see S. 2 (18)]. See, for instance, the following provisions :

(1) *Section 55 (4)* — Security for the production of the judgment-debtor within the time fixed by Court.[3]
(2) *Section 143* — Time for payment of postage.
(3) *Order 6 Rule 18* — Amendment of pleadings.
(4) *Order 7 Rule 11 (b)* — Correction of valuation of suit.
(5) *Order 7 Rule 11 (c)* — Supply of deficient stamp paper.[4]
(6) *Order 8 Rule 9* — Time for filing written statement or additional written statement.
(7) *Order 9 Rule 9* — Restoration of suit (dismissed for default) on applicant paying costs within a given time.
(8) *Order 9 Rule 13* — Setting aside *ex parte* decree on applicant paying costs within given time.
(9) *Order 21 Rule 17* — Amendment of application for execution.
(10) *Order 23 Rule 1* — Allowing suit to be withdrawn with leave to bring fresh suit on plaintiff paying costs within a given time.
(11) *Order 25 Rule 1* — Security for costs of suit.
(12) *Order 41 Rule 3* — Amendment of memorandum of appeal.
(13) *Order 41 Rule 10* — Security for costs of appeal.
(14) *Order 41 Rule 19* — Re-admission of appeal dismissed for default, on appellant paying costs within given time.
(15) *Order 41 Rule 21* — Re-hearing appeal decided *ex parte*, on respondent paying costs.
(16) *Order 41 Rule 26* — Objections to the finding returned by the lower Court on remand.

Note 4

1. ('18) 5 AIR 1918 Cal 554 (555) (DB).

Note 5

1. ('42) 46 Cal W N 11 (12). (Order under S. 13 of the Presidency Small Cause Courts Act — This section does not apply.)
('40) 27 AIR 1940 Cal 275 (276). (Court has no power under S. 148 to extend time fixed for making deposit provided under S. 174 of the Bengal Tenancy Act.)
('39) 26 AIR 1939 Cal 30 (31, 32). (Court under S. 148 has no power to extend time fixed for making deposit provided under S. 174 (5), Bengal Tenancy Act.)
2. ('33) 20 AIR 1933 Mad 563 (564). (Order of stay under inherent powers fixing a time for payment of certain sums of money.)
3. ('25) 12 AIR 1925 Rang 135 (137) : 2 Rang 567 (DB).
[*See also* ('34) 21 AIR 1934 Lah 424 (425). (Memorandum of appeal insufficiently stamped without any *bona fide* mistake—No extension of time granted.)]
4. ✣('09) 32 Mad 305 (311) (FB).

(17) *Order 47 Rule 7 (2)* — Restoration of application for review dismissed for default, on applicant paying costs within given time.

The section does not apply when time is fixed for doing an act *not prescribed or allowed by the Code.*[5]

But in so far as the provisions of the Code are made applicable to proceedings under any other Act, the section applies to steps to be taken under such Act. Thus, according to the High Courts of Madras, Lahore and Nagpur, an Insolvency Court can extend the time fixed for applying for discharge, even after the time originally fixed has expired,[6] though the High Courts of Rangoon and Patna have taken a contrary view.[7] Further, even without recourse to S. 148 it may be possible to construe a particular section in such a way as to admit of an extension of the time fixed by the Court. Thus, it was held under the former Code that a Court could extend the time fixed for security for costs of appeal under S. 549 (now O. 41 R. 10),[8] or for paying deficit court-fee under S. 54 (now O. 7 R. 11).[9] On similar reasoning, it has been held that a Court can extend the time fixed for payment of deficit court-fee under the Court-fees Act, S. 10 cl. (2)[10] or S. 11,[11] or for deposit of one-fifth of the purchase money in a suit for pre-emption under S. 22 (4) of the Punjab Pre-emption Act.[12] Paragraph 8 of Sch. II expressly conferred on the Court the power to extend the time fixed for making an award, even after the expiry of the period originally fixed.[13] Hence, there was no necessity for resort to S. 148 for extension of time in such a case. Now see the Arbitration Act, 1940, S. 28.

See also the undermentioned case.[14]

6. Discretion of Court. — The power to enlarge time under this section is discretionary.[1] The Appellate Court should not interfere with the discretion of a Court

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5. ('42) 46 Cal W N 11 (12). (The Judge of the Presidency Small Cause Court has no jurisdiction to extend the time fixed by his order under S. 43 of the Presidency Small Cause Courts Act, directing the bailiff to give possession.)
('40) 27 AIR 1940 Cal 275 (276). (Deposit under S. 174 of the Bengal Tenancy Act.)
('20) 7 AIR 1920 Pat 111 (112). (Security under S. 17, Provincial Small Cause Courts Act.)
† ('16) 3 AIR 1916 Mad 224 (227) (DB). (Payment of court-fee under S. 11, Court-fees Act.)
('25) 12 AIR 1925 Pat 153 (154). (Remand — Appellant directed to pay costs within a given time as a condition — Payment is not act directed by the Code.)
('24) 11 AIR 1924 All 818 (824) : 46 All 864 (DB).
('39) 26 AIR 1939 Cal 30 (32). (Deposit under S. 174 (5), Bengal Tenancy Act.)
[But see † ('11) 10 Ind Cas 268 (269) (DB) (Cal). (Where it was held that the language of S. 11, Court-fees Act, itself admitted of an extension of time.)

6. ('24) 11 A I R 1924 Mad 635 (637, 638) (DB). (Waller, J., dissenting.)
✠('30) 17 A I R 1930 Mad 389 (392) : 53 Mad 288 (FB).
('25) 12 AIR 1925 Lah 416 (416).
('39) 26 A I R 1939 Nag 103 (104) : I L R (1939) Nag 478.

7. † ('30) 17 AIR 1930 Rang 166 (172):8 Rang 187 (DB).
('25) 12 A I R 1925 Pat 355 (356) : 4 Pat 51 (DB). (No reference was, however, made to S. 148 of the Code.)

8. See O. 41 R. 10 Note 10.

9. ('04) 31 Cal 75 (78) (DB).
('26) 13 AIR 1926 Nag 312 (312).
('85) 7 All 79 (92, 93) (FB). (Observations of Mahmood, J.)
NOTE.—The cases in this foot-note and foot-note (5) above have been cited only as instances of the language of a section empowering a Court to extend the time fixed by it. The acts in those cases were however acts prescribed or allowed by the "Code."

10. ('97) 19 All 240 (243) (DB).

11. † ('11) 10 Ind Cas 268 (269) (DB) (Cal).
[But see ✠('16) 3 AIR 1916 Mad 224 (227) (DB). (Where it was held that S. 148, C. P. C., did not apply to such a case as the act was not one allowed by the "Code".)]

12. ('23) 10 AIR 1923 Lah 643 (645) (DB).

13. ('19) 6 A I R 1919 Pat 93 (98) : 4 Pat L Jour 265 (DB).
('15) 2 AIR 1915 Cal 101 (103).
('92) 15 Mad 384 (386) (DB).

14. ('38) 25 AIR 1938 Oudh 50 (51) : 13 Luck 666 (DB). (U. P. Temporary Regulation of Execution Act, S. 7—Court can enlarge period fixed by it but not exceeding 30 days.)

Note 6

1. ('38) 25 AIR 1938 Mad 542 (543, 544).

under S. 148 except on very strong grounds.[2] A Court passing orders for extension of time should be taken, on the record as it stands, to have exercised its discretion as provided by the section and an Appellate Court cannot go into the question whether, as a matter of fact, the lower Court did exercise such discretion.[3]

7. Extension of time after the expiry of the period originally fixed.— The section empowers a Court to extend the time even after the expiry of the period originally fixed.[1] In this respect it gives effect to the undermentioned rulings.[2]

8. Implied extension of time. — No *express* order is necessary for extension of time. Such extension may be inferred from the fact that the Court has actually allowed a thing to be done beyond the prescribed time.[1]

9. Extension of time by appeal being preferred. — Suppose a decree of the primary Court which fixes a date for the performance of an act directed thereby is appealed against, and the appeal is dismissed. Is the period originally fixed, in such a case, to be calculated from the first Court's decree or from the appellate decree ? On this point there is a conflict of decisions. It has been held by the High Court of Bombay[1] and the Chief Court of the Punjab[2] that the period should be calculated from the date of the appellate decree, the reason given being that the lower Court's decree is merged in that of the appellate Court and though the latter decree may not expressly enlarge the period originally fixed, it should be deemed to do so *impliedly*. On the other hand, it has been held by the Madras,[3] Allahabad[4] and Patna[5] High Courts and the Judicial Commissioner's

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2.✣('25) 12 A I R 1925 Pat 299 (302) : 4 Pat 190 (DB).
('34) 21 AIR 1934 Mad 82 (84).
3. ('16) 3 A I R 1916 Cal 616 (616) (DB). (Case under S. 149, C. P. Code.)
('38) 25 AIR 1938 Mad 542 (544).
Also see S. 149 Note 8.

Note 7

1. † ('10) 6 Ind Cas 424 (425) (DB) (Cal).
('32) 19 AIR 1932 Lah 235 (236) DB).
('34) 21 AIR 1934 Lah 537 (538).
('34) 21 AIR 1934 Nag 109 (110): 30 Nag L R 258.
† ('25) 12 AIR 1925 Pat 299 (301): 4 Pat 190 (DB).
('22) 9 AIR 1922 Cal 234 (234).
('36) 23 AIR 1936 Cal 221 (223) (DB).
Also see S. 149 Note 7 and O. 7, R. 11, Note 5.
2. ('01) 16 Bom 263 (266).
('90) 17 Cal 512 (515) : 17 Ind App 1 (PC). (Time for furnishing security under S. 549 (now O. 41 R. 10)—Reversing 11 Cal 716, overruling 1 All 687 and impliedly overruling 11 Mad 190.)
('97) 21 Bom 576 (579) (DB). (Time for furnishing security under S. 549 (now O. 41 R. 10).)
('90) 17 Cal 1 (3) (PC). (Do.)
('04) 31 Cal 75 (77,78) (DB). (Time for paying deficit court-fee.)

Note 8

1. ('26) 13 AIR 1926 Mad 676 (677) (DB). (Accepting deficit court-fee beyond the prescribed time.)
('16) 3 AIR 1916 Mad 685 (685) (DB). (Accepting deficit court-fee.)
('32) 19 AIR 1932 Lah 235 (236) (DB). (Do.)
✣('25) 12 AIR 1925 Pat 299 (302): 4 Pat 190 (DB). (Do.)
('20) 7 AIR 1920 Pat 170 (170) (DB). (Do.)
('20) 7 AIR 1920 Pat 281 (282). (Accepting deficit court-fee beyond the prescribed time.)
('25) 12 AIR 1925 Oudh 399 (400) : 28 Oudh Cas 382. (Amendment of execution application.)
('16) 3 AIR 1916 Cal 356 (357) (DB). (Do.)

Note 9

1. ('14) 1 AIR 1914 Bom 132 (134) : 39 Bom 175 (DB). (19 Bom 258 referred to ; 17 Bom 547 explained.)
('87) 11 Bom 172 (173) (DB).
2.✣('06) 1906 Pun Re No. 48, pages 173 to 180 (185) (FB). (Overruling 1898 Pun Re No. 88.)
[*See also* ('95) 1895 Pun Re No. 10, p. 40 (42). (Pre-emption decree modified in appeal — Appellate decree not specifying time for payment — Time fixed for payment of purchase price runs from appellate decree.)]
3. ('18) 5 A I R 1918 Mad 919 (920). (Appellate decree confirming decree of first Court and silent regarding the time fixed for payment by the Court of first instance—Time not extended.)
† ('08) 31 Mad 28 (32) (DB).
('12) 16 Ind Cas 799 (799) (DB) (Mad).
† ('19) 6 AIR 1919 Mad 938 (939) (DB).
('92) 15 Mad 170 (173) (DB).
4. ('29) 16 AIR 1929 All 677 (680) (DB).
('96) 18 All 455 (457, 458).
('96) 18 All 223 (226, 227) (SB).
('09) 31 All 379 (381) (DB).
('38) 25 AIR 1938 All 497 (500) (DB).
[But see ('89) 11 All 346 (348).]
5. ('27) 14 A I R 1927 Pat 345 (347) : 7 Pat 76 (DB). (Distinguishing AIR 1925 Pat 369 : 4 Pat 378 and holding that the observations therein were *obiter*.)

Courts of Nagpur[6] and Upper Burma[7] that though the lower Court's decree is merged in the appellate decree, in the absence of express provision extending the time, the appellate decree should be taken as confirming the lower Court's decree as it stands and cannot be held to extend by implication the period fixed thereby. Opinion in the Calcutta High Court is divided, some cases taking the Bombay view[8] and some the Madras view.[9]

But where an appeal is simply dismissed for default of appearance or want of prosecution,[10] or is withdrawn,[11] or summarily dismissed under O. 41 R. 11,[12] there is no *decree* of the Appellate Court in which the lower Court's decree may be said to have merged, and hence the period fixed does not get a fresh start from the decree of the Appellate Court.

Where a decree awarding future *mesne profits* is confirmed in appeal, the three years' period under O. 20 R. 12 runs from the *appellate* decree.[13] The reason is that the term "decree" in O. 20 R. 12 refers to the *executable* decree in a case, and where an appeal is preferred against a decree, the only *executable* decree is that of the Appellate Court, whether it affirms, reverses or modifies the lower Court's decree. See also Note 5 on Order 34 Rule 3.

10. Court to which application for extension should be made. — Where an appeal has been preferred from a decree, the only Court that can extend the time fixed by it, assuming that the case is one in which time can be extended, is the Appellate Court.[1] *A fortiori* the lower Court has no jurisdiction to extend the time fixed in an appellate *decree*.[2] But it has been held by the Rangoon High Court that where an appeal has been dismissed, the trial Court has power to enlarge the time fixed by the order appealed from.[3] See also the undermentioned case.[4]

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6. ('97) 11 C P L R 115 (121).
[*See also* ('26) 13 AIR 1926 Nag 207 (208). (Appellate Court modified the preliminary decree for redemption—*Held* this did not necessarily involve a change in the due date.)]

7. ('21) 8 AIR 1921 Upp Bur 5 (7) : 4 Upp Bur Rul 1.

8. ('86) 13 Cal 13 (16) (DB).
† ('21) 8 AIR 1921 Cal 699 (705) (DB). (See the observations of Mookerjee, J. — 11 Cal W N 679 approved.)

9. ('98) 25 Cal 311 (313) (DB).
('22) 9 AIR 1922 Cal 329 (329) (DB).
[*See* ('14) 1 AIR 1914 Cal 323 (324). (High Court in second appeal while restoring decree of first Court which had been reversed by lower Appellate Court, fixed fresh date for redemption.)]

10. ('96) 18 All 101 (103) (FB). (Order of dismissal under O. 41 R. 10 for non-payment of security for costs.)
('17) 4 AIR 1917 All 392 (393) : 39 All 393. (Dismissal of appeal for default.)
† ('17) 4 AIR 1917 Cal 728 (730) : 44 Cal 954 (DB). (Dismissal for default.)
('14) 1 AIR 1914 P C 65 (66) : 36 All 284 : 41 Ind App 104 (PC). (Dismisal of appeal for non-prosecution.)
† ('14) 1 AIR 1914 P C 66 (67) : 36 All 350 (PC). (Do.)

11. ('91) 1 Mad L Jour 745 (746). (Withdrawal of appeal against decree for redemption—Time fixed for redemption by the decree appealed against not extended.)
('75) 1 All 293 (295) (DB). (Pre-emption decree specifying a certain time from the date of the decision becoming final—Decree affirmed in appeal—Special appeal from appellate decree withdrawn—Time runs from the date of decree in first appeal.)
('91) 15 Bom 370 (374) (DB).
('92) 16 Bom 243 (248) (DB).

12. ('24) 11 AIR 1924 Bom 98 (99) : 47 Bom 956 (DB).
('97) 21 Bom 548 (551) (DB).
NOTE.—But some cases have held that dismissal of appeal under O. 41 R. 11 (1) is a decree : see for instance A I R 1926 Cal 368 and the cases cited therein.

13. ('01) 23 All 152 (158) : 27 Ind App 209 (PC).

Note 10

1. ('10) 37 Cal 548 (550) (DB).

2. ('11) 12 Ind Cas 139 (139) (DB) (Mad).
('33) 20 AIR 1933 Cal 83 (85) (DB). (Remand order of Appellate Court fixing time for doing an act — Lower Court cannot extend time.)

3. ('35) 22 AIR 1935 Rang 500 (501).

4. ('38) 25 AIR 1938 All 497 (499) (DB). (Subordinate Judge passing preliminary decree and directing decree-holder to pay deficiency in court-fee within certain time adding that in default decree would be nullity—Munsif merely in charge of routine duties of Subordinate Judge has no jurisdiction to extend time so fixed for payment of court-fee.)

11. Appeal. — No appeal lies from an order under this section as it is neither a decree nor an appealable order under section 104.[1]

After a *final* decree, the Court cannot extend the time fixed by it, under S. 148. Hence, if the Court does extend the time it should be deemed to be acting not under S. 148 but under S. 47, and its order is therefore appealable as a *decree*.[2]

12. Revision. — An order under this section is not appealable but is open to revision provided the conditions of S. 115 are satisfied.[1] See Note 11. But the High Court will not interfere in revision unless it is necessary in the interest of *justice* to do so.[2]

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149. [New.] Where the whole or any part of any fee[6] prescribed for any document[4] by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion,[5] at any stage,[7] allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

Power to make up deficiency of court-fees.

[1882, *cf.* S. 582A.]

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Payment of court-fees after the period of limitation.
4. "Any document."
4a. "For the time being in force."
5. "Discretion of Court."
6. Whole or any part of any fee.
7. "At any stage."
8. Power of Appellate or Revisional Court to interfere with the discretion of the lower Court.
9. Plaints and memoranda of appeals.
10. Application for leave to sue or appeal as pauper.
10a. Power to call for court-fees after judgment is pronounced.
11. Conversion of proceedings.
12. Extension of time by admission Court.
13. Appeal.
14. Revision.
15. Review.

1. Legislative changes. — This section corresponds to S. 582A introduced into the old Code by Act IV of 1892. The material changes in the present section are the following:

Note 11

1. ('29) 16 AIR 1929 All 666 (667) (DB).
('20) 7 AIR 1920 Pat 281 (282). (Order granting time under S. 148 cannot be questioned in appeal.)
('16) 3 AIR 1916 Mad 694 (695) : 39 Mad 876 (DB).
† ('13) 35 All 582 (586) : 21 Ind Cas 585 (586) (SB). (Reversing 17 Ind Cas 912 and distinguishing 14 All 520.)
('24) 11 AIR 1924 Oudh 330 (331). (Order refusing to extend time not appealable.)
('23) 10 AIR 1923 Lah 162 (163).
('35) 22 AIR 1935 Rang 500 (501). (Executing Court granting extension of time for payment of money — Decree-holders fruitlessly appealing — Execution Court again granting extension of time —Such order is not appealable.)
2. ('24) 11 AIR 1924 Oudh 179 (179). (It was held in this case that even under S. 47 the Court cannot extend the time fixed by the decree though for the purpose of appeal, the order must be deemed to have been passed under S. 47.)

Note 12

1. ('41) 28 AIR 1941 Mad 706 (706). (Order under S. 148 without jurisdiction — High Court should not refuse to interfere in revision merely on ground of hardship to person adversely affected.)
('34) 21 AIR 1934 Lah 537 (538). (Court refusing to extend time for payment of deficient Court-fee on ground of want of power, fails to exercise discretion within the meaning of S. 115.)
2. ('30) 17 AIR 1930 Pat 279 (280).
('26) 13 AIR 1926 Mad 1059 (1060).
('33) 20 AIR 1933 Cal 20 (21) (DB). (Even if the order of the lower Court is erroneous.)
('25) 12 AIR 1925 Pat 153 (154).

(1) Section 582A applied only to *appeals* and *applications for review*. The present section applies to *all documents* chargeable with court-fees. See Note 4.

(2) The insufficiency of the stamp must under S. 582A have been caused by mistake on the part of the appellant or applicant for review as to the amount of the requisite stamp. There is no such restriction in the present section. See Note 5.

2. Scope of the section. — It is provided under the Court-fees Act, 1870, Ss. 4 and 6, that no document chargeable with court-fee under that Act shall be filed, or recorded in any Court of Justice, unless the court-fee payable in respect thereof is paid. The institution of a suit or other proceeding or the presentation of a document will not be a *legal* institution or presentation if the fee chargeable under law is not paid *at the time* of such institution or presentation. This section enacts an exception to that rule[1] by empowering the Court to allow a party to pay the requisite fee *at any stage* after the proceeding has been filed, and by providing that such payment shall have the same effect as if it had been made in the first instance. The result is that where a proceeding is instituted within the period of limitation, with an insufficient court-fee, it will not be time-barred, provided the full fee is paid with the leave of the Court under this section although, at the time the full fee is paid, the period of limitation has expired.[2]

But the payment of fee under this section cannot be claimed by a party *as of right*; it is in the *discretion* of the Court to allow or not such payment. See Note 5.

3. Payment of court-fees after the period of limitation. — It is only where the deficit is made good *within the time* allowed by the Court that the payment will have the force or effect as if it had been paid on the date of presentation.[1] If the payment is made *beyond* the time allowed, the presentation will be deemed to be made only *on the date such deficit is made good*. If that date itself is within limitation, the suit will not be barred.[2] If that date is beyond limitation, the suit will be barred unless the time originally allowed is extended by the Court up to the date of payment under S. 148 of the Code.[3] But such extension need not be by an *express* order. It may be inferred from the acceptance of the court-fees by the Court after the prescribed period.[4] Similarly, where the Court accepts payment of court-fee after the period of limitation without any express order allowing time under this section the Court must be deemed to have condoned the delay under this section.[5]

Section 149 — Note 2

1. *See* ('41) 28 AIR 1941 Nag 220 (221) : I L R (1941) Nag 467 (DB). (Section 6 of Court-fees Act does not bar the application of S. 149, C. P. Code.)

2. ('40) 27 AIR 1940 Mad 934 (936) (DB).
('32) 19 AIR 1932 Lah 21 (22).
('14) 1 AIR 1914 Cal 888 (889) (DB).
('12) 13 Ind Cas 900 (902) (DB) (Cal).
('01) 4 Oudh Cas 108 (114) (DB).
† ('09) 32 Mad 305 (311) (FB).

Note 3

1. See Note 2.
('28) 15 AIR 1928 Lah 274 (275).
('37) 24 AIR 1937 Lah 111 (112).
('36) 23 AIR 1936 Lah 564 (566) (DB).
('38) 25 AIR 1938 Mad 560 (562) (DB).
[*See also* ('37) 24 AIR 1937 Lah 392 (393). (Plaint presented to officer whose duty was to distribute plaints — Deficiency made up before the plaint reached the proper Court — As under O. 7 R. 11 the latter Court would have been bound to allow time for making up the deficit court-fee if it had not been paid already, the fact that the deficiency had been made up on the requisition of officer who was not authorized under S. 149 to allow time for making up deficit court-fee does not make the plaint invalid.)
('38) 25 AIR 1938 Mad 316 (317) (DB). (Court refusing to allow time for payment of deficient court-fee—Memorandum of appeal cannot be held to be presented in time.)]
2. ('05) 2 Cal L Jour 70 (72) (DB).
† ('07) 34 Cal 20 (26) (FB).
3. † ('10) 7 Ind Cas 578 (581) (DB) (Cal).
('34) 21 AIR 1934 Lah 537 (538).
(1900) 27 Cal 376 (378) (DB).
4. See S. 148 Note 8.
5. ('37) 24 AIR 1937 Lah 111 (112).

4. "Any document." — The corresponding section of the Code of 1882 (S. 582A) applied only to appeals and applications for review. This section is general in its terms and applies to *all* documents chargeable with court-fees under the Court-fees Act, such as plaints, memoranda of appeal or cross-objections, written statement claiming set-off[1] or making a counter-claim, etc. Thus, the section applies to an application to set aside an award.[2]

4a. "For the time being in force." — The court-fee payable according to the law "for the time being in force" means the court-fee payable according to the scale which was in force when the document *was filed* and not according to the scale which is in force when the *payment is made*.[1]

5. "Discretion of Court." — There are certain cases in which the Court is *bound* to give some time for making up the deficient court-fee. Thus, under O. 7 R. 11 (c) where a *plaint* is insufficiently stamped, the Court is *bound* to grant some time to supply the deficient court-fee.[1] In all other cases the Court has a *discretion* under the section to allow the court-fee to be paid at any stage. The High Courts of Calcutta,[2] Lahore,[3] Patna[4]

('34) 21 AIR 1934 Lah 701 (703) (DB).

Note 4

1. ('95) 5 Mad L Jour 233 (236) (DB). (Written statement pleading set-off.)
('35) 22 AIR 1935 Pat 110 (111) (DB). (Written statement claiming set-off.)
2. ('28) 15 AIR 1928 Sind 87 (89) : 23 Sind L R 91 (DB).

Note 4a

1. ('32) 19 AIR 1932 Oudh 343 (344).

Note 5

1. See Note 9.
2. ('18) 5 AIR 1918 Cal 193 (194) (DB).
('14) 1 AIR 1914 Cal 735 (736) : 41 Cal 1092 (DB).
('13) 21 Ind Cas 866 (867) (DB) (Cal). (Delay excused where non-payment was due to mistake.)
† ('32) 19 AIR 1932 Cal 482 (484, 485) : 59 Cal 388 (DB). (Court-fee stamp of one rupee in appeal memo to avoid limitation.)
3. ('26) 13 AIR 1926 Lah 689 (690) (DB).
('34) 21 AIR 1934 Lah 424 (425). (Counsel presenting appeal with insufficient stamp—Mistake pointed out but counsel persisting that court-fee paid was adequate — Question being simple one, mistake is not *bona fide* and extension of time cannot be granted.)
('33) 20 AIR 1933 Lah 264 (265). (Honest belief of appellant regarding adequacy of court-fee—Delay in giving adequate court-fee may be condoned.)
('27) 14 AIR 1927 Lah 884 (885). (Gross negligence on the part of the appellant's counsel, cannot be condoned.)
('24) 11 AIR 1924 Lah 325 (327) (DB). (Insufficiency brought to notice of appellant's pleader — Deliberate refusal—No extension to be allowed.)
('32) 33 Pun L R 187 (188) (DB). (Do.)
('31) 18 AIR 1931 Lah 343 (343). (Do.)
('28) 15 AIR 1928 Lah 274 (275). (Shortage of court-fee stamp in treasury, valid ground.)
('21) 8 AIR 1921 Lah 371 (372). (Appellant disputing order for more court-fee.)
('23) 10 AIR 1923 Lah 309 (309). (Disputing demand for more court-fee—Party not entitled to indulgence.)
('21) 8 AIR 1921 Lah 43 (44). (Ignorance of law and poverty, no excuse.)
('19) 6 AIR 1919 Lah 252 (253).
('29) 16 AIR 1929 Lah 748 (748) (DB). (Court-fee paid according to the old practice, following 1913 Pun Re No. 57.)
('30) 17 AIR 1930 Lah 24 (26).
('25) 12 AIR 1925 Lah 381 (383): 6 Lah 233 (DB).
† ('23) 10 AIR 1923 Lah 135 (137) (DB). (Debatable point—*Bona fide* mistake made—Delay may be excused.)
('13) 1913 Pun Re No. 55 : 19 Ind Cas 788 (788) (DB). (Reasonable diligence in the prosecution of appeal, necessary.)
('23) 10 AIR 1923 Lah 629 (630) (DB). (*Bona fide* mistake—Delay may be excused.)
('22) 9 AIR 1922 Lah 440 (441) (DB). (In absence of *bona fide* mistake Court should not resort to section 149.)
('26) 13 AIR 1926 Lah 509 (510) (DB).
('21) 67 Ind Cas 130 (130) (DB) (Lah).
('25) 12 AIR 1925 Lah 246 (246).
('19) 6 AIR 1919 Lah 280 (281) : 1919 Pun Re No. 10.
('20) 7 AIR 1920 Lah 92 (93) : 1 Lah 234 (DB).
('19) 6 AIR 1919 Lah 65 (65) : 1 Lah 220 (DB).
('09) 4 Ind Cas 554 (555) (Lah).
('36) 23 AIR 1936 Lah 935 (936). (Error of counsel not *bona fide*—Extension of time not granted.)
4. ('22) 9 AIR 1922 Pat 56 (56) (DB). (Deliberate payment of deficit stamp on memorandum of appeal—Payment of deficit after period of limitation does not save the appeal.)
('20) 7 AIR 1920 Pat 818 (820).
('24) 11 AIR 1924 Pat 663 (664) : 3 Pat 337 (DB). (Time of grace expired during the vacation—After the vacation the stamp could not be procured as the stamp vendor had none.)
† ('17) 4 AIR 1917 Pat 26 (27) : 3 Pat L Jour 74 (DB). (Deliberately and to suit their convenience the appellants had paid deficient court-fee.)
('29) 16 AIR 1929 Pat 731 (732) : 8 Pat 906 (DB).

and the Judicial Commissioner's Court of Nagpur[5] have held that this discretion cannot be exercised in favour of a party who has not been *bona fide*, that is, who is not under any honest mistake or doubt or who has not made an honest attempt to comply with the law. Mere poverty or ignorance is not a ground for indulgence under the section.[6] The reason is that where an appeal is not filed in time with a proper court-fee, the appeal becomes barred and the respondent gets a valuable right. The Court should not, therefore, exercise its discretion under this section to his prejudice except where sufficient grounds exist for the non-payment of the full court-fee in the first instance. The Bombay High Court[7] has, on the other hand, held that the discretion is not limited to cases where the party is under a *bona fide* misunderstanding of the law as to valuation. This view is based on the fact that the present section omits the provision which occurred in S. 582A of the old Code restricting the exercise of discretion to cases where the insufficiency of the stamp is caused by *mistake* on the part of the appellant or applicant. It has been held in a Full Bench decision of the Lahore High Court that the discretion conferred on the Court by this section is normally expected to be exercised *in favour* of the litigant except in cases of contumacy or positive *mala fides* or reasons of a similar kind.[8] The Peshawar Judicial Commissioner's Court[9] also has held that where the failure to pay the requisite court-fee is due to a *bona fide* mistake, the Court can allow the deficiency to be made up under this section.

Where a party has been contesting with some show of justification the correctness of the order requiring him to pay an enhanced court-fee, he should be allowed reasonable time in which to pay the deficiency on an adverse order being finally passed against him.[10]

('18) 5 AIR 1918 Pat 336 (338):3 Pat L J 484 (DB). (Failure of the plaintiff to affix sufficient stamp was due to gross negligence of his legal advisers.)

('25) 12 AIR 1925 Pat 435 (438) : 4 Pat 180. (Deficit amount paid to pleader — Pleader's clerk misappropriating it — Suit rejected in consequence — Suit can be restored subsequently.)

5. ('29) 16 AIR 1929 Nag 294 (295).

('08) 4 Nag L R 168 (176).

6. ('19) 6 AIR 1919 Lah 252 (253).

† ('34) 21 AIR 1934 Cal 659(661):61 Cal 663 (DB). (Inability to raise money is not sufficient ground for permitting payment of deficit court-fee.)

('21) 8 AIR 1921 Lah 43 (44) (DB).

('35) 22 AIR 1935 Rang 336 (339) : 13 Rang 50 (DB). (Mere inability to pay funds is not sufficient ground for Court exercising discretion.)

('36) 40 Cal W N 1294 (1295) (DB). (But where it is shown that the party lives in a district where an acute famine prevails and that in consequence he was unable to procure the necessary funds, an exception should be made to the rule, and the Court in such a case will exercise its discretion in his favour under S. 149.)

[*See* ('38) 25 AIR 1938 Nag 322 (323). (Substantial portion of court-fee paid—Poverty pleaded—Time can be extended.)]

7. ('14) 1 AIR 1914 Bom 249 (251) : 38 Bom 41 : 21 Ind Cas 337 (338) (DB).

8. † ('38) 25 AIR 1938 Lah 361 (365) (FB). (The question of *bona fides* in this connexion should be construed in the sense that the word is used in the General Clauses Act and not as used in the Limitation Act.)

Also see the following cases :

('40) 27 AIR 1940 Lah 446 (447): ILR (1941) Lah 652 (DB). (Application to sue in *forma pauperis* found *mala fide*—Extension of time not granted.)

('35) 22 AIR 1935 Lah 448 (450) : 17 Lah 122 (DB). (Appeals presented without proper court-fee accepted by office without objection — Question of court-fee payable not free from doubt—Appellants not guilty of deliberate attempt to avoid payment of proper court fee — They are entitled to grant of time for payment of proper court-fee.)

('36) 38 Pun L R 262 (263) (DB). (Where the mistake is *bona fide*, Court should allow deficiency to be made up.)

('37) 24 AIR 1937 Lah 276 (276). (Court-fee on objections to award not paid through inadvertence, owing to *bona fide* mistake of party's counsel — Requisite court-fee paid at earliest opportunity—Court should accept it under S. 149.)

('37) 24 AIR 1937 Lah 688 (688). (Appeal filed within time on insufficient stamp on basis of valuation of suit — Appellant making good deficiency within time allowed but after limitation—Appeal is not barred—Delay can be condoned under S. 149.)

9. ('37) 24 AIR 1937 Pesh 3 (4) (DB).

('37) 24 AIR 1937 Pesh 31 (32) (DB).

[*See* ('43) 30 AIR 1943 Pesh 43 (45) (DB). (Appellant failing to stamp his memo of appeal with respect to question of costs in lower Courts, through clear negligence — *Held* time could not be extended.)

('23) 73 Ind Cas 788 (791) (Pesh). (Memorandum of appeal insufficiently stamped even though there was no misapprehension as to the amount of court-fee payable — Appellant is not entitled to any indulgence under this section.)]

10. ('38) 25 AIR 1938 Mad 921 (922).

6. Whole or any part of any fee. — The discretion under S. 149 applies not only where the court-fee paid is not sufficient but also where no court-fee has been paid at all.[1] It has been held by the Madras High Court that S. 149 contemplates cases in which payment of duty is insufficient *ab initio*. Hence, it does not apply where a plaintiff is allowed to sue on the basis of a *tentative* valuation, as in suits for accounts or mesne profits, and, on a decree for a higher amount being passed, is required under Court-fees Act, S. 11, to pay additional court-fees.[2] It is however open to a Court on the construction of the Court-fees Act, S. 11, itself to enlarge the period fixed for payment of additional court-fee under that section.[3]

As to the right of an appellant in an insufficiently stamped appeal to be heard on the proportionate part of his claim in appeal, see the undermentioned cases.[4]

7. "At any stage." — Under the former Code. it was held by the High Courts of Bombay,[1] Calcutta[2] and Madras,[3] the Chief Courts of the Punjab[4] and Lower Burma[5] that where the deficiency in court-fee is supplied after the period of limitation but within the time allowed by the Court, the suit or appeal was not barred by limitation. The reason given was that the suit or appeal should be deemed to be instituted on the date of the original presentation of the plaint or memorandum of appeal and not on the date on which the deficit court-fee was made up. The Allahabad High Court did not accept this view.[6] According to that Court, the presentation of an insufficiently stamped plaint or memorandum of appeal was not a valid presentation, and the suit or appeal could be deemed to be instituted only when the full court-fee was paid. But, as has been seen in Note 1, *in the case of appeals and applications for review* a different rule was provided by S. 582A which was introduced into the Code by Act IV of 1892.[7] The section superseded the undermentioned decision[8] which held that a Court could not allow deficient

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Note 6

1. † ('29) 16 AIR 1929 P C 147 (148) : 56 Ind App 232 : 10 Lah 737 (PC).
('17) 4 AIR 1917 Low Bur 179 (180) (DB). (Court-fees Act, S. 12 (ii) which does not apply when no fee at all has been paid.)
† ('35) 22 AIR 1935 Pat 110 (111) (DB). (The Court is not precluded from considering the question of set-off even if the written statement does not bear the requisite court-fee at the time it is filed.)
('34) 21 AIR 1934 Lah 701 (703) (DB). (Memorandum of Letters Patent appeal.)
[But see ('33) 20 AIR 1933 Cal 796 (797) (DB).]
2. ('16) 3 AIR 1916 Mad 224 (227) (DB).
[*See also* ('33) 20 AIR 1933 Mad 330 (331, 332) : 56 Mad 705 (DB).]
3. ('11) 10 Ind Cas 268 (269) (Cal).
4. ('26) 13 AIR 1926 Lah 558 (559) (DB). (Appeal not to be dismissed but to be heard to the extent of court-fee paid.)
('31) 18 AIR 1931 Lah 237 (238) (DB). (Do—Pre-emption suit.)

Note 7

1. ('03) 27 Bom 330 (332) (DB).
2. ('92) 19 Cal 780 (783) (DB). (Dissenting from 12 All 129 (FB).)
† ('93) 20 Cal 41 (43) (DB).
(1900) 27 Cal 814 (818) (DB). (Following 20 Cal 41 and 17 Cal 780.)
('04) 31 Cal 75 (77) (DB).
('92) 19 Cal 747 (749) (DB).
3. ('02) 25 Mad 380 (383) (DB).
† ('09) 32 Mad 305 (311) (FB).
('99) 22 Mad 494 (502) (DB).
('92) 15 Mad 29 (34) (DB). (Following 2 All 241 : 6 Ind App 126 (PC).)
('92) 15 Mad 78 (79) (DB). (Following the principle laid down in 2 All 241 : 6 Ind App 126 (PC).)
('97) 20 Mad 319 (321) (DB). (A different note was struck in this case but the case was not followed in other decisions.)
4. ('05) 1905 Pun Re No. 104, page 309 (315) (FB).
('93) 1893 Pun Re No. 3, page 30 (37, 38) (DB).
('07) 1907 Pun Re No. 123, page 600 (607) (DB).
('03) 1903 Pun Re No. 74, page 309 (312) (DB).
('74) 6 N W P H C R 139 (141) (DB). (No time fixed — Payment of deficiency within reasonable time held sufficient.)
('71) 3 N W P H C R 202 (203).
[But see ('90) 1890 Pun Re No. 130, page 425 (427, 428).]
5. (1900) 1 Low Bur Rul 32 (33).
6. ('04) 1904 All W N 133 (133).
('01) 23 All 423 (426) (DB).
('05) 27 All 411 (414) (DB).
('06) 28 All 310 (312) (DB).
('02) 24 All 218 (220) (DB).
† ('93) 15 All 65 (74) (SB).
7. (01) 24 Mad 331 (332, 333) (DB).
('01) 16 C P L R 89 (90).
('02) 1902 All W N 153 (153) (DB).
('07) 29 All 618 (620) (DB).
8. ('90) 12 All 129 (143) (FB).

court-fee on an appeal or an application for review[9] to be made good after the expiry of limitation unless the memorandum of appeal or application for review had been received through the mistake of the Court or of an officer thereof. The principle embodied in the section was extended to *plaints* in the Full Bench case of *Hari Ram* v. *Akbar Hussain*.[10] The learned Judges in that case relied upon S. 28 of the Court-fees Act which enables deficit court-fees to be made up where insufficiently stamped documents have been received or filed through mistake or inadvertence. Their Lordships interpreted the expression "mistake or inadvertence" in S. 28 so as to include the mistake not only of the *Court or its officers but also of the party*. The present section gives legislative effect to this view and enables a defective document to be retrospectively validated at any stage if the insufficiency of the stamp is subsequently made up within the time allowed by the Court.[11]

The Court can also enlarge the time even after the lapse of the period originally fixed by it.[12]

Deficit court-fees on a plaint may be allowed to be made good even in appeal.[13] But it is desirable that in such cases the matter is disposed of at the earliest possible moment after the deficit is discovered.[14]

As to the power of a Court to extend time for payment of court-fees fixed by its own decree, see Note 2 on section 148.

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9. ('90) 12 All 57 (59) (DB).

10. *('07) 29 All 749 (764, 765) (FB).

11. ('22) 9 AIR 1922 Cal 234 (235).
('18) 5 AIR 1918 Mad 1039 (1040):40 Mad 687(DB).
*('29) 16 AIR 1929 P C 147 (148) : 10 Luck 737 : 56 Ind App 232 (PC).
('34) 21 AIR 1934 All 740 (765) : 56 All 828 (DB). (NOTE: This case is reversed on another point in A I R 1938 P C 165 : I L R (1938) All 601 : 32 Sind L R 531 : 65 Ind App 182 (PC).)
('34) 21 AIR 1934 All 160 (160).
('09) 2 Ind Cas 1 (3) (Cal).
('13) 20 Ind Cas 767 (767) (DB) (Mad).
('22) 9 AIR 1922 Lah 225 (226) : 3 Lah 35 (DB).
('26) 13 AIR 1926 Nag 156 (157).
('09) 3 Ind Cas 435 (436) (DB) (Mad).
('09) 3 Ind Cas 557 (558) (DB) (All).
('13) 21 Ind Cas 866 (867) (DB) (Cal).
('14) 1 AIR 1914 All 216 (216) (DB).
('15) 2 AIR 1915 Mad 426 (427) (DB).
('16) 3 AIR 1916 Pat 136 (137, 138): 1 Pat L Jour 420 (DB).
('16) 3 AIR 1916 Cal 616 (616) (DB).
('23) 10 AIR 1923 All 538 (538) : 45 All 518 (DB).
('26) 13 AIR 1926 Lah 346 (347) (DB).
† ('09) 32 Mad 305 (311) (FB).
('10) 37 Cal 399 (406) : 5 Ind Cas 532 (535) (DB).
('36) 23 AIR 1936 Oudh 340 (354).
('35) 22 AIR 1935 Oudh 231 (232) : 10 Luck 569.
('35) 22 AIR 1935 Pat 201 (201).
† ('37) 24 AIR 1937 Pat 550 (551):16 Pat 600 (SB).
('38) 25 AIR 1938 All 539 (540) : I L R (1938) All 848 (DB). (Decree conditional on payment of court-fee — Acceptance of court-fee though after three years from the date of the order directing the payment of the necessary court-fee, is quite valid and time for execution of the decree begins to run only after the date when the court-fee was paid.)
('38) 25 AIR 1938 Mad 560 (562).
[*See* ('35) 22 AIR 1935 All 985 (986). (Deficiency of court-fee ordered to be made good — Court rejecting plaint under O. 7 R. 11 — Plaintiff filing restoration application after making good deficient court-fee — Court can treat such application as fresh plaint under O. 7 R. 13 and can allow court-fee paid on rejected plaint to be counted towards court-fee on fresh plaint under Ss. 149 and 151, C. P. Code.)]
Also see O. 44 R. 1, Note 7.

12. ('22) 9 AIR 1922 Cal 234 (234).
('10) 6 Ind Cas 424 (425) (DB) (Cal).
('09) 2 Ind Cas 1 (3) (Cal).
('19) 6 AIR 1919 Cal 261 (261) (DB).
('94) 1894 Pun Re No. 113, page 435 (436).
('26) 13 AIR 1926 Mad 676 (678).
('87) 9 All 252 (253) (DB).
('76) 1876 Pun Re No. 84, page 169 (170) (DB).
('35) 22 AIR 1935 Pat 201 (201).
('38) 25 AIR 1938 Mad 560 (562) (DB).
[*See also* ('36) 23 AIR 1936 Cal 245 (246) (DB). (Where the Appellate Court orders the plaintiff in a suit to put in additional court-fee within a particular time and directs that in case of failure to do so on his part the suit is to stand dismissed, and the plaintiff applies for extension of time for putting in the deficit court-fee before expiry of the period, the Appellate Court has jurisdiction under S. 149 to extend the time as the appeal is not finally disposed of before the order of extension of time is made.)]
Also see S. 148 Note 7 and O. 7 R. 11, Note 5.

13. ('36) 23 AIR 1936 Cal 245 (246) (DB).
('38) 40 Pun L R 33 (35). (Trial Court itself fixing value of suit — Appellate Court finding value insufficient — Time should be given for paying deficit court-fee.)

14. † ('21) 8 AIR 1921 Pat 88 (89) : 6 Pat L Jour 293 (FB).

Where no time is fixed in the decree for the payment of the court-fee which is payable under it, the executing Court can allow time for such payment.[16] Where a decree is passed on condition that a certain court-fee is deposited and the decree-holder deposits the same after three years and the Court accepts it, it cannot be said that execution is barred by limitation inasmuch as the decree is complete only when the court-fee is deposited and limitation cannot begin to run under Art. 182 of the Limitation Act until there is a decree capable of execution.[16]

8. Power of Appellate or Revisional Court to interfere with the discretion of the lower Court. — An Appellate Court should not interfere with the discretion of the lower Court under the section except on very strong grounds.[1] Where a Judge has allowed deficient court-fee to be made up under this section, he must be taken, on the record as it stands, to have exercised his discretion in the matter and it is not open to the Appellate Court to go into the question as to whether he exercised his discretion.[2] Nor is it open even for the Judge while granting time for the payment of deficit court-fee to leave open the question of limitation.[3] But where a Judge *refuses* to allow a party to make up deficient court-fee under this section, there must be something to show that he did exercise his discretion in the matter.[4] In a Special Bench decision of the Patna High Court[5] it has been held that where the lower Court has exercised its discretion under this section in an outrageous fashion, the aggrieved party must immediately move the High Court in revision and if he does not do so, he cannot afterwards impeach the order of the Court in the appeal from the final decision. (It may, however, be noted that there is a conflict of decisions as to the power of the High Court to interfere in revision with interlocutory orders : see S. 115 Note 5. See also sections 100 and 101 Note 16.)

9. Plaints and memoranda of appeals. — A person is not entitled, as a matter of right, to make up deficient court-fee under this section. It is entirely left to the discretion of the Court to allow him to do so or not. But in a case of a plaint insufficiently stamped, the Court is *bound* under O. 7 R. 11 to allow some time to make up the deficiency, provided the plaint has been presented within the period of limitation. See O. 7 R. 11, Note 5. Does the same rule apply to appeals? On this point there is a conflict of decisions. See Note 6 on O. 7 R. 11 for a full discussion of the subject.

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15. ('37) 24 AIR 1937 Lah 720 (720). (An application for execution of that decree filed within time is not therefore barred by limitation by reason of the court-fee having been paid after limitation, if it was paid within the time allowed by the executing Court.)

16. ('38) 25 AIR 1938 All 539 (540) : I L R (1938) All 848 (DB).

Note 8

1. ('42) 29 AIR 1942 Pat 234 (235, 236) (DB). (Appellate Court may interfere where the order of the lower Court as to the time within which the court-fee is to be paid is unreasonably stringent.)
('41) 28 AIR 1941 Nag 304 (305) : I L R (1941) Nag 629. (Suit by plaintiff for possession of his share in house—At advanced stage of suit, defendant raising plea that value of house was much more—Plaintiff is entitled to extension of time to make good deficiency in court-fee — Refusal to grant extension amounts to improper exercise of discretion.)
('26) 13 AIR 1926 Nag 156 (157).
† ('25) 12 AIR 1925 Pat 299 (302) : 4 Pat 190 (DB).
('14) 1 AIR 1914 Cal 735 (736) : 41 Cal 1092 (DB).
('14) 1 AIR 1914 All 216 (216) (DB).
('20) 7 AIR 1920 Pat 281 (282) (DB).
('36) 38 Pun L R 262 (263) (DB).
('38) 25 AIR 1938 Mad 560 (562) (DB).

2. ('16) 3 AIR 1916 Cal 616 (616) (DB).
('38) 25 AIR 1938 Mad 542 (544). (The Appellate Court should presume that there was a real exercise of discretion by the lower Court, giving effect to the maxim *omnia præsumuntur rite esse acta*.)
[*See* ('38) 25 AIR 1938 Nag 322 (323). (It is not a question whether there was sufficient cause for the failure to pay the entire court-fee within the proper time but whether the Court acted unreasonably in allowing an extension of time.)]
Also see S. 148, Note 6.

3. ('33) 20 AIR 1933 Lah 598 (599) : 14 Lah 312.

4. ('23) 10 AIR 1923 All 349 (349) (DB).

5. † ('37) 24 AIR 1937 Pat 550 (552) : 16 Pat 600 (SB).

10. Application for leave to sue or appeal as pauper. — (1) Where an application for leave to sue or appeal as a pauper is rejected, can the Court allow the court-fees to be paid under this section so as to treat the suit or appeal as filed on the date of the filing of the pauper application and not on the date on which the court-fee is paid ?

(2) Has the Court power to convert an application for leave to sue or appeal as a pauper into a suit or appeal and by allowing time for the payment of court-fees on such suit or appeal under this section treat the same as filed on the date on which the application for leave was made?

For a discussion of these questions, see Notes on Order 33 Rule 7 and O. 44 R. 1.

10a. Power to call for court-fees after judgment is pronounced. — A Court has no power to call for deficient court-fee after it has pronounced its decision.[1] The reason is that thereafter it parts with the seisin of the case and becomes *functus officio*. For the same reason, an order stating that in the event of court-fee not being paid by a certain date, the suit will stand dismissed, is final, and the Court has no jurisdiction to extend the time under this section.[2]

11. Conversion of proceedings. — When an application is made under S. 95 of the Code, the Court may allow it to be converted into a suit on payment of the requisite court-fee. In such a case, the suit will be deemed to be instituted when the application was made and not when the court-fee is paid.[1]

Similarly, the High Court can, in a fit case, allow an application for revision to be converted into an appeal upon payment of the requisite court-fee although the period of limitation for an appeal may have expired, provided that it had not expired when the application for revision was filed.[2]

12. Extension of time by admission Court. — Where the admission Court allows deficit court-fee to be paid after the expiry of limitation subject to objections by the other side at the hearing of the appeal, the question can be gone into at the hearing.[1] But where the admission Court allows the deficit court-fee to be paid after time, without any such reservation and the respondent does not object as soon as he receives notice of the admission, he will be precluded from raising the objection at the time of hearing of the appeal.[2]

13. Appeal. — An appeal lies against an order dismissing an appeal on the ground of deficiency of court-fee, the appellant having failed to make good the deficiency

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Note 10a

1. ('33) 20 AIR 1933 Mad 321 (321).
('33) 20 AIR 1933 Lah 208 (208). (Following AIR 1919 Cal 194 : 46 Cal 520.)
† ('32) 19 AIR 1932 Pat 228 (231) : 11 Pat 532 (DB).
('32) 19 AIR 1932 All 316 (317).
2. ('42) 29 AIR 1942 Pat 234 (235) (DB).

Note 11

1. ('12) 16 Ind Cas 443 (444) (DB) (Cal).
Also see S. 95, Note 6.
2. ('25) 12 AIR 1925 Pat 16 (17) : 3 Pat 344 (DB).
Also see S. 115, Note 18.

Note 12

1. ('18) 5 AIR 1918 Pat 336 (338) : 3 Pat L Jour 484 (DB).
('14) 1 AIR 1914 Mad 386 (386) (DB). (According to the practice of the Madras High Court order of admission Judge is subject to objections before Court hearing appeal.)
('22) 9 AIR 1922 Lah 233 (234) : 2 Lah 1. (DB). (Discretion under S. 5, Limitation Act.)
[*See also* ('98) 21 Mad 269 (270) (DB). (Admission of appeal by Registrar — "No decision" as to court-fee—Question can be raised at the hearing.)]
2. † ('33) 20 AIR 1933 All 572 (574) (DB).
[*See also* ('35) 22 AIR 1935 Oudh 198 (201) : 10 Luck 606 (DB). (Court-fee made good and notice given to respondents—Court ordering restoration of appeal after hearing parties — Respondents cannot raise objection on the ground of limitation subsequently.)]

within the time allowed for the purpose. Such an order is not a mere order of dismissal for default under O. 41 R. 19 and hence is a decree.[1]

14. Revision. — It has been held by the High Courts of Calcutta and Patna[1] that an order requiring a plaintiff to pay additional court-fee within certain time is not one that would be interfered with in revision, inasmuch as he has another remedy open to him, namely, an appeal against dismissal of suit if the order is not complied with. The High Court of Madras[2] has, on the other hand, held that, where a Judge on an erroneous view of the court-fee payable refuses to proceed with the suit until the proper court-fee is paid, it amounts to a refusal to exercise jurisdiction and the order is therefore revisable. The High Court of Lahore[3] has held that an order by a Judge refusing to extend time for payment of deficit court-fee under this section on the ground that he had no *power to do so* is open to revision. The High Court of Allahabad[4] has held that an order refusing to give time to a party to make up the deficiency is not open to revision as the order does not amount to the decision of a "case" within the meaning of S. 115 of the Code.

See also Notes 5 and 27b on S. 115 and Note 12 on O. 7 R. 11.

15. Review. — A Court granting time under this section has power to review its order when it has been obtained by false pretences in the absence of the opposite party.[1] See also the undermentioned cases.[2]

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150. [New.] Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

Transfer of business.

Synopsis

1. "Save as otherwise provided."
2. "Where the business of any Court is transferred to any other Court."
3. Abolition of Court.
4. Powers and duties of Court to which business is transferred.

Note 13

1. ('22) 9 AIR 1922 Pat 281 (282) : 6 Pat L Jour 625 (DB).
† ('22) 9 AIR 1922 Nag 62 (63, 64) : 18 Nag L R 15.
('39) 26 AIR 1939 Pat 83 (84) : 17 Pat 687 (DB).
Also see S. 2 (2) Note 13 and O. 41 R. 17 Note 14.

Note 14

1. ('19) 6 AIR 1919 Cal 840 (841) (DB).
('21) 8 AIR 1921 Pat 180 (180) : 5 Pat L Jour 400 (DB).
2. ('42) 29 AIR 1942 Mad 585 (585).
† ('28) 15 AIR 1928 Mad 416 (418) : 51 Mad 664 (DB).
('17) 4 AIR 1917 Mad 134 (135) (DB). (Following 7 Ind Cas 92.)
('26) 13 AIR 1926 Mad 768 (769).
('25) 12 AIR 1925 Mad 722 (723).
3. ('34) 21 AIR 1934 Lah 537 (538).
[*See also* ('37) 169 Ind Cas 672 (672) (Lah). (Objections to award — Failure to pay court-fees —Court disposing of matter without taking any notice of objections and without giving time for paying court-fees—Order set aside.)]
4. ('23) 10 AIR 1923 All 118 (119) : 45 All 218 (DB).

Note 15

1. ('37) 24 AIR 1937 Nag 87 (88) : I L R (1938) Nag 359.
2. ('39) 26 AIR 1939 All 452 (454). (Court has jurisdiction to accept the court-fee and restore the plaint rejected as being insufficiently stamped if deficiency in court-fee could not be paid within time allowed due to illness of plaintiff.)
('39) 26 AIR 1939 Cal 722 (722) : 69 Cal L Jour 379 (380). (If without an application for review, a Court sets aside its own previous order rejecting a plaint for nonpayment of deficit court-fees and gives a further extension of time under S. 149, C. P. C., its subsequent order is not a nullity but remains a perfectly good order until it is set aside by a superior Court or in proper proceedings.)

1. "Save as otherwise provided." — The mere fact that the Court by which a certain power is to be exercised, is specified does not preclude any Court to which the business of the former Court is "transferred," from exercising the power under S. 150, unless it is expressly or impliedly provided that no Court other than the one specified can exercise the power.[1] The following are some of the cases bearing upon this question :

Execution proceedings — Section 38 provides that a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. Section 37 defines what a "Court which passed the decree" includes. A decree is passed by a Court A. The business of Court A is transferred to Court B within the meaning of S. 150. But Court B does not come within any of the categories mentioned in Ss. 37 and 38. Nevertheless Court B can execute the decree passed by Court A. The reason is that there is no express or implied exclusion of the competency of any Court not mentioned in Ss. 37 and 38 to execute the decree.[2] As to cases where a *particular area* concerned in a suit is transferred to another Court, see Note 5 on section 37 and also Note 2.

Application to set aside ex parte decree — Order 9 Rule 13 provides that an *application* to set aside an *ex parte* decree may be made to *the Court by which the decree was passed.* This does not mean that no other Court can set aside the *ex parte* decree. Hence, a Court to which the business of another Court is transferred under S. 150 can set aside the *ex parte* decree passed by the latter Court.[3]

Power to punish for disobedience of temporary injunction — Order 39 R. 2 (2) empowers the "Court granting an injunction" to punish persons for disobeying the injunction. This does not mean that no other Court has the power. Hence, a Court to which the business of another Court is "transferred" within S. 150 can punish for disobedience of an injunction granted by the latter Court.[4]

Power to demand inventory under the Probate and Administration Act, 1881 — Section 98 of the Probate and Administration Act, 1881 (corresponding to the present S. 317 of the Succession Act, 1925) imposes on the grantee of a probate, the duty of furnishing an inventory to the *Court which issued the probate.* The power of the Court which could grant probate to receive the inventory was held in the undermentioned case[5] to be saved from the operation of S. 150.

2. "Where the business of any Court is transferred to any other Court." — A, a Munsif in Bengal (whose ordinary pecuniary jurisdiction extends only up to Rs. 1000) who is specially empowered to try suits up to Rs. 2000, passes a preliminary decree in a mortgage suit for over Rs. 1000. A is then transferred and his successor B is not similarly empowered. The final decree is, therefore, passed by the Subordinate Judge having jurisdiction in the matter. B also is transferred and C, who is specially empowered succeeds. As soon as C succeeds to B, the business of the Subordinate Judge's Court, so far as it related to suits up to the value of Rs. 2000, must be taken to have been transferred to the Court of C and that Court is, therefore, competent to execute the decree.[1] Where a *particular area* is transferred from the jurisdiction of Court A to that of Court B, does it effect a "transfer of business" from Court A to Court B within the meaning of S. 150 ? The answer to this question depends upon what exactly is meant by a "transfer

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Section 150 — Note 1

1. ('42) 29 AIR 1942 Oudh 226 (228, 229) : 17 Luck 739 (DB). (Oudh Chief Court can amend decree of Judicial Commissioner's Court.)
2. ('20) 7 AIR 1920 Cal 532 (533) : 47 Cal 1100 (DB).
3. See O. 9 R. 13, Note 13.
4. See O. 39 R. 2, Note 6.
5. ('16) 3 AIR 1916 Mad 908 (909) (DB).

Note 2

1. ('20) 7 AIR 1920 Cal 532 (533) : 47 Cal 1100 (DB). (Facts slightly modified.)

of business." It is clear that unless a business is *removed* from the hands of one Court and placed in the hands of another, there cannot be a "transfer" of business, and that a business cannot be said to have been *removed or transferred* from Court A to Court B if Court A *continues* to have power to deal with that business. Now it is a general principle of law that where a Court has jurisdiction to entertain a suit or proceeding *at the time of its institution*, such jurisdiction is not lost by the *subsequent* transfer of the area or territory with reference to which the suit or proceeding was instituted.[2] In other words, the suit or proceeding *pending* in one Court at the time of the transfer of the local area is not *removed or transferred* to the Court to which the area is transferred. It follows, therefore, that there is no "transfer of business" effected by the transfer of a particular area so far as pending suits and proceedings are concerned. This is the decision of the Madras High Court in the undermentioned case.[3] A contrary view has, however, been expressed in the cases noted below.[4] Some of these cases hold that the transfer of an area operates as transfer of all the business, pending or otherwise, in that area to the transferee Court.[5] Some of them also hold that the Court in which the suit or proceeding was instituted would at the same time continue to have jurisdiction thereon.[6] This is an impossible position. As has been seen already, where a business is *transferred* from Court A to Court B, Court A has no longer *that business* before it and has no power to deal with it. If, on the other hand, Court A *continues* to have power over a particular business it cannot be said to have been transferred from it to another Court. For all the above reasons the decisions taking the second of the two views set forth above are not correct and have been overruled by a Full Bench of the Madras High Court in the undermentioned case.[7] The above Full Bench decision has been distinguished in a recent case[8] by the same High Court. In that case, a mortgage decree was passed by a Court at

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2. ('25) 12 AIR 1925 Mad 117 (118, 119) (DB). (Per Phillips, J.)
('01) 24 Mad 39 (41, 42) (DB). (Case dealing with appellate jurisdiction of High Court in cases instituted under enactments in force at time of institution of suit, but repealed before hearing of appeal.)
('09) 32 Mad 140 (141) (DB).
('16) 3 AIR 1916 Mad 80 (83) : 39 Mad 239 (FB).
('16) 3 AIR 1916 Lah 146 (148) : 1916 Pun Re No. 88.
('30) 17 AIR 1930 Mad 528 (529) : 53 Mad 378.
† ('22) 9 AIR 1922 Cal 274 (277, 278) (DB). (It was however held that the rule does not apply to cases of jurisdiction over the subject-matter.)
[*See also* ('18) 5 AIR 1918 Mad 998 (1002) : 40 Mad 1 (DB). (There was a change in the pecuniary jurisdiction — NOTE—The point occurs in the Order of Reference.)]
Also see S. 21 Note 4.
[But see ('36) 23 AIR 1936 Pat 546 (547) : 15 Pat 704 (DB).]

3. ✠ ('28) 15 AIR 1928 Mad 746 (750, 751) (DB). (The reasoning of the Court, however, in this case is somewhat different from that set forth above.)

4. † ('20) 7 AIR 1920 Mad 427 (432, 433) : 42 Mad 821 (F B). (The observations on this point are obiter.)
('15) 2 AIR 1915 Mad 1075 (1075) (DB).
('17) 4 AIR 1917 Mad 272 (273) (DB).
('15) 2 AIR 1915 Mad 362 (363) : 37 Mad 477.
† ('27) 14 AIR 1927 Mad 627 (628, 629) : 50 Mad 882 (DB). (It has power to entertain execution application and transmit it to the Court having territorial jurisdiction to execute it.)
('24) 11 AIR 1924 Mad 697 (700) (DB).
('10) 7 Ind Cas 864 (864) (DB) (Mad). (Point left open.)
('29) 16 AIR 1929 Mad 852 (854, 856) (DB). (In this case the question was left open.)
[*See also* ('24) 11 AIR 1924 Mad 32 (32) (DB).
('36) 23 AIR 1936 Pat 546 (547) : 15 Pat 704 (DB). (Transfer of local area to jurisdiction of another Court—Former Court ceases to have jurisdiction to pass decree.)]

5. † ('14) 1 AIR 1914 Mad 162 (167) : 37 Mad 462 (DB). (NOTE—Overruled on different point in AIR 1931 Mad 656 : 55 Mad 17 (FB).)
('15) 2 AIR 1915 Mad 1075 (1075) (DB).
('15) 2 AIR 1915 Mad 362 (363) : 37 Mad 477.
† ('24) 11 AIR 1924 Mad 697 (700) (DB)

6. ('20) 7 AIR 1920 Mad 427 (433) : 42 Mad 821 (FB) (The point was however discussed obiter.)
('10) 7 Ind Cas 864 (864) (Mad). (Point left open.)

7. ('32) 19 AIR 1932 Mad 418 (420, 421) : 55 Mad 801 (FB).
[*See also* ('43) 30 AIR 1943 Mad 449 (450, 451). (Case of execution—AIR 1932 Mad 418 : 55 Mad 801 (FB), relied on.)]

8. ('43) 2 Mad L Jour 31 (40) (DB). (The word "transferred" in S. 150, C. P. Code, was not confined to cases where the business of the Court was specifically transferred to another Court, but would include also cases where a new Court was given part of the territorial jurisdiction of an old Court.)

Berhampore. Subsequently, Berhampore was transferred to Orissa. But the place where the mortgaged property was situated remained in the Madras Presidency and came within the jurisdiction of the Court at Chicacole. It was held that this effected a transfer of business within the meaning of this section and that an application for scaling down the debt under the Madras Agriculturists' Relief Act could be made to the Chicacole Court. The Full Bench decision was distinguished on the ground that it dealt with an application for execution while the present was an *independent* proceeding. The Allahabad High Court has held in the undermentioned case[9] that the section cannot be invoked in a case where there has only been a transfer of jurisdiction as to future business subject to an express reservation as regards pending cases. Thus, a Court in which a suit was pending at the time of the transfer has exclusive jurisdiction to entertain an application for restitution arising out of such a suit. See also section 37 Note 5.

There is a conflict of decisions as to whether an assignment of business by the District Judge under the Civil Courts Act is a *transfer of business* within the meaning of S. 150. The Calcutta[10] and Patna[11] High Courts hold that it is not. The High Court of Madras[12] has, on the other hand, held that the word "transfer" is not inapplicable to a case where the District Judge fixes the jurisdiction of the Court under the Civil Courts Act, and transfers the whole of the business within the area to it.

3. Abolition of Court. — Where a Court is abolished, its proceedings can be continued by the Court which would have jurisdiction to entertain the suit if it was instituted at the time when the proceedings are sought to be continued.[1] (See S. 37 of the Code.) If a new Court is established in the place with the same jurisdiction as the old one, it can continue the proceedings[2] unless they have been transferred to some other Court.[3] But where the new Court, although substituted in the place of the old one, is essentially of a different jurisdiction, it cannot be said to be a successor or a transferee of the business of the old Court and cannot continue the proceedings instituted therein.[4] In one case it has been held by the Madras High Court that S. 150 applies only to cases of transfer from a Court and not to cases of a Court ceasing to exist.[5] No reasons are given and no authorities are cited for this proposition. It is submitted that there is no reason to limit the scope of section 150 in this way.

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9. ✝('37) 24 AIR 1937 All 515 (522) : ILR (1937) All 670 (DB).

10. ('42) 29 AIR 1942 Cal 321 (323) : ILR (1942) Cal 289 (DB).
('22) 9 AIR 1922 Cal 41 (42) (DB).
('38) 25 AIR 1938 Cal 193 (194) (DB).
[*See also* ('98) 25 Cal 315 (317, 319) (DB).
('36) 163 Ind Cas 622 (623) (Cal). (Section 150 refers to the change of the territorial limits of a Court's jurisdiction by notification or by special order and not to a mere distribution of work among Courts exercising the same jurisdiction — Hence where a temporary injunction in a suit filed in the Court of the Central Munsif is granted by that Court, and subsequently in the usual course of practice, the suit is allocated to the Court of the third Munsif, the latter Court has no jurisdiction to punish for breach of the injunction, as that is not "the Court granting the injunction," within the meaning of O. 39 R. 2 (3), C. P. C.—The Central Munsif's Court alone has jurisdiction to deal with the breach.)]

11. ✝('21) 8 AIR 1921 Pat 152 (155) : 6 Pat L Jour 364. (Transfer of business must be proved for the section to apply.)

12. ('23) 10 AIR 1923 Mad 92 (94) : 46 Mad 83 (DB). (AIR 1922 Cal 41 dissented.)
('32) 19 AIR 1932 Mad 260 (262).

Note 3

1. ('06) 4 Cal L Jour 473 (474) (DB).
✝('04) 31 Cal 1057 (1063) (DB).
('12) 13 Ind Cas 542 (543, 544) (Cal).
('15) 2 AIR 1915 All 219 (220) : 37 All 450 (DB).
('20) 7 AIR 1920 Cal 532 (532) : 47 Cal 1100 (DB).
2. ('26) 13 AIR 1926 Pat 209 (210) : 4 Pat 688 (DB).
3. ('29) 16 AIR 1929 All 677 (680) (DB).
4. ('15) 2 AIR 1915 Lah 171 (172) : 1915 Pun Re No. 30 (DB).
5. ('27) 14 AIR 1927 Mad 627 (628) : 50 Mad 882 (DB).

4. Powers and duties of Court to which business is transferred. — The Court to which the business of another Court has been transferred has the power to grant leave under O. 3 R. 4, sub-r. (2) for the determination of the appointment of a pleader.[1]

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151. [New.] Nothing in this Code shall be deemed to limit or otherwise affect the inherent power[1] of the Court to make such orders as may be necessary for the ends of justice[4] or to prevent abuse of the process of the Court.[6]

Saving of inherent powers of Court.

Synopsis

1. Inherent power.
2. Court cannot override express provisions of law.
3. Court cannot override general principles of law.
4. Ends of justice.
5. Other remedy open—Effect. See Note 4.
6. "Prevent abuse of the process of the Court."
7. Criminal cases.
7a. Contempt of Court, proceedings for.
8. Insolvency Court.
8a. General Clauses Act (1897), Section 21.
8b. Legal Practitioners Act, cases under.
9. Appeal.
10. Revision.
11. Limitation.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Additional evidence. See O. 41 R. 27, Note 1.
Amendments. See Note 2.
Consolidation of suits and appeals. See Note 4.
Contempt of Court. See Note 6.
Defence in *forma pauperis*. See O. 33 R. 1, Note 9.
Expunging scandalous matter. See Note 6.
Extension of time fixed by decree. See Note 2.
Fraud and misrepresentation. See Note 6.
Interim injunction and appointment of receivers. See Note 2.
Joinder of parties. See Note 2.
Rectification of mistakes. See Note 6.
Refund of court-fees. See Note 4.
Remand. See Note 2.
Restitution. See S. 144 Note 34.
Review. See Note 3.
Setting aside *ex parte* decisions and restoration of suits, etc., dismissed for default. See Note 2.
Stay of execution and other proceedings. See Note 2.

1. Inherent power. — In administering justice as prescribed by a Code there are two necessary shortcomings :

(1) There will always be cases and circumstances which are *not covered by the express provisions of the Code* wherein justice has to be done.[1] The reason is that the Legislature can foresee only the most natural and ordinary events and no rules can "regulate for all time to come so as to make express provision against all inconveniences which are infinite in number and so that their dispositions shall express all the cases that may probably happen."[2]

Note 4

1. ('35) 22 AIR 1935 Pesh 145 (145).

Section 151 — Note 1

1. ('41) 28 AIR 1941 Cal 670 (672) : ILR (1941) 1 Cal 490.
✠('06) 33 Cal 927 (932) (DB).
† ('06) 33 Cal 1094 (1098) (DB).
('07) 34 Cal 860 (862) (DB). (Order as to costs on dismissal of application for leave to appeal to Privy Council can be executed though no provision exists.)
('09) 36 Cal 193 (203) : 1 Ind Cas 913 (917) (DB).
('10) 6 Ind Cas 214 (247) (DB) (Cal).
('13) 40 Cal 955 (959) : 18 Ind Cas 207 (208, 209) (DB).
('95) 17 All 29 (31) (DB).
† ('28) 15 AIR 1928 Pat 187 (188) (DB).
('30) 17 AIR 1930 Lah 20 (21): 11 Lah 93.
('18) 5 AIR 1918 Mad 580 (584) : 40 Mad 1069 (FB). (Courts in British India have no power under C. P. Code to send decrees for execution to Native State Courts but they may and should send documents required by the latter to enable them to execute.)

2. ('41) 28 AIR 1941 Cal 670 (672) : ILR (1941) 1 Cal 490.

(2) The prescribed rules of procedure may be abused, or so used as to give a mere formality, the significance of substantive effect and thus obstruct instead of facilitating the administration of justice.[3]

It cannot be said that in the above circumstances Courts have no power to do justice, or redress a wrong merely because *no express provision* of the Code[4] or reported decision of a Court[5] can be found to meet the requirements of a case. As observed by Mahmood, J., in *Narsingh Das* v. *Mangal Dubey*[6]:

"Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibitions cannot be presumed."

Every Court, whether a Civil Court or otherwise[7] must, therefore, in the absence of express provision in the Code for that purpose, be deemed to possess, as inherent in its very constitution, all such powers as are necessary to do the right and to undo a wrong in the course of the administration of justice.[8] It has inherent power to determine how its proceedings should be conducted.[9] It was held in *Hukum Chand* v. *Kamalanand*[10] that the Court has inherent power

"*ex debito justitiæ* to consolidate; postpone pending the decision of a selected action; and to advance the hearing of suits; to stay on the ground of convenience cross suits; to ascertain whether the proper parties are before it;to enquire whether a plaintiff is entitled to sue as an adult; to entertain the application of a third person to be made a party; to add [Section 32 (1882) not being exhaustive] a party; to allow a defence in *forma pauperis*; to decide one question and to reserve

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† ('68) 9 Suth W R 402 (406) (FB). (Quoted by Peacock C. J., from Damat's Civil Law, Chapter 12, Section 17, page 88.)
('25) 12 AIR 1925 Oudh 128 (129).

3. † ('84) 6 All 351 (356, 357) (DB). (Per Mahmood, J.)
('33) 20 AIR 1933 Rang 52 (54): 11 Rang 79 (DB). (Technicalities not to override the substance of the law.)
(1879) 4 App Cas 504 (525), Kandall v. Hamilton. (Per Lord Penzance.)
('33) 20 AIR 1933 Nag 73 (74): 29 Nag L R 89.
† ('23) 10 AIR 1923 P C 128 (135) : 50 Ind App 183 : 2 Pat 676 (PC). (Rules of procedure are not made for the purpose of hindering justice.)
('24) 11 AIR 1924 Oudh 389 (390) : 27 Oudh Cas 103.
('28) 15 AIR 1928 P C 261 (262) (PC). (No forms or procedure should ever be permitted to exclude the presentation of a litigant's defence.)
('98) 21 Mad 373 (381) (DB).
('15) 2 AIR 1915 Mad 770 (772) (DB). (Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy.)
('09) 3 Ind Cas 34 (36) (DB) (Cal).
('12) 16 Ind Cas 614 (615) (DB) (Cal). (Application to exercise admitted power — But wrong section quoted — Refusal unjust.)
('14) 1 AIR 1914 Mad 59 (60) (DB). (*Bona fide* amendments must be allowed.)
('17) 4 AIR 1917 Cal 562 (563) (DB). (Statement of plaint claim—Mere defect of form—No bar in law.)
('21) 8 AIR 1921 Cal 147 (147) (DB). (Court sale of property in hands of executrix — Party described personally and not as executrix—Sale not invalid.) [*See also* ('33) 20 AIR 1933 Lah 210 (211). (Procedure is meant to serve and not to govern.)]

4. ('42) 29 AIR 1942 Pat 185 (187). (Where mortgaged property had already been sold to satisfy prior claim and surplus sale proceeds are lawfully payable to the mortgagee, Court can pass a decree declaring the right of the mortgagee to receive the surplus sale proceeds — If O. 34 R. 5 (3) does not cover the case Court can act under S. 151.)
('40) 27 AIR 1940 Rang 162 (167): 1940 Rang L R 512 (FB). (Per Blagden, J.)
('97) 19 All 155 (164) : 24 Ind App 22 (PC).
('09) 36 Cal 193 (204): 1 Ind Cas 913 (917) (DB).
('10) 7 Ind Cas 846 (848) (DB) (Cal).
('95) 17 All 29 (31, 33) (DB).
† ('93) 15 All 84 (95) (FB).
[*See also* ('34) 21 AIR 1934 Oudh 337 (340) (DB). ('33) 20 AIR 1933 Lah 266 (266, 267).]
Also see Preamble, Note 4.

5. ('24) 11 AIR 1924 Bom 90 (92, 93).

6. ('83) 5 All 163 (172) (FB).

7. ('15) 2 AIR 1915 Cal 49 (51) (DB). (Guardians and Wards Act.)
('18) 46 Ind Cas 621 (624) (Cal). (Court of the Board of Revenue — Bengal Revenue Act.)
('19) 6 AIR 1919 Pat 343 (344) : 4 Pat L Jour 371 (DB). (Chota Nagpur Tenancy Act.)
('95) 20 Bom 281 (283) (DB). (The Dekkhan Agriculturists' Relief Act.)

8. †(1856) 6 Moo Ind App 393 (410, 411) (PC).
('15) 2 AIR 1915 Mad 69 (71) (DB).

9. ('33) 20 AIR 1933 P C 43 (44, 45) (PC).

10. ('06) 33 Cal 927 (932) (DB).

another for investigation, the Privy Council pointing out that it did not require any provision of the Code to authorize a Judge to do what in this matter was justice and for the advantage of the parties; to remand a suit in a case to which neither S. 562 nor S. 566 (1882) applies; to stay the drawing up of the Court's own orders or to suspend their operation, if the necessities of justice so require; to stay, apart from the question whether the case falls within S. 545, the carrying out of a preliminary order pending appeal ; to stay proceedings in a lower Court pending appeal and to appoint temporary guardian of a minor upon such stay ; to apply the principles *of res judicata* to cases not falling within Ss. 13 and 14 of the Code (1882) and so forth."

In *Nandkishore* v. *Ramgolam*,[11] further instances were added, *viz* :

> Punishing for contempt of Court committed when the Court is not sitting: deciding questions of jurisdiction though the Court is ultimately found not to have jurisdiction over the suit : directing a party who has applied for leave to appeal to His Majesty in Council to pay costs on the dismissal of his application: amending decrees or orders : granting restitution in cases of reversal of execution sales and orders in execution proceedings : restraining by injunction a person from proceeding with a suit in the Small Cause Court: staying proceedings pursuant to its own order in view of an intended appeal ; and treating an application for revision as an appeal and *vice versa*.

The Court has an inherent power under such circumstances to act according to justice, equity and good conscience[12] especially in India, where every Court is a Court of Equity as well as of Law.[13]

This section does not confer any new powers on the Courts but only *saves* their inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.[14] The object of enacting the section is to show

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11. ('13) 40 Cal 955 (959, 960) (DB).

12. ('39) 26 AIR 1939 All 668 (669) (DB). (Court has no unrestricted jurisdiction to pass orders under S. 151 but it must proceed according to principles of justice, equity and good conscience.)
('84) 6 All 351 (355, 357) (DB).
('07) 4 Bom H C R O C 1 (27).
('25) 12 AIR 1925 All 280 (281, 282) : 47 All 538. (Inherent power to strike off defence for failure to obey order of Court.)
('32) 19 AIR 1932 Mad 263 (264). (Do.)
('28) 15 AIR 1928 Oudh 262 (263) (DB). (Do.)
[*See also* ('35) 22 AIR 1935 Cal 39 (72) (DB). (Every Court has an inherent power to make order *ex debito justitiæ*, with a view to the shortening of litigation, preventing duplication of proceedings and saving the parties from harassment and expense.)]

13. ('14) 1 AIR 1914 Cal 129 (131) : 41 Cal 137 (DB).
('84) 6 All 370 (373) (DB).
('24) 11 AIR 1924 Bom 231 (231) : 47 Bom 593. (Section applies to Courts and not to a commissioner appointed by Court for examining accounts — No inherent power to review.)
('25) 12 AIR 1925 Oudh 264 (265).
('30) 17 AIR 1930 Mad 618 (621) : 53 Mad 533 (DB). (Court or officer exercising quasi-judicial functions has inherent jurisdiction.)
('36) 23 AIR 1936 Bom 250 (255): 60 Bom 645. (With the limitation that though these powers are wide and undefinable the Court cannot use them to override the express provisions of law.)
[See however ('30) 17 AIR 1930 Lah 657 (658) (DB). (Section 151 is not one of the sections open to commissioner under Workmen's Compensation Act.)]

14. ('42) 29 AIR 1942 Cal 390 (393) (DB). (Section 151 does not deal with any application nor does it prescribe the procedure for any application; it is a clause whereby the inherent power which is in the Court to act *ex debito justitiæ* is recognized and left unfettered by the Code.)
('39) 26 AIR 1939 All 668 (669) (DB).
✠('13) 35 All 331 (336, 337) : 40 Ind App 151 : 16 Oudh Cas 194 (PC).
('12) 16 Ind Cas 966 (966) (DB) (Cal).
('13) 40 Cal 955 (959): 18 Ind Cas 207 (208) (DB).
('18) 5 AIR 1918 Cal 850 (857) : 44 Cal 804 (DB).
('17) 4 AIR 1917 Mad 159 (161) (DB).
('25) 12 AIR 1925 Cal 420 (421) (DB).
✝('26) 13 AIR 1926 All 212 (213): 48 All 356 (DB).
('31) 18 AIR 1931 All 427 (428) (DB).
('14) 1 AIR 1914 Sind 61 (62) : 8 Sind L R 327 (DB).
('18) 5 AIR 1918 Pat 52 (53) : 2 Pat L Jour 206 (DB). (Though section 151 does not confer any new jurisdiction yet the result has been to widen the exercise of power of Civil Courts.)
('20) 7 AIR 1920 Lah 346 (347).
('09) 2 Ind Cas 874 (912) (Bom). (It can take evidence in camera.)
('21) 8 AIR 1921 Pat 409 (410) (DB). (Court can *suo motu* raise attachment which becomes invalid by operation of law.)
✝('35) 22 AIR 1935 Cal 707 (709) (DB).
('36) 23 AIR 1936 All 555 (557) (DB).
('35) 22 AIR 1935 All 27 (28).
✝('35) 22 AIR 1935 All 599 (599): 57 All 977 (FB).
✝('36) 23 AIR 1936 Rang 208 (210): 14 Rang 173 (FB).

that the powers expressly conferred by the Code apply only so far as they go, but cannot restrict the scope of the Court's inherent powers to do complete and substantial justice[15] for the administration of which alone Courts exist.[16]

The inherent powers of the Court being very wide and indefinable[17] the *limits* of such jurisdiction should be carefully guarded and its exercise in an arbitrary and capricious manner effectively prevented.[18] It has been seen that the inherent power of a Court is recognized only to meet those cases for which no provision is made by the Code. It follows, therefore, that where there *are express provisions* of law applicable to a particular case, there is no inherent power in the Court to override them.[19] (See Note 2.) The words "nothing in this Code shall be deemed to limit or otherwise affect" do not mean that the Code stands repealed where a Court decides to exercise its inherent powers, for the inherent powers can be exercised *only where there is no express provision of the Code.*[20] Another limitation on the exercise of such power by the Court is that it must be consistent with sound general principles of law, and with the intention of the Legislature.[21]

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15. ('06) 3 Cal L Jour 29 (31) (DB).
('33) 20 AIR 1933 All 295 (297) : 56 All 216 (DB).
('07) 34 Cal 860 (862) (DB). (Legal order can be executed though no provision exists.)
† ('26) 13 AIR 1926 All 212 (213) : 48 All 356 (DB). (NOTE.—This case is overruled on another point in AIR 1935 All 599 : 57 All 977 (FB).)
('28) 15 AIR 1928 All 108 (110) : 50 All 335 (DB).

16. ('41) 28 AIR 1941 Oudh 344 (347).
('09) 1 Ind Cas 677 (681) (DB) (Cal).
('10) 7 Ind Cas 19 (20, 21) (DB) (Cal).
('24) 11 AIR 1924 Oudh 408 (410).

17. ('24) 11 AIR 1924 Oudh 11 (13) (DB). (It is dangerous to attempt definition of the inherent powers of the Court.)

18. ('41) 28 AIR 1941 All 314 (315, 316) : I L R (1941) All 612 (DB). (Court cannot refuse to examine a witness merely because he was present when the previous witness was examined. AIR 1934 All 840 holding that such witness should not be examined overruled.)
('41) 28 AIR 1941 Pesh 34 (36). (Powers under S. 151 should not be exercised lightly.)
('40) 27 AIR 1940 Oudh 298 (300) (DB). (Discretion under S. 151 should be exercised on judicial grounds.)
('20) 7 AIR 1920 Pat 56 (59).
† ('13) 40 Cal 955 : 18 Ind Cas 207 (208) (DB).
† ('36) 23 AIR 1936 Rang 208 (210) : 14 Rang 173 (FB).
[*See* ('42) 29 AIR 1942 Cal 390 (393) (DB). (The Court will exercise its inherent powers if it considers that justice requires their exercise and if it is satisfied that there are no such laches on the part of the applicant which would disentitle him to relief.)
('20) 7 AIR 1920 Oudh 84 (85). (Hard cases must not be allowed to make bad law.)]
[*See also* ('33) 20 AIR 1933 Rang 96 (98) (DB). (Not to nullify principles of law of limitation.)
('32) 19 AIR 1932 All 524 (526) (DB). (Order for production of defendant for medical examination—Defendant, woman—Her consent not got—Order of arrest on default—Illegal.)
('39) 26 AIR 1939 All 497 (497) : 1939 All L Jour 398 (400) (DB). (Section 151 does not confer an unlimited jurisdiction on the Courts to do what they please.)]

19. ('40) 27 AIR 1940 Nag 349 (351) : I L R (1940) Nag 538 (DB). (Order against S. 13, Court-fees Act.)
('14) 1 AIR 1914 All 314 (316) : 36 All 354 (DB). (Exercise irregular and uncalled for—Condemned.)
('06) 33 Cal 927 (931) (DB).
('34) 21 AIR 1934 Mad 199 (200, 201): 57 Mad 635.
('32) 19 AIR 1932 Lah 238 (239).
('32) 19 AIR 1932 Lah 443 (443). (Remand under O. 41 R. 25 available—Remand under S. 151 not justified since appeal is thereby denied.)
('33) 20 AIR 1933 Sind 29 (31) : 26 Sind L R 395.
('35) 22 AIR 1935 Cal 707 (709) (DB). (By the exercise of inherent power, the Court cannot exonerate a litigant from an obligation imposed upon him by the statute.)
('36) 23 AIR 1936 Bom 250 (255) : 60 Bom 645.
† ('39) 26 AIR 1939 Sind 137 (142) : I L R (1939) Kar 330 (DB). (New plea allowed to be argued without amendment of pleading and raising proper issue—Order cannot be allowed to stand.)
[*See also* ('31) 18 AIR 1931 All 443 (447) : 53 All 804 (SB). (No inherent power in Courts to make complaints apart from Ss. 195 and 476, Cr. P. Code.)]

20. ('43) 30 AIR 1943 Oudh 136 (138) (DB). (An execution Court is competent at any time to revoke its own order of stay of execution for good reason and after hearing the parties. It is not necessary for the Civil Court to invoke S. 151 for that purpose.)
('12) 15 Ind Cas 53 (53) (DB) (Cal).
('29) 16 AIR 1929 Lah 694 (695).
† ('25) 12 AIR 1925 Mad 42 (44) : 48 Mad 494.
('27) 14 AIR 1927 Cal 657 (658) (DB). (Section applies only when remedies in the Code are not ample or sufficient.)
('16) 3 AIR 1916 Lah 350 (351) (DB).
('34) 21 AIR 1934 Pat 582 (582) (DB). (Compromise signed by only one of two plaintiffs who was the manager of the family — Procedure under O. 23 R. 3 and not under S. 151.)
('34) 21 AIR 1934 All 624 (625) (DB).
[*See* ('35) 22 AIR 1935 Bom 222 (225) : 59 Bom 430. (Courts should not, as far as possible, travel beyond the provisions of the Code.)]

21. † ('06) 33 Cal 927 (931) (DB).

The inherent powers of a Court under S. 151 can be exercised, as the section itself indicates, only —

(1) for the *ends of justice* (See Note 4), or

(2) to prevent the abuse of the process of the Court.[22] (See Note 6.)

The Court has a special inherent jurisdiction derived from the Crown as *parens patriæ* to protect the interests of minors.[23]

2. Court cannot override express provisions of law. — It has been seen in Note 1 that the inherent power of a Court exists only where there is *no* express provision of law applicable to the case.[1] Thus, where there is a specific *prohibition* of a particular act or order, the Court cannot do the act or make the order under its inherent powers.[2] The following are instances of express prohibitions of law which cannot be contravened by a Court under its inherent powers :

1. Section 34 (2) — Where a decree is silent as to further interest after date of decree, the Court cannot grant it under its inherent powers.[3]

2. Sections 104 and 105 — No appeal can be allowed from a non-appealable order, under the inherent powers of the Court.[4]

3. Order 20 Rule 3 — Where once a judgment is signed it shall not afterwards be altered or added to, save as provided by S. 152, or on review. A Court cannot, therefore,

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('10) 37 Cal 399 (404):5 Ind Cas 532 (534, 535)(DB).
('27) 14 AIR 1927 Cal 420 (420) (DB).
† ('36) 23 AIR 1936 Rang 208 (210):14 Rang 173 (FB).
[*See also* ('33) 20 AIR 1933 Pat 196 (202, 203) : 12 Pat 216 (DB). (Interest on equitable grounds not available in the face of Interest Act.)]

22. ('42) 29 AIR 1942 Oudh 189 (193) : 17 Luck 297 (DB). (Amendment sought for not necessary for the ends of justice nor to prevent abuse of process of Court—S. 151 not applied.)
('40) 27 AIR 1940 Rang 162 (167):1940 Rang LR 512 (FB). (Per Blagden J.—S. 151 does not empower the Court to make any order which the particular individuals who at a given moment happen to compose it think just or calculated to prevent an abuse of its process. The words "ends of justice" and "abuse of the process of the Court," must, in fact, be construed with due regard to the rest of the provisions of the Code, the section being really intended to prevent the Courts being rendered impotent by any omission in the Code. The section empowers the Court to make "necessary orders," and no other orders.)
† ('28) 15 AIR 1928 Mad 522 (523) (DB).
('18) 5 AIR 1918 Oudh 163 (166) (DB).
('22) 9 AIR 1922 Sind 6 (9) : 16 Sind L R 79.
('15) 2 AIR 1915 All 172 (173) : 37 All 380 (DB).
[*See also* ('41) 28 AIR 1941 Rang 60 (61) : 1940 Rang L R 749. (Claimant to attached property filing declaratory suit—Stay of sale unnecessary in ends of justice or to prevent abuse of the process of Court.)
('33) 20 AIR 1933 Bom 200 (202) (DB). (Decree in wrong name owing to misdescription—Real person can be brought on record in execution proceedings.)]

23. ('42) 29 AIR 1942 All 150 (152): I L R (1942) All 144. (Person becoming next friend cannot repudiate that position afterwards.)

Note 2

1. ('43) 30 AIR 1943 Cal 361 (367) (DB).
('43) 30 AIR 1943 Mad 235 (236).
('42) 29 AIR 1942 Pat 328 (328).
('40) 27 AIR 1940 Lah 85 (87).
† ('76) 2 Cal 233 (261) : 4 Ind App 23 (PC).
('29) 16 AIR 1929 Cal 17 (19) (DB).
('28) 15 AIR 1928 Cal 179 (180).
('18) 5 AIR 1918 Oudh 311 (312).
('12) 17 Ind Cas 583 (584) (Mad).
('21) 8 AIR 1921 Sind 38 (41) : 15 Sind L R 61.
('37) 24 AIR 1937 Bom 173 (176).
('35) 22 AIR 1935 Bom 222 (225) : 59 Bom 430.
('37) 24 AIR 1937 All 232 (234). (The Court can grant restitution under its inherent power under S. 151 only when it is made out that it cannot be obtained in any other way.)
2. ('40) 27 AIR 1940 Rang 156 (156): 1940 Rang L R 392.
† ('15) 2 AIR 1915 Cal 137 (140) (DB).
('24) 11 AIR 1924 Oudh 420 (421) : 27 Oudh Cas 137 (DB).
('36) 23 AIR 1936 Bom 250 (255) : 60 Bom 645.
('38) 25 AIR 1938 Mad 67 (67) (DB). Withdrawal of appeal as having been settled out of Court—Court-fee paid on such appeal cannot be refunded : AIR 1934 Mad 566: 57 Mad 1028, followed.)
[*See* ('35) 22 AIR 1935 Mad 175 (178). (Court cannot use its inherent powers to extend the scope of a provision which places limitations on it: AIR 1920 Mad 640: 43 Mad 94 (FB), relied on.)]
[*See also* ('41) 28 AIR 1941 Mad 364 (365). (Court can invent procedure not provided for unless it is expressly or impliedly prohibited from doing so.)]
3. ('24) 11 AIR 1924 Rang 275 (277) (DB).
4. ('40) 27 AIR 1940 Bom 10 (11, 12) : I L R (1939) Bom 708. (Order refusing to amend decree.)

under its inherent powers, set aside its own decree or recall an order made by it previously or question the validity of a decree in execution.[5] A contrary view has, however, been expressed in the undermentioned cases.[6]

3a. Order 21, Rules 58, 60 — An order under R. 58 of O. 21, even though it be a dismissal for default is *conclusive* until set aside by a suit under R. 63; the Court cannot set aside the order under its inherent powers.[7]

4. Order 21 Rule 78 — A Court cannot set aside a sale of *moveable property* for an irregularity in publishing or conducting the sale.[8]

5. Section 9 of the Specific Relief Act, 1877 — No application for review can be entertained in respect of any decree or order passed in a suit under S. 9 of the Act.[9]

6. Section 56 of the Specific Relief Act, 1877 — No injunction can be granted under the Court's inherent powers, in contravention of the provisions of S. 56 of the Act.[10]

7. For other instances, see the undermentioned cases.[11]

But it is not necessary in order to exclude the exercise of the inherent powers of a Court that there should be a specific *prohibition*. Where the procedure to be adopted in a particular case or a class of cases is provided for by the Code, and a case in which the inherent powers are invoked falls within the intendment of such provision, there is no inherent power to act except under the conditions specified by such provision.[12] The reason

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('23) 10 AIR 1923 Oudh 177 (179): 26 Oudh Cas 10.

5. ('41) 28 AIR 1941 Lah 419 (419, 420): I L R (1942) Lah 212. (Where the error is not clerical, accidental or arithmetical Ss. 151 and 152 do not apply—The remedy is by way of review or appeal.)
('25) 12 AIR 1925 Pat 47 (47): 3 Pat 654 (DB).
('33) 20 AIR 1933 Bom 244 (244, 245): 57 Bom 369 (DB). (Compromise subsequent to leave to appeal to Privy Council—High Court has no power to pass compromise decree.)
('25) 12 AIR 1925 Pat 36 (36): 3 Pat 778 (DB).
('24) 11 AIR 1924 Pat 696 (697) (DB).
('23) 10 AIR 1923 All 603 (603) (DB). (Remedy open by review—S. 151 not applied.)
('22) 9 AIR 1922 Mad 186 (186) (DB). (Amendment of final decree.)
('21) 8 AIR 1921 Bom 301 (302): 45 Bom 459 (DB). (Questioning validity of decree under execution.)
('13) 20 Ind Cas 3 (5) (DB) (Lah).
('17) 4 AIR 1917 Mad 290 (292) (DB).
('24) 11 AIR 1924 All 62 (62): 45 All 628 (DB).
('23) 10 AIR 1923 Pat 354 (355): 2 Pat 504 (DB).
('32) 136 Ind Cas 253 (254) (Oudh).
[*See* ('40) 27 AIR 1940 Oudh 298 (300) (DB). (*Prima facie* it would be hard to say that if a matter really fell within the scope of S. 152, a Court could possibly be justified in correcting under its inherent powers a defect which it was declining to correct under provisions of S. 152.)]
[*See also* ('34) 21 AIR 1934 Lah 399 (399). (Compromise according to terms agreed correct—Not to be altered merely on the allegation of omission of disputed items.)]
Also see S. 38 Note 8 and S. 152 Note 6.

6. ('34) 21 AIR 1934 Nag 234 (235): 31 Nag L R 53. (Order 20 R. 3 is not exhaustive and it is the duty of a Court to invoke its inherent powers to correct errors that have led to injustice through no fault of a party.)
('34) 21 AIR 1934 Rang 108 (109) (DB). (Decree as per compromise when the compromise and joint statements prayed for dismissal—Amended—No review or suit needed.)
('34) 21 AIR 1934 All 287 (288) (DB). (Order under misapprehension of facts—True facts known—Corrected.)

7. ('34) 21 AIR 1934 Mad 699 (699).
('36) 23 AIR 1936 Pesh 115 (116) (DB). (Objection under O. 21 R. 58 accepted *ex parte*—Order cannot be set aside under inherent power.)

8. ('30) 17 AIR 1930 All 513 (513).

9. ('18) 5 AIR 1918 Cal 925 (927): 45 Cal 519 (DB).

10. ('19) 6 AIR 1919 Oudh 154 (159) (DB).

11. ('43) 30 AIR 1943 Cal 361 (367) (DB). (Besides S. 26, Bengal Act XI of 1859, the Board, even if it is considered acting as Court, has no inherent power to set aside revenue sale.)
('23) 10 AIR 1923 Bom 51 (58). (No jurisdiction as against R. 36 of Admiralty Rules of Bombay High Court.)
('36) 40 Cal W N 89 (90). (Award under Co-operative Societies Act cannot be questioned in Civil Court.)

12. ('43) 30 AIR 1943 Mad 235 (236). (Apart from the circumstances mentioned in O. 21 R. 93, the Court has no power under this section to order payment of interest on the purchase money.)
('41) 28 AIR 1941 All 219 (221): I L R (1941) All 418. (No inherent power to demand security for costs, apart from O. 25 R. 1.)
('41) 28 AIR 1941 Bom 395 (397): I L R (1941) Bom 652. (No inherent power to attach property before the decree becomes executable.)
('41) 28 AIR 1941 Oudh 383 (385): 16 Luck 765. (A person obtaining a preliminary decree for partition, is not entitled to ask the Court under S. 151, C. P. Code, to direct the making of a proclamation about his share.)

is that the provision must be deemed to be *exhaustive of the matters dealt with by it.*[13] Thus, a Court cannot, under its inherent powers, refuse to be bound by the periods of limitation prescribed by the Limitation Act, 1908.[14] Where, however, there is a doubt or

('40) 27 AIR 1940 Lah 85 (87). (Where S. 10 does not apply, inherent power cannot be invoked.)
('40) 27 AIR 1940 Nag 349 (351, 352) : I L R (1940) Nag 538 (DB). (Inherent power of remand.)
('40) 27 AIR 1940 Oudh 298 (300) (DB). (Court declining under S. 152 to correct defect falling within scope of S. 152 — Court is not justified in correcting such defect under S. 151.)
('76) 2 Cal 233 (261) : 4 Ind App 23 (PC).
('32) 19 AIR 1932 Lah 537 (537, 538). (Order 21 R. 18 exhaustive.)
('19) 6 AIR 1919 Cal 44 (45) (DB). (Contempt outside Court premises cannot be punished summarily under S. 151.)
('23) 10 AIR 1923 Mad 331 (331) (DB).
('20) 7 AIR 1920 Upp Bur 37 (37): 3 Upp Bur Rul 198.
('21) 8 AIR 1921 Oudh 46 (46): 24 Oudh Cas 215.
('30) 17 AIR 1930 Lah 789 (790).
('30) 17 AIR 1930 Lah 26 (31, 32) : 11 Lah 342 (DB). (Modification of award in contravention of Sch. II Para. 12.)
('12) 1912 Pun Re No. 8 : 16 Ind Cas 521 (521). (No inherent power to force witness to sign deposition in the face of O. 18 R. 5.)
('16) 3 AIR 1916 Lah 95 (96): 1917 Pun Re No. 11. (Cannot wholly ignore the provisions of S. 22, C. P. Code.)
('32) 19 A I R 1932 Lah 238 (239). (No inherent power to disregard default in deposit of five per cent. under O. 21 R. 89.)
('18) 5 A I R 1918 Lah 368 (368) : 1918 Pun Re No. 58. (Court cannot entertain claims against attachment contrary to the terms of O. 21 R. 58.)
('16) 3 AIR 1916 Cal 371 (372) (DB). (Section 73, C. P. Code—Execution petition after realisation of asset—No rateable distribution.)
('11) 12 Ind Cas 719 (720) (Mad). (Order 11 R. 21 exhaustive—No inherent power.)
('24) 11 AIR 1924 Cal 1054 (1055).
('25) 12 AIR 1925 Cal 274 (275) (DB).
('26) 13 AIR 1926 Cal 897 (898) (DB).
('24) 11 AIR 1924 Cal 251 (256) : 50 Cal 853 (DB).
('26) 13 AIR 1926 Cal 957 (958) (DB).
('27) 14 AIR 1927 Cal 158 (159) (DB).
('27) 14 AIR 1927 Cal 850 (853): 55 Cal 219 (DB).
('11) 9 Ind Cas 246 (247) (DB) (Cal).
('09) 34 Bom 72 (81) : 2 Ind Cas 173 (178) (DB).
('29) 16 A I R 1929 Sind 110 (111) (DB). (An inquiry into pauperism under O. 21 R. 40 cannot be made until the conditions in the rules are satisfied—No inherent power.)
('37) 24 AIR 1937 All 141 (142) (SB). (Court cannot revoke its order of reference to arbitration in the exercise of its inherent power under S. 151 C. P. C. — Such power does not exist apart from the provisions contained in Sch. II, C, P. Code.)
[*See* ('23) 10 AIR 1923 Lah 514 (515).]
[*See also* ('33) 20 A I R 1933 Pat 582 (583). (Inherent power only when powers expressly conferred are exhausted.)]

13. ('41) 28 AIR 1941 All 212 (215). (Section 136, though it may not be prohibitory, provided for the contingency that had arisen, hence inherent power not exercised.)
('41) 28 AIR 1941 All 219 (221) : I L R (1941) All 418.
† ('06) 33 Cal 927 (931) (DB).
† (02) 29 Cal 707 (715) : 29 Ind App 196 (PC).
('24) 11 A I R 1924 Mad 114 (115, 116) : 47 Mad 171 (DB).
[*See also* ('43) 30 AIR 1943 Mad 235 (236). (Payment of interest on purchase money under O. 21 Rule 93.)]
Also see Preamble, Note 4.

14. ('43) 30 AIR 1943 Sind 132 (134) (DB). (Order dismissing appeal under O. 41 R. 18—No inherent power under S. 151, C. P. C., to set aside the order — A I R 1921 Bom 20 : 45 Bom 648 held overruled by A I R 1935 P C 85 : 62 Ind App 80: 57 All 242 (PC).)
('24) 11 AIR 1924 All 668 (669) : 46 All 631. (AIR 1924 All 446 : 46 All 144, followed.)
('33) 20 AIR 1933 Pat 132 (133, 134).
('15) 2 A I R 1915 Cal 530 (531) (DB). (No mesne profits for more than three years.)
('20) 7 AIR 1920 Lah 261 (262).
('20) 7 AIR 1920 Lah 309 (310) : 1 Lah 363 (DB).
('22) 9 AIR 1922 Lah 266 (266).
('25) 12 AIR 1925 Lah 321 (321).
('26) 13 AIR 1926 Lah 135 (135).
('22) 9 A I R 1922 Pat 479 (480) : 1 Pat 277 (DB). (Petition under O. 9 R. 13 after time.)
('10) 6 Ind Cas 901 (902) (Bom). (Do.)
('28) 15 A I R 1928 Nag 91 (92) : 23 Nag L R 183. (Petition under O. 9 R. 9 after time.)
('31) 18 AIR 1931 Cal 319 (320). (Do.)
('26) 13 AIR 1926 Mad 980 (984) : 50 Mad 67 (DB).
('17) 4 A I R 1917 Mad 176 (177) (DB). (No valid deposit under O. 21 R. 89 after time.)
('22) 9 AIR 1922 Mad 417 (421) (DB).
('20) 7 AIR 1920 Lah 346 (347).
('32) 19 AIR 1932 Oudh 220 (222) (DB).
('33) 20 AIR 1933 Mad 258 (258, 259) (DB).
('33) 20 A I R 1933 Rang 96 (98) (DB). (Section 5, Limitation Act, not to be nullified by powers under this section.)
('34) 21 A I R 1934 Nag 43 (44). (Time for deposit to set aside *ex parte* decree in small cause suit not to be extended.)
('37) 24 A I R 1937 Oudh 426 (427) : 13 Luck 425 (DB) (Application for re-admission of appeal under O. 41 R. 19, C. P. C., made after 30 days of order of dismissal — Application is time-barred under Art. 168, Limitation Act, even if it is assumed to be one made under S. 151.)
† ('35) 22 AIR 1935 Rang 466 (471) : 13 Rang 595 (DB). (Section 151 only declares that nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court.)
('35) 22 AIR 1935 Pesh 146 (147) (DB). (Court has no inherent power to enlarge period of limitation laid down by statutory law.)

difficulty as to which provision will apply to a particular case, the inherent powers may be invoked.[15]

It may be useful to refer to certain classes of cases in which the question of the inherent powers of the Court to act have been discussed :

1. Setting aside ex parte decisions and restoration of suits dismissed for default — It has been held by the High Courts of Allahabad,[16] Calcutta,[17] Lahore,[18] Madras,[19] Patna[20] and Rangoon[21] and the Chief Courts of Oudh and Sind[22] that there is no

('39) 26 AIR 1939 Cal 310 (312):ILR (1939) 1 Cal 452. (An application under O. 21 R. 91, C. P. C., made more than 30 days from the date of the sale cannot be treated as an application under S. 151.)
('35) 22 AIR 1935 Lah 60 (61) (DB).
('36) 23 AIR 1936 Pat 270(273) : 15 Pat 422 (DB). (Certification of payment—Article 174, Limitation Act, cannot be overridden.)
('36) 23 AIR 1936 Lah 495 (496). (Application for restoration of suit dismissed for default — Article 163, Limitation Act, applies—Having recourse to S. 151, C. P. C., cannot help limitation.)
[*See also* ('33) 20 AIR 1933 Mad 418 (420, 424) : 56 Mad 490 (FB).
('33) 20 AIR 1933 Mad 315 (319) : 56 Mad 458. (Decree already barred by limitation cannot be revived for execution by subsequent amendment.)
('36) 23 AIR 1936 Pesh 191 (192)(DB). (Restoration of execution application consigned to record room—No power to restore on ground that fresh application would be barred by time.)
('33) 20 AIR 1933 Mad 258 (259) (DB). (Court has no inherent power to restore an application to restore a suit after that application was itself time-barred.)]

15. ('25) 12 AIR 1925 Pat 435 (437) : 4 Pat 180 (DB).

16. † ('25) 12 AIR 1925 All 610 (614) : 48 All 175 (DB).
('22) 9 AIR 1922 All 441 (441) (DB).
('31) 18 AIR 1931 All 294 (296) : 53 All 612 (FB).
[*See also* ('33) 20 AIR 1933 All 41 (42) (DB).]
[But see ('12) 34 All 426 : 14 Ind Cas 187 (188) (DB).
('29) 16 AIR 1929 All 811 (812) (DB). (Court wrongly dismissing suit under O. 9 R. 8 even when pleader for party is present—Error can be rectified and suit restored under Section 151.)
('12) 34 All 518 (522): 16 Ind Cas 677 (678) (DB).
('17) 4 AIR 1917 All 125 (127) (DB).
('29) 16 AIR 1929 All 721 (721):51 All 901 (DB).]

17. ('30) 17 AIR 1930 Cal 387 (388) (DB).
('30) 17 AIR 1930 Cal 488 (489) (DB).
('29) 16 AIR 1929 Cal 158 (159) (DB).
('35) 39 Cal W N 894 (895). (Suit cannot be restored under S. 151 after finding that sufficient cause for non-appearance was not proved.)
[But see ('19) 6 AIR 1919 Cal 979 (980) (DB). (Appellate Court restored a suit under S. 151—*Held* not without jurisdiction.)
('32) 19 AIR 1932 Cal 770 (771) : 59 Cal 1334.
('28) 15 AIR 1928 Cal 772 (774) : 55 Cal 473 (DB). (High Court on the original side — O. 9 R. 13 not strictly applicable—Inherent power to set aside lies.)
† ('05) 32 Cal 253 (256) (FB). (Under S. 89 of T. P. Act—Before the Code of 1908.)
('08) 35 Cal 767 (772, 773) (DB). (Under S. 90, T. P. Act—Before Code of 1908.)]

18. † ('27) 14 AIR 1927 Lah 622 (624, 625).
('23) 10 AIR 1923 Lah 147 (147).
('25) 12 AIR 1925 Lah 321 (321).
[But see ('28) 15 AIR 1928 Lah 534 (535). (Case under O. 9 Rr. 3 and 4.)
('19) 6 AIR 1919 Lah 105 (106) : 1919 Pun Re No. 53. (Case under O. 41 R. 19.)]

19. ✣ ('20) 7 AIR 1920 Mad 640 (642, 643): 43 Mad 94 (FB). (23 Mad 445 ; 26 Mad 599 and 14 Ind Cas 823 cannot be considered now to be good law.)
('25) 12 AIR 1925 Mad 209 (211). (Order 9 R. 9.)
('24) 20 Mad L W 490 (490). (Order 9 R. 13.)
('13) 18 Ind Cas 360 (362) (DB) (Mad). (Do).
('26) 97 Ind Cas 936 (936) (Mad). (Do.)
('34) 21 AIR 1934 Mad 428 (429) : 57 Mad 1069.

20. ('27) 14 AIR 1927 Pat 369 (369). (Dismissal under O. 9 R. 3 — Not restored under O. 9 R. 4 but under S. 151 by Munsif—*Held* it could not be done so.)
('22) 9 AIR 1922 Pat 479 (480) : 1 Pat 277 (DB).
('41) 22 Pat L Tim 965 (967). (Execution application dismissed for default—Power under S. 151 should not be utilised to restore it.)
[But see ('24) 11 AIR 1924 Pat 274 (275) (Refusing to restore under O. 9 R. 4—*Held*, Court can, under inherent powers.)
('24) 11 AIR 1924 Pat 698 (700) : 5 Pat L Jour 567.
('21) 8 AIR 1921 Pat 491 (493).
('30) 122 Ind Cas 585 (585) (Pat).]

21. ('40) 27 AIR 1940 Rang 162 (166) : 1940 Rang L R 512 (FB).
('30) 17 AIR 1930 Rang 65 (67) (DB). (AIR 1920 Mad 640 : 43 Mad 94 (FB), followed.)
[But see ('12) 15 Ind Cas 358 (359) (Low Bur).
('24) 11 AIR 1924 Rang 274 (275) (DB).
('26) 13 AIR 1926 Rang 109 (110) : 4 Rang 18. (AIR 1920 Bom 337 : 44 Bom 82, followed.)
('27) 14 AIR 1927 Rang 58 (58) (DB) (Do.)
('28) 15 AIR 1928 Rang 273 (275) : 6 Rang 494.
(09) 4 Ind Cas 816 (818) (Upp Bur).
('20) 7 AIR 1920 Low Bur 35 (36) (DB).]

22. ('40) 27 AIR 1940 Oudh 279(282):15 Luck 350. (Where a decree for dissolution of marriage has been made absolute, it is not open to a third party to seek the aid of the Court under S. 151, C. P. Code, to set it aside on the ground that one of the parties to the divorce proceedings was a minor and has not been represented by a guardian *ad litem*. Nor is there any provision in the Divorce Act to set aside a decree absolute in the manner in which a decree *nisi* could be attacked.)
('11) 14 Oudh Cas 111 (113, 114) : 11 Ind Cas 344 (345) (DB).

inherent power to set aside an *ex parte* decree or to restore a suit dismissed for default, except under the circumstances and conditions mentioned in O. 9 R. 13 and R. 9 respectively. A contrary view has been taken by the High Court of Nagpur[23] and the Judicial Commissioner's Court of Peshawar.[24] The High Court of Bombay[25] holds that even in cases within the scope of O. 9 Rr. 9 and 13 the Court has inherent power to act and set aside the decree or restore the suit, although the conditions mentioned in the said Rules are not satisfied. It is submitted that this view is not correct, inasmuch as it is the basic principle that the inherent power is recognized only in order to meet those cases for which *no provisions have been made by the Legislature.*

Where an application under O. 9 R. 9 is itself dismissed for default or an execution application is so dismissed, or an *ex parte order* is passed in execution proceedings, the question has arisen whether the application could be restored or the order set aside under the Court's inherent powers. That question again depends on the applicability or otherwise of O. 9 Rr. 9 and 13 to such proceedings by virtue of S. 141. If, by virtue of S. 141, O. 9 Rr. 9 and 13 apply to such proceedings, then there is no scope for the application of the inherent power of the Court.[26] If S. 141 does not apply to such proceedings, the inherent power can be invoked in proper cases.[27] The Allahabad and Bombay High Courts have

('14) 1 AIR 1914 Sind 92 (93) : 8 Sind L R 241 (DB). (Restoration of appeal.)
('20) 7 AIR 1920 Sind 34 (36) : 14 Sind L R 239 : 60 Ind Cas 948 (950, 951) (DB).
('21) 8 AIR 1921 Sind 38 (41) : 15 Sind L R 61.
† ('26) 13 AIR 1926 Sind 249 (250) : 20 Sind L R 266 (DB).
('27) 14 AIR 1927 Sind 223 (224) : 22 Sind L R 192 (DB).
[*See also* ('37) 24 AIR 1937 Oudh 364 (364) : 13 Luck 263. (In this case it was held by the Oudh Chief Court that a suit dismissed for non-payment of additional court-fee cannot be restored to hearing on an application under S. 151.)]
[See however ('42) 29 AIR 1942 Sind 97 (98) : ILR (1942) Kar 218 (DB). (*Ex parte* decree against firm as such—Application by some of the partners to set aside decree on ground that they were fixed with liability as partners without summons being served on them—Application should be heard under S. 151.)
('42) 29 AIR 1942 Sind 99 (100) : ILR (1942) Kar 220 (DB). (Decree against firm — Application to set aside the decree by a partner who was served — Applicant wishing not to appear on behalf of the firm but under protest under O 30 R. 8 — Application should be heard under S. 151.)]
[But see ('41) 28 AIR 1941 Oudh 367 (378) (DB). (Even though a Court may find that there is not sufficient cause within the meaning of O. 9 R. 9, C. P. Code, still the Court may restore the suit or application in the ends of justice to correct palpable mischiefs.)
('31) 18 AIR 1931 Sind 153 (153) (DB). (Dismissal of appeal for non-payment of paper book charges —Restoration under S. 151.)]

23. ('35) 22 AIR 1935 Nag 189 (190) : 31 Nag L R 374. (Where a suit is dismissed for default of plaintiff in ignorance of the plaintiff's death and subsequently an application is filed by his legal representative to bring him on record, the Court can set aside order of dismissal and restore suit to file under S. 151 and substitute the legal representative's name for the deceased plaintiff.)
('26) 13 AIR 1926 Nag 409 (409, 410).
[But see ('42) 29 AIR 1942 Nag 78 (79) : ILR (1942) Nag 675.
('30) 17 AIR 1930 Nag 48 (49) : 26 Nag L R 30.]

24. ('35) 22 AIR 1935 Pesh 186 (188). (Case outside scope of O. 9 Rr. 8 and 9—Court has inherent power to restore suit dismissed for default.)

25. ('20) 7 AIR 1920 Bom 337 (337) : 44 Bom 82 (DB).
('32) 19 AIR 1932 Bom 634 (636).
('07) 31 Bom 45 (49) (DB).
[*See also* ('42) 29 AIR 1942 Bom 198 (199). (Order 41 R. 19 not exhaustive — The rule laid down in AIR 1921 Bom 20 : 45 Bom 648 would equally apply to a case where an appeal is dismissed for non-prosecution when it is due to the fact that costs of the preparation of the paper book had not been deposited in time.)
('21) 8 AIR 1921 Bom 20 (21): 45 Bom 648 (DB). (Order 41 R. 19 not exhaustive.)]

26. ('33) 20 AIR 1933 Pesh 59 (61) (DB). (Order 9 R. 9 applies—So no inherent power.)

27. ('42) 29 AIR 1942 Lah 71 (72).
('35) 22 AIR 1935 Lah 145 (145). (Fresh application can be entertained.)
('25) 12 AIR 1925 All 773 (774, 775) : 47 All 878 (DB). (Followed in AIR 1929 All 906.)
† ('33) 20 AIR 1933 All 783 (784, 785) : 55 All 891 (FB).
† ('32) 19 AIR 1932 Nag 101 (102) : 28 Nag L R 111 (DB)
('29) 16 AIR 1929 All 624 (624) (DB).
('23) 10 AIR 1923 Nag 18 (19).
('22) 9 AIR 1922 Oudh 201 (202) (DB).
('26) 13 AIR 1926 Oudh 59 (59) (DB).
† ('21) 8 AIR 1921 Sind 55 (56) : 17 Sind L R 105 (DB) (Restoration of application under O. 21 Rule 90.)
† ('31) 18 AIR 1931 Sind 97 (98) : 25 Sind L R 475 (FB). (*Ex parte* order for execution set aside.)

also held that there is inherent power to restore such proceedings even if S. 141 applies to such proceedings.[28] This view, as has been mentioned in Note 1, is not correct. See also the undermentioned decision[29] and Note 2 on Order 9 'General.'

2. Interim injunctions and appointment of receivers — In cases falling within the scope of S. 94 and O. 39 R. 1 and O. 40, there is, according to the general rule, no inherent power to grant an injunction or to appoint a receiver.[30] But in cases *outside* the scope of those provisions, e. g., arbitration proceedings, the Court can grant such reliefs under its inherent powers.[31] See also O. 39 R. 1, Notes 3 and 22.

('11) 12 Ind Cas 351 (351) (DB) (Mad). (*Quære* — Whether S. 151 can be utilized to restore application under O. 21 R. 89 dismissed for default.)
('32) 19 AIR 1932 Cal 569 (571) (DB). (Objections to execution dismissed for default—Application for restoration also dismissed—Fresh application with additional objections—Revival of both applications under this section.)
('31) 18 AIR 1931 All 594 (594, 595) (DB). (Application under O. 21 R. 90 dismissed for default — *Held* O. 9 R. 9 does not apply but S. 151.)
('29) 16 AIR 1929 All 721 (721) : 51 All 901 (DB). (Court can under S. 151 entertain application by judgment-debtor for restoration of his previous application made for setting aside the sale.)
✠('27) 14 A I R 1927 Cal 534 (536) : 54 Cal 405 (DB). (No proper remedy provided but no prohibition provided—S. 151 is to be invoked.)
('28) 15 AIR 1928 Cal 179 (180). (A I R 1927 Cal 534 : 54 Cal 405, followed.)
('29) 16 AIR 1929 Cal 17 (19) (DB).
('21) 8 AIR 1921 Lah 67 (68) : 2 Lah 66 (DB).
('20) 7 AIR 1920 Lah 304 (304) : 1 Lah 339. (O. 9 R. 9 was however held to apply by virtue of S. 141.)
('24) 11 AIR 1924 Lah 350 (351).
('26) 13 AIR 1926 Lah 534 (535).
('30) 17 AIR 1930 Lah 20 (21) : 11 Lah 93. (Execution application dismissed for default—Restored under S. 151.)
('29) 117 Ind Cas 372 (373) (Lah). (Do.)
('22) 9 AIR 1922 Nag 267 (271) : 18 Nag L R 152. (Followed in AIR 1930 Nag 134.)
('39) 26 A I R 1939 Lah 223 (224). (Application under O. 21 R. 90—Dismissal for default—Inherent power of Court.)
[*See* ('39) 26 AIR 1939 All 17 (18) : ILR (1939) All 15. (Special Judge under U. P. Encumbered Estates Act, has an inherent jurisdiction under S. 151, C. P. Code, to restore application under the Act, which has been dismissed by him for the default of the debtor, on good cause being shown.)]
[*See also* ('15) 2 AIR 1915 Cal 434 (435) (DB).]
Also see O. 9 General N. 1 and O. 21 R. 90, N. 48.

28. See cases in foot-notes 16 and 25 of this Note.

29. ('39) 43 Cal W N 1113 (1114) (DB). (Petition for recording compromise of suit dismissed for default—Proper course is to apply under S. 151 to set aside the dismissal.)

30. ('39) 26 AIR 1939 All 643 (645, 646) : I L R (1939) All 825. (Suit by mortgagor in United Provinces Court under S 33, U P. Agriculturists' Relief Act, for accounts of mortgage transaction — Simultaneous suit by mortgagee in Bombay Court for enforcement of mortgage—Both parties acting within their own rights — Injunction restraining mortgagee from proceeding with his Bombay suit held could not be granted either under O. 39 R. 2 or under S. 151.)
('26) 13 AIR 1926 Mad 258 (258).
†('33) 20 AIR 1933 Mad 500 (501) : 56 Mad 563.
('27) 14 AIR 1927 Mad 687 (688).
('24) 11 AIR 1924 Mad 797 (798) : 47 Mad 700.
('38) 25 AIR 1938 Mad 190 (192).

31. ('43) 30 AIR 1943 Cal 93 (99) : ILR (1942) 2 Cal 203. (High Court has power to issue injunction to restrain person not resident within its jurisdiction from proceeding with suit in Court outside province of Bengal— AIR 1943 Cal 89; 36 Cal 233 and 38 Cal 405, dissented from.)
('41) 28 AIR 1941 Bom 219 (222). (High Court can grant injunction *in personam* against party restraining him from proceeding with criminal complaint in Court outside its jurisdiction but that has to be exercised with extreme caution — Injunction was refused as applicant had not exhausted other remedy open to him.)
('41) 28 A I R 1941 Cal 434 (435) : ILR (1941) 1 Cal 373.
('41) 28 AIR 1941 Cal 670 (672) : I L R (1941) 1 Cal 490. (Court can restrain defendant by injunction from litigating in another Court.)
('40) 27 AIR 1940 All 185 (186) : I L R (1940) All 201 (DB). (Court can pass temporary injunction for preservation of property in respect of which person has filed plaint and has applied for leave to sue as pauper.)
('40) 27 AIR 1940 All 241 (241, 242) : ILR (1940) All 232 (DB). (*A* and *B* agreeing to bring suit at particular place — Suit by *A* at place agreed — *B* instituting suit at other place—Court has inherent power to issue injunction restraining *B* from proceeding with his suit though filed prior to *A*'s suit.)
('25) 12 A I R 1925 Sind 102 (102) : 18 Sind L R 303. (Appointment of receiver in arbitration proceedings.)
('34) 21 AIR 1934 Lah 79 (80).
('33) 20 AIR 1933 Lah 73 (74). (Injunction.)
('15) 2 AIR 1915 Cal 565 (567) (DB). (Temporary injunction in probate proceedings.)
('25) 12 A I R 1925 Lah 242 (243). (Temporary injunction by High Court.)
('26) 13 AIR 1926 Mad 1126 (1127). (High Court has power to stay execution in another suit.)
('25) 12 AIR 1925 Lah 618 (618). (Non-chartered High Court cannot restrain executing Court from executing a decree.)
('27) 14 AIR 1927 Mad 210 (211, 212). (Temporary mandatory injunction.)

3. Amendments — See section 152.

4. Remand — All the High Courts except the High Court of Allahabad are agreed that an Appellate Court has an inherent power of remand in cases not covered by O. 41 R. 23.[32] See Note 10 on Order 41 Rule 23.

5. Restitution — See section 144, Note 34.

6. Joinder of parties — Every Court has inherent power to ascertain whether or not proper parties are before it[33] and to add them at any stage.[34] An appellate Court has inherent power to add or transpose a party apart from O. 41 R. 20. See O. 41 R. 20, Note 8.

7. Stay of execution and other proceedings — The rules in O. 21 and O. 41 relating to the stay of execution (see O. 21 Rr. 26-29 and O. 41 R. 5) do not exhaust the cases in which stay can be granted. The Court can therefore under its inherent powers stay its

('09) 3 Sind L R 128 (129, 130) : 4 Ind Cas 609 (610). (Arbitration proceedings—Injunction.)
('20) 7 AIR 1920 Lah 436 (437) (DB). (Injunction to restrain a person from proceeding with arbitration proceedings.)
('31) 18 A I R 1931 Cal 279 (280, 281) : 57 Cal 1280. (Injunction by a High Court against a person living within jurisdiction of another Indian High Court.)
† ('32) 19 A I R 1932 Mad 180 (181). (High Court can grant injunction independent of C. P. Code.)
('27) 14 AIR 1927 Lah 833 (834). (Strong *prima facie* case needed for grant of temporary injunction under inherent power.)
[*See* ('36) 23 A I R 1936 Lah 567 (568). (Applicant not coming to Court with clean hands — Equitable relief by way of injunction not granted.)]
[*See also* ('33) 20 A I R 1933 Lah 437 (439) : 14 Lah 68.
('37) 24 AIR 1937 Sind 315 (316) (DB). (Interim injunction can be ordered even in execution proceedings.)
('35) 22 AIR 1935 Pesh 182 (184) (DB). (Injunction cannot be addressed by one Court to another—C. R. No. 57 of 1926 Reversed and AIR 1921 Pat 92 : 6 Pat L Jour 268 Approved.)]

32. ('42) 29 AIR 1942 Pat 195 (196) (DB).
('41) 28 AIR 1941 Cal 446 (447).
('41) 28 AIR 1941 Nag 308 (310) : ILR (1942) Nag 487. (Section 151 to be resorted to only when trial is so radically defective as not to amount to a trial at all.)
('41) 28 AIR 1941 Oudh 561 (562).
('40) 27 AIR 1940 Nag 349 (351) : ILR (1940) Nag 538 (DB). (Remand—Power to, must be sparingly used.)
('39) 26 AIR 1939 Lah 563 (564) (DB). (Necessary issues not tried—Appellate Court can remand.)
('30) 17 AIR 1930 Lah 224 (225) (DB).
('33) 20 AIR 1933 Pat 706 (707).
('33) 20 AIR 1933 Sind 327 (328) : 27 Sind L R 194 (DB).
('28) 15 AIR 1928 Cal 812 (814) (DB).
† ('18) 40 Cal 955 : 18 Ind Cas 207 (209) (DB).
('27) 14 AIR 1927 Oudh 629 (630) (DB).
† ('28) 15 AIR 1928 Mad 991 (992, 994) (DB).
('32) 19 AIR 1932 Lah 311 (311).
('32) 19 AIR 1932 Lah 443 (443). (Findings on all issues given by trial Court—Still remand—O. 41, R. 25 or S. 151—Not O. 41 R. 23—Inherent powers under exceptional circumstances—No remand after adverse finding.)
('28) 15 AIR 1928 Lah 116 (116).
('33) 20 AIR 1933 Lah 157 (158).
('34) 21 AIR 1934 Pat 284 (287). (Order of remand can be made under this section only on its finding that the trial Court has not tried the case properly and not otherwise.)
('30) 17 AIR 1930 Lah 441 (442).
('31) 18 AIR 1931 Lah 299 (299).
('31) 18 AIR 1931 Lah 302 (302).
('30) 17 AIR 1930 Mad 72 (73).
† ('35) 22 AIR 1935 Bom 216 (217, 218). (But it has no power to remand disregarding method of procedure enjoined by Code — Where it so acts, High Court can interfere in revision.)
('36) 23 AIR 1936 Pat 491 (492).
('36) 23 AIR 1936 Nag 140 (141) : ILR (1936) Nag 188.
('35) 22 AIR 1935 Pat 68 (68). (Appellate Court should not without sufficient cause order retrial where it can effectively deal with matter under O. 41 R. 25—S. 151 can be resorted to only when specific provisions are exhausted.)
('35) 22 AIR 1935 Mad 715 (716). (But merely because it finds that the lower Court has fallen into errors here and there, is no ground for remanding under inherent powers.)
[*See also* ('33) 20 AIR 1933 Pat 220 (222). (Inherent powers to remand for particular purpose alone. Whole matter not re-opened.)]
Also see O. 41 R. 23, Note 10.
[See however ('31) 18 AIR 1931 Mad 791 (791). (*Held* no inherent power to remand where there is express provision in O. 41 Rr. 25 and 27.)]

33. † ('06) 33 Cal 927 (932) (DB).
('13) 40 Cal 955 (959, 960) (DB). (Also to entertain application of a stranger to be made party.)
('88) 10 All 223 (239) (FB).

34. ('41) 28 AIR 1941 Lah 402 (403, 404) : ILR (1942) Lah 603 (DB). (Apart from O. 41, R. 20, C. P. Code, the High Court has ample power under S. 151, C. P. Code, to add a party to an appeal even after the expiry of the period of limitation prescribed for appeals.)
('41) 28 AIR 1941 Nag 178 (179).
('03) 8 Cal W N 404 (406) (DB).

own process except where its jurisdiction in this respect is taken away.[35] Thus, it can stay the execution of a decree on an application for leave to appeal to the Privy Council[36] or on special leave thereto.[37]

Apart from execution proceedings a Court has also inherent powers to stay a suit pending the decision in a connected proceeding, apart from S. 10 of the Code.[38] An Appellate or Revision Court has similarly inherent power to stay further proceedings in the suit in the lower Court apart from O. 41 R. 5 of the Code.[39] There is a difference of opinion as to whether, where an appeal has been preferred to the Privy Council, the High Court can, under its inherent powers, stay further proceedings in the trial Court apart from O. 45 R. 13. According to the High Courts of Calcutta and Lahore it can.[40] According

('11) 35 Bom 393 (395): 11 Ind Cas 559 (560)(DB). (To add legal representative in a partition suit even after limitation.)
('26) 13 AIR 1926 Sind 26 (26). (After preliminary decree.)
('33) 20 AIR 1933 Bom 200 (202) (DB).
('16) 3 AIR 1916 Pat 45 (46) (DB).

35. (40) 27 AIR 1940 Mad 917 (917). (The Court has power when it orders stay by virtue of its inherent powers, to impose such terms as it thinks fit.)
† ('27) 14 AIR 1927 Cal 581 (585) (DB).
('34) 21 AIR 1934 Pat 637 (637).
('23) 10 AIR 1923 Lah 514 (515). (To stay execution on the ground that the *ex parte* decree was obtained by fraud.)
('24) 11 AIR 1924 Lah 602 (603). (After appeal filed lower Court cannot under inherent power stay execution, for its jurisdiction is taken away by filing the appeal.)
('01) 5 Cal W N 781 (796) (SB).
('10) 1910 Pun Re No. 82, p. 239. (Staying execution not only pending suit but even appeal.)
[*See also* ('33) 20 AIR 1933 Mad 563 (564). (Order of stay of delivery of possession conditional on payment of kist and rent by certain date is one under S. 151 and S. 148 applies to such order.)
('87) 9 All 36 (42).]

36. ('25) 12 AIR 1925 Sind 216 (217) (DB).
('33) 20 AIR 1933 All 18 (18) (DB).
('31) 18 AIR 1931 Cal 79 (81) (DB). (Pending appeal before Privy Council—High Court granted stay of proceedings in the suit.)
Also see O. 45 R. 13, Note 3.

37. ('13) 40 Cal 955 (959):18 Ind Cas 207 (210)(DB).
Also see O. 45 R. 13 Note 6.

38. ('41) 28 AIR 1941 Pesh 34 (36). (Powers conferred by S. 151 should not be exercised lightly.)
('34) 21 AIR 1934 Cal 33 (36) (DB).
('79) 4 Cal L Rep 282 (284).
† ('29) 16 AIR 1929 Lah 12 (14).
('39) 20 AIR 1933 Lah 50 (50. 51).
† ('15) 2 AIR 1915 Mad 608 (611) (DB). (Staying a suit, suit being an abuse of process of Court.)
('24) 11 AIR 1924 Cal 757 (760) (DB). (To postpone hearing of a suit pending decision of selected action.)
† ('24) 11 AIR 1924 Bom 90 (93).
† ('29) 16 AIR 1929 Oudh 341 (346) : 4 Luck 573 (DB).
('30) 123 Ind Cas 50 (50) (DB) (Oudh).
('30) 17 AIR 1930 Lah 527 (528).
('31) 18 AIR 1931 Oudh 313 (314). (Inherent power assumed — But sufficient grounds held not to exist.)
('30) 17 AIR 1930 Lah 525 (525, 526). (Do.)
('17) 4 AIR 1917 Sind 95 (96) : 10 Sind L R 1. (Pending an arbitration out of Court.)
('35) 22 AIR 1935 Rang 355 (356). (Suit for possession to be stayed pending decision of suit for declaration of title to same property by opposite party.)
('36) 23 AIR 1936 Pat 408 (409) (DB).
[*See* ('41) 28 AIR 1941 Cal 236 (240): ILR (1940) 1 Cal 497 (DB). (Stay under inherent power refused as ground on which stay was asked for involved difficult questions.)]
[*See also* ('38) 1938 Nag L Jour 120 (121). (The High Court has ample jurisdiction under S. 151, C. P. Code, to stay the proceedings in connected suits.)]
[But see ('40) 27 AIR 1940 Lah 85 (87.)]

39. † ('04) 31 Cal 722 (724) (FB). (Further proceedings on a decree under O. 20 R. 16.)
† ('32) 19 AIR 1932 All 655 (656) (DB). (Appeal from order confirming a sale—Stay of proceedings for delivery of possession to auction purchaser.)
('34) 21 AIR 1934 Lah 909 (910). (Revision against decree pending—High Court can stay execution.)
† ('21) 8 AIR 1921 Pat 328 (329, 330) (DB). (Taking accounts on a decree for partition under Appeal.)
('32) 19 AIR 1932 All 238 (238) : 54 All 344 (DB). (Staying execution of final decree in a mortgage suit pending the appeal from preliminary decree.)
('31) 18 AIR 1931 Bom 384 (384) : 55 Bom 801 (DB). (Arbitration Act — Refusal to set aside award — Appeal to High Court — Execution of award stayed pending appeal.)
('28) 15 AIR 1928 Lah 912 (912). (Appeal under Guardians and Wards Act—Stay of proceedings in lower Court.)
[*See* ('37) 24 AIR 1937 Oudh 359 (360) : 13 Luck 581 (DB). (Chief Court of Oudh has no power either under S. 151 or under O. 41 R. 5, C. P. Code, to stay the proceedings under Ss. 18 and 35 of the U. P. Encumbered Estates Act pending an appeal filed before it against the decree of the Special Judge under S. 14 (7) of that Act. The proper procedure is to move the Collector to stay proceedings until the decision of the appeal filed in the Chief Court.)]
Also see O. 41 R. 5, Note 2.

40. ('42) 29 AIR 1942 Cal 488 (491) : ILR (1942) 1 Cal 67 (DB).

to the High Court of Allahabad it has no jurisdiction to do so.[41] See also the undermentioned cases.[42]

8. Additional evidence in appeal — See Order 41 Rule 27, Note 1.

9. Extension of time fixed by decree — See section 148.

10. Setting aside execution sales — Courts have, apart from O. 21 R. 92, inherent power to set aside or refuse to confirm an execution sale in cases not provided for by O. 21 Rr. 89 to 91,[43] but not in cases covered by those provisions.[44]

11. Allowing defendant to defend suit in forma pauperis — See Order 33 Rule 1, Note 9.

As to other instances, see the undermentioned cases.[45]

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† ('34) 21 AIR 1934 Cal 823 (824) (DB).
† ('39) 26 AIR 1939 Cal 308 (309) (DB).
('34) 21 AIR 1934 Lah 238 (238, 239).

41. †('34) 21 AIR 1934 All 585 (586): 56 All 907 (DB).

42. ('39) 26 AIR 1939 Mad 204 (208). (Administration suit — Creditor obtaining preliminary decree is entitled to order, against another decree-holder attaching property of deceased judgment-debtor staying all proceedings taken by him and restraining him from executing his decree—Court is entitled to pass appropriate orders to safeguard interests of all creditors—Such orders cannot be strictly called injunction orders—Recourse to provisions of S. 151 is not necessary.)
('38) 25 AIR 1938 All 434 (434): ILR (1938) All 650 (DB). (A Court in the United Provinces is not competent under S. 151, C. P. Code, to issue a stay order to a Court in another province.)

43. ('42) 29 AIR 1942 Lah 153 (160): ILR (1942) Lah 559 (FB). (Hardship worked by strict application of O. 21 R. 92 may be remedied under S. 151 or by review.)
('42) 29 AIR 1942 Pat 262 (264). (Decree itself set aside before confirmation of execution sale—Court is bound to set aside sale under inherent power.)
('24) 11 AIR 1924 Mad 778 (778).
('33) 20 AIR 1933 Mad 399 (400, 401). (Sale held in contravention of express order of Court set aside under S. 151.)
('11) 9 Ind Cas 452 (452) (Low Bur). (Sale under satisfied decree—Mistake of Court.)
('25) 12 AIR 1925 Oudh 128 (129): 27 Oudh Cas 89. (Parties coming to an arrangement before confirmation of the auction sale.)
† ('23) 10 AIR 1923 Mad 635 (636, 638): 46 Mad 583 (DB). (If Court has been misled in granting leave to bid and in fixing upset price.)
('22) 9 AIR 1922 Pat 511 (514): 1 Pat 235 (DB). (Decree-holder permitted to bid on conditions — Failure to fulfil conditions.)
('15) 2 AIR 1915 Oudh 140 (142). (To set aside order confirming a sale in favour of a person other than the bidder.)
('30) 17 A I R 1930 Lah 793 (794). (Stay pending appeal regarding a compromise and adjustment of decree.)
('26) 13 AIR 1926 Nag 17 (18): 24 Nag L R 48. (O. 21 Rr. 89 to 91 applying— No power to refuse to confirm sale.)
('93) 20 Cal 8 (11): 19 Ind App 154 (PC). (Case under the old Code—Old section corresponding to O. 21 R. 90 did not provide for setting aside sale for fraud—Such sale can be set aside in appropriate proceedings.)
('37) 24 A I R 1937 Lah 72 (72). (Minor auction purchaser subsequently applying to set aside sale on ground of minority — Court can set aside sale as confirmation will give rise to complications.)
('38) 25 A I R 1938 Lah 232 (234) (DB). (Sale in execution of mortgage decree without protecting prior mortgagee's rights can be set aside.)
[*See* ('28) 15 A I R 1928 Nag 265 (272): 24 Nag L R 127 (FB). (Do—Decree-holder-purchaser.)
('19) 6 AIR 1919 Bom 175 (176): 43 Bom 235 (DB). (Court sale under an *ex parte* decree subsequently reversed.)
('16) 3 AIR 1916 Cal 710 (711) (DB). (Do.)
('39) 26 A I R 1939 Cal 161 (162). (Third party seeking to set aside sale on ground that on account of conduct of another third party he was misled and prevented from attending and bidding at sale —No inherent power to set aside sale: AIR 1923 Mad 635: 46 Mad 583 distinguished; A I R 1931 P C 83: 58 Ind App 50: 27 Nag L R 95 and AIR 1933 Lah 99: 13 Lah 761 relied on.)]
Also see O. 21 E. 89, N. 2 and O. 21 R. 92, N. 2.
[But see ('42) 29 AIR 1942 Bom 306 (308): ILR (1942) Bom 704. (Having regard to express provisions of R. 92 of O. 21 making it obligatory on the Court to confirm sale under certain circumstances stated, it can be safely said that Court's jurisdiction to set it aside on any other ground not specified is impliedly excluded.)
('41) 28 AIR 1941 Mad 399 (401). (Execution sale in favour of stranger purchaser—Before confirmation decree set aside—Sale must nevertheless be confirmed—Section 151 cannot be invoked to set aside sale in such circumstances.)
('32) 19 AIR 1932 All 403 (404) (DB). (No inherent jurisdiction outside O. 21 Rr. 89 to 91.)]

44. ('32) 19 AIR 1932 Lah 238 (239).
[*See also* ('30) 17 AIR 1930 Lah 789 (791).]

45. ('42) 29 AIR 1942 Cal 390 (393) (DB). (Court may under S. 151 substitute parties in execution proceedings.)
('42) 29 AIR 1942 Mad 369 (370). (Application for copies struck off for non-deposit of stamp paper—Subsequent application to restore previous application—Court can restore former application and treat subsequent application as continuation of original application.)

('41) 28 AIR 1941 Cal 156 (158) : I L R (1940) 2 Cal 277. (Execution application dismissed as time-barred — On decree-holder's application under S. 151, Court reconsidering previous order and reviving execution case — Order under S. 151 is not illegal.)

('41) 28 A I R 1941 Cal 207 (215) : I L R (1940) 2 Cal 131. (In a suit for damages for nuisance Court may grant damages for period of pendency of suit under S. 151.)

('41) 28 AIR 1941 Mad 55 (55). (A Court has no inherent power under S. 151, C. P. Code, to pass an interim order of maintenance.)

('40) 27 A I R 1940 Oudh 421 (423): 15 Luck 730 (DB). (A scheme prepared under S. 92 particularly one relating to a Muslim wakf can be modified by an application under S. 151.)

('39) 26 AIR 1939 Oudh 277 (278) : 15 Luck 26. (Provisions of O. 22 Rr. 1 to 11 are not applicable to revision petition. If however a party to a revision petition dies the Court can pass an order under S. 151 to bring his legal representative on record — There is no limitation for an application for substitution of parties in a revision petition.)

('33) 20 AIR 1933 Lah 678 (680) (DB). (Practice— Prayer in appeal to expunge unnecessary findings in lower Court's judgment — High Court has not power to do so but can only declare that such findings are not binding on parties.)

('26) 13 A I R 1926 Pat 27 (28) : 4 Pat 704 (DB). (No power if review could not be granted.)

('33) 20 AIR 1933 Mad 321 (321, 322): (After disposal of appeal no power to recover deficit court-fee.)

('33) 20 AIR 1933 Mad 691 (693) : 56 Mad 989. (Security bond to Court for loss by temporary injunction enforceable in execution under S. 151 since no other remedy is open.)

('24) 11 AIR 1924 Oudh 413 (414) (DB). (Court can reject plaint on grounds other than in O. 7 R. 11.)

('28) 15 AIR 1928 All 494 (496) : 50 All 748 (DB). (Court can record or refuse to record a compromise apart from O. 23 R. 3.)

('30) 17 AIR 1930 Pat 395 (399) : 9 Pat 314 (DB). (Postponing passing of decree after recording compromise under O. 23 R. 3.)

('29) 16 AIR 1929 Mad 121 (131, 132) (DB). (Interlocutory judgment not falling strictly under O. 14 Rule 2.)

('12) 35 Mad 607 (612) : 39 Ind App 218 : 16 Ind Cas 250 (252) (PC). (Framing vital issues at any stage — Compare O. 14 R. 5.)

('27) 14 AIR 1927 Lah 187 (187). (Revocation of appointment of arbitrator even before award — Compare Sch. II Para. 15.)

('29) 16 AIR 1929 All 743 (744, 745) : 51 All 1010 (DB). (Do.)

('25) 12 AIR 1925 Pat 720 (723). (Do.)

('25) 12 AIR 1925 Cal 102 (104) (DB). (To allow a set-off not coming under O. 21 R. 18.)

(1841) 1 Cr and Ph 161, Rawson v. Samuel. (Set-off independent of C. P. Code.)

('25) 12 AIR 1925 Mad 42 (43) : 48 Mad 494. (To grant time to surety before actual arrest of judgment-debtor—Compare O. 21 R. 40.)

('07) 34 Cal 860 (862) (DB). (To order costs on dismissal of application for leave to appeal to Privy Council.)

('25) 12 AIR 1925 All 280 (282) : 47 All 538. (Striking off defence for default in payment of adjournment costs before date fixed.)

('29) 16 AIR 1929 All 123 (124) (DB). (To set aside an order striking off objection of judgment-debtor for default.)

('33) 20 AIR 1933 Nag 176 (176): 29 Nag L R 176 (DB). (Do.)

('32) 19 AIR 1932 Cal 569 (570) (DB). (Do.)

('37) 24 AIR 1937 Cal 199 (201) : I L R (1937) 2 Cal 48 (DB). (Section 51 of the Code contemplates sale without attachment and so even if a share of debt be not attachable under O. 21 R. 46 or under any other rule prescribed, a Court can pass prohibitory orders similar to one under O. 21 R. 46 under its inherent powers for the ends of justice)

('36) 23 AIR 1936 All 97 (101) : 58 All 538 (DB). (Court has inherent power to amend scheme passed under S. 92.)

('33) 20 AIR 1933 All 49 (49). (Court has inherent jurisdiction to set aside its own order passed under a misunderstanding of the case and signed inadvertently — Court can re-hear the case.)

('35) 22 AIR 1935 All 281 (282) (DB). (Two out of three arbitrators related to one of parties — Court has inherent power to supersede reference.)

('36) 23 AIR 1936 Pat 506 (508) (DB). (Adjustment of decree effected by next friend of minor decree-holder, during execution proceedings, without sanction of Court sought to be set aside—S. 47 bars fresh suit — Proper remedy is by application for review or by invoking inherent jurisdiction of Court.)

('38) 25 AIR 1938 Cal 287 (290) : I L R (1938) 1 Cal 53. (Plaintiff in interpleader suit can apply on completion of pleadings that he should be removed from proceedings — Court can grant such relief under S. 151.)

('36) 23 AIR 1936 Cal 342 (343). (Inherent power to treat suit as application.)

('36) 23 AIR 1936 Cal 751 (752) : I L R (1937) 1 Cal 573 (DB). (Decree in suit for partition making no provsion for maintenance of some members of family — Appeal directed to question of maintenance only — Certified copy of portion of decree relating to allotment of property need not be filed —Appeal filed without such copy is in proper form — Court can also admit appeal as being in proper form in exercise of its inherent powers.)

('36) 23 AIR 1936 Cal 409 (412) : I L R (1937) 1 Cal 57 (DB). (Executing Court can entertain and give effect to a claim to set-off even in case which does not come strictly under O. 21 R. 19, C. P. Code.)

('35) 22 AIR 1935 Cal 231 (234) : 62 Cal 223. (On premature threat from Bench, pleader agreeing to settlement of case —Counsel held intimidated and Court had inherent power to set aside settlement.)

('35) 22 AIR 1935 Lah 956 (957). (Executive order of interlocutory nature — Government not made party—Order held revisable under inherent powers read with S. 107, Government of India Act of 1915.)

('39) 26 AIR 1939 Lah 380 (382).(*P* attaching property of *K* in execution of decree against *K* — *M* subsequently purchasing that property at auction sale in another execution proceedings against *K* contending that property is not liable to sale in

In exercising inherent powers in cases not provided for, the Courts may apply *analogous provisions* of the Code nearest in point to the circumstances before it.[46]

3. Court cannot override general principles of law. — No inherent power can be exercised so as to conflict with sound general principles of law.[1] Thus, a Court has no inherent power to recall an order previously made by it, or entertain an application raising questions which had already been heard and finally decided by it, and which are consequently barred by the general principles of *res judicata*.[2] Similarly, it cannot under

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execution of *P*'s decree—Application purporting to be under O. 21 R. 58—Execution Court held could inquire into title of *M* under S. 151 even if S. 47 did not apply, to prevent unnecessary complications which would otherwise result from a second sale.)

('35) 22 AIR 1935 Mad 349 (350). (Court has inherent power to revoke reference, if arbitration is grossly irregular and defective.)

('33) 20 AIR 1933 Oudh 229 (231) : 8 Luck 496 (DB). (Preliminary decree passed — Judgment-debtors' failure to pay—Application for final decree —Dismissal under O. 9 R. 3—Legality of—Application to set aside order — Inherent power of Court — Relief can be granted though applicant be negligent.)

('37) 24 AIR 1937 Oudh 106 (107) : 12 Luck 739 (DB). (Collector passing order under S. 6, U. P. Encumbered Estates Act—Civil Court not staying execution proceedings but passing decree subsequent to Collector's order — Decree held could be set aside under S. 151.)

('35) 22 AIR 1935 Pat 439 (444) : 14 Pat 356 (DB). (Where a Court passes a decree on the basis of a compromise without a formal order for recording the compromise, the decree is irregularly passed and such a decree can be set aside on an application under S. 151.)

('39) 26 AIR 1939 All 452 (454). (Though a plaint is rejected under O. 7 R. 13 a Judge has jurisdiction under S. 151, C. P. Code, to restore the suit.)

('35) 22 AIR 1935 All 985 (986). (Deficiency of court-fees ordered to be made good—Court rejecting plaint under O. 7 R. 11 — Plaintiff filing restoration application after making good deficient court-fee — Court can treat such application as fresh plaint under O. 7 R. 13 and can allow court-fee paid on rejected plaint to be counted towards court-fee on fresh plaint under Ss. 149 and 151, C. P. Code.)

('36) 23 AIR 1936 Pat 93 (94) : 15 Pat 51 (DB). (Mortgage suit—Application for final decree beyond time —Similar previous application made in time dismissed for failure to comply with some steps concerning service of notice on judgment-debtors — Though application was beyond time Court held could restore previous application for ends of justice.)

46. †('21) 8 AIR 1921 Mad 599 (605) : 44 Mad 919 (FB). (For example assignee of portion of decree comes under O. 21 Rr. 15 and 16.)

('10) 6 Ind Cas 386 (387) (DB) (Cal). (Execution against Commissioner for recovery of excess fees.)

('24) 11 AIR 1924 All 122 (123). (Execution in favour of Commissioner.)

('29) 16 AIR 1929 All 211 (212). (Execution of orders not provided for.)

† ('07) 34 Cal 860 (862) (DB). (Do.)

('18) 5 AIR 1918 Cal 133 (134). (Do.)

('26) 13 AIR 1926 Mad 1005 (1006) (DB). (Enforcement of surety bond in execution, on the analogy of Section 145.)

('29) 16 AIR 1929 Mad 828 (829):53 Mad 43 (DB). (To continue suit in *forma pauperis*.)

('20) 7 AIR 1920 Mad 230 (231) (DB). (Appeal to to continued in *forma pauperis*.)

('11) 12 Ind Cas 692 (693) (DB) (Mad). (Refund of amounts deposited as security.)

('10) 6 Ind Cas 120 (120, 121) (Cal). (Resistance outside O. 21 Rr. 97 to 99.)

† ('28) 15 AIR 1928 Pat 187 (188) (DB). (Directing successful respondent to furnish security for restitution.)

† ('93) 15 All 84 (95) (FB). (Dismissal of execution petition for default.)

('96) 20 Bom 541 (542) (DB). (Do.)

† ('31) 18 AIR 1931 Mad 303 (306, 312) (DB). (Applicability of O. 22 Rr. 2 and 3 to execution applications.)

[*See also* ('39) 26 AIR 1939 Pat 678 (681):19 Pat 159 (FB). (Appeal dismissed for non-filing of the appellants' list within time — Application for restoration—*Held*, failure to file list stands on no worse footing than O. 47 Rr. 11, 17 and 18 — Appeal can be restored under S. 151.)]

[But see ('30) 17 AIR 1930 Rang 280 (281) : 8 Rang 423 (DB). (No inherent power to grant application for review in *forma pauperis* of order in appeal.)]

Note 3

1. † ('04) 26 All 407 (427) (FB).

('10) 7 Ind Cas 19 (20) (DB) (Cal).

('13) 20 Ind Cas 3 (5) (DB) (Lah). (Superior Court's decision cannot be upset.)

('22) 9 AIR 1922 Cal 1 (1) (DB). (No inherent power to introduce a new form of procedure.)

('37) 24 AIR 1937 All 18 (19). (Recourse should not be had to a general Section of the nature of S. 151, C. P. Code, for a remedy which does not come under some positive rule of law—Court auction purchaser not entitled to refund of purchase money if subsequently a third party obtains a decree for possession.)

('37) 24 AIR 1937 Pat 647 (650): 16 Pat 729 (DB). (Court has no power under the Section to give compensation to a decree-holder, who after purchasing property in execution in satisfaction of his decree loses part of that property as the result of another suit.)

[*See* ('33) 20 AIR 1933 All 343 (344). (*Held*, that the circumstances of the case did not warrant the overriding of Section 115, by an application of the inherent powers of the Court.)]

2. ('40) 27 AIR 1940 Rang 156 (156) : 1940 Rang L R 392.

its inherent powers deal with matters over which it has no *jurisdiction*[3] though it has always jurisdiction to determine *whether it has jurisdiction*.[4] The power of a Court to hear an appeal or to review a previous judgment exists *only if it is given by statute* and, therefore, when there is no such right given by statute, a Court cannot, under its inherent powers, hear an appeal or review its previous order[5] or transfer a case.[6] [But the Court has always power to rectify its own mistakes and where a previous order has been passed under a *mistake* the Court can rectify such mistake. See Note 6.] Similarly, the High Court has no *inherent* power of revision over proceedings in Subordinate Courts, because the power of revision is a creature of the statute and does not exist if it is not provided for by statute.[7] So also, there can be no inherent power to alter a decree or certificate which was correct at the time it was made or given, because of the happening of some

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† ('27) 14 AIR 1927 Cal 57 (60) (DB).
† ('22) 9 AIR 1922 Pat 204 (205) (DB).
('24) 11 AIR 1924 Cal 830 (831): 51 Cal 715 (DB). (Successor Judge should not condemn predecessor's order in strong words.)
('17) 4 AIR 1917 Lah 306 (307) : 1917 Pun Re No. 14 (DB).
† ('24) 11 AIR 1924 Mad 489 (489). (No inherent power to restore a suit once disposed of.)
† ('35) 22 AIR 1935 Lah 60 (61) (DB).
('38) 25 AIR 1938 Pat 593 (594). (Order passed by Court having jurisdiction to pass it cannot be recalled.)
[*See* ('38) 25 AIR 1938 Oudh 103 (105) (DB). (Where a presiding officer of a Court has passed an order, his successor cannot and should not go behind that order and hold that order to be *ultra vires*.)]
[*See also* ('36) 23 AIR 1936 Rang 77 (80) : 13 Rang 722.]
[See however ('40) 27 AIR 1940 Rang 17 (17) : 1939 Rang L R 626. (A Judge can always reconsider an order which he has passed *ad interim* until he comes to his final decision.)]
[But see ('28) 15 AIR 1928 Lah 244 (245).
('17) 4 AIR 1917 All 477 (479) : 39 All 8 (DB).
('30) 17 AIR 1930 All 644 (645, 646) : 52 All 924 (DB).]

3. ('26) 13 AIR 1926 Mad 631 (632). (Order in respect of suit not pending before it.)
('19) 6 AIR 1919 Pat 240 (241). (No pending suit.)
('22) 9 AIR 1922 Bom 444 (445, 446) : 47 Bom 250. (Summoning a witness before a private person.)
('26) 13 AIR 1926 Lah 284 (284). (Injunction against Government Officers not subordinate to Court.)
† ('09) 34 Bom 467 (483): 4 Ind Cas 108 (116) (DB). (Caste questions.)
('18) 5 AIR 1918 Mad 580 (584) : 40 Mad 1069 (FB). (No jurisdiction to send decrees to foreign Courts for execution—See S. 45, C. P. Code.)
('16) 3 AIR 1916 Mad 554 (554) (DB). (Consent confers no jurisdiction.)
('25) 12 AIR 1925 Oudh 142 (142). (No inherent power for Judges to find on facts and legal relations outside pleadings.)

4. † ('15) 2 AIR 1915 Cal 49 (51) (DB).
(1862) 1862 Marsh 99.

5. (42) 29 AIR 1942 Bom 279 (280) (DB). (No appeal lies from the decision of a District Court on a finding recorded under S. 6C, Mussalman Wakf Act of 1923.)
('40) 27 AIR 1940 Lah 123 (123). (Appeal.)
† ('19) 6 AIR 1919 Mad 244 (246) (DB). (Religious Endowments Act—No provision therein for review — No inherent power.)
('33) 20 AIR 1933 Lah 169 (171).
('26) 13 AIR 1926 All 50 (55) : 48 All 160 (DB).
('18) 5 AIR 1918 Cal 925 (927) : 45 Cal 519 (DB).
('27) 14 AIR 1927 Cal 920 (921). (Review.)
('29) 1929 Mad W N 140 (141). (Do.)
('29) 16 AIR 1929 Cal 162 (162).
('39) 26 AIR 1939 Sind 137 (140) : ILR (1939) Kar 330.
[*See* ('31) 18 AIR 1931 Pat 409 (409). (Review.)]
[*See also* ('18) 5 AIR 1918 Bom 157 (157): 42 Bom 363 (DB). (No inherent power for revision apart from S. 115.)
('34) 21 AIR 1934 Pat 229 (231) : 13 Pat 165 (DB). (Review can only be granted on grounds set out in O. 47.)]
[*Compare* ('27) 14 AIR 1927 Cal 534 (536) : 54 Cal 405 (DB). (Dismissal of application for restoration—Inherent power to review—Followed in AIR 1929 Cal 17.)]
[See however ('29) 16 AIR 1929 Nag 185 (189, 190) (DB).
[But see ('36) 23 AIR 1936 Pesh 213 (214). (Order fixing court-fees—Trial Court has inherent power to review.)]

6. † ('05) 32 Cal 875 (881) (DB).
('34) 21 AIR 1934 All 677 (679). (Section 151, C. P. Code, cannot be invoked so as to treat an appeal filed on behalf of one party as the appeal of another, simply because it should have been filed on behalf of the other and it was the intention of the pleader filing it to appeal on behalf of the other.)
[But see ('24) 11 AIR 1924 Lah 306 (310). (Inherent power of the High Court to transfer.)
('31) 133 Ind Cas 876 (876) (Lah).]

7. ('40) 1940 Nag L Jour 93 (94).
✠ ('38) 25 AIR 1938 FC 1 (3) : ILR (1939) Kar (FC) 1 : 1939 FCR 13 (FC). (Court by the exercise of any inherent powers cannot extend its appellate jurisdiction or increase its revisional authority over other Courts.)
† ('35) 22 AIR 1935 All 599 (600) : 57 All 977 (FB). (Overruling AIR 1928 All 108 : 50 All 335.)

subsequent event. Hence, neither the High Court nor the Federal Court can vacate under S. 151 a certificate granted by the High Court under S. 205, Government of India, Act, 1935, because of some subsequent event.[8]

4. Ends of justice. — The inherent powers saved by the section are to be used only to secure the ends of justice or to prevent the abuse of process of the Court.[1] The following broad rules may be taken as a guide to determine what constitute the "ends of justice":

(1) It is in the ends of justice that an injury should be remedied and needless expense and inconvenience to parties avoided.[2] Thus, a Court will remedy an obvious injustice by refund of court-fee levied[3] or prevent the substance of a compromise from

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[See however ('42) 29 AIR 1942 Oudh 392 (394). (It is open to the Chief Court to interfere in revision under S. 151, C. P. Code, with an order refusing to amend a decree, even if S. 115 was not applicable.)]

8. ('40) 27 AIR 1940 F C 7 (8) : ILR (1940) Kar (FC) 45 : 1940 FCR 31 (FC).

Note 4

1. ('21) 8 AIR 1921 P C 80 (84) : 48 Ind App 76 : 48 Cal 481 (PC).
(1908) 1 Ch 471 (479, 487), Norton v. Norton.
† ('33) 20 AIR 1933 Pat 84 (87): 12 Pat 163 (DB). (Annulment without provision for protecting creditors—Insolvency Court can pass supplementary order under Provincial Insolvency Act (1920), section 5 (1).)
('09) 34 Bom 135 (139) : 4 Ind Cas 595 (595).
('22) 9 AIR 1922 Pat 409 (411) : 1 Pat 149 (DB). (Execution application — Overstating amount — Amendment under S. 151.)
('29) 16 AIR 1929 All 421 (428) : 51 All 780 (DB). (High Court refused to be bound by finding in a remand order even though neither party could question it.)
('17) 4 AIR 1917 All 474 (475) : 39 All 147 (DB). (Obvious miscarriage of justice can be prevented.)
('30) 17 AIR 1930 Bom 294 (295) : 55 Bom 368. (Interlocutory order by Judge in Chambers—Corrected to prevent injustice though review did not strictly lie.)
('32) 19 AIR 1932 Lah 295 (296). (Lease by judgment-debtor after sale and before confirmation — Prohibitory order issued to lessee in the interests of justice.)
† ('38) 25 AIR 1938 Bom 199 (205) (SB).
('38) 25 AIR 1938 Rang 241 (241): 1939 Rang L R 14 (DB). (Ends of justice—Objection that pleader engaged by opposite party should not be allowed to appear—Objection accepted in lower Court—Order is in accord with ends of justice.)
[*See* ('43) 30 AIR 1943 Cal 427 (431) (DB). (Apart from O. 23 R. 1 (4), a Court can in exercise of inherent powers, control a co-plaintiff from withdrawing a case to the prejudice of the other plaintiffs.)]

2. See the cases in foot-notes 3 to 17 below.
('41) 28 AIR 1941 Cal 434 (435) : I L R (1941) 1 Cal 373. (High Court has jurisdiction to restrain defendant from litigating in another Court on ground of convenience.)
('23) 10 AIR 1923 Bom 419 (419) (DB). (Suit for maintenance — Quantum to be fixed in suit itself and not to be left to be decided in separate suit.)
('32) 19 AIR 1932 Lah 295 (296). (Subsequent to court sale and before confirmation the judgment-debtor leasing the premises sold — Court can issue prohibitory order against the tenant and judgment-debtor under S. 151.)
† ('34) 21 AIR 1934 Pat 683 (685) (DB). (Objection to execution — Objectors mentioning by mistake that they were in possession—Objection upheld but no order as to possession passed — Court should under S. 151 restore possession to objectors.)
[*See also* ('12) 17 Ind Cas 987 (988) (DB) (Mad). (Suit for ejectment by vendor—Conditional decree on refund of purchase money could be passed.)]

3. ('43) 30 AIR 1943 Bom 50 (52) : I L R (1943) Bom 25 (DB). (Succession certificate infructuous —Court has power to refund court-fee.)
('42) 29 AIR 1942 Mad 316 (317). (Plaint rejected for non-payment of deficit court-fee—Plaintiff filing review application and tendering deficit court-fee along with it—Review application rejected—Plaintiff held entitled to refund of deficit court-fee—Court held could return same under S. 151 — Though Ss. 13, 14 or 15, Court-fees Act, did not apply.)
('42) 29 AIR 1942 Mad 464 (465).
('30) 17 AIR 1930 All 471 (471) : 52 All 546 (DB).
('32) 19 AIR 1932 Cal 450 (451) (DB).
('33) 20 AIR 1933 Lah 135 (135).
('33) 20 AIR 1933 Oudh 170 (170) : 7 Luck 588 (DB).
('33) 20 AIR 1933 Lah 351 (351) (DB).
('34) 21 AIR 1934 Mad 84 (84, 85) : 57 Mad 542.
('34) 21 AIR 1934 Cal 615 (616) (DB). (Appeal rejected as time-barred — Mistake of legal adviser and not of party— Fit for certificate for refund of court-fees)
('18) 5 AIR 1918 Pat 496 (496) : 3 Pat L Jour 452 (DB).
('23) 10 AIR 1923 Pat 600 (600) (DB). (Certificate for renewal or refund.)
('29) 16 AIR 1929 Rang 158 (160) : 7 Rang 88 (DB).
('28) 15 AIR 1928 Pat 35 (36) : 6 Pat 599 (DB).
('28) 107 Ind Cas 825 (825) (DB) (Pat).
('32) 19 AIR 1932 Lah 219 (220). (Remand under S. 151—Refund of court-fee ordered.)
('32) 19 AIR 1932 Mad 438 (439) : 55 Mad 641 (DB).
('70) 14 Suth W R 47 (47) (DB). (Excess stamps by overvaluation of appeal refunded.)

being wrecked at the will of an obstinate party[4] or prevent a counsel from unduly harassing and browbeating a witness[5] or vacate manifestly unjust orders.[6] It will not refuse relief merely because the application therefor is made under a wrong section,[7] or because there is some technical defect.[8] It can revive an appeal dismissed for want of a subsisting decree

('36) 23 AIR 1936 Cal 347 (348) (DB). (Suit for enhancement of rent under S. 7, Bengal Tenancy Act — Excess court-fee paid was directed to be refunded.)

('36) 23 AIR 1936 Lah 301 (304). (Where a person pays court-fees into the Court at the time of presenting an appeal which does not lie and appeal is converted into revision, court-fees can be refunded to the party—AIR 1933 Lah 351 relied on.)

('39) 26 AIR 1939 Lah 257 (258). (The Court has inherent jurisdiction to order a refund of court-fee even in cases which do not fall within Ss. 13, 14 and 15, Court-fees Act—AIR 1933 Oudh 170 : 7 Luck 588 relied on—Where there has been no real trial of the main issues involved in the case in both the Courts below, the appellant is entitled to a refund of court-fee paid by him in the lower Appellate Court on the memorandum of appeal.)

[*See* ('34) 21 AIR 1934 Mad 643 (644). (Remand purporting to be under S. 151 but really such as to fall under O. 41 R. 23 — Appellant is entitled to refund of court-fee.)

('36) 23 AIR 1936 Rang 208 (210) : 14 Rang 173 (FB). (Where a court-fee of a larger amount than that exigible under the Court-fees Act has been paid, the Court has inherent jurisdiction to order that the excess court-fee be refunded *ex debito justitiæ* — But where a specific court-fee exigible under the Court-fees Act has duly been paid, Court has no inherent power, except in cases specifically provided for by Court-fees Act to order that the court-fee chargeable and paid shall be refunded to a litigant—Hence where an order of remand passed by the Court does not come within S. 13 of the Court-fees Act but is one purported to have been passed under its inherent powers, the Court has no jurisdiction either under the Court-fees Act or in the exercise of its inherent powers to refund the court-fee paid by the appellant — A I R 1926 Rang 129 : 4 Rang 66 overruled.)]

[*See also* ('37) 24 AIR 1937 Cal 86 (88) : I L R (1937) 1 Cal 624 (DB) (Court has inherent jurisdiction to grant refund of custody fees lying unspent.)]

Also see O. 41 R. 1 Note 17 and O. 41 R. 23 Note 33.

[But see ('40) 27 AIR 1940 Mad 451 (452) (DB). (Where a suit is properly filed in a Civil Court, the plaintiff being at the time entitled in law to institute such suit, but in the meantime the Legislature takes away by an amendment of the law, the right to the relief claimed in the suit, the proper course for the Civil Court to adopt is to dismiss the suit — In such circumstances the Court cannot invoke its inherent powers to order the refund of the court-fee or grant a certificate under the Court-fees Act.)

('34) 21 AIR 1934 Mad 409 (410). (No power to direct refund of poundage.)

('35) 22 AIR 1935 Pesh 8 (10) (DB). (No power to order refund of court-fee in cases in which it is not allowed under Court-fees Act—Remand of case under S. 151 — Refund of court-fee cannot be ordered.)

('35) 22 AIR 1935 Cal 707 (709) (DB). (Legally stipulated fees paid — Court cannot by ordering refund under inherent power exempt litigant from statutory obligation.)]

4. ('23) 10 AIR 1923 All 460 (462) (DB). (Commissioner appointed by consent — His refusal to act — Appointment of another without party's consent.)

5. ('17) 4 AIR 1917 Pat 437 (440) (DB).

6. ('22) 9 AIR 1922 Bom 385 (385) : 47 Bom 104 (DB). (Ordering pauper to pay Rs. 500 as costs of amendment.)

('34) 21 AIR 1934 Lah 156 (157) : 15 Lah 80. (Panchayat Court acting contrary to express prohibition in the statute — Interference by High Court under S. 151.)

[*See also* ('25) 12 AIR 1925 Oudh 461 (461) : 28 Oudh Cas 323. (Sub-Judge directing plaintiff to go to Munsif — Munsif directing again to Sub-Judge—High Court interfered.)]

7. ('09) 1 Ind Cas 677 (682) (DB) (Cal).
('32) 19 AIR 1932 Mad 223 (224).
('24) 11 AIR 1924 Cal 90 (91) (DB).
('04) 31 Cal 737 (741) (DB).
('18) 5 AIR 1918 Pat 668 (671, 672) (DB). (Revision can be converted into appeal and *vice versa* provided the laws of limitation and court-fees are complied with.)
('15) 2 AIR 1915 Cal 268 (271) (DB). (Revision treated as appeal.)
('28) 15 AIR 1928 Pat 197 (198) (DB). (Appeal treated as revision.)
('11) 5 Sind L R 61 (66) : 10 Ind Cas 211 (212) (DB). (Do.)
('25) 12 AIR 1925 Rang 192 (192) : 2 Rang 659. (Review treated as an application under O. 9 R. 13.)
('21) 8 AIR 1921 All 321 (322) (DB). (Courts are not disciplinary bodies to punish parties for inapt procedure.)

8. ('25) 12 AIR 1925 Rang 188 (189). (Erroneously filing a different decree with appeal—Substitution of correct one allowed.)
('22) 9 AIR 1922 Nag 125 (125) : 5 Nag L R 265. (Presentation of plaint to proper Court without fresh vakalat—Time may be granted for vakalat.)
('32) 19 AIR 1932 Pat 3 (5) (DB). (Omission of name of vakil in vakalatnama—Defect condoned.)
('27) 14 AIR 1927 P C 264 (265) (PC). (Dismissal of appeal for technical defect in security bond under O. 41 R. 10, without giving opportunity for rectification—Dismissal reversed.)
('22) 9 AIR 1922 Pat 368 (369).
('27) 14 AIR 1927 Oudh 455 (456) : 2 Luck 731 (DB). (Fundamental defect undetected and not raised in grounds of appeal.)
('13) 20 Ind Cas 294 (294) (DB) (Cal). (High Court can consider an admitted document though not printed.)

(decree having been set aside by the first Court) when that decree is subsequently restored.[9] It cannot, however, restore an appeal which was dismissed on the application of the appellant stating that he wished to withdraw it, though the appellant might have acted under a mistake of law.[10] The Court can restore a suit, the decree in which has been set aside in a separate suit on the ground that the minor or lunatic defendant was not properly represented.[11] In order to avoid multiplicity of proceedings and needless expenses and inconvenience, it can re-hear a matter before final orders are passed in it[12] and consolidate suits,[13] appeals[14] or other proceedings[15] and can take notice of subsequent events[16] or of

('32) 19 AIR 1932 Lah 267 (268) (DB). (An unregistered document becoming inadmissible, because of a Privy Council ruling—Court ought to receive the document on registration notwithstanding prior order of rejection.)
[*See* ('35) 22 AIR 1935 All 391 (394).]
[But see ('11) 5 Sind L R 68 (70):11 Ind Cas 77 (78) (DB). (Application cannot be construed as something essentially different from what it is.)]

9. ('30) 17 AIR 1930 All 100 (100) (DB).
('20) 7 AIR 1920 Cal 399 (400).(Appeal left undecided on parties agreeing to settle matter in dispute by separate suit—Separate suit not tenable—Appellate Court has power to restore appeal and determine the question.)

10. ('42) 29 AIR 1942 All 253 (253) (DB).

11. ('40) 1940 All W R (H C) 62 (63) (DB).
('28) 1928 Mad W N 275 (278). (AIR 1917 All 477 : 39 All 8 followed.)
('17) 4 AIR 1917 All 477 (479) : 39 All 8 (DB).
('30) 17 AIR 1930 All 644 (645, 646) : 52 All 924 (DB).
('31) 18 AIR 1931 Cal 168 (169) (DB). (Case of a lunatic defendant.)
('37) 24 AIR 1937 All 552 (556) (DB).
Also see O. 32 R. 3, Note 5.

12. ('10) 37 Cal 259 (262) (DB).
('18) 5 AIR 1918 Cal 173 (175) (DB).
('29) 16 AIR 1929 All 403 (404). (Allahabad High Court Rules, Chap. VII R. 3, non-compliance, irregularity merely—No rehearing.)
(1837-41) 2 Moo Ind App 181 (216) (PC). (Rehearing of an appeal before the Privy Council.)
('32) 19 AIR 1932 All 656 (657). (There is no rule of law except S. 151, C. P. Code, which can authorise a Court to revise its own order superseding a reference to arbitration.)
[*See also* ('33) 20 AIR 1933 Lah 266 (266, 267).]
Also see S. 112 Note 9.

13. ('43) 30 AIR 1943 Bom 12 (17, 18) : I L R (1943) Bom 104 (DB).
('71) 15 Suth W R 110 (111) (DB).
('84) 10 Cal 58 (60).
('95) 22 Cal 511 (517).
('11) 11 Ind Cas 161 (163) (DB) (Cal).
('12) 15 Ind Cas 897 (898) (DB) (Cal).
(1841) 1 Cr. & Ph. 161 (181, 182), Rawson v. Samuel.
('17) 4 AIR 1917 All 336 (337) (DB). (Even without the consent of parties.)
('22) 9 AIR 1922 Pat 566 (566) : 1 Pat 669 (DB). (Do.)
('15) 2 AIR 1915 Bom 146 (148) : 39 Bom 604 (FB). (However High Court has no jurisdiction for consolidation of suits pending before a District Court.)
('37) 24 AIR 1937 Nag 132 (133) : I L R (1937) Nag 6. (Consolidation is the exception and not the rule, and Courts should be slow to presume its existence when there is no express order to that effect, especially as the Code does not allow consolidation in express terms.)
('39) 26 AIR 1939 Pat 30 (31). (In deciding whether two suits should be consolidated or not, the whole question is whether or not in the long run, it will be expeditious and advantageous to all concerned to have the two suits tried together as analogous cases.)
[*See also* ('24) 11 AIR 1924 Nag 196 (198).]
Also see O. 2 R. 6 Note 4.
[But see ('95) 22 Cal 511 (517). (Admiralty jurisdiction—Following practice of Court of Admiralty in England application for consolidation of salvage claims was not allowed.)]

14. ('18) 5 AIR 1918 Mad 368 (369).
('28) 15 AIR 1928 Mad 463 (463).
('23) 10 AIR 1923 All 490 (491) : 45 All 506 (FB). (Two cross-appeals—One final decree.)
('25) 12 AIR 1925 Pat 765 (769) : 4 Pat 448 (DB). (Order of consolidation must be express.)
('18) 5 AIR 1918 Pat 196 (197) : 3 Pat L Jour 446 (DB). (Consolidation by High Court of Privy Council appeals—Compare O. 45 R. 4.)
[*See* ('30) 17 AIR 1930 Mad 376 (379, 381) : 53 Mad 248 (FB). (Overruling AIR 1928 Mad 463 on the question of number of vakalats to be filed in consolidated appeals.)
('36) 23 AIR 1936 All 832 (833) : ILR (1937) All 105 (DB). (Ordinarily inherent powers exist as regards matter relating exclusively to the proceedings in Court which exercises such powers. The High Court has no inherent power to pass orders under O. 45 R. 4 directing consolidation of appeals pending before their Lordships of the Privy Council, when there is no specific provision to that effect in O. 45 R. 4, and, when O. 45 R 4 is confined to particular cases—AIR 1918 Pat 196 : 3 Pat L Jour 446 not followed.)]
Also see O. 41 R. 1, Note 15.

15. ('18) 5 AIR 1918 Pat 415 (416) (DB). (Application to set aside *ex parte* decree — Another to set aside sale thereunder — Fraud — Joint trial.)
[*See* ('30) 17 AIR 1930 Mad 381 (382):53 Mad 262 (FB). (Several revisions against common respondent cannot be consolidated for purposes of vakalat and process fee.)]

16. ('17) 4 AIR 1917 Cal 716 (719):44 Cal 47 (DB). (Taking notice of events subsequent to date of suit to do complete justice.)
('12) 13 Ind Cas 377 (381) (DB) (Cal). (Do.)
† ('15) 2 AIR 1915 Cal 103 (104) (DB). (Do.)
('17) 4 AIR 1917 Cal 822 (822) (DB). (Do.)

questions which cut at the root of the subject-matter in controversy.[17] Where, owing to accident or other cause, the records of the Court are lost or are destroyed, it can reconstruct the records from its memory[18] or on evidence and affidavit.[19] Where, by mistake a party is allowed to withdraw money from Court, it may be ordered to be refunded.[20] See also the undermentioned cases.[21]

('21) 8 AIR 1921 Cal 792 (795) (DB). (Do.)
('25) 12 AIR 1925 Cal 561 (564) (DB). (Do.)
('23) 10 AIR 1923 Lah 24 (25) (DB). (Do.)
† ('25) 12 AIR 1925 Nag 104 (107). (Do.)
('24) 11 AIR 1924 Nag 188 (189) (DB). (Do.)
('24) 11 AIR 1924 Nag 204 (207). (Do.)
('24) 11 AIR 1924 Nag 344 (345). (Do.)
('26) 13 AIR 1926 Oudh 32 (32) (DB). (Do.)
('23) 10 AIR 1923 Lah 590 (591) (DB). (Cause of action arising subsequent to suit.)
('31) 18 AIR 1931 Bom 280 (282) (DB). (Appellate Court can vary decree on grounds subsequently arising.)
('32) 19 AIR 1932 Lah 295 (296). (When subsequent to court sale but before confirmation, judgment-debtor leased his premises, the Court has inherent jurisdiction to issue prohibitory orders on tenant from paying rent.)
('29) 16 AIR 1929 Lah 409 (415) (DB).
[*See* ('35) 22 AIR 1935 Mad 190 (193) (DB). (No doubt it is competent to the Appellate Court to decree a suit which is premature in its inception. But in exercising this discretion the Court must be guided by one very clear principle viz., that no injustice should be done to the defendants.)]

See however the following cases holding to the contrary :

('24) 11 AIR 1924 Pat 438 (438) : 3 Pat 224 (DB).
('18) 46 Ind Cas 794 (796) (Nag).
('10) 8 Ind Cas 576 (577) (DB) (Lah).
('22) 9 AIR 1922 Lah 437 (439) (DB).
('26) 13 AIR 1926 Mad 594 (597).
('22) 9 AIR 1922 All 526 (526) (DB).

17. † ('12) 35 Mad 607 (612): 39 Ind App 218 (PC). (Question of attestation.)
('32) 19 AIR 1932 Oudh 244 (246) : 8 Luck 87 (DB).
('27) 14 AIR 1927 Oudh 455 (456) : 2 Luck 731. (Point of appeal being premature.)
('27) 14 AIR 1927 Mad 143 (144). (High Court requiring proof of attestation of mortgage bond though execution admitted by defendant.)

Also see S. 107, Note 11.

18. ('15) 2 AIR 1915 Mad 1038 (1039) : 38 Mad 498 : 21 Ind Cas 467 (468).
('15) 2 AIR 1915 Mad 407 (412) (DB).

19. ('23) 10 AIR 1923 Mad 647 (648) : 46 Mad 679 (FB).

20. ('35) 22 AIR 1935 Mad 212 (212, 213) (DB). (Money under attachment wrongly paid out.)
('33) 20 AIR 1933 Lah 850 (851).
('34) 21 AIR 1934 Lah 142 (143). (Money wrongfully paid contrary to O. 21 R. 53—Refund under Section 151.)

21. ('42) 29 AIR 1942 Mad 519 (520) (DB). (Court returning application due to mistake caused by misunderstanding of parties and Court itself — Applicant discovering mistake and applying to Court to restore application—Court held had power to restore application.)
('41) 28 AIR 1941 Cal 80 (85) (DB). (High Court affirming ambiguous decree of Court of first instance and subsequently removing ambiguity by reviewing its judgment — Directions in final judgment passed on review not embodied in decree — There is no bar in bringing decree in conformity with final judgment where rights of third party have not intervened—High Court can, if necessary, itself order aforesaid amendment.)
('41) 28 AIR 1941 Sind 196 (197, 198) : ILR (1941) Kar 389 (DB). (Default clause — Court can grant relief on equitable grounds against condition in nature of penalty but not against condition granting concession — Decree-holder agreeing to accept Rs. 255 instead of full decretal amount of Rs. 330 provided amount was paid in regular monthly instalments of Rs. 10 — Judgment-debtor paying Rs. 250 as per terms of agreement but defaulting in respect of remaining Rs. 5 — Court held could not interfere as agreement embodied concession to debtor and not penal clause — Decree-holder held entitled to recover full decretal amount.)
('35) 22 AIR 1935 All 868 (871) : 58 All 249 (DB). (Officer acting judicially has inherent power to correct his orders if he is satisfied that it is necessary for ends of justice — Collector acting under S. 68, C. P. Code, has inherent power to cancel his order on valid grounds—Such inherent power does not depend on continuance of proceedings in course of which order is made.)
('37) 24 AIR 1937 Mad 563 (565). (Court is entitled under S. 151 to do justice by giving effect to agreement entered into between parties as to the manner of the disposal of the suit and for this purpose can transpose a defendant as a plaintiff although the case is not covered by O. 1 R. 10.)
('35) 22 AIR 1935 Mad 105 (106). (Suit for partition on behalf of minors—Order for their maintenance can be passed in suit on petition for same under S. 151.)
('32) 19 AIR 1932 Lah 120 (121). (Where an order is passed behind the back of a party the Court is justified in setting it aside on the true state of affairs being brought to its notice.)
('38) 25 AIR 1938 Mad 860 (863) : ILR (1938) Mad 744 (FB). (Money realised by execution sale of attached property — Application for payment by Crown towards arrears of income-tax due by judgment-debtor—Court can order payment—Separate suit by Crown not necessary.)
('38) 25 AIR 1938 Cal 791 (792). (If an application is filed before a Court which has no jurisdiction to receive it, such Court, under proper circumstances, will be fully competent to return the application in exercise of its inherent power under S. 151.)

(2) Where a party has another remedy open and will not adopt or negligently fails to pursue it, it will not be in the ends of justice, as a general rule, to grant him relief under the Court's inherent powers[22] except in exceptional and peculiar

22. ('43) 30 AIR 1943 Pat 13 (14) (DB).
('42) 29 AIR 1942 Oudh 189 (193) : 17 Luck 297 (DB). (Remedy by way of appeal or cross-objection open—No amendment of decree under S. 151.)
('41) 28 AIR 1941 Bom 219 (222). (Criminal complaint filed by defendant in Court of another Province—Injunction against defendant restraining him from proceeding with complaint not granted as he had not exhausted his remedy of applying to Criminal Court for stay of criminal proceedings.)
('41) 28 AIR 1941 Oudh 83 (84) : 16 Luck 492 (DB). (Suit pending before trial Court being one subject to appeal and second appeal—It is not competent for the trial Court either under S. 113 or S. 151 to refer to High Court question whether it is competent to decide certain issue.)
('41) 28 AIR 1941 Oudh 587 (589) : 17 Luck 121 (DB). (Application challenging decree as not executable—Decree already executed and satisfied—Proper remedy is suit and not application under S. 151.)
('41) 28 AIR 1941 Pat 408 (409) (DB). (Order appealable—No interference under S. 151.)
('40) 27 AIR 1940 Mad 876 (878).
('39) 26 AIR 1939 Cal 658 (660) (DB). (Setting aside consent decree on ground of fraud—S. 151 does not apply—Remedy is by separate suit.)
('24) 11 AIR 1924 All 446 (447): 46 All 144.
('33) 20 AIR 1933 Lah 73 (75).
('34) 21 AIR 1934 All 442 (444) (DB).
('26) 13 AIR 1926 Bom 139 (140) (DB). (Appeal not filed—No inherent power to be exercised.)
('33) 20 AIR 1933 Lah 592 (592).
('33) 20 AIR 1933 Lah 671 (675) : 14 Lah 779.
('33) 20 AIR 1933 Pat 132 (133, 134).
('25) 12 AIR 1925 Lah 321 (321).
('34) 21 AIR 1934 All 624 (625) (DB).
('33) 20 AIR 1933 Mad 485 (488).
('33) 20 AIR 1933 All 382 (384) : 55 All 548 (DB).
('18) 5 AIR 1918 Nag 193 (194) (DB). (Order under O. 41, R. 23, cannot be reconsidered in a subsequent appeal from the decision on remand.)
('20) 7 AIR 1920 Nag 23 (24).
('27) 14 AIR 1927 Nag 197 (198).
('27) 14 AIR 1927 Nag 262 (264).
('24) 11 AIR 1924 Rang 274 (275) (DB).
('16) 32 Ind Cas 967 (968) (Mad). (Court of the Board of Revenue, Madras.)
('28) 15 AIR 1928 Lah 772 (773).
† ('27) 14 AIR 1927 Cal 158 (159) (DB).
('27) 14 AIR 1927 Mad 592 (593) (DB).
('30) 17 AIR 1930 Lah 72 (74). (Declaratory suits —Mesne profits under S. 151 cannot be awarded.)
('27) 14 AIR 1927 Nag 212 (212, 213): 23 Nag L R 79. (Remedy by suit available—No relief under S. 151.)
† ('27) 14 AIR 1927 Nag 95 (96). (*Ex parte* decree —Remedy under S. 25, Small Cause Courts Act, not resorted to.)
('25) 12 AIR 1925 Mad 886 (887). (No appeal filed —Review petition dismissed.)
('29) 16 AIR 1929 Cal 470 (472): 57 Cal 154 (DB). (Remedy by suit open.)
('24) 11 AIR 1924 Lah 70 (70, 71). (Do.)
† ('29) 16 AIR 1929 Mad 757 (763) : 52 Mad 899 (FB). (Do.)
('19) 6 AIR 1919 Mad 949 (949) (DB). (*Ex parte* decree set aside—High Court cannot set aside the decision under S. 151.)
('24) 11 AIR 1924 Nag 325 (326). (Do.)
('29) 16 AIR 1929 Nag 111 (111).
('16) 3 AIR 1916 Cal 323 (324) (DB).
('23) 10 AIR 1923 All 603 (603). (Mistake of Judge —Review, proper remedy, not S. 151.)
('29) 16 AIR 1929 Mad 404 (406, 407) (DB). (Review open.)
('21) 8 AIR 1921 Upp Bur 5 (7) : 4 Upp Bur Rul 1. (Mortgage suit—Judgment and decree silent about interest for certain period—No amendment under S. 151—Only review.)
('25) 12 AIR 1925 Lah 144 (144). (Where revision lies, S. 151 does not apply.)
('24) 11 AIR 1924 Pat 136 (138) (DB). (Remedy of appeal or review open.)
('16) 3 AIR 1916 Sind 70 (70) : 9 Sind L R 132.
('09) 34 Bom 135 (139) : 4 Ind Cas 595 (595) (DB). (Execution open.)
('27) 14 AIR 1927 Bom 79 (80) : 51 Bom 26 (DB). (Application under S. 23 (3), C. P. Code.)
✣ ('15) 2 A I R 1915 Mad 392 (395) (DB). (Other remedy not availed of.)
('32) 19 A I R 1932 Oudh 220 (222) (DB). (Execution petition dismissed—No appeal filed — Not to be restored under this section.)
('23) 10 A I R 1923 Bom 386 (386) (DB). (No restoration of application to set aside dismissal for default.)
† ('33) 20 AIR 1933 Sind 29(31):26 Sind L R 395. (Consent decree in a partnership suit—No inherent power to vacate it for non-registration of agreement of partnership—Suit is the only remedy for fraud.)
('24) 11 AIR 1924 All 398 (399) : 46 All 245. (Do.)
('39) 26 A I R 1939 Cal 349 (350) (DB). (Applicant not applying for restitution within the prescribed period of limitation.)
('39) 26 AIR 1939 All 497 (497) : 1939 All L Jour 398 (400) (DB). (Order of executing Court permitting sale of materials of house only—Decree-holder acquiescing in order and allowing other remedies to be barred by time—Application by him under S. 151 to set aside sale not competent.)
('38) 25 AIR 1938 Pat 447 (450).
('38) 25 A I R 1938 Pesh 15 (17) (DB). (Leave granted under S. 20 (b) without notice to opposite party — Objections against such leave cannot be heard under S. 151, as opposite party could resort to S. 23.)
('38) 25 AIR 1938 Rang 433 (435) (DB). (Where a party has not applied under O. 21 Rr. 89, 90 or 91 it is not open to him to seek the inherent power of the Court to set aside the sale.)
('35) 22 A I R 1935 Pat 68 (68). (Appellate Court should not without sufficient cause order retrial where it can effectively deal with matter under Order 41 Rule 25.)
('33) 20 AIR 1933 Pat 582 (583).

circumstances.[23] Thus, where an application under O. 21 Rr. 97 and 100 is dismissed for

('34) 21 A I R 1934 Pat 582 (582). (Section 151, C. P. C., is a section to be resorted to only when no other section of the Code is available. Thus a matter of compromise should be considered under O. 23 R. 3 and not under S. 151.)

('36) 38 Pun L R 373 (374). (Another remedy by suit.)

('34) 21 A I R 1934 Cal 623 (624) (DB). (Rejection of plaint—Aggrieved party can apply under O. 47 R. 1 or file appeal — When he does not do either, he cannot seek relief under S. 151.)

('38) 25 A I R 1938 Bom 510 (512) : I L R (1938) Bom 743.

('37) 24 AIR 1937 Bom 173 (176).

('39) 26 AIR 1939 All 66 (69) : ILR (1939) All 103 (DB). (Where the relief claimed is not really restitution and can appropriately be claimed in a suit, recourse cannot be had to the inherent powers of the Court under S. 151.)

('39) 26 AIR 1939 All 25 (27). (Party neglecting to avail himself of right of appeal or revision against decree or order — He cannot subsequently invite Court to exercise its jurisdiction under S. 151.)

† ('35) 22 AIR 1935 Pesh 151 (152) (DB).

('35) 22 AIR 1935 Cal 336 (337) : 62 Cal 61 (DB). (Suit filed when claim is about to be barred—Rejection of plaint—No appeal filed from order—Court cannot use inherent power to set aside order.)

('39) 69 Cal L Jour 533 (537) (DB). (Remedy of party impeaching consent decree on the ground of fraud is to institute a regular suit and not to invoke inherent powers of Court.)

('37) 24 AIR 1937 Cal 425 (427) (DB). (Party not availing of remedy of appeal from order — Court cannot set aside such order under S. 151.)

('38) 25 AIR 1938 Cal 554 (557) (DB). (Proper remedy under S. 144—Parties should not be allowed to invoke S. 151.)

('36) 38 Pun L R 331 (332). (Order open to appeal.)

('37) 24 AIR 1937 Lah 416 (417). (Order of sale in contravention of Punjab Land Alienation Act — Act itself providing for remedy—Executing Court should not resort to inherent jurisdiction to set aside sale.)

† ('36) 23 AIR 1936 Lah 672 (673). (Application under S. 151, C. P. C., is not competent when some other provision of C. P. C. is available — Delay caused by wrong prosecution of such application cannot be condoned under S. 5, Limitation Act.)

('38) 25 AIR 1938 Lah 4 (5). (Remedy by way of appeal from decree open — Inherent jurisdiction cannot be invoked.)

[Contra ('27) 14 AIR 1927 Mad 355 (356, 357) (DB). (Execution application dismissed for default cannot be restored under inherent powers.)
('26) 13 AIR 1926 Pat 27 (28) : 4 Pat 704 (DB).]

23. ('43) 30 AIR 1943 Oudh 136 (138) (DB). (The view that S. 151 is intended to meet only cases for which there is no other provision is not adopted by 'this Court in some recent cases.')

('42) 29 AIR 1942 Oudh 343 (344) : 17 Luck 673 (DB). (Lower Court passing *ex parte* decree even when the Judge had discovered that notice necessary under S. 14 of the U. P. Encumbered Estates Act, had not been served on the creditors and they had even no information of the date — Though an appeal was open from such order, an order by the lower Court under S. 151 directing re-trial held justified under the circumstances.)

('41) 28 AIR 1941 Oudh 91 (93) : 16 Luck 294.

† ('22) 9 AIR 1922 Mad 193 (193). (Decree against corporation with wrong representative — Right representative may apply to vacate it — Separate suit not just.)

('33) 20 AIR 1933 Nag 176 (177):29 Nag L R 176.

('28) 15 AIR 1928 Oudh 478 (479). (Dismissal of execution application for default — Fresh application time-barred — Extenuating circumstances—Application for restoration of original application is maintainable.)

('21) 8 AIR 1921 Lah 67 (68) : 2 Lah 66 (DB). (Do.)

† ('21) 8 AIR 1921 Pat 491 (493, 494). (Personal decree against non-mortgagor defendants by mistake of Court, may be rectified though no appeal or review preferred.)

('21) 8 AIR 1921 Oudh 141 (142) : 24 Oudh Cas 282. (Order under O. 9 R. 8, without jurisdiction — High Court acts under S. 151, other remedy notwithstanding.)

('30) 17 AIR 1930 All 701 (701). (A wrong or illegal order under O. 11 R. 21, set aside by the same Court notwithstanding remedy by way of appeal.)

('32) 19 AIR 1932 Bom 271 (272). (An order under O. 11 R. 21 was set aside under S. 151, since remedy by appeal was costly.)

('37) 24 AIR 1937 Sind 101 (103): 31 Sind L R 32 (DB). (The fact that a minor has a remedy to have an adverse order set aside by a suit does not exclude the remedy which the Court possesses under S. 151 if the Court thinks that it is essential in the interests of justice that this power under S. 151 should be exercised.)

('38) 25 AIR 1938 Pat 468 (469). (The fact that the claimant could have brought a regular suit for possession of the property was no ground for the Court to refuse restitution of the property which had been taken away from an innocent person under its orders.)

('39) 26 AIR 1939 Lah 223 (224). (Inherent power to restore an application in execution proceedings which has been dismissed for default.)

('38) 25 AIR 1938 Pat 447 (450). (Third party claimant establishing title to property sold in execution — Application by auction purchaser for refund of purchase money without first applying under O. 21 R. 91 for setting aside sale — Limitation for making such application expired — Circumstances of case were held to be such that amendment of application for refund of purchase money by adding prayer for setting aside sale should be allowed.)

[*See* ('35) 22 AIR 1935 Mad 753 (754). (Setting aside decree on ground that it had been passed against lunatic—*Held*, that though the fact that another remedy by way of suit was available was not necessarily a ground for refusing the inherent powers of the Court under S. 151, C. P. C., under the circumstances of the case, it was but proper

default, the aggrieved party has his remedy by suit under O. 21 R. 103. The Court cannot, in such a case, set aside the order under its inherent powers.[24]

(3) It will not be in the ends of justice to exercise inherent powers if it would interfere with the rights of third parties or cause mischief or injustice.[25]

(4) It will not be in the ends of justice to assist a party guilty of laches in consequence of which new rights have arisen against him.[26]

5. Other remedy open — Effect. — See Note 4.

6. "Prevent abuse of the process of the Court." — The term "abuse of the process of the Court" has not been defined, and therefore its connotation has to be gathered from the instances of abuse which are recognised to be such by judicial decisions.

An abuse of the process of the Court may be committed *by the Court or by a party*. In a Privy Council case, *Debi Baksh* v. *Habib Shah*,[1] the Court of the Deputy Commissioner of Oudh had dismissed a suit for default of appearance of the plaintiff who was in fact dead at the time the order was made. On an application under O. 9 R. 9 by the heir of the plaintiff the suit was restored. On revision the Judicial Commissioner reversed the order of restoration on the ground that the original dismissal was rightly made on default. On appeal to the Privy Council, Lord Shaw, after stating that the rules and orders applicable to a defaulter could not be applied to a dead man and quoting the words of S. 151, observed "in their Lordships' opinion such abuse has occurred by the course adopted in the Court of the Judicial Commissioner. Quite apart from section 151 any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made. But S. 151 could never be invoked in a case clearer than the present." It follows from this ruling that where a Court employed a procedure in doing something which it never intended to do and there is miscarriage of justice, there is an abuse of the process of the Court.[2] The injustice so done must be remedied on the principle *actus curiæ neminem gravabit*—an act of the Court shall prejudice no person.[3] Such

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that the petitioner should be referred to a regular suit, and that it was not a fit case for the exercise of the Court's inherent powers under S. 151 to set aside the decree.)]

24. † ('29) 16 AIR 1929 Mad 757 (763) : 52 Mad 899 (FB).
('34) 21 AIR 1934 Cal 653 (654).

25. ('40) 27 AIR 1940 Rang 201 (202) : 1940 Rang L R 421 (SB). (The inherent powers of the Court cannot be used for the purpose of overriding the rights of one party for the benefit of another.)
('24) 11 AIR 1924 Nag 98 (101): 20 Nag L R 11.
('26) 13 AIR 1926 Bom 377 (378):50 Bom 457(DB).
('22) 9 AIR 1922 Mad 228 (229) (DB).
('14) 1 AIR 1914 Mad 141 (142).
('25) 12 AIR 1925 Mad 443 (443) (DB). (Plaintiff not clearly entitled to relief — Advancement of income cannot be granted.)
('36) 23 AIR 1936 Oudh 50 (51) : 11 Luck 519(DB). (Setting aside order under inherent power—Effect being to deprive decree-holder's right to get personal decree for balance, further application being barred by time — Interference under inherent powers is not proper.)

26. ('25) 12 AIR 1925 All 236 (237) : 47 All 304 (DB). (Mistake in execution sale will not be rectified after three years so as to affect a *bona fide* purchaser.)
('34) 21 AIR 1934 All 250 (252). (Review not to be allowed after appeal by other party is time-barred.)
('18) 5 AIR 1918 Bom 105 (106): 43 Bom 240(DB).
('23) 10 AIR 1923 Nag 109 (110). (Decree acted upon for six years—Inherent power should not be used to amend the decree.)
('28) 15 AIR 1928 Nag 149 (149).
('26) 13 AIR 1926 Rang 50 (51) : 3 Rang 488.
('23) 10 AIR 1923 Oudh 59 (60): 25 Oudh Cas 286.

Note 6

1. ('13) 35 All 331 (337) : 40 Ind App 151: 16 Oudh Cas 194 (PC).

2. ('29) 16 AIR 1929 All 147 (148) : 50 All 859. (Property other than the judgment-debtor's included in judgment, decree and map by accident.)
† ('09) 36 Cal 193 (203): 1 Ind Cas 913 (918) (DB).
('17) 4 AIR 1917 Pat 495(497):2 PatLJour 361 (DB).
('35) 22 AIR 1935 All 27 (28). (Decree-holder being driven to the necessity of making fresh application for execution, which is barred by limitation — Order passed by oversight.)
('38) 32 Sind L R 215 (219) (DB). (Court can set aside its own order which is null and void and ought never to have been made — Power not confined to cases of fraud or deception practised upon the Court.)

3. † ('20) 7 AIR 1920 Cal 399 (400).

an abuse by the Court may arise *either (a)* by the default or mistake of the Court itself[4]

('26) 13 AIR 1926 Nag 331 (331).
('09) 36 Cal 193 (203) : 1 Ind Cas 913 (918) (DB).
('14) 1 AIR 1914 Sind 61 (62) : 8 SindLR 327 (DB).
('38) 25 AIR 1938 All 8 (11) : ILR (1938) All 71 (DB). (A Court has inherent jurisdiction to recall and cancel its invalid orders.)
('39) 26 AIR 1939 Bom 51 (52) : ILR (1939) Bom 27 (DB). (Court can vacate a prior wrong order made by it.)
('36) 23 AIR 1936 Cal 343 (346) : 63 Cal 1079. (This principle ought to be applied even when for relieving a party from such injury the Court has to consider the question of time and Court can grant extension of time though case not covered by S. 5, Limitation Act—Correctness of this view is questionable.)
('37) 24 AIR 1937 Mad 150 (151). (Inherent power of restitution.)
('35) 22 AIR 1935 Sind 214 (215) : 29 Sind L R 251 (DB). ("The act of the Court" means not merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case : AIR 1922 P C 269 : 49 Ind App 351 : 2 Pat 10 (PC) relied on.)

4. ('43) 30 AIR 1943 Pat 72 (73). (Amendment of consent decree without notice to party affected—Party can apply under S. 151 for recalling order of amendment.)

('42) 1942 Pat W N 94 (98). (Order passed in the mistaken belief that both the parties were heard—Order reconsidered under inherent powers.)
('41) 28 AIR 1941 Oudh 91 (93) : 16 Luck 294.
('16) 3 AIR 1916 Cal 241 (244) : 43 Cal 269 (DB). (Adverse order without notice — "*Audi alteram partem*".)
† ('16) 3 AIR 1916 P C 85 (85) (PC). (Do.)
('12) 34 All 518 (522) : 16 Ind Cas 677 (678) (DB). (Do.)
('70) 13 Suth W R 232 (232) (DB). (Do.)
('06) 3 Cal L Jour 276 (279) (DB). (Do.)
† ('12) 16 Ind Cas 567 (569) (DB) (Cal). (Do.)
('17) 4 AIR 1917 Cal 633 (634) : 44 Cal 454 (DB). (Do.)
('17) 4 AIR 1917 Cal 728 (731) : 44 Cal 954 (DB). (Do.)
('27) 14 AIR 1927 Cal 76 (77) : 53 Cal 844 (DB). (Do.)
('17) 4 AIR 1917 Mad 945 (496) (DB). (Do.)
('19) 6 AIR 1919 Mad 14 (15) (DB). (Do.)
('21) 8 AIR 1921 Mad 286 (291) (DB). (Do.)
('22) 9 AIR 1922 Mad 485 (485, 486). (Do.)
('17) 4 AIR 1917 Pat 672 (672) : 1 Pat L Jour 245 (DB). (Do.)
('21) 8 AIR 1921 Pat 293 (295). (Do.)
('23) 10 AIR 1923 Pat 180 (183) (DB). (Do.)
('23) 10 AIR 1923 Pat 597 (599). (Do.)
('33) 20 AIR 1933 Oudh 229 (230, 231) : 8 Luck 496 (DB). (Dismissal of final decree application for default — Application for restoration and for final decree—To be allowed though decree-holder negligent.)
('33) 20 AIR 1933 Pat 135 (138).
('34) 21 AIR 1934 Mad 506 (507) : 58 Mad 84. (Disposal of appeal without full hearing owing to mistake—Re-heard.)
('20) 7 AIR 1920 Cal 434 (435) (SB). (Dismissal of a petition under misapprehension.)
('68) 9 Suth W R 283 (284) (DB). (Case struck off under a misapprehension that the parties had settled it.)
('12) 5 Sind L R 184 (190) : 13 Ind Cas 264 (266). (Order based on erroneous assumption by Court.)
('28) 15 AIR 1928 All 108 (110) : 50 All 335 (DB). (Failure to enquire under O. 32 R. 15—Note:—This case is overruled on another point in AIR 1935 All 599 : 57 All 977 (FB).)
('29) 16 AIR 1929 All 147 (148) : 50 All 859. (Judgment including property of person other than judgment-debtor owing to accidental slip.)
('24) 11 AIR 1924 Mad 100 (101) (DB). (Sale ignoring injunction.)
('25) 12 AIR 1925 All 622 (623) : 47 All 546 (DB). (Application for final decree—Applicants' default —Dismissal of suit itself.)
('29) 16 AIR 1929 Rang 158 (160) : 7 Rang 88 (DB). (Error in drafting the decree.)
('31) 18 AIR 1931 Oudh 346 (348). (Court omitting to include mesne profits in decree by mistake.)
('32) 19 AIR 1932 Nag 31 (31) : 27 Nag L R 341. (Decree directing partition in impossible manner.)
('27) 14 AIR 1927 Oudh 276 (277). (Change of date and hasty procedure in the Munsif's Court.)
('23) 10 AIR 1923 Oudh 16 (17). (Execution granted to defaulting plaintiff.)
('22) 9 AIR 1922 Bom 210 (211) (DB). (Error in procedure on the part of the trial Court.)
('32) 19 AIR 1932 Cal 569 (571) (DB). (Improper dismissal of an application.)
('21) 8 AIR 1921 Pat 491 (493). (*Ex parte* decree under O. 34 R. 6 passed by oversight against a person who is not mortgagor.)
† ('29) 16 AIR 1929 Oudh 385 (387) : 4 Luck 562 (FB). (Passing decree on a compromise not signed by a party or his authorized agent.)
('10) 7 Ind Cas 91 (92) (DB) (Cal). (Only one lot sold—Sale certificate comprising all lots.)
('08) 12 Cal W N 1027 (1028) (DB).
('10) 6 Ind Cas 208 (209) (DB) (Cal). (Dismissal of suit for default under misrepresentation and by mistake.)
('28) 15 AIR 1928 All 301 (301). (Application for setting aside sale — Dismissal for default when no default.)
('28) 15 AIR 1928 Lah 534 (535). (Do.)
('17) 4 AIR 1917 Mad 157 (157).
('24) 11 AIR 1924 Nag 58 (59).
('27) 14 AIR 1927 Cal 636 (642) : 54 Cal 836 (DB).
† ('26) 13 AIR 1926 Pat 218 (226, 231) : 5 Pat 861 (FB). (Wrong order for payment of court-fee, and wrong dismissal on default of payment.)
('25) 12 AIR 1925 Oudh 418 (419).
('19) 6 AIR 1919 Cal 261 (263) (DB). (Refusal of Court to make a proper order.)
('17) 4 AIR 1917 Lah 209 (209).
('23) 10 AIR 1923 Mad 58 (59) (DB).
('10) 5 Ind Cas 909 (910) (DB) (Mad).

or its officers[5] *or (b)* as the result of misrepresentation by or fraud of a party.[6] But

('17) 4 AIR 1917 Mad 223 (224) (DB). (Expunging objectionable or unnecessary matter from judgments—Power of High Court—*Compare* Government of India Act, 1915 S. 107.)
('19) 6 AIR 1919 Mad 655 (655) (DB). (Do.)
('85) 11 Cal 544 (545) (DB). (Do.)
('24) 11 AIR 1924 All 724 (726). (Do.)
('21) 8 AIR 1921 Bom 394 (395) : 45 Bom 1127 (DB). (Do.)
('35) 22 AIR 1935 Mad 420 (421). (Wrong survey number entered in sale certificate — Court can amend it as well as the decree if the mistake occurs in the decree also.)
('37) 24 AIR 1937 Mad 93 (96). (Court paying to wrong person by mistake is bound to restore it to right person.)
('38) 25 AIR 1938 Lah 472 (473). (Error patent on face of record and previous order made by Court *suo motu* through oversight — *Held*, Court had inherent power to review.)
('36) 23 AIR 1936 Lah 759 (760). (A Court has inherent jurisdiction to restore a suit, which has been dismissed in default owing to a mistake of the Court itself : AIR 1928 Lah 534 and 6 Ind Cas 208, Applied.)
('37) 24 AIR 1937 Lah 204 (205) (DB). (Court failing to pass personal decree under O. 34 R. 6 through oversight—Court can correct mistake.)
† ('34) 21 AIR 1934 Nag 234 (235):31 Nag L R 53. (Amendment of errors in judgment.)
† ('38) 25 AIR 1938 Pat 468 (469, 470). (Property wrongly taken away in execution against another under erroneous order of Court—Court is bound to make restitution on establishment of title.)
('36) 23 AIR 1936 Cal 343 (346) : 63 Cal 1079. (Where rights of third parties have not intervened, it is not only in the power, but it is the duty of the Court to relieve a party of the injury done to him by it, by reason of its mistakes and defaults or mistakes or defaults of its officers inadvertently committed.)

[*See also* ('14) 1 AIR 1914 Oudh 171 (173).]

[See however ('19) 6 AIR 1919 Cal 673 (674) (DB).]

5. ('41) 28 AIR 1941 Mad 706 (707). (Order that in default of payment of certain sum within specified time appeal would stand dismissed — Default in payment due to error of Court's officer—Application for extension of time — Court has no power to extend time under S. 148 but it can do so under S. 151 for ends of justice.)
('14) 1 AIR 1914 Sind 61 (62) : 8 Sind L R 327 (DB). (Failure of Court officer to notify date of hearing.)
('29) 16 AIR 1929 Pat 391 (392) (DB). (Delivery of wrong property by plaintiff.)
('24) 11 AIR 1924 All 819 (824) : 46 All 864 (DB). (Wrongful acts of the Court permitted or performed by its own officials.)
('25) 12 AIR 1925 Mad 1212 (1212, 1213). (Dishonesty of officer of Court in execution.)
('31) 18 AIR 1931 Lah 344 (344) : 12 Lah 602 (DB). (Sale ordered free of, but sale conducted subject to a mortgage.)
('35) 22 AIR 1935 Sind 214 (216) : 29 Sind L R 251 (DB). (Where the act of the Nazir and of the executing Court in parting with the money without safe-guards caused prejudice to a person, it is within the competence of the Court in the exercise of its inherent powers to prevent its act causing injury and to see that the money was duly restored.)
('36) 23 AIR 1936 Pat 176 (177). (Application under O. 21 R. 58—Court requiring application to be put up on date fixed for hearing execution proceedings and also ordering information to be sent to decree-holder—Officers of Court not informing him—Order passed in absence of decree-holder — Court has inherent jurisdiction to recall such order.)
('36) 33 AIR 1936 Cal 343 (346) : 63 Cal 1079.
[But see ('27) 14 AIR 1927 Lah 372 (372). (*Ex parte* decree on the basis of return of summons in a different suit.)]

6. ('43) 30 AIR 1943 Pat 127 (129) : 21 Pat 838 (DB). (Order induced by misrepresentation against party *ex parte*—Court can recall such order.)
('41) 28 AIR 1941 Cal 336 (336, 337) : ILR (1941) 1 Cal 405. (Decree obtained by fraud on Court—Court can entertain application for setting aside decree under S. 151 though remedy by way of separate suit is open.)
('40) 27 AIR 1940 Lah 265 (266). (Order under S. 19, Arbitration Act, staying suit obtained on a fraudulent misrepresentation.)
('06) 28 All 671 (673) (DB).
('68) 9 Suth W R 394 (395) (DB).
('32) 19 AIR 1932 Lah 120 (121).
('34) 21 AIR 1934 Pat 229 (231): 13 Pat 165 (DB). (Fraud upon Court in a compromise.)
('34) 21 AIR 1934 Pat 41 (42). (Fraud in compromise.)
('70) 13 Suth W R 258 (257) (DB).
('05) 2 Cal L Jour 306 (309) (DB).
('07) 6 Cal L Jour 662 (666) (DB).
('23) 10 AIR 1923 Mad 635 (636) : 46 Mad 583 (DB). (Court misled in granting leave to bid and fixing upset price.)
('11) 9 Ind Cas 918 (921) (DB) (Cal). (Sale of property not previously attached.)
('28) 15 AIR 1928 Mad 610 (611). (Getting an order by misleading the Court.)
('31) 18 AIR 1931 Sind 111 (111) (DB). (Order obtained by misrepresentation of facts.)
('26) 13 AIR 1926 Mad 119 (120). (Guardian of minor plaintiff withdraws claim against one defendant without leave under O. 32 R. 7.)
('15) 2 AIR 1915 Cal 49 (51) (DB). (Appointment of guardian—Fact of majority suppressed.)
('04) 8 Cal W N 468 (470) (DB). (*Ex parte* adjudication in insolvency—Fraud.)
† ('05) 7 Bom L R 961 (963). (Suppression of facts.)
('15) 2 AIR 1915 Cal 622 (624) (DB). (Compromise — Suppression of service of summons — False vakalatnama—Fraudulent consent.)
('15) 2 AIR 1915 Mad 281 (282) (DB). (Satisfaction recorded by fraud in Court.)
('14) 1 AIR 1914 Bom 123 (124) : 38 Bom 638 (DB). (Arbitration—No differences between parties.)
† ('10) 34 Bom 408 (410) : 5 Ind Cas 968 (969) (DB). (Pleader not engaged—Consenting to decree.)

where the fraud alleged in a petition under this section for setting aside a decree is fraud on the *party* and not fraud on the *Court*, the decree cannot be set aside under this section.[7]

Abuse by a party — A party to a litigation may be guilty of an abuse of the process of the Court in any of the following cases :

(a) Gaining an unfair advantage by the use of a rule of procedure.[8]

(b) Contempt of the authority of the Court by a party or stranger.[9]

(c) Fraud or collusion in Court proceedings as between parties.[10]

(d) Retention of a benefit wrongly received.[11]

(e) Resorting to and encouraging multiplicity of proceedings.[12]

('26) 13 AIR 1926 Oudh 315 (315) : 1 Luck 341 (DB). (Compromise decree — Compromise signed by pleader not authorized.)

† ('23) 10 AIR 1923 Pat 483(486,487):2 Pat731(DB). (Fraudulent alteration of terms of compromise.)

('27) 14 AIR 1927 Pat 354 (363):6 Pat 108 (DB).(Do.)

('24) 11 AIR 1924 Oudh 408 (409). (Error in decree due to fraudulent inclusion of a property in plaint.)

('37) 24 AIR 1927 Sind 101 (103): 31 Sind L R 32 (DB). (Court has power under S. 151 to vacate an order obtained by misleading and practising fraud upon Court.)

('37) 24 AIR 1937 Lah 29 (31). (Restoration of property wrongfully attached.)

('37) 24 AIR 1937 Lah 631 (631). (A Court whether acting in its ordinary jurisdiction or under its special jurisdiction in insolvency, has got inherent power to set aside an *ex parte* order obtained by fraud or misrepresentation or to rectify a mistake inadvertently made.)

[*See* ('39) 26 AIR 1939 Cal 658 (661) (DB). (Apparent consent given by party to suit—Party impeaching decree afterwards on ground of fraud — Court has no jurisdiction under S. 151 to set aside decree—Remedy is by way of suit.)]

7. ('43) 30 AIR 1943 Pat 13 (14) (DB).

('39) 26 AIR 1939 Bom 490 (491). (Consent decree — Setting aside of, on ground that party had not authorized his pleader to effect compromise — Remedy of party held separate suit and not application under S. 151.)

('35) 22 AIR 1935 Pat 439 (444): 14 Pat 856 (DB).

('39) 26 AIR 1939 Cal 658 (661) : 69 Cal L Jour 533 (538) (DB). (Consent decree, setting aside of, of ground of consent of a party having been obtained by other by fraud — Remedy is by suit and not application under this section because there is no fraud practised upon the Court which would justify it in exercising its inherent power.)

8. ('28) 15 AIR 1928 Nag 106 (107, 108).

('24) 11 AIR 1924 Oudh 230 (231) (DB). (Attempt to ignore terms of compromise.)

('13) 18 Ind Cas 994 (996) (DB). (Lah).

('28) 15 AIR 1928 Oudh 260 (261). (Valuation under S. 7, Cl. iv (c) and (d) of Court-fees Act outrageously low—Court can interfere.)

9. † ('84) 10 Cal 109 (131, 132) (PC). (Power to punish summarily for a contempt by the publication of a libel out of Court when the Court is not sitting—High Court—Common law.)

('25) 12 AIR 1925 All 280 (282) : 47 All 538. (Disobedience of order as to costs.)

('18) 5 AIR 1918 Pat 100 (103) : 4 Pat L Jour 20 (DB). (Suit against receiver without sanction.)

('29) 16 AIR 1929 Sind 136 (136). (An application to sue in *forma pauperis* rejected for vaxatious delay in impleading legal representative of a deceased respondent.)

('11) 9 Ind Cas 121 (121) (Sind). (Application for declaration of insolvency dismissed—Fresh application without leave of Court under R. 11, Sind Insolvency Rules.)

[*See also* ('26) 13 AIR 1926 Rang 188 (189, 190): 4 Rang 257 (DB).

('79) 4 Cal 655 (659) (DB),]

[But see ('19) 6 AIR 1919 Cal 44 (45) (DB).]

10. ('43) 30 AIR 1943 Pat 13 (14) (DB). (Compromise decree—Setting aside of—Fraud upon party and Court—Distinction—Question whether there was consent in fact — Court has inherent power to investigate question and set aside decree if aggrieved party is found not to have in fact consented to compromise—O. 23 R. 3 does not apply.)

† ('79) 2 Mad 264 (267, 268) (DB). (Fraud between auction purchaser and decree-holder.)

('82) 6 Bom 148 (150) (DB). (Fraudulent adjustment of decree.)

('27) 14 AIR 1927 Mad 813 (815).

('15) 2 AIR 1915 Mad 281 (282) (DB). (Fraud in procuring order.)

† ('10) 34 Bom 408 (410) (DB).

('27) 14 AIR 1927 Pat 354 (363) : 6 Pat 108 (DB).

('15) 2 AIR 1915 Cal 622 (623) (DB).

[*See also* ('26) 13 AIR 1926 Oudh 315 (315) : 1 Luck 341 (DB).]

[But see ('23) 10 AIR 1923 Pat 483 (486): 2 Pat 731 (DB). (Consent decree — Fraud upon Court — Court can summarily investigate question of fraud but not fraud in obtaining consent.)]

11. ('24) 11 AIR 1924 Rang 181 (181) : 1 Rang 770 (DB). (Improper appointment of receiver — Refund from plaintiff of salary paid by defendant to receiver.)

('16) 3 AIR 1916 Cal 241 (244) : 43 Cal 269 (DB). (Refund of money wrongly paid out.)

('18) 5 AIR 1918 Pat 418 (419) (DB). (Sale set aside —Auction purchaser withdraws sale price — Sale confirmed on appeal — Refund by auction purchaser.)

('17) 4 AIR 1917 Pat 495 (497) : 2 Pat L Jour 361 (DB). (Do.)

12. ('41) 28 AIR 1941 Pesh 34 (36). (Idle multiplicity of suits prevented by High Court ordering stay of subsequently instituted suit.)

(*f*) Circumventing of the law by indirect means.[13]

(*g*) Presence of witness during examination of previous witness.[14]

(*h*) Instituting vexatious, obstructive or dilatory actions.[15]

(*i*) Introduction of scandalous or objectionable matter in proceedings.[16]

(*j*) Executing a decree manifestly at variance with its purpose and intent.[17]

But no act done or proceeding taken as of right and in due course of law, is an abuse of the process of the Court simply because such act or proceeding is likely to embarrass another.[18] A person who brings himself within the terms of a statute is not to be deprived of a right conferred by that statute on "so treacherous a ground of decision as an abuse of the process of the Court."[19] Nor is the failure to conform to a mere rule of practice, an abuse of process in every case; the Court must find in each case what exactly the abuse is.[20] It has been held in the undermentioned case[21] that the expression "abuse of the process" refers only to some process of the Court such as a writ of attachment, taken maliciously to the injury of another. It is submitted that this view is too narrow and is not in accord with the general trend of judicial decisions referred to above.

7. Criminal cases. — Where a Court issues notice to a party to show cause why he should not be proceeded against under S. 476, Criminal Procedure Code, for producing a forged receipt, and the question of forgery is before the High Court on appeal from the proceeding wherein the document was held to be a forgery, the High Court has

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('24) 11 AIR 1924 All 818 (824) : 46 All 864 (DB).
† (26) 13 A I R 1926 All 212 (214) : 48 All 356 (DB). (NOTE.— This case is overruled on another point in AIR 1935 All 599 : 57 All 977 (FB).)
('29) 16 AIR 1929 Lah 317 (318) (DB).
('12) 15 Ind Cas 845 (846) (DB) (Lah).
('10) 7 Ind Cas 94 (96) (DB) (Cal).
('26) 13 AIR 1926 Pat 171 (173) (DB).
[*See also* ('34) 21 AIR 1934 Mad 82 (84).]

13. ('84) 10 Cal 757 (760) (DB). (Decree-holder purchasing in the name of another on Court refusing permission to bid.)
('09) 32 Mad 242 (245, 252) (DB). (Decree-holder permitted to bid but a minimum amount fixed for him—He purchasing in the name of another for less amount.)
('18) 5 A I R 1918 Cal 598 (599) (DB). (Litigation conducted through another—Real person ordered to pay costs.)

14. ('34) 21 A I R 1934 All 840 (841). (Court can refuse to take his evidence.)

15. † ('05) 28 Mad 560 (564, 565) (DB). (Dismissing vexatious suits without proof.)
('09) 4 Ind Cas 797 (799) (Nag). (Summoning witness with vexatious desire to obstruct.)
('05) 28 Mad 28 (32) (DB). (Do.)
† ('09) 31 All 116 (122) : 36 Ind App 9 (PC). (Witness — Citing opponent as.)
('10) 32 All 104 (109) : 37 Ind App 1 (P C). (Do.)
('13) 21 Ind Cas 737 (738) (DB) (Mad). (Do.)
('98) 25 Cal 203 (206) (DB). (Vexatious delay or default.)
('32) 19 A I R 1932 Mad 263 (264). (Repeated disobedience of Court orders—Defence struck off.)
[*See also* ('93) 15 All 84 (90) (FB).]
[See however ('13) 21 Ind Cas 781 (781) (Mad). (Practice of citing opponent as witness is not illegal.)
('24) 11 AIR 1924 Bom 90 (93). (Stay of vexatious and oppressive suit.)]

16. ('80) 5 Cal 707 (710).
('99) 22 Mad 155 (158) (DB).

17. ('18) 5 A I R 1918 Pat 352 (354) : 3 Pat L Jour 435 (DB).

18. ('42) 29 AIR 1942 Lah 119 (120). (Execution of decree for Rs. 44 — Property attached worth about Rs. 3000 — Judgment-debtor not shown to have any other attachable property — There is no abuse of process of Court.)
('10) 8 Ind Cas 474 (475) (Upp Bur). (Applicant under O. 33 R. 5 a real pauper — Solvent co-heirs putting him forward to get a decision of their rights also, is no abuse of the process of the Court.)
('15) 2 AIR 1915 Mad 608 (612) (DB). (Choice of *forum* no abuse though defendant suffers.)
('15) 2 AIR 1915 Mad 461 (463). (Second suit against same party for same relief on same cause of action pending first suit, is no abuse because first may fail on some technicality.)

19. † ('16) 3 A I R 1916 P C 64 (65) : 44 Cal 535 : 44 Ind App 11 (P C).
('15) 2 A I R 1915 Mad 461 (463). (Second suit on same cause of action for same relief and against same party is not abuse of process of Court when first suit is not disposed of.)

20. ('28) 15 AIR 1928 Mad 522 (523) (DB). (Rule 24 of the Madras Rules of Practice.)
[*See also* ('29) 16 A I R 1929 Nag 251 (254) : 27 Nag L R 102 (FB).]

21. ('09) 32 Mad 242 (250) (DB). (Per Abdur Rahim, J.)

inherent power to stay the proceedings under S. 476 pending disposal of the appeal.[1] See also the undermentioned cases.[2]

7a. Contempt of Court, proceedings for. — The High Court as a Superior Court of Record has an inherent power to punish for contempt of Court and that power is not affected in any way by the Codes of Civil or Criminal Procedure.[1] The High Court can also *enforce* its orders but does not possess the power to arrest for contempt a person outside its general jurisdiction.[2] It has been held that the High Court has jurisdiction to award costs in a criminal prosecution for contempt of Court and has inherent jurisdiction to order its recovery on the lines on which decrees are executed by the Civil Court.[3] As to the jurisdiction of High Courts to punish for contempt of Subordinate Courts and as to the powers of a Chief Court to punish for contempt, see Contempt of Courts Act, XII of 1926 and the undermentioned case.[4]

8. Insolvency Court. — As has already been observed in Note 1, *every* Court will, in the absence of express provision in respect of any matter, be deemed to possess, as inherent in its very constitution, all such powers as are necessary to do the right and undo a wrong in the course of the administration of justice.[1] An Insolvency Court has, therefore, inherent powers to pass just and necessary orders in cases not provided for by the Insolvency Act.[2] This is made clear by S. 5 of the Provincial Insolvency Act, 1920, read with S. 151 of the Civil Procedure Code. An Insolvency Court has thus power to grant *ad interim* protection before adjudication[3] or to rectify mistakes in its proceedings,[4] or to set aside an *ex parte* order obtained by fraud or misrepresentation.[5] It has, however, no power to stay an execution sale going on in another Court[6] though the *latter Court* may, on a claim by the Official Receiver under S. 51 or S. 52 of the Insolvency Act, stay the execution under its inherent powers.[7]

Where an applicant is entitled to an order of adjudication as of right under the Insolvency Act, there is no inherent power in the Courts to refuse adjudication on the ground that it is an abuse of the process of the Court.[8]

8a. General Clauses Act (1897), Section 21. — Under S. 21 of the General Clauses Act, 1897, where by any Central Act or Regulation a power to issue orders is conferred, that power includes, subject to like conditions, a power to add to, amend, vary

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Note 7

1. ('25) 12 AIR 1925 Lah 323 (323).
2. ('32) 19 AIR 1932 Nag 86 (87, 88).
('32) 19 AIR 1932 Oudh 31 (32) (DB). (Stay of criminal proceedings pending civil litigation in respect of the same matter.)

Note 7a

1. ('36) 40 Cal W N 1285 (1289, 1292).
2. ('36) 40 Cal W N 1285 (1289, 1292).
3. ('35) 22 AIR 1935 All 1013 (1014) : 58 All 374 (DB). (The High Court has jurisdiction to award costs in a criminal prosecution for contempt of Court and has inherent jurisdiction to order its recovery on the lines on which decrees are executed by the Civil Court.)
4. ('40) 27 AIR 1940 Sind 239 (241): ILR (1941) Kar 3 (FB).

Note 8

1. See foot-note (7) Note 1.
2. ('40) 27 AIR 1940 Rang 156 (156): 1940 Rang L R 392. (But S. 151, C. P. Code, does not confer upon a Court authority to do that which is prohibited by law — A Court has no inherent power to alter or vacate its own order and cannot invoke its inherent powers for this purpose—Consequently, a Provincial Insolvency Court has no inherent power to revoke an order of discharge which it has previously passed.)
('33) 20 AIR 1933 Pat 84 (87) : 12 Pat 163 (DB).
3. ('10) 6 Ind Cas 95 (97) (DB) (Cal).
4. ('34) 21 AIR 1934 Lah 177 (178). (Cancelling prior order passed without hearing objections.)
('34) 21 AIR 1934 Mad 31 (31) (DB).
('33) 20 AIR 1933 Mad 345 (346).
('32) 19 AIR 1932 Lah 84 (84). (A I R 1920 Lah 361 followed.)
('37) 24 AIR 1937 Lah 631 (631, 632).
[*See also* ('19) 6 AIR 1919 All 264 (264) (DB).]
5. ('37) 24 AIR 1937 Lah 631 (631, 632).
6. ('17) 4 AIR 1917 Mad 945 (946) (DB).
7. ('24) 11 AIR 1924 Sind 69 (71). (Claim under Section 52.)
8. † ('16) 3 AIR 1916 P C 64 (65) : 44 Ind App 11 : 44 Cal 535 (PC).
('10) 32 All 645 (650) : 7 Ind Cas 39 (41) (DB).

or rescind any orders so issued. It has been held by the Chief Court of Oudh that the High Court has inherent jurisdiction to reinstate legal practitioners who have been dismissed from their profession.[1]

See also Note 8b.

8b. Legal Practitioners Act, cases under. — It has been held that although there is no express provision for a review of an order made under the Lagal Practitioners Act, the High Court has inherent power to restore a pleader whose name has been struck off the rolls.[1]

See also Note 8a.

9. Appeal.—An order under S. 151 is not an appealable order under S. 104 and no appeal, therefore, lies as an appeal from an order.[1] But if such an order amounts to a

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Note 8a

1. † ('34) 21 AIR 1934 Oudh 140 (142) (SB).

Note 8b

1. ('35) 22 AIR 1935 All 321 (322) (FB).

Note 9

1. ('43) 30 AIR 1943 Oudh 35 (36) (DB). (Order of remand under inherent power.)
('42) 29 AIR 1942 Bom 306 (307) : ILR (1942) Bom 704. (Order refusing to exercise jurisdiction under S. 151 is not appealable.)
('42) 29 AIR 1942 Pat 195 (195) (DB). (Remand under inherent power.)
('41) 28 AIR 1941 Lah 419 (420) : ILR (1942) Lah 212. (Revision lies.)
('40) 27 AIR 1940 Bom 10 (11, 12) : ILR (1939) Bom 708. (Order refusing to amend decree is not appealable.)
('40) 27 AIR 1940 Lah 123 (123).
('40) 27 AIR 1940 Oudh 387 (390) : 16 Luck 27 (DB).
('40) 15 Luck 448 (449) (DB). (Remand under inherent power.)
('39) 26 AIR 1939 Lah 508 (508) (DB).
('27) 14 AIR 1927 Cal 867 (868) (DB).
† ('32) 19 AIR 1932 Nag 101 (102) : 28 Nag L R 88 (DB).
('33) 20 AIR 1933 Lah 73 (74). (Injunction under inherent powers.)
('33) 20 AIR 1933 Lah 135 (135).
('33) 20 AIR 1933 Pat 564 (566) (DB).
('34) 21 AIR 1934 Lah 79 (80).
('34) 21 AIR 1934 Pat 41 (42). (Fraudulent compromise set aside under S. 151— No appeal.)
('34) 21 AIR 1934 Lah 177 (178).
('34) 21 AIR 1934 Lah 349 (350).
('28) 15 AIR 1928 Lah 802 (803).
('30) 17 AIR 1930 Lah 789 (790).
('23) 10 AIR 1923 Oudh 177 (179): 26 Oudh Cas 10.
('24) 11 AIR 1924 Lah 487 (487).
('18) 5 AIR 1918 Pat 505 (505) : 3 Pat L Jour 253 (DB).
('22) 9 AIR 1922 Pat 479 (480): 1 Pat 277 (DB).
('28) 15 AIR 1928 Lah 414 (418).
('23) 10 AIR 1923 Cal 450 (451).
('25) 12 AIR 1925 Cal 184 (186).
('29) 16 AIR 1929 Lah 884 (885).
('30) 17 AIR 1930 Lah 496 (496).
('30) 17 AIR 1930 Nag 199 (200): 26 Nag L R 187.
('31) 18 AIR 1931 Lah 344 (344): 12 Lah 602 (DB).
('29) 16 AIR 1929 Lah 245 (245). (Remand under Section 151.)
('20) 7 AIR 1920 Mad 759 (760) : 60 Ind Cas 609 (609) (DB). (Do.)
('25) 12 AIR 1925 Mad 229 (229) : 48 Mad 713 (DB). (Do.)
† ('27) 14 AIR 1927 Mad 335 (336) (DB). (Do.)
('27) 14 AIR 1927 Mad 859 (860) (DB). (Do.)
('27) 14 AIR 1927 Mad 1190 (1190) (DB). (Do.)
('29) 16 AIR 1929 Pat 232 (233) (DB). (Do.)
('24) 11 AIR 1924 Rang 177 (177) : 1 Rang 656 (DB). (Do.)
('25) 12 AIR 1925 Pat 336 (336) (DB). (Erroneous order of remand — Even though no appeal lay in this case the High Court intervened in the exercise of inherent powers.)
('35) 37 Pun L R 674 (676). (An order passed by a Court reviewing a prior order in exercise of the Court's inherent powers under S. 151, C. P. Code, is not open to appeal.)
('36) 23 AIR 1936 Lah 212 (213).
('39) 26 AIR 1939 All 28 (29).
('35) 158 Ind Cas 998 (999) (Nag).
('38) 25 AIR 1938 Pesh 81 (82). (Order passed on appeal is without jurisdiction and open to further appeal or revision.)
('36) 23 AIR 1936 Sind 166 (167) : 30 Sind L R 170 (DB). (Order in exercise of inherent jurisdiction in execution—No appeal lies.)
† ('37) 24 AIR 1937 Cal 152 (155, 156) : I L R (1937) 1 Cal 637 (DB).
('35) 22 AIR 1935 Mad 420 (421) (DB).
('35) 22 AIR 1935 All 27 (28).
('38) 25 AIR 1938 Pat 447 (448). (Third party claimant establishing title to property sold in execution—Order of Court directing decree-holder to restore purchase money to auction purchaser comes not under S. 144 but under S. 151 and is therefore not appealable.)
('36) 23 AIR 1936 Pat 491 (492). (Where the appellate Court remands the case to be begun as *de novo*, the remand is under S. 151 and not under O. 41 R. 23 and no appeal lies from such order of remand.)
('36) 23 AIR 1936 Pesh 79 (80) (DB). (Order of remand by Appellate Court under S. 151, is not decree and hence not appealable.)

Also see O. 41 R. 23 Note 22.

decree within the definition of S. 2, sub-s. (2), an appeal will lie under S. 96.[2] Thus, an order of remand under S. 151 which amounts to an adjudication under S. 2 (2) is appealable as a decree under S. 96.[3] Where an order is made in execution under S. 151 and such order falls within S. 47, an appeal and a second appeal will lie therefrom.[4] An order under S. 151 can also be challenged under S. 105 if it affects the decision of the case on the merits but not otherwise.[5]

Where the order appealed from is silent as to whether it was passed under S. 151 or under any other provision of the Code, the Appellate Court must decide the question in order to ascertain whether an appeal lies therefrom.[6] Where however the order *purports* to be under an appealable provision, though wrongly, an appeal will lie therefrom.[7]

It has been held by the High Court of Patna,[8] that where an order is made under this section, the fact that a jurisdiction analogous to that conferred by an appealable provision is exercised, will not render it appealable. The Oudh Chief Court has also held a similar view.[9] The High Courts of Calcutta, Madras and Nagpur,[10] on the other hand, have come to a contrary conclusion. It is submitted that the last view is not correct inasmuch as there can be no right of appeal unless expressly given by statute, and there is no appeal from orders under S. 151. In the undermentioned case[11] the Sind

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2. ('36) 23 AIR 1936 Lah 212 (213).
[*See* ('40) 27 AIR 1940 Bom 10 (11, 12) : I L R (1939) Bom 708. (Order refusing to amend decree is not decree and, therefore, not appealable.)
('40) 27 AIR 1940 Cal 92 (92) : I L R (1939) 2 Cal 378 (DB). (*Held*, in this case that the order did not amount to a decree.)]
3. ('41) 28 AIR 1941 Cal 446 (447).
('40) 27 AIR 1940 Nag 349 (354) : I L R (1940) Nag 538 (DB).
✠ ('26) 13 AIR 1926 Pat 457 (459): 6 Pat 160 (DB).
('27) 14 AIR 1927 Pat 296 (297): 6 Pat 380 (DB).
('23) 10 AIR 1923 Cal 606 (607) (DB). (The view that the remand order in this case amounted to a decree is unsustainable; Per Mookerjee, J.)
('28) 15 AIR 1928 Cal 218 (219) (DB).
('24) 11 AIR 1924 Mad 778 (779). (Order falling under S. 47.)
('35) 22 AIR 1935 Pat 49 (51) (DB). (Order of remand not amounting to decree—Not appealable.)
[*See also* ('30) 17 AIR 1930 Lah 468 (468).
('18) 5 AIR 1918 Mad 545 (547) (DB).]
Also see O. 41 R. 23 Note 22.
4. ('43) I L R (1943) Kar 245 (249) (DB).
† ('33) 20 AIR 1933 Mad 399 (400).
('37) 24 AIR 1937 Cal 152 (156): I L R (1937) 1 Cal 637 (DB).
('36) 23 AIR 1936 Lah 725 (727). (In considering whether an application is under S. 47 or not a Court must examine the substance of the application to find out its true nature and should not be guided solely by the heading given to it by the applicant.)
('36) 23 A I R 1936 Mad 636 (638).
('35) 22 A I R 1935 All 27 (28).
5. ('34) 21 A I R 1934 Lah 312 (312).
6. ('29) 16 A I R 1929 Mad 205 (208).
('30) 17 AIR 1930 Mad 158 (159): 53 Mad 395 (DB).
('25) 12 A I R 1925 Pat 760 (761).
('26) 13 AIR 1926 Pat 516 (516) (DB).
('23) 10 AIR 1923 Mad 331 (331) (DB). (Order was deemed to be one under O. 41 R. 23.)
† ('32) 19 AIR 1932 Lah 311 (311). (Lower Court remanding a case and refusing refund of Court-fees—*Held* by High Court that remand was under Section 151.)
[*See* ('38) 25 AIR 1938 Sind 124 (126): ILR (1939) Kar 50 (DB). (A plaint returned on the ground of pecuniary jurisdiction is also to be considered as returned under O. 7 R. 10 and not under S. 151—Hence the order returning the plaint on this ground for presentation to proper Court is appealable.)]
7. ('28) 15 AIR 1928 Lah 341 (341).
('32) 19 AIR 1932 Pat 317 (319): 11 Pat 553 (DB). (Order passed under Ss. 144 and 151—Really under S. 144—Appeal lies.)
[But see ('40) 27 AIR 1940 Nag 349 (351, 352): I L R (1940) Nag 538 (DB). (Judge purporting to act under O. 41 R. 23—Matter not in fact falling under the Rule—No appeal—A I R 1936 Nag 8: 31 Nag L R Sup 72 overruled.)]
8. ('17) 4 AIR 1917 Pat 495 (496, 497): 2 Pat L Jour 361 (DB). (Order for restitution under S. 151 on the analogy of S. 144.)
9. ('39) 26 AIR 1939 Oudh 273 (275): 183 Ind Cas 709 (710) (DB). (Restitution — Application and order thereon not strictly coming under S. 144 but under S. 151—No appeal lies from such order.)
10. ('43) 30 A I R 1943 Nag 172 (174). (Orders though not strictly under S. 47 or S. 144 or S. 145 if passed under those sections read with S. 151 are appealable.)
('41) 28 AIR 1941 Mad 564 (565). (Order for restitution under inherent power.)
('40) 27 AIR 1940 Nag 349 (352) : I L R (1940) Nag 538 (DB). (*Obiter.*)
('27) 14 AIR 1927 Cal 285 (286) (DB).
('31) 18 AIR 1931 Cal 779 (781) (DB). (AIR 1927 Cal 285 followed.)
('38) 25 AIR 1938 Nag 326 (328) : I L R (1939) Nag 350 (DB). (Order for restitution under inherent power is appealable on analogy of order under Section 144.)
11. ('39) 26 AIR 1939 Sind 303 (304): ILR (1939) Kar 428 (DB).

Judicial Commissioner's Court held that the nature of an order is not to be determined by the provision of law to which it may wrongly have been assigned and that the true test is what is the order itself. In that case it was held that where a decree is amended, although the Court may purport to act under S. 151 in making the amendment, the Appellate Court should deal with the matter as an appeal from the amended *decree.*

An order refusing to exercise jurisdiction under this section has been held not to be a "judgment" within clause 10 of the Letters Patent (Patna).[12]

10. Revision. — Revision lies from an order under the inherent jurisdiction of the Court.[1] Where, however, Court exercises its inherent jurisdiction it will not be ordinarily interfered with in revision.[2] Where it refuses to exercise its inherent jurisdiction[3] or purports to exercise it in cases in which it has no power to do so[4] revision will lie. See also the undermentioned case.[5]

See section 115 for a full discussion.

11. Limitation. — See Note 2 on Article 181 in the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn.

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152. [New.] Clerical or arithmetical mistakes in judgments, decrees or orders[2] or errors arising therein from any accidental slip or omission[3] may at any time[8] be corrected by the Court either of its own motion[10] or on the application of any of the parties.

Amendment of judgments, decrees or orders.

[1882, *cf.* S. 206, para. 3; 1877, Ss. 204 to 206; 1859, S. 189; R. S. C., O. 28 R. 11; See also S. 153 and O. 6 R. 17.]

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12. † ('33) 20 AIR 1933 Pat 139 (141, 142): 12 Pat 202 (DB).

Note 10

1. ('43) 30 AIR 1943 Oudh 35 (36) (DB).
('41) 28 AIR 1941 Lah 419 (420): ILR (1942) Lah 212.
('41) 28 AIR 1941 Rang 60 (61) : 1940 Rang L R 749.
('40) 27 AIR 1940 Pat 475 (476).

2. ('40) 1940 All W R (H C) 62 (63) (DB). (Order granting application for revival of suit under S. 151 passed following rulings of High Court— No interference in revision.)
('14) 1 AIR 1914 All 125 (125).
('32) 19 AIR 1932 Mad 223 (224). (Quoting wrong section should not be taken too much into account.)
('34) 21 AIR 1934 Cal 780 (781) (DB).
('27) 14 AIR 1927 Cal 420 (421) (DB).
('14) 1 AIR 1914 Lah 9 (11): 1914 Pun Re No. 10: 20 Ind Cas 203 (205) (DB). (Lower Court refused to exercise the discretionary power vested in it by Section 151.)

3. ('42) 29 AIR 1942 Bom 306 (307) : ILR (1942) Bom 704.
('25) 12 AIR 1925 Cal 420 (421) (DB).
('34) 21 AIR 1934 Lah 108 (108). (Refusal to order restitution.)
('34) 21 A I R 1934 Mad 84 (84, 85): 57 Mad 542.
† ('19) 6 AIR 1919 Mad 14 (15).
('33) 20 AIR 1933 Lah 50 (51).
('23) 10 AIR 1923 Lah 506 (508). (Powers under S. 151 are discretionary—High Court will interfere only when the order is perverse or illegal.)
('37) 24 AIR 1937 Lah 894 (895). (Revision lies from an order of the Court rejecting an application to amend the decree under Ss. 151 and 152.)

4. ('42) 29 AIR 1942 Pat 328 (328).
('39) 26 AIR 1939 All 668 (669, 670) (DB). (Injunction under inherent power, staying suit — Order not in accordance with justice, equity and good conscience.)
('29) 16 AIR 1929 Cal 158 (159) (DB). (Court restoring to file dismissed suit.)
('30) 17 AIR 1930 Nag 48 (49) : 26 Nag L R 30. (Restoration of suit dismissed for default.)
('18) 5 AIR 1918 Pat 100 (103) : 4 Pat L Jour 20 (DB).
('35) 22 AIR 1935 Cal 336 (338) : 62 Cal 61 (DB). (Order rejecting plaint not appealed against—Court has no inherent power to interfere—If lower Court interferes, High Court can set aside order in revision.)
[*See* † ('39) 26 AIR 1939 Sind 137 (142) : I L R (1939) Kar 330 (DB). (Judge setting aside order of predecessor on ground of error of law.)]
[*See also* ('25) 12 AIR 1925 Pat 36 (37) : 3 Pat 778 (DB).]

5. ('35) 22 AIR 1935 All 49 (49). (Section 115 cannot be applied to cases where the Court has considered a matter judicially and has refused to exercise its discretion under S. 151 so that no question of jurisdiction arises at all.)

Synopsis

1. Legislative changes.
2. Amendment of judgments, decrees or orders.
3. Clerical or arithmetical mistakes and errors arising from accidental slip or omission.
4. Mistakes originating in pleadings.
5. Mistakes originating anterior to the suit.
6. Inherent power of the Court to amend decrees or orders.
7. "May ..... be corrected."
8. "At any time."
9. Court by which amendment can be made.
10. "Of its own motion."
11. Who can apply for amendment.
12. Notice of amendment.
13. Effect of amendment.
14. Amendment and limitation.
15. Successive applications for amendment—Res judicata. See S. 11, Note 24.
16. Consent decree.
17. Award.
18. Suit to rectify mistake, if lies.
19. Appeal.
20. Revision.

NOTE to the Synopsis. See the Notes indicated for the following topics :

Amendment pending appeal. See Note 9.
Amendment pending appeal to Privy Council. See Note 9.
Amendment after dismissal of appeal for default. See Note 9.
Amendment of Small Cause Court decree. See Note 9.
Amendment directing payment of interest. See Notes 3 and 6.
Amended decree — Execution — Limitation. See Note 14.
Application, whether should be made to same Bench of Judges who heard appeal. See Note 9.
Decree affirmed or modified in appeal — If first Court can amend. See Note 9.
Erroneous judgment or decree. See Note 3.
Extension of time fixed by decree. See Notes 2 and 3 on S. 148.
Mistake as to costs. See Note 3.
Power of executing Court to amend decree. See Note 9.
Powers of successor in office to amend. See Note 9.
Sale certificate. See Note 5 on S. 153.
Variance between plaint and decree. See Note 3.
Which Court to amend on dismissal of appeal. See Note 9.

1. Legislative changes. — The third paragraph of S. 206 of the old Code ran as follows :

> "If the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall, of its own motion or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment or to correct such error : provided that reasonable notice has been given to the parties or their pleaders of the proposed amendment."

The present section differs from the above provision in the following respects :

(1) It does not provide for amendment where the decree is found to be at variance with the judgment. An application to amend the decree, so as to bring it into conformity with the judgment, should, under the present Code, be made to the Court in the exercise of its inherent power which is saved by S. 151.

(2) The provision as to errors arising from any accidental slip or omission is new. Section 206 of the former Code referred only to clerical or arithmetical errors and errors due to discrepancy between the judgment and decree.

(3) The present section has omitted the proviso as to notice being given of the proposed amendment.

2. Amendment of judgments, decrees or orders. — It will be seen from O. 20 R. 3 that a judgment, once signed, cannot afterwards be altered or added to, save as otherwise provided by S. 152 or on review. Order 20 R. 6 provides that the decree shall be drawn up so as to agree with the judgment. Reading this section with O. 20 Rr. 3 and 6, it is clear that as a general rule a judgment, decree or final order, once drawn up and signed, cannot subsequently be altered, varied or amended in any manner even with

the consent of the parties.[1] The only exceptions to the general rule are the following :

(1) Under S. 152 a *clerical or arithmetical mistake or an error arising from an accidental slip or omission* may be corrected by the Court,[2] even though the decree is in *conformity* with the judgment.[3]

(2) Under the inherent powers of the Court (section 151) a decree which is *at variance with the judgment* can be amended so as to agree with the judgment.[4]

(3) A decree or order may be varied or amended in *any other case* by a review of judgment or by an appeal from the decree.[5]

Without correcting the *decree itself*, the Court may, under O. 20 R. 11, order that the payment under a money decree may be made in instalments. A decree if made *ex parte* may also be *set aside* by a proceeding under O. 9 R. 13 or a suit in certain circumstances, or in appeal or revision.

Where the Court *can* amend a decree passed by it, the proper course is to apply for amendment and not to appeal.[6] But neglect to apply for amendment does not preclude a party from obtaining the same result in appeal.[7] But an amendment should not be made if it will have the effect of making the decree differ from the judgment. If the same mistakes are made in both the judgment and decree, both should be amended and not the decree alone.[8]

A decree may be amended though the applicant's pleader may have signed the decree.[9]

Section 152 — Note 2

1. See O. 20 R. 3 Note 3.

2. ('17) 4 AIR 1917 Cal 184 (185) : 44 Cal 28.
('23) 10 AIR 1923 Pat 354 (355) : 2 Pat 504 (DB).
('18) 1913 Pun Re No. 47 : 17 Ind Cas 418 (418).
('13) 20 Ind Cas 3 (5) (DB) (Lah).
('23) 10 AIR 1923 Nag 109 (110).
('24) 11 AIR 1924 Nag 325 (326). (Such mistakes may be corrected at any time.)
('22) 9 AIR 1922 Mad 192 (192) (DB).
('95) 1895 All W N 237 (238).
('01) 24 Mad 1 (10) : 27 Ind App 197 (PC).
('80) 2 All 497 (506) (FB).
('23) 10 AIR 1923 Mad 663 (664).
('28) 15 AIR 1928 Lah 636 (637).
('68) 9 Suth W R 301 (304) (DB). (Clerical mistake.)
('18) 5 AIR 1918 Mad 422 (424). (Wrong name added owing to clerical error.)
† ('23) 10 AIR 1923 Lah 147 (148, 149). (Accidental slip or omission.)
('26) 13 AIR 1926 PC 29 (30) : 4 Rang 513 (PC). (Mis-statement of fact due to accidental slip or omission—Judgment may be amended — If committed by High Court then it can be corrected by High Court and not by Privy Council.)
† ('29) 16 AIR 1929 All 337 (337) : 51 All 672. (Accidental slip in judgment — Correction may be done at any time and in any situation.)
('27) 14 AIR 1927 Pat 25 (27) (DB). (Accidental omission of direction in judgment.)
('15) 2 AIR 1915 All 188 (189) : 37 All 323 (DB). (Accidental omission of important thing in judgment.)
('17) 4 AIR 1917 Lah 216 (216).
('20) 7 AIR 1920 Nag 157 (157). (Application to correct the decree in the matter of costs.)
('35) 22 AIR 1935 Cal 619 (620): 63 Cal 181 (DB).
† ('35) 22 AIR 1935 Oudh 92 (93) : 10 Luck 496 (DB).

3. ('27) 14 AIR 1927 Mad 435 (436).

4. See Note 6.

5. ('80) 2 All 497 (506) (FB).
('22) 9 AIR 1922 Mad 192 (192) (DB).
('01) 24 Mad 1 (10) : 27 Ind App 197 (PC).
('27) 14 AIR 1927 Mad 720 (722).
('71) 15 Suth W R 414 (414). (An omission to award costs—Review.)

6. ('70) 2 N W P H C R 184 (184) (DB).
† ('76) 25 Suth W R 63 (64).
('69) 1 N W P H C R 168 (170) (DB).
('81) 1881 All W N 60 (61) (DB).
('74) 21 Suth W R 41 (41).
('35) 22 AIR 1935 Cal 619 (620) : 63 Cal 181 (DB). (Omission to appeal does not bar an application for amendment.)

7. ('85) 7 All 606 (611) (FB).

8. ('15) 2 AIR 1915 Mad 939 (940).
† ('11) 11 Ind Cas 896 (897) (DB) (All).
('07) 31 Bom 447 (449) (DB).
('71) 15 Suth W R 4 (5) (DB).
('39) 41 Pun L R 119 (120). (The Court should not refuse to correct the error on the ground that since the mistake appears in the judgment, the error in the decree is not accidental.)
[*See also* ('42) 29 AIR 1942 Oudh 226 (231) : 17 Luck 739 (DB). (Mistake corrected in judgment and the decree also when mistake in judgment was sought to be corrected by the applicant.)

9. ('25) 12 AIR 1925 Oudh 373 (373) (DB).

As to the powers of the Court to extend the time fixed by a decree, there is a conflict of opinion. See section 148, Notes 2 and 3.

In an application to *amend* a decree or order under this section, the Court has no power to *annul* the decree or order itself.[10]

See also Notes on Order 20 Rule 6.

3. Clerical or arithmetical mistakes and errors arising from accidental slip or omission. — As has been seen in Note 2, a Court can always correct clerical or arithmetical mistakes and errors arising from accidental slip or omission even though the decree agrees with the judgment. Thus, where a direction as to costs,[1] or interest,[2] or leave to bring a fresh suit,[3] or a provision fixing the period for payment in a redemption decree,[4] or a relief asked by the plaintiff,[5] is *inadvertently* omitted, the decree may be amended by adding the direction or provision.

The following are some instances of accidental slips that may be corrected by the Court under this section :

(1) Inadvertently passing a decree for foreclosure instead of one for sale.[6]

(2) Inadvertently recording an order of dismissal instead of an order decreeing the suit or appeal.[7]

(3) Inadvertently misdescribing the property covered by the decree or judgment.[8]

(4) Judgment accidentally including the property of a stranger.[9]

(5) Passing a *personal* decree against the legal representatives of a party.[10]

(6) Accidentally entering the name of a deceased party instead of his legal representatives who had been brought on the record.[11]

(7) Passing an erroneous order as to costs by oversight.[12]

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10. ('19) 6 AIR 1919 Low Bur 151 (153) : 9 Low Bur Rul 263.

Note 3

1. ('20) 7 AIR 1920 Pat 180 (180).
('28) 15 AIR 1928 Lah 800 (801).
2. ('10) 37 Cal 623 (625) : 37 Ind App 133 (PC). (Privy Council allowed amendment granting subsequent interest to plaintiff in appeal by defendant even though there was no cross appeal by former.)
† ('26) 13 AIR 1926 Oudh 223 (224).
3. ('73) 20 Suth W R 401 (401).
4. ('17) 4 AIR 1917 Oudh 141 (143).
5. ('30) 17 AIR 1930 Lah 210 (211).
† ('37) 24 AIR 1937 Oudh 191 (192) : 12 Luck 759 (DB). (Suit for possession and mesne profits —Court accepting oral request to determine mesne profits in execution—No mention as to mesne profits in judgment and decree—Amendment can be granted.)
6. ('14) 7 Low Bur Rul 81 (82) : 22 Ind Cas 935 (936) (DB).
7. ('15) 2 AIR 1915 All 323 (324).
('24) 11 AIR 1924 Oudh 144 (144).
8. ('15) 2 AIR 1915 Cal 586 (586) (DB).
('18) 5 AIR 1918 All 78 (78) (DB).
9. ('29) 16 AIR 1929 All 147 (147) : 50 All 859.
10. ('40) 27 AIR 1940 Cal 202 (203) : I L R (1939) 1 Cal 305.
('23) 10 AIR 1923 Bom 414 (415) (DB). (It may be amended though the application is made at a later stage.)
('24) 11 AIR 1924 Lah 621 (622).
† ('39) 43 Cal W N 490 (492, 493).
11. ('30) 17 AIR 1930 Sind 96 (96) : 26 Sind L R 150.
12. ('01) 1901 All W N 94 (95).
('26) 13 AIR 1926 Lah 664 (665). (Order under this Section is not appealable.)
('12) 15 Ind Cas 910 (910) (DB) (Cal).
(1893) 1893 App Cas 638 (641), Milson v. Carter.
('39) 26 AIR 1939 Lah 255 (256). (Suit for accounts — Final decree including only costs between preliminary and final decrees — Decree can be amended so as to include costs prior to preliminary decree.)
† ('35) 22 AIR 1935 Oudh 369 (371) : 11 Luck 150 (DB).
('36) 23 AIR 1936 Pesh 196 (197). (An application for amendment of a decree is maintainable under S. 152, where the question of award of costs is not in dispute but only the method of assessment or any item awarded is in controversy. NOTE.—This case was dissented from in AIR 1940 Lah 182.)
('38) 25 AIR 1938 Oudh 7 (8). (Full pleader's fee awarded against an admitting defendant contrary to rules.)
[*See also* ('35) 22 AIR 1935 Cal 619 (620):63 Cal 181. (If judgment includes costs it means costs allowed by rules—If costs which are not permissible are included in decree, Court should correct decree so as to make it in conformity with the judgment.)]

See also the undermentioned cases.[13]

Where by an oversight or accidental slip the name of a wrong person is inserted in the decree as the guardian of a minor party, the Patna High Court has held that the mistake may be corrected under this section.[14] But where it is not a case of mere misdescription but a case of real non-representation of the minors by the proper guardian, it is a defect of substance and hence the Madras High Court has held[15] that such a defect cannot be cured by substituting the name of the proper guardian under this section.

Section 152 does not apply where there is no question of clerical or arithmetical mistakes or errors arising from accidental slips and omissions,[16] even though the order has been passed under an erroneous impression as to the facts of the case.[17] The test to determine whether the slip or omission is accidental or not is to see whether the order as it stands represents the intention of the Judge at the time he made it, and if it does, then, a mistake in it cannot be treated as an accidental slip or omission.[18] An amendment

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13. ('41) 28 AIR 1941 Oudh 344 (347). (Redemption suit brought with the intention of redeeming entire property—Mortgagor wrongly stating in the plaint that only half the plot was mortgaged—Decree for redemption of half the plot — *Held*, the error could be corrected at any time.)
('93) 1893 All W N 123 (124) (DB). (Judgment decreeing possession—Decree as drawn up, being only for establishment of ancestral right—Decree can be amended so as to be brought into accord with judgment.)
('33) 20 AIR 1933 All 102 (103). (Mortgage suit —Omission to specify property in decree—Court has power to amend decree.)
('33) 20 AIR 1933 All 608 (609). (Decree passed on basis of compromise—Defect not detected by any one—Court has inherent power to correct mistake.)
('38) 25 AIR 1938 Mad 573 (575) (DB). (Appellate Court dismissing suit in toto instead of dismissing it only against appealing defendant—Mistake can be corrected under S. 152.)
('37) 169 Ind Cas 226 (227) (DB) (Oudh). (*Ex parte* decree—Judge mentioning O. 17 R 3 instead of O. 17 R. 2 in decree — Accidental slip can be corrected.)
('37) 1937 Mad W N 1013 (1013). (Suit to enforce charge—Judgment and decree not in terms of O. 34 R. 4 read with O. 34 R. 15 — Judgment and decree can be amended.)

14. ('26) 13 AIR 1926 Pat 564 (565).

15. ('28) 15 AIR 1928 Mad 1057 (1059).

16. ('42) 29 AIR 1942 Oudh 189 (193) : 17 Luck 297 (DB).
('42) 29 AIR 1942 Pat 328 (328). (It cannot be invoked where the question before the Court is more or less of a contentious nature.)
('41) 28 AIR 1941 Lah 212 (214). (Court reviewing judgment *suo motu* and allowing interest at 9 per cent. per annum from 1927—No finding in original judgment that plaintiff was entitled to aforesaid rent from 1927 — Modification held did not fall under S. 152.)
('41) 28 AIR 1941 Lah 419 (420) : I L R (1942) Lah 212. (Judge instead of passing decree in form No. 9 in Appendix *D* of the Code, deliberately passing decree in different form — His successor cannot under Ss. 151 and 152 amend decree so as to make it in accordance with form No. 9.)
('41) 193 Ind Cas 53 (54) (Oudh). (Where there is dispute between the parties as regards the interpretation to be placed on the order of the trial Court in regard to proportionate costs, held there was no clerical or arithmetical mistake apparent on the face of the record.)
('40) 27 AIR 1940 Lah 182 (182). (AIR 1936 Pesh 196 dissented from.)
('40) 27 AIR 1940 Mad 538 (539). (Court cannot rectify decree merely because it was wrong or unfair or parties did not realize their rights.)
('26) 13 AIR 1926 Oudh 223 (224). (The test is whether the order represents the intention of the Court at the time.)
('09) 33 Bom 216 (218).
('15) 2 AIR 1915 All 102 (104).
† ('31) 18 AIR 1931 All 427 (428) (DB). (Provision for sale in final decree under O. 34 R. 8, cannot be annulled by amendment on the ground that the preliminary decree does not contain it.)
('39) 26 AIR 1939 All 96 (96, 97). (Amending decree by reducing decretal amount in light of accounts newly filed is not justified under the Section.)
('35) 22 AIR 1935 All 841 (841). (Where an entry in a decree has been deliberately made by the Court after due consideration of the circumstances, no matter whether it is right or wrong, it is not an error which can be corrected under this Section.)
('34) 21 AIR 1934 Lah 735 (736).
('35) 22 AIR 1935 Pesh 104 (106).
('32) 19 AIR 1932 Lah 619 (619, 620). (Suit for accounts by principal—Preliminary decree directing plaintiff to apply for appointment of commissioner for taking accounts—Subsequent amendment that on plaintiff failing to apply by certain date defendant may apply or Court may take steps on its own initiative is not competent in law. NOTE.— This case is held to be not good law on another point in A I R 1942 Lah 81 : I L R (1943) Lah 151.)

17. ('20) 7 AIR 1920 Pat 743 (744): 5 Pat L Jour 253 (DB).
[*See also* ('12) 13 Ind Cas 113 (116) (Mad).]

18. ('42) 29 AIR 1942 Oudh 226 (229) : 17 Luck 739 (DB).

allowing a correct description of property which completely alters the plaint and the decree and the deed on which the plaint is based, cannot be said to be the correction of a clerical mistake in the judgment and cannot be allowed.[19]

4. Mistakes originating in pleadings. — A Court can, under S. 152, amend clerical errors in a decree although the error may have first occurred in the parties' pleadings and may have been merely copied from them in the decree: it is not necessary to first amend the pleadings in such a case.[1] There is, however, a conflict of opinion in the Allahabad High Court on this point. One set of cases[2] has taken the view that such errors could be amended under this section, while in the undermentioned cases[3] it has been held that S. 152 is confined to the correction of clerical errors made by the *Court itself* and that it has no concern with the mistakes of parties which are repeated by the Court. No reasons are given for thus restricting the scope of S. 152. The language of the section does not exclude mistakes copied from pleadings. The latter view cannot be accepted as a sound one.

5. Mistakes originating anterior to the suit. — It has been held by the High Courts of Madras[1] and Rangoon[2] and the Chief Court of Oudh[3] that accidental mistakes may be amended even though they may have an origin anterior to the suit and may have been merely repeated in the decree. Thus, where there is an error in the description of mortgaged property owing to the accidental omission of certain words[4] or

19. ('34) 21 AIR 1934 All 100 (101) (DB).
[*See also* ('41) 28 AIR 1941 Pat 399 (401) (DB). (Amendment of the mortgage decree involving a question as to not so much the description of the property as the identity of the property actually mortgaged, could not be allowed.)]

Note 4

1. ('14) 1 AIR 1914 Mad 297 (297) (DB). (Following 16 Mad 424.)
('34) 21 AIR 1934 Lah 561 (561).
('34) 21 AIR 1934 Lah 29 (29, 30).
('34) 21 AIR 1934 Pat 493 (494): 13 Pat 773 (DB). (Misdescription of property in bond repeated in decree.)
('27) 14 AIR 1927 Mad 435 (435, 436).
('23) 10 AIR 1923 Lah 147 (148).
('21) 8 AIR 1921 Oudh 190 (190).
('23) 10 AIR 1923 Pat 218 (218) (DB).
('21) 62 Ind Cas 652 (653) (Mad).
('09) 5 Nag L R 159 (160): 4 Ind Cas 231 (232).
('34) 21 AIR 1934 Oudh 352 (354): 8 Luck 734. (Wrong khasra number of mortgaged property repeated in judgment and decree — Plaint, judgment and decree can be amended.)
('33) 20 AIR 1933 All 102 (103). (Mortgage suit — Particulars of mortgage recited in plaint but property not detailed at the foot of plaint—No specification of property in preliminary and final decrees —Decrees can be amended—Amendment of plaint not necessary.)
('35) 22 AIR 1935 Oudh 92 (93): 10 Luck 496(DB). (Misdescription of mortgaged property in plaint repeated in preliminary and final decrees — Plaint and decree can be amended.)
[*See also* ('42) 29 AIR 1942 Rang 56 (57) (DB). (Heading of application by mistake stating application to be by A who was dead—Mistake creeping into cause title of order recording adjustment — Section 152 applies.)
('41) 28 AIR 1941 Pat 399 (400) (DB). (Mortgage —Subsequent partition—Mortgagor allotted other properties than those mortgaged —Suit on mortgage ignoring partition — Decree and sale — Obstruction to delivery— Application by decree-holder purchaser for amendment of the description of the mortgaged properties in plaint and decree and execution petition, sale proclamation and sale certificate—*Held* that no amendment in documents following final decree could be made, as that would have the effect of bringing to sale property which was never put up for sale — But amendment of plaint, preliminary and final decrees could be made.)
('35) 22 AIR 1935 Rang 522 (523). (Property incorrectly described in plaint, preliminary decree and final decree—Amendment can be allowed in final decree under inherent power.)]
2. ('23) 10 AIR 1923 All 349 (350) (DB).
† ('14) 1 AIR 1914 All 61 (62).
('24) 11 AIR 1924 All 520 (520) (DB).
('35) 22 AIR 1935 All 914 (914, 915). (Decree granted on plaint giving wrong name of defendant can be amended by the insertion of the name of the right person after giving notice to him.)
3. ('19) 6 AIR 1919 All 264 (265) (DB).
('27) 14 AIR 1927 All 585 (585) (DB). (But in a fit case the Court may correct the mistake under Section 151.)
('06) 1906 All W N 220 (220).

Note 5

1. ('41) 28 AIR 1941 Mad 940 (940). (Extent mentioned in mortgage deed mistaken.)
† ('31) 18 AIR 1931 Mad 260 (263).
('32) 19 AIR 1932 Mad 275(279)(DB). (Decree may be amended after rectification of deed in a suit.)
2. ('24) 11 AIR 1924 Rang 104 (104).
3. ('34) 21 AIR 1934 Oudh 352 (354): 8 Luck 734.
4. ('24) 11 AIR 1924 Rang 104 (104).

the insertion of a wrong survey number[5] in the mortgage deed and the error is repeated in the plaint and the decree, the Court has ample power to rectify the error. The Nagpur Judicial Commissioner's Court, however, is of the view that S. 152 does not apply to such a case, and that a suit for rectification would be the appropriate remedy.[6]

6. Inherent power of the Court to amend decrees or orders. — It is a cardinal principle of the law of procedure that the decree should agree with the judgment. (See O. 20 R. 6.) Hence, even in cases not falling within section 152, a Court has inherent power to amend its decree when it is *at variance* with the judgment.[1] In other words, when the decree does not correctly express what was really *decided and intended* by the Court, the Court has an inherent power to amend the decree so as to carry out its own meaning.[2] In exercising this power the Court is correcting what is really a mistake of its

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5. ('31) 18 AIR 1931 Mad 260 (263).
('32) 19 AIR 1932 Mad 275 (278, 279) (DB).

6. ('12) 8 Nag L R 13 (16): 14 Ind Cas 407 (409).

Note 6

1. ('10) 37 Cal 649 (657).
('32) 19AIR 1932 All 587 (589) : 54 All 800 (DB).
('33) 20 AIR 1933 Pat 135 (138).
('32) 19 AIR 1932 Oudh 293 (295).
('24) 11 AIR 1924 Cal 895 (898) (DB).
('25) 12 AIR 1925 Cal 420 (421) (DB).
('15) 2 AIR 1915 Cal 586 (586).
('14) 1 AIR 1914 Cal 387 (387) (DB).
('19) 6 AIR 1919 Lah 30 (31): 1919 Pun Re No. 92.
('06) 1906 Pun L R No. 167. (Where the decree does not agree with the judgment, it can be amended under S. 206. NOTE.—Now this will have to be done under S. 151 : see Note 1.)
('92) 14 All 226 (229) (FB).
('73) 20 Suth W R 111 (112) (DB).
('66) 6 Suth W R Misc 31 (32) (DB).
('11) 12 Ind Cas 151 (154) (DB) (Cal).
('97) 1 Cal W N 65 (67) (DB).
('88) 12 Bom 174 (183) (DB).
('70) 14 Moo Ind App 40 (48) (PC).
('98) 22 Bom 370 (374).
('92) 16 Bom 404 (407).
('02) 4 Bom L R 909 (911).
('88) 1888 Pun Re No. 94, page 251 (253) (DB). (The variance must be patent on the face of the document—Decision under S. 206 of the old Code.)
('24) 11 AIR 1924 All 818 (821): 46 All 864 (DB).
('23) 10 AIR 1923 All 119 (120) (DB).
('32) 19 AIR 1932 All 337 (340) : 54 All 490 (DB). (Costs awarded in judgment means legal costs — Decree including costs covered by Vakil's fees contrary to rules—Amendment obligatory—No application for amendment is necessary—Plea of laches not available against such application.)
('29) 16 AIR 1929 Lah 664 (664) (DB).
('11) 11 Ind Cas 102 (104) (DB) (Cal).
('12) 17 Ind Cas 279 (280) (DB) (Cal).
('17) 4 AIR 1917 Pat 396 (397) (DB).
('17) 4 AIR 1917 All 443 (445): 38 All 398 (DB). (Court ought to frame final decree in accordance with preliminary decree.)
('14) 1 AIR 1914 Cal 220 (221) (DB).
('16) 3 AIR 1916 Lah 350 (351) (DB).
('28) 15 AIR 1928 Rang 215 (216) (DB).
('97) 24 Cal 759 (762) (DB).
('16) 3 AIR 1916 Pat 45 (46) (DB). (Preliminary decree for partition—Name of one cosharer omitted —Decree amended so as to bring it into conformity with pleadings.)
('35) 22 A I R 1935 Cal 619 (620) : 63 Cal 181. (Where the judgment awards costs to a party it implies costs allowed by the rules—If the decree includes costs which are not permissible under the rules, the decree is not in accordance with the judgment and does not correctly state what the Court intended—It is therefore the duty of the Court to correct it so as to make it in conformity with the judgment.)
('37) 24 AIR 1937 Cal 96 (98) (DB). (Judgment directing that costs of appeal would be costs in suit —Decree providing that costs of original hearing and of retrial ordered thereby, as well as costs of appeal to abide result of trial—Decree could be amended to agree with judgment.)
('38) 25 AIR 1938 Lah 188(190, 191): ILR (1938) Lah 148 (DB). (Judgment imposing personal liability for costs on mortgagor—Decree drawn up in usual form and making no mention of such liability—Decree can be amended and brought into conformity with judgment.)
[*See also* ('15) 2 AIR 1915 All 351 (352).]

2. ('24) 11 AIR 1924 All 690 (690) (DB).
('31) 18 AIR 1931 P C 104 (106) : 58 Ind App 141 : 58 Cal 1281 (PC). (Amendment by Privy Council of its order.)
('17) 4 AIR 1917 Lah 216 (216). (Judge has power to avoid *reductio ad absurdum*.)
('16) 3 AIR 1916 All 207 (210) (DB).
('31) 18 AIR 1931 Oudh 422 (424) (DB).
('26) 13 AIR 1926 Lah 499 (501): 8 Lah 161 (DB). (Name of party omitted in decree — Amendment lies —Court has inherent power.)
('40) 27 AIR 1940 Cal 202(204):ILR(1939) 1 Cal 305. (Observations of Bowen, L.J., in(1885)30 ChD 239, *In re* Swire; Mellor v. Swire quoted with approval.)
('35) 22 AIR 1935 Bom 75 (75, 76) : 59 Bom 158 (DB). (Decree drawn up in terms of interlocutory application instead of according to final order owing to mistake on part of ministerial servant—Court has inherent power to amend decree.)
('35) 22 AIR 1935 Oudh 461 (462) : 11 Luck 413. (Amendment may be made even after limitation for appeal from decree has expired.)
('35) 22 AIR 1935 Cal 619 (620): 63 Cal 181. (Provided amendment can be made without injustice or in terms which preclude injustice.)
[*See also* ('88) 12 Bom 174 (183).

ministerial officers by whom the decree or order was drawn up. In *In re Swire; Mellor* v. *Swire*,[3] Lindley, L. J., said :

> "This case has raised a discussion of some importance, because it was contended that when once the order of the Court was passed and entered it could not be put right, even although as drawn it did not express the order as intended to be made. I protest against any such notion. There is no such magic in passing and entering an order as to deprive the Court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the Court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal."

And Bowen, L. J., said :

> "Every Court has inherent power over its own records so long as those records are within its power, and it can set right any mistake in them. It seems to me that it would be prefectly shocking if the Court could not rectify an error which is really the error of its own minister. An order, as it seems to me, even when passed and entered, may be amended by the Court as to carry out the intention and express the meaning of the Court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice."

Thus, where P sues Q and R for a certain sum and judgment is given in favour of P 'as prayed' but the decree as drawn up makes the amount payable by Q alone, the Court can amend the decree so as to bring it in conformity with the judgment.[4] Similarly, where the judgment gives a *mortgage* decree in favour of the plaintiff but the decree is wrongly drafted so as to give the decree-holder only a *charge* on the property, the decree may be amended so as to agree with the judgment.[5]

Where an order which had been dictated but which had been intended to be reconsidered was signed inadvertently, the High Court of Allahabad set aside the order under its inherent powers.[6]

But where the decree as drafted is in accordance with the intention of the judgment and there is no clerical or arithmetical mistake or accidental slip or omission, the Court has no power, either under S. 152 or under its inherent jurisdiction, to amend it[7] and this

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('13) 19 Ind Cas 916 (917) (Cal). (Following (1882) 7 App Cas 34, Lawrie v. Lees and (1892) App Cas 560, Hatton v. Harris.)
('18) 5 AIR 1918 Mad 1287 (1293) : 40 Mad 259 (FB).]

3. ✝(1885) 30 Ch D 239 (246), *In re* Swire; Mellor v. Swire.
[*See also* ('26) 13 AIR 1926 P C 136 (143) (PC). ((1885) 30 Ch D 239 (246), *In re* Swire; Mellor v. Swire; observation of Bowen, L. J. quoted with approval.)]

4. ('92) 15 Mad 403 (404) (DB). (And the matter becomes *res judicata*.)

5. ('16) 3 AIR 1916 Mad 520 (521) (DB).

6. ('33) 20 AIR 1933 All 49 (49).

7. ('42) 29 AIR 1942 Pat 328 (328). (Applicability — Question of contentious nature—S. 152 cannot be invoked — Execution sale — Question whether description of property by khewat numbers or its description by area should prevail—Question cannot be dealt with under Ss. 151 and 152 — It can be decided in separate suit.)
('40) 27 AIR 1940 Oudh 298 (301) (DB). (Error in opinion of trial Court not being one arising from accidental slip or omission — Error due to negligence of parties—Refusal to amend held, proper.)
('27) 14 AIR 1927 Pat 405 (406).
('30) 17 AIR 1930 Lah 589 (591).
('27) 14 AIR 1927 Lah 403 (404).
('26) 13 AIR 1926 Cal 1100 (1101) (DB).
† ('27) 14 AIR 1927 Cal 203 (206) (DB). (Arithmetical mistake in Commissioner's report crept into judgment and decree — No remedy by way of amendment but by review or appeal.)
('04) 8 Cal W N 473 (474) (DB).
† ('10) 13 Oudh Cas 114 (118):6 Ind Cas 979 (981).
('13) 7 Sind L R 186 (191) : 24 Ind Cas 831 (831) (DB).
('28) 108 Ind Cas 737 (738) (Lah).
† ('09) 2 Ind Cas 551 (551) (DB) (All).
('25) 12 AIR 1925 Pat 47 (47, 48): 3 Pat 654 (DB).
('86) 8 All 377 (380) (DB).
('99) 22 Mad 364 (367) (SB).
('93) 15 All 121 (123) (DB). (Interest not granted by decree or judgment—Decree cannot be amended by award of interest.)
('98) 20 All 337 (339) (DB).
('82) 1882 All W N 72 (73) (DB).
('39) 26 AIR 1939 Lah 312 (313).
('38) 25 AIR 1938 Cal 187 (187, 188).
('36) 23 AIR 1936 Oudh 81 (83) (DB). (Preliminary mortgage decree providing that the plaintiff was entitled to apply for personal decree in case of deficiency of the sale proceeds of the mortgaged property—If the decree is allowed to stand and is not appealed against, it cannot be amended by the

is so even if the judgment itself is erroneous in law[8] and the error is apparent on the face of the judgment.[9] Thus, where a judgment is passed against G and the decree agrees with the judgment, it cannot be amended so as to convert it into a decree against G and another person.[10] The High Court or Federal Court has no power under S. 151 or S. 152 to vacate the certificate granted under S. 205 of the Government of India Act which was correct at the time it was given, because of some subsequent event.[11]

7. "May . . . . be corrected." — The amendment of accidental mistakes under this section cannot be claimed by any party *as of right*. The matter is left to the discretion of the Court to be exercised in view of the peculiar facts of each case.[1] But the Calcutta High Court has, in the undermentioned case,[2] held that the word "may" in S. 152 does not make it discretionary with the Court to order the correction but merely enlarges the powers of the Court by providing that such correction can be done at any time. It was, however, conceded in that case that the amendment may be refused when it offended against the principles of equity, for instance, where the interest of a *bona fide* purchaser for value without notice will be jeopardised by the amendment. In a later case of the same High Court,[3] Suhrawardy, J., adhered to the view taken in the case and further held that where the decree was not in conformity with the judgment owing to an error of the Court, it was *incumbent* on the Court to order its amendment without regard to any laches on the part of the parties. Graham, J., on the other hand, held that the matter is one of *discretion* to be exercised in view of the particular facts of each case. In a still later case,[4] the same High Court held that a decree could be brought into conformity with the judgment even after the lapse of years and that the only limitation is that the Court may deem it inexpedient or inequitable to exercise its power where third parties have acquired rights *bona fide*, under the erroneous decree. The Chief Court of Oudh has held that unless it will be *inequitable* to do so, mistakes in judgments due to accidental slips or omissions should be corrected.[5]

8. "At any time." — It is a general principle that rules of limitation are applicable to acts to be performed by *litigants* and not to acts which the Court may or

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omission of the provision for the personal decree because such provision amounts to an adjudication on the rights of the parties.)

('38) 25 AIR 1938 Lah 331 (332, 333).

[*See* ('40) 27 AIR 1940 Mad 29 (30) (DB). (Decree following judgment and silent with respect to payment of further interest from date of decree to date of payment—Omission even if accidental cannot be rectified — In such cases, the interest must, under S. 34 (2), be deemed to have been refused.)]

Also see S. 151, Note 2.

8. ('41) 28 AIR 1941 Lah 419 (420) : ILR (1942) Lah 212. (Judge instead of passing decree in form No. 9 of Appendix D of the Code, deliberately passing decree in different form.)

† ('17) 4 AIR 1917 Mad 290 (291, 292) (DB).

9. ('24) 11 AIR 1924 Mad 225 (226).
('17) 4 AIR 1917 Mad 290 (290, 291) (DB).

10. ('17) 4 AIR 1917 All 166 (167) (DB).
('16) 3 AIR 1916 Pat 45 (46) (DB).

11. ('40) 27 AIR 1940 F C 7 (8) : I L R (1940) Kar F C 45 : 1940 F C R 31 (FC). (Subsequent to the granting of certificate, S. 11 of Bihar Moneylenders' Act, VII of 1938, in respect of which the certificate of fitness to appeal to Federal Court was granted, was repealed—*Held*, the certificate Could not be vacated by the High Court or the Federal Court.)

Note 7

1. ('23) 10 AIR 1923 Mad 57 (57) (DB).
('33) 20 AIR 1933 Oudh 425 (425).
('33) 20 AIR 1933 Oudh 466 (468): 9 Luck 90 (DB).
† ('33) 20 AIR 1933 Oudh 529 (530) : 9 Luck 162 (DB).
('33) 142 Ind Cas 880 (882) (DB) (Nag).
('25) 12 AIR 1925 All 187 (188) : 47 All 44 (DB).
('25) 12 AIR 1925 All 556 (556) (DB).
('35) 22 AIR 1935 Oudh 369 (371) : 11 Luck 150 (DB).
('38) 25 AIR 1938 Lah 4 (6).
('37) 24 AIR 1937 Lah 894 (895).

2. † ('24) 11 AIR 1924 Cal 895 (897) (DB).
Also see S. 115, Note 21.

3. ('32) 19 AIR 1932 Cal 563 (564, 566, 567).

4. ('40) 44 Cal W N 708 (708) (DB). (Delay—Third party acquiring interest in decree—Its subsequent amendment not permissible.)
('33) 20 AIR 1933 Cal 627 (629) : 60 Cal 753 (DB).

5. ('42) 29 AIR 1942 Oudh 226 (230) : 17 Luck 739 (DB).

has to perform *suo motu*.[1] An amendment under this section falls within the latter class of acts and there is consequently no limitation for an application for amendment under this section.[2] The amendment can be made *at any time*.[3] But where satisfaction of a decree has been entered up the Court is *functus officio* and has no power to amend the decree. An order for amendment in such a case is a mere nullity unless steps are taken to set aside the order recording satisfaction.[4]

Similarly, where third parties have acquired rights under the erroneous decree, for valuable consideration and in ignorance of the error in the decree, no amendment should be allowed so as to prejudice their rights.[5] The reason is that it would be inequitable to allow amendment of the decree in such a case.[6] Laches may also, in the particular circumstances of a case, disentitle a party to relief by way of amendment of a decree.[7]

See also Note 7.

Note 8

1. † ('86) 8 All 519 (533, 534) (DB). (The mere fact that one of the parties has made an application under this section, will not render the act of the Court subject to the rule of limitation.)
('87) 11 Bom 284 (285) (DB).
('13) 7 Sind L R 53 : 21 Ind Cas 540 (541) (DB).

2. ('29) 16 AIR 1929 Oudh 385 (388) : 4 Luck 562 (FB).
('21) 8 AIR 1921 Pat 491 (494).
('24) 11 AIR 1924 Oudh 408 (409).
('24) 11 AIR 1924 Oudh 144 (144).
('24) 11 AIR 1924 Cal 895 (899) (DB).
('82) 4 Mad 172 (173) (DB).
('97) 1897 Pun Re No. 12, p. 49 (50).
('87) 10 Mad 51 (52) (DB).
('08) 11 Oudh Cas 208 (211).
('87) 9 All 364 (365).
('69) 12 Suth W R 65 (66) (DB). (Review—Limitation does not apply.)
('94) 21 Cal 259 (261) (DB).
('37) 24 AIR 1937 Lah 894 (895).
† ('37) 41 Cal W N 1330 (1331) (DB).

3. ('42) 29 AIR 1942 Oudh 226 (230) : 17 Luck 739 (DB). (Amendment can be allowed even if the application for it is made after the expiry of the period of limitation for the filing of an appeal by the opposite party.)
('41) 28 AIR 1941 Oudh 344 (348). (Lapse of time, however considerable, is no bar to the correction of errors under S. 151 or S. 152.)
('21) 8 AIR 1921 Oudh 190 (190).
('29) 16 AIR 1929 All 337 (337) : 51 All 672.
(1892) 1892 App Cas 547 (564), Hatton v. Harris. (Decree amended after 39 years.)
† ('88) 12 Bom 174 (183) (DB). (Decree amended after 10 years.)
('91) 14 Mad 150 (152) (DB). (Amendment after execution.)
('24) 11 AIR 1924 All 690 (690).
('23) 10 AIR 1923 Bom 414 (415) (DB). (Late stage of the proceeding.)
('27) 14 AIR 1927 Rang 57 (57) : 4 Rang 347 (DB). (Omission to appeal does not bar application.)
('25) 12 AIR 1925 Oudh 418 (419). (Section 151 adhered to.)
† ('11) 39 Cal 265 : 12 Ind Cas 151 (154) (DB).
('94) 17 Mad 67 (69) (DB).
('14) 1 AIR 1914 Sind 40 (41) : 8 Sind L R 28 (DB).
('16) 3 AIR 1916 Mad 908 (908). (Pending second appeal—S. 151.)
('39) 26 AIR 1939 Bom 389 (390) : 41 Bom L R 800 (802).
('29) 16 AIR 1929 Mad 830 (832).
('39) 43 Cal W N 490 (492).

4. ('25) 12 AIR 1925 All 556 (556) (DB).
† ('26) 13 AIR 1926 Mad 516 (517).
('02) 12 Mad L Jour 96 (97) (DB).
[But see ('41) 28 AIR 1941 Oudh 344 (348). (The fact that the decree has been satisfied and the Court has become *functus officio* does not necessarily preclude amendment.)]

5. ('40) 44 Cal W N 708 (708) (DB). (Assignment of decree in favour of third party.)
('23) 10 AIR 1923 Mad 57 (57) (DB).
('24) 11 AIR 1924 Cal 895 (897) (DB).
('25) 12 AIR 1925 Bom 389 (390) (DB).
† ('11) 39 Cal 265 (276) : 12 Ind Cas 151 (155) (DB). (But this principle has no application in cases of assignments of decrees.)
('24) 11 AIR 1924 Oudh 408 (410).
('39) 26 AIR 1939 Bom 389 (391) : 41 Bom L R 800 (804, 805).
('37) 41 Cal W N 1330 (1331) (DB).

6. ('24) 11 AIR 1924 Cal 895 (897) (DB).
[*See also* ('37) 24 AIR 1937 Oudh 217 (220) : 13 Luck 101 (FB). (Decree subsequently amended cannot be allowed to operate retrospectively so as to affect rights of purchaser for value without notice.)]

7. ('41) 28 AIR 1941 Oudh 344 (348). (Under the particular circumstances it was held that the applicant was not guilty of negligence so as to be disentitled to amendment.)
('40) 27 AIR 1940 Lah 182 (182).
('25) 12 AIR 1925 All 187 (188) : 47 All 44 (DB).
('28) 15 AIR 1928 Nag 149 (149).
('29) 16 AIR 1929 Cal 676 (679) : 57 Cal 549 (DB).
('15) 2 AIR 1915 Lah 213 (214).
† ('32) 19 AIR 1932 Cal 563 (568) : 36 Cal W N 97 (103, 104, 105) (DB).
('37) 24 AIR 1937 Cal 96 (99) (DB). (Applicant not appearing in appeal which resulted in decree and hence having no knowledge of discrepancy between judgment and decree—Delay in making application for amendment — Delay held not fatal to granting of application.)

9. Court by which amendment can be made. — Unless and until a decree is superseded in appeal or revision, the Court which passed it is entitled to amend it under this section.[1] Where an appeal or revision has been preferred from the decree, the power of the Court of first instance to amend the decree depends on the question whether the decree has been superseded by the appellate decree or is left intact. Where the decree of the lower Court is *confirmed, reversed or varied,* it is superseded by the decree of the Appellate Court, and the only Court that can amend the decree thereafter is the Appellate Court.[2] But where the decree of the lower Court is left intact, as for instance, where an appeal or revision is dismissed *in limine,*[3] or for default,[4] or where the amendment relates to a portion of the decree which is outside the scope of the appeal[5] or where the appeal is withdrawn,[6] the lower Court is entitled to amend the decree. It was held by the High Court of Allahabad in the undermentioned case[7] that the words "at any time" have a

('37) 41 Cal W N 1330 (1331) (DB). (Under the circumstances of the case it was held that the applicant was under no obligation to satisfy the Court that there were no laches on his part.)
('35) 37 Pun L R 623 (623). (Application to correct clerical error as to costs refused on ground of laches.)
Also see S. 115 Note 21.
[See however ('42) 29 AIR 1942 Oudh 226 (230): 17 Luck 739 (DB). (Where the mistake sought to be corrected by the application for amendment is not one made by a party but by the Court, no question of laches can arise.)]

Note 9

1. ('85) 1885 All W N 325 (326). (Execution Court cannot add to or alter decree.)
(1864) 1 Suth W R Misc 8 (8) (DB).
('70) 13 Suth W R 330 (330) (DB).
('91) 13 All 124 (126) (DB).
('22) 9 AIR 1922 Mad 186 (186) (DB). (Transfer of application for amendment to another Court is not proper.)
2. ('41) 28 AIR 1941 Mad 123 (125). (When an appeal abates so far as one of the respondents is concerned but is decided on the merits so far as the other respondents are concerned, a subsequent application for amendment of the decree under S. 152, C. P. Code, at the instance of the legal representatives of the deceased respondent must be made in the Appellate Court and not in the trial Court.)
('10) 32 All 295 (300) : 37 Ind App 70 (PC).
('93) 6 C P L R 142 (143).
('93-1900) 1893-1900 Low Bur Rul 449.
('10) 5 Ind Cas 304 (304) (DB) (Cal).
† ('10) 5 Ind Cas 261 (262) (DB) (Cal).
('89) 11 All 314 (318) (FB).
('14) 1 AIR 1914 Mad 99 (100) (DB).
('14) 1 AIR 1914 Oudh 332 (333).
('96) 1896 Pun Re No. 32, page 89 (91) (DB).
('18) 5 AIR 1918 Cal 133 (134) (DB.)
('17) 4 AIR 1917 All 417 (418) (DB).
('13) 7 Sind L R 53 (54): 21 Ind Cas 540 (541) (DB).
('17) 4 AIR 1917 Mad 589 (589).
('16) 3 AIR 1916 Mad 1202 (1202) (DB).
('11) 12 Ind Cas 139 (139) (DB) (Mad).
† ('11) 12 Ind Cas 669 (672) (DB) (Cal).
('15) 2 AIR 1915 Mad 1068 (1068).
('25) 12 AIR 1925 Mad 735 (735).
('27) 14 AIR 1927 Rang 57 (58): 4 Rang 347 (DB).
('21) 8 AIR 1921 Upp Bur 5 (6): 4 Upp Bur Rul 1.
('29) 16 AIR 1929 Rang 158 (159) : 7 Rang 88 (DB).
('31) 18 AIR 1931 Rang 153 (154): 9 Rang 186 (DB).
('30) 17 AIR 1930 Nag 138 (138) (DB).
('29) 16 AIR 1929 Mad 830 (831).
('21) 8 AIR 1921 All 130 (130, 131).
(1900) 1900 Pun Re No. 59, page 231 (232) (DB).
('95) 18 Mad 214 (216) (FB). (Overruling 9 Mad 354.)
('94) 18 Bom 542 (545) (DB).
('10) 5 Ind Cas 723 (725) (DB) (Cal).
('07) 6 Cal L Jour 542 (543) (DB).
('18) 5 AIR 1918 All 341 (342).
✠ ('89) 11 All 267 (274) (FB).
('38) 25 AIR 1938 Lah 4 (6).
('35) 22 AIR 1935 Cal 619 (620) : 63 Cal 181 (DB).
[*See also* ('41) 193 Ind Cas 53 (54) (Oudh).]
Also see O. 41 R. 11 Note 9.
The following cases to the contrary are not good law especially in view of the Privy Council decision in 32 All 295 : 37 Ind App 70 (PC) cited above :
('88) 10 All 51 (54).
('69) 11 Beng L R 367*n*.
('69) 11 Beng L R 368*n*. (But executing Court cannot question validity of decree on the ground that it was amended by lower Court after it had been confirmed in appeal.)
('74) 21 Suth W R 41 (41). (Decree of trial Court affirmed by lower Appellate Court — Application for amendment must be made to the lower Appellate Court and not to the High Court.)
('70) 14 Suth W R 26 (26).
[*See* ('89) 9 Cal W N 605 (608).]
3. ('12) 16 Ind Cas 933 (933) (DB) (Mad). (Appeal dismissed on the ground that no appeal lay.)
† ('32) 19 AIR 1932 Pat 238 (240): 11 Pat 409 (DB).
('20) 7 AIR 1920 Lah 321 (322) : 1 Lah 342. (Revision dismissed — Application to amend should be made to the Small Cause Court.)
('35) 22 AIR 1935 Pesh 91 (92).
4. ('25) 12 AIR 1925 All 556 (556) (DB).
('17) 4 AIR 1917 Nag 24 (24).
5. ('20) 7 AIR 1920 Cal 286 (286) (DB).
[*See also* ('33) 20 AIR 1933 Cal 335 (336): 36 Cal W N 665 (667). (Decree confirmed by Privy Council — Clerical mistake discovered subsequently as to double payment of court-fees — High Court can correct.)]
6. ('28) 15 AIR 1928 All 679 (680) : 50 All 608 (DB).
7. ('34) 21 AIR 1934 All 971 (972).

special significance and provide for amendment by the lower Court even where its decree has merged in the decree of the Appellate Court.

There is a conflict of opinion as to the effect of a dismissal of an appeal under O. 41 R. 11 of the Code and as to whether after such dismissal the decree can be amended by the lower Court or can be amended only by the Appellate Court. For a discussion of the question, see Notes on O. 41 R. 11.

Amendment pending appeal against decree — From what has been said above, it is clear that an amendment can be made by the Court which passed the decree even when an appeal against the decree is pending in a superior Court.[8] But the Appellate Court can also amend the lower Court's decree under S. 152 read with S. 107 (2).[9]

Power of executing Court to amend — An executing Court has no power, as such, to amend the decree. It cannot go behind the decree but must take the decree as it stands.[10] The proper course is to apply to the Court which passed the decree for amendment, and not to the executing Court.[11] But where the executing Court and the Court which passed the decree are one and the same, the Court can amend the decree in the course of the execution.[12]

Power of successor in office to amend — The successor in office of a Judge can correct a clerical mistake in the order passed by his predecessor. The word used in S. 152 is "Court" and not "Judge" and the "Court" must mean the Court whoever be the presiding Judge.[13] The power given by this section is wider than that conferred under O. 47 R. 2 on the successor of a Court passing an order.[14]

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8. ('18) 5 AIR 1918 Mad 295 (296).
('14) 1 AIR 1914 Cal 220 (221) (DB).
('11) 12 Ind Cas 669 (672) (DB) (Cal). (Lower Court's control over its decree does not come to an end on the filing of an appeal.)
('24) 11 AIR 1924 Pat 528 (528) (DB).
('26) 13 AIR 1926 All 304 (304) : 48 All 224.
('24) 11 AIR 1924 All 127 (127) (DB).
('31) 18 AIR 1931 All 766 (766) (DB).
('94) 21 Cal 476 (479) (DB). (The matter was left to the Appellate Court in the peculiar circumstances of the case.)

NOTE.—The language of the decision in AIR 1916 All 170 (FB) would seem to lay down a contrary view but the real decision in the case is quite different, namely that after a decree is drawn up, it cannot be altered on the ground that it is erroneous in law.

[*See also* ('32) 19 AIR 1932 Oudh 291 (293) : 8 Luck 93.]

Also see O. 45 R. 13 Note 12.

9. ('41) 28 AIR 1941 All 277 (278) : I L R (1941) All 360 (DB). (Though appeal on merits is held to be incompetent.)
('28) 15 AIR 1928 All 458 (459) (DB).
('23) 10 AIR 1923 All 358 (360) : 45 All 53 (DB). (Error in calculating amount.)
('75) 1 Bom 1 (6, 7) (DB). (Clerical error in decree ordered to be amended at hearing of appeal.)

[*See* ('34) 21 AIR 1934 Pat 146 (147). (Decree cannot be amended in appeal arising from proceedings for execution of the decree.)]

[*See also* ('11) 10 Ind Cas 96 (97) (Mad.) (Appeal dismissed for default — Appellate Court corrected the lower Court's decree.)]

10. ('40) 27 AIR 1940 Bom 10 (11) : ILR (1939) Bom 708.
† ('12) 15 Ind Cas 719 (720) (DB) (Cal).
('77) 3 Cal 161 (170) : 4 Ind App 137 (PC).
('82) 8 Cal 332 (335, 336) : 9 Ind App 1 (PC).
('01) 28 Cal 353 (361) : 28 Ind App 57 (PC).
(1900) 27 Cal 951 (967) : 27 Ind App 110 (PC).
('09) 3 Sind L R 137 (139) : 4 Ind Cas 479 (480) (DB).
('70) 2 N W P H C R 59 (60) (DB).
('70) 2 N W P H C R 184 (185) (DB).
† ('35) 22 AIR 1935 Cal 619 (620) : 63 Cal 181 (DB).

[*See* ('35) 22 AIR 1935 Mad 429 (430). (Order in execution cannot amount to amendment of decree or modification of its terms.)]

[*See also* ('87) 1887 Pun Re No. 67, p. 138 (140).]

Also see S. 38, Note 8.

11. ('40) 27 AIR 1940 Bom 10 (11) : I L R (1939) Bom 708.
('11) 9 Ind Cas 433 (434) (Oudh).
† ('89) 1889 Pun Re No. 78, p. 294.
('87) 1887 Pun Re No. 61, p. 121 (124).

12. ('35) 22 AIR 1935 Cal 619 (620) : 63 Cal 181 (DB). (AIR 1933 Cal 627: 60 Cal 753 followed.)
('40) 27 AIR 1940 Cal 202 (203): I L R (1939) 1 Cal 305 : 43 Cal W N 490 (493). (The omission to raise an objection to the form of decree in previous execution application does not operate as *res judicata*.)

[*See also* ('33) 20 AIR 1933 Bom 200 (202).]

13. ('21) 8 AIR 1921 Pat 306 (307).
('20) 7 AIR 1920 All 64 (65).
('10) 5 Ind Cas 723 (724) (DB) (Cal). (The settled practice of the High Court is to allow applications of this character to be made to the Division Bench in charge of the group to which the case belongs.)
† ('89) 11 All 267 (293) (FB).

14. ('32) 19 AIR 1932 Pat 321 (322).

Transfer of business — On the transfer of the business of one Court to another Court, the latter can amend judgments, decrees and orders passed by the former Court.[15]

See also the undermentioned case.[16]

10. "Of its own motion." — Under this section the Court can amend a decree of its own motion.[1]

11. Who can apply for amendment. — The section expressly says "or on the application of any of the *parties*." A person not a party to the suit has therefore no right to apply for amendment of the decree.[1] But an assignee of a decree may apply for amendment under this section.[2] It has been held by the Chief Court of Oudh that as the Court can correct a mistake even of its own motion, it is not necessary that the applicant for amendment should have been a party to the suit.[3] Where an appeal abates so far as one of the respondents is concerned but is decided on the merits as against the other, it has been held that the Appellate Court has the power to carry out the necessary amendment of the decree at the instance of the legal representative of the deceased respondent.[4]

12. Notice of amendment.—The third paragraph of S. 206 of the Code of 1882 insisted on notice being given to the opposite party before a decree was amended under the section.[1] The present section does not require any notice to be given. But it would be unfair for a decree to be amended without an opportunity being given to the party against whom the amendment will operate, to show cause against it.[2] When an amendment is ordered in this manner, the aggrieved party may apply for a review of the order[3] or under section 151 to set aside the amendment.[4]

It has been held that where a plaintiff applies for the amendment of a decree on the ground that by an accidental slip he mentioned in his plaint the name of a wrong person as the defendant which name has been repeated in the decree, and asking that the decree should be amended by the insertion of the name of the right person, it is open to the Court to amend the decree as prayed for after giving notice to the person whose name is sought to be inserted as that of the defendant and giving him an opportunity to show that the mistake is not accidental or clerical.[5]

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15. ('42) 29 AIR 1942 Oudh 226 (229):17 Luck 739 (DB). (Oudh Chief Court can amend decree of Oudh Judicial Commissioner's Court.)

16. ('32) 19 AIR 1932 All 337 (339):54 All 490 (DB). (Where an application for amendment of a decree should be made in the first instance to the High Court, High Court can treat an application for revision from the order on such application as one for amendment.)

Note 10

1. ('29) 16 AIR 1929 All 337 (337) : 51 All 672.
('18) 5 AIR 1918 Nag 41 (44). (*Vide* O. 41 R. 33.)
('23) 10 AIR 1923 All 358 (360) : 45 All 53 (DB). (Clerical error.)
('25) 12 AIR 1935 Cal 178 (179) (DB).
† ('32) 19 AIR 1932 All 337 (340): 54 All 490 (DB). (Duty of Court to see that decree agrees with judgment—No application needed—Hence no question of laches or delay in such an application.)
('36) 23 AIR 1936 Sind 53 (55) : 29 Sind L R 445 (DB).

Note 11

1. ('78) 2 Cal L Rep 461 (463) (DB). (Government not being a party, had no right to be heard.)
2. ('39) 26 AIR 1939 Lah 255 (256). (A person who purchases a decree purchases the rights in the decree and if one of these rights vesting in the vendor is a right to have the decree amended under the law, this right also passes to vendee.)
3. ('42) 29 AIR 1942 Oudh 226 (229):17 Luck 739 (DB).
4. ('41) 28 AIR 1941 Mad 123 (125).

Note 12

1. ('85) 7 All 276 (279) (DB).
(1865) 2 Suth W R Misc 15 (16) (DB).
('73) 19 Suth W R 349 (350) (DB).
2. ('43) 30 AIR 1943 Pat 72 (73). (Amendment of consent decree under Ss. 152 and 151—Notice to party affected by amendment is necessary—Notice not issued — Party affected can recall amendment by application under Section 151.)
('40) 27 AIR 1940 Lah 182 (182).
('35) 22 AIR 1935 Cal 619 (620) (DB). (32 Cal 253 (FB) applied.)
[*See also* ('35) 22 AIR 1935 All 841 (841, 842).]
3. ('26) 13 AIR 1926 All 384 (386) : 48 All 281.
4. ('43) 30 AIR 1943 Pat 72 (73).
5. ('35) 22 AIR 1935 All 914 (914, 915).

13. Effect of amendment. — An amended decree must be taken as in force from the date of the original decree. There is a distinction between a case of amendment and one of novation or substitution. When an instrument is amended so as to express the real intention which it was intended to express but which it did not completely express, the transaction is not in *substance* varied but its inaccurate description is only rectified.[1] Hence, where a decree is amended the amended decree operates as *res judicata* from the date of the original decree and not from that of the amendment.[2] But it has been held by the Oudh Chief Court that though the *general* rule is that an amendment of a decree dates back to the date of the decree, yet the amendment should not be allowed to take effect from the date of the decree so as to affect the rights of a purchaser for value without notice who has acquired the property after the decree but before the making of the amendment.[3]

14. Amendment and limitation. — As to whether an amendment of the decree under this section gives a fresh starting point of limitation for an appeal or application see the Authors' Commentaries on the Limitation Act, 2nd (1942) Edn., S. 5, Note 14 and Art. 156, Note 8. And on the question of limitation for the execution of decree see, *ibid*, Art. 182, Notes 39 and 50.

15. Successive applications for amendment — Res judicata. — See S. 11, Note 24.

16. Consent decree. — A clerical or arithmetical mistake or an error due to an accidental slip or omission in a consent decree may, as in the case of any other decree, be corrected by the Court under S. 152.[1] Similarly, where a consent decree is not in accordance with the agreement of the parties the Court has power under S. 151 to bring it into conformity with the agreement.[2] But where there is no such mistake and there is no variance between the decree and the compromise petition, it cannot be amended either under S. 152 or S. 151, on the ground that the compromise itself is bad for mutual mistake or fraud of the parties or on the ground that it does not represent the true intention of the parties.[3] In such a case the remedy of the aggrieved party is to *sue* for setting aside the decree on the ground of mistake or fraud. The reason is that a consent decree is in the nature of a contract and can be set aside on grounds on which a contract can be set aside.[4]

A consent decree, in any other case, cannot be varied except by consent.[5] Where, owing to ambiguity in the petition of compromise, the decree passed thereon is varied by

[*See also* ('33) 20 AIR 1933 Bom 200 (202). (Misdescription of person against whom decree is passed —This can be amended in execution proceedings.)]

Note 13

1. †('91) 14 Mad 150 (152) (DB).
('92) 15 Mad 403 (405) (DB).
2. See cases cited in foot-note (1).
[*See also* ('38) 25 AIR 1938 Mad 573 (575). (Correction of accidental or clerical mistakes though purporting to be made in review really falls under S. 152 and there is no new decree substituted for the original one in such cases and appeal lies from the original decree.)]
3. ('42) 29 AIR 1942 Oudh 226 (231): 17 Luck 739 (DB).
('37) 24 AIR 1937 Oudh 217 (220): 13 Luck 101 (FB).

Note 16

1. ('13) 21 Ind Cas 115 (116) (DB) (Cal).
('34) 21 AIR 1934 Rang 108 (109) (DB).
('29) 16 AIR 1929 Lah 254 (254).
('29) 16 AIR 1929 Lah 400 (401).
('28) 15 AIR 1928 Lah 352 (353): 9 Lah 176 (DB).
† ('37) 24 AIR 1937 Bom 457 (457, 458): I L R (1937) Bom 837.
2. ('34) 21 AIR 1934 Rang 108 (109) (DB).
Also see O. 23 R. 3 Note 28.
3. ('40) 27 AIR 1940 Mad 538 (540). (Omission of an important term in consent decree—Application for amendment after 18 years — Omission could not be attributed to accidental slip.)
('16) 3 AIR 1916 Cal 446 (446) (DB).
('34) 21 AIR 1934 Lah 399 (399).
('29) 16 AIR 1929 Nag 34 (36) (DB).
[*See* ('37) 24 AIR 1937 Bom 457 (457, 458): ILR (1937) Bom 837. (Clerical or arithmetical mistake in contract common to both parties embodied in decree can be corrected under this section.)]
4. See Order 23 Rule 3, Note 28.
5. ('40) 27 AIR 1940 Mad 538 (540). (Court has no jurisdiction under S. 152 to add to a term in a consent decree without the consent of both parties to the decree.)

consent so as give expression to the true intention of the parties, it cannot be amended and restored to its former form on the ground of its variation from the compromise petition.[6]

17. Award. — The section is general in its terms and applies to clerical and accidental errors in judgments and decrees based on awards.[1]

Schedule 2 Para. 12 of the Code provided *inter alia* for the correction of clerical and accidental slips in *awards*. But that paragraph did not apply to private awards. (See Para. 21.)[2] (See now Arbitration Act, X of 1940, S. 15 (c).)

Where a decree is in accordance with the award and there is no clerical mistake or accidental slip, it cannot be amended or modified by the Court in any manner.[3] See also the undermentioned case.[4]

18. Suit to rectify mistake, if lies. — Where a decree has been passed by a Court of competent jurisdiction, no suit by a party thereto will lie to set aside or rescind that decree.[1] This is based on the principle of *res judicata*, which itself rests on the maxim *interest reipublicæ ut sit finis litium*—it concerns the State that there be an end to law suits.[2] An exception has been recognized in the case of a decree obtained by *fraud*. In such a case a suit will lie to set aside a former decree which had been obtained through fraud.[3] There is a difference of opinion as to whether a suit lies to set aside or correct a decree on the ground of *mistake*. It was held in the undermentioned cases[4] that such a suit would lie. Other cases have, on the other hand, taken a contrary view.[5]

Where an amendment is sought on the ground of a subsequent change of circumstances, a suit, and not an application, would be the most appropriate remedy.[6]

As to the maintainability of suits to set aside or correct a *consent decree* on the ground of mutual mistake of the parties, see Note 16.

19. Appeal. — An order granting or refusing an amendment under this section is not a decree[1] or an appealable order and consequently, no appeal lies therefrom.[2]

('14) 1 AIR 1914 Bom 127 (127) (DB).
('14) 1 AIR 1914 Bom 109 (109) (DB).
('31) 18 AIR 1931 Cal 51 (51) : 57 Cal 1143.
('35) 22 AIR 1935 Pesh 104 (106).
6. ('03) 7 Cal W N 880 (883) (SB).

Note 17

1. ('42) 29 AIR 1942 Oudh 426 (426, 427). (Court can refer to arbitrator to find out if mistake was clerical or not.)
† ('32) 19 AIR 1932 Oudh 293 (297, 298).
('14) 1 AIR 1914 Lah 477 (478). (Section 151 adhered to.)
[*See* ('27) 14 AIR 1927 Mad 720 (720). (Which proceeds on the hypothesis that the section applies to such judgments and decrees.)]
2. ('25) 12 AIR 1925 Lah 86 (86).
3. ('93) 17 Bom 657 (661).
4. ('35) 22 AIR 1935 Pesh 104 (106). (Decree not in accordance with the award but in accordance with the statements of the parties in Court held to be a consent decree and as such could not be amended except with the consent of the parties.)

Note 18

1. ('15) 2 A I R 1915 P C 99 (101) : 42 Ind App 171 : 37 All 485 (PC). (Except on ground of fraud.)
† ('25) 12 AIR 1925 Mad 640 (641).
('13) 17 Cal W N 82 (84) (DB).
('15) 2 A I R 1915 All 400 (401) : 37 All 535 (DB).
('06) 10 Cal W N 1024 (1025) (DB).
('68) 1868 Pun Re No. 31, page 80 (81) (DB).
('19) 6 A I R 1919 Mad 1044 (1046) : 41 Mad 743 (FB). (Not on the ground of perjury even.)
('22) 9 AIR 1922 Mad 404 (404) (DB).
('32) 19 AIR 1932 Mad 275 (279) (DB).
('15) 2 AIR 1915 Cal 69 (69) (DB).
('16) 3 AIR 1916 Cal 816 (817) : 43 Cal 217 (DB). (Following 21 Cal 612 and dissenting from 8 Cal W N 473.)
('05) 27 All 174 (177, 178) (DB).
† ('99) 3 Cal W N 375 (377) (DB).
('31) 18 AIR 1931 Pat 296 (298).
('11) 11 Ind Cas 537 (539) (Oudh).
2. *See* ('25) 12 AIR 1925 Mad 640 (641, 642).
3. See Note 61 on S. 9.
4. ('12) 8 Nag L R 13 (16) : 14 Ind Cas 407 (409).
† ('18) 5 AIR 1918 Pat 185 (187) (DB).
5. ('06) 10 Cal W N 1024 (1025) (DB).
('12) 14 Ind Cas 93 (95) (DB). (Cal).
('20) 7 AIR 1920 Oudh 171 (172):23 Oudh Cas 140.
6. ('15) 2 AIR 1915 Cal 696 (698) (DB).

Note 19

1. ('33) 20 AIR 1933 Rang 264 (265). (Application to set aside order allowing amendment of decree is governed by Art. 181.)
† ('36) 23 AIR 1936 Oudh 81 (82) (DB).
('39) 26 A I R 1939 Bom 389 (390) : 41 Bom L R 800 (802).
2. ('41) 28 AIR 1941 Lah 419 (419, 420) : I L R (1942) Lah 212.
('40) 27 AIR 1940 Bom 10 (11):ILR (1939) Bom 708.

Where, however, there is no clerical or arithmetical mistake or accidental slip or omission, but the whole method of calculation is altered by the amendment, the order, though purporting to be one under S. 152, must be deemed to be one passed on review under O. 47 and hence will be appealable.[3]

An order of the High Court rejecting an application to amend a decree passed by it on appeal, is not an order made "on appeal" within the meaning of Cl. 39 of the Letters Patent (Calcutta), and is not appealable to the Privy Council under that clause.[4] As to whether an order of a single Judge of the High Court on an application for amendment is appealable under Cl. 15 of the Letters Patent as a "judgment," see Note 6 on section 104.

The amended decree is always appealable as a decree.[5] Where the Judge instead of amending the decree passes a fresh decree, there is a right of appeal from the fresh decree,[6] but not from the original decree.[7]

20. Revision. — An order granting or refusing an application for amendment under the section is, as has been observed already in Note 19, neither a decree nor an appealable order. Hence, it is open to revision by the High Court in a fit case.[1] Thus, a Court is not *bound* to amend a decree in every case under this section. If a Court erroneously thinks that it is so bound and amends a decree although it feels that the case is one in which amendment ought to be refused, the order can be revised, as it is vitiated by a material irregularity.[2] Similarly, where a Court has jurisdiction to amend a decree but refuses to do so on the ground that it has no jurisdiction, its order can be revised.[3] See also the undermentioned cases[4] where the refusal to amend was held to amount to a failure to exercise jurisdiction. In an earlier Madras decision,[5] however, it was held that an order

('10) 5 Ind Cas 304 (305) (DB) (Cal).
† ('01) 28 Cal 177 (179) (DB).
('88) 1888 Pun Re No. 101, page 266 (268) (DB).
('26) 13 AIR 1926 Lah 664 (665).
('23) 10 AIR 1923 Lah 147 (148).
('27) 14 AIR 1927 Lah 68 (68).
('11) 10 Ind Cas 850 (850) (Lah).
('19) 6 AIR 1919 All 30 (31) (DB).
('18) 5 AIR 1918 Lah 63 (63) : 1918 Pun Re No. 43.
† ('84) 6 All 125 (129) (DB).
('04) 1 All L Jour 701 (702).
† ('38) 25 A I R 1938 Lah 4 (5). (Order amending decree passed on separate application under Ss. 151/152 but not in execution—Application under Ss. 151/152 does not fall under S. 47—No appeal is competent from order.)
('36) 23 AIR 1936 Oudh 81 (82) (DB).

3. ('21) 8 AIR 1921 Lah 250 (251).
Also see O. 47 R. 7, Note 2.

4. ('03) 30 Cal 679 (681) (DB).

5. ('41) 28 AIR 1941 Lah 419 (420): I L R (1942) Lah 212.
('05) 9 Cal W N 605 (607) (DB).
('31) 18 AIR 1931 Cal 578 (579) (DB).
('28) 15 AIR 1928 All 194 (196) (DB).
('38) 25 AIR 1938 Lah 331 (332).
[*See* ('81) 6 Cal 22 (24, 25) (DB). (Decree passed on review of judgment—Time for appeal runs from such decree, and not the original decree.)]
Also see S. 96 Note 13.

6. ('34) 21 AIR 1934 Lah 839 (839).

7. ('36) 23 AIR 1936 Sind 53 (55) : 29 Sind L R 445 (DB).

Note 20

1. ('41) 28 AIR 1941 Oudh 66 (66) : 16 Luck 252.
('41) 28 AIR 1941 Lah 419 (420) : ILR (1942) Lah 212. (Amendment entirely changing operative portion of judgment—*Held*, Judge exercised jurisdiction which did not vest in him under S. 152 or S. 151.)
('85) 7 All 276 (281) (DB).
('07) 31 Bom 447 (449) (DB).
† ('34) 21 AIR 1934 All 100 (101) (DB). (Order to amend is different from amended decree.)
('15) 2 AIR 1915 Mad 1068 (1068).
('12) 16 Ind Cas 933 (933, 934) (DB) (Mad).
('25) 12 AIR 1925 All 556 (556) (DB).
('93) 15 All 121 (122) (DB).
('85) 7 All 875 (876) (FB).
('85) 7 All 876 (878) (FB).
('37) 24 AIR 1937 Lah 894 (894, 895).
('38) 25 AIR 1938 Lah 4 (5).
('39) 26 AIR 1939 Bom 389 (390) : 41 Bom L R 800 (802).
† ('36) 23 AIR 1936 Oudh 81 (82) (DB).
('34) 21 AIR 1934 Rang 108 (109) (DB). (Order refusing amendment of consent decree not in accordance with agreement is revisable.)

2. ('25) 12 AIR 1925 All 556 (556).

3. ('18) 5 AIR 1918 All 208 (208) (DB).
('29) 16 AIR 1929 Lah 664 (664). (Decision also under S. 44, Punjab Courts Act.)
('84) 6 All 125 (129) (DB).
('25) 12 AIR 1925 Cal 420 (421) (DB).
('31) 18 AIR 1931 Oudh 422 (424) (DB).

4. ('36) 23 AIR 1936 Pesh 196 (197).
('35) 22 AIR 1935 Oudh 461 (462) : 11 Luck 413 (DB).
('34) 21 AIR 1934 Oudh 352 (354) : 8 Luck 734.

5. ('01) 24 Mad 646 (649, 650) (DB).

for the amendment of a decree was not revisable on the ground that the party aggrieved by the amendment could appeal from the *amended decree.* But in later decisions of the same High Court, such an order has been held to be revisable.[6]

Where the lower Court has had jurisdiction to amend a decree, its order is not revisable although it may have relied on a wrong section,[7] or made the amendment unnecessarily.[8]

Similarly, where it has refused to amend a decree, not on the ground of its want of jurisdiction, but on some other ground, its order is not open to revision.[9] It has been held by the Oudh Chief Court that even in cases in which upon a strict construction of S. 115 the High Court is precluded from interfering in *revision* with an order of the lower Court refusing to amend a decree, it is still open to the High Court under section 151 to interfere in such cases.[10]

See also section 115, Note 21.

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153. [New.] The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

General power to amend.

[R. S. C., O. 28 R. 12; See O. 6 R. 17.]

1. Legislative changes.—This section is new. It is based on O. 28 R. 12 of the Rules of the Supreme Court (of England).

2. Scope of the section. — Section 152 deals with amendments of *judgments, decrees* and *orders.* Order 6 Rule 17 deals with amendments of *pleadings.* The present section confers a general power on the Court to amend any defect or error in *any proceeding* in a suit and to make all necessary amendments for the purpose of determining the real questions between the parties. The object of the rule allowing amendments is to minimise litigation and avoid multiplicity of proceedings,[1] and also to see that the merest technicality may not be allowed to stand in the way of substantial justice.[2] Hence, the Court has power to allow all necessary amendments for raising the real questions at issue between the parties provided that no injury or injustice is caused to the opposite party or

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6. ('40) 27 AIR 1940 Mad 538 (539).
('15) 2 AIR 1915 Mad 1068 (1068).
('12) 16 Ind Cas 933 (934) (DB) (Mad).
7. ('93) 16 Mad 424 (427, 428) (DB).
8. ('91) 1891 All W N 35 (37) (DB).
9. ('15) 2 AIR 1915 Lah 213 (214). (Refusal on ground of laches.)
('87) 10 Mad 51 (52) (DB). (Refusal on ground of laches, etc.)
('86) 8 All 519 (522) (DB). (Refusal on ground of application being time barred.)
10. ('37) 24 AIR 1937 Oudh 246 (247) : 13 Luck 186 (DB).
† ('35) 22 AIR 1935 Oudh 461 (462) : 11 Luck 413 (DB).

Section 153 — Note 2

1. ('98) 25 Cal 371 (390) (SB).
('15) 2 AIR 1915 Cal 203 (207) (DB). (Decree for sale under O. 34 R. 4—But property already sold in revenue sale—Decree amended for disposal of sale proceeds.)
('14) 1 AIR 1914 Mad 256 (258). (Amendment of an application in *forma pauperis.*)
('19) 6 AIR 1919 Oudh 55 (56). (Amendment of pre-emption decree granting set-off.)
('10) 37 Cal 399 (405) : 5 Ind Cas 532 (535) (DB). (Omission of pleader's name in vakalatnama — Amendment allowed.)
('23) 10 AIR 1923 Nag 182 (186):19 Nag L R 36. (Do.)

2. ('33) 20 AIR 1933 All 295 (297) : 55 All 216.
('37) 24 AIR 1937 Nag 173 (174) : ILR (1937) Nag 514. (Courts are to be reluctant to non-suit parties on purely technical grounds if a way of escape can be found.)

[*See also* ('35) 22 AIR 1935 Mad 118 (118). (Decree-holder applying for execution before date mentioned in decree — Judgment-debtor filing counter only subsequent to such date—Court has discretion to condone such irregularity if no prejudice is caused to opposite side as it amounts to little more than a mere technicality.)]

the injury, if any, is such as can be sufficiently compensated for by costs or otherwise.[3] But the Court will not aid a party by allowing him to amend his pleading where the mistake was fraudulent or intended to get round a previous decision of the Court.[4]

The power to get an amendment of a proceeding under this section is subject to the *discretion* of the Court, and is not claimable as of *right*.[5] As to the general principles guiding the exercise of discretion in granting or refusing an amendment, see O. 6 R. 17.

3. **"At any time."** — The power of amendment conferred by this section can be exercised "at any time" during the proceedings.[1] The power is vested both in the original as well as in the Appellate Court.[2] But *prima facie* it is limited to amendments during the actual pendency of proceedings and not after the decree has been drawn up and sealed.[3]

4. **"Defect or error."** — Assuming that S. 153 applies to orders of Courts, an order erroneous on the merits is not "a defect or error" in the proceedings within the meaning of the section, and cannot be amended or corrected under this section.[1]

5. **"Any proceeding in a suit."** — The term "proceeding" in this section must be interpreted as including any application to a Court of justice, however made, for aid in the enforcement of rights, for reliefs, for redress of injuries, for damages or for any remedial object.[1] See for instance the following :

(i) Pleadings — See Order 6 Rule 17.

(ii) Memorandum of appeal — A memorandum of appeal may be amended under this section.[2] Whether a memorandum of appeal can be amended when an appeal is filed against a dead person, see O. 22 R. 1, Note 19.

(iii) Application for execution — See Notes on Order 21 Rule 17.

(iv) Application for final decree in a mortgage suit — The section applies to the amendment of an application for a final decree in a mortgage suit.[3]

(v) Application for personal decree under O. 34 R. 6 — Under section 153 an application for a personal decree against the mortgagor under O. 34 R. 6 may be amended by allowing a party to sign it, where he has failed to do so in the first instance[4] or by allowing the addition of an alternative prayer.[5]

(vi) Application for restitution — Where an application for restitution has not been made in the correct form, it may be amended under this section.[6]

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3. (1889) 14 App Cas 318 (320), Australian Steam Navigation Co. v. Smith and Sons.
('1878) 10 C P 393 (396), Tildesly v. Harper.
(1883) 32 W R (Eng) 262 (263), Clarapede v. Commercial Union Association.
(1884) 26 Ch D 700 (711), Cropper v. Smith.
(1887) 19 Q B D 394 (396), Weldon v. Neal.
4. ('25) 12 AIR 1925 All 142 (142). (Overvaluing the suit in order to get round a previous decision is an abuse of the process of the Court.)
5. ('97) 21 Bom 570 (571) (DB).
('15) 2 AIR 1915 Mad 449 (451, 452) (DB). (Great delay on applicant's part due to his negligence — Amendment refused.)

Note 3

1. ('98) 20 All 478 (480) (DB). (Formal error as to date in a pending execution application may be amended even after limitation.)
2. ('16) 3 AIR 1916 Pat 347 (348) : 1 Pat L Jour 393 (DB).
('22) 9 AIR 1922 All 81 (81) (DB). (Amendment may be allowed even in second appeal.)
3. ('24) 11 AIR 1924 Bom 166 (166).
('12) 8 Nag L R 13 (16) : 14 Ind Cas 407 (409).

Note 4

1. ('22) 9 AIR 1922 Pat 121 (121) : 4 Pat L Jour 287 (DB).

Note 5

1. ('37) 24 AIR 1937 Mad 342 (343).
2. ('30) 17 AIR 1930 All 131 (132).
('23) 10 AIR 1923 Lah 115 (116): 3 Lah 382 (DB). (Grounds of appeal may be amended to make them clear.)
[*See* ('26) 96 Ind Cas 11 (11) (Lah). (Amendment of the respondent's name.)]
3. ('22) 9 AIR 1922 All 446 (447) (DB).
4. ('24) 11 AIR 1924 All 804 (805) (DB).
5. ('15) 2 AIR 1915 Mad 452 (453) : 38 Mad 677 (DB).
6. ('21) 8 AIR 1921 All 321 (322) (DB).

(vii) Answers to interrogatories — Leave may be given in a fit case to amend answers to interrogatories. Thus, an answer containing an admission made by mistake may be amended.[7] Similarly, an answer may be amended where subsequent to the filing of the affidavit of answer, it is found that there are other matters which could have been included in it.[8]

(viii) Particulars — Leave to amend particulars will generally be given on terms, provided the application is made within a reasonable time before the trial.[9] But leave will be granted at the trial only when it is shown that the new matter has been recently discovered.[10]

(ix) Notice of motion — A notice of motion can be amended under this section.[11]

(x) Power of attorney — The Court has inherent power to amend a power of attorney filed by the *mukhtiar* of a party by the insertion of the mukhtiar's name which was omitted by mistake.[12] It has been held in the undermentioned case[13] that section 153 would apply to such a case.

(xi) Sale certificate — The present section *prima facie* applies to *pending proceedings*.[14] Section 152 applies to the amendment of *decrees and orders*. Although a sale certificate is a document issued by a Court, it is doubtful whether it is an order of Court within S. 152. It may also be doubted whether it is a proceeding in a suit within the meaning of the present section. A Court has, however, inherent power to amend a sale certificate after notice to the judgment-debtor, where the certificate does not correctly describe the property sold. See O. 21 R. 94, Note 7.

See also the undermentioned cases.[15]

6. Amendment by Court suo motu. — Under O. 6 R. 17 the Court has no power to amend the pleadings of its own accord. Under the present section the Court has a power of amendment *suo motu*. But even under this section the Court has no power to convert, of its own accord, a suit for declaration into one for possession.[1] The reason is that a Court is bound to adjudicate on a claim as brought and cannot direct parties to alter their claims.[2]

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154. [S. 3, para. 3.] Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement.

Saving of present right of appeal.

1. "Any present right of appeal." — It has been observed in Note 3 on the Preamble that the general principle is that an Act which takes away a substantive right

7. (1892) 3 Ch 226 (236), Hollis v. Burton.
8. (1877) 7 Ch D 435 (452), Saunders v. Jones.
9. (1895) 2 Q B 148 (155), Yorkshire Provident Co. v. Gilbert.
10. (1886) 33 Ch D 603 (604), Moss v. Malings.
11. (1897) 1 Ch 266 (270, 271), Cook v. Andrews.
12. † ('10) 37 Cal 399 (404) : 5 Ind cas 532 (535) (DB).
13. ('34) 21 AIR 1934 All 810 (811). (Omission of name of vakil from body of vakalatanama.)
14. ('24) 11 AIR 1924 Bom 166 (166).
('12) 14 Ind Cas 407 (409) (Nag).
15. † ('37) 24 AIR 1937 Mad (342) (343). (Application for challan for depositing amount for setting aside execution sale is "proceeding" within S. 153 and may be amended by inclusion of prayer for setting aside sale.)
('37) 24 AIR 1937 Nag 108 (110) : ILR (1938) Nag 245. (Verification in application to appeal in *forma pauperis* — Verification not made in prescribed manner must be allowed to be corrected.)

Note 6

1. ('13) 19 Ind Cas 672 (672) (Mad).
2. ('11) 1911 Pun Re No. 1 : 9 Ind Cas 673 (674) (DB).
† ('32) 19 AIR 1932 Bom 394 (396, 397). (Suit on pro-note inadmissible for want of stamp—Amendment into a suit on original cause of action — Wholly distinct suit—Not allowable.)

is not retrospective in effect except by express enactment or by necessary implication. This principle is recognized in S. 6 of the General Clauses Act of 1897. But this principle does not apply to enactments merely affecting practice or procedure. For, there can be no vested right in any course of procedure. But a right of appeal is a substantive right and not a mere matter of procedure. When the law permits an appeal, the right of appeal vests in a party on the commencement of proceedings in the lower Court.[1] Any Act coming into force subsequently cannot affect this right prejudicially, except by express words or by necessary implications.[2] This is the general rule apart from S. 154. Under this section the question has arisen whether this general right is restricted by the words "*any present* right of appeal" in the section. The question has arisen in this way. Take, for instance, an order which was appealable under the former Code, but is not appealable under the present Code. The present Code came into force on 1st January 1909. Suppose, the proceedings in which the order was passed were commenced before 1st January 1909, and also that the order was passed before 1st January 1909. In such a case, there was undoubtedly a *present* right of appeal accrued to a party at the commencement of the Code (1st January 1909) because the order having already been passed, the right of appeal given by the former Code was capable of being exercised immediately on that date. But suppose, in the above instance, the proceedings were started before 1st January 1909, but the order therein was passed *after* 1st January 1909. In such a case, no doubt a right of appeal had accrued to the party at the commencement of the present Code, because when the law permits an appeal, the right of appeal vests in a party on the initiation of the proceedings in the lower Court. But as the order had not been passed at the commencement of the Code but was passed only subsequently, the right of appeal was not therefore capable of being immediately exercised at that date. Is such a right, a *present* right of appeal within S. 154? On this question there is a conflict of decisions. It has been held by the Calcutta High Court,[3] the Punjab Chief Court[4] and the Sind Judicial Commissioner's Court[5] that such a right of appeal cannot be called a *present* right of appeal because although it has vested in a party, it is not capable of being immediately exercised. But the Madras High Court takes a different view.[6] According to that High Court the words "present right" of appeal mean only a right of appeal which has become vested in a litigant whether the right is capable of being exercised immediately or not, and the words are not sufficient to exclude the general rule that a statute taking away a vested right of appeal is presumably not retrospective in effect. See also the undermentioned case.[7]

2. Right of appeal being given by the new Code but not by the old Code — Effect on pending proceedings. — The section contemplates cases where a

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Section 154 — Note 1

1. ('43) 30 AIR 1943 Nag 36 (60, 67) : ILR (1943) Nag 73 (DB). (The right of appeal (in civil cases) arises on the institution of the suit and not with the cause of action—Per Grille C. J. and Digby, J.)
2. (1905) 1905 App Cas 369 (372, 373), Colonial Sugar Refining Co. Ltd. v. Irving.
✣(1900) 1900 Pun Re No. 12, p. 36 (40, 42) (FB.)
✣('28) 15 AIR 1928 Lah 627 (630, 631) : 10 Lah 165 (FB).
('21) 8 AIR 1921 Mad 126 (128, 129) (DB).
('80) 2 All 785 (786) (DB).
('12) 15 Ind Cas 725 (726, 727) (DB) (Lah).
('16) 3 AIR 1916 Mad 1035 (1036) (DB).
('78) 1 All 668 (670, 671) (FB).
('08) 32 Bom 337 (344, 345) (DB).
('01) 24 Mad 39 (42) (DB).

[*See also* ('40) 27 AIR 1940 Oudh 364 (365) : 16 Luck 42. (Case under S. 296 of U. P. Tenancy Act (XVII of 1939).)]
3. ('12) 15 Ind Cas 679 (681) (DB) (Cal).
('13) 14 Ind Cas 53 (54) (DB) (Cal).
('10) 8 Ind Cas 3 (4) (DB) (Cal).
('13) 17 Cal W N 524 (525) (DB).
[See however ('12) 16 Ind Cas 690 (691) (Cal).]
4. ('12) 16 Ind Cas 834 (834) (DB) (Lah).
✣('13) 1913 Pun Re No. 1:15 Ind Cas 725(726)(DB).
5. ('13) 6 Sind L R 168 (174) : 19 Ind Cas 348 (351) (DB).
6. ('11) 9 Ind Cas 937 (938) (DB) (Mad).
7. ('40) 27 AIR 1940 Oudh 221 (222) : 15 Luck 460. (Appeal validly filed under S. 45 of Encumbered Estates Act—Subsequent amendment taking away right of appeal does not affect validity of the appeal already filed.)

right of appeal was given by the former Code, but has been taken away by the present Code. Suppose, the present Code gives a right of appeal in a matter in which there was no right of appeal under the former Code. Is the present Code to be given retrospective effect in this respect, so as to affect proceedings instituted under the former Code? No, because to hold otherwise would mean that the right which accrued to a party under the former Code, viz., the right to hold the decree or order in his favour undisturbed, can be taken away by the new Code.[1]

3. **Other rights accrued before the present Code.** — The fact that S. 154 expressly saves pending rights of appeal does not mean that other vested rights are not saved. The application of the maxim *expressio unius est exclusio alterius* (mention of one is exclusion of another) is unsafe in such cases. Thus, where the date of the mortgage decree and the date fixed for payment were both under the Transfer of Property Act and before the present Code came into force, the right to apply for an order absolute is a vested right not affected by the provisions of O. 34 Rr. 4 and 5.[1]

4. **Power of Appellate Court.** — The section means that nothing shall prejudicially affect any present *right* of appeal. It has no bearing on the powers of an Appellate Court in dealing with an appeal before it.[1]

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155. [New.] The enactments mentioned in the Fourth Schedule are hereby amended to the extent specified in the fourth column thereof.

Amendment of certain Acts.

As to the retrospective effect of the Code, see Note 3 on Preamble.

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156. [S. 3, first sentence.] [*Repeals.*] ***Repealed by the Second Repealing and Amending Act, 1914 (XVII of 1914), Section 3 and Schedule II.***

This section and the Fifth Schedule of the Code have been repealed by Act XVII of 1914, section 3.

The section as it stood before repeal was as follows:

> "The enactments mentioned in the fifth schedule are hereby repealed to the extent specified in the fourth column thereof."

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157. [S. 3, second sentence.] Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively

Continuance of orders under repealed enactments.

Note 2

1. ('10) 5 Ind Cas 102 (105) (SB) (Mad).
('10) 8 Ind Cas 1189 (1189) (DB) (Low Bur).
('10) 8 Ind Cas 8 (9) (DB) (All).
('10) 5 Low Bur Rul 148 (149) : 5 Ind Cas 980 (981) (DB).
('86) 13 Cal 86 (89) (DB).
[*See also* ('84) 7 Mad 195 (197). (Right accrued under Code of 1877 cannot be disturbed by procedure under Code of 1882.)]
[But compare ('89) 16 Cal 429 (432) (DB).]

Note 3

1. ('21) 8 AIR 1921 Mad 126 (128) (DB).

Note 4

1. ('11) 9 Ind Cas 815 (816) (DB) (Cal).

published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf.

1. **"Rules."** — The expression "rules made" means rules properly and validly made, in other words, made with jurisdiction by the proper authority. Rules, which though purporting to be made under the old Code, were beyond the powers given by the old Code, do not become valid by reason of the fact that, if they had been made under the new Code, they would be valid.[1]

2. **"Consistent with the Code."**—The word 'Code' according to the definition in S. 2 cl. (1) includes the rules in the First Schedule. Hence, it has been held that the Madras Civil Rules of Practice made by the High Court under the Code of 1882 but not re-enacted and published in accordance with the procedure prescribed in Part X of the Code of 1908 are invalid if and in so far as they are inconsistent with any of the rules in the First Schedule of the later Code.[1]

3. **Retrospective effect of the Code.** — See Note 3 on Preamble.

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158. [S. 3, para. 2.] In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule.

Reference to Code of Civil Procedure and other repealed enactments.

As to the retrospective effect of the Code, see Note 3 on Preamble.

Section 157 — Note 1

1. ('16) 3 AIR 1916 Mad 1165 (1166) (DB).

Note 2

1. † ('38) 25 AIR 1938 Mad 438 (441) : ILR (1938) Mad 734 (FB). (A I R 1914 Mad 652 : 37 Mad 17 (FB), Overruled.)
[*See also* ('35) 22 AIR 1935 Mad 893 (895) : 59 Mad 342. (Rule 199 of Civil Rules of Practice, to the extent to which it is opposed to, and inconsistent with, the provisions of Sch. 1, C. P. C., cannot take effect.)]

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Overlooking of Precedents leads to Erroneous Decisions.

(1943) 30 A. I. R. 1943 Privy Council 189 (191).— In an appeal from Allahabad the question for decision involved was as to the inherent power of the Court to grant restitution to the successful defendant. Their Lordships observed: "The decision of the Board in 46 I. A. 228 was not cited in either of the Courts in India . . . . . The application now before the Board . . . . . invoked the powers of the learned Subordinate Judge to assess the sum due by way of restitution . . . . by the method laid down in 46 I. A. 228 . . . For this purpose the case must go back to the Court of the Subordinate Judge . . . .

(1922) 9 A. I. R. 1922 Privy Council 11 (12) = 43 All. 469 (475) (P.C.).—Section 89, T.P. Act, 1882, ended after providing for the decree "and thereafter the defendants' right to redeem and the security shall both be extinguished." These words do not occur in either the foreclosure section of the Act of 1882 or the corresponding rule of O. 34, Civil P. C.

"The difficulty which had arisen as to these words in several cases, e.g., *Vanmikalinga* v. *Chidambara*, (1905) I. L. R. 29 Mad. 37 — which case, it may be mentioned, does not seem to have been brought to the notice of the Board in *Het Ram's case*, (1918) 45 I. A. 130—therefore no longer arises."

(1944) 31 A. I. R. 1944 Bombay 100 (103) = I. L. R. 1944 Bom. 12. — *Per Sen J.* — "This case (viz. 41 Bom. L. R. 521) was decided in 1938 and it is to be observed that the earlier decision in 36 Bom. L. R. 1201 was not cited before the Court nor was it noticed in the judgment."

(1944) 31 A. I. R. 1944 Lahore 329 (335) (FB).—*Per Din Mohammad, J.* — 'The only Lahore authority which has been brought to our notice in support of this view is one reported as A. I. R. 1938 Lah. 836. . . . . The learned Judges [in that case] referred to no previous case of this Court [namely, (1937) 18 Lah. 268] but mentioned the case in 51 Cal. 969 in support of their decision without trying to analyse its dictum."

(1944) 31 A.I.R. 1944 Madras 421 (422).— "There was, however, one decision to which our attention was drawn, the decision of Venkataramana Rao, J., reported in 1939 M. W. N. 1009. . . . It does not appear that the decision of Venkatasubba Rao and Cornish, JJ., in (1936) 59 Mad. 751 was brought to the notice of the learned Judge especially the observations of Cornish, J., and we do not think that that case can be held to be an authority apart from the special facts on which it was decided."

(1944) 31 A.I.R. 1944 Patna 17 (21)=22 Pat. 783 (FB).— While considering the decision in A.I.R. 1923 Cal. 362 *Sinha J.* observed:—"Though the decision related to the question of court-fees payable on the plaint, their Lordships of the Calcutta High Court do not appear to have considered the previous decision of that very Court in the matter of court-fees, which will be referred to presently." The case referred to is 39 Cal. 701.

(1943) 30 A. I. R. 1943 Allahabad 220 (230) = I. L. R. 1943 All. 610. (FB). —Per *Mathur, J.*:— " The same view was taken by a Division Bench of this Court in (1929) 51 All. 530. The case was decided by Sulaiman and Kendall, JJ. This case was decided before the Full Bench case in 1931 A. L. J. 61 but has not been referred to in the judgment of the Full Bench."

(1943) 30 A. I. R. 1943 Allahabad 393 (397) = I. L. R. 1944 All. 76. (FB). — *Per Collister J.*— "The next decision to which I will refer is A. I. R. 1929 All. 209 . . . . The Full Bench decision in (1920) 42 All. 575 was not referred to by the learned Judge . . . ."

(1943) 30 A.I.R. 1943 Bom. 409(411)=I.L.R. 1943 Bom. 525.—*Per Beaumont C. J.*—"In a later case a Bench of this Court in 41 Bom. L. R. 1269 held that the direction for payment of costs in (O.33) R. 15 can be waived by the defendant . . . . . Unfortunately, 34 Bom. L. R. 236 was not brought to the notice of the Court in 41 Bom. L. R. 1269."

(1943) 30 A. I. R. 1943 Lahore 65 (72) (FB)= I.L.R. 1943 Lah. 257. — (*Per Bhide, J.*:—" It is, however, clear from the decision in (1925) 7 Lah. L. J. 418 that the

learned Chief Justice did not intend to lay down that such a branch of the suit, at any rate, should not be looked upon as a 'case' for the purpose of S. 115, Civil P. C. The Full Bench decision in (1924) 5 Lah: 288 was not referred to in 7 Lah. L. J. . . . "

(1943) 30 A. I. R. 1943 Madras 633 (636). — *Per Somayya J.*—"There is also a prior decision of this Court to the same effect in (1912) 17 I. C. 593 . . . . . The decision in 17 I. C. 593 was not apparently brought to the notice of the learned Judges in (1915) 39 Mad' 62."

(1943) 30 A. I. R. 1943 Patna 305 (308, 310)=22 Pat. 187.— *Per Chatterji J.* — "In support of this contention he relies on the decision of the Allahabad High Court in I. L. R. (1939)All. 185 in which the view was expressed that . . . . . This view is directly opposed to the decision of the Privy Council in (1905) 32 I. A. 123 . . . . It is to be observed that this decision of the Privy Council was not noticed in the Allahabad case."

"In the case of (1922) 1 Pat. 780 the facts were these . . . . Their Lordships based their decision on the Privy Council case in (1910) 39 I. A. 68. Das J. who delivered the judgment said . . . . . The Privy Council case in (1905) 32 I. A. 123, cited above, which to my mind furnishes a clue to the solution of the problem before us, was not referred to in the judgment of Das J. That being so, I do not think it necessary to refer the matter to a Full Bench."

(1943) 30 A.I.R. 1943 Patna 96 (101)=21 Pat, 799.—*Per Chatterji, J.*, — " I may observe here that in 52 All. 1005, which was decided in May 1930, there is no reference to 17 Cal. 543 (F.B.), decided in 1890, or to 55 Cal. 1181, decided and reported in 1928."

(1942) 29 A. I. R. 1942 Lahore 228 (230) (FB) = I.L.R. 1943 Lah. 1. — *Per Tek Chand, J.*: — " This decision is not in accord with 12 P. R. 1911, in which the identical objection had been raised and overruled. That case was regarded in the Chief Court and this Court as the ruling authority on the subject for over 25 years, but there is no reference to it in the judgment in A.I.R. 1937 Lah. 637. Apparently, the attention of the learned Judge, who decided the latter case, was not drawn to it."

(1942) 29 A. I. R. 1942 Madras 136 (138).—" Neither the Full Bench decision in (1914) 37 Mad. 483 nor the decision in (1929) 52 Mad. 936 was noticed and considered in (1933) 65 M. L. J. 455."

(1941) 28 A. I. R. 1941 Allahabad 396(397)=I.L.R. 1941 All. 737 (740).— " The Full Bench decision in *Kalian Das* v. *Bhagirathi*, (1883) 6 All. 47 is binding on us . . . . The Full Bench case in 6 All. 47 was not cited in arguments in *Radhey Shiam* v. *Nazir Hussain*, 1941 A.L.J. 43. Had it been cited, the decision would have been the other way."

(1941) 28 A. I. R. 1941 Madras 933(933, 934)=I.L.R. 1942 Mad. 264 (265, 266, 268, 270) (FB). — " The substantial question in this appeal is whether (1907) 30 Mad. 367 was rightly decided by this Court. The appellant contends that the decision conflicts with the judgment of the Privy Council in (1896) 23 Cal. 775 and therefore cannot be allowed to stand. . . . They (i. e., the learned Judges who decided 30 Mad. 367) did not, however, make any reference to the judgment of the Privy Council in 23 Cal. 775. Presumably it was not brought to their notice. . . . We consider that the present case is governed by the decision of the Privy Council in 23 Cal. 775."

(1941) 28 A. I. R. 1941 Madras 898 (902) = I. L. R. 1942 Mad. 271 (278) (FB).—" The decision in (1884) 7 Mad. 255 was criticised by Ayling and Sheshagiri Iyer, JJ., in (1917) 5 M. L. W. 158. On the other hand, it receives support from the judgments given by Madhavan Nair and Stodart, JJ., in (1936) 71 M. L. J. 511, by Cornish, J., in (1937) 71 M. L. J. 725 and by Ramesam and Jackson, JJ., in A. I. R. 1928 Mad. 1270. It is, however, significant that in these cases no reference was made to the decisions in (1907) 30 Mad. 26, (1909) 32 Mad. 429 and (1917) 5 M. L. W. 158."

A. I. R. Commentaries Judicially Noticed.

(1938) 25 A. I. R. 1938 Calcutta 730 (733) = I.L.R. (1939) 1 Cal. 112 (120). —"The expression 'other cause of a like nature' has been the subject of various decisions, most of which will be found mentioned in Chitaley's Limitation Act [1st (1939) Edn.], pp. 567 to 572."

(1938) 25 A. I. R. 1938 Calcutta 287 (289 & 290) = I. L. R. (1938) 1 Cal. 53 (58 & 60). — "In the Note to Messrs. Chitaley and Annaji Rao's Code of Civil Procedure, [2nd (1935) Edn.] at p. 1388, I find the following comment : 'The first . . . . parties.'

'The learned authors of Chitaley and Annaji Rao's Code of Civil Procedure in the paragraph to which I have already referred, appear to me to sum up in a few words the substance of the decisions'."

(1937) 24 A. I. R. 1937 Calcutta 222 (224). — "On this point there is a considerable mass of case law which will be found set out in Chitaley's Commentary [2nd (1935) Edn.] on the Civil Procedure Code." [O. 21, R. 2, Note 6.]

(1943) 30 A. I. R. 1943 Allahabad 162 (167) = I.L.R. 1943 All. 467. — "In Chitaley's Limitation Act (Edn. 1) at p. 548 [now see 2nd (1942) Edn. p. 554] the learned commentator takes this same view. He says: "As regards proceedings before arbitrators . . . . . good law." [The view is approved and followed.]

(1942) 29 A. I. R. 1942 Allahabad 77 (78). — "So far as Art. 120 is concerned, there are a large number of cases quoted in Chitaley's Commentary . . . ." [1st (1938) Edn.].

(1941) 28 A. I. R. 1941 Allahabad 110 (117) (FB) = I. L. R. 1941 All. 77 (95). — "Where a decree is against *A* and another decree is against *A* and *B*, it has been held that the decrees are against the same judgment-debtor within the meaning of S. 73. The cases on the point are noted in Chitaley's Code of Civil Procedure [1st (1932) Edn.], vol. 1, page 647." [This principle was cited with approval.]

(1940) 27 A. I. R. 1940 Allahabad 263 (266) = I. L. R. 1940 All. 396 (406). — "In Chitaley's Criminal Procedure Code, [1st (1936) Edn.], vol. 1, p. 797, the learned commentators say : 'It is . . . . Evidence Act. I agree with their conclusion'."

(1943) 30 A. I. R. 1943 Lahore 189 (191).— "I would refer in this connection to the discussion on the applicability of the doctrine of constructive res judicata to execution proceedings in Chitaley's Civil Procedure Code, Edn. 3, Note 23, S. 11, pages 177 to 180."

(1943) 30 A. I. R. 1943 Lahore 65 (77) (FB) = I. L. R. 1943 Lah. 257. — "These principles are generally recognized in the decisions of the other High Courts also : see rulings collected under Notes 3 and 8 to S. 115 in Chitaley's Code of Civil Procedure."

(1942) 29 A. I. R. 1942 Lahore 119 (120). — "No authority directly in point has been quoted by either side but in Chitaley's Code of Civil Procedure, [3rd (1940) Edn.] vol. 1, under S. 151, Civil Procedure Code., the learned author deals at some length in Note 6 (p. 1220) with the meaning of the words 'abuse of the process of the Court' in the Section. After dealing . . . . . exactly the abuse is." [Cited with approval.]

(1941) 28 A. I. R. 1941 Lahore 128 (128) = I. L. R. 1941 Lahore 697 (698). —"This is a petition for revision of an order . . . allowing the plaintiff to sue as a pauper On my expressing doubt whether a revision against such an order lies the petitioner's learned counsel referred to the Lahore cases cited in Chitaley's Code of Civil Procedure [3rd (1940) Edn.], vol. 1, p. 1082."

(1941) 28 A. I. R. 1941 Lahore 96 (96). — "A puisne mortgagee, who is not impleaded in a previous suit by the prior mortgagee, is entitled to disregard the decree made in the previous suit and to fall back upon the original mortgage only . . . . . Mulla in his Commentary on the Code of Civil Procedure at p. 983 also holds the same view, and so does Chitaley in Volume 3 at p. 2718, [3rd (1940) Edn.]."

(1943) 30 A. I. R. 1943 Nagpur 231 (232) = I. L. R. 1944 Nag. 131. — The Commentary on the Civil Procedure Code was referred to with approval in these

words : "It is argued in appeal that O. 32 R. 7 does not apply to execution proceedings, but there is ample authority to show that it does. Cases on the point are collected on page 1924 of Chitaley's Code of Civil Procedure, 3rd (1940) Edn., Vol. 2, under Note 11 to O. 21, R. 2."

(1943) 30 A. I. R. 1943 Nagpur 204 (206) (FB) = I. L. R. 1943 Nag. 241. — In the Order of Reference to the Full Bench : " . . . . According to Chitaley and Anna Rao, all the other High Courts take the view adopted in 8 N. L. R. 92. The learned authors are of opinion that that is the right view and that the present Nagpur and Lahore decisions are wrong. See Chitaley's Civil Procedure Code, Vol. I, page 40" (2nd Edn. Now see (1943) Edn. S. 2 (2) Note 8.) (This opinion is now approved by the decision of the Full Bench.)

(1944) 31 A. I. R. 1944 Oudh 139 (143, 144). — "We think, however, that the presence of Fakhr Jahan Begum, the mother and one of the legal representatives of Abi Jahan Begum as respondent 5, is sufficient to save abatement as regards any of the legal representatives. We are referred to Chitaley's Note 9 on O. 22 R. 4 : 'Supposing that a defendant dies . . . . . the suit will abate'." (Cited with approval.)

"The question whether an issue of law can be *res judicata* is a very wide one on which divergent views have been expressed by different High Courts. We are referred to pages 156 to 158 of Chitaley's Civil Procedure Code, Edn. 3, Note 11 on S. 11."

(1944) 31 A. I. R. 1944 Oudh 94 (99). — "Chitaley's Commentary on S. 11 [see Note 33 on that section in 4th (1944) Edn.] arrives at the same conclusion. We take from it the following quotation based on actual cases : 'Where a matter is constructively in issue . . . . . to have raised it'." (Cited with approval.)

(1943) 30 A. I. R. 1943 Oudh 425 (427). — "The argument of the appellants is really founded upon the discussion in Chitaley's Transfer of Property Act, Vol. 4, (Edn. 1), page 1282. After commenting on the change made by the substitution of the word "due" for "payable" it remarks : ' In the undermentioned case A.I.R. 1937 ALL. 32 . . . . . executed after the amendment'. "

(1943) 30 A. I. R. 1943 Oudh 378 (380). — "The legal position arising out of these provisions (and those contained in S. 28 of the Contract Act), is discussed in Chitaley's Commentary on the Civil Procedure Code to which Mr. Wasim himself referred us. In Note 1 on Para. 18 of Sch. 2 (3rd (1940) Edn.) we read: 'If a party to the agreement . . . . . the Sovereign has provided.' In Note 4 on the same paragraph reference is made to the following observations by Moulton L. J. as quoted with approval and followed by the High Courts in India ; 'The present position . . . . . the rights of the parties are settled'." (This discussion is approved).

(1943) 30 A. I. R. 1943 Oudh 274 (276). — " Chitaley in his Commentary on the Code of Civil Procedure, 3rd (1940) Edn., page 3061 says : 'An appeal will, therefore, lie . . . . on which the order of remand was based.' A. I. R. 1923 Lah. 206 is cited . . . . A number of other rulings are mentioned in Chitaley's Civil Procedure Code, and we accept the principle laid down therein."

(1943) 30 A. I. R. 1943 Oudh 266 (268). —The following citation was approved and followed. "Chitaley in his book on the Civil Procedure Code, 3rd (1940) Edn., Vol. I, at page 992 summarises the law in the following words : 'A claim or question to or respecting other property . . . . . or indirectly in the decree or order'."

(1943) 30 A. I. R. 1943 Oudh 243 (259) = 19 Luck 109. — " Appellant's learned counsel cites . . . . Chitaley's Civil Procedure Code, 3rd (1940) Edn., Vol. II, page 1557 : 'Where a plaintiff claims . . . . . would embarrass the defendant'."

[Cited with approval and followed.]

(1943) 30 A. I. R. 1943 Oudh 177 (183) = 18 Luck 439. — " In Chitaley's commentary on the Indian Limitation Act it is said (Vol. III, page 2266, Edition 2): 'Mere un-interrupted possession . . . Other co-owner's possession." Reference is then made in the commentary to the following observations of their Lordships of the Privy Council in 47 I. C. 626: "It is important to bear . . . . . other interested members."

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